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CHAPTER 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Air Transport Agreements

Information on recent U.S. air transport agreements, by country, is available at https://www.state.gov/e/eb/rls/othr/ata/. The United States signed new air transport agreements in 2016 with Azerbaijan, Côte D'Ivoire, and the Kingdom of the Netherlands, in respect of Curaçao. The United States and Japan amended their air transport agreement in 2016. And a new air transport agreement between the United States and Mexico entered into force in 2016, superseding the 1960 air transport agreement between the parties.

On June 14, the United States and Azerbaijan completed an exchange of diplomatic notes that brought into force the U.S.-Azerbaijan Open Skies Agreement, which was signed on April 6, 2016. See June 14, 2016 State Department media note, available at http://2009-2017.state.gov/r/pa/prs/ps/2016/06/258455.htm.

On August 16, 2016, U.S. Ambassador to the Republic of Côte d'Ivoire Terence McCulley and Minister of Foreign Affairs for the Government of the Republic of Côte d'Ivoire Abdallah Albert Toikeusse Mabri signed an air transport agreement, available at https://2009-2017.state.gov/e/eb/rls/othr/ata/c/cdi/261264.htm.

On September 26, 2016, U.S. Consul General Margaret D. Hawthorne and the Curaçao Minister for Traffic, Transport and Urban Planning Suzanne Camelia-Römer signed an Open Skies Agreement between the United States and the Kingdom of the Netherlands, in respect of Curaçao. See State Department media note, available at http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262438.htm.

On February 18, 2016, the United States and Japan concluded negotiations to amend their open skies agreement to allow daytime flights to and from the United States at Haneda airport in Tokyo. The amended agreement entered into force in 2016. The February 18, 2016 State Department media note containing the announcement is excerpted below and available at http://2009-2017.state.gov/r/pa/prs/ps/2016/02/252608.htm.

> Under the current agreement, U.S. airlines have a total of four slot pairs (four arrivals and four departures) for service to and from Haneda, which are now restricted to use during nighttime hours. Under the proposed amendment, these four slot pairs would be transferred to daytime hours. In addition, a fifth daytime slot pair for scheduled service to and from Haneda would be added and U.S. airlines would be able to continue operating one nighttime slot pair. Several U.S. carriers have expressed strong interest in offering daytime service to Haneda, and their passengers will benefit from convenient access to downtown Tokyo.

2. Aviation Arrangement with Cuba

As discussed in *Digest 2015* at 459, the United States and Cuba negotiated a bilateral arrangement to establish scheduled air services between the two countries. On February 16, 2016, Assistant U.S. Secretary of State Charles H. Rivkin and U.S. Transportation Secretary Anthony Foxx signed the arrangement on behalf of the United States at a ceremony in Havana. Assistant Secretary Rivkin's remarks at the ceremony are excerpted below and available at http://2009-2017.state.gov/e/eb/rls/rm/2016/252528.htm.

> …By restoring scheduled air service between our two countries, our governments are creating more opportunities for Cubans and Americans to engage with one another in the years to come.
>
> Around the world, we have seen that expanding air travel strengthens cultural and economic ties between countries. And that will certainly be true here, as well. Even as the two sides were negotiating this arrangement, we saw a significant increase in the number of authorized U.S. travelers to Cuba due to the policy changes of the past year.
>
> For example, recent U.S. regulatory changes in January made it easier for airlines from both countries to enter into commercial arrangements, such as code-sharing and aircraft leasing. With our new arrangement, we expect the number of travelers between our countries to grow even faster. That will benefit the people of both Cuba and the United States.
>
> I am also pleased to note, that with this arrangement, our two governments reaffirm our commitment to cooperation on aviation safety and aviation security matters.

3. Preclearance Agreement with Sweden

On November 4, 2016, the governments of the United States and Sweden signed an agreement on air transport preclearance. The agreement allows travelers on non-stop flights to the United States who are pre-cleared at Stockholm Arlanda Airport to be free from any further customs and immigration processing upon arrival in the United States. The text of the agreement is available at www.state.gov/s/l/c8183.htm.

4. Foreign Air Carrier Permit for Norwegian Air International and Norwegian UK

On April 14, 2016, Brian Egan, Legal Adviser for the U.S. Department of State, and Karl R. Thompson, Principal Deputy Assistant Attorney General in the Office of Legal Counsel ("OLC") at the U.S. Department of Justice, provided opinions to the Department of Transportation ("DOT"), at DOT's request, addressing the interpretation of Article 17 *bis* of the Air Transport Agreement between the United States of America and the European Community and its Member States, signed on April 25 and 30, 2007, as amended. This request arose in the context of two pending applications for foreign air carrier permits, submitted by Norwegian Air International ("NAI") and Norwegian UK ("NUK"). Some parties to the regulatory proceedings before the DOT argued that the issuance of permits to these carriers would be inconsistent with Article 17 *bis,* which states:

1) The Parties recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards. The opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties' respective laws.
2) The principles in paragraph 1 shall guide the Parties as they implement the Agreement, including regular consideration by the Joint Committee, pursuant to Article 18, of the social effects of the Agreement and the development of appropriate responses to concerns found to be legitimate.

Mr. Egan conveyed the State Department's views on the dispute to Principal Deputy Assistant Attorney General Thompson on April 13, 2016. Excerpts follow (with some footnotes omitted) from Mr. Egan's April 13, 2016 letter to Mr. Thompson.

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* * * *

This letter provides the State Department's views on whether Article 17 *bis* of the Air Transport Agreement between the United States of America and the European Community and its Member States, signed on April 25 and 30, 2007, as amended,[1] provides a basis upon which a Party to the Agreement may unilaterally deny an air carrier of another Party a permit to provide services under the Agreement when the carrier is otherwise qualified to receive such a permit. It is the Department's view that this Article does not provide a basis to unilaterally deny another Party's

---

[1] The 2007 Agreement was amended by the Protocol to Amend the Air Transport Agreement between the United States of America and the European Community and its Member States, signed on June 24, 2010. For purposes of thisanalysis, the Department refers to these agreements collectively as the "Agreement." Article 17 *bis* was added to the Agreement by the 2010 Protocol. In addition, the United States of America, the European Union and it Member States, Iceland and Norway signed the Air Transport Agreement of June 16 and 21, 2011, which incorporated the 2007 Agreement, as amended by the 2010 Protocol, to provide for its application to Norway and Iceland, as if they were European Union Member States. These agreements are not yet in force but are being provisionally applied consistent with their terms.

carrier a permit to provide services when the carrier is otherwise qualified to receive such a permit.

Background

We understand that, in connection with applications for foreign air carrier permits filed by Norwegian Air International (NAI), a carrier that is registered in Ireland and is therefore a carrier of the European Union (EU), and Norwegian UK (NUK), a carrier that is registered in the United Kingdom and is also a carrier of the EU, the Department of Transportation (DOT) has requested your office's views on whether Article 17 *bis* of the Agreement allows the United States to unilaterally deny an application for a permit assuming the air carrier is otherwise qualified to receive one. Certain parties to the regulatory proceedings before DOT that oppose NAI's application have argued that DOT should deny the permit on the basis of Article 17 *bis* of the Agreement, which refers to "the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards." These parties maintain that NAI was incorporated in Ireland as an affiliate of Norwegian carrier Norwegian Air Shuttle to avoid application of Norway's allegedly more stringent labor laws to NAI's crew. We understand that similar arguments are being made in opposition to NUK's application.

DOT is required by statute to "act consistently with obligations of the United States Government under an international agreement." 49 U.S.C. § 401 05(b)(A). In addition, the Secretary of Transportation must consult with the Secretary of State in carrying out DOT's authorities related to foreign air transportation. 49 U.S.C. § 40105(a). The Department has therefore also provided its analysis of Article 17 *bis* to DOT.

Applicable Legal Framework

As you know, the Department's interpretation of the Agreement is entitled to deference. As the agency "charged with supervision of our foreign relations," the Department's construction of treaties and other international agreements [is] afforded "much weight," both within the Executive Branch and by Federal Courts. 5 Op. Off. Legal Counsel 80. 82 (1981); *see also Kolovrat v. Oregon,* 366 U.S. 187, 194,81 S. Ct. 922, 926 (1961); 14 Op. Atty. Gen. 302, 308 (1873). Deference is further supported where, as here, the Department led negotiations of the Agreement. *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 183, 102 S. Ct. 2374, 2379 (1982) ("the meaning attributed to treaty provisions by Government agencies charged with their negotiation ... is entitled to great weight").

Article 31 of the Vienna Convention on the Law of Treaties, which provides the basic framework for analyzing the meaning of the Agreement, states that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, art. 31.1, May 23, 1969, 1155 U.N.T.S. 331. Based on the "ordinary meaning" of Article 17 *bis* and "in light of [the] object and purpose" of the Agreement, the Department has concluded that Article 17 *bis* does not provide a basis upon which a Party to the Agreement may unilaterally deny an air carrier of another Party a permit to provide services under the Agreement, when the carrier is otherwise qualified to receive such a permit. The considerations set forth in Article 17 *bis* are not factors that may be considered in determining whether to issue a permit under the Agreement.

A. Ordinary Meaning

The factors that may be considered by a Party in determining whether to issue a permitunder the Agreement are clearly and unambiguously defined in Article 4 of the Agreement. Article 4 states that "on receipt of applications from an airline or one Party" in the appropriate form and manner, the other Party "shall grant appropriate authorizations and permissions with minimum procedural delay" provided that the criteria identified in Article 4 are met. In other words, Article 4 imposes an obligation to issue a permit provided that the criteria in Article 4 are met. The criteria identified in Article 4 are (1) ownership and control requirements, (2) whether the airline seeking the permit is qualified to "meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transportation by the Party considering the application," and (3) that the provisions set forth in Articles 8 (Safety) and 9 (Security) are being maintained and administered. Article 4 does not reference Article 17 *bis* or incorporate concepts of a "social dimension" as a factor in the authorization of a permit.

As noted above, Article 17 *bis* was added to the Agreement by the 2010 Protocol. The other amendments in the 2010 Protocol confirm that Article 4 provides the exclusive criteria for issuance or denial of permits. For example, Article 6 *bis,* which was also added by the 2010 Protocol, provides that in connection with applications by airlines submitted under Article 4, the Parties shall "recognize any fitness and/or citizenship determination made by the aeronautical authorities" of the other Parties "as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters," unless the Party in receipt of the application has a specific reason for concern that the applicant does not meet "the conditions prescribed in Article 4." The reference to Article 4 in Article 6 *bis* of the Agreement as the source for the conditions applicable to the authorization of permits further supports the conclusion that the only conditions that must be satisfied by NAI and NUK in order to receive a foreign air carrier permit are listed in Article 4.

The language of Article 17 *bis* does not support a contrary conclusion. Paragraph (1) of Article 17 *bis* does not impose a legal obligation for the Parties to take any particular action, reflecting instead a recognition of "the benefits that arise when open markets are accompanied by high labour standards" and a shared understanding that "[t]he opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties' respective laws." Paragraph (2) provides that the Parties' implementation of the Agreement is to be guided by the principles in Paragraph (1). Consistent with this Paragraph, if a Party has concerns about some aspect of labor rights regarding its own implementation or the implementation of the Agreement by another Party, that Party could consider on its own what, if any action is appropriate (and consistent with the Agreement) or could potentially raise the issue with some or all other Parties. However, Paragraph (2) does not authorize actions that would run counter to express legal obligations of the Parties under other provisions of the Agreement—such as the obligation at issue here, to grant a permit where Article 4's requirements are satisfied. In that context, Paragraph (2) at most provides for the Joint Committee to consider labor-related concerns raised by the Parties and leaves to the discretion of the Joint Committee any further actions to be taken related to such concerns."

B. Object and Purpose

Article 17 *bis* must also be interpreted in light of the object and purpose of the Agreement. The central purpose of the Agreement was to increase opportunities to provide air services between the Parties. The preamble expresses the desire to "promote ... competition

among airlines in the marketplace with minimum government interference and regulation," expand "international air transport opportunities," and enable airlines "to offer ... competitive prices and services in open markets." The preamble also reflects the Parties' expectation that "all sectors of the air transport agreement, including airline workers" would benefit from "a liberalized agreement." The way to accomplish these outcomes was to establish clear and unambiguous standards for each Party to apply in the authorization of a foreign carrier's permit to provide services, an outcome that would be defeated by allowing a Party to deny permits based upon the incorporation in the Agreement of generally-worded language about how the opportunities of the Agreement are not intended to undermine labor standards or the labor-related rights and principles contained in the Parties' respective laws.

C. Negotiating History

The Department is of the view that the terms of the Agreement are unambiguous and that recourse to supplementary means of interpretation is therefore unnecessary. Notwithstanding this conclusion, the Department, which led the U.S. delegation that negotiated the Agreement, believes that the negotiating history of the treaty confirms the conclusion that Article 17 *bis* does not constitute a basis for a Party to unilaterally deny a permit to an otherwise qualified carrier of another Party.

***

For the foregoing reasons the Department has concluded that the considerations set forth in Article 17 *bis* are not factors to be considered in determining whether a permit may be issued, and Article 17 *bis* does not provide a basis upon which a Party to the Agreement may unilaterally deny an air carrier of another Party a permit to provide services under the Agreement when the carrier is otherwise qualified to receive such a permit.

* * * *

On December 2, 2016, the Department of Transportation issued its final order granting a foreign air carrier permit to NAI. The final order references the OLC and Legal Adviser's opinions:

> Therefore, we have decided to finalize our tentative decision to grant NAI's request for a foreign air carrier permit under 49 U.S.C. §41301 to enable it to conduct foreign scheduled and charter air transportation of persons, property, and mail to the full extent permitted under the U.S.-EU Agreement, as specified in the foreign air carrier permit attached as the Appendix to this Order. Having carefully reviewed the submissions filed in response to Order 2016-4-12, we find that the clear weight of legal analysis in this case directs us to uphold the tentative findings and conclusions previously made.
>
> The opponents' position on what they view as the proper interpretation of Article 17 *bis* relies on arguments submitted to us before we reached our tentative decision, and we fully considered and rejected those arguments there. As stated above, our tentative decision reflected our own General Counsel's analysis of Article 17 *bis,* and that interpretation was subsequently supported by the legal analyses of DOS and an authoritative legal opinion from OLC. In these

> circumstances, we conclude that our tentative findings with regard to Article 17 *bis* should be finalized, and we do so here.

5. Investigation of the Downing of Malaysia Airlines Flight MH17 in Ukraine

Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, welcomed the interim findings of the Joint Investigation Team ("JIT") regarding the shoot down of Malaysia Airlines Flight MH-17, which were released on September 28, 2016. See U.S. Mission to the UN press release, available at http://2009-2017-usun.state.gov/remarks/7459, Ambassador Power's statement includes the following:

> The thorough, impartial report—carried out by independent investigators from five nations—offers strong evidence that, the night before the attack, a Buk surface-to-air missile system was transported from Russia to separatist-controlled territory in eastern Ukraine; that MH-17 was shot down by a Buk missile system, which was fired from separatist-controlled territory; and a Buk missile system was returned shortly after the attack from separatist-occupied territory in eastern Ukraine to Russia. The report also contains extensive findings pointing to attempts to cover up the movement of this missile system into and out of separatist-held territory in eastern Ukraine after the attack, on the part of Russia and Russian-backed separatists.
>
> …
>
> Investigators have said their next step will be to identify suspects involved in this crime, in preparation for seeking criminal indictments. We fully support this step. Those responsible for carrying out and ordering this attack must be held accountable. The loved ones of the victims, the eleven nations from which they came, and the international community all demand it.
>
> Four days after MH-17 was shot down, members of the Security Council, including Russia, unanimously adopted Resolution 2166, which expressed its support for efforts to establish an independent international investigation and demanded that all states cooperate fully with efforts to establish accountability. We continue to support the full implementation of Resolution 2166, and we call on the Russian Federation to do the same.

6. ICAO Settlement of Differences Proceedings: Brazil and the United States

On December 12, 2016, the Secretary General of the International Civil Aviation Organization ("ICAO") provided notification to the ICAO Council that the Delegation of Brazil had submitted an application and memorial for the settlement of a disagreement naming the United States as the respondent. The application, submitted to ICAO on December 2, 2016, relates to "the interpretation and application of the Convention and its Annexes following the collision, on September 29th 2006, of the air carrier Boeing 737-8EH operating a regular flight GLO 1907, and air jet Legacy EMB-135BJ operating a

flight by ExcelAire Services Inc." The Secretary General of ICAO found that the submission by Brazil complied with the requirements of the ICAO *Rules for the Settlement of Differences* (Doc 7782/2).

B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS

1. Non-Disputing Party Submissions under Chapter 11 of the North American Free Trade Agreement

a. Windstream v. Canada

On January 12, 2016, the United States made a submission pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA") in the arbitration under Chapter 11 of the NAFTA between Windstream Energy, LLC, Inc. ("Windstream") and the Government of Canada. Windstream's claims relate to its efforts to build and operate an offshore electric wind generation facility in Lake Ontario. The submission offers interpretations of Article 1110 (Expropriation and Compensation); Article 1105(1) (Minimum Standard of Treatment); Article 1108(7) (Procurement Exception); and Articles 1102 (National Treatment) and 1103 (Most Favored Treatment). Excerpts follow (with footnotes omitted) from the section on the procurement exception in the U.S. Article 1128 submission, which is available in full at https://www.state.gov/documents/organization/252148.pdf.

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* * * *

Article 1108(7) (Procurement Exception)

23. NAFTA Article 1108(7) exempts "procurement by a Party or state enterprise" from Chapter Eleven's obligations with respect to national treatment and most-favored-nation treatment." In interpreting the meaning of this and other NAFTA Chapter 11 articles, NAFTA Article 1131(1) requires that Chapter Eleven tribunals "decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Article 102(2) requires the NAFTA to be interpreted "in accordance with applicable rules of international law." Thus, the NAFTA requires Chapter Eleven tribunals to apply rules of customary international law both in interpreting the NAFTA's provisions and as a rule of decision in the cases before them. There is no basis to apply this requirement differently to so-called "carve out" clauses such as Article 1108(7) than any other NAFTA Chapter 11 provision.

24. The preeminent codification of customary international law on the interpretation of treaties is Articles 31 through 33 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention"). Article 31(1) of the Vienna Convention sets forth the cardinal rule in construing international agreements such as the NAFTA: they must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The context includes the treaty's text, its

preamble and annexes and any related agreements or instruments. Consistent with Article 31, treaties must be construed to avoid unreasonable results.

25. The term "procurement" is not defined in the NAFTA. The ordinary meaning of the term, however, encompasses any and all forms of procurement by a NAFTA Party. Consistent with the ordinary meaning of the term "procurement," the exception under Article 1108(7) applies to treatment accorded at all stages of the procurement process.

* * * *

b. Eli Lilly & Co. v. Canada

On March 18, 2016, the United States filed an Article 1128 submission in the arbitration under NAFTA Chapter 11 between Eli Lilly and Company and the Government of Canada. The submission addresses: the three-year limitations period in Articles 1116 and 1117 for claims to brought; the meaning of the minimum standard in Article 1105 and its application to judicial measures; Article 1110 (Expropriation) and its application to patents; and Article 1709. Excerpts follow (with footnotes omitted) from the submission, which is available in full at https://www.state.gov/documents/organization/255090.pdf.

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* * * *

Articles 1116(2) and 1117(2) (Limitations Period)

* * * *

3. Articles 1116 and 1117, as their titles indicate, concern claims by an "investor of a Party," which is defined in Article 1139 as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment." The time limitations period in Articles 1116(2) and 1117(2) must therefore relate to the particular investment for which the investor seeks a remedy for the breach and loss. The time limitations period thus runs from when the investor first acquires knowledge of the alleged breach and loss in connection with that particular investment.

* * * *

Article 1105 (Minimum Standard of Treatment)

* * * *

Claims for Judicial Measures

20. As noted above, the obligation to provide "fair and equitable treatment" under Article 1105(1) includes, for example, the customary international law obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Denial of justice in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government"

and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process." Aliens have no cause for complaint at international law about a domestic system of law provided that it conforms to "a reasonable standard of civilized justice" and is fairly administered. "Civilized justice" has been described as requiring "[f]air courts, readily open to aliens, administering justice honestly, impartially, [and] without bias or political control[.]"

21. A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a "notoriously unjust" or "egregious" administration of justice "which offends a sense of judicial propriety." More specifically, a denial of justice exists where there is, for example, an "obstruction of access to courts," "failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment." Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom of impartiality of the judicial process. At the same time, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law. Similarly, neither the evolution nor development of "new" judge-made law that departs from previous jurisprudence within the confines of common law adjudication, implicates a denial of justice.

22. The international responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts. Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.

23. In this connection, it is well-established that international tribunals such as NAFTA Chapter Eleven tribunals are not empowered to be supranational courts of appeal on a court's application of domestic law. Thus, an investor's claim challenging judicial measures under Article 1105(1) is limited to a claim for denial of justice under the customary international law minimum standard of treatment. *A fortiori*, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law. Moreover, an investor bringing an Article 1105(1) claim may not invoke an alleged host State violation of an international obligation owed to another State or its home State, for example an obligation contained in another treaty or another Chapter of NAFTA such as Chapter Seventeen. A violation of that Chapter, which is subject to the State-to-State dispute resolution provisions of NAFTA Chapter Twenty, may be the basis of a claim by one NAFTA Party against another, but that violation does not provide a separate cause of action for an investor, who may only bring claims against a host Party for alleged breaches of Chapter Eleven, Section A. And, as stated previously, the FTC Interpretation provides that a "determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of" the minimum standard of treatment.

24. For the foregoing reasons, judicial measures may form the basis of a claim under the customary international law minimum standard of treatment under Article 1105(1) only if they are final and if it is proved that a denial of justice has occurred. Were it otherwise, it would be impossible to prevent Chapter Eleven tribunals from becoming supranational appellate courts on matters of the application of substantive domestic law, which customary international law does not permit. Nor may judicial measures be challenged under Article 1105(1) for violating another rule of international law. Such a result would extend the obligations of the NAFTA Parties well beyond the customary international law minimum standard of treatment and what they consented to under Article 1105(1), as reflected in the FTC Interpretation.

Article 1110 (Expropriation and Compensation)

* * * *

28. The obligation not to expropriate except as set forth in Article 1110(1) reflects customary international law and forms part of the customary international law minimum standard of treatment. A State is, of course, responsible under international law for acts committed by any of its organs. Judicial measures applying domestic law may give rise to a claim for denial of justice under the circumstances described above with respect to Article 1105(1). As previously explained, a denial of justice may exist where there is, for example, an obstruction of access to courts, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. Additional instances of denial of justice have included corruption in judicial proceedings and executive or legislative interference with the freedom of impartiality of the judicial process.

29. Separately, decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not give rise to a claim for expropriation under Article 1110(1). It is therefore not surprising that commentators have acknowledged the particular "dearth" of international precedents on whether judicial acts may be expropriatory. Moreover, the United States has not recognized the concept of "judicial takings" as a matter of domestic law.

30. Of course, where a judiciary is not separate from other organs of the State and those organs (executive or legislative) direct or otherwise interfere with a domestic court decision so as to cause an effective expropriation, these executive or legislative acts may form the basis of a separate claim under Article 1110, depending on the circumstances. Were it otherwise, States might seek to evade international responsibility for wrongful acts by using the courts as the conduit of executive or legislative action.

Article 1110(7)

31. Article 1110(7) provides that: "This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property)." The question of Article 1110(7)'s scope is a matter of first impression for a Chapter Eleven tribunal. Article 1110(7) must be interpreted in accordance with its ordinary meaning in its context and in light of the object and purpose of the treaty.

32. The ordinary meaning of Article 1110(7) is that it excludes the listed measures from the scope of Article 1110, establishing a "safe harbor," to the extent those measures are consistent with Chapter Seventeen. Specifically, the provision preserves the ability of the NAFTA Parties to adopt or maintain intellectual property laws, consistent with Chapter

Seventeen, even where those measures might be claimed to contravene Article 1110. As some commentators have recognized, in the absence of such a provision, investors might allege that any revocation of a patent under domestic law constitutes an expropriation requiring compensation or restitution. “The mischief that such a claim would cause domestic intellectual property regimes is evident.”

33. Article 1110(7) therefore should not be read as an element of an investor’s claim under Article 1110(1) or as a jurisdictional hook that allows a Chapter Eleven tribunal to examine whether alleged breaches of Chapter Seventeen by a NAFTA Party constitute an expropriation of intellectual property rights. Nor should Article 1110(7) be read as an invitation to review a NAFTA Party’s measures, each time they arise, for consistency with Chapter Seventeen.

34. Instead, a tribunal must first analyze whether an expropriation in violation of international law has occurred with respect to the standard set out in Article 1110(1). In fact, a NAFTA Party’s conduct may be inconsistent with Chapter Seventeen, yet not be expropriatory. Thus, a claimant must first demonstrate an expropriation has otherwise occurred pursuant to Article 1110(1). If the claimant is successful in so demonstrating, the disputing NAFTA Party may invoke Article 1110(7) as a safe refuge, provided that the challenged measures were taken consistent with Chapter Seventeen. If the disputing NAFTA Party does so, a Chapter Eleven tribunal may then assess the consistency of the relevant measure with those provisions of Chapter Seventeen so placed in issue.

35. This interpretation is confirmed by the context and structure of Article 1110, which is entitled “Expropriation and Compensation.” The Article’s first paragraph outlines the nature and scope of the obligation on NAFTA Parties not to expropriate covered investments, except in accordance with the stated conditions. The Article’s second through sixth paragraphs outline the requirements for providing compensation in the event of an expropriation. Paragraph 7 of Article 1110 begins with the phrase “[t]his Article,” clearly referring back to the obligations contained in paragraphs 1-6. Thus, the structure is plain that if a NAFTA Party’s measures did not first implicate “[t]his Article” (*i.e.*, paragraphs 1-6), there would be no reason to examine whether the conduct is excluded from the scope of Article 1110(1) by virtue of Article 1110(7).

36. This interpretation is also consistent with the context and structure of NAFTA Chapters Eleven and Seventeen. Chapter Eleven tribunals are tribunals of limited jurisdiction, and investors may allege a breach of a NAFTA Party’s obligations under Chapter Eleven Section A. Chapter Seventeen obligations, by contrast, are subject to the State-State dispute settlement provisions of NAFTA Chapter Twenty. Thus, Article 1110(7) should not be read to provide a NAFTA Chapter Eleven tribunal with jurisdiction to review alleged inconsistencies or breaches of Chapter Seventeen absent a threshold determination by a tribunal that an expropriation has otherwise occurred pursuant to Article 1110(1).

37. Finally, this interpretation is consistent with the purpose of the provision as a “safe harbor.” To interpret Article 1110(7) as an element of an investor’s claim for expropriation or a jurisdictional hook to assess the consistency of a NAFTA Party’s measures with Chapter Seventeen, absent an *a priori* determination that an expropriation has occurred under Article 1110(1), would defeat the purpose of the provision by encouraging such claims. This outcome would subject the obligations set forth in Chapter Seventeen routinely to challenge by investors.

38. In view of the foregoing, the United States offers its views on the interpretation of some provisions of NAFTA Article 1709 (Patents).

Article 1709

39. Article 1709(1) provides that the NAFTA Parties "shall make patents available for any inventions, whether products or processes, in all fields of technology, provided that such inventions are new, result from an inventive step and are capable of industrial application." The Article also clarifies that the term "capable of industrial application" may be deemed to be synonymous with the term "useful."

40. Article 1709(1) thus establishes that, subject to certain permissible exclusions from patentability, each Party shall make available patents with respect to patent applications that disclose an invention that satisfy three requirements, one of which is commonly referred to as the "utility" requirement. To satisfy the utility requirement, such inventions must be "capable of industrial use" or "useful." The NAFTA does not prescribe any particular definition of the terms, "capable of industrial application," or "useful," but the text notes that these two terms may be deemed to be synonymous. Article 1709(1) provides each NAFTA Party with the flexibility to determine the appropriate method of implementing the requirements of Chapter Seventeen, including the utility requirement in Article 1709(1), within its own legal system and practice.

41. Article 1709(1) must be interpreted in accordance with its ordinary meaning in its context and in light of the object and purpose of the treaty. Reference to the domestic laws and practice of the NAFTA Parties is not dispositive when ascertaining the ordinary meaning of the "utility" requirement under Article 1709(1). The Parties retain discretion to change or refine their domestic law, but that discretion is not without limits. Were it otherwise, the obligation stated in 1709(1) would be without meaning or effect. A NAFTA Party may not apply requirements or conditions that would vitiate the obligation to make patents available for inventions that meet the requirements, including the "utility" requirement, of Article 1709(1).

42. Article 1709(7) obligates the Parties, subject to certain other provisions of Article 1709, to make patents "available and patent rights enjoyable without discrimination as to the field of technology, the territory of the Party where the invention was made and whether the products are imported or locally produced."

43. Differential effects of a measure on a particular sector, even if shown, do not necessarily prove discrimination as to the field of technology within the meaning of Article 1709(7). As a WTO Panel Report found with respect to the identically worded Article 27.1 of the TRIPS Agreement, de facto discrimination in most legal systems involves both the presence of differentially disadvantageous effects of a measure and the existence of discriminatory objectives. Without these "basic elements of a discrimination claim" the Panel did not find a breach under the TRIPS Agreement.

44. Article 1709(8) provides that a Party may revoke a patent only when, inter alia, "grounds exist that would have justified a refusal to grant the patent[.]" Thus, if a court, in determining whether to revoke a patent, finds that "grounds exist" that would have provided the Party's patent examining authority to refuse to grant the patent, then revocation of that patent would not be inconsistent with Article 1709(8). Article 1709(8) does not mean that courts are limited to reviewing the specific grounds of refusal before the patent examiner; the use of the present tense "exist" in Article 1709(8) confirms this interpretation. Nor can it mean that NAFTA Parties are required to freeze their intellectual property laws indefinitely from the date of review of a given patent. Article 1709(8) allows for evolvement of patent law.

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The United States made a further Article 1128 submission in the Eli Lilly arbitration on June 8, 2016. The supplemental submission addresses: Article 1131(1); Article 1105(1); and the relationship between Chapter 11 and Chapter 17 of the NAFTA. The submission is available at https://www.state.gov/s/l/c63964.htm.*

2. Non-Disputing Party Submissions under other Trade Agreements

a. Aven v. Costa Rica

David Aven and other U.S. nationals filed a Chapter Ten claim against the Republic of Costa Rica alleging that Costa Rica's enforcement of environmental laws prevented the claimants' property development in violation of Articles 10.5 (Minimum Standard of Treatment) and 10.7 (Expropriation and Compensation) of the Dominican Republic – Central America – United States Free Trade Agreement (the "CAFTA-DR"). On December 2, 2016, the United States filed an Article 10.20.2 submission on questions of interpretation of the CAFTA-DR in the case. That submission is excerpted below (with footnotes omitted). The submission in its entirety, and a link to further information about the arbitration, are available at https://www.state.gov/s/l/c73942.htm.

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Article 10.11 (Investment and Environment)

4. Article 10.11 provides that:

"Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

5. Article 10.11 informs the interpretation of other provisions of CAFTA-DR Chapter Ten, including Articles 10.5 and 10.7, and shows that Chapter Ten was not intended to undermine the ability of governments to take measures otherwise consistent with the Chapter, including measures based upon environmental concerns, even when those measures may affect the value of an investment.

Relationship between Chapters Ten and Seventeen

6. Article 10.2 ("Relation to Other Chapters"), paragraph 1 provides that: "In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency." Article 10.2 subordinates the provisions of Chapter Ten to the provisions in all other Chapters of the CAFTA-DR, in cases where there is an inconsistency with another Chapter. 1 The mere coverage of a particular matter or issue by a Chapter other than

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* Editor's note: On March 16, 2017, the tribunal rendered its award, dismissing Eli Lilly's claims under NAFTA Articles 1110 and 1105 primarily because the claimant failed to prove a fundamental or dramatic change in Canada's patent law, as it acknowledged it must to do prevail on its claims. *Eli Lilly and Company v. Government of Canada* (NAFTA/UNCITRAL), Case No. UNCT/14/2 (Award of Mar. 16, 2017) ¶¶387-88, *available at*: http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3544/DC10133_En.pdf.

Chapter Ten does not necessarily remove the relevant matter or issue from the scope of Chapter Ten in the absence of an inconsistency.

7. A Chapter Ten tribunal does not have jurisdiction to address matters that arise under Chapter Seventeen. Rather, the jurisdiction of a Chapter Ten tribunal is limited, according to Article 10.16(1), to claims that a respondent Party breached an obligation of Chapter Ten (Section A), an investment authorization, or an investment agreement.

8. Nevertheless, Chapter Seventeen provides relevant context for purposes of interpretation of Chapter Ten, including Articles 10.5 and 10.7. As a recent tribunal observed, Chapter Seventeen highlights generally the critical importance the CAFTA-DR Parties placed on ensuring respect for domestic levels of environmental protection and enforcement. The provisions of Chapter Seventeen, together with the Preamble and Article 10.11, serve to inform the interpretation of other provisions of Chapter 10. Specifically, these provisions demonstrate the Parties' commitment to preserving policy discretion in the adoption, application and enforcement of domestic laws aimed at achieving a high level of environmental protection, provided that doing so is not otherwise inconsistent with the express provisions of Chapter 10.

* * * *

b. Corona v. Dominican Republic

Corona Materials, LLC ("Corona") filed a Chapter Ten claim against the Dominican Republic in connection with Corona's efforts to build and operate a construction aggregate mine in the Dominican Republic. Corona alleges CAFTA-DR violations of Article 10.3 (national treatment), Article 10.5 (minimum standard of treatment), and Article 10.7 (expropriation). On March 11, 2016, the United States made a submission pursuant to Article 10.20.2 on questions of interpretation of the CAFTA-DR. Excerpts follow from the submission (with footnotes omitted). The full text is available at https://www.state.gov/documents/organization/254913.pdf.

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Article 10.18.1 (Limitations Period)

2. Article 10.18.1 requires a claimant to submit a claim to arbitration within three years of the "date on which the claimant first acquired, or should have first acquired, knowledge"of (i) the alleged breach, and (ii) loss or damage incurred by the claimant or enterprise.

3. Article 10.18.1 refers to knowledge of the alleged breach and loss first acquired as of a particular "date." Such knowledge cannot be acquired at multiple points in time or on a recurring basis. Accordingly, a continuing course of conduct cannot renew the limitations period under Article 10.18.1. A legally distinct injury, by contrast, can give rise to a separate limitations period under CAFTA-DR Chapter Ten.

4. A tribunal constituted under CAFTA-DR Chapter Ten is bound by the terms of the agreement. Article 10.18.1 expressly requires a claimant to submit a claim to arbitration within three years of the date on which the claimant "first acquired, or should have first acquired" knowledge of breach and loss.

5. Where a "series of similar and related actions by a respondent state" is at issue, an investor cannot evade the limitations period by basing its claim on "the most recent transgression in that series." To allow an investor to do so would, as the tribunal in *Grand River* recognized, "render the limitations provisions ineffective[.]" An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties. Accordingly, once a claimant first acquires (or should have acquired) knowledge of breach and loss, subsequent transgressions by the State Party arising from a continuing course of conduct, as opposed to a legally distinct injury, do not renew the limitations period under Article 10.18.1. In the case of a challenge to a measure adopted or maintained by a Party, the exhaustion of local remedies will not give rise to a legally distinct injury, unless the institutions to whom appeal has been made commit some new breach of the applicable standard. Moreover, when a court decision is being challenged, the limitations period will not begin without a final decision of a State's highest judicial authority.

6. The interpretation provided by the Tribunal in *UPS v. Canada* with respect to this point is misplaced. That tribunal found that "it was true generally in the law" that continuing courses of conduct constituting continuing breaches may renew claims limitation periods under international law. Irrespective of whether the tribunal in *UPS v. Canada* properly characterized the law, a general rule would not override the specific requirements of Article 10.20.1, which operates as a *lex specialis* and governs the operation of the limitations period for claims brought under CAFTA-DR Chapter Ten. Acquiring more detailed information about the breach or the loss does not reset the limitations period. As other NAFTA tribunals have held, knowledge of loss or damage incurred does not require knowledge of the full or precise extent of loss or damage.

7. Finally, because the claimant bears the burden to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1,8 the claimant must prove the necessary and relevant facts (*i.e*., the date when such knowledge of breach and loss was first acquired) to establish that its claims fall within the three-year claims limitation period.

<u>Article 10.18.2(b) (Waiver Requirement)</u>

8. One of the preconditions to the Parties' consent to arbitrate claims under Chapter Ten of the CAFTA-DR is the waiver required by Article 10.18.2. That provision states in relevant part that:

> 2. No claim may be submitted to arbitration under this Section unless: ...
>
> (b) the notice of arbitration is accompanied, (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

9. Under the ordinary meaning of this provision, a claim cannot be submitted unless and until it is accompanied by a waiver that complies with Article 10.18.2(b). Therefore, a Notice of Arbitration that is unaccompanied by a valid waiver does not constitute a claim that is capable of being submitted for purposes of any provision of Chapter Ten, including, and in particular, Articles 10.16.4 and 10.18.1. Where a valid waiver is filed subsequent to a Notice of Arbitration, the claim will be considered to have been submitted on the date on which the waiver, and not the Notice of Arbitration, was submitted.

Article 10.5 (Minimum Standard of Treatment)

10. CAFTA-DR Article 10.5.1 requires that each Party "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." CAFTA-DR Article 10.5.2 specifies that:

> For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

11. These provisions demonstrate the States Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in CAFTA-DR Article 10.5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law. The standard establishes a minimum "floor below which treatment of foreign investors must not fall."

12. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 1105(1), concerns the obligation to provide "fair and equitable treatment." This includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Denial of justice in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process." Aliens have no cause for complaint at international law about a domestic system of law provided that it conforms with "a reasonable standard of civilized justice" and is fairly administered.

13. Instead, a denial of justice arises, for example, when the final act of a State's judiciary constitutes a "notoriously unjust" or "egregious" administration of justice "which offends a sense of judicial propriety." There can be no denial of justice without a final decision of a State's highest judicial authority, unless seeking appeal would be obviously futile or manifestly ineffective. This rule applies to claims of denial of justice brought under treaties, such as the CAFTA-DR, that require claimants to waive their rights to pursue claims before other fora in order to submit a claim to arbitration.

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C. WORLD TRADE ORGANIZATION

1. Dispute Settlement

U.S. submissions in WTO dispute settlement proceedings are available at https://ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/dispute-settlement. The following discussion of a selection of WTO dispute settlement proceedings involving the United States in 2016 is drawn largely from Chapter II "The World Trade Organization" of the 2016 Annual Report of the President of the United States on the Trade Agreements Program ("2016 Annual Report"), available at https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf. WTO legal texts referred to below are available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

a. *Disputes brought by the United States*

(1) China – Tax Measures Concerning Certain Domestically Produced Aircraft (DS501)

As discussed in the 2016 Annual Report at 59, consultations held by the United States and China in January 2016 led to a resolution of an issue raised by the United States in 2015 concerning tax advantages accorded by China to the sale of certain domestically produced aircraft in China. China rescinded the discriminatory tax exemptions as a result of the consultations process.

(2) China — Export Duties on Certain Raw Materials (DS508)

Consultations with China in 2016 regarding China's restraints on the exportation of antimony, chromium, cobalt, copper, graphite, indium, lead, magnesia, talc, tantalum, and tin did not lead to a resolution. See 2016 Annual Report at 59. The United States requested that the WTO Dispute Settlement Body ("DSB") establish a panel to consider the dispute, which it did on November 8, 2016.

(3) European Union and certain Member States – Measures affecting trade in large civil aircraft (DS316)

As discussed in *Digest 2010* at 480-81, the Dispute Settlement Body panel established to consider U.S. challenges to subsidies that the European Union, France, Germany, Spain, and the United Kingdom provided to Airbus issued its report in 2010, agreeing with the United States that the EU measures were inconsistent with the Subsidies and Countervailing Measures ("SCM") Agreement. As discussed in *Digest 2011* at 373-74, the Appellate Body affirmed the panel's main findings and the EU purported to comply with the DSB rulings. As discussed in *Digest 2012* at 378, the parties disagreed on compliance and the United States requested the matter be referred to the original panel in accordance with Article 21.5.

The 2016 Annual Report at 63-64 summarizes the report of the Article 21.5 Panel that was issued on September 22, 2016:

> The panel found that the EU breached Articles 5(c) and 6.3(a), (b), and (c) of the SCM agreement, and that the EU and certain Member States failed to comply with the DSB recommendations under Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects or ... withdraw the subsidy."
>
> Significant findings by the compliance panel against the EU include:
>
> - 34 out of 36 alleged compliance "steps" notified by the EU did not amount to "actions" with respect to the subsidies provided to the Airbus or the adverse effects that those subsidies were to have caused in the original proceeding.

- As a result, the EU failed to withdraw the subsidies, as recommended by the DSB.
- Those subsidies were a genuine and substantial cause of lost sales to U.S. aircraft, and displacement and impedance of exports of U.S. aircraft to Australia, China, India, Korea, Singapore, and the United Arab Emirates.

The EU has appealed aspects of the Article 21.5 Panel's report.

(4) India – Solar Local Content I / II (DS456)

The dispute settlement panel established to consider whether India's requirement of domestic content for its National Solar Mission program is inconsistent with its WTO obligations issued its final public report on February 24, 2016, finding in favor of the United States on all claims. As summarized in the 2016 Annual Report at 66-67:

> The Panel found that India's domestic content requirements under its National Solar Mission are inconsistent with India's national treatment obligations under Article III:4 of the GATT 1994, and Article 2.1 of the Agreement on Trade-related Investment Measures (TRIMS Agreement). Because an Indian solar power developer may bid for and maintain certain power generation contracts only by using domestically produced equipment, and not by using imported equipment, India's requirements accord "less favorable" treatment to imported solar cells and modules than that accorded to like products of Indian origin.

India appealed the panel decision to the WTO Appellate Body and the Appellate Body issued its report on September 16, 2016, affirming the panel's findings. On October 14, 2016, the DSB adopted the panel and Appellate Body reports. India has notified the DSB that it intends to comply with the DSB's rulings.

(5) Indonesia – Import Restrictions on Horticultural Products, Animals, and Animal Products (DS455, DS465, and DS478)

On December 22, 2016, the panel established to consider Indonesian measures restricting imports of horticultural and animal products issued its report. The panel found that the measures are inconsistent with Article XI:1 of the GATT 1994 and are not justified under any general exception available under the GATT 1994. The United States and New Zealand requested the establishment of a panel in 2015 after consultations failed to resolve the dispute. See 2016 Annual Report at 67-68.

b. Disputes brought against the United States

(1) Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products (Mexico) (DS381)

As discussed in *Digest 2011* at 375-76, *Digest 2012* at 378-79, *Digest 2013* at 320, and *Digest 2015* at 478-79, Mexico challenged U.S. dolphin-safe labeling requirements for tuna and tuna products. The United States has sought to comply with rulings of the original DSB panel and subsequent compliance panel. In 2016, Mexico and the United States each requested further proceedings on compliance. The 2016 Annual Report summarizes developments in 2016 at page 78:

> On March 10, 2016, Mexico sought authorization to suspend concessions or other obligations under the covered agreements. The United States objected to Mexico's proposed level of suspension of concessions or other obligations on March 22, 2016, which referred the matter to arbitration pursuant to Article 22.6 of the DSU. The arbitrator held a meeting with the parties on October 25-26, 2016. The proceeding is ongoing.
>
> On March 22, 2016, the [National Oceanic and Atmospheric Administration or] NOAA promulgated an interim final rule amending the U.S. dolphin safe labeling measure, and, on April 11, 2016, the United States requested that the DSB establish a compliance panel to determine whether the U.S. dolphin-safe labeling provisions, as amended by the new final rule, are consistent with U.S. WTO obligations. The DSB referred the matter to the original panel at its meeting on May 9, 2016. On May 27, 2016, the compliance panel was composed, including a new chairperson, Mr. Stefan Johannesson, due to the unavailability of the original chairperson. On June 9, 2016, Mexico also requested the establishment of a compliance panel pursuant to Article 21.5 of the DSU. At its meeting on June 22, 2016, the DSB referred the matter to the same panel as the other compliance proceeding. The schedules of the two proceedings have been harmonized, and the United States and Mexico submitted written submissions in fall of 2016.

(2) Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from Vietnam (DS429)

On July 18, 2016, the United States and Vietnam signed an agreement that resolved this matter and notified the DSB of their resolution to this dispute. See 2016 Annual Report at 85. See *Digest 2015* at 479-80 for background on the dispute.

(3) United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea (DS464)

The panel established to consider antidumping and countervailing duty measures imposed by the United States regarding large residential washers from Korea circulated its report on March 11, 2016. The panel found in favor of Korea on its claim that aspects

of Commerce's antidumping determination were inconsistent with the second sentence of Article 2.4.2 of the AD Agreement, but rejected other claims by Korea with respect to antidumping ("AD"). With respect to countervailing duty ("CVD") claims, the panel found that Commerce's "disproportionality analysis" was inconsistent with Article 2.1(c) of the SCM Agreement, but rejected Korea's other claims. See 2016 Annual Report at 89-90. The Annual Report summarizes actions taken by the parties after the panel issued its report:

> On April 19, 2016, the United States appealed certain of the panel's findings. Korea filed another appeal on April 25, 2016. The oral hearing in the appeal was held on June 20-21, 2016, in Geneva.
>
> On September 7, 2016, the Appellate Body circulated its report. The Appellate Body upheld several of the panel's findings under the AD Agreement, including the panel's finding that the average-to-transaction comparison methodology should be applied only to so-called pattern transactions, the panel's finding that the use of zeroing is inconsistent with the second sentence of Article 2.4.2 and Article 2.4, both "as such" and as applied, and the panel's finding that the differential pricing methodology is inconsistent "as such" with the second sentence of Article 2.4.2 of the AD Agreement. The Appellate Body reversed other findings made by the panel. For instance, the Appellate Body found that an investigating authority must assess the price differences at issue on both a quantitative and qualitative basis, and the Appellate Body mooted the panel's finding concerning systemic disregarding, finding instead that the combined application of comparison methodologies is impermissible. With respect to the CVD issues, the Appellate Body upheld the panel's rejection of Korea's regional specificity claim, but found that certain aspects of Commerce's calculation of subsidy rates were inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.
>
> On September 26, 2016, the DSB adopted the panel and Appellate Body reports. On October 26, 2016, the United States stated that it intends to implement the recommendations of the DSB in this dispute in a manner that respects U.S. WTO obligations, and that it will need a reasonable period of time in which to do so.

(4) Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China (DS471)

The panel circulated its report on October 19, 2016 in a challenge brought by China to the U.S. Commerce Department's application in certain investigations and administrative reviews various methodologies, including: a "targeted dumping methodology," "zeroing," a "single rate presumption for non-market economies," a "NME-wide methodology" including certain "features," a "single rate presumption" and the use of "adverse facts available" "as such." As summarized in the 2016 Annual Report at 91, the panel sided with China only in part:

> The panel found that a number of aspects of the "targeted dumping methodology" applied by Commerce in three challenged investigations were not inconsistent with the requirements of the AD Agreement, including certain quantitative aspects of Commerce's methodology. However, the Panel found fault with other aspects of Commerce's methodology and with Commerce's explanation of why resort to the alternative methodology was necessary. The panel also found that Commerce's application of the alternative methodology to all sales, rather than only to so-called pattern sales, and Commerce's use of "zeroing" in connection with the alternative methodology, were inconsistent with the second sentence of Article 2.4.2 of the AD Agreement. The panel found that Commerce's use of a rebuttable presumption that all producers and exporters in China comprise a single entity under common government control – the China-government entity – to which a single antidumping margin is assigned, both as used in specific proceedings and generally, is inconsistent with certain obligations in the WTO Antidumping Agreement concerning when exporters and producers are entitled to a unique antidumping margin or rate. Finally, the Panel agreed with the United States that China had not established that Commerce has a general norm whereby it uses adverse inferences to pick information that is adverse to the interests of the China-government entity in calculating its antidumping margin or rate. The panel also decided to exercise judicial economy with respect to the information Commerce utilized in particular proceedings.

China has appealed the panel's ruling.

(5) Conditional Tax Incentives for Large Civil Aircraft (DS487)

On November 28, 2016, the panel issued its report on the EU's claim that tax incentives offered by the State of Washington to aircraft companies are illegal subsidies under the SCM Agreement. The panel found that one particular measure—the Washington State B&O tax incentive—was a prohibited subsidy. The other challenged tax incentives were deemed legal under WTO rules. See 2016 Annual Report at 91-92. The United States has appealed some of the panel's findings.

2. WTO Declaration on Expansion of Trade in IT Products

On June 30, 2016, President Obama issued Proclamation 9466 "To Implement the World Trade Organization Declaration on the Expansion of Trade in Information Technology Products and for Other Purposes." 81 Fed. Reg. 44,129 (July 6, 2016). Excerpts follow from the proclamation.

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* * * *

1. On July 28, 2015, the United States and other Members of the World Trade Organization (WTO) issued a Declaration on the Expansion of Trade in Information Technology Products (Declaration), which established a framework for eliminating duties on certain information and communication technology products. These products include advanced semiconductors, medical equipment, and a range of audio and video equipment. The Declaration sets forth commitments for immediate or staged elimination of duties on the covered products, expanding on duty-elimination commitments set forth in the 1996 Declaration on Trade in Information Technology Products, which the United States implemented in Proclamation 7011 of June 30, 1997.

2. On December 16, 2015, the United States and other WTO Members issued a Ministerial Declaration in which ministers endorsed the Declaration of July 28, 2015, and acknowledged that the conditions for implementation had been met.

3. Section 111(b) of the Uruguay Round Agreements Act (URAA) (19 U.S.C. 3521(b)) authorizes the President to proclaim the modification of any duty or staged rate reduction of any duty set forth in Schedule XX for products in tariff categories that were the subject of reciprocal duty elimination or harmonization negotiations during the Uruguay Round, if the United States agrees to such action in a multilateral negotiation under the auspices of the WTO, and after compliance with the requirements of section 115 of the URAA (19 U.S.C. 3524). The products covered by the Declaration were the subject of reciprocal duty elimination negotiations during the Uruguay Round, and the requirements of section 115 of the URAA have been met.

4. Accordingly, pursuant to section 111(b) of the URAA, I have determined to proclaim modifications to the tariff categories and rates of duty set forth in the Harmonized Tariff Schedule (HTS), as set forth in Annexes I and II to this proclamation.

* * * *

3. WTO Accessions

Liberia joined the WTO on July 14, 2016, becoming the 163rd member. On July 29, 2016, Afghanistan joined, as the 164th Member. There were 21 applicants for WTO membership pending at the end of 2016. See 2016 Annual Report at 103.

D. TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Trade Agreements

a. Trans-Pacific Partnership

As discussed in *Digest 2015* at 481-83, negotiations of the Trans-Pacific Partnership (“TPP”) agreement concluded in 2015. The United States and the other 11 parties signed the TPP in New Zealand on February 4, 2016. The full text of the agreement is available at https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.[**] On April 12, 2016, Secretary Kerry delivered remarks,

[**] Editor’s note: On January 30, 2017, the U.S. Trade Representative notified New Zealand, the TPP depositary, and the other TPP countries that the United States does not intend to become a party to the TPP and accordingly has no legal obligations arising from its signature.

available at http://2009-2017.state.gov/secretary/remarks/2016/04/255766.htm, at the Pacific Council on International Policy, describing the high standards enshrined in the TPP.

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TPP is the highest-standard trade deal ever reached, period.

It improves governance by setting high standards on transparency, corruption, and government accountability. It defends the rights of men and women to collective bargaining. It requires every country to refrain from using underage workers and unsafe workplaces. It sets a high bar for environmental protection, for clean air, clean water, and wildlife preservation, putting it on a par with things that we always complained about because other countries didn't do them. Now they will.

It enhances fairness by compelling governments to ensure that state-owned enterprises compete on a level playing field with privately owned companies. Think of the consequences of that step. And it establishes strong, balanced rules to protect intellectual property and the 40 million Americans working in creative and digital industries, which I don't have to tell you is a huge issue for California film studios and for Silicon Valley.

The list goes on. But here's the most important thing: Unlike in most past trade agreements, these standards are not part of a trade side deal. They're not contained in a letter. They're not contained in a separate document. They are defined within the text of the agreement itself, and they are binding—fully enforceable—as a result. That means that each participant in TPP has to keep the promises that they make or face tough sanctions for every violation.

* * * *

b. *Trans-Atlantic Trade and Investment Partnership*

Negotiations of the Trans-Atlantic Trade and Investment Partnership ("TTIP") agreement continued in 2016. Further information is available at the United States Trade Representative ("USTR") website at https://ustr.gov/ttip. On October 7, 2016, following the 15th round of TTIP negotiations, Chief Negotiator for the United States Dan Mullaney delivered the following remarks.

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* * * *

The rationale for T-TIP remains strong. This agreement is vital to strengthening our transatlantic relationship in a time of significant geopolitical uncertainty and uneven economic growth internationally. It will also give the U.S. and the EU an opportunity to work together to raise global standards based on shared values.

The U.S. delegation came to this round prepared to push forward across the broad range of negotiating areas and, in fact, we have done that. We have made excellent progress over the past few days.

We tabled a number of new texts just before and during this round, including on rules of origin, autos, intellectual property, trade remedies and textiles. We had a good discussion of these proposals this week.

We also made good progress in resolving conceptual and language differences in several negotiating areas during this round, especially in customs and trade facilitation, good regulatory practices, regulatory cooperation, technical barriers to trade, and regulatory compatibility in key sectors, like autos, pharmaceuticals and medical devices.

* * * *

All total, more than 20 different negotiating groups met during this round. In addition to the negotiating areas already mentioned, we achieved forward movement in investment, state-to-state dispute settlement, cross-border services, financial services, government procurement, environment, labor, agriculture, including market access and sanitary and phytosanitary (SPS) measures, industrial tariffs, energy and raw materials, small- and medium-sized enterprises (SMEs), and legal and institutional issues.

Looking ahead, we plan to keep working to make progress in the coming months to deliver real, near-term benefits to our people. Our EU colleagues share that goal. In the remaining time of the current U.S. Administration, there is still much that we can accomplish together.

* * * *

2. Trade Legislation and Trade Preferences

a. Generalized System of Preferences

Pursuant to the GSP 2015/2016 Annual Review, on June 30, 2016, the President designated an array of travel goods (including luggage, backpacks, handbags, and wallets) as eligible for duty-free status when imported from least developed beneficiary developing countries and African Growth and Opportunity Act ("AGOA") countries. Proclamation 9466.

On September 14, 2016, President Obama notified Congress of his intent to reinstate the GSP eligibility of Burma as a "least-developed beneficiary developing country". Proclamation 9492. President Obama's message to Congress explains that the reinstatement of Burma's designation under the GSP program complies with Section 502 of the Trade Act of 1974, as amended (the "1974 Act") (19 U.S.C. § 2462), which provides that the President may designate countries as least-developed beneficiary developing countries if conditions set forth in Section 502(b) are met, taking into account factors set forth in Section 502(c) and having due regard for the considerations set forth in Section 501 (19 U.S.C. § 2461). Burma's eligibility for trade benefits became effective on November 13, 2016.

b. AGOA

On December 15, 2016, President Obama designated the Central African Republic ("CAR") as a beneficiary sub-Saharan African country under AGOA. Proclamation 9555.

The President determined that CAR met the eligibility requirements set forth in Section 104 of the AGOA (19 U.S.C. § 3703) and the eligibility criteria set forth in Section 502 of the Trade Act of 1974 (19 U.S.C. § 2462).

3. Trade-related Arbitration and Litigation

Dominican Republic-Central America-United States Free Trade Agreement

In 2015, an arbitral panel established pursuant to the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR") undertook its review of claims by the United States that Guatemala was failing to adhere to its CAFTA-DR obligations regarding its labor laws. This is the first such matter under the CAFTA-DR to be brought before an arbitral panel. The United States originally requested the establishment of a panel in 2011. See *Digest 2011* at 384. In 2013, the panel suspended its work at the request of the Parties to allow them to negotiate and implement an Enforcement Plan. See *Digest 2013* at 329-31. However, the United States requested that the panel resume its work in 2014 after engagement through the Enforcement Plan failed to effectively address concerns. 80 Fed. Reg. 4027 (Jan. 26, 2015). The United States filed its opening submission on November 3, 2014. Guatemala filed its first submission on February 2, 2015. The United States submitted its rebuttal on March 16, 2015. Guatemala made its rebuttal submission on April 27, 2015. Eight non-governmental entities made written submissions on April 27, 2015. Guatemala and the United States submitted comments on the written submissions of the non-governmental entities on May 11, 2015. The arbitral panel held hearings on June 2, 2015 in Guatemala City. The proceedings were suspended on November 4, 2015, when one of the members of the panel resigned. Proceedings resumed on November 27, 2015, after the appointment of a replacement. The panel's final report remains pending as of the end of 2016. Information about the dispute is available at https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr#.

E. TAXATION

1. Tax Treaties

On February 17, 2016, the U.S. Treasury Department issued a new U.S. Model Income Tax Convention (the "2016 Model"), to be used as a starting point in negotiating tax treaties. The previous model dates back to 2006. The text of the 2016 Model and its preamble are available at https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/treaties.aspx. The Treasury Department issued a press release announcing the 2016 Model, available at https://www.treasury.gov/press-center/press-releases/Pages/jl0356.aspx, and excerpted below.

Many of the 2016 Model updates reflect technical improvements developed in the context of bilateral tax treaty negotiations and do not represent substantive changes to the prior model. The 2016 Model also includes a number of new provisions intended to more effectively implement the Treasury Department's longstanding policy that tax treaties should eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance. For example, the 2016 Model does not reduce withholding taxes on payments of highly mobile income—income that taxpayers can easily shift around the globe through deductible payments such as royalties and interest—that are made to related persons that enjoy low or no taxation with respect to that income under a preferential tax regime. In addition, a new article obligates the treaty partners to consult with a view to amending the treaty as necessary when changes in the domestic law of a treaty partner draw into question the treaty's original balance of negotiated benefits and the need for the treaty to reduce double taxation. The 2016 Model also includes measures to reduce the tax benefits of corporate inversions. Specifically, it denies reduced withholding taxes on U.S. source payments made by companies that engage in inversions to related foreign persons.

The Treasury Department has been a strong proponent of facilitating the resolution of disputes between tax authorities regarding the application of tax treaties. Accordingly, the 2016 Model contains rules requiring that such disputes be resolved through mandatory binding arbitration. The "last best offer" approach to arbitration in the 2016 Model is substantively the same as the arbitration provision in four U.S. tax treaties in force and three U.S. tax treaties that are awaiting the advice and consent of the Senate.

2. FATCA

The United States continued in 2016 to engage with jurisdictions around the world to improve international tax compliance and implement the Foreign Account Tax Compliance Act ("FATCA"). For background on FATCA, see *Digest 2012* at 413, *Digest 2013* at 358, and *Digest 2014* at 489. In 2016, the United States concluded a new FATCA intergovernmental agreements ("IGAs") with Vietnam, bringing the total number of concluded agreements to 113, of which 74 were in force by the end of 2016. A table listing the jurisdictions that are treated as if they have IGAs in effect, with links to the texts of the agreements, is available at https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

As discussed in *Digest 2015* at 487-88, the court in *Crawford et al. v. U.S. Dept. of the Treasury et al.*, No. 3:15-cv-250 (S.D. Ohio 2015), held that nearly all of the plaintiffs lacked standing to challenge the FATCA IGAs. On April 26, 2016, the court dismissed all claims, denied a request for further leave to amend the complaint, and terminated the case. The court summarized its reasoning as follows:

> Here, analyzing each Plaintiff individually, the Court finds that none of the Plaintiffs has standing to sue Defendants. No individual Plaintiff has suffered an invasion of a legally protected interest, which is concrete and particularized, and actual or imminent, not conjectural or hypothetical. Moreover, no alleged injury is fairly traceable to the actions of the Defendants, but rather, the actions of an independent third party. Finally, there are no allegations that it is likely that the alleged injury will be redressed by a favorable decision. See *Lujan*, 504 U.S. at 560–61. In reaching these holdings, the Court analyzed the proposed Amended Verified Complaint, (doc. 32–1), which could not withstand Defendants' Motion to Dismiss, (doc. 26); therefore, the proposed amendments are futile.

F. LOAN GUARANTEES

On June 3, 2016, Tunisia signed a $500 million loan guarantee agreement with the United States. See June 3, 2016 State Department media note, available at http://2009-2017.state.gov/r/pa/prs/ps/2016/06/258033.htm. Provisions in the agreement are aimed at encouraging Tunisia to make economic reforms in order to access the affordable financing from international capital markets. The United States provided earlier loan guarantees to Tunisia for $485 million in 2012 and $500 million in 2014.

Also on June 3, 2016, Ukraine signed an additional one billion dollar loan guarantee agreement with the United States. The purpose of the agreement is to reinforce Ukraine's economic reform program. Ukraine previously received loan guarantees from the United States in 2015 and 2014. See *Digest 2015* at 494.

G. TELECOMMUNICATIONS, DATA PRIVACY, and CYBER ISSUES

1. Transatlantic Commercial Data Transfers

The EU-U.S. and Swiss-U.S. Privacy Shield Frameworks were designed by the U.S. Department of Commerce, and the European Commission and Swiss Administration, respectively, to provide companies on both sides of the Atlantic with a mechanism to comply with data protection requirements when transferring personal data from the European Union and Switzerland to the United States in support of transatlantic commerce. On July 12, 2016, the European Commission deemed the EU-U.S. Privacy Shield Framework adequate to enable data transfers under EU law. On January 12, 2017, the Swiss Government announced the approval of the Swiss-U.S. Privacy Shield Framework as a valid legal mechanism to comply with Swiss requirements when transferring personal data from Switzerland to the United States.

The Under Secretary of State for Economic Growth, Energy, and the Environment serves as the Privacy Shield Ombudsperson, a position dedicated to facilitating the processing of requests from EU and Swiss individuals relating to national security access to data transmitted from the European Union or Switzerland to the United States. Applicable data transfers include those conducted pursuant to the Privacy Shield

Frameworks, standard contractual clauses (“SCCs”), binding corporate rules (“BCRs”), and “Derogations” or “Possible Future Derogations.” This role builds on the Under Secretary’s position under Presidential Policy Directive 28 as the Senior Coordinator for International Information Technology Diplomacy, which includes serving as a point of contact for foreign governments to raise concerns regarding signals intelligence activities conducted by the United States.

The Under Secretary reports directly to the Secretary of State and is independent from the Intelligence Community. To carry out the Ombudsperson duties, the Under Secretary works closely with other United States government officials, including independent oversight bodies such as inspectors general and the Privacy and Civil Liberties Oversight Board, as appropriate, to ensure that completed requests are processed and resolved in accordance with applicable laws and policies.

2. *Weinstein v. Iran*: Attempt to attach Internet names and addresses

As explained in *Digest 2015* at 497-502, the United States filed an amicus brief in the D.C. Circuit in *Weinstein v. Iran*, No. 14-7193, opposing attachment under the Foreign Sovereign Immunities Act (“FSIA”) of property interests in the Internet’s global name and address system via the Internet Corporation for Assigned Names and Numbers (“ICANN”), asserting that the country-code top-level domains (known as “ccTLDs”) associated with geographic regions are not “property of” or “assets of” a foreign state within the meaning of those terms in the FSIA or the Terrorism Risk Insurance Act (“TRIA”). The D.C. Circuit issued its opinion on August 2, 2016, affirming the district court’s dismissal of the attachment claim. 831 F.3d. 470 (D.C. Cir. 2016). Excerpts from the court’s opinion pertaining to the issue of whether country code top-level domains constitute property appear below (with footnotes omitted). Other excerpts from the court’s opinion appear in Chapter 10.

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*   *   *   *

To this point we have assumed *arguendo* that D.C. law does not impede the plaintiffs’ pursuit of the defendant sovereigns’ ccTLDs. …Ordinarily, remand would be in order to allow the plaintiffs to continue discovery in an effort to establish whether the ccTLDs can properly be considered “property of” the defendants under the FSIA. *See* 28 U.S.C. § 1610(g)(1); *Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013). Many critical issues remain disputed.

We assume without deciding that the ccTLDs the plaintiffs seek constitute “property” under the FSIA and, further, that the defendant sovereigns have some attachable ownership interest in them. Nonetheless, pursuant to the terrorist activity exception, the court has the “authority” to “prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment”—*i.e.*, we are expressly authorized to protect the interests of ICANN and other entities. 28 U.S.C. § 1610(g)(3). Because of the enormous third-party interests at stake—and because there is *no* way to execute on the plaintiffs’ judgments without impairing those interests—we cannot permit attachment.

The plaintiffs demand, in effect, that ICANN delegate management of the ".ir" ccTLD so that they can "sell or license the operation of the ccTLD [ ] to a third party." …As explained, the power to operate a ccTLD includes the power to register (or remove) domain names from that registry. Thus, an entity seeking a ".ir" domain name will have to register through the plaintiffs or their designee—a process in which the ccTLD manager can extract a fee. The plaintiffs' plan plainly impairs the interests of "person[s] who [are] not liable in the action giving rise to [the] judgment" in myriad ways. 18 U.S.C. § 1610(g).

First, requiring ICANN to delegate ".ir" to the plaintiffs would bypass ICANN's process for ccTLD delegation, which includes ensuring that the incoming manager has technical competence and a commitment to serving the Iranian Internet community's interests. The plaintiffs and, more importantly, their prospective designee may not possess that technical competence or commitment. Granted, the plaintiffs are "aware that the ... court can —and should—protect the interests of third parties" and they "welcome the opportunity to work together with the district court and ICANN to ensure a smooth transition." … But even if the plaintiffs are able to show adequate competence and commitment, the act of forced delegation *itself* impairs ICANN's interest in "protect[ing] the stability ... [and] interoperability ... of the DNS." Decl. of John O. Jeffrey, App'x 24.2 ¶ 5.

Recall that a change in the root zone file will only affect the routing of a search for ".ir." But a change in the root zone file does not also transfer the information stored on the ccTLD server. To ensure that any delegation occurs seamlessly, ICANN requires that the incoming manager provide a plan to preserve the stability of the ccTLD, which plan explains how existing registrants will be affected. According to ICANN, the current ccTLD managers in the defendant countries will not voluntarily transfer information regarding their registrants and, because the relevant servers are located abroad, we are powerless to so require them. If ICANN is required to direct an end-user looking for ".ir" web pages to the plaintiffs' server but the plaintiffs are unable to direct them to the requested SLD, the Internet's stability and interoperability are undermined.

The impairment does not end there. As the plaintiffs recognize, ICANN occupies its position only because "the global community *allows it* to play that role." Appellants' Br. at 34 (emphasis added). "[T]he operators of ... top level domains" can "form a competitor to ICANN and agree to refer all DNS traffic to a new root zone directory." *Id.*; *see also* Br. for United States as *Amicus Curiae* at 13 ("As a technological matter, nothing prevents an entity outside the United States from publishing its own root zone file and persuading the operators of the Internet's name servers to treat that version as authoritative instead."). This result, known as "splitting the root," is widely viewed as a potentially disastrous development; indeed, some regard it as the beginning of "ultimate collapse of Internet stability"—a "doomsday scenario for the globally accessible" network and, thus, for ICANN. Harold Feld, *Structured to Fail: ICANN and the 'Privatization' Experiment*, *in* WHO RULES THE NET?: INTERNET GOVERNANCE AND JURISDICTION 351 (Cato Inst. 2003). Whether that description of a split root is accurate need not concern us; ICANN's interests, as a third party "not liable in the action giving rise to [the] judgment," 18 U.S.C. § 1610(g)(3), are sufficient for us to protect them pursuant to section 1610(g)(3) of the FSIA. *See* Appellee's Br. at 34 ("[F]orced re-delegation of the Subject ccTLDs would ... wreak havoc on the domain name system."); *see also* Br. for United States as *Amicus Curiae* at 13 ("[T]he result would be devastating for ICANN, for the [current] model of Internet governance, and for the freedom and stability of the Internet as a whole.").

But given that the ICANN-administered DNS is the beneficiary of substantial network effects, how could such a doomsday scenario arise? And why would forced delegation hasten its arrival? In light of the plaintiffs' recognition that ICANN's control "stems only from the fact that the global community allows it to play that role," … and considering that the delegation of the three defendant sovereigns' ccTLDs could likely antagonize the global community, *see* Br. for United States as *Amicus Curiae* at 13 ("It is not difficult to imagine that a court-ordered change to the authoritative root zone file at the behest of private plaintiffs would prompt members of the global Internet community to turn their backs on ICANN for good."), we believe the doomsday scenario is not beyond imagining.

For the foregoing reasons, the judgment of the district court is affirmed.

* * * *

H. INTELLECTUAL PROPERTY

1. Transmittal of Treaties

The President transmitted two IP-related treaties to the Senate on February 10, 2016. The President's message conveying the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, done at Marrakesh on June 27, 2013 ("Marrakesh Treaty") includes the following:

> This copyright treaty, concluded under the auspices of the World Intellectual Property Organization (WIPO), advances the national interest of the United States in promoting the protection and enjoyment of creative works. The Marrakesh Treaty lays a foundation, in a manner consistent with existing international copyright standards, for further opening up a world of knowledge for persons with print disabilities by improving their access to published works.
>
> The United States played a leadership role in the negotiation of the treaty, and its provisions are broadly consistent with the approach and structure of existing U.S. law. Narrow changes in U.S. law will be needed for the United States to implement certain provisions of the treaty. Proposed legislation is being submitted to both houses of the Congress in conjunction with this transmittal.

Information on the Marrakesh Treaty as received by the U.S. Senate is available at https://www.congress.gov/treaty-document/114th-congress/6/document-text.

The President's message conveying the Beijing Treaty on Audiovisual Performances, done at Beijing on June 24, 2012 ("Beijing Treaty"), includes the following:

> This copyright treaty, concluded under the auspices of the World Intellectual Property Organization (WIPO), advances the national interest of the United States in promoting the protection and enjoyment of creative works. The Beijing

> Treaty provides a modern international framework for the rights of performers in motion pictures, television programs, and other audiovisual works, similar to that already in place for producers of such works, for authors, and for performers and producers of sound recordings, pursuant to other WIPO copyright treaties the United States has joined.
>
> The United States played a leadership role in the negotiation of the treaty, and its provisions are broadly consistent with the approach and structure of existing U.S. law. Narrow changes in U.S. law will be needed for the United States to implement certain provisions of the treaty. Proposed legislation is being submitted to both houses of the Congress in conjunction with this transmittal.

The transmittal package for the Beijing Treaty is available at https://www.congress.gov/114/cdoc/tdoc8/CDOC-114tdoc8.pdf.

2. Intellectual Property: Special 301 Report

The "Special 301" Report is an annual review of the global state of intellectual property rights ("IPR") protection and enforcement. USTR provides information about the Special 301 Report on its website at *https://ustr.gov/issue-areas/intellectual-property/Special-301*.

USTR issued the 2016 Special 301 Report in April 2016. The Report is available at https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf. The 2016 Report lists the following countries on the Priority Watch List: Algeria; Argentina; Chile; China; Ecuador; India; Indonesia; Kuwait; Pakistan; Russia; Thailand; Ukraine; and Venezuela. Ecuador, Kuwait, and Ukraine were added in 2015. It lists the following on the Watch List: Barbados; Belarus; Bolivia; Brazil; Bulgaria; Canada; Colombia; Costa Rica; Dominican Republic; Egypt; Greece; Guatemala; Jamaica; Lebanon; Mexico; Paraguay; Peru; Romania; Tajikistan; Trinidad and Tobago; Turkey; Turkmenistan; Uzbekistan; and Vietnam. See *Digest 2007* at 605–7 for additional background on the watch lists.

3. U.S. Joint Strategic Plan on IP Enforcement

On December 12, 2016, the State Department announced the release by the Office of the U.S. Intellectual Property Enforcement Coordinator ("IPEC") of the 2017-2019 U.S. Joint Strategic Plan on Intellectual Property Enforcement. The December 12, 2016 State Department media note on the subject is available at http://2009-2017.state.gov/r/pa/prs/ps/2016/12/265173.htm. The media note describes the plan as providing opportunities for "state and local governments, foreign governments, and the private sector" to support the federal government's policy of IP enforcement. The State Department collaborated with the IPEC and other government departments in arriving at the plan, which is available at

https://obamawhitehouse.archives.gov/sites/default/files/omb/IPEC/2016jointstrategicplan.pdf. As explained in the media note:

> The State Department's Office of International Intellectual Property Enforcement promotes American and global innovation by advocating for the protection and enforcement of intellectual property rights (IPR) around the world. The office works with economic officers at the State Department's embassies, consulates, and missions to ensure that the interests of U.S. rights holders are represented overseas, and to highlight the vital role of IPR protection in the global economy.

I. OTHER ISSUES

1. Presidential Permits: Keystone XL Pipeline

As discussed in *Digest 2015* at 502, the Secretary of State denied the application for a permit for the proposed Keystone XL pipeline in November 2015. In 2016, that denial was the subject of litigation in federal court and an arbitration claim under the NAFTA.

On April 1, 2016, the United States filed a motion to dismiss or for summary judgment in *TransCanada Keystone XL Pipeline LP, et al. v. Kerry*, *et al*., No. 16-0036 (S.D. Tex.). The introduction and summary from the U.S. brief appear below. The United States filed a further reply brief in support of its motion on June 2, 2016. Both U.S. briefs are available at https://www.state.gov/s/l/c8183.htm.[***]

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* * * *

TransCanada brings this suit to challenge the decision of the Secretary of State, with the concurrence of the President of the United States, to deny TransCanada's application to construct and operate oil pipeline facilities to cross the border from Canada into the United States for the transport of up to 830,000 barrels per day of crude oil through the proposed Keystone XL pipeline. Despite having vigorously defended the President's constitutional authority over cross-border oil pipeline facilities in previous litigation, TransCanada now remarkably asserts that the President has no authority to deny the permit. According to TransCanada, this Court should invalidate the Executive's decision because it differs from prior decisions and because it conflicts with congressional bills that never became law. TransCanada essentially seeks to construct and operate a facility that will pump millions of gallons of oil across the United States' international border with no Government authorization—*i.e.*, without Executive approval and under no statutory authority otherwise governing cross-border oil pipelines.

TransCanada's extraordinary request has no basis in law, is inconsistent with historical practice, and is contrary to the allocation of authority in this area between the two political branches. The Supreme Court has recognized that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President" by Article II, Section 1 of the

[***] Editor's note: On March 31, 2017, TransCanada filed a notice of voluntary dismissal of the federal action.

Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); *see also Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). It is well established that the President's Article II power encompasses the authority to control border crossings into the United States. For close to 150 years, Presidents have exercised authority over a wide range of physical connections between the United States and foreign countries pursuant to the President's powers over foreign affairs and as Commander in Chief. Congress has affirmed or accepted this authority by legislating to require Presidential approval for certain types of border crossings and by leaving undisturbed the Presidential permitting requirement for others. Indeed, Congress has enacted no law to question the President's permitting authority in the close to one and a half centuries of the Executive's exercise of such authority. As the Supreme Court has said, "[g]iven the President's independent authority 'in the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval.'" *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 429 (2003) (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)).

In 1968, after nearly 100 years of Executive exercise of authority over border-crossing facilities, President Lyndon Johnson reaffirmed this authority over oil pipeline border crossings in an Executive Order, and President George W. Bush did so again in 2004, *see* Executive Order No. 13337, 69 Fed. Reg. 25,299 (Apr. 30, 2004) (Ex. 1). Those Executive Orders govern a complex policy inquiry to determine whether, in the judgment of the Secretary of State, issuance of any particular permit would "serve the national interest." In the decades that followed President Johnson's order, Congress has enacted no law to displace the President's authority or alter the applicable standard that governs the Executive's decision. On the contrary, the only law that Congress enacted regarding any oil pipeline border crossing—section 501 of the Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, 125 Stat. 1280 (2011)—expressly affirmed the President's constitutional authority to grant the Keystone XL permit "under Executive Order No. 13337" unless the "President determine[d] that the Keystone XL pipeline would not serve the national interest," which the President did both at that time and upon TransCanada's reapplication. Even the bill vetoed by the President that sought to approve the application, the Keystone XL Pipeline Approval Act, S.1, 114th Cong. (2015), did not question the President's constitutional authority in the absence of contrary law; indeed, it was premised on the existence of that authority. The President's authority to deny the permit is indisputable, therefore, both as a matter of law and as a matter of practice.

Specifically, the Executive appropriately exercised its Article II authority in determining that denying the Keystone XL permit was, among other concerns, important to avoid adversely impacting our ability to encourage other countries to take ambitious action to combat an urgent global environmental threat—climate change—that has serious implications for national and international security, in light of the impending December 2015 climate change negotiations among more than 190 nations. Despite TransCanada's attempt to question the Executive's reasons for the decision, this type of foreign policy and national security assessment belongs to the Executive and is beyond the purview of this Court.

TransCanada invokes the tripartite framework first articulated by Justice Robert Jackson in *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring), for evaluating the scope of Executive authority. But unlike the circumstances that led to the outcome in *Youngstown*, this case does not present a conflict between the political branches of the type calling for the Court to determine whether the President's power is "so conclusive and preclusive" as to "disabl[e] Congress from acting upon the subject." *Id.* at 637-38 (Jackson, J., concurring). President Harry

Truman's power to seize the nation's steel mills in order to avert a strike was at its lowest ebb in *Youngstown* because it conflicted with statutes governing precisely when seizure could be used to remedy labor disputes. Here, in contrast, the President's action is not in conflict with any enacted statute. TransCanada tries to manufacture a conflict by pointing to unenacted bills that sought to approve the Keystone XL project or otherwise restrict Presidential authority in this area. But bills that did not become law cannot restrict the President's exercise of long-standing Article II authority without violating the constitutional structure of checks and balances. This Court accordingly cannot invalidate the denial of a Presidential permit to TransCanada on the basis of action that Congress did not take.

* * * *

On June 24, 2016, TransCanada Corporation and TransCanada Pipelines Limited filed claims under the NAFTA for alleged injuries arising out of the denial of the permit. TransCanada sought more than $15 billion in damages for alleged violations of NAFTA Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment) and 1110 (Expropriation and Compensation). The notice of arbitration is available at https://www.state.gov/s/l/c71937.htm.[****]

2. Corporate Responsibility Regimes

a. Voluntary Principles on Security and Human Rights

See Chapter 6 for discussion of U.S. actions on the VPs Initiative in 2016.

b. Kimberley Process

The Kimberley Process ("KP") is an international, multi-stakeholder initiative created to increase transparency and oversight in the diamond industry in order to eliminate trade in conflict diamonds, or rough diamonds sold by rebel groups or their allies to fund conflict against legitimate governments. See State Department Conflict Diamonds webpage, https://www.state.gov/e/eb/tfs/tfc/diamonds/index.htm. For background on U.S. participation in the KP, see *Digest 2014* at 506-07; *Digest 2013* at 183; *Digest 2004* at 653-54; *Digest 2003* at 704-709; and *Digest 2002* at 728-29.

[****] Editor's note: On January 24, 2017, the President issued a Memorandum inviting TransCanada to resubmit its application to the State Department for a permit for the construction of the Keystone XL Pipeline and directing the Secretary of State to make a national interest determination and reach a final permitting decision with respect to the application within 60 days of its submission. On January 26, 2017, TransCanada resubmitted its permit application. On February 27, 2017, the ICSID Secretary-General suspended the arbitration proceeding for one month upon the request of the parties. Acting on behalf of the President under delegated authorities in accordance with Executive Order 13337 and the January 24 Presidential Memorandum, the Under Secretary of State for Political Affairs issued TransCanada a permit for the construction and operation of the Keystone XL pipeline on March 23, 2017. The next day, at the request of the parties, the ICSID Secretary-General issued a procedural order, taking note of the discontinuance of the proceeding.

In 2016, the United States government formalized as a public-private partnership its relationship with the U.S. Kimberley Process Authority ("USKPA"), a not-for-profit organization that supports U.S. implementation of the responsibility to issue certificates accompanying shipments of diamonds to indicate compliance with the Kimberley Process Certification Scheme. The memorandum of understanding, formalizing the public-private partnership, was signed by: U.S. Assistant Secretary of State Charles H. Rivkin on May 5, 2016; USKPA Director Cecilia L. Gardner on April 14, 2016, and U.S. Census Bureau Associate Director for Economic Programs William G. Bostic, Jr. on May 26, 2016.

3. Fiscal Transparency Report

The Department of State issued its 2016 Fiscal Transparency Report pursuant to section 7031(b)(3) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (Div. K, P.L.114-113) ("the Act"). The report, available at https://www.state.gov/e/eb/ifd/oma/fiscaltransparency/260301.htm, reviews governments that receive U.S. government assistance for their compliance with defined minimum requirements of fiscal transparency and their progress toward meeting the requirements during the period of January 1 – December 31, 2015. Of the 64 governments identified as not meeting the minimum requirements of fiscal transparency, Azerbaijan, Central African Republic, Iraq, Mali, Nigeria, Somalia, Tanzania, and Ukraine were found to have made significant progress in 2015 toward meeting those requirements. The report provides government-by-government assessments of all 64 governments that were reviewed.

4. International Financial Institutions

a. Global Concessional Financing Facility

In 2016, the United States welcomed the launch by the World Bank of a Global Crisis Response Platform ("GCRP"), intended to assist low and middle-income countries in coping with the refugee crisis. For middle-income countries, the World Bank established the Global Concessional Financing Facility ("GCFF") to provide concessional financing for projects to benefit refugees and host communities. The GCFF seeks to incentivize countries to align refugee policies with international law and best practices and facilitate access to employment, education, and health services. The United States pledged to contribute at least $50 million over five years to the GCFF in addition to $25 million that the United States had pledged previously for programs in Jordan. A July 28, 2016 World Bank press release, available at http://www.worldbank.org/en/news/press-release/2016/07/28/concessional-financing-facility-funds-projects-to-support-refugees, announced that the first financing in support of refugees and host communities pursuant to the GCFF had been provided in Jordan and Lebanon. In April, the World Bank convened a pledging session in Washington, DC where eight nations and the European Commission pledged a package of more than US$1 billion, comprising US$141

million in grants, US$1 billion in soft loans, and US$500 million in guarantees. See April 15, 2016 World Bank press release, available at http://www.worldbank.org/en/news/press-release/2016/04/15/international-community-endorses-new-initiative-to-support-refugees-host-communities-and-recovery-in-mena.

b. IMF Reform

In 2016, the United States government accepted an amendment of the International Monetary Fund ("IMF") Articles of Agreement to reform its Executive Board and changes to the New Arrangements to Borrow ("NAB"), and also provided U.S. consent to the increase in the U.S. quota at the IMF. The measures were part of a package of IMF reforms recommended by the Obama Administration and the G20 in 2010 in order to modernize IMF governance to better reflect countries' economic weight in the global economy. Excerpts follow (with footnotes omitted) from the memorandum of law prepared by the Office of the Legal Adviser regarding the proposed reform package.

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The Proposed Amendment … and the increase in quota reform are both set forth in IMF Resolution No. 66-2…which was submitted to the IMF Governors on November10, 2010, for a vote without a meeting. The time period by which a member can consent to the increase in the member's quota has been extended multiple times, most recently to June 30, 2016. The increase in quota for all members does not become effective until certain conditions are met, including that the Proposed Amendment has entered into force, which (given the United States' significant voting share) cannot occur without United States' acceptance.

The Proposed Amendment reforms the IMF Executive Board as follows: instead of a Board consisting of five appointed and nineteen elected Executive Directors, it provides for a Board consisting of twenty elected Executive Directors. It also makes fourteen related changes to the IMF Articles of Agreement to update relevant provisions to reflect the all-elected Board, including with regard to election regulations, vacancies, voting, and representation. As described by Treasury, the quota reforms double the IMF's quotas, which are its core resources, thereby putting the IMF's finances on more stable footing, while at the same time reducing U.S. participation in the NAB by a corresponding amount so that the United States' overall financial commitment to the IMF quota and NAB will remain the same. The quota reform package entails changes to the New Arrangements to Borrow …that are discussed below.

As a general matter, the United States participates in the IMF pursuant to the Bretton Woods Agreements Act (BWAA). 22 U.S.C. § 296 et seq. The President has appointed the Secretary of the Treasury as United States Governor to the IMF under the BWAA. See 22 U.S.C. §286a(a).

<u>Authorities Concerning the Amendment to the Articles of Agreement and Consent to Quota Increase</u>

Acceptance of the Proposed Amendment and consent to the quota increase is authorized under section 9002 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (Division K, P.L. 114-113) (SFOAA) which provides:

"The Bretton Woods Agreements Act (22 U.S.C. 286 et seq.) is amended by adding at the end of the following:

'SEC. 71. ACCEPTANCE OF AMENDMENTS TO THE ARTICLES OF AGREEMENT OF THE FUND.

The United States Governor of the Fund may accept the amendments to the Articles of Agreement of the Fund as proposed in resolution 66-2 of the Board of Governors of the Fund.

SEC. 72. QUOTA INCREASE.

(a) IN GENERAL. - The United States Governor of the Fund may consent to an increase in the quota of the United States in the Fund equivalent to 40,871,800,000 Special Drawing Rights.

(b) SUBJECT TO APPROPRIATIONS. - The authority provided by subsection (a) shall be effective only to such extent or in such amounts as are provided in advance in appropriations Acts.'"

The first paragraph under the Direct Loan Program Account subheading in title IX of the SFOAA also appropriates the dollar equivalent of the U.S. quota increase, to remain available until expended, provided that the President designates such amount, and an equivalent amount to be rescinded per the next paragraph of title IX, as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended. The President made this designation on December 18, 2015. …

Authorities Concerning the Changes to the New Arrangements to Borrow

Executive Board Decision No. 15073-(12/1), adopted December 21, 2011 (Decision), changes the amounts of the credit arrangement of participants set forth in Annex I of the NAB decision, effective when certain conditions are met. With regard to the United States, the Decision decreases the U.S. amount by 40,871.8 million Special Drawing Rights. The Decision also amends the NAB decision to require the Fund, at the request of a NAB participant, to effect an early repayment for any outstanding NAB claims that would exceed its new (reduced) credit arrangement.

…Two provisions of the SFOAA are particularly relevant. First, the second paragraph under the Loans to the International Monetary Fund, Direct Loan Program Account (Including Rescission of Funds) subheading in title IX of the SFOAA provides that the dollar equivalent to 40,871.8 Million Special Drawing Rights is permanently rescinded as of the date when the United States rollback of the U.S. credit arrangement in the NAB is effective. Second, section 9001 of the SFOAA amends the provision of the Bretton Woods Agreement Act that authorized the appropriations of the amounts for U.S. participation in the NAB by adding ", only to the extent that amounts available for such loans are not rescinded by an Act of Congress."

Additionally, Section 17(d) of the Bretton Woods Act, codified at 22 U.S.C. 286e-2(d), provides that absent Congressional authorization no person acting on behalf of the United States may instruct the United States Executive Director of the IMF to consent to amendments to the NAB decision that would "significantly alter the amount, terms, or conditions o f participation by the United States" in the NAB. …Congressional authorization for IMF quota reform contained in the SFOAA should constitute sufficient authorization to accept the changes to NAB credit arrangements and amendments to the NAB decision.

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5. Committee on Foreign Investments in the United States

On December 2, 2016, the President issued an order regarding the proposed acquisition of a controlling interest in Aixtron SE by Grand Chip Investment GmbH. The President's determination that the acquisition would not be in the U.S national interest was based on section 721 of the Defense Production Act of 1950, as amended ("section 721"), 50 U.S.C. § 4565. 81 Fed. Reg. 88,607 (Dec. 7, 2016). The order includes the following findings and actions:

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Section 1. *Findings.* I hereby make the following findings:
(a) There is credible evidence that leads me to believe that: (1) Grand Chip Investment GmbH, a limited liability company organized under the laws of the Federal Republic of Germany (Grand Chip); (2) Grand Chip's parent companies Grand Chip Investment S.a.r.l., a company organized under the laws of the Grand Duchy of Luxembourg (GC Investment), and Fujian Grand Chip Investment Fund LP, a limited partnership organized under the laws of the People's Republic of China (Fujian Grand); and (3) Fujian Grand's partners, Mr. Zhendong Liu, a citizen of the People's Republic of China (Mr. Liu), and Xiamen Bohao Investment Co. Ltd., a company organized under the laws of the People's Republic of China (Xiamen Bohao and, together with Grand Chip, GC Investment, Fujian Grand, and Mr. Liu, the Purchasers), through exercising control of the U.S. business of AIXTRON SE., a company organized under the laws of the Federal Republic of Germany (Aixtron), might take action that threatens to impair the national security of the United States. The U.S. business of Aixtron consists of AIXTRON, Inc., a California corporation, the equity interests of AIXTRON, Inc., and any asset of Aixtron or AIXTRON, Inc. used in, or owned for the use in or benefit of, the activities in interstate commerce in the United States of AIXTRON, Inc., including without limitation any interest in any patents issued by, and any interest in any patent applications pending with, the United States Patent and Trademark Office (collectively, Aixtron US); and

(b) Provisions of law, other than section 721 and the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*), do not, in my judgment, provide adequate and appropriate authority for me to protect the national security in this matter.

Sec. 2. Actions Ordered and Authorized. On the basis of the findings set forth in section 1 of this order, considering the factors described in subsection 721(f), as appropriate, and pursuant to my authority under applicable law, including section 721, I hereby order that:

(a) The proposed acquisition of Aixtron US by the Purchasers is hereby prohibited, and any substantially equivalent transaction, whether effected directly or indirectly through the Purchasers' shareholders, partners, subsidiaries, or affiliates is prohibited.

(b) In order to effectuate this order, the Purchasers and Aixtron shall take all steps necessary to fully and permanently abandon the proposed acquisition of Aixtron US not later than 30 days after the date of this order, unless such date is extended by the Committee on Foreign Investment in the United States (CFIUS) for a period not to exceed 90 days, on such

written conditions as CFIUS may require. Immediately upon completion of all steps necessary to terminate the proposed acquisition of Aixtron US, the Purchasers and Aixtron shall certify in writing to CFIUS that such termination has been effected in accordance with this order and that all steps necessary to fully and permanently abandon the proposed acquisition of Aixtron US have been completed.

(c) From the date of this order until the Purchasers and Aixtron provide a certification of termination of the proposed acquisition to CFIUS pursuant to subsection (b) of this section, the Purchasers and Aixtron shall certify to CFIUS on a weekly basis that they are in compliance with this order and include a description of efforts to permanently abandon the proposed acquisition of Aixtron US and a timeline for projected completion of remain- ing actions.

(d) Any transaction or other device entered into or employed for the purpose of, or with the effect of, avoiding or circumventing this order is prohibited.

(e) The Attorney General is authorized to take any steps necessary to enforce this order.

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Cross References

Treaties generally, **Chapter 4.A.1.**
Marrakesh and Beijing treaties transmitted to Senate, **Chapter 4.A.2.**
Right to food (WTO ministerial in Nairobi), **Chapter 6.E.1.**
Responsible business conduct, **Chapter 6.F.**
Relations with Cuba, **Chapter 9.A.3.**
Application of FSIA in enforcement of arbitral award, **Chapter 10.B.1.**
Weinstein v. Iran, **Chapter 10.B.6.a.(5)**
Private international law, **Chapter 15**
Transmittal of treaties on arbitration and international trade, **Chapter 15.A.3.**
Applicability of international law in cyberspace, **Chapter 18.A.3.d.**