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Contemporary Practice of the United States Relating to International Law

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CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY KRISTINA DAUGIRDAS, AND JULIAN DAVIS MORTENSON

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

Congress Enacts Sanctions Legislation Targeting Russia

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In July 2017, Congress passed the Countering America's Adversaries Through Sanctions Act.¹ The legislation—which enjoyed nearly unanimous legislative support²—contained sanctions targeting Russia, North Korea, and Iran.³ Title II of the Act—titled separately as the Countering Russian Influence in Europe and Eurasia Act of 2017 (Countering Russian Influence Act)—entrenched and extended U.S. sanctions against Russia for violating Ukraine's territorial sovereignty and interfering with the U.S. presidential election.⁴ Title II's key provisions codified existing sanctions against Russia;⁵ imposed new sanctions against Russia;⁶ and restricted the president's authority to modify or eliminate these sanctions without congressional approval.⁷ Despite voicing constitutional objections to the legislation, President Trump signed the bill into law.⁸

In 2014, President Obama had imposed sanctions on Russia in response to its purported annexation of Ukraine's Crimean Peninsula.⁹ Russia, acting in contravention of international law, used force to seize and occupy the so-called Republic of Crimea.¹⁰ With Russia's help, Ukrainians living in the Crimean Peninsula then approved a ballot referendum—in violation of the Ukrainian Constitution—declaring the region's intent to be integrated into the Russian Federation.¹¹ In response to these developments, President Obama issued four executive orders¹² designed to “send a strong message to the Russian government that there are consequences for their actions that threaten the sovereignty and territorial integrity of Ukraine.”¹³ These executive orders authorized the imposition of sanctions pursuant to the International Emergency Economic Powers Act, the National Emergencies Act, and the

¹ Actions Overview H.R. 3664 – 115th Congress (2017–2018), at <https://www.congress.gov/bill/115th-congress/house-bill/3364/actions>.

² *Id.*

³ See generally Countering America's Adversaries Through Sanctions Act, Pub. L. 115-44 (2017). The Act imposes two categories of sanctions against North Korea: first, it includes sanctions to enforce and implement United Nations Security Council Sanctions against North Korea; second, the legislation adds sanctions against North Korea in response to its human rights abuses. §§ 311–24. Similarly, the Act imposes sanctions against Iran for human rights abuses in addition to its ballistic missile program and terrorism-related activities. §§ 104–06. Notably, the congressional review process, described below, see *infra* notes 48–57 and accompanying text, does not apply to the sanctions on either Iran or North Korea.

⁴ See *id.*; see also Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 111 AJIL 483 (2017) [hereinafter *Russian Electoral Interference*].

⁵ Countering Russian Influence in Europe and Eurasia Act of 2017, 22 U.S.C. § 9522 (2017).

⁶ 22 U.S.C. §§ 9524–29.

⁷ 22 U.S.C. § 9511.

⁸ *Infra* notes 58–61.

⁹ Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 108 AJIL 783, 797–808 (2014) [hereinafter *Attempted Annexation*].

¹⁰ See generally Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 109 AJIL 175 (2015); Daugirdas & Mortenson, *Attempted Annexation*, *supra* note 9.

¹¹ Daugirdas & Mortenson, *Attempted Annexation*, *supra* note 9, at 798–805.

¹² Exec. Order No. 13685, 79 Fed. Reg. 77357 (2014); Exec. Order No. 13662, 79 Fed. Reg. 16169 (2014); Exec. Order No. 13661, 79 Fed. Reg. 15535 (2014); Exec. Order No. 13660, 79 Fed. Reg. 13493 (2014).

¹³ U.S. Dep't of State, Ukraine and Russia Sanctions, at <https://www.state.gov/eb/tfs/spi/ukrainerrussia>.

Immigration and Nationality Act of 1952.¹⁴ Additionally, the orders put in place travel restrictions on a number of specified individuals who either “asserted governmental authority over any part or region of Ukraine without the authorization of the Government of Ukraine”¹⁵ or were

responsible for or complicit in [actions or policies] . . . that undermine democratic processes or institutions in Ukraine . . . threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine; or . . . misappropriat[e] . . . state assets of Ukraine or of an economically significant entity of Ukraine.¹⁶

In December 2016, President Obama imposed additional sanctions on Russia in retaliation for its interference with the U.S. presidential election.¹⁷ Shortly before the general election the preceding month, the Department of Homeland Security and the Office of the Director of National Intelligence published an outline of the case for their conclusion that Russia had engaged in cyberattacks with the intent to influence the presidential election.¹⁸ These findings, along with corroborating evidence from other intelligence agencies, prompted President Obama to impose additional sanctions via executive order against five Russian entities and four Russian individuals—all of whom had, according to President Obama, engaged in, or provided material support to persons or entities engaged in, “tampering, altering, or causing a misappropriation of information with the purpose or effect of interfering with the 2016 U.S. election processes.”¹⁹

Since President Trump took office in January, his administration’s stance on Russian sanctions has seemed to evolve. White House Economic Adviser Gary Cohn remarked in late May that President Trump was “looking at” the future of the Russian sanctions, and that the administration currently “[did not] have a position” on whether they should stay.²⁰ But a few days later, Cohn said the administration would “not lower[] our sanctions on Russia”²¹ and, “[i]f anything, we would probably look to get tougher on Russia.”²² As

¹⁴ Exec. Order No. 13685, *supra* note 12 (blocking the property of any person dealing in Crimea and prohibiting persons in the United States from: investing in Crimea; importing Crimean goods or services; exporting goods or services to Crimea; and facilitating or supporting a transaction involving Crimean goods or services); Exec. Order No. 13662, *supra* note 12 (blocking the “property and interests in property that are in the United States” belonging to persons operating in the Russian economy from being “transferred, paid, exported, withdrawn, or otherwise dealt in”); Exec. Order No. 13661, *supra* note 12 (blocking the property of persons deemed to be a Russian government official, a Russian arms supplier, or an individual providing material assistance to a Russian government official or arms supplier); Exec. Order No. 13660, *supra* note 12 (blocking the property of persons “responsible for or complicit in” actions contributing to the crisis in Ukraine).

¹⁵ Exec. Order No. 13660, *supra* note 12.

¹⁶ *Id.*

¹⁷ Daugirdas & Mortenson, *Russian Electoral Interference*, *supra* note 4.

¹⁸ *Id.* at 483.

¹⁹ White House Press Release, Fact Sheet: Actions in Response to Russian Malicious Cyber Activity and Harassment (Dec. 29, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/29/fact-sheet-actions-response-russian-malicious-cyber-activity-and>.

²⁰ Max Greenwood, *Official: Trump “Looking at” Future of US Sanctions on Russia*, HILL (May 25, 2017), at <http://thehill.com/homenews/administration/335244-official-trump-looking-at-future-of-us-sanctions-on-russia>.

²¹ Margaret Talev & Jennifer Jacobs, *Trump to Keep Russia Sanctions, Economic Adviser Cohn Says*, BLOOMBERG POLITICS (May 26, 2017), at <https://www.bloomberg.com/news/articles/2017-05-26/trump-to-maintain-russia-sanctions-economic-adviser-cohn-says>.

²² *Id.*

Congress deliberated over legislative proposals, White House Deputy Press Secretary Sarah Huckabee Sanders affirmed that the administration “believe[s] the existing executive branch sanctions regime is the best tool for compelling Russia to fulfill its commitments.”²³

At least partly in response to concern that the Trump Administration might remove some of the Obama sanctions, Congress passed the Countering Russian Influence Act. During floor debate on the proposed legislation, Senator Cardin remarked:

The legislation we are about to vote on will give the United States the strongest possible hand to stand up against the aggression of Russia. Russia attacked us and our democratic institutions; Russia invaded the sovereignty of other countries, including Ukraine and Georgia

. . .

Mandatory sanctions are included in this legislation with regard to the energy sector, the financial sector, the intelligence and defense sectors—not only with primary sanctions but with secondary sanctions.

. . .

This legislation provides a review process so the President, on his own, cannot eliminate sanctions. He must come to Congress.

. . .

This is a tough bill to stand up to what Russia has done and requires mandatory action.²⁴

Other legislators likewise made clear that the legislation was meant to prevent President Trump from relaxing sanctions against Russia.²⁵ Despite the administration’s objections that the provisions interfered with the president’s foreign policy authority,²⁶ the final House and Senate votes were close to unanimous in approving the bill.²⁷

As approved by Congress, the Act enacts two sets of sanctions. First, it entrenches as legislation the six executive orders that President Obama issued in response to Russian interference in Ukraine and in the U.S. presidential election.²⁸ Second, it imposes a new set of “mandatory” sanctions against Russia that go beyond those imposed by the Obama administration. On the latter front, sections 224 through 234 provide that the president “shall” impose additional sanctions relating to cybersecurity, natural resource mining, financial

²³ White House Press Release, Press Gaggle by Principal Deputy Press Secretary Sarah Sanders (June 15, 2017), at <https://www.whitehouse.gov/the-press-office/2017/06/15/press-gaggle-principal-deputy-press-secretary-sarah-sanders-6152017>.

²⁴ 163 CONG. REC. S4,387, S4,387 (2017).

²⁵ See *id.* at S4,388 (statement of Sen. Brown) (“The bill provides for a range of tough sanctions against . . . Russia This bill will prevent President Trump from relaxing sanctions on Russia without congressional review. We are all concerned about that.”); see also *id.* at S4,387 (statement of Sen. McCain) (arguing that the legislation would impose “mandatory sanctions” to “respond to Russia’s attack on American democracy”).

²⁶ See Richard Lardner, *White House Criticizes Russia Sanctions Stalled in House*, PBS (July 11, 2017), at <http://www.pbs.org/newshour/runtdown/white-house-criticizes-russia-sanctions-stalled-house>.

²⁷ Actions Overview H.R. 3664, *supra* note 1.

²⁸ 22 U.S.C. §§ 9522, 9524–29.

institutions, corruption, human rights abuses, intelligence sharing, and arms sales to Syria.²⁹ These sanctions use a variety of methods to pressure Russia, including: blocking assets;³⁰ denying or revoking visas;³¹ imposing import and export restrictions;³² restricting U.S. financial institutions from opening and maintaining accounts affiliated with certain foreign nationals;³³ barring the Export-Import Bank from supporting the export of goods or services to certain persons or regions;³⁴ prohibiting the U.S. government from entering into contracts with sanctioned persons;³⁵ and forbidding financial institutions from loaning money to sanctioned individuals.³⁶

While the Countering Russian Influence Act describes the second group of sanctions as “mandatory,” some of them only materialize if the president determines that persons meet the statutory criteria for their imposition.³⁷ For example, Sections 224, 228, 231, 232, 233, and 234 all specify that the president “shall impose” sanctions but only if he first determines that persons “knowingly” engaged in conduct proscribed by those respective sections.³⁸ Conduct triggering the imposition of sanctions includes: engaging in malicious cyberactivity;³⁹ investing in Russian crude oil projects;⁴⁰ facilitating a “significant financial transaction” on behalf of sanctioned Russian persons;⁴¹ perpetrating human rights abuses;⁴² participating in corrupt practices;⁴³ engaging in transactions with persons involved in Russian intelligence or defense sectors;⁴⁴ investing in Russian energy development;⁴⁵ and investing in Russian state-owned assets.⁴⁶ Sections 225 and 226 require sanctions to be imposed “unless it is not in the national interest of the United States to do so.”⁴⁷

The Act establishes a new congressional review process.⁴⁸ That congressional review process applies to both the codified Obama-era sanctions as well as the new sanctions.⁴⁹ Section 216 describes that process, starting by requiring before taking any action to modify those sanctions, the president must “submit to the appropriate congressional committees and leadership a report that describes the proposed action and the reasons for that

²⁹ Countering America’s Adversaries Through Sanctions Act, *supra* note 3, §§ 224–35.

³⁰ *Id.*, §§ 224(b)(1), 227–28.

³¹ *Id.*, §§ 224(b)(2), 235(a)(11).

³² *Id.*, §§ 225, 235(a)(1)–(2).

³³ *Id.*, § 226.

³⁴ *Id.*, § 235(a)(1).

³⁵ *Id.*, § 235(a)(6).

³⁶ *Id.*, § 235(a)(5).

³⁷ *E.g.*, *id.*, § 224(a) (stating that the president shall impose sanctions on “any person that the President determines” meets several statutory criteria).

³⁸ *See id.*, §§ 224(a)(1), 228(a), 231(a), 232(a), 233(a), 234(a)(1).

³⁹ *Id.*, § 224(a).

⁴⁰ *Id.*, § 225.

⁴¹ *Id.*, § 226.

⁴² *Id.*, § 228.

⁴³ *Id.*, § 227.

⁴⁴ *Id.*, § 231.

⁴⁵ *Id.*, § 232.

⁴⁶ *Id.*, § 233.

⁴⁷ *Id.*, §§ 225–26.

⁴⁸ *See id.*, § 216.

⁴⁹ *Id.*, § 216(a)(2)(B)(i)(I).

action.”⁵⁰ Section 216(a)(2) continues by listing the actions that trigger the reporting requirement and congressional review process:

(2) ACTIONS DESCRIBED.—

(A) IN GENERAL.—An action described in this paragraph is—

- (i) an action to terminate the application of any sanctions described in subparagraph (B);
- (ii) with respect to sanctions described in subparagraph (B) imposed by the President with respect to a person, an action to waive the application of those sanctions with respect to that person; or
- (iii) a licensing action that significantly alters United States’ foreign policy with regard to the Russian Federation.

(B) SANCTIONS DESCRIBED.—The sanctions described in this subparagraph are—

- (i) sanctions provided for under—
 - (I) this chapter or any provision of law amended by this title, including the Executive orders codified under section 222 . . . ;
 - (II) the Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act of 2014 (22 U.S.C. 8921 et seq.); or
 - (III) the Ukraine Freedom Support Act of 2014 (22 U.S.C. 8921 et seq.); and
- (ii) the prohibition on access to the properties of the Government of the Russian Federation located in Maryland and New York that the President ordered vacated on December 29, 2016.⁵¹

Once the president proposes an action triggering Section 216’s reporting requirement, the Act requires the report to describe whether that action is “intended to significantly alter United States foreign policy with regard to the Russian Federation.”⁵² For all proposed actions intended to “significantly alter” U.S. policy toward Russia, the president must include a description of:

- (i) the significant alteration to United States foreign policy with regard to the Russian Federation;
- (ii) the anticipated effect of the action on the national security interests of the United States; and
- (iii) the policy objectives for which the sanctions affected by the action were initially imposed.⁵³

Congress then has thirty days from the filing of the report to review the proposed action.⁵⁴ Section 216 prohibits the president from taking the proposed action during that thirty-day review period “unless a joint resolution of approval with respect to that action is enacted”

⁵⁰ 22 U.S.C. § 9511(a)(1).

⁵¹ 22 U.S.C. § 9511(a)(2).

⁵² 22 U.S.C. § 9511(a)(3).

⁵³ 22 U.S.C. § 9511(a)(4)(A).

⁵⁴ 22 U.S.C. § 9511(b)(1).

pursuant to the Act.⁵⁵ Congress may authorize the president to take the proposed action by passing a resolution of approval or prohibit the president from acting by passing a resolution of disapproval.⁵⁶ The president may veto a disapproval resolution subject to congressional override.⁵⁷

President Trump signed the bill into law on August 2, 2017.⁵⁸ The president issued two statements about the legislation. In his initial statement, the president asserted that the bill inappropriately interfered with his ability to direct foreign affairs:

[T]he bill remains seriously flawed—particularly because it encroaches on the executive branch’s authority to negotiate By limiting the Executive’s flexibility, this bill makes it harder for the United States to strike good deals for the American people, and will drive China, Russia, and North Korea much closer together. The Framers of our Constitution put foreign affairs in the hands of the President. This bill will prove the wisdom of that choice.⁵⁹

Subsequently, the president noted in his formal signing statement that:

In its haste to pass this legislation, the Congress included a number of clearly unconstitutional provisions. For instance, although I share the policy views of sections 253 and 257, those provisions purport to displace the President’s exclusive constitutional authority to recognize foreign governments, including their territorial bounds, in conflict with the Supreme Court’s recent decision in *Zivotofsky v. Kerry*.

Additionally, section 216 seeks to grant the Congress the ability to change the law outside the constitutionally required process. The bill prescribes a review period that precludes the President from taking certain actions. Certain provisions in section 216, however, conflict with the Supreme Court’s decision in *INS v. Chadha*, because they purport to allow the Congress to extend the review period through procedures that do not satisfy the requirements for changing the law under Article I, section 7 of the Constitution. I nevertheless expect to honor the bill’s extended waiting periods to ensure that the Congress will have a full opportunity to avail itself of the bill’s review procedures.⁶⁰

Despite his concerns, the president indicated that he signed the legislation “for the sake of national unity.”⁶¹

Russian officials warned the United States that the Act would harm bilateral relations and prompt Russia to take retaliatory measures. In the days leading up to Congress’s approval of the Act, President Putin remarked that Russia had remained “restrained and patient” with the

⁵⁵ 22 U.S.C. § 9511(b)(3).

⁵⁶ 22 U.S.C. § 9511(b)(3)–(6).

⁵⁷ *Id.*

⁵⁸ Actions Overview H.R. 3664, *supra* note 1.

⁵⁹ White House Press Release, Statement by President Donald J. Trump on Signing the “Countering America’s Adversaries Through Sanctions Act” (Aug. 2, 2017), at <https://www.whitehouse.gov/the-press-office/2017/08/02/statement-president-donald-j-trump-signing-countering-americas> [hereinafter Aug. 2 Trump Statement].

⁶⁰ White House Press Release, Statement by President Donald J. Trump on the Signing of H.R. 3364 (Aug. 2, 2017), at <https://www.whitehouse.gov/the-press-office/2017/08/02/statement-president-donald-j-trump-signing-hr-3364>.

⁶¹ Aug. 2 Trump Statement, *supra* note 59.

United States.⁶² “At a certain moment,” Putin continued, “we will have to respond.”⁶³ Russia’s deputy foreign minister Sergei Ryabkov said that “[t]he authors and sponsors of this bill are making a very serious step toward destruction of prospects for normalizing relations with Russia and do not conceal that that’s their target.”⁶⁴ Prime Minister Medvedev also lamented the legislation marked an end to “[t]he hope for improving our relations with the new U.S. administration.”⁶⁵

Shortly after Congress passed the law, the Russian Foreign Ministry released a statement condemning the United States and outlining its own plans for retaliation. The Foreign Ministry wrote:

On July 27, the US Congress passed a new bill on tougher anti-Russia sanctions. This measure is further proof of the United States’ extremely hostile foreign policy. Hiding behind its sense of superiority, the United States arrogantly ignores the stances and interests of other countries.

It is common knowledge that the Russian Federation has been doing everything in its power to improve bilateral relations, to encourage ties and cooperation with the US on the most pressing issues

. . .

Meanwhile, the United States is using Russia’s alleged interference in its domestic affairs as an absolutely contrived excuse for its persevering and crude campaigns against Russia. This activity contradicts the principles of international law, the UN Charter, WTO regulations and, simply, the standards of [civilized] international communication.

The United States continues to pass more unlawful sanctions against Russia, to seize Russia’s diplomatic property, which is [formalized] in binding bilateral documents, and to deport Russian diplomats. This is clearly a violation of the Vienna Convention on Diplomatic Relations and generally [recognized] diplomatic practices.

The adoption of the new sanctions bill is an obvious indication that relations with Russia are being dragged down by political infighting in the United States. Moreover, the new bill uses political means to create a dishonest competitive advantage for the US in the global economy. This blackmail aimed at restricting Russia’s cooperation with its foreign partners threatens many countries and international businesses.⁶⁶

The Russian Foreign Ministry then ordered the United States to reduce its “diplomatic and technical staff” then serving in Russia to 455 people, a number equal to “the number of

⁶² Andrew Higgins, *Putin Derides Sanctions and Trump Investigations as ‘Boorishness,’* N.Y. TIMES (July 27, 2017), at <https://www.nytimes.com/2017/07/27/world/europe/putin-sanctions-trump-investigations.html>.

⁶³ *Id.*

⁶⁴ Neil MacFarquhar, *Lawmakers in Russia Call for Retaliation Against New U.S. Sanctions,* N.Y. TIMES (July 26, 2017), at <https://www.nytimes.com/2017/07/26/world/europe/us-sanctions-russia.html>.

⁶⁵ Vladimir Isachenkov, *Russia Accuses Donald Trump of Waging ‘Full-Scale Trade War’ After U.S. President Signs New Sanctions Bill,* INDEPENDENT (Aug. 3, 2017), at <http://www.independent.co.uk/news/world/europe/donald-trump-sanctions-russia-signs-bill-trade-war-dmitry-medvedev-a7874201.html>.

⁶⁶ Embassy of the Russian Federation Press Release, Foreign Ministry’s Statement (July 28, 2017), at <http://www.russianembassy.org/article/foreign-ministry%E2%80%99s-statement>.

Russian diplomats and technical staff currently working in the United States.”⁶⁷ The Foreign Ministry also announced that the United States would no longer have access to storage facilities “on Dorozhnaya Street in Moscow and [at] the country house in Serebryany Bor. . . .”⁶⁸ The statement ended with the Ministry’s warning that “Russia reserves the right to resort to other measures affecting US’ interests on a retaliatory basis.”⁶⁹

The United States condemned Russia’s retaliatory measures. On July 31—several days before President Trump signed the legislation—Vice President Pence commented on Russia’s embassy restrictions:

President Trump has called on Russia to cease its destabilizing activities in Ukraine and elsewhere and to cease its support for hostile regimes like North Korea and Iran.

And under President Trump, the United States will continue to hold Russia accountable for its actions—and we call on our European allies and friends to do the same.

. . .

The preference of the United States is a constructive relationship with Russia based on cooperation on common interests Regrettably, last week Russia took the drastic step of limiting the United States’ diplomatic presence in their nation.

President Trump has made it clear: America is open to a better relationship with Russia. But the President and our Congress are unified in our message: A better relationship and the lifting of sanctions will require Russia to reverse the actions that caused sanctions to be imposed in the first place.

We hope for better days and better relations with Russia, but as I said earlier today, recent diplomatic actions taken by Moscow will not deter the commitment of the United States to our security, that of our allies, and to freedom-loving nations around the world.⁷⁰

The day after Russia announced its new restrictions, U.S. Secretary of State Rex Tillerson issued a press release stating that:

[t]he near unanimous votes for the sanctions legislation in Congress represent the strong will of the American people to see Russia take steps to improve relations with the United States. We hope that there will be cooperation between our two countries on major global issues and these sanctions will no longer be necessary.⁷¹

On August 31, the State Department announced that it would require Russia “to close its Consulate General in San Francisco, [California] a chancery annex in Washington, D.C., and

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Office of the Vice President Press Release, Remarks by the Vice President to Enhanced Forward Presence and Estonian Troops (July 31, 2017), at <https://www.whitehouse.gov/the-press-office/2017/07/31/remarks-vice-president-enhanced-forward-presence-and-estonian-troops>.

⁷¹ U.S. Dep’t of State Press Release, On Sanctions Legislation (July 29, 2017), at <https://www.state.gov/secretary/remarks/2017/07/272938.htm>.

a consular annex in New York City.”⁷² State Department officials designated the closures as formal retaliation against Russia:

With this action both countries will remain with three consulates each. While there will continue to be a disparity in the number of diplomatic and consular annexes, we have chosen to allow the Russian Government to maintain some of its annexes in an effort to arrest the downward spiral in our relationship.

The United States hopes that, having moved toward the Russian Federation’s desire for parity, we can avoid further retaliatory actions by both sides and move forward to achieve the stated goal of both of our presidents: improved relations between our two countries and increased cooperation on areas of mutual concern. The United States is prepared to take further action as necessary and as warranted.⁷³

The State Department gave Russia until September 2 to complete the closures.⁷⁴

GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

United States and Qatar Sign Memorandum of Understanding Regarding Terrorism Financing
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On July 11, 2017, U.S. Secretary of State Rex Tillerson signed a memorandum of understanding (MOU) between the United States and Qatar, thereby establishing a joint plan to investigate and eliminate the financing of terrorism.¹ The agreement was signed against a backdrop of conflict between Qatar and a number of its regional neighbors, particularly Saudi Arabia. While it appears that negotiations between Qatar and the United States predated the formal standoff between Qatar and its neighbors, Qatar has invoked the MOU to defend itself against Saudi accusations of terror financing.

In May, Tillerson and President Donald Trump had traveled to Saudi Arabia, where Trump signed a joint “strategic vision” with the Saudi government and Tillerson outlined the countries’ common counterterrorism goals.² During the same visit Trump also met with the heads of the countries in the Gulf Cooperation Council (GCC), a group consisting of all the Arab states in the Persian Gulf except Iraq.³

⁷² U.S. Dep’t of State Press Release, *Achieving Parity in Diplomatic Missions* (Aug. 31, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/08/273738.htm>.

⁷³ *Id.*

⁷⁴ *Id.*

¹ Carol Morello & Kareem Fahim, *Qatar Agrees to Combat Terrorism Financing Under Deal with U.S.*, WASH. POST (July 11, 2017), at https://www.washingtonpost.com/world/qatar-agrees-to-curb-terrorism-financing-under-deal-with-us/2017/07/11/1a86e3b0-a041-4300-ab03-c840d8a19bcf_story.html.

² Philip Rucker & Karen DeYoung, *Trump Signs ‘Tremendous’ Deals with Saudi Arabia on His First Day Overseas*, WASH. POST (May 20, 2017), at https://www.washingtonpost.com/politics/trump-gets-elaborate-welcome-in-saudi-arabia-embarking-on-first-foreign-trip/2017/05/20/679f2766-3d1d-11e7-a058-ddbb23c75d82_story.html.

³ *Id.*

The next month, a group of Arab countries led by Bahrain, Egypt, Saudi Arabia, and the United Arab Emirates cut off diplomatic ties with Qatar and commenced an “air, sea, and land blockade” of the small Gulf state.⁴ The countries justified the blockade as a response to Qatar’s purported violation of a 2014 agreement by GCC member states, which requires that the nations “not undermine the ‘interests, security, and stability’ of each other.”⁵ The blockading states argued that Qatar had violated this obligation by financing terrorist activities and “embrac[ing] various terrorist and sectarian groups aimed at destabilizing the region.”⁶ In addition, the standoff is apparently related to the blockading states’ disapproval of Qatar’s relationship with Iran. Earlier this year, Bahrain, Egypt, Saudi Arabia, and the United Arab Emirates blocked Qatari media when a story published on state-run news sites published statements attributed to the Qatari emir that supported Iran and Hamas (for example, calling Iran an “Islamic power”⁷) and speculated that President “Trump might not be in power for long.”⁸ Qatar denied that the emir had made any such statement and claimed that the websites had been hacked by some outside actor—a claim reportedly bolstered by a U.S. intelligence finding that the hack had actually been perpetrated by the UAE.⁹

News of the U.S.-Qatar MOU emerged as part of the U.S. response to the blockade of Qatar, which hosts a large American air base and has extensive ties to the United States. While President Trump praised Saudi Arabia in strong but general terms in the wake of the May 2017 Riyadh Summit,¹⁰ the State Department’s more specific interventions into the Qatar dispute have built on Secretary Tillerson’s evaluation of Qatar’s position as “reasonable.”¹¹ In a press briefing after Tillerson’s comment, spokesperson Heather Nauert stated:

⁴ Liz Sly, *Qatar Responds to the Demands of Saudi Arabia as Trump Weighs in*, WASH. POST (July 3, 2017), at https://www.washingtonpost.com/world/middle_east/qatar-responds-to-the-demands-of-saudi-arabia-and-its-allies/2017/07/03/88420336-5ff9-11e7-80a2-8c226031ac3f_story.html. Yemen, the Maldives, and the eastern Libyan government joined the blockade. Patrick Wintour, *Gulf Plunged into Diplomatic Crisis as Countries Cut Ties with Qatar*, GUARDIAN (June 5, 2017), at <https://www.theguardian.com/world/2017/jun/05/saudi-arabia-and-bahrain-break-diplomatic-ties-with-qatar-over-terrorism>.

⁵ *Gulf States Agree to Deal to End Qatar Tensions*, AL JAZEERA (Apr. 17, 2014), at <http://www.aljazeera.com/news/middleeast/2014/04/gulf-states-agree-deal-end-qatar-tensions-2014417221056589789.html> (describing circumstances under which the 2014 agreement was reached). For text of the 2013 and 2014 agreements obtained and translated by CNN, see <http://i2.cdn.turner.com/cnn/2017/images/07/10/translation.of.agreementsupdated.pdf>.

⁶ Wintour, *supra* note 4. Anne Barnard & David D. Kirkpatrick, *5 Arab Nations Move to Isolate Qatar, Putting the U.S. in a Bind*, N.Y. TIMES (June 5, 2017), at <https://www.nytimes.com/2017/06/05/world/middleeast/qatar-saudi-arabia-egypt-bahrain-united-arab-emirates.html>.

⁷ Karen DeYoung & Ellen Nakashima, *UAE Orchestrated Hacking of Qatari Government Sites, Sparking Regional Upheaval, According to U.S. Intelligence Officials*, WASH. POST (July 16, 2017), at https://www.washingtonpost.com/world/national-security/uae-hacked-qatari-government-sites-sparking-regional-upheaval-according-to-us-intelligence-officials/2017/07/16/00c46e54-698f-11e7-8eb5-cbcc2e7bfbf_story.html.

⁸ Barnard & Kirkpatrick, *supra* note 6; Wintour, *supra* note 4.

⁹ DeYoung & Nakashima, *supra* note 7.

¹⁰ Michael D. Shear & Peter Baker, *Saudis Welcome Trump’s Rebuff of Obama’s Mideast Views*, N.Y. TIMES (May 20, 2017), at <https://www.nytimes.com/2017/05/20/world/middleeast/donald-trump-saudi-arabia.html>. Trump said, “They’re doing a great job, they’re going to be doing something very special. You see it with terrorism, the funding of terrorism. It’s going to stop, going to stop the funding of radical Islamic terrorism.” *Trump Praises Saudi Arabia*, WASH. POST (June 7, 2017), at https://www.washingtonpost.com/video/politics/trump-praises-saudi-arabia/2017/06/07/4136e148-4ba7-11e7-987c-42ab5745db2e_video.html.

¹¹ Morello & Fahim, *supra* note 1; see also Sly, *supra* note 4 (“A White House statement suggested, however, that Trump continues to back Saudi Arabia and its allies against Qatar, despite efforts by Secretary of State Rex Tillerson to adopt a more measured approach.”).

Now that it's been more than two weeks since the embargo started, we are mystified that the Gulf states have not released to the public, nor to the Qataris, the details about the claims that they are making toward Qatar. The more that time goes by, the more doubt is raised about the actions taken by Saudi Arabia and the UAE. At this point, we are left with one simple question: Were the actions really about their concerns regarding Qatar's alleged support for terrorism, or were they about the long simmering grievances between and among the GCC countries?¹²

On this background, Secretary Tillerson announced U.S.-Qatar MOU at a press conference on July 11. Asked about the effect of the memorandum on the diplomatic tensions between Qatar and the GCC countries, Secretary Tillerson responded:

[T]he agreement that was signed today is an agreement that we have been working on for quite some time. In fact, there's elements of this work that actually had been underway as long as a year ago. So what I think you're seeing the culmination today is really of this reinvigoration of our talks as a result of the Riyadh summit. And President Trump's very strong call in Qatar, I think, has taken the initiative to move out on things that had been discussed but had not been brought to a conclusion, and to put in place a very, very strong agreement, one that has commitments for action immediately in a number of fronts, and in fact, several steps have already been taken and implemented.

As it relates to the conflict that exists here in the Gulf, we had a good trilateral exchange around the conflict with His Highness The Emir and the foreign minister, with our Kuwaiti mediator partner. And my role here is to support the efforts of the Emir of Kuwait and the Kuwaiti mediator to bring what we can to the discussions to help both sides more fully understand the concerns of the relative parties and also point out possible solutions to those.¹³

Qatari Foreign Minister Al-Thani agreed:

Just to follow up what His Excellency just mentioned, this agreement which was signed, which is being signed now, it's a separate bilateral agreement between Qatar and the United States which has been underway and in discussion for weeks now, and it has nothing related directly to or indirectly to the recent crisis and the blockade which is imposed against Qatar.¹⁴

While the memorandum may not have originated as a response to the blockade of Qatar, the Qatari foreign minister indicated that Qatar would use the memorandum to move negotiations with the GCC states forward:

But the main output was the memorandum of understanding pertaining to combating financing terrorism, which for long the blockading countries have accused Qatar of financing terrorism. Now the state of Qatar is the first country to sign this memorandum

¹² U.S. Dep't of State Press Briefing, Spokesperson Heather Nauert, Department Press Briefing (June 20, 2017), at <https://www.state.gov/r/pa/prs/dpb/2017/06/272056.htm>.

¹³ U.S. Dep't of State Press Release, Press Availability with Qatari Foreign Minister Sheikh Mohammed bin Abdulrahman al-Thani (July 11, 2017), at <https://www.state.gov/secretary/remarks/2017/07/272522.htm>.

¹⁴ *Id.*

of understanding with the United States. We invite the other blockading countries to join signing this understanding.¹⁵

The text of the MOU has not been released, and official sources have been vague about the substantive details. Secretary Tillerson characterized the agreement, in the joint press conference announcing its signing, as containing benchmarks, information-sharing requirements, and provisions for tracking and disabling terror funding:

The agreement in which we both have signed on behalf of our governments represents weeks of intensive discussions between experts and reinvigorates the spirit of the Riyadh summit. The memorandum lays out a series of steps the two countries will take over the coming months and years to interrupt and disable terror financing flows and intensify counterterrorism activities globally. The agreement includes milestones to ensure both countries are accountable to their commitments.

Together, the United States and Qatar will do more to track down funding sources, will do more to collaborate and share information, and will do more to keep the region and our homeland safe.¹⁶

Saudi Arabia, along with Egypt, the United Arab Emirates, and Bahrain, issued a joint statement in response to the memorandum of understanding. The four countries indicated that, although they valued the efforts of the United States, the memorandum was not sufficient for them to lift their blockade:

The signing of a Memorandum of Understanding on Combating the Financing of Terrorism between the United States and the Qatari authorities is the result of the repeated pressures and demands over the past years by the four countries and their partners to stop its support for terrorism with the assertion that this step is not enough and that the four countries will closely monitor the seriousness of the authorities in its fight against all forms of terrorist financing, its support and embrace.

The four countries emphasize that the measures they have taken have been because of the continuation of various activities of the Qatari authorities in supporting and financing terrorism, harboring extremists, spreading hatred and extremism and interfering in the internal affairs of other countries. These activities must be fully and definitively stopped in implementation of the legitimate and just demands.

The Qatari authorities have consistently revoked all the agreements and commitments, the most recent of which was the Riyadh Agreement (2013), which led to the withdrawal of ambassadors and their return only after the Qatari authorities signed the supplementary agreement (2014)¹⁷ and their continued intervention, incitement, conspiracy, harboring of terrorists, financing terrorist acts and spreading hatred and extremism, with which it cannot be trusted in any commitment it makes according to its existing policy

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ These comments appear to refer to the two agreements Qatar signed with its fellow Gulf Cooperation Council members. *See supra* note 5.

without the establishment of strict controls to verify the seriousness of its return to the normal and right track.

The four countries also reiterate the continuation of their current procedures until the Qatari authorities are committed to the implementation of the just and full demands that will ensure that terrorism is addressed and stability and security are established in the region.¹⁸

The next day, the Saudi-led group issued a list of thirteen demands to Qatar, including, among others, that it must shut down Al Jazeera and its affiliates, close its diplomatic outposts in Iran, and pay an undisclosed amount of money for “loss of life and other financial losses caused by [their] policies”¹⁹ The list included demands that Qatar cut ties with groups such as the Muslim Brotherhood and ISIL, cut funding to individual terrorists and terrorist groups, and deliver terrorist fugitives to their countries of origin.²⁰ The group gave Qatar ten days to comply, leaving the consequences unspecified.²¹ Qatar denied any involvement in either the funding of terrorism or the publication of the inflammatory statements, insisting that the “many false allegations directed at the State of Qatar [were] made for political gains and to tarnish the public opinion’s image of the State of Qatar.”²²

The Gulf State standoff continues. “Right now,” said Tillerson, “the parties are not even talking to one another at any level.”²³

GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

Trump Reverses Certain Steps Toward Normalizing Relations with Cuba

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In June 2017, President Donald Trump announced a plan to roll back various steps taken by his predecessor toward normalizing relations between the United States and Cuba. A senior official for the administration announced the plan in a White House press briefing:

The President vowed to reverse the Obama administration policies toward Cuba that have enriched the Cuban military regime and increased the repression on the island.

¹⁸ Royal Embassy of Saudi Arabia Press Release, Joint Statement by Saudi Arabia, Egypt, The United Arab Emirates, and Bahrain Regarding MOU to Combat Terrorism Between the U.S. and Qatar (July 11, 2017), at <https://saudiembassy.net/statements/joint-statement-saudi-arabia-egypt-united-arab-emirates-and-bahrain-regarding-mou-combat>.

¹⁹ *Arab States Issue 13 Demands to End Qatar-Gulf Crisis*, AL JAZEERA (July 12, 2017), at <http://www.aljazeera.com/news/2017/06/Arab-states-issue-list-demands-qatar-crisis-170623022133024.html>.

²⁰ *Id.*

²¹ *Id.*

²² Qatar Ministry of Foreign Affairs Press Release, Qatar Denounces Statement Made by Saudi Arabia, Egypt, Bahrain, and UAE (June 9, 2017), at <https://www.mofa.gov.qa/en/all-mofa-news/details/2017/06/09/qatar-denounces-statement-made-by-saudi-arabia-egypt-bahrain-and-uae>.

²³ Gardiner Harris, *Tillerson Comes Up Short in Effort to Resolve Qatar Dispute*, N.Y. TIMES (July 13, 2017), at <https://www.nytimes.com/2017/07/13/world/middleeast/qatar-saudi-arabia-rex-tillerson.html>.

It is a promise that President Trump made, and it's a promise that President Trump is keeping.

With this is a readjustment of the United States policy towards Cuba. And you will see that, going forward, the new policy under the Trump administration, will empower the Cuban people. To reiterate, the new policy going forward does not target the Cuban people, but it does target the repressive members of the Cuban military government.¹

Relations between the United States and Cuba had been rife with conflict for more than half a century when, in 2014, President Obama initiated a major shift in U.S. policy and announced a plan to “reestablish diplomatic relations . . . , review Cuba’s designation as a State Sponsor of Terrorism . . . [, and] take[] steps to increase travel, commerce, and the flow of information to and from Cuba.”² The U.S. Treasury and Commerce Departments subsequently revised various regulations to “facilitate travel to Cuba for authorized purposes, . . . and allow a number of . . . activities related to, among other areas, telecommunications, financial services, trade, and shipping.”³ In the months and years that followed, the United States and Cuba took further steps to normalize ties.⁴ The final weeks of the Obama administration yielded bilateral agreements with the Cuban government on a range of issues, including: a memorandum of understanding relating to plant and animal health to facilitate trade in agricultural goods;⁵ a treaty to delimit the maritime boundary between the two countries in the eastern Gulf of Mexico;⁶ an agreement to improve the environmental management of protected areas in Cuba and Florida;⁷ an “agreement to strengthen cooperation in the field of maritime and aeronautical search and rescue”;⁸ a “Memorandum of Understanding to

¹ White House Press Release, Background Briefing on the President’s Cuba Policy (June 15, 2017), at <https://www.whitehouse.gov/the-press-office/2017/06/15/background-briefing-presidents-cuba-policy>, [hereinafter Background Briefing on the President’s Cuba Policy].

² White House Press Release, Statement by the President on Cuba Policy Changes (Dec. 17, 2014), at <https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes>; see also Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 109 AJIL 407, 415 (2015).

³ U.S. Dep’t of Treasury Press Release, Fact Sheet: Treasury and Commerce Announce Regulatory Amendments to the Cuba Sanctions (Jan. 15, 2015), at <http://www.treasury.gov/press-center/press-releases/Pages/jl9740.aspx>. The Treasury regulations can be found at 31 C.F.R. §515 (2015); the Commerce regulations can be found at 15 C.F.R. §§730–74 (2015).

⁴ Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 109 AJIL 663, 666–67 (2015); Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 109 AJIL 407, 415–19 (2015).

⁵ Ministry of Foreign Affairs of Cuba Press Release, Cuba and the United States Sign Memorandum of Understanding in the Field of Plant and Animal Health (Jan. 20, 2017), at <http://www.minrex.gob.cu/en/cuba-and-united-states-sign-memorandum-understanding-field-animal-and-plant-health> (“This new Memorandum is mainly intended to contribute to prevent the introduction and spread of quarantine pests, animal and plant disease agents and vectors in the United States and Cuba . . .”).

⁶ U.S. Dep’t of State Press Release, United States and Cuba Sign Maritime Treaty Boundary (Jan. 18, 2017), at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/267117.htm> (noting the treaty will be submitted to the Senate for its advice and consent).

⁷ Ministry of Foreign Affairs of Cuba Press Release, Cuba and the United States Signed Twinning Agreement Between Ciénaga de Zapata and Everglades National Parks (Jan. 18, 2017), at <http://www.minrex.gob.cu/en/cuba-and-united-states-signed-twinning-agreement-between-cienaga-de-zapata-and-everglades-national>.

⁸ U.S. Dep’t of State Press Release, United States and Cuba Sign Search and Rescue Agreement (Jan. 18, 2017), at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/267107.htm>.

deepen law enforcement cooperation and information sharing”;⁹ and an “agreement to prepare for and respond to oil spills and hazardous substance pollution in the Gulf of Mexico and the Straits of Florida.”¹⁰

In addition, on January 12, 2017, President Obama ended the “wet foot/dry foot” policy on Cuban immigration to the United States.¹¹ That policy had been adopted by the Clinton Administration in 1995 and, as explained by the *New York Times*, “owes its name to its unusual rules, which require Cubans caught trying to reach the United States by sea to return home, yet allow those who make it onto American soil to stay and eventually apply for legal, permanent residency.”¹² Obama explained the policy change:

Today, the United States is taking important steps forward to normalize relations with Cuba and to bring greater consistency to our immigration policy. The Department of Homeland Security is ending the so-called “wet-foot/dry foot” policy, which was put in place more than twenty years ago and was designed for a different era. Effective immediately, Cuban nationals who attempt to enter the United States illegally and do not qualify for humanitarian relief will be subject to removal, consistent with U.S. law and enforcement priorities. By taking this step, we are treating Cuban migrants the same way we treat migrants from other countries. The Cuban government has agreed to accept the return of Cuban nationals who have been ordered removed, just as it has been accepting the return of migrants interdicted at sea.¹³

The Cuban government had condemned the “dry feet-wet feet” policy as “a stimulus for irregular migration, trafficking of migrants and irregular entry into the United States” and as “an incitement to illegal exits” that led to

migratory crises, hijacking of ships and aircraft and the commission of crimes, such as trafficking in migrants, trafficking in persons, immigration fraud and the use of violence with a destabilizing extraterritorial impact on other countries of the region, used as transit to arrive in US territory.¹⁴

As a candidate, President Trump criticized his predecessor’s policies with respect to Cuba, and articulated his intention to reverse them.¹⁵ In February 2017, shortly after President

⁹ U.S. Dep’t of State Press Release, United States and Cuba To Sign Law Enforcement Memorandum of Understanding (Jan. 16, 2017), at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/267007.htm>.

¹⁰ U.S. Dep’t of State Press Release, United States and Cuba Sign Bilateral Oil Spill Preparedness and Response Agreement (Jan. 9, 2017), at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/266726.htm>.

¹¹ White House Press Release, Statement by the President on Cuban Immigration Policy (Jan. 12, 2017), at <https://obamawhitehouse.archives.gov/the-press-office/2017/01/12/statement-president-cuban-immigration-policy> [hereinafter Obama on Cuban Immigration Policy].

¹² Julie Hirschfeld Davis & Frances Robles, *Obama Ends Exemption for Cubans Who Arrive Without Visas*, N.Y. TIMES (Jan. 12, 2017), at <https://www.nytimes.com/2017/01/12/world/americas/cuba-obama-wet-foot-dry-foot-policy.html>.

¹³ Obama on Cuban Immigration Policy, *supra* note 11.

¹⁴ Ministry of Foreign Affairs of Cuba Press Release, Declaration by the Revolutionary Government (Jan. 16, 2017), at <http://www.minrex.gob.cu/en/declaration-revolutionary-government-0>.

¹⁵ Patricia Mazzei & Amy Sherman, *Trump Learns to Play Miami’s Ethnic Politics*, MIAMI HERALD (Sept. 16, 2016), at <http://www.miamiherald.com/news/politics-government/election/donald-trump/article102378397.html> (quoting Donald Trump as saying the following at a campaign rally: “All of the concessions Barack Obama has granted the Castro regime were done through executive order—which means the next president

Trump was sworn into office, he ordered a full review of U.S. policy toward Cuba.¹⁶ Two months later, anonymous sources within the Trump administration informed journalists that the administration was working on plans to roll back the renewal of diplomatic ties.¹⁷ The president's plan was officially announced one month later, on June 15.¹⁸ A senior administration official previewed some elements during a White House press briefing the evening before the plan was announced:

There's a few components of it. One part is . . . measures designed to restrict the flow of money to the oppressive elements of the Cuban regime—the military, intelligence, and security services.

There are also measures to ensure that the statutory ban on tourism is strictly enforced, which will include ending the individual people-to-people travel.¹⁹ There are 12 categories of travel that are permitted still, but the one of the individual people-to-people travel was one that was at the highest risk of potential abuse of the statutory ban on tourism. And then there are several other components of the policy that you'll see tomorrow that relate to the supporting requirements ensuring that these regulations are enforced.²⁰

The policy itself is reflected in a National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba. That Memorandum provides, in part, that:

It shall be the policy of the executive branch to:

- (a) End economic practices that disproportionately benefit the Cuban government or its military, intelligence, or security agencies or personnel at the expense of the Cuban people.
- (b) Ensure adherence to the statutory ban on tourism to Cuba.
- (c) Support the economic embargo of Cuba described in section 4(7) of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (the embargo), including by opposing measures that call for an end to the embargo at the United Nations

can reverse them. And that I will do unless the Castro regime meets our demands. Not my demands—our demands. . . . Those demands will include religious and political freedom for the Cuban people, and the freeing of political prisoners.”)

¹⁶ Background Briefing on the President's Cuba Policy, *supra* note 1.

¹⁷ Julie Hirschfeld Davis, *Trump Considers Rolling Back Obama's Opening with Cuba*, N.Y. TIMES (May 31, 2017), at <https://www.nytimes.com/2017/05/31/world/americas/cuba-trump.html>.

¹⁸ Background Briefing on the President's Cuba Policy, *supra* note 1.

¹⁹ *Id.* [Editors' note: "Individual people-to-people travel is educational travel that: (i) does not involve academic study pursuant to a degree program; and (ii) does not take place under the auspices of an organization that is subject to U.S. jurisdiction that sponsors such exchanges to promote people-to-people contact." See U.S. Dep't of the Treasury Office of Foreign Assets Control, Frequently Asked Questions on President Trump's Cuba Announcement (June 16, 2017), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_20170616.pdf.]

²⁰ Background Briefing on the President's Cuba Policy, *supra* note 1; see also White House Press Release, Fact Sheet on Cuba Policy (June 16, 2017), at <https://www.whitehouse.gov/the-press-office/2017/06/16/fact-sheet-cuba-policy>.

and other international forums and through regular reporting on whether the conditions of a transition government exist in Cuba.

- (d) Amplify efforts to support the Cuban people through the expansion of internet services, free press, free enterprise, free association, and lawful travel.
- (e) Not reinstate the “Wet Foot, Dry Foot” policy, which encouraged untold thousands of Cuban nationals to risk their lives to travel unlawfully to the United States.
- (f) Ensure that engagement between the United States and Cuba advances the interests of the United States and the Cuban people. These interests include: advancing Cuban human rights; encouraging the growth of a Cuban private sector independent of government control; enforcing final orders of removal against Cuban nationals in the United States; protecting the national security and public health and safety of the United States, including through proper engagement on criminal cases and working to ensure the return of fugitives from American justice living in Cuba or being harbored by the Cuban government; supporting United States agriculture and protecting plant and animal health; advancing the understanding of the United States regarding scientific and environmental challenges; and facilitating safe civil aviation.²¹

The memorandum thus reflects both change and continuity. As explained during the White House press briefing, the changes would be implemented by regulations that would be subsequently adopted by the secretaries of Treasury and Commerce.²² The decision not to reinstate the “wet foot, dry foot” policy reflects continuity with the Obama administration’s abandonment of that policy; in addition, some of the shared “interests” of the United States and the Cuban people track the subjects of the bilateral agreements that the United States had reached with Cuba at the end of the Obama administration.²³

In addition to rolling out this policy, the Trump Administration has also contended with a bizarre series of medical issues plaguing U.S. diplomats in the country. A press report indicated that at least six diplomats had been flown to the University of Miami’s hospital since the beginning of the year, suffering from symptoms including headaches, dizziness, and hearing loss that, according to one source, appeared to have been caused by some kind of sonic wave machine.²⁴

A State Department spokesperson first acknowledged the problem during a press conference on August 9, 2017, saying:

[S]ome U.S. Government personnel who were working at our embassy in Havana, Cuba on official duties—so they were there working on behalf of the U.S. embassy there—they’ve reported some incidents which have caused a variety of physical symptoms.

²¹ White House Press Release, National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba (June 16, 2017), at <https://www.whitehouse.gov/the-press-office/2017/06/16/national-security-presidential-memorandum-strengthening-policy-united>.

²² Background Briefing on the President’s Cuba Policy, *supra* note 1.

²³ See *supra* notes 5–10.

²⁴ Frances Robles & Kirk Semple, ‘Health Attacks’ on U.S. Diplomats in Cuba Baffle Both Countries, N.Y. TIMES (Aug. 11, 2017), at <https://www.nytimes.com/2017/08/11/world/americas/cuba-united-states-embassy-diplomats-illness.html>.

I'm not going to be able to give you a ton of information about this today, but I'll tell you what we do have that we can provide so far.

We don't have any definitive answers about the source or the cause of what we consider to be incidents. We can tell you that on May 23rd, the State Department took further action. We asked two officials who were accredited at the Embassy of Cuba in the United States to depart the United States. Those two individuals have departed the United States. We take this situation very seriously. One of the things we talk about here often is that the safety and security of American citizens at home and abroad is our top priority. We're taking that situation seriously and it's under investigation right now.²⁵

In response to journalists' questions, the spokesperson said that "we first heard about these incidents back in late 2016," and they have caused some State Department employees to seek medical attention: "What this requires is providing medical examinations to these people. Initially when they started reporting what I will just call symptoms, it took time to figure out what this was, and this is still ongoing. So we're monitoring it."²⁶ The spokesperson also noted Cuba's international obligations:

The Cuban Government has a responsibility and an obligation under the [Vienna] Convention to protect our diplomats, so that is part of the reason why this is such a major concern of ours, why we take this so seriously, and in addition to the protection and security of Americans.²⁷

Under the Vienna Convention on Diplomatic Relations, the state hosting a diplomatic mission "is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."²⁸

Cuba has repeatedly denied any role in the incidents. On September 19, the Cuban embassy in Washington DC issued the following statement:

Cuba strictly observes its obligations to protect foreign diplomats on its soil. Cuba has never perpetrated nor will it ever perpetrate actions of this nature, and has never permitted nor will it ever permit any third-party use of its territory for this purpose.²⁹

On September 26, U.S. Secretary of State Rex Tillerson met with Bruno Rodríguez Parrilla, the Cuban Minister of Foreign Affairs. According to a press release from the Cuban ministry of foreign affairs:

²⁵ U.S. Dep't of State Press Release, Press Briefing (Aug. 9, 2017), at <https://www.state.gov/r/pa/prs/dpb/2017/08/273288.htm>.

²⁶ *Id.*

²⁷ *Id.* (reflecting a corrected version of the transcript, which initially referred to the "Geneva Convention").

²⁸ Vienna Convention on Diplomatic Relations, Art. 22(2), Apr. 18, 1961, 500 UNTS 95 [hereinafter VCDR].

²⁹ Matthew Lee, *Cuba Denies Role in 'Sonic Attacks' that Left U.S. Diplomats with Brain Damage*, TIME (Sept. 19, 2017), at <http://time.com/4949115/cuba-sonic-attack-brain-damage-deaf>.

The Cuban Foreign Minister reiterated the seriousness, celerity and professionalism with which the Cuban authorities have taken on this issue. Following instructions from the top level of the Cuban government, a priority investigation was opened as from the moment these incidents were first reported and additional measures were adopted to protect the US diplomats and their relatives. This has been recognized by the representatives of the US specialized agencies who have travelled to Cuba as from June, whose visits have been considered as positive by the Cuban counterparts.

Minister Bruno reiterated to Secretary Tillerson how important it was for the US authorities to cooperate, in an effective way, with the Cuban authorities in order to clarify these incidents, which are unprecedented in Cuba.

He likewise reaffirmed Secretary Tillerson that the decision and the argument claimed by the US Government to withdraw two Cuban diplomats from Washington were unwarranted and emphasized that Cuba strictly abides by its obligations under the Vienna Convention on the protection and integrity of diplomats, an area in which it keeps an impeccable record.

He reaffirmed that the Cuban government has never perpetrated nor will it ever perpetrate attacks of any kind against diplomats. The Cuban government has never permitted nor will it ever permit the use of its territory by third parties for this purpose.³⁰

Despite the Cuban government's assurances, at the end of September, the U.S. State Department ordered the withdrawal of all non-emergency employees from the Cuban embassy. Tillerson announced:

Over the past several months, 21 U.S. Embassy employees have suffered a variety of injuries from attacks of an unknown nature. The affected individuals have exhibited a range of physical symptoms, including ear complaints, hearing loss, dizziness, headache, fatigue, cognitive issues, and difficulty sleeping. Investigators have been unable to determine who is responsible or what is causing these attacks.

On September 29, the Department ordered the departure of non-emergency personnel assigned to the U.S. Embassy in Havana, as well as all family members. Until the Government of Cuba can ensure the safety of our diplomats in Cuba, our Embassy will be reduced to emergency personnel in order to minimize the number of diplomats at risk of exposure to harm.

In conjunction with the ordered departure of our diplomatic personnel, the Department has issued a Travel Warning advising U.S. citizens to avoid travel to Cuba and informing them of our decision to draw down our diplomatic staff. We have no reports that private U.S. citizens have been affected, but the attacks are known to have occurred in U.S. diplomatic residences and hotels frequented by U.S. citizens. The Department does not have

³⁰ Cuba's Representative Office Abroad Press Release, Cuban Foreign Minister Meets with US Secretary of State (Sept. 26, 2017), at <http://misiones.minrex.gob.cu/en/articulo/press-release-cuban-foreign-minister-meets-us-secretary-state>.

definitive answers on the cause or source of the attacks and is unable to recommend a means to mitigate exposure.

The decision to reduce our diplomatic presence in Havana was made to ensure the safety of our personnel. We maintain diplomatic relations with Cuba, and our work in Cuba continues to be guided by the national security and foreign policy interests of the United States. Cuba has told us it will continue to investigate these attacks and we will continue to cooperate with them in this effort.

The health, safety, and well-being of our Embassy community is our greatest concern. We will continue to aggressively investigate these attacks until the matter is resolved.³¹

The travel advisory Tillerson referenced warns U.S. citizens not to travel to Cuba, explaining: “Because our personnel’s safety is at risk, and we are unable to identify the source of the attacks, we believe U.S. citizens may also be at risk and warn them not to travel to Cuba.”³² A notice issued the same day by the U.S. embassy in Havana informed travelers: “Due to the drawdown in staff, the U.S. Embassy in Havana has limited ability to assist U.S. citizens. The Embassy will provide only emergency services to U.S. citizens.”³³ In addition, the U.S. embassy informed visa applicants that, as of September 29, “the U.S. Department of State suspended almost all visa processing in Havana,” and that the U.S. Embassy in Havana has cancelled “[a]ll previously-scheduled nonimmigrant and immigrant visa interview appointments.”³⁴

In response, Josefina Vidal, a senior Cuban diplomat, said:

We consider that the decision announced by the Department of State is hasty and that it will affect the bilateral relations, specifically, the cooperation in matters of mutual interest and the exchanges on different fields between both countries.

I wish to reaffirm Cuba’s willingness to continue an active cooperation between the authorities of both countries, to fully clarify these incidents, for which purpose a more effective involvement by the United States will be essential.³⁵

Notwithstanding these affirmations from the Cuban government, a few days later, the Department of State ordered the departure of fifteen officials from the Cuban Embassy in Washington DC. Announcing the decision, a State Department spokesperson said:

The decisions do not signal a change of policy or determination of responsibility for the attacks on U.S. Government personnel in Cuba. Investigations into those attacks are still

³¹ U.S. Dep’t of State Press Release, Actions Taken in Response to Attacks on U.S. Government Personnel in Cuba (Sept. 29, 2017), at <https://www.state.gov/secretary/remarks/2017/09/274514.htm>.

³² U.S. Dep’t of State Press Release, Cuba Travel Warning (Sept. 29, 2017), at <https://travel.state.gov/content/passports/en/alertswarnings/cuba-travel-warning.html>.

³³ U.S. Embassy in Cuba Press Release, Security Message for U.S. Citizens: Cuba Travel Warning (Sept. 29, 2017), at <https://cu.usembassy.gov/security-message-u-s-citizens-cuba-travel-warning>.

³⁴ U.S. Embassy in Cuba, Visas, at <https://cu.usembassy.gov/visas>; see also Ernesto Londoño, *U.S. Halt in Visa Services Leaves Cuban Families in Limbo*, N.Y. TIMES (Oct. 5, 2017), at <https://www.nytimes.com/2017/10/05/world/americas/cuba-us-visas.html>.

³⁵ Cuba’s Representative Office Abroad Press Release, Statement to the Press by General Director for US Affairs, Josefina Vidal Ferreiro (Sept. 29, 2017), at <http://misiones.minrex.gob.cu/en/articulo/statement-press-general-director-us-affairs-josefina-vidal-ferreiro>.

ongoing. Regarding the attacks, there are now 22 people who have been medically confirmed to have experienced health effects due to the attacks on diplomatic personnel in Havana. The Cuban Government has told us it will continue the investigation into the attacks, and we will continue to cooperate with them in this effort. We will also continue our own investigation into the attacks.³⁶

The spokesperson explained that the decision to expel the Cuban diplomats was made “due to Cuba’s inability to protect our diplomats in Havana, as well as to ensure equity in the impact of our respective operations.”³⁷ In response to a question from a journalist about how the individuals were chosen, she said:

The people serving here in their embassy did what we believe some of the similar jobs as our folks down in the embassy in Cuba. We have a reduced ability to do our work in Cuba because of the attacks on our Americans, okay? They now will have a reduced ability to do their jobs as well.³⁸

Opponents of normalizing relations with Cuba cheered this development and urged the Trump administration to go still further and declare all Cuban diplomats in the United States “*persona non grata*.”³⁹ The Cuban foreign minister, however, described the expulsion of Cuban diplomats as “eminently political” as well as “unwarranted and unjustifiable.”⁴⁰

To date, it appears that neither the Trump administration’s June 16 policy announcement nor the dispute over the medical problems suffered by U.S. diplomatic staff has precluded continued implementation of the bilateral agreements reached between Cuba and the United States. The United States has not publicly repudiated any of the agreements. For its part, Cuba affirmed its continued “readiness to actively implement the bilateral accords that have been formalized over the past two years” in September.⁴¹

³⁶ U.S. Dep’t of State Press Release, Press Briefing (Oct. 3, 2017), at <https://www.state.gov/r/pa/prs/dpb/2017/10/274592.htm> [hereinafter Oct. 3 Press Briefing]; see also U.S. Dep’t of State Press Release, Press Statement, Rex W. Tillerson, Washington, DC (Oct. 3, 2017), at <https://www.state.gov/secretary/remarks/2017/10/274570.htm>.

³⁷ Oct. 3 Press Briefing, *supra* note 36.

³⁸ *Id.*

³⁹ Gardiner Harris, Julie Hirschfeld Davis & Ernesto Londoño, *U.S. Expels 15 Cuban Diplomats, in Latest Sign Détente May Be Ending*, N.Y. TIMES (Oct. 3, 2017), at <https://www.nytimes.com/2017/10/03/world/americas/us-cuba-diplomats.html>; see also VCDR, *supra* note 27, Art. 9.

⁴⁰ Harris, Hirschfeld Davis & Londoño, *supra* note 39.

⁴¹ Ministry of Foreign Affairs of Cuba Press Release, Sixth Cuba-US Bilateral Commission Meeting Held in Washington DC (Sept. 19, 2017), at <http://www.minrex.gob.cu/en/sixth-cuba-us-bilateral-commission-meeting-held-washington-dc>. The media note from the U.S. Department of State did not directly address these agreements, saying instead: “The delegations also reviewed the Administration’s priorities and areas for engagement in the interests of the United States and the Cuban people, including human rights; implementation of the Migration Accords; and protecting the national security and public health and safety of the United States.” U.S. Dep’t of State Press Release, United States and Cuba Hold Sixth Bilateral Commission Meeting in Washington, DC (Sept. 20, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/09/274281.htm>.

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

United States Announces Plans to Withdraw from Paris Agreement on Climate Change

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On September 3, 2016, the United States deposited with the UN its instrument of acceptance for the Paris Agreement on Climate Change.¹ The agreement entered into force on November 4, 2016.² Following the change of U.S. presidential administrations, new President Donald Trump announced less than seven months later that the United States would withdraw from the Agreement.³ On August 4, 2017, the United States communicated this intention to the United Nations secretary-general, who serves as the depositary for the agreement.⁴

Article 28 of the Paris Agreement sets out two routes for withdrawal. The United States' withdrawal follows the first route, which allows for withdrawal after a period of delay:

1. At any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary.
2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.⁵

Under these provisions, the earliest date that a withdrawal can take effect is November 4, 2020—exactly four years after the Paris Agreement entered into force.

The second route allows for faster withdrawals if withdrawal from the Paris Agreement is coupled with a withdrawal from the United Nations Framework Convention on Climate Change (UNFCCC). The United States, which has been a party to the UNFCCC since 1992,⁶ did not take this more drastic step.⁷ Article 28 of the Paris Agreement provides:

¹ U.S. Dep't of State Press Release, John Kerry Remarks, U.S. and China Joining the Paris Agreement (Sept. 3, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/09/261567.htm>.

² The Paris Agreement, Apr. 22, 2016, TIAS No. 16-1104, available at http://unfccc.int/paris_agreement/items/9485.php [hereinafter Paris Agreement].

³ White House Press Release, President Donald Trump, Statement on the Paris Climate Accord (June 1, 2017), at <https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord> [hereinafter Trump Statement].

⁴ U.S. Dep't. of State Press Release, Communication Regarding Intent to Withdraw from Paris Agreement (Aug. 4, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm> [hereinafter Aug. 4 Press Release].

⁵ Paris Agreement, *supra* note 2, Art. 28.

⁶ *Status of Ratification of the Convention*, UN FRAMEWORK CONVENTION ON CLIMATE CHANGE, at http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php. See generally Marian Nash (Leich), Contemporary Practice of the United States, 87 AJIL 103 (1993) (providing an overview of the UN Framework Convention on Climate Change).

⁷ In its withdrawal statement, the United States indicated that it “will continue to participate in international climate change negotiations and meetings, including the 23rd Conference of the Parties (COP-23) of the UN Framework Convention on Climate Change, to protect U.S. interests and ensure all future policy options remain open to the administration. Such participation will include ongoing negotiations related to guidance for implementing the Paris Agreement.” Aug. 4 Press Release, *supra* note 4.

“Any Party that withdraws from the [UNFCCC] shall be considered as also having withdrawn from this Agreement.”⁸ Withdrawals from the UNFCCC are effective after a one-year delay.⁹

In a June 1 speech, President Trump explained his decision to withdraw from the Paris Agreement:

As President, I can put no other consideration before the wellbeing of American citizens. The Paris Climate Accord is simply the latest example of Washington entering into an agreement that disadvantages the United States to the exclusive benefit of other countries, leaving American workers—who I love—and taxpayers to absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production.

Thus, as of today, the United States will cease all implementation of the non-binding Paris Accord and the draconian financial and economic burdens the agreement imposes on our country. This includes ending the implementation of the nationally determined contribution and, very importantly, the Green Climate Fund which is costing the United States a vast fortune.

Compliance with the terms of the Paris Accord and the onerous energy restrictions it has placed on the United States could cost America as much as 2.7 million lost jobs by 2025 according to the National Economic Research Associates. This includes 440,000 fewer manufacturing jobs—not what we need—believe me, this is not what we need—including automobile jobs, and the further decimation of vital American industries on which countless communities rely. . . .

Not only does this deal subject our citizens to harsh economic restrictions, it fails to live up to our environmental ideals. As someone who cares deeply about the environment, which I do, I cannot in good conscience support a deal that punishes the United States—which is what it does—the world’s leader in environmental protection, while imposing no meaningful obligations on the world’s leading polluters.

For example, under the agreement, China will be able to increase these emissions by a staggering number of years—13. They can do whatever they want for 13 years. Not us. India makes its participation contingent on receiving billions and billions and billions of dollars in foreign aid from developed countries. There are many other examples. But the bottom line is that the Paris Accord is very unfair, at the highest level, to the United States.

Further, while the current agreement effectively blocks the development of clean coal in America which it does, and the mines are starting to open up. We’re having a big opening in two weeks. Pennsylvania, Ohio, West Virginia, so many places. A big opening of a brand-new mine. It’s unheard of. For many, many years, that hasn’t happened. . . .

China will be allowed to build hundreds of additional coal plants. So we can’t build the plants, but they can, according to this agreement. India will be allowed to double its coal production by 2020. Think of it: India can double their coal production. We’re supposed to get rid of ours. Even Europe is allowed to continue construction of coal plants.

⁸ Paris Agreement, *supra* note 2, Art. 28.

⁹ United Nations Framework Convention on Climate Change, Art. 25, May 9, 1992, 1771 UNTS 107 [hereinafter UNFCCC].

In short, the agreement doesn't eliminate coal jobs, it just transfers those jobs out of America and the United States, and ships them to foreign countries. This agreement is less about the climate and more about other countries gaining a financial advantage over the United States. The rest of the world applauded when we signed the Paris Agreement—they went wild; they were so happy—for the simple reason that it put our country, the United States of America, which we all love, at a very, very big economic disadvantage. A cynic would say the obvious reason for economic competitors and their wish to see us remain in the agreement is so that we continue to suffer this self-inflicted major economic wound. We would find it very hard to compete with other countries from other parts of the world. . . .

The agreement is a massive redistribution of United States wealth to other countries. . . .

Even if the Paris Agreement were implemented in full, with total compliance from all nations, it is estimated it would only produce a two-tenths of one degree—think of that; this much—Celsius reduction in global temperature by the year 2100. Tiny, tiny amount. . . .

Beyond the severe energy restrictions inflicted by the Paris Accord, it includes yet another scheme to redistribute wealth out of the United States through the so-called Green Climate Fund—nice name—which calls for developed countries to send \$100 billion to developing countries all on top of America's existing and massive foreign aid payments. So we're going to be paying billions and billions and billions of dollars, and we're already way ahead of anybody else. Many of the other countries haven't spent anything, and many of them will never pay one dime.

The Green Fund would likely obligate the United States to commit potentially tens of billions of dollars of which the United States has already handed over \$1 billion—nobody else is even close; most of them haven't even paid anything—including funds raided out of America's budget for the war against terrorism. That's where they came. Believe me, they didn't come from me. They came just before I came into office. Not good. And not good the way they took the money. . . .

There are serious legal and constitutional issues as well. Foreign leaders in Europe, Asia, and across the world should not have more to say with respect to the U.S. economy than our own citizens and their elected representatives. Thus, our withdrawal from the agreement represents a reassertion of America's sovereignty. . . .

Staying in the agreement could also pose serious obstacles for the United States as we begin the process of unlocking the restrictions on America's abundant energy reserves, which we have started very strongly. It would once have been unthinkable that an international agreement could prevent the United States from conducting its own domestic economic affairs, but this is the new reality we face if we do not leave the agreement or if we do not negotiate a far better deal.

The risks grow as historically these agreements only tend to become more and more ambitious over time. In other words, the Paris framework is a starting point—as bad as it is—

not an end point. And exiting the agreement protects the United States from future intrusions on the United States' sovereignty and massive future legal liability. Believe me, we have massive legal liability if we stay in.

As President, I have one obligation, and that obligation is to the American people. The Paris Accord would undermine our economy, hamstring our workers, weaken our sovereignty, impose unacceptable legal risks, and put us at a permanent disadvantage to the other countries of the world. It is time to exit the Paris Accord . . . and time to pursue a new deal that protects the environment, our companies, our citizens, and our country.¹⁰

President Trump's decision to "end[] the implementation of the nationally determined contribution" referenced the Paris Agreement obligation for each Party to "prepare, communicate and maintain successive nationally determined contributions [NDCs] that it intends to achieve."¹¹ Former President Obama had communicated the United States' initial NDC on March 31, 2015,¹² indicating that "[t]he United States intends to achieve an economy-wide target of reducing its greenhouse gas emissions by 26%–28% below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%."¹³

As a matter of international law, the United States will remain a party to the Paris Agreement until November 4, 2020, when its withdrawal will become effective. So long as it remains a party,¹⁴ the United States must "pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions"—i.e., the NDCs as defined by the United States.¹⁵

The Paris Agreement does not, however, explicitly prohibit the United States from *lowering* those NDC objectives. The agreement states that "[a] Party may at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition."¹⁶ The agreement also states that "[e]ach Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."¹⁷ Susan Biniaz, the State Department's lead climate change lawyer throughout the negotiations of the Paris Agreement, explained: "The Paris agreement provides for contributions to be nationally determined and it encourages countries, if they decide to change their targets, to make them

¹⁰ Trump Statement, *supra* note 3.

¹¹ Paris Agreement, *supra* note 2, Art. 4(2). *See generally* Kristina Daugirdas & Julian D. Mortenson, Contemporary Practice of the United States, 110 AJIL 374 (2016) (providing an overview of the agreement's requirements).

¹² *INDCs as Communicated by Parties*, UN FRAMEWORK CONVENTION ON CLIMATE CHANGE, at <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>.

¹³ *U.S. Cover Note INDC and Accompanying Information*, available at <http://www4.unfccc.int/Submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf>.

¹⁴ Duncan Hollis, *What to Look for in Any U.S. Withdrawal from the Paris Agreement*, OPINIO JURIS (June 1, 2017), at <http://opiniojuris.org/2017/06/01/what-to-look-for-in-any-us-withdrawal-from-the-paris-agreement>; Daniel Bodansky, *Sound and Fury on the Paris Agreement – But Does It Signify Anything?*, OPINIO JURIS (June 2, 2017), at <http://opiniojuris.org/2017/06/02/33147>.

¹⁵ Paris Agreement, *supra* note 2, Art. 4(2).

¹⁶ *Id.* Art. 4(11).

¹⁷ *Id.* Art. 4(3).

more ambitious, . . . [b]ut it doesn't legally prohibit them from changing them in another direction."¹⁸ Following the announcement, she opined that

[i]t seems very unnecessary to have to withdraw from the Paris agreement if the concern is focused on the U.S. emissions target and financial contributions[.] . . . The U.S. can unilaterally change its emissions target under the agreement—it doesn't have to “renegotiate” it¹⁹

The Paris Agreement does not require the United States to make particular contributions to the Green Climate Fund, which was established in 2010 to help “developing countries limit or reduce their greenhouse gas emissions and adapt to climate change”²⁰ Article 9 of the Paris Agreement provides that “[d]eveloped country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.”²¹ So far, the United States has contributed \$1 billion of a \$3 billion pledge made to the fund by former President Obama.²²

Many world leaders criticized the U.S. decision to withdraw from the Paris Agreement.²³ President Emmanuel Macron of France, in a twist on the U.S. president's campaign slogan, tweeted “Make Our Planet Great Again” and created a website, under that domain, to encourage researchers and entrepreneurs supportive of climate change to emigrate to France.²⁴ Prime Minister Charles Michel of Belgium tweeted, “I condemn this brutal act against #ParisAccord.”²⁵ Prime Minister Justin Trudeau of Canada was “deeply disappointed.”²⁶ Germany, France, and Italy, together, “t[ook] note with regret.”²⁷

¹⁸ Juliet Eilperin, *In the Trump White House, the Momentum Has Turned Against the Paris Climate Agreement*, WASH. POST (May 3, 2017), at <https://www.washingtonpost.com/news/energy-environment/wp/2017/05/02/in-the-trump-white-house-the-momentum-has-turned-against-the-paris-climate-agreement>.

¹⁹ Chris Mooney, *Trump's Reasons for Leaving the Paris Climate Agreement Just Don't Add Up*, WASH. POST (June 1, 2017), at <https://www.washingtonpost.com/news/energy-environment/wp/2017/06/01/trumps-reasons-for-leaving-the-paris-climate-agreement-just-dont-add-up>.

²⁰ *About the Fund*, GREEN CLIMATE FUND, at <http://www.greenclimate.fund/who-we-are/about-the-fund>.

²¹ Paris Agreement, *supra* note 2, Art. 9(1); *see also* Mooney, *supra* note 19 (quoting Biniac as saying that “financial contributions are voluntary”); Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AJIL 288, 309–11 (2016) (Paris Agreement does not create any new substantive financial obligations).

²² Chris Mooney, *Days Before Trump's Inauguration, State Dept. Sends \$500 Million to United Nations Climate Fund*, WASH. POST (Jan. 17, 2017), at <https://www.washingtonpost.com/news/energy-environment/wp/2017/01/17/days-before-trumps-inauguration-state-dept-sends-500-million-to-united-nations-climate-fund>.

²³ Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), at <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>.

²⁴ Nicholas Vinocur, *Macron Trolls Trump with 'Make Our Planet Great Again' Website*, POLITICO (EU) (June 8, 2017), at <http://www.politico.eu/article/macron-trolls-trump-with-make-our-planet-great-again-website>; *Make Our Planet Great Again*, at <https://www.makeourplanetgreatagain.fr>; Somini Sengupta, Melissa Eddy, Chris Buckley & Alissa J. Rubin, *As Trump Exits Paris Agreement, Other Nations Are Defiant*, N.Y. TIMES (June 1, 2017), at <https://www.nytimes.com/2017/06/01/world/europe/climate-paris-agreement-trump-china.html>.

²⁵ Sengupta, Eddy, Buckley & Rubin, *supra* note 24.

²⁶ Justin Trudeau, Prime Minister of Canada Press Release, Statement in Response to the United States' Decision to Withdraw from the Paris Agreement (June 1, 2017), at <http://pm.gc.ca/eng/news/2017/06/01/statement-prime-minister-canada-response-united-states-decision-withdraw-paris> [hereinafter Trudeau Statement].

²⁷ Paolo Gentiloni, Emmanuel Macron & Angela Merkel, Prime Minister of Italy, President of France, & Chancellor of Germany, Dichiarazione Italia-Germania-Francia sull'annuncio degli USA dell'uscita dall'Accordo di Parigi sul clima (June 1, 2017), at <http://www.governo.it/articolo/dichiarazione-italia>

The spokesperson for the secretary-general of the UN expressed “major disappointment.”²⁸

In conjunction with his announcement that the United States would withdraw from the Paris Agreement, President Trump announced that he will seek to renegotiate it. He stated:

[W]e will start to negotiate, and we will see if we can make a deal that’s fair. And if we can, that’s great. And if we can’t, that’s fine. . . . I’m willing to immediately work with Democratic leaders to either negotiate our way back into Paris, under the terms that are fair to the United States and its workers, or to negotiate a new deal that protects our country and its taxpayers. . . . So if the obstructionists want to get together with me, let’s make them non-obstructionists. We will all sit down, and we will get back into the deal. And we’ll make it good, and we won’t be closing up our factories, and we won’t be losing our jobs. And we’ll sit down with the Democrats and all of the people that represent either the Paris Accord or something that we can do that’s much better than the Paris Accord. And I think the people of our country will be thrilled, and I think then the people of the world will be thrilled. But until we do that, we’re out of the agreement.”²⁹

It is unclear how strong the administration’s desire to renegotiate is. As of August 4, 2017, the State Department told its diplomats that at this time, “there are no plans to seek to renegotiate or amend the text of the Paris Agreement, or begin negotiations toward a new agreement.”³⁰ Additionally, according to press reports, Secretary of State Rex Tillerson instructed diplomats to sidestep questions regarding what it would take for the U.S. to reengage.³¹

Even if the U.S. commits to renegotiation, Christiana Figueres, the former executive secretary of UNFCCC who led the negotiations on the agreement, expressed doubts about the feasibility of this approach.³² Most world leaders have rejected this possibility, and many took the opportunity to reaffirm their countries’ commitment to the Paris Agreement and combating climate change.³³ Prime Minister Trudeau stated “Canada is unwavering in our commitment to fight climate change and support clean economic growth. . . . While the U.S. decision is disheartening, we remain inspired by the growing momentum around the world to combat climate change”³⁴ Germany, France, and Italy issued an emphatic

[germania-francia-sullannuncio-degli-usa-delluscita-dallaccordo-di](#) [hereinafter Gentilioni, Macron & Merkel Statement].

²⁸ Stéphane Dujarric, Spokesman for the Secretary-General of the UN, Statement on the US Decision to Withdraw from the Paris Agreement (June 1, 2017), at <https://www.un.org/sg/en/content/sg/statement/2017-06-01/statement-attributable-spokesman-secretary-general-us-decision>.

²⁹ Trump Statement, *supra* note 3.

³⁰ Yeganeh Torbati & Valerie Volcovici, *Exclusive: U.S. Envoys Told To Be Coy on Re-engaging in Paris Climate Deal – Cable*, REUTERS (Aug. 8, 2017), at <https://www.reuters.com/article/us-usa-climate-diplomacy/exclusive-us-envoys-told-to-be-coy-on-re-engaging-in-paris-climate-deal-cable-idUSKBN1AO276>.

³¹ *Id.*

³² Sengupta, Eddy, Buckley & Rubin, *supra* note 24; Kevin Loria, *Paris Climate Agreement Architect: This Was a “Vacuous Political Melodrama,”* BUS. INSIDER (June 1, 2017), at <http://www.businessinsider.com/christiana-figueres-trump-decision-to-pull-us-out-of-paris-agreement-2017-6>.

³³ Sengupta, Eddy, Buckley & Rubin, *supra* note 24.

³⁴ Trudeau Statement, *supra* note 26.

joint statement supporting the Paris Agreement calling it “a cornerstone . . . for effectively and timely tackling climate change.”³⁵ They stated:

We deem the momentum generated in Paris in December 2015 irreversible and we firmly believe that the Paris Agreement cannot be renegotiated, since it is a vital instrument for our planet, societies and economies.

We are convinced that the implementation of the Paris Agreement offers substantial economic opportunities for prosperity and growth in our countries and on a global scale.

We therefore reaffirm our strongest commitment to swiftly implement the Paris Agreement, including its climate finance goals and we encourage all our partners to speed up their action to combat climate change.

We will step up efforts to support developing countries, in particular the poorest and most vulnerable, in achieving their mitigation and adaptation goals.³⁶

China also made statements, both before and after President Trump’s announcement, reaffirming the Chinese commitment to the agreement.³⁷

The G-20 also issued a declaration responding to the United States’ decision to withdraw from the Paris Agreement. The leaders of the G-20 (with the exception of the United States) stated:

We take note of the decision of the United States of America to withdraw from the Paris Agreement. The United States of America announced it will immediately cease the implementation of its current nationally-determined contribution. . . . The Leaders of the other G20 members state that the Paris Agreement is irreversible. We reiterate the importance of fulfilling the UNFCCC commitment by developed countries in providing means of implementation including financial resources to assist developing countries with respect to both mitigation and adaptation actions in line with Paris outcomes. . . . We reaffirm our strong commitment to the Paris Agreement, moving swiftly towards its full implementation in accordance with the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”³⁸

The G-20 (except for the United States) also announced the G20 Hamburg Climate and Energy Action Plan for Growth, an annex to the Leaders’ Declaration, promising to

move forward to implement[] our current and future Nationally Determined Contributions (NDCs) in line with the Paris Agreement. We will increase cooperation among ourselves and with non-G20 countries to facilitate mutual learning, good practice

³⁵ Gentiloni, Macron & Merkel Statement, *supra* note 27.

³⁶ *Id.*

³⁷ Sengupta, Eddy, Buckley & Rubin, *supra* note 24; Michael D. Shear & Coral Davenport, *World Leaders Increase Pressure on Trump to Stay in Paris Accord*, N.Y. TIMES (May 26, 2017), at <https://www.nytimes.com/2017/05/26/world/europe/paris-climate-agreement-trump-g7.html>.

³⁸ G20 Leaders’ Declaration: Shaping an Interconnected World, 10, July 7/8, 2017, available at <https://www.g20.org/gipfeldokumente/G20-leaders-declaration.pdf>.

sharing and capacity-building, including through existing fora, inter alia, such as the NDC Partnership.³⁹

Notably, following Trump's announcement, numerous state and local officials declared their intention to support the Paris Agreement within the limits of their respective jurisdictions and authority. Thirteen states and Puerto Rico have joined the U.S. Climate Alliance, a "bi-partisan coalition of states . . . committed to the goal of reducing greenhouse gas emissions consistent with the goals of the Paris Agreement."⁴⁰ One of those states, Hawaii, has already passed legislation committing the state to the goals and limits of the Paris Agreement.⁴¹ Nearly four hundred mayors across the country have joined the Mayors National Climate Action Agenda, to "work[] together to strengthen local efforts for reducing greenhouse gas emissions."⁴² The U.S. Conference of Mayors stated that it "strongly opposes President Trump's withdrawal from the Paris Climate Accord and has vowed that the nation's mayors will continue their commitment to reduce greenhouse gas emissions to alleviate the impacts of global warming."⁴³

Several individual elected officials engaged directly with foreign officials as well. Governor Jerry Brown of California travelled to China to meet with President Xi Jinping personally to discuss climate change.⁴⁴ The governor and the Chinese Ministry of Science and Technology signed an agreement to collaborate on green energy technology.⁴⁵ Brown has also proposed hosting a global environmental summit in San Francisco in 2018.⁴⁶ He has explicitly said, "President Trump is trying to get out of the Paris agreement, but he doesn't speak for the rest of America."⁴⁷ Prime Minister Trudeau spoke about shared climate change goals to the National Governors Association.⁴⁸ (For his part, Trudeau indicated that "Canada will

³⁹ G20, Hamburg Climate and Energy Action Plan for Growth, Annex to G20 Leaders Declaration, July 7/8, 2017, at <http://www.g20.utoronto.ca/2017/2017-g20-climate-and-energy-en.pdf>.

⁴⁰ U.S. CLIMATE ALLIANCE, at <https://www.usclimatealliance.org>.

⁴¹ Jonah Engel Bromwich, *Defying Trump, Hawaii Becomes First State to Pass Law Committing to Paris Climate Accord*, N.Y. TIMES (June 7, 2017), at <https://www.nytimes.com/2017/06/07/climate/hawaii-climate-paris-trump.html>.

⁴² CLIMATE MAYORS, at <http://climatemayors.org>.

⁴³ Sara Durr, *Mayors Strongly Oppose Withdrawal from Paris Climate Accord*, THE U.S. CONF. OF MAYORS (June 1, 2017), at <https://www.usmayors.org/2017/06/01/mayors-strongly-oppose-withdrawal-from-paris-climate-accord>.

⁴⁴ Jessica Meyers, *Jerry Brown in China with a Climate Message to the World: Don't Follow America's Lead*, L.A. TIMES (June 7, 2017), at <http://www.latimes.com/world/asia/la-fg-brown-china-20170607-story.html>; Javier C. Hernandez & Adam Nagourney, *As Trump Steps Back, Jerry Brown Talks Climate Change in China*, N.Y. TIMES (June 6, 2017), at <https://www.nytimes.com/2017/06/06/world/asia/xi-jinping-china-jerry-brown-california-climate.html>.

⁴⁵ Associated Press, *China and California Sign Deal to Work on Climate Change Without Trump*, GUARDIAN (June 6, 2017), at <https://www.theguardian.com/us-news/2017/jun/07/china-and-california-sign-deal-to-work-on-climate-change-without-trump>; Meyers, *supra* note 44.

⁴⁶ Lisa Friedman, *Jerry Brown Announces Climate Summit Meeting in California*, N.Y. TIMES (July 6, 2017), at <https://www.nytimes.com/2017/07/06/climate/jerry-brown-california-climate-summit.html>; Melanie Mason, Evan Halper & Patrick McGreevy, *Gov. Brown Unveils Plan for Global Climate Summit, Further Undercutting Trump's Agenda*, L.A. TIMES (July 6, 2017), at <http://www.latimes.com/politics/la-pol-sac-jerry-brown-climate-summit-20170706-story.html>.

⁴⁷ Friedman, *supra* note 46.

⁴⁸ Alexander Burns, *Going Around Trump, Governors Embark on Their Own Diplomatic Missions*, N.Y. TIMES (July 15, 2017), at <https://www.nytimes.com/2017/07/15/us/trump-governors-diplomatic-missions.html>.

continue to work with the U.S. at the state level, and with other U.S. stakeholders, to address climate change and promote clean growth.”⁴⁹)

Some business leaders also reacted strongly, both in opposing the withdrawal announcement and reaffirming their commitment to combating climate change.⁵⁰ Anticipating funding gaps following Trump’s announcement regarding withdrawal from the Paris Agreement, former New York City mayor Michael Bloomberg’s charitable organization, Bloomberg Philanthropies, committed \$15 million to support the work of the UNFCCC secretariat.⁵¹ Bloomberg has also organized mayors, governors, state attorneys general, and business CEOs to take “America’s Pledge.”⁵² Together the group has declared “We Are Still In” and eventually plans to develop and submit to the UN a “societal NDC” based on the efforts of state and local governments, businesses, and other subnational actors.⁵³ In a letter to the UN, Bloomberg stated:

Today, on behalf of an unprecedented collection of U.S. cities, states, businesses and other organizations, I am communicating to the United Nations and the global community that American society remains committed to achieving the emission reductions we pledged to make in Paris in 2015. . . . I am confident the broad array of leaders and organizations that have signed today’s declaration, and many others that will join in the days to come, will work together to reduce U.S. carbon emissions by 26 percent by 2025, just as we had pledged in Paris. These groups will take vigorous and ambitious actions to address climate change, and we will communicate those actions in a transparent and accountable way to the UN. The United States can, and will, meet its commitment under the Paris Agreement.⁵⁴

⁴⁹ Trudeau Statement, *supra* note 26.

⁵⁰ Abigail Abrams & Lucinda Shen, ‘Climate Change is Real’: Business Leaders React to President Trump’s Withdrawal from Paris Agreement, FORTUNE (June 2, 2017), at <http://fortune.com/2017/06/01/paris-climate-agreement-business-leaders-react>.

⁵¹ Kristine Phillips, Michael Bloomberg Pledges His Own Money to Help U.N. After Trump Pulls Out of Paris Climate Deal, WASH. POST (June 3, 2017), at <https://www.washingtonpost.com/news/energy-environment/wp/2017/06/03/michael-bloomberg-pledges-his-own-money-to-help-u-n-after-trump-pulls-out-of-paris-climate-deal/>; Bloomberg Philanthropies Press Release, Mike Bloomberg Doubles Down to Ensure America Will Fulfill the Paris Agreement (June 1, 2017), at <https://www.bloomberg.org/press/releases/bloomberg-philanthropies-commits-15-million-fill-budget-gap-left-trumps-revoking-us-support-un-climate-treaty>.

⁵² Bloomberg Philanthropies Press Release, Mike Bloomberg Sends Statement to the United Nations Following Unprecedented Outpouring of Support for Paris Agreement (June 5, 2017), at <https://www.bloomberg.org/press/releases/mike-bloomberg-sends-statement-united-nations-following-unprecedented-outpouring-support-paris-agreement>; AMERICA’S PLEDGE, at <https://www.americaspledgeonclimate.com>; Hiroko Tabuchi & Lisa Friedman, U.S. Cities, States and Businesses Pledge to Measure Emissions, N.Y. TIMES (July 11, 2017), at <https://www.nytimes.com/2017/07/11/climate/cities-states-businesses-emissions-climate-pact.html>.

⁵³ Bloomberg Philanthropies Press Release, *supra* note 52.

⁵⁴ *Id.*

INTERNATIONAL ECONOMIC LAW

President Trump Issues Trade-Related Executive Orders and Memoranda

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The United States' total trade deficit in 2016 was \$502.3 billion.¹ President Trump believes that the deficit—and especially its consequences (“wealth . . . stripped from our country”), causes (“bad trade deals”), and images (“shuttered factories”)—played a prominent role in his electoral success in 2016.² Since taking office, Trump has signed a series of executive orders and memoranda on trade in order to fulfill various campaign promises on this front.³ The executive orders and memoranda focus mainly on gathering information and laying groundwork for future executive action. Taken together, they signal the Trump administration's intention to address the United States' trade deficits, especially with China.

On March 31, President Trump signed two executive orders related to trade enforcement. The first—titled “Omnibus Report on Significant Trade Deficits”—requires the U.S. Department of Commerce and U.S. Trade Representative to identify trading partners with which the United States ran a significant trade deficit in goods in 2016.⁴ The executive order requires these agencies to submit to the president a report that, for each identified trading partner, shall

- (a) assess the major causes of the trade deficit, including, as applicable, differential tariffs, non-tariff barriers, injurious dumping, injurious government subsidization, intellectual property theft, forced technology transfer, denial of worker rights and labor standards, and any other form of discrimination against the commerce of the United States or other factors contributing to the deficit;
- (b) assess whether the trading partner is, directly or indirectly, imposing unequal burdens on, or unfairly discriminating in fact against, the commerce of the United States by law, regulation, or practice and thereby placing the commerce of the United States at an unfair disadvantage;
- (c) assess the effects of the trade relationship on the production capacity and strength of the manufacturing and defense industrial bases of the United States;
- (d) assess the effects of the trade relationship on employment and wage growth in the United States; and
- (e) identify imports and trade practices that may be impairing the national security of the United States.⁵

¹ Bureau of Economic Analysis Press Release, 2016 Trade Gap Is \$502.3 Billion (Feb. 7, 2017), *available at* https://www.bea.gov/newsreleases/international/trade/2017/pdf/trad1216annual_fax.pdf.

² White House Press Release, Remarks by President Trump et al. at Signing of Trade Executive Orders (Mar. 31, 2017), *at* <https://www.whitehouse.gov/the-press-office/2017/03/31/remarks-president-trump-et-al-signing-trade-executive-orders> [hereinafter Mar. 31 White House Press Release].

³ *See, e.g.*, White House Press Release, Presidential Memorandum for the Secretary of Commerce (Apr. 20, 2017), *available at* <https://www.gpo.gov/fdsys/pkg/DCPD-201700259/pdf/DCPD-201700259.pdf> [hereinafter Presidential Memorandum Regarding Steel Imports].

⁴ Executive Order 13786, Omnibus Report on Significant Trade Deficits, 82 Fed. Reg. 16721 (Mar. 31, 2017), *at* <https://www.federalregister.gov/documents/2017/04/05/2017-06968/omnibus-report-on-significant-trade-deficits>.

⁵ *Id.*

At the signing ceremony, President Trump announced that the findings in the omnibus report would be used to take “necessary and lawful action to end those many abuses.”⁶

Secretary of Commerce Wilbur Ross, who is taking the lead on preparing the report, said that enforcement of international trade obligations is a “very primary objective of this administration on trade.”⁷ Notably, in order to impose antidumping or countervailing duties under World Trade Organization (WTO) rules, a member state must determine whether there is evidence of dumped or subsidized imports, material injury to the domestic industry, and a causal link between the two; then the member state must conduct an impartial investigation which gives all interested parties—including foreign producers—“full opportunity for the defense of their interests.”⁸

The second executive order issued at the end of March focuses on collection of antidumping and countervailing duties and enforcement of U.S. trade and customs laws. The order provides, in relevant part:

Sec. 3. Implementation Plan Development. Within 90 days of the date of this order, the Secretary of Homeland Security shall, in consultation with the Secretary of the Treasury, the Secretary of Commerce, and the United States Trade Representative, develop a plan that would require covered importers that, based on a risk assessment conducted by [Customs and Border Patrol (CBP)], pose a risk to the revenue of the United States, to provide security for antidumping and countervailing duty liability through bonds and other legal measures, and also would identify other appropriate enforcement measures. . . .

Sec. 4. Trade and Suspected Customs Law Violations Enforcement.

- (a) Within 90 days of the date of this order, the Secretary of Homeland Security, through the Commissioner of CBP, shall develop and implement a strategy and plan for combating violations of United States trade and customs laws for goods and for enabling interdiction and disposal, including through methods other than seizure, of inadmissible merchandise entering through any mode of transportation, to the extent authorized by law.
- (b) To ensure the timely and efficient enforcement of laws protecting Intellectual Property Rights (IPR) holders from the importation of counterfeit goods, the Secretary of the Treasury and the Secretary of Homeland Security shall take all appropriate steps, including rulemaking if necessary, to ensure that CBP can, consistent with law, share with rights holders:

⁶ See Mar. 31 White House Press Release, *supra* note 2.

⁷ Vicki Needham, *Trump Signs Executive Orders Ramping Up Trade Enforcement*, HILL (Mar. 31, 2017), at <http://thehill.com/policy/finance/326803-trump-signs-executive-orders-ramping-up-trade-enforcement>.

⁸ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 UNTS 201, available at https://www.wto.org/english/docs_e/legal_e/19-adp.pdf (providing threshold requirements for initiating an investigation in Article 5 and regulating the procedure of investigations in Article 6); see also Agreement on Subsidies and Countervailing Measures, 1869 UNTS 14, available at https://www.wto.org/english/docs_e/legal_e/24-scm.pdf.

- (i) any information necessary to determine whether there has been an IPR infringement or violation; and
- (ii) any information regarding merchandise voluntarily abandoned . . . before seizure, if the Commissioner of CBP reasonably believes that the successful importation of the merchandise would have violated United States trade laws.

Sec. 5. Priority Enforcement. The Attorney General, in consultation with the Secretary of Homeland Security, shall develop recommended prosecution practices and allocate appropriate resources to ensure that Federal prosecutors accord a high priority to prosecuting significant offenses related to violations of trade laws.⁹

Explaining the motivations behind the executive order, Secretary of Commerce Ross said that he was “horrified” by the ways in which “very clever” foreign exporters dodged billions of dollars in antidumping and countervailing duties by “setting up shell companies here so when the fine [i.e., duty] is levied there is no way to collect.”¹⁰ This charge tracks reports that some foreign exporters have established shell companies to evade such payments,¹¹ misrepresented the country of origin of goods, transshipped goods to hide their origin, and otherwise misclassified goods.¹² The Government Accountability Office found in July 2016 that CBP had failed to collect \$2.3 billion in antidumping and countervailing duties between 2001 and 2014, due in part “to the U.S. government’s retrospective and complex process for determining final [antidumping/countervailing duty] duty rates.”¹³

Section 3 of the executive order requires the Department of Homeland Security (DHS) to develop a plan to combat certain importers’ potential nonpayment and evasion by requiring those importers to post bonds and possibly fulfill other security requirements.¹⁴ Depending on the form, severity, and reasonableness of these bonding requirements as ultimately

⁹ Executive Order 13785, Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws, 82 Fed. Reg. 16719 (Mar. 31, 2017), at <https://www.federalregister.gov/documents/2017/04/05/2017-06967/establishing-enhanced-collection-and-enforcement-of-antidumping-and-countervailing-duties-and->

¹⁰ Needham, *supra* note 7.

¹¹ *White House Issues Two Executive Orders Related to Trade Enforcement*, SIDLEY UPDATES (Apr. 3, 2017), available at <https://www.sidley.com/-/media/update-pdfs/2017/04/20170403-intl-trade-update.pdf>.

¹² *U.S. Customs and the New Trump Administration: Your Top Ten Questions Answered*, FOLEY & LARDNER LLP (Feb. 7, 2017), at <https://www.foley.com/us-customs-and-the-new-trump-administration-your-top-ten-questions-answered-02-07-2017>.

¹³ U.S. Government Accountability Office (GAO), Antidumping and Countervailing Duties: CBP Action Needed to Reduce Duty Processing Errors and Mitigate Nonpayment Risk (July 2016), available at <http://www.gao.gov/assets/680/678419.pdf> [hereinafter U.S. GAO Antidumping and Countervailing Duties Report]. The report does not make findings of bad faith, but a comment from U.S. Customs and Border Protection (CBP) filed in the appendix of the report notes that the GAO statistical analysis may “understate the impact of the duty evasion issues relating to high-risk imports from China.” *Id.* at Appendix IV.

¹⁴ These steps build on the 2015 Enforce and Protect Act, which “establishe[d] formal procedures for submitting and investigating antidumping or countervailing allegations of evasion against” foreign exporters. *See* The Enforce and Protect Act, 19 USC §1517 (2016), at <https://www.cbp.gov/trade/trade-enforcement/tftea/enforce-and-protect-act-eapa> [hereinafter EAPA]. On August 14, 2017, the CBP issued its first final decision under EAPA authority, finding that certain wire hangers were transshipped from China through Thailand to avoid antidumping duties, in one of its many recent investigations of illegal imports from China. *See* U.S. Customs and Border Protection Press Release, U.S. Customs and Border Protection Exercises EAPA Authority, Launches Multiple Investigations on Illegal Imports from China (Aug. 17, 2017), at <https://www.cbp.gov/newsroom/national-media-release/us-customs-and-border-protection-exercises-eapa-authority-launches>.

promulgated by DHS, they may face challenge at the WTO.¹⁵ In 2005, both national courts and the WTO Appellate Body upheld challenges to certain enhanced bonding requirements on imported shrimp; in the Appellate Body's case, finding that bonds are a form of antidumping duty under the General Agreement on Tariffs and Trade (GATT), and thus subject to a reasonableness requirement, relative to the margin of dumping.¹⁶

When asked about President Trump's March 31 executive orders and the Trump administration's concerns with the United States' trade deficit with China, China's Foreign Ministry Spokesperson Lu Kang said:

You may say that China holds a trade surplus on trade in goods, but the US also has huge trade surplus in services. Even in terms of trade in goods, 40% of China's trade surplus was created by US enterprises operating in China. China-US trade and economic relations have developed to such a stage that the two countries' interests are inextricably intertwined. For issues that might crop up amid cooperation, the two sides should properly resolve them through consultation. I said yesterday that we hope that China and the US could work together to make bigger the cake of common interests, which the two sides certainly have the potential to achieve, instead of bending over on which side grabs a larger share.¹⁷

In April, President Trump signed two memoranda for the Secretary of Commerce initiating investigations into the ways in which large volumes of excess capacity may affect national security (the first dealt with steel; the second with aluminum).¹⁸ These memoranda provide, in identical language (excepting the substitution of "steel" with "aluminum"), that:

The Secretary of Commerce (Secretary) has initiated an investigation under section 232(b)(1)(A) of the Trade Expansion Act of 1962 (the "Act") (19 U.S.C. 1862(b)(1)(A)) to determine the effects on national security of steel [aluminum] imports. In conducting this investigation, and in accordance with section 232(d) of the Act (19 U.S.C. 1862(d)), the Secretary shall, as appropriate and consistent with law:

- (a) consider the domestic production of steel [aluminum] needed for projected national defense requirements; the capacity of domestic industries to meet such requirements; the existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense; the

¹⁵ U.S. GAO Antidumping and Countervailing Duties Report, *supra* note 13.

¹⁶ *Natl Fisheries Inst., Inc. v. United States Bureau of Customs and Border Protection*, 30 C.I.T. 1838 (Nov. 13, 2006), available at <https://www.cbp.gov/bulletins/41slipops1.pdf>; Appellate Body Report, United States—Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties, United States—Sections 301–310 of the Trade Act of 1974, WT/DS345/AB/R (circulated July 16, 2008), available at https://www.wto.org/english/tratop_e/dispu_e/343_345abr_e.pdf.

¹⁷ Ministry of Foreign Affairs of the People's Republic of China Press Release, Foreign Ministry Spokesperson Lu Kang's Regular Press Conference (Mar. 31, 2017), at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1450613.shtml.

¹⁸ Presidential Memorandum Regarding Steel Imports, *supra* note 3; White House Press Release, Presidential Memorandum for the Secretary of Commerce (Apr. 27, 2017), at <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-commerce> [hereinafter Presidential Memorandum Regarding Aluminum Imports].

requirements of growth of such industries and such supplies and services, including the investment, exploration, and development necessary to assure such growth; and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements;

- (b) recognize the close relation of the Nation's economic welfare to our national security, and consider the effect of foreign competition in the steel [aluminum] industry on the economic welfare of domestic industries;
- (c) consider any substantial unemployment, decrease in government revenues, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive steel [aluminum] imports; and
- (d) consider the status and likely effectiveness of efforts of the United States to negotiate a reduction in the levels of excess steel [aluminum] capacity worldwide.¹⁹

The Secretary of Commerce is to submit a report and provide recommendations.²⁰

In conjunction with the memorandum on steel, Secretary of Commerce Ross explained:

Over the years, we've conducted 152 steel cases against improper imports of one type of steel or another, and we have another 25 cases pending. The problem with those anti-dumping and countervailing duty cases is they're very, very limited in nature to a very, very specific product from a very, very specific country. So what really happens is you'll bring the action and that will help eliminate the problem with that one little product from that one country. That country then will start shipping something else in, or they'll modify slightly the product to get around the order, or they will ship it in through another country and pretend that it came from a country not subject to the duties.

So it's a fairly porous system, and while it has accomplished some fair measure of reduction, it doesn't solve the whole problem. So we're groping here to see whether the facts warrant a more comprehensive solution that would deal with a very wide range of steel products and a very wide range of countries.²¹

The international community's reaction to these Section 232 investigations was generally negative. At a June 2017 meeting of the WTO Goods Council, Russia said that the United States should refrain from these Section 232 investigations and instead rely on "concerted action in the international community."²² The EU said that a "proliferation of actions from the US Section 232 investigations would pose 'systemic risks.'"²³ China said that "US Section 232 investigations were inconsistent with the GATT and the "imports of

¹⁹ Presidential Memorandum Regarding Steel Imports, *supra* note 3; Presidential Memorandum Regarding Aluminum Imports, *supra* note 18.

²⁰ *Id.*

²¹ White House Press Release, Press Briefing by Secretary of Commerce Wilbur Ross on the Memorandum Regarding the Investigation Pursuant to Section 232(B) of the Trade Expansion Act (Apr. 20, 2017), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-memorandum-regarding-investigation-pursuant-section-232b-trade-expansion-act>.

²² World Trade Organization Press Release, National Security Cited in Two Trade Concerns at Goods Council Meeting (June 30, 2017), at https://www.wto.org/english/news_e/news17_e/good_10jul17_e.htm.

²³ *Id.*

steel and aluminum were not a threat to national security.”²⁴ Notably, Article XXI of the GATT (“Security Exceptions”) provides: “Nothing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests”²⁵—though whether member states are entirely free to judge their own security needs remains unsettled and uncontroversial.

The Trump administration took additional trade related measures on April 28, when the Office of the U.S. Trade Representative (USTR) released its annual Special 301 Report. As with every report since USTR began publishing them in 1989, this year’s report placed China on its Priority Watch List of countries about which USTR has significant intellectual property (IP) concerns—this year citing insufficient protection of trade secrets, manufacture of counterfeit goods, piracy in e-commerce markets, conditioning market access on disclosure of IP, lack of promotion of indigenous innovation through patents and other policies, and lack of effective redress in civil courts.²⁶ In response, China’s Ministry of Commerce released a statement saying that China had “serious concerns” about the “widely opposed” “unfair report,” and that China accords a “high priority to IPR protection.”²⁷

On April 29, President Trump celebrated the 100th day of his presidency by holding a rally at the site of a company that has produced shovels continuously in Pennsylvania since 1774.²⁸ There he announced his signing of two more executive orders addressing trade issues.²⁹ The first—titled “Addressing Trade Agreement Violations and Abuses”—provides as follows:

Sec. 2. Conduct Performance Reviews. The Secretary of Commerce and the United States Trade Representative (USTR), in consultation with the Secretary of State, the Secretary of the Treasury, the Attorney General, and the Director of the Office of Trade and Manufacturing Policy, shall conduct comprehensive performance reviews of:

- (a) all bilateral, plurilateral, and multilateral trade agreements and investment agreements to which the United States is a party; and
- (b) all trade relations with countries governed by the rules of the World Trade Organization (WTO) with which the United States does not have free trade agreements but with which the United States runs significant trade deficits in goods.

Sec. 3. Report of Violations and Abuses.

²⁴ *Id.*

²⁵ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 UNTS 194, at https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXXI [hereinafter GATT].

²⁶ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2017 SPECIAL 301 REPORT (Apr. 28, 2017), available at <https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF>; see, e.g., OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1989 SPECIAL 301 REPORT (May 25, 1989), available at <https://ustr.gov/sites/default/files/1989%20Special%20301%20Report.pdf>.

²⁷ Ministry of Commerce People’s Republic of China Press Release, Regular Press Conference of the Ministry of Commerce – May 11, 2017 (May 12, 2017), at <http://english.mofcom.gov.cn/article/newsrelease/press/201705/20170502577390.shtml>.

²⁸ Associated Press, *Trump Highlights Executive Orders on Trade*, LA TIMES (May 1, 2017), at <http://www.latimes.com/politics/la-pol-updates-everything-president-trump-highlights-executive-orders-on-1493672444-htmlstory.html>.

²⁹ *Id.*

- (a) Each performance review shall be submitted to the President by the Secretary of Commerce and the USTR within 180 days of the date of this order and shall identify:
 - (i) those violations or abuses of any United States trade agreement, investment agreement, WTO rule governing any trade relation under the WTO, or trade preference program that are harming American workers or domestic manufacturers, farmers, or ranchers; harming our intellectual property rights; reducing our rate of innovation; or impairing domestic research and development;
 - (ii) unfair treatment by trade and investment partners that is harming American workers or domestic manufacturers, farmers, or ranchers; harming our intellectual property rights; reducing our rate of innovation; or impairing domestic research and development;
 - (iii) instances where a trade agreement, investment agreement, trade relation, or trade preference program has failed with regard to such factors as predicted new jobs created, favorable effects on the trade balance, expanded market access, lowered trade barriers, or increased United States exports; and
 - (iv) lawful and appropriate actions to remedy or correct deficiencies identified pursuant to subsections (a)(i) through (a)(iii) of this section.
- (b) The findings of the performance reviews required by this order shall help guide United States trade policy and trade negotiations.

Sec. 4. Remedy of Trade Violations and Abuses. The Secretary of Commerce, the USTR, and other heads of executive departments and agencies, as appropriate, shall take every appropriate and lawful action to address violations of trade law, abuses of trade law, or instances of unfair treatment.³⁰

In a statement accompanying the signing of the two executive orders, President Trump said that if trade violations and abuses identified by the performance reviews “don’t get cleared up, [Secretary of Commerce] Wilbur [Ross] will end the trade agreements.”³¹ The second April 29 executive order created the Office of Trade and Manufacturing Policy (OTMP) and instructed the office to:

- (a) advise the President on innovative strategies and promote trade policies consistent with the President’s stated goals;
- (b) serve as a liaison between the White House and the Department of Commerce and undertake trade-related special projects as requested by the President; and
- (c) help improve the performance of the executive branch’s domestic procurement and hiring policies, including through the implementation of the policies described in Executive Order 13788 of April 18, 2017 (Buy American and Hire American).³²

³⁰ Executive Order 13796, Addressing Trade Agreement Violations and Abuses, 82 Fed. Reg. 20819 (Apr. 29, 2017), at <https://www.federalregister.gov/documents/2017/05/04/2017-09156/addressing-trade-agreement-violations-and-abuses>.

³¹ White House Press Release, Remarks by President Trump at Signing of Executive Orders on Trade (Apr. 29, 2017), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-executive-orders-trade> [hereinafter Apr. 29 White House Press Release].

³² Executive Order 13797, Establishment of Office of Trade and Manufacturing Policy, 82 Fed. Reg. 20821 (Apr. 29, 2017), at <https://www.federalregister.gov/documents/2017/05/04/2017-09161/establishment-of->

According to the president's statement, the mission of the OTMP is to "defend American workers and companies from those who would steal our jobs and threaten our manufacturing base."³³

China responded by emphasizing a more positive conception of trade with the United States. China's Ministry of Commerce described U.S.-China trade as "win-win cooperation" and the "natural result of advantage complementarity," and stated that concerns should be addressed by "bilateral pragmatic cooperation."³⁴ The ministry's comments coincided with the release of a report titled "Research Report on China-US Economic and Trade Relations" that, though generally optimistic, lays out China's areas of concern in the area of U.S.-China trade: use of unfair benchmarks in calculating dumping margins in WTO antidumping investigations of China; U.S. export control against China; unfair treatment of Chinese enterprises investing in the United States, and abuses of trade remedy measures of the United States.³⁵ As for allegations that the U.S. is abusing trade remedy measures, the report states that

the US has a tendency to use alternative state, separate rates, public institutions, external benchmarks and other unfair approaches, with the intention to impose abnormally high tax rates on Chinese products, which has definitely hindered Chinese exports to the US.³⁶

On August 14, President Trump signed another memorandum directing the USTR to evaluate whether to investigate China's practices with respect to intellectual property:

The United States Trade Representative shall determine, consistent with section 302(b) of the Trade Act of 1974 (19 U.S.C. 2412(b)), whether to investigate any of China's laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development.³⁷

[office-of-trade-and-manufacturing-policy](#). Through Executive Order 13788, President Trump established that "[i]t shall be the policy of the executive branch to buy American and hire American." That order provides, in part:

In order to promote economic and national security and to help stimulate economic growth, create good jobs at decent wages, strengthen our middle class, and support the American manufacturing and defense industrial bases, it shall be the policy of the executive branch to maximize, consistent with law, through terms and conditions of Federal financial assistance awards and Federal procurements, the use of goods, products, and materials produced in the United States.

Executive Order 13788, Buy American and Hire American, 82 Fed. Reg. 18837 (Apr. 18, 2017), at <https://www.federalregister.gov/documents/2017/04/21/2017-08311/buy-american-and-hire-american>.

³³ See Apr. 29 White House Press Release, *supra* note 31.

³⁴ Ministry of Commerce People's Republic of China Press Release, Regular Press Conference of the Ministry of Commerce - May 25, 2017 (May 27, 2017), at <http://english.mofcom.gov.cn/article/newsrelease/press/201706/20170602585140.shtml>.

³⁵ Ministry of Commerce of the People's Republic of China Press Release, Research Report on China-US Economic and Trade Relations (Courtesy Translation) (May 25, 2017), available at <http://images.mofcom.gov.cn/www/201705/20170525093626470.pdf>.

³⁶ *Id.*

³⁷ White House Press Release, Presidential Memorandum for the United States Trade Representative (Aug. 14, 2017), at <https://www.whitehouse.gov/the-press-office/2017/08/14/presidential-memorandum-united-states-trade-representative>.

In response, Chinese Foreign Ministry Spokesperson Hua Chunying emphasized three broad points:

[F]irst, we think the US should not be a spoiler of multilateral rules; second, any protectionist action by the US side will surely undermine the bilateral economic and trade relations as well as the interests of both Chinese and American enterprises; third, if the US take measures that are harmful to bilateral economic and trade relations in disregard of facts and with no respect to multilateral rules, the Chinese side will never sit idly and will take every appropriate measure to resolutely uphold its lawful rights and interests.³⁸

Notably, the Trump administration has suggested that it may connect its actions on trade—especially with China—with its separate attempts to deal with North Korea’s nuclear belligerence. On April 11, President Trump tweeted, “I explained to the President of China that a trade deal with the U.S. will be far better for them if they solve the North Korean problem!”³⁹ President Trump has continued to link the two issues during the subsequent months. On September 3, President Trump tweeted, “The United States is considering, in addition to other options, stopping all trade with any country doing business with North Korea.”⁴⁰

USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

United States, Russia, and Jordan Sign Limited Ceasefire for Syria

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As the civil war in Syria continues, some of the key actors have sought ways to reduce the conflict’s toll on civilians.¹ In May, 2007, Russia and the United States began exploring the possibility of establishing “safe” or “de-escalation” zones.² On July 7, this dialogue yielded a trilateral agreement and memorandum signed by Russia, the United States, and Jordan to establish a ceasefire in southwest Syria.³ The resulting ceasefire—the first in Syria signed

³⁸ Ministry of Foreign Affairs of the People’s Republic of China Press Release, Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference (Aug. 15, 2017), at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1484923.shtml.

³⁹ Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 11, 2017, 4:59 AM), at <https://twitter.com/realDonaldTrump/status/851766546825347076>.

⁴⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 3, 2017, 9:14 AM), at <https://twitter.com/realDonaldTrump/status/904377075049656322>.

¹ Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 112 AJIL 781 (2017).

² See White House Press Release, Readout of President Donald J. Trump’s Call with President Vladimir Putin of the Russian Federation (May 2, 2017), at <https://www.whitehouse.gov/the-press-office/2017/05/02/readout-president-donald-j-trumps-call-president-vladimir-putin-russian> (describing telephone discussion between Trump and Russian Prime Minister Vladimir Putin regarding “safe, or de-escalation,” zones); see also Suleiman Al-Khalidi, *U.S., Russia Discuss De-escalation Zone for Southwest Syria: Diplomats*, REUTERS (June 9, 2017), at <http://www.reuters.com/article/us-mideast-crisis-syria-deraa-idUSKBN1902HR> (describing a series of meetings between the Russian and U.S. special envoys for Syria regarding the possible addition of new de-escalation zones).

³ White House Press Release, Press Briefing on the President’s Meetings at the G20 (July 7, 2017), at <https://www.whitehouse.gov/the-press-office/2017/07/07/press-briefing-presidents-meetings-g20-july-7-2017>; Zachary Cohen & Kevin Liptak, *Tillerson: Trump, Putin Reach Syria Ceasefire Agreement*, CNN (July 8, 2017), at <http://www.cnn.com/2017/07/07/politics/syria-ceasefire-us-russia-tillerson/index.html>.

by the Trump administration—governs hostilities between Syrian government forces and associated troops on one side and rebels on the other. It began on July 9.⁴

The text of the agreement is confidential,⁵ but Trump administration officials have described its key parameters. According to Brett McGurk, Special Presidential Envoy for the Global Coalition to Counter ISIS, the agreement is “essentially an undertaking to use our influence, the Jordanians, their influence, the Russians to use their influence with all of the sides of the conflict to stop the fighting, to essentially freeze the conflict.”⁶ One significant feature of the ceasefire is that it divides the territory covered by the agreement into two areas, with United States-associated forces on one side and Syrian and Russian-associated forces on the other. According to McGurk:

... if you take the southwest, what we did there—and I think quite successfully—is a very painstaking negotiation with Jordan and with Russia and with us trilaterally to map out a very detailed—we call it a line of contact—between opposition and regime forces. And everybody agreed on that line of contact, and that is the ceasefire line.

This is the first time we have had a ceasefire with a very detailed negotiated line. It’s a very different endeavor than just declaring a ceasefire in a particular area. So we have a very detailed, painstakingly negotiated ceasefire line.⁷

McGurk described the agreement as “phase one” of de-escalating the Syrian civil war.⁸ A Senior State Department Official elaborated on the description of the agreement as an “interim step”:

The idea is it should create a better environment to discuss a broader and more comprehensive southwest de-escalation area in greater detail. We felt that a ceasefire—near-term ceasefire—was important because the violence in the southwest, although historically, over the course of the conflict, it has been . . . less than other parts of Syria, the violence has steadily increased in the south since February, with both the Syrian regime and opposition defenses threatening to derail any potential for progress there

Now, the agreement . . . previews additional steps that we think we’re going to have to take to strengthen and solidify that ceasefire, and those steps would include potential deployment of monitoring forces to the area, and as Secretary Tillerson noted, that’s something that we’re close to an understanding on but we’re not in a position to announce in detail on that yet; and also formation of an effective monitoring cell, an

⁴ *A Tripartite Agreement to Back the Ceasefire in South-West of Syria*, PETRA (July 7, 2017), at http://petra.gov/jo/Public_News/Nws_NewsDetails.aspx?lang=2&site_id=1&NewsID=308533&CatID=13.

⁵ See Colum Lynch, Robbie Gramer, Dan De Luce & Paul McCleary, *Secret Details of Trump-Putin Syria Cease-fire Focus on Iranian Proxies*, FOREIGN POLICY (July 11, 2017), at <http://foreignpolicy.com/2017/07/11/exclusive-trump-putin-ceasefire-agreement-focuses-on-iranian-backed-fighters-middle-east>.

⁶ U.S. Dep’t of State Press Release, *Background Briefing on the Ceasefire in Syria* (July 7, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/07/272433.htm> [hereinafter *Background Briefing*].

⁷ U.S. Dep’t of State Press Release, *Brett McGurk, Briefing on the Global Coalition to Counter ISIS* (July 13, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/07/272601.htm> [hereinafter *McGurk briefing*]. See also Laura Rozen, *US Touts Success of Syria Cease-fire Negotiated with Russia*, AL-MONITOR (Aug. 9, 2017), at <http://www.al-monitor.com/pulse/originals/2017/08/us-russia-ceasefire-syria-trump-cooperation-sanctions.html>.

⁸ McGurk Briefing, *supra* note 7.

arrangement by which the parties could participate and monitor the details of the ceasefire and violations.⁹

The agreement did not address monitoring and compliance.¹⁰ Shortly after the agreement was announced, Russia indicated its willingness to deploy monitors.¹¹ On August 23, the Jordanian Embassy announced that, as envisioned by the ceasefire agreement, the Amman Center for Ceasefire Control, with participation by representatives from Jordan, Russia, and the United States, started its official work to “monitor, stabilise, and deepen” the ceasefire.¹²

Early reports indicate that the ceasefire has held. On July 14, Russian Foreign Ministry Spokesperson Maria Zakharova said that the situation on the ground was “steady” and noted that the ceasefire might “be an example for other areas in Idlib province.”¹³ A month into the ceasefire, Department of State spokesperson Heather Nauert offered the following assessment of its progress:

[T]hat ceasefire, to my understanding, is still holding. Okay? We are pleased with that. That provides the United States and the coalition partners with the opportunity to start to get some humanitarian in—that is so badly needed in that area. And so . . . we’ve been able to start reaching some of the vulnerable Syrians without the complications of avoiding airstrikes or increases in violence. We’re continuing to work with our international partners to assess the ongoing emergency humanitarian needs throughout Syria and facilitate the delivery of vitally needed supplies.

I’m also told that people are starting to slowly come back into parts of those areas, which . . . we would consider to be a moderate success at this point, and we look forward to that happening eventually.¹⁴

⁹ Background Briefing, *supra* note 6.

¹⁰ McGurk Briefing, *supra* note 7 (“So that’s a very active and ongoing discussion, and it’s also a very detailed discussion in terms of where monitors would go and how it would work. There are sensitivities in this area. There are some spoilers on the ground that neither side can control. So I would just say, given we have this very detailed kind of de-confliction arrangement or detailed line of contact, we’re now looking at kind of where the monitors would go. So that discussion is very much ongoing, and I’m hopeful over the next week or so we can get somewhere.”); Background Briefing, *supra* note 6 (“[T]here’s a lot of discussions ahead of us still, including about some very important elements, including how to monitor the ceasefire, the rules that would govern the southwest de-escalation area, all of these—the presence of monitors. All of this will be the subject of ongoing talks.”).

¹¹ *U.S. Says Russia Willing to Deploy Monitors for Syria Ceasefire*, REUTERS (July 13, 2017), at <https://www.reuters.com/article/us-mideast-crisis-usa/u-s-says-russia-willing-to-deploy-monitors-for-syria-ceasefire-idUSKBN19Y27Q> (“The Russians have made clear they’re very serious about this and willing to put some of their people on the ground to help monitor from the regime side,” McGurk told reporters. “They do not want the regime violating the ceasefire.”).

¹² The Embassy of the Hashemite Kingdom of Jordan Press Release, Amman Centre for South Syria Ceasefire Control Embarks on Mission (Aug. 23, 2017), at <http://jordanembassyus.org/news/amman-centre-south-syria-ceasefire-control-embarks-mission>.

¹³ Russian Foreign Ministry Press Release, Briefing by Foreign Ministry Spokesperson Maria Zakharova, Moscow (July 14, 2017), at http://www.mid.ru/en/press_service/spokesman/briefings/-/asset_publisher/D2wHaWMCU6Od/content/id/2815668.

¹⁴ U.S. Dep’t of State Press Release, Department Press Briefing (Aug. 10, 2017), at <https://www.state.gov/t/pa/prs/dpb/2017/08/273325.htm>.

On September 11, Russian Foreign Minister Sergey Lavrov likewise described the ceasefire “successful.”¹⁵

USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

Trump Administration Recertifies Iranian Compliance with JCPOA Notwithstanding Increasing Concern with Iranian Behavior

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In July 2015, Iran, the five permanent members of the UN Security Council, Germany, and the European Union adopted the Joint Comprehensive Plan of Action (JCPOA). Pursuant to that agreement, Iran committed to limiting the scope and content of its nuclear program in exchange for relief from various nuclear-related sanctions imposed by the other signatories.¹ By law, the U.S. State Department is required to certify Iran’s compliance with the agreement every ninety days.² The Trump administration first certified Iran’s compliance with the agreement in April 2017, albeit reluctantly.³ In its first certification, the Trump administration expressed ongoing concern about Iran’s sponsorship of terrorism,⁴ and repeated previous criticism of the JCPOA as “fail[ing] to achieve the objective of a non-nuclear Iran.”⁵

In the following months, the Trump administration continued to criticize the agreement as it conducted an interagency review of its policy toward Iran. In an address to the Arms Control Association on June 2, 2017, a senior National Security Council official noted that the Trump administration was reassessing the United States’ commitment to the JCPOA:

We are in the middle of an ongoing Iran review. . . . It is a broader review than just of the JCPOA. . . . One of our complaints, as we see it, about the previous administration was the degree to which, having gotten a nuclear deal it was a tempting conclusion to make other aspects of Iran policy sort of hostage to that deal. . . . We felt that there is a—an unwelcome reluctance to press back and hold Iran accountable on those fronts for fear that oh, my goodness, if you make them too mad they’ll walk away from the deal. We are determined not to make everything hostage to the nuclear question.⁶

¹⁵ Lavrov: *Saudi Arabia Committed to Solve Syria Crisis*, AL JAZEERA (Sept. 11, 2017), at <http://www.aljazeera.com/news/2017/09/lavrov-saudi-arabia-committed-solve-syria-crisis-170911145838638.html>.

¹ Joint Comprehensive Plan of Action, July 14, 2015, 55 ILM 103 (2016) [hereinafter JCPOA]; Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 649 (2015); 110 AJIL 789 (2016).

² See Iran Nuclear Agreement Review Act, Pub. L. No. 114-17, 129 Stat. 201 (2015).

³ Letter from Rex Tillerson, U.S. Sec’y of State, to Paul Ryan, Speaker of the U.S. House of Representatives (Apr. 18, 2017) [hereinafter Letter from Rex Tillerson]; see also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL 776 (2017).

⁴ Letter from Rex Tillerson, *supra* note 3.

⁵ U.S. Dep’t of State Press Release, Secretary of State Rex Tillerson Press Availability (Apr. 19, 2017), at <https://www.state.gov/secretary/remarks/2017/04/270341.htm>.

⁶ Chris Ford, Special Assistant to the President, Keynote Address at the 2017 Arms Control Association Annual Meeting (June 2, 2017), at <https://www.armscontrol.org/ArmsControl17#chrisford>.

On the same day, the International Atomic Energy Agency (IAEA)—which has monitored and verified Iran’s implementation of its nuclear-related JCPOA commitments—released its seventh report concluding that Iran had again implemented its commitments under the JCPOA.⁷

The Trump administration nevertheless continued to criticize at a UN Security Council meeting later that month. While the EU and other UN nations praised Iran for its implementation of the nuclear deal, U.S. Ambassador to the UN Nikki Haley focused instead on Iran’s repeated violations of UN Security Council Resolution 2231.⁸ UN Security Council Resolution 2231, adopted in part to facilitate JCPOA implementation, provides:

Iran is called upon not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology, until the date eight years after the JCPOA Adoption Day or until the date on which the IAEA submits a report confirming the Broader Conclusion, whichever is earlier.⁹

Ambassador Haley cited “repeated ballistic missile launches, proven arms smuggling, and illicit procurement of ballistic missile-related technology” as violations of the resolution.¹⁰ She reiterated that the administration was conducting an ongoing review of its policy toward Iran, but noted that the United States would comply with its JCPOA commitments at least until the review was completed.¹¹

Despite these criticisms, the Trump administration issued its second formal certification of Iran’s compliance with the nuclear agreement on July 17, 2017.¹² The press release announcing the certification, stated:

[T]he United States continues to waive sanctions as required to continue implementing U.S. sanctions-lifting commitments in the JCPOA, and is certifying to Congress that, based on available information, the conditions of Section 135(d)(6) of the Atomic Energy Act of 1954 (AEA), as amended, including as amended by the Iran Nuclear Agreement Review Act of 2015 (Public Law 114-17), enacted on May 22, 2015, are met as of July 17, 2017.¹³

The press release also stressed, however, that “Iran’s continued malign activities outside the nuclear issue undermine the positive contributions to regional and international peace and security that the deal was supposed to provide.”¹⁴ Accordingly, the statement also announced

⁷ IAEA Director General, Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 (June 2, 2017), available at <https://www.iaea.org/sites/default/files/gov2017-24.pdf>.

⁸ U.S. Mission to the United Nations Press Release, Nikki Haley, U.S. Permanent Representative to the United Nations, Remarks at a UN Security Council Briefing on Non-proliferation in Iran (June 29, 2017), at <https://usun.state.gov/remarks/7886> [hereinafter June 29 Haley Remarks].

⁹ S.C. Res. 2231, Annex B, para. 3 (July 20, 2015).

¹⁰ June 29 Haley Remarks, *supra* note 8.

¹¹ *Id.*

¹² U.S. Dep’t of State Press Release, U.S. Announces New Iran-Related Sanctions (July 17, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/07/272635.htm> [July 17 U.S. Dep’t of State Press Release].

¹³ *Id.*

¹⁴ *Id.*

that the Trump administration had sanctioned eighteen entities and individuals for “supporting Iran’s ballistic missile program and for supporting Iran’s military procurement or Iran’s Islamic Revolutionary Guard Corps (IRGC)” as well as an Iran-based transnational crime organization.¹⁵ The State Department specifically designated the IRGC Aerospace Force Self Sufficiency Jihad Organization (ASF SSJO) for involvement in Iranian ballistic missile research and flight test launches and the IRGC Research and Self Sufficiency Jihad Organization (RSSJO), for responsibility in the research and development of ballistic missiles.¹⁶

In a press briefing, administration officials emphasized that the decision to combine recertification with a new round of sanctions reflected the U.S. view that Iran has failed to comply with the “spirit” of the JCPOA.¹⁷ For its part, Iran condemned the new round of sanctions as illegal under the JCPOA and promised to “in turn impose new sanctions against a number of other American persons and entities that have taken hostile steps against the Iranian people and other Muslim nations in the region.”¹⁸

On July 27, 2017, Iran launched a Simorgh space launch vehicle, testing a rocket that could deliver satellites into orbit.¹⁹ Although Iran denied that the rocket was a missile designed to carry nuclear warheads,²⁰ the United States, France, Germany, and the United Kingdom issued a joint statement condemning the launch.²¹ The United States viewed the launch as “inconsistent with” Resolution 2231, noting in particular that “[s]pace launch vehicles use technologies that are closely related to those of ballistic missiles development, in particular to those of Intercontinental Ballistic Missiles.”²² Accordingly, “Iran’s program to develop ballistic missiles continues to be inconsistent with UN Security Council Resolution 2231 and has a destabilizing impact in the region.”²³ The United States did not, however, describe the launch as a violation of the JCPOA.

In response to the space launch, the U.S. Treasury’s Office of Foreign Assets Control (OFAC) imposed sanctions on six subsidiaries of Shahid Hemmat Industrial Group (SHIG), a company that is central to Iran’s ballistic missile program.²⁴ OFAC explained

¹⁵ *Id.* The sanctions were designated pursuant to Executive Order 13382, targeting proliferators of weapons of mass destruction, their means of delivery, and supporters of such activity. Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (2005) and Executive Order 13581 (targeting transnational criminal organizations), Exec. Order No. 13,581, 76 Fed. Reg. 44,757 (2011).

¹⁶ July 17 U.S. Dep’t of State Press Release, *supra* note 12.

¹⁷ U.S. Dep’t of State Press Release, Department Press Briefing (July 18, 2017), at <https://www.state.gov/r/pa/prs/dpb/2017/07/272665.htm>. The State Department specifically noted that a key purpose of the JCPOA is to “contribute to regional and international peace and security” and the administration believes Iranian government actions undermine this goal. *Id.*

¹⁸ *Iran Vows Retaliation Against New US Sanctions*, PRESS TV (July 18, 2017), at <http://www.presstv.ir/Detail/2017/07/18/528919/Iran-US-Foreign-Ministry-Sanctions-missile>.

¹⁹ *U.S. Says Iran Rocket Test Breaches U.N. Resolution*, REUTERS (July 27, 2017), at <https://www.reuters.com/article/us-iran-satellite/u-s-says-iran-rocket-test-breaches-u-n-resolution-idUSKBN1AC1YY>.

²⁰ *Id.*

²¹ U.S. Dep’t of State Press Release, Iran’s Space Launch Vehicle Inconsistent with UNSCR 2231 Joint Statement by France, Germany, the United Kingdom and United States (July 28, 2017), at <https://www.state.gov/r/pa/prs/ps/2017/07/272934.htm>.

²² *Id.*

²³ *Id.*

²⁴ U.S. Dep’t of Treasury Press Release, Treasury Sanctions Key Ballistic Missile Entities in Iran (July 28, 2017), at <https://www.treasury.gov/press-center/press-releases/Pages/sm0136.aspx>. Shahid Hemmat Industrial

that the sanctions were issued in response to “Iran’s continued provocative actions,” since “[s]pace launch vehicles use technologies that are closely related to those of an intercontinental ballistic missile and this launch represents a threatening step by Iran.”²⁵ These sanctions were issued just hours after the U.S. Senate unanimously approved a U.S. House of Representatives bill imposing additional sanctions on Iran in response to Iran’s ballistic missile program and for human rights abuses.²⁶ President Trump signed the bill into law shortly afterward on August 2, 2017.²⁷

Iran lodged a formal complaint with the Joint Commission alleging that the new administrative and statutory sanctions violated the JCPOA.²⁸ Iranian Parliament Speaker Ali Larijani stated: “With regard to the imposition of new sanctions by the US, in addition to diplomatic measures, which should be taken, a complaint had to be filed with the relevant commission (the Iran-P5 + 1 Joint Commission) and this has been done.”²⁹ Mr. Larijani alleged that the new sanctions contradicted paragraphs 26, 28, and 29 of the JCPOA,³⁰ which provide, respectively, that the “U.S. Administration, acting consistent with the respective roles of the President and the Congress, will refrain from imposing new nuclear-related sanctions,”³¹ that the United States, as a member of the EU/EU + 3, “commit[s] to implement this JCPOA in good faith and in a constructive atmosphere, based on mutual respect, and to refrain from any action inconsistent with the letter, spirit and intent of this JCPOA that would undermine its successful implementation,”³² and that

the United States, consistent with [its] laws, will refrain from any policy specifically intended to directly and adversely affect the normalisation of trade and economic relations with Iran inconsistent with [its] commitments not to undermine the successful implementation of this JCPOA.³³

Per the procedures outlined in the agreement, the Joint Commission has fifteen days to resolve such an issue before Iran can request the issue be elevated to an Advisory Board, which after an additional fifteen days will provide a non-binding opinion on the compliance

Group (SHIG) itself, responsible for the development and production of Iran’s liquid propellant ballistic missiles, is currently sanctioned under Executive Order 13382 and is also currently sanctioned by the United Nations and the European Union. *Id.*

²⁵ *Id.*

²⁶ See Countering America’s Adversaries Through Sanctions Act, Pub. L. No.155-44 (2017). The statute also imposes sanctions on both Russia and North Korea. *Id.*

²⁷ Presidential Statement on Signing the Countering America’s Adversaries Through Sanctions Act, 2017 DAILY COMP. PRES. DOC. 1 (Aug. 2, 2017).

²⁸ *Iran Complains to JCPOA Commission over New US Bans: Larijani*, PRESS TV (Aug. 1, 2017), at <http://www.press tv.com/Detail/2017/08/01/530369/Iran-US-Security-Council-Ali-Larijani-Parliament-Speaker-sanctions> [hereinafter *Iran Complains to JCPOA Commission*]. The Joint Commission is made up of the eight members that negotiated the JCPOA and oversees dispute resolution if any of the JCPOA participant states believe any or all of the EU/EU+3 were “not meeting their commitments.” JCPOA, *supra* note 1, para. 36. See also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 649, 652–53 (2015).

²⁹ *Iran Complains to JCPOA Commission*, *supra* note 28.

³⁰ *Id.*

³¹ JCPOA, *supra* note 1, para. 26.

³² *Id.*, para. 28.

³³ *Id.*, para. 29.

issue.³⁴ The Commission, however, did not publicly comment on Iran's complaint. A spokesperson from the office of Frederica Mogherini, Joint Commission Chair, confirmed only that Iran's views about the permissibility of new sanctions had been "extensively discussed" at recent meetings.³⁵

While continuing to express dissatisfaction with the JCPOA, U.S. officials also emphasized their commitment to monitoring Iran's compliance with the agreement. On the day Iran filed its complaint with the Joint Commission, Secretary of State Rex Tillerson acknowledged that, although President Trump had "been pretty clear on his dissatisfaction with the JCPOA as a tool or instrument," the United States was

working with the other parties to that agreement, our European allies in particular, to ensure that we are fully enforcing all aspects of that agreement, holding Iran accountable for its commitments, and challenging whether Iran is, in fact, living up to its commitments and the spirit of that agreement.³⁶

For his part, President Trump warned on August 10, 2017, that "I don't think Iran is in compliance . . . and they are certainly not in the spirit of the agreement in compliance. And I think you'll see some very strong things taking place if they don't get themselves in compliance. But I do not believe they are in compliance right now."³⁷

On August 15, Iranian President Hassan Rouhani warned that the United States' sanctions activity might cause Iran to leave the JCPOA. He asserted that Iran could return to pre-JCPOA conditions "not within months and weeks, but in a matter of hours and days."³⁸ U.S. Ambassador to the United Nations Nikki Haley responded with the following statement:

Iran cannot be allowed to use the nuclear deal to hold the world hostage. Iran, under no circumstances, can ever be allowed to have nuclear weapons. At the same time, however, we must also continue to hold Iran responsible for its missile launches, support for terrorism, disregard for human rights, and violations of UN Security Council resolutions. The nuclear deal must not become "too big to fail."³⁹

On August 23, 2017, Ambassador Haley met with IAEA Director General Yukiya Amano to express concern about the IAEA's monitoring and verification of Iran's compliance with

³⁴ *Id.*, para. 36. The Advisory Board would consist of three members, one appointed by each participant in the dispute and a third independent member. *Id.*

³⁵ Rick Gladstone, *Iran Says New U.S. Sanctions Violate Nuclear Deal*, N.Y. TIMES (Aug. 1, 2017), at <https://www.nytimes.com/2017/08/01/world/middleeast/iran-nuclear-trump-sanctions-complaint.html>; see also European Union External Action Service Press Release, Chair's Statement Following the 21 July 2017 Meeting of the JCPOA Joint Commission (July 21, 2017), at https://eeas.europa.eu/headquarters/headquarters-homepage/30249/chairs-statement-following-21-july-2017-meeting-jcpoa-joint-commission_pt.

³⁶ U.S. Dep't of State Press Release, Remarks at a Press Availability (Aug. 1, 2017), at <https://www.state.gov/secretary/remarks/2017/08/272979.htm>.

³⁷ Aaron Blake, *Trump's Tough-on-North Korea, Toned-Down-on-Russia Q&A Session, Annotated*, WASH. POST (Aug. 11, 2017), at <https://www.washingtonpost.com/news/the-fix/wp/2017/08/11/president-trumps-contrarian-qa-session-with-reporters-annotated>.

³⁸ *Iran Can Return to Pre-JCPOA State if US Slaps More Sanctions: Rouhani*, PRESSTV (Aug. 15, 2017), at <http://www.presstv.com/Detail/2017/08/15/531846/Iran-nuclear-deal-US>.

³⁹ U.S. Mission to the United Nations Press Release, Nikki Haley, U.S. Permanent Representative to the United Nations, Ambassador Haley on Iran's Threats to Quit the JCPOA (August 15, 2017) at <https://usun.state.gov/remarks/7933>.

JCPOA.⁴⁰ Ambassador Haley specifically pressed Director General Amano to seek new access to additional suspected Iranian nuclear facilities and other military sites.⁴¹ Under the text of the JCPOA, “if the IAEA has concerns regarding undeclared nuclear materials or activities, or activities inconsistent with the JCPOA, at locations that have not been declared under the comprehensive safeguards agreement or Additional Protocol, the IAEA will provide Iran the basis for such concerns and request clarification.”⁴² Under such circumstances, if Iran’s clarification does not resolve IAEA concerns, “the Agency may request access to such locations for the sole reason to verify the absence of undeclared nuclear materials and activities or activities inconsistent with the JCPOA at such locations. The IAEA will provide Iran the reasons for access in writing and will make available relevant information.”⁴³

After Ambassador Haley’s meeting with Director General Amano, there was no public indication that the Trump administration had presented any evidence that could serve as a basis for an IAEA concern or request for clarification. A statement from the United States Mission to the United Nations indicated that if such evidence were presented by the IAEA, Iran would have to “follow the unambiguous access provisions of its IAEA safeguards agreement, the Additional Protocol, and the JCPOA.”⁴⁴ In response to reports about this meeting, Iranian government spokesman Mohammad Baqer Nobakht stated: “Iran’s military sites are off limits. . . . All information about these sites are classified. Iran will never allow such visits. Don’t pay attention to such remarks that are only a dream.”⁴⁵

Shortly after Ambassador Haley’s meeting with the director general, on August 31, 2017, the IAEA issued its eighth verification of Iran’s compliance with the JCPOA.⁴⁶ Despite this verification, Ambassador Haley emphasized in a speech several days later that the question of Iranian compliance requires more than evaluating Iran’s execution of “the technical terms of the nuclear agreement”; indeed, “[i]t requires a much more thorough look.”⁴⁷ She insisted Iran be evaluated not only by its compliance with the terms of the JCPOA, but also by “its violations of Resolution 2231 and its long history of aggression,” its “repeated, demonstrated hostility toward the United States,” its “history of deception about its nuclear program,” and “its ongoing development of ballistic missile technology.”⁴⁸ Accordingly, Haley stressed that

⁴⁰ See U.S. Mission to the United Nations Press Release, Readout of a Meeting Between Ambassador Haley and Director General of the International Atomic Energy Agency Yukiya Amano (Aug. 23, 2017), at <https://vienna.usmission.gov/readout-meeting-ambassador-haley-director-general-international-atomic-energy-agency-yukiya-amano>.

⁴¹ *Id.*; see also U.S. Mission to the United Nations Press Release, Ambassador Haley on the Latest Iranian Misbehavior (Aug. 31, 2017), at <https://usun.state.gov/remarks/7950> [hereinafter Aug. 31 Haley Remarks].

⁴² JCPOA, *supra* note 1, Annex I, para. 75.

⁴³ *Id.*, Annex I, para. 76.

⁴⁴ See Aug. 31 Haley Remarks, *supra* note 41.

⁴⁵ Parisa Hafezi, *Iran Rejects U.S. Demand for U.N. Visit to Military Sites*, REUTERS (Aug. 29, 2017), at <https://www.reuters.com/article/us-iran-nuclear-usa/iran-rejects-u-s-demand-for-u-n-visit-to-military-sites-idUSKC N1B918E>.

⁴⁶ See IAEA Director General, Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 (Aug. 31, 2017), available at <https://www.iaea.org/sites/default/files/gov2017-35.pdf>.

⁴⁷ Nikki Haley, U.S. Permanent Representative to the United Nations, Address on Iran and the JCPOA to the American Enterprise Institute (Sept. 5, 2017), at <https://www.aei.org/publication/nikki-haley-address-on-iran-and-the-jcpoa>.

⁴⁸ *Id.*

“we must consider the whole picture, not simply whether Iran has exceeded the JCPOA’s limit on uranium enrichment. . . . That’s the judgment President Trump will make in October,”⁴⁹ when the Trump administration is next scheduled to certify Iran’s compliance with the JCPOA to Congress.

⁴⁹ *Id.*