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## CHAPTER 4

### Treaty Affairs

#### A. CONCLUSION, ENTRY INTO FORCE, AND RESERVATIONS

##### 1. Treaties and International Agreements Generally

On October 15, 2016, State Department Legal Adviser Brian J. Egan spoke at Yale Law School on the future of international agreements. Mr. Egan’s remarks are excerpted below and available at

<http://2009-2017.state.gov/s/l/releases/remarks/263221.htm>.

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...[T]oday, I’d like to focus on one particular part of this topic that should be important to future Administrations, whatever their makeup. And this is the need to preserve the continued importance and vitality of Article II treaties in our system.

There appears to be much talk in academic circles about the “end”—including the end of Article II treaties. I submit that Article II treaties are not dead, although some notable failures to garner Senate advice and consent in recent years warrant further reflection and examination. It is also true that some Article II treaties continue to generate anxiety. I’ll explain why I think that general anxiety over treaties is unwarranted and curtails the United States’ ability to promote U.S. interests and values.

In short, I will use these brief remarks on Article II treaties to suggest some occasions for optimism, some causes for concern, and some proposals for progress.

First, let’s talk about why we should be optimistic.

In spite of the widely publicized recent failures to provide advice and consent to the Disabilities Convention and the Law of the Sea Treaty earlier in the Obama Administration, a host of other treaties have received the required 2/3 vote in the same timeframe. For all the challenges the advice and consent process sometimes poses, it’s clear that—even in the current environment—the executive branch and the Senate can work together effectively on treaties. As recently as the 110th Congress of 2007 to 2008, the Senate provided advice and consent to over 80 treaties across a broad range of subject matters. For example:

1. Treaties in the environment area addressing control of anti-fouling systems on ships and land based sources of marine pollution;
2. Treaties in the law of armed conflict area addressing explosive remnants of war, use of blinding laser weapons, use of incendiary weapons, and protection of cultural property during armed conflict;
3. Intellectual property conventions addressing patents, trademarks, and international regulation of industrial designs;
4. Treaties addressing cooperation to combat terrorism and the proliferation of weapons of mass destruction; and
5. A range of law enforcement treaties enhancing law enforcement cooperation with the European Union and its member states.

During the most recent Congress, much of the focus in this area has been on two instruments that were not Article II treaties: the Joint Comprehensive Plan of Action with Iran, and the Paris Agreement. Less attention has been paid, however, to recent, enhanced efforts by the Administration and the Senate to work together on pending Article II treaties. Those efforts have resulted in seven treaties being approved by the Senate this year. While seven is significantly fewer than 80, seven is not “zero.”

Two of the treaties approved by the Senate this year are multilateral treaties—one addressing access to plant genetic resources, and the other addressing choice of law rules regarding certain transactions involving securities. Five bilateral law enforcement treaties were also approved. This of course follows on the heels of the successful partnership between the Administration and the Senate in 2010 to ratify the New START treaty with Russia.

A few things are notable about these successes:

First, they each occurred in periods of divided government. During the 2007-2008 period, the Republicans held the White House and the Democrats controlled the Senate. And our recent, albeit more modest, successes occurred with a Democratic President and a Republican-controlled Senate. So this history demonstrates that bipartisan cooperation on treaties is possible, even in polarized times.

Second, a number of the treaties approved during these periods were non-routine multilateral agreements. In approving them, the Senate was not simply deferring to familiar past practice. Rather, these treaties required at least two-thirds of the Senate to make judgments about the merits of a variety of unique treaty regimes, each with diverse groups of stakeholders, and impacting a range of U.S. interests. The Senate’s approval of these treaties confirms the continuing support for the view that multilateral cooperation through treaties can advance U.S. interests.

Third, a number of these treaties were approved by the Senate subject to declarations that they are self-executing—in other words, that they can be enforced by our courts without further legislation. Among these is the recently passed Hague Securities Convention, which addresses transactions that are otherwise governed by state law enactments of the Uniform Commercial Code and thus interfaces significantly with state law. This suggests, even in a time of increased attention to federalism issues, support from a substantial majority of the Senate for having treaties operate directly in U.S. law at least in some categories of cases, including in ways that may displace state law.

Declarations of self-execution are a recent phenomenon in U.S. treaty practice, and they are indicative of the Senate’s increasing sophistication in its use of reservations, understandings and declarations to facilitate entering into treaties that might otherwise raise federalism or other

types of concerns. As most of you already know, reservations, understandings and declarations, or “RUDs,” are tools the Senate has long used to address risks or concerns about particular treaties in a way that would allow the United States to join. Where a treaty’s provisions may be ambiguous on particular points of importance to the United States, we have often publicly stated how we will interpret the provision, and such interpretive understandings are often included in the Senate’s resolution of advice and consent approving ratification of the treaty. Such statements are also used to indicate how a treaty’s provisions relate to U.S. law and how the United States expects to implement them. In some instances, treaties permit reservations, allowing the United States to decline to accept particular obligations that it disagrees with or that would conflict with our law. As some of you have discussed in your writings, there are of course limits to the use of RUDs—sometimes in the text of the treaty itself, and as a matter of customary international law. But in general, I think that RUDs, used appropriately, are an important mechanism for facilitating the treaty approval process.

In recent decades, RUDs adopted in approving treaties have included provisions to address concerns related to the potential impact of the treaties on U.S. states and to ensure that treaties won’t be interpreted to require or authorize actions prohibited by the Constitution. They also include so-called declarations of non-self-execution, which ensure that the treaties won’t create rights enforceable in U.S. courts independent of the laws relied on to implement the treaties. U.S. courts, including the Supreme Court, have routinely given effect to such conditions when considering claims involving these treaties. The use of RUDs has proven to be successful and is an important tool for facilitating continued work on Article II treaties between the political branches of government.

Our track record on finding mechanisms for joining treaties, including complex multilateral treaties, suggests that there are many reasons to see the Article II treaty glass as half full. However, there are other aspects of the Senate’s approach to certain treaties that create cause for concern, and that are worth examining:

As the Senate has recognized in a variety of contexts, RUDs can be highly effective. However, they have not always been sufficient to generate the required support for a given treaty. And some have suggested that doubt exists as to whether these tools can be fully effective even in contexts in which they have been used previously. For example, during the Senate’s consideration of the Convention on the Rights of Persons with Disabilities in 2013, the then ranking member (and now Chairman) of the Senate Foreign Relations Committee Bob Corker announced that he could not support the Convention because U.S. ratification could “undermine the constitutional balance between the state and federal governments and the legitimacy of our democratic processes.” He expressed uncertainty that “even the strongest RUDs” designed to address such concerns “would stand the test of time,” and said that, “any uncertainty on this issue is not acceptable.” To some, this is reminiscent of the controversy surrounding World War II-era human rights treaties that nearly resulted in the adoption of the Bricker Amendment. Among other things, the Bricker Amendment would have required that treaties could become effective as domestic law in the United States only through enactment of legislation that would be valid in the absence of the treaty—meaning both that treaties could never be self-executing and that Congress could not rely on a treaty to enact legislation necessary and proper to its implementation.

Senator Corker’s statement doesn’t indicate any particular instances in which he believes prior human rights treaties approved in this way have harmed our Constitutional system. I would submit that the “test of time” has actually shown the absence of any such problems. In other

words, the Senate and executive branch have managed to enter a variety of multilateral treaties under conditions that appropriately addressed and minimized federalism and related constitutional concerns.

The United States has had a successful experience with joining and implementing such human rights treaties in a manner consistent with our Constitution. Beginning with U.S. ratification of the Genocide Convention in the 1980s, we have established a consistent practice of support for core human rights treaties based on the understanding that such treaties, are consistent with—and help promote—U.S. human rights interests and values, including the ability to exercise political and moral leadership on issues of human rights and human dignity. In joining these treaties, the United States has relied on a variety of reservations, understandings and declarations to ensure that the United States could join in a manner consistent with our Constitution. Similar approaches have been followed in respect to the United States' joining the Convention Against Torture, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Presidents Reagan, George H.W. Bush, and George W. Bush advocated for ratification of these human rights treaties—which address genocide, torture, civil and political rights, and human trafficking and sexual slavery—subject to appropriate reservations, understandings and declarations. None of this would have been possible if past Presidents and Senates had believed that RUDs were ineffective tools in the way Senator Corker appears to suggest.

Given this history of reliance on RUDs, it would be worrying if the Senate came to doubt the effectiveness of RUDs approved by the Senate to address federalism or other potential concerns. In the absence of tools capable of addressing such concerns, the default position for many Senators with such concerns may be to oppose treaties altogether. In my view, this stance would be unnecessary and would come at a great cost to the ability of the United States to exercise political and moral leadership on issues of human rights and human dignity. A fresh look at using these tools in a manner consistent with the Senate's practices over the last several decades could help to provide paths toward approval for more treaties.

These points connect to a larger point about how we approach treaties generally. The United States takes treaty obligations seriously. For that reason, we give treaties careful consideration before joining them. We want to be sure we understand what they mean, how we will implement them, and whether they advance U.S. interests and values. This is all as it should be, and is extremely important. This judicious approach to treaties does not, however, require that every treaty be perfect in every respect in order for joining a treaty to be in our interests. It should not mean that any hypothetical risk associated with joining a treaty, no matter how remote or implausible, should serve as a bar to our joining, particularly when tools are available to address such risks.

President Reagan saw treaties in these terms. In recommending U.S. ratification of the Convention Against Torture, he noted that, "In view of the large number of States concerned, it was not possible to negotiate a treaty that was acceptable to the United States in all respects." This fact, however, did not cause Reagan to oppose the Convention. Rather, he recommended to the Senate that the United States join the Convention subject to certain RUDs to address a series of concerns he had with the Convention. This approach to treaties is consistent with common sense approaches we see in other areas. Legislators in our Congress and in our state legislatures are familiar with the need to compromise in order to enact laws that benefit their constituents,

and that often involves supporting legislation that includes some provisions they personally oppose. Similarly, businesses regularly negotiate contracts that involve compromises but that on balance produce benefits that will help them become more profitable.

Seeing treaties in this vein can lead to a more balanced view of the costs and benefits associated with a treaty. Whatever concerns one might have, for example, about the International Seabed Authority created under the Law of the Sea Convention, are they really so significant as to justify our staying out of a regime that codifies for the world our views about the uses of the oceans and provides enormous benefits to our military and industry?

Does the possibility that a human rights treaty body might make a recommendation regarding the interpretation of the treaty that we disagree with and remain free to disregard really mean that we should stay outside the treaty and forfeit our ability to lead and shape the international community's approaches on matters of human rights and human dignity? In short, taking treaties seriously should not mean that we focus only on the ways in which a treaty might lead to outcomes of concern. Rather it should also mean that we look closely at the ways we can mitigate such risks, using all the tools available to us, and that we consider any such risks in the contexts of the benefits that joining the treaty regime can provide.

Often these benefits are practical and tangible. Our joining the Law of the Sea Convention, for example, would clarify U.S. sovereign rights over maritime areas and would promote the maritime mobility of the U.S. military. Sometimes, the benefits are to ensure continued U.S. leadership on an issue of importance to our country. In the disabilities area, our Americans with Disabilities Act was groundbreaking legislation in establishing standards for prohibiting discrimination and ensuring equal opportunity for persons with disabilities. Our Congress led with this law, and the core principles in the Disabilities Convention can be found in our own ADA.

Another area in which recent efforts on treaties have been less successful is tax treaties. Historically, tax treaties have been among the least controversial treaties, and they have enjoyed broad bipartisan support. The United States has tax treaty relationships with over 60 countries, pursuant to treaties that have received the Senate's advice and consent. Tax treaties help U.S. businesses by providing greater certainty regarding their potential liability for tax in foreign jurisdictions, and by allocating taxing rights between jurisdictions to reduce the risk of double taxation. They also provide important tools to prevent tax evasion, including mechanisms allowing for the exchange of information between tax authorities to assist in the administration and enforcement of tax laws.

However, the Senate has not approved a tax treaty since 2010. The Senate Foreign Relations Committee has favorably reported tax treaties to the full Senate without opposition in each of the last three Congresses, but in each instance a single Senator has objected to their approval. Eight tax treaties are currently on the Senate's executive calendar and sitting in limbo. Given that, under the Constitution, a two-thirds majority of the Senate is sufficient to advise and consent to ratification of a treaty, the opposition of one Senator should not be enough to defeat a treaty. Yet, to date, the Senate has been unwilling to hold a vote on tax treaties to allow the voices of the Senate as a whole to be heard on the matter. Though the practice has been less common in recent years, in the 1980s the Senate frequently held roll call votes on treaties, precluding isolated minority views from preventing the Senate from providing its advice and consent. Voting, of course, requires the Senate to find time on a full calendar to debate an issue and may come at the expense of its ability to spend time on other pressing matters. But the alternative establishes a de facto unanimity requirement for treaties. And in the case of the tax

treaties, this would result in an indefinite halt to forging new cooperative relationships on tax matters, harming the interests of U.S. businesses and our ability to combat tax evasion. So the time has come for the Senate to hold a vote to approve the tax treaties.

Rather than end on a despairing note, let me conclude with some proposals for progress at this important juncture. This is a particularly useful moment to be considering our approach to treaties. We are about to experience a Presidential transition and the beginning of a new session of the Senate. Lessons from this recent experience can usefully inform the next Administration and Senate and help guide cooperation on treaties. With this in mind, I'd like to offer a few thoughts on steps both branches can take to promote productive work on treaties in the period ahead.

First and foremost is dialogue. Successful efforts on treaties require the active engagement of both the executive branch and the Senate. Dialogue between the branches throughout the treaty process is essential, and touches a range of issues. To name a few:

- Treaty negotiation: Executive branch engagement with the Senate early in the treaty negotiating process can play a very important role in maximizing chances for treaty approval. Doing so gives the Senate a chance to learn about the problem to be addressed by a proposed treaty, to provide input on issues in the negotiation, and to become a stakeholder in the outcome.
- Development of a treaty agenda: Dialogue between the executive branch and the Senate on a treaty agenda can help both branches focus efforts on treaties that have the greatest chances of winning support, as well as identifying areas where further work can create additional opportunities.
- Treaty ratification process: Close consultation between the executive branch and the Senate in preparing for hearings on treaties and drafting resolutions of advice and consent is critical to identifying issues that may need to be addressed and developing workable solutions that advance a treaty's chances for approval.

The importance of dialogue isn't limited to the executive branch and the Senate. Successful efforts on treaties also require engagement with treaty stakeholders, including the private sector, civil society, interest groups, scholars and others—including state and local governments. These actors are often among the most effective advocates for (or against) treaties that affect their interests, and mobilizing their support and addressing their concerns is critical. The area of private international law provides one example of the importance of this collaboration. The United States is a relative newcomer to the field. Although Europe began work in earnest on private international law treaties in the 19th century, the United States did not actively participate in negotiations over private international law instruments until the 1960s. Our reluctance was based in significant part on federalism concerns—the idea that commercial law was an area for the U.S. states to regulate. Over time, we have learned how to work with state law officials, the private sector, and academic experts to develop a practical private international law agenda—to prioritize our work on areas that have tangible benefits, in a manner that can be compatible with U.S. state law.

It's also important for the executive branch and Senate to prioritize work on treaties.

- For the executive branch's part, this requires giving early and consistent attention to treaties and how they fit into a broader policy agenda. This can be done in part through of the "treaty priority list" that the State Department usually transmits to the Congress at the beginning of a new Congress. This can also be accomplished by considering whether the negotiation of new treaties would advance important objectives in particular areas, or

whether those objective can be met better through other legal instruments. This work can then inform efforts advance work on treaties both in the Senate and with international partners.

- For the Senate’s part, prioritizing treaties requires planning for work on them as an integral part of its legislative agenda. The Senate Foreign Relations Committee can develop a treaty work plan, allocating time on the Committee’s calendar for hearings on treaties at regular intervals throughout the year. And, while many treaties can proceed without controversy, others—as I noted earlier—may require debate or roll call votes. Allocation of time on the Senate calendar for these steps is important as well.

In addition, it will be important for the next Administration to be able to explain the benefits of treaties and to advocate effectively on their behalf. ... [W]inning support for particular treaties requires explaining the tangible benefits a treaty provides and why it advances U.S. interests. This is an area where we as a government can and should sharpen our efforts. The next Administration should give careful thought about how to make better use of its public messaging and public diplomacy tools to effectively make the case for treaties.

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Deputy National Security Adviser Avril Haines also spoke at Yale Law School on October 15, 2016 on the importance of treaties. Her remarks are excerpted below and available at <https://obamawhitehouse.archives.gov/the-press-office/2016/10/19/remarks-dnsa-avril-d-haines-yale-law-school-importance-treaties>.

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As Brian indicated in his remarks, in recent years, we have experienced a backlash against treaties. I am the first to admit that you have to judge the substance of a treaty—not every deal is a good deal—but the criticism has frequently been framed against treaties generally. They are criticized as unnecessary limitations on our sovereignty, tools for the federal government to take power away from the states, and vehicles through which the United States submits itself to international bodies that do not share our values.

I have an entirely different image of treaties that I want to share with you—not as a treaty lawyer but as a policymaker and a national security professional in today’s complex world. I see treaties as enablers of U.S. foreign policy and core U.S. interests. From my perspective, treaties—whether advice and consent, or otherwise—are absolutely essential to meeting the challenges we face as a country. We need to change the conversation about treaties.

Brian explained how, as a legal matter, there are tools available to the Senate for addressing risks or concerns about particular treaties, including any federalism issues that are raised. What I thought I would spend my time on is why we need treaties; how we use treaties, international agreements, and even non-legally binding commitments to advance American interests; and then give you a sense of why I believe that if we turn away from treaties as a tool of foreign policy or demand that they only be ratified if no compromises have been made in the context of negotiations, we will be abdicating U.S. leadership in the world when it is sorely needed and to our great advantage as a country.

Let me start on an optimistic note. Thanks in large part to the international system that the United States has played a leading role in building and maintaining, we are living in the most prosperous and progressive era in human history. ...

At the same time, we live in an increasingly complex and fast-paced world—one in which issues that first arise across the globe can reach our shores in record time or impact us from abroad, creating national security challenges for the United States. ...

Naturally, people question whether governments can meet all of these challenges and threats. We see this in polls reflecting the falling trust that people have in their government—not just in the United States but in Europe and elsewhere around the world.

So how do we address the challenges and harness the opportunities? When defining our core interests as a nation, past administrations have typically focused on three: security, prosperity, and values. We added a fourth to our National Security Strategy: promoting international order—or, as the 2015 strategy put it, “a rules-based international order advanced by U.S. leadership that promotes peace, security, and opportunity through stronger cooperation to meet global challenges.”

Why make this change? Why emphasize it as a core national interest? Because it is through a rules-based international order that we are able to promote security, prosperity, and even our values and without it, we are in danger of not achieving these core interests. The United States, as powerful as it is, cannot bear every burden alone—nor should we seek to do so. Establishing multilateral frameworks is how we address challenges that span borders and amplify our ability to prevent and respond to increasingly complex threats that demand coordinated action. A rules-based order promotes prosperity and influences behavior without the need to resort to military force. A rules-based order has served us well in promoting our values, such as equality and human dignity. That’s why—as the United States has recognized from our founding to the creation of the post-war international framework to today—fostering a rules-based international order is not just a nice idea, but a core national interest. Of course, treaties and other international instruments, form the backbone of a rules-based international order.

Let me give you a few examples to illustrate my point. When Ebola swept through West Africa, our response benefitted greatly from the resources of the World Health Organization, which was established by an international agreement. When the globe was gripped by a worldwide financial crisis, the World Bank and IMF, two institutions founded by treaties, allowed us to take measures to respond and mitigate the recession. And when we need a force to maintain fragile peace in South Sudan, Haiti, or Kashmir, the Security Council, an organ of the United Nations established by treaty, is empowered to send in those Blue Helmets. In other words, treaties framing the international order allow us to mobilize unprecedented collective action to address challenges central to global prosperity and stability.

Treaties and other forms of international agreements are likewise important to our economy: free trade agreements, bilateral investment treaties, and the WTO contribute to our economic growth by helping American businesses operate in and export their products to foreign markets and protect the intellectual property of American innovators. Bilateral tax treaties make it so that U.S. companies with overseas presences are not subject to double taxation.

Another example is the Iran nuclear deal, which demonstrates how a rules-based international order can provide sufficient leverage to change another country's behavior in our national security interest without resorting to the use of military force. We imposed unprecedented sanctions on Iran through the Security Council in response to its nuclear program, and then led a hard-fought campaign of multilateral diplomacy that achieved the Joint

Comprehensive Plan of Action. As a result, Iran has dismantled two-thirds of its installed centrifuges and shipped 98 percent of their enriched uranium stockpile out of the country, and we've put a lid on its nuclear program without firing a shot.

Or take the South China Sea. To be sure, we've seen growing tensions between China and Southeast Asian nations over maritime claims. But, recently, we saw the Philippines make a lawful and peaceful effort to resolve their maritime claims with China using the tribunal established under the Law of the Sea Convention. The tribunal's ruling delivered a clear and legally binding decision on maritime claims in the South China Sea as they relate to China and the Philippines—a ruling that we and a number of other countries have made very clear should be respected. Without the Law of the Sea Convention to establish clear rules of the road—or the ocean, as the case may be—the risk of a clash between competing claimants could well be higher.

And through a rules-based order, we are able to lead by example and promote U.S. values. Brian talked about the Genocide Convention and other core human rights treaties that promote U.S. interests in preventing atrocities and promoting universal rights and fundamental freedoms. Of course, this really only works when we can actually demonstrate that the rules and principles underpinning the order we are crafting, apply to the United States as much as to other countries. As a party to the WTO, we've shown that even a nation as powerful as the United States is not above the law if we commit trade violations or other infringements. And, in a number of instances, we've agreed to adopt a uniform set of rules governing particular conduct or transactions, such as intellectual property treaties and certain environmental agreements.

This brings me to the heart of my talk and today's event. Treaties and other forms of international agreements underwrite so many of the institutions, rules, and structures that are critical to the international order—and therefore to U.S. interests. And the same charges made against the international order frequently are leveled against treaties—that they're obsolete in today's world, that they reduce our national power, or that they require us to compromise our sovereignty.

In my view, the very opposite is true. Treaties are at least as essential today as they have ever been. They are a vital tool in helping the United States achieve our national objectives. And they provide a framework in which we can harness the cooperative energy of other countries to address threats that no single nation—no matter how powerful—can address on its own.

I recognize that there are scholars who see international law as an impediment rather than as an enabler. There are those who argue that entering into arms control treaties with Russia limits American military options while Russia ignores its obligations. Or that adhering to the laws of armed conflict places us at a disadvantage when our enemies flout the rules. Or that ratifying the UN Disabilities Treaty would allow an international committee to tell American parents how to raise their children. I won't address each substantive issue—suffice it to say that I believe we should join the UN Disabilities Treaty, remain convinced that following the law of armed conflict is critical, and that arms control treaties, while not perfect, remain among the best mechanisms I know for promoting a safer world. But I would like to make two broader points.

First, I don't think those same critics are necessarily saying that all treaties are bad—just some of them because of concerns about substance or actors, or both. And thus I would ask you, as you write on these issues, that you make the point that treaties or other international instruments are not, in and of themselves, problematic, as I fear that gets lost in the public debate.

I doubt, frankly, that anyone—on a bipartisan basis—would regard most treaties as problematic. But the average person may not realize how often we all rely on legal frameworks established by treaties. When you want to call, email, or send a letter to a friend living abroad, you're able to do so thanks to rules established by treaties. One of the reasons that you can feel reasonably assured of your safety when getting on a commercial flight in countries around the world is that the International Civil Aviation Organization establishes safety standards. Treaties help improve the quality of our air and ensure that food imported from abroad doesn't make us sick. Overall, the United States is a party to over 10,000 treaties—and that's a good thing for enhancing our everyday lives and advancing American interests in the world.

Second, if we are to reap the benefits of negotiated international instruments, while we should insist on a good deal for the United States, we should also be prepared to comply with the rules we are telling everyone else to comply with and to take on some risk with respect to, for example, the possibility that international mechanisms we establish will not always do exactly what we want them to do, so long as we believe that they are worth it in the long run as mechanisms that promote U.S. security, prosperity, and values.

My concern is that this strain of skepticism regarding treaties and other international instruments has stymied what has long been a healthy dynamic between Congress and the White House, regardless of which party has been in power—and the impact has been stark. Since 1960, the U.S. Senate has provided advice and consent to ratification of over 800 treaties, a rate of more than one treaty every month. Between 1995 and 2000, when President Clinton was in office and Jesse Helms chaired the Senate Foreign Relations Committee, the Senate approved over 140 treaties, including the Chemical Weapons Convention, the START Treaty, and treaties dealing with labor rights, law enforcement cooperation, environmental protection and investment protection.

But since 2009 the Senate has provided advice and consent to just 20 treaties, or roughly 2.5 per year—a fraction of the historical average. While we have seen some signs of progress in the past few months of this Congress, the trend line is not encouraging.

That is to our detriment as a nation, and this skeptical attitude toward treaties would have been surprising to our founders, who routinely relied on treaties to build political and economic relationships. The prominent placement of treaties in our Constitution is due to the founders' strong belief that entering into treaties with other nations and carrying out the obligations they provide for were essential tools to allow the country to protect and advance its interests in the world.

The insight central to this view—that our country is stronger when we can work together with other nations and that some problems we face can't be solved by our efforts alone—is truer today than ever before. Treaties are essential to helping us address the increasing number of global challenges that affect us and are important even with respect to domestic challenges, given the mobility of our citizens, the increasing contact that our citizens have with persons and entities outside of the United States, and the impact that the world has on the United States. And as the challenges evolve, so should our legal framework, which means new treaties or other international instruments.

This is my final point. Another charge against treaties is that they are obsolete—we have done what we need to do in treaty form. This is a point generally made with respect to advice and consent treaties because we have all seen the challenges associated with Senate approval, but I simply do not accept that assertion; why would we willingly give up on a type of international agreement, particularly given the potential limits that might provide on what we can negotiate

with other countries? We should not accept this. Some argue that we've established all of the multilateral and bilateral frameworks needed but nothing could be further from the truth. We need every tool and we need to ensure that our legal frameworks evolve in step with the challenges and opportunities we face as a country.

Over the last eight years, at the President's direction, we have worked to advance our core interests in the international order by building on existing legal frameworks—or creating new ones—that allow us to share the burden in meeting the global challenges we face, while simultaneously reducing the chance of conflict and instability. As President Obama told graduates at the Air Force Academy earlier this year, “one of the most effective ways to lead and work with others is through treaties that advance our interests.”

The President rallied the world against the threat of climate change with the historic Paris Agreement, and after a long night in Kigali, Rwanda—we just adopted an amendment to the Montreal Protocol to phase down harmful emissions like hydrofluorocarbons, which is a particularly potent greenhouse gas. We're working to strengthen our economy through TTIP (the Transatlantic Trade and Investment Partnership), as well as TPP (the Trans-Pacific Partnership), an agreement that, if approved by Congress, will advance America's economic and strategic interests by helping us sell more American exports to the Asia Pacific, leveling the playing field for our workers and establishing strong labor and environmental standards. We've bolstered our security through the New START Treaty with Russia to reduce nuclear stockpiles, and by concluding a protocol to allow Montenegro to join NATO, which is now pending in the Senate. Every one of these new instruments represent critical developments that were built on existing instruments, many of which were advice and consent treaties.

Far from tying our hands, treaty regimes serve as mechanisms through which the United States exercises its power and advances its interests and values. When the United States negotiates environmental treaties, for example, that obligate other countries to take measures that we typically already take domestically, we are effectively shaping the world's approach to dealing with environmental problems, raising foreign standards to meet our own, leveling the playing field for our industries, and helping to protect the health of our people. When we negotiated the Law of the Sea Convention, we enshrined rules regarding freedom of navigation and rights of coastal states that benefit the United States more than any other state. Conversely, when we choose to stay outside treaty regimes, we allow others to shape the terms of international cooperation, in ways that maximize their interests and advance their values rather than our own. It means, for example, that our companies will have to operate under others' rules in many of the places they do business around the world—or else, in the absence of international legal frameworks, operate in a less predictable and certain environment.

So treaties and international agreements play a vital role in upholding the international order and advancing our interests. Nevertheless, the institutions and norms built up in the post-war era are being tested—by the forces of globalization, by an unprecedented migration crisis, by growing regional and sectarian violence. We cannot ignore the fact that the benefits of globalization and automation have not been distributed equally. We cannot ignore the inequality within and among nations, or the fact that international institutions are ill-equipped, underfunded, and under-resourced to handle the problems we are handing them. For example, if we do not address the growing inequality in many states, we're likely to see economic retrenchment, further political polarization between the “haves” and “have-nots,” and a return to mercantilist economic policies that would endanger American access to foreign markets and

threaten global economic growth—and a withdrawal from U.S.-led international organizations and agreements.

The key is that we cannot hope to address the impact of these vital trends without engaging the world and ultimately developing and strengthening the international mechanisms discussed, which are established by treaties. And this is true across the board from a foreign policy and national security standpoint. Whether we are trying to strike the right balance in the South China Sea between demonstrating resolve and avoiding inadvertent escalation, or reassuring our allies and reinforcing resilience in Europe in the face of a migrant crisis, or in adapting the U.S. government’s capacity to exploit new opportunities and mitigate risks associated with an emerging technological landscape. International legal mechanisms are among the most important tools we have for addressing these policy issues.

I hope I have convinced you to stand up for treaties. I don’t mean to suggest that you should not criticize the substance of particular treaties—and although I have views on that too, I am not taking that up today. I just ask that you separate out your concern over substance, even if linked to trends in treaty-making, from concerns regarding treaties generally as an instrument in foreign policy, which needs to be preserved, as treaties are the backbone of a rules-based international order that serves the interests of the United States and ultimately promotes U.S. security, prosperity, and values.

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## **2. Treaties Transmitted to the Senate**

The President transmitted eleven treaties to the U.S. Senate for its advice and consent to ratification in 2016. Those transmitted in 2016 are:

1. The United Nations Convention on the Use of Electronic Communications in International Contracts, done at New York on November 23, 2005, and signed that day on behalf of the United States (S. Treaty Doc. 114-5); transmitted to the Senate February 10, 2016.
2. 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, and signed on behalf of the United States on October 2, 2013 (S. Treaty Doc. 114-6); transmitted to the Senate February 10, 2016.
3. The United Nations Convention on the Assignment of Receivables in International Trade, done at New York on December 12, 2001, and signed on behalf of the United States on December 30, 2003 (S. Treaty Doc. 114-7); transmitted to the Senate February 10, 2016.
4. The Beijing Treaty on Audiovisual Performances, done at Beijing on June 24, 2012, and signed on behalf of the United States on June 26, 2012 (S. Treaty Doc.: 114-8); transmitted to the Senate February 10, 2016.
5. United Nations Convention on Independent Guarantees and Stand-By Letters of Credit, done at New York on December 11, 1995, and signed on behalf of the United States on December 11, 1997 (S. Treaty Doc. 114-9); transmitted to the Senate February 10, 2016.

6. Extradition Treaty between the Government of the United States of America and the Government of the Dominican Republic, signed at Santo Domingo on January 12, 2015 (S. Treaty Doc. 114-10); transmitted to the Senate February 10, 2016.
7. Treaty between the United States of America and the Republic of Kazakhstan on Mutual Legal Assistance in Criminal Matters, signed at Washington on February 20, 2015 (S. Treaty Doc. 114-11); transmitted to the Senate March 17, 2016.
8. Protocol to the North Atlantic Treaty on the Accession of Montenegro, done at Brussels May 19, 2016, and signed that day on behalf of the United States (S. Treaty Doc. 114-12); transmitted to the Senate June 28, 2016.
9. Treaties on the delimitation of maritime boundaries between the United States of America and the Republic of Kiribati, signed at Majuro September 6, 2013, and between the United States of America and the Federated States of Micronesia, signed at Koror August 1, 2014 (S. Treaty Doc. 114-13); transmitted to the Senate December 9, 2016.
10. The Arms Trade Treaty, done at New York April 2, 2013, and signed on behalf of the United States on September 25, 2013 (S. Treaty Doc. 114-14); transmitted to the Senate December 9, 2016.
11. United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, done at New York December 10, 2014, and signed on behalf of the United States on March 17, 2015 (S. Treaty Doc. 114-15); transmitted to the Senate December 9, 2016.

### **3. Senate Advice and Consent to Ratification of Treaties**

The U.S. Senate provided its advice and consent to ratification of seven treaties in 2016. See Chapter 3 for discussion of the U.S. Senate's advice and consent to ratification of extradition and mutual legal assistance treaties in 2016. See Chapter 13 for discussion of the U.S. Senate's approval of the Treaty on Plant Genetic Resources for Food and Agriculture on September 28, 2016. See Chapter 15 for discussion of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, also approved on September 28, 2016.

### **4. ILC Work on the Law of Treaties**

On October 24, 2016, Department of State Legal Adviser Brian J. Egan, delivered remarks at the 71st Session of the UN General Assembly Sixth Committee on the work of the International Law Commission ("ILC"). His remarks on the topic of subsequent agreements and subsequent practice in relation to interpretation of treaties are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7560>.

Mr. Chairman, turning to the topic of “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, the United States would like to thank the Special Rapporteur, Professor Georg Nolte, and the Commission for their extensive and impressive work on this important topic. We have begun our review of the draft conclusions and lengthy commentary and look forward to commenting next year.

In the meantime, we would like to note certain of our concerns with the draft conclusions as adopted by the Commission on first reading.

We are particularly focused on paragraph 3 of Draft Conclusion 12, which states that the “practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.”

The draft commentary explains that the purpose of this provision is to address the role of the practice of an international organization “as such” in the interpretation of the instrument by which it was created. In other words, it refers, not to the practice of the States party to the international organization, but to the conduct of the international organization itself. In citing VCLT articles 31(1) and 32, the Commission recognized that the practice of that international organization is not “subsequent practice” for the purposes of the rule reflected in Vienna Convention, Article 31(3)(b), which we believe is correct because the international organization itself is not a party to the constituent instrument and its practice as such, therefore, cannot contribute to establishing the agreement of the parties.

However, in light of the inapplicability of Article 31(3)(b), the draft conclusion states instead that consideration of the international organization’s practice is appropriate under paragraph 1 of Article 31 as well as Article 32 of the Vienna Convention.

The United States believes that paragraph 1 of Article 31 is not relevant in this context. Paragraph 1 reads: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose.” The factors to be considered pursuant to Article 31(1)—“ordinary meaning,” “context” and “object and purpose”—do not encompass consideration of subsequent practice regardless of whether the actor is a party or the international organization. The draft commentary fails to explain how Article 31(1) can properly be interpreted—consistent with the Vienna Convention itself—in this way. Indeed, it provides no support for this proposition, such as in relevant international or national case law.

Article 32 of the Vienna Convention may potentially provide a basis for considering the practice of an international organization with respect to the treaty by which it was created, particularly where the parties to the treaty are aware of and have endorsed the practice. We believe that circumstances in which the practice of the international organization may fall within Article 32, however, would need to be explained in the commentary. The current draft does not do so.

Before concluding on this topic, we would also like to note our comments regarding Draft Conclusions 5 and 11. With respect to Draft Conclusion 5, we question the language of paragraph 1, which states that subsequent practice “may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.” In our view, there are many acts that are attributed to a State for purposes of holding a State responsible that are not properly viewed as the practice of the State for purposes of the interpretation of a treaty to which it is party. An example would be the actions of a State agent contrary to instructions.

It is also our view that the inclusion in this ILC product of Draft Conclusion 11, on decisions adopted within the framework of a Conference of States Parties, may suggest that the work of such conferences frequently involves acts that may constitute subsequent agreements or subsequent practice in the interpretation of a treaty. We believe that these results are by far the exception, not the rule, and we are studying the commentary, including the examples included in it, from this perspective.

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On November 2, 2016, Stephen Townley, Deputy Legal Adviser for the U.S. Mission to the UN, delivered the U.S. statement at the Sixth Committee on the Report on the Work of the ILC at its 68<sup>th</sup> session. Mr. Townley's remarks on the provisional application of treaties are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7536>.

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Mr. Chairman, turning to the topic of “Provisional application of treaties,” the United States thanks the Special Rapporteur, Juan Manuel Gómez-Robledo, for his fourth report. We also thank the Drafting Committee for its contributions in the Draft Guidelines it has provisionally adopted.

As the United States has stated, we believe the meaning of “provisional application” in the context of treaty law is well-settled—“provisional application” means that a State agrees to apply a treaty, or certain provisions of it, prior to the treaty’s entry into force for that State. Provisional application gives rise to a legally binding obligation to apply the treaty or treaty provision in question, although this obligation can be more easily terminated than the treaty itself may be once it has entered into force. We approach all of the ILC’s work on this topic from that perspective. With that in mind, we are generally in agreement with the text of most of the Draft Guidelines as provisionally adopted by the Drafting Committee.

One exception is Draft Guideline 4, entitled “Form.” As we have noted previously, we are concerned that Draft Guideline 4 as provisionally adopted may suggest that a State’s legal obligations under provisional application may be incurred through some method other than the consent of all the States concerned, contrary to Article 25 of the Vienna Convention on the Law of Treaties. We believe that it is important that that Guideline be reworked to avoid that interpretation, perhaps rephrasing subparagraph (b) to read: “any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, that reflect the consent of all the States concerned.”

We also hope to see Draft Guideline 3 as provisionally adopted and Draft Guideline 10 as proposed by the Special Rapporteur clarified to make clear that a State may provisionally apply a treaty pending its entry into force for that State, even if it has entered into force for other States, and that a State may agree to provisionally apply a treaty only to the extent it is consistent with its national law.

In addition, we are continuing to consider Draft Guideline 7, which provides that the provisional application of a treaty or part of a treaty “produces the same legal effects as if the treaty were in force” unless otherwise agreed. While we believe that is largely correct, one way in which this is not precisely true is that, as we have noted, provisional application can be more easily terminated. Moreover, we are studying whether—as suggested in the Special Rapporteur’s report and by some members of the Commission—Draft Guideline 7 means that that all or many of the rules set forth in the Vienna Convention on the Law of Treaties apply to the provisional application of a treaty as they would if the treaty were in force. This is a fascinating and complicated issue to which we will be giving additional thought as the Commission’s work on this topic progresses.

With regard to future work of the Special Rapporteur and the ILC on this topic, we continue to support the suggestion that the ILC develop model clauses as a part of this exercise, as those clauses may assist practitioners in considering the many options that are available. However, we are not convinced of the merits of specifically studying the provisional application of treaties that address the rights of individuals, as we do not believe that the rules regarding provisional application of treaties differ based on the subject matter of the instrument.

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## **B. TREATY AMENDMENT**

### ***South Pacific Tuna Treaty***

On June 29, 2016, the State Department announced that the renegotiation of the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America (“South Pacific Tuna Treaty”) had concluded successfully on June 25. See June 29, 2016 media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/06/259201.htm>, excerpted below.

The revised Treaty would set the operational terms and conditions for the U.S. tuna purse seine fleet to fish in waters under the jurisdiction of the Pacific Island Parties, which cover a wide swath of the Western and Central Pacific Ocean. The Western and Central Pacific Ocean contains the largest and most valuable tuna fisheries in the world. Many Pacific Island parties depend on fisheries as one of their most important natural resources, and the United States has for decades sought to be a valued partner in developing regional fisheries. The U.S. purse seine fleet operates according to the highest commercial standards and is subject to strict enforcement by U.S. authorities. The Treaty has supported U.S. contributions to sound sustainable fishery management and efforts to combat illegal, unreported, and unregulated fishing. It has been a cornerstone for cooperation between the Pacific Islands and the United States, and has helped establish best practices for fisheries management in the region.

The United States sought amendment of the 27-year-old treaty to allow greater flexibility in commercial cooperation between U.S. industry and Pacific Island parties. On

December 3, 2016, the United States and 16 Pacific Island governments initialed and adopted amendments to the South Pacific Tuna Treaty at a ceremony in Fiji. See State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/12/264807.htm>. The media note is excerpted below.

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The revisions to the Treaty will generate higher economic returns from fisheries for Pacific Island countries, while supporting the continued viable operation of the U.S. fishing fleet in the region. The positive outcome reflects strong commitments to the Treaty by the parties and relevant stakeholders, including the Pacific Islands Forum Fisheries Agency (FFA) and the U.S. fishing industry, and a further enhancement of political and economic ties between the United States and the Pacific Island region.

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The parties have been negotiating amendments to modernize the Treaty and extend its terms of access since 2009. Based on the progress demonstrated by these Treaty amendments, the United States rescinded its decision to withdraw from the Treaty, which would otherwise have taken effect in January 2017.

The revisions to the Treaty include the general terms of fishing access for the U.S. purse seine fishing vessels to waters under the jurisdiction of Pacific Island parties through 2022. Greater flexibility in the fishing arrangements, as well as opportunities for new forms of commercial cooperation, will benefit both U.S. industry and the Pacific Island parties. The U.S. government intends to continue providing \$21 million annually pursuant to a related agreement to support economic development in the Pacific Island region.

The amended Treaty also reinforces U.S. marine conservation interests in the Western and Central Pacific Ocean, where over half of the world's tuna are caught. The continued operation of the U.S. fishing industry also provides important economic benefits to the territory of American Samoa, which played an active role on the U.S. delegation in recent years.

The continued presence of the U.S. purse seine fleet is important to the development of sustainable, well-managed fisheries in the region. U.S. fishing vessels operate according to the highest commercial standards, and are subject to strict enforcement by U.S. authorities of U.S. laws and regulations as well as regional conservation measures. The Treaty framework also supports efforts to combat illegal, unreported, and unregulated fishing, including through cooperation on maritime monitoring, control, and surveillance.

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Prior to renegotiation, the Secretary of State sent a diplomatic note communicating U.S. withdrawal from the South Pacific Tuna Treaty to the depositary (Papua New Guinea) on January 29, 2016. According to the terms of the Treaty, it would cease to have effect one year following the depositary's receipt of the U.S. notice of withdrawal. The Department of Foreign Affairs of Papua New Guinea received the letter

from Secretary Kerry rescinding its instrument of withdrawal from the Treaty on December 7, 2016 and thereafter provided formal notification to all other Parties. Because the U.S. withdrawal was rescinded less than a year after it was noticed to the depositary, the Treaty never ceased to have effect during the time period between U.S. issuance and rescission of its notice of withdrawal.

## C. LITIGATION INVOLVING TREATY LAW ISSUES

### 1. *Abu Khatallah*

As discussed in *Digest 2015* at 131-35, the United States filed a brief refuting assertions by defendant Ahmed Salim Faraj Abu Khatallah that criminal charges against him should be dismissed because his apprehension in Libya violated international treaties. Abu Khatallah was charged with participating in the September 11-12, 2012 terrorist attack in Benghazi, Libya. On February 2, 2016, the U.S. District Court for the District of Columbia issued its decision denying the motion to dismiss that was based on alleged violations of international treaties. *United States v. Khatallah*, 160 F.Supp.3d 144 (D.D.C. 2016). Excerpts below (with footnotes and record citations omitted) include the court's consideration of the international treaty law issues.

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Abu Khatallah further accuses the government of “knowingly and intentionally violat[ing] international law.” Specifically, he contends that the government violated Article 2 of the United Nations Charter, which provides, in relevant part:

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4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

U.N. Charter art. 2. Abu Khatallah also contends that the government violated the Hague Convention, 2 which he describes as “provid[ing] that belligerents may not violate the sovereignty of neutral nations[ ] not participating in a conflict.” see also Hague Convention art. 1 (“The territory of neutral Powers is inviolable.”). In Abu Khatallah’s view, “sending the military into Libya, without authorization from or notice to the Libyan government, ... violated these treaties and Libya’s sovereignty.”

The government's response is two-fold: It contends that none of the cited provisions of the U.N. Charter or of the Hague Convention is self-executing and that none creates privately enforceable rights. If the government is correct on either point, Khatallah may not seek to enforce either agreement in this Court.

### 1. Whether the U.N. Charter or the Hague Convention Is Self-Executing

The Supreme Court “has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law.” *Medellín v. Texas*, 552 U.S. 491, 504, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008). The Court explained the distinction:

[A] treaty is equivalent to an act of the legislature, and hence self-executing, when it operates of itself without the aid of any legislative provision. When, in contrast, [treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect. In sum, while treaties may comprise international commitments ... they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.

*Id.* at 505, 128 S.Ct. 1346 (internal citations and quotation marks omitted). Unless the provisions of the U.N. Charter or the Hague Convention that Abu Khatallah cites are self-executing—or otherwise backed by implementing statutes—they may not be enforced in a U.S. court. He does not claim that Article 2 of the U.N. Charter or the Hague Convention is supported by implementing legislation, nor does he contend that they are self-executing.

This concession is notable, yet unsurprising. Under the test the Supreme Court laid out in *Medellín*, a self-executing treaty is one whose terms “reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.” ... A treaty is non-self-executing when it “reads like a compact between independent nations that depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.” *Al-Bihani v. Obama*, 619 F.3d 1, 20 (D.C. Cir. 2010) (quoting *Medellín*, 552 U.S. at 521, 128 S.Ct. 1346). Nothing in the Charter or the Convention demonstrates a determination by the President and the Senate that those agreements should have domestic legal effect. Abu Khatallah’s citations to the Charter do not show otherwise. Discussing the text of the Charter, for example, he appears to rely on ... U.N. Charter art. 2(4). The Charter, however, explicitly labels this statement a general “[p]rinciple[.]” *Id.* art. 2. It is clearly “not a directive to domestic courts,” *Medellín*, 552 U.S. at 508, 128 S.Ct. 1346, but rather a commitment—in the form of a compact between independent nations—to conduct their international relations in a manner “[ ] consistent with the Purposes of the United Nations,” U.N. Charter art. 2(4). Moreover, the language of the “[p]rinciples” that Abu Khatallah cites is so broad that it is difficult to imagine how a court could enforce them absent some additional implementing legislation—which he does not contend exists.

Similarly, the Hague Convention provides no directive to U.S. courts, and Abu Khatallah cites no authority to support the notion that the President and Senate intended it to be judicially enforceable. He claims that it “provides that belligerents may not violate the sovereignty of neutral nations [ ] not participating in a conflict,” likely referring to the provision that states, “The territory of neutral Powers is inviolable.” This general statement of principle, however, is at least as broad as the language Abu Khatallah cites in the U.N. Charter. And there is no indication—in the text or otherwise—that this provision was intended to have “immediate legal effect in domestic courts.” *Medellín*, 552 U.S. at 508, 128 S.Ct. 1346.

At least one court has followed this line of reasoning and rejected the exact argument that Abu Khatallah advances here. See *al Liby*, 23 F.Supp.3d at 201–03. In *al Liby*, the defendant—who was himself seized in Libya by members of the U.S. army—complained that his apprehension violated the same provisions of the U.N. Charter and the Hague Convention cited

by Abu Khatallah. The court held that none of these treaty provisions was self-executing, reasoning that “[t]he United Nations Charter has been ratified by the United States, but nothing suggests that it was intended to be enforceable in federal courts” and that “the provisions on which al Liby relies in Article 2 of the Charter ... are only general principles. None of those principles ... can reasonably have been intended to be enforceable in U.S. courts.” *Id.* at 201–02. The court held the Hague Convention to be “similarly ... not self-executing. It attempts to impose standards of conduct for belligerent nations, but the Convention itself indicates that it was not intended to create judicially enforceable rights.” *Id.* at 202.

Other courts have consistently agreed that similar provisions of the U.N. Charter and Hague Convention are not self-executing. ... Here, too, the Court finds that none of the treaty provisions on which Abu Khatallah relies is self-executing. \_\_\_\_\_

## 2. Whether the U.N. Charter or the Hague Convention Creates Privately Enforceable Rights

As the Supreme Court has explained, “[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’ ” *Medellín*, 552 U.S. at 506 n. 3, 128 S.Ct. 1346 (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907, cmt. a (1987)). The D.C. Circuit “presume[s] that treaties do not create privately enforceable rights in the absence of express language to the contrary.” *Id.* (citing *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C.Cir.1980)). Therefore, even if the provisions of the U.N. Charter and the Hague Convention that Abu Khatallah cites were self-executing—and thus “ha[d] the force and effect of a legislative enactment,” *id.* at 506, 128 S.Ct. 1346 (quoting *Whitney v. Robertson*, 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386 (1888))—he could not seek relief pursuant to them in court unless the treaty provided him a cause of action to enforce some individual right.

As in *al Liby*, Abu Khatallah “has not identified any provision of the United Nations Charter or the Hague Convention that created judicially enforceable private rights.” 23 F.Supp. 3d at 202–03. Nor has he pointed to anything in the drafting or negotiating history to support the existence of a private right of action under either treaty. Abu Khatallah’s failure to do so is understandable. After all, the provisions on which he relies are not intended to directly benefit private persons. They “do not speak in terms of individual rights but impose obligations on nations and on the United Nations itself.” *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C.Cir.1984) (Bork, J., concurring). Rather than respond to the government’s argument that the treaty provisions at issue “are not self-executing and do not provide for individual rights,” Abu Khatallah contends that “regardless of the ordinary enforceability of treaty provisions and international law,” the Court has the authority to enforce them here “because this is an extraordinary case involving outrageous government misconduct.” This statement essentially operates as a concession that these treaty provisions do not confer rights on private individuals or allow those individuals to enforce these provisions in court. Therefore, especially in the absence of “express language to the contrary,” *Medellín*, 552 U.S. at 506 n. 3, 128 S.Ct. 1346, this Court finds that no private right of action exists to enforce the provisions of the U.N. Charter or Hague Convention on which Abu Khatallah relies.

### 3. The Appropriate Remedy for a Violation of the U.N. Charter or the Hague Convention

[D]ivestiture of personal jurisdiction is an inappropriate remedy for a violation of the treaty provisions at issue here. It is true that “where a treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States or the other federal branches. Courts must apply the remedy as a requirement of federal law.” *Sanchez–Llamas v. Oregon*, 548 U.S. 331, 346–47, 126 S.Ct. 2669, 165 L.Ed.2d 557 (2006). Yet “[w]here a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one ... through lawmaking of their own” under the guise of exercising their supervisory powers. *Id.* at 347, 126 S.Ct. 2669. Therefore, unless the U.N. Charter or the Hague Convention makes available to Abu Khatallah the remedy he seeks, the Court is powerless to grant him such relief even if his apprehension violated those agreements.

The closest parallel is again *al Liby*, where the court held that it would still have had jurisdiction over the defendant “even assuming that the international treaties were self-executing and created judicially enforceable private rights.” 23 F.Supp. 3d at 203. As a result, “dismissal of the indictment would not [have] be[en] appropriate” because “[t]he treaties do not provide for such relief, and the Court will ‘infer neither an entitlement to suppression nor an entitlement to dismissal absent express, or undeniably implied, provision for such remedies in a treaty’s text.’” *Id.* (quoting *United States v. Li*, 206 F.3d 56, 62 (1st Cir.2000)). And again, that Abu Khatallah asks the Court to divest itself of jurisdiction over him, rather than to dismiss the indictment outright, does not substantively change the analysis. Indeed, if a court would be unjustified in suppressing evidence after finding a treaty violation, without some authority in the treaty for granting that form of relief, see *Sanchez–Llamas*, 548 U.S. at 346, 126 S.Ct. 2669, it is difficult to fathom how this Court could properly divest itself of jurisdiction over Abu Khatallah without some clear indication to that effect from the treaty provisions themselves. He has identified none, and the Court accordingly finds that his requested relief is unavailable, even if the treaty provisions were self- executing and provided for privately enforceable rights.

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## 2. Litigation Regarding U.S.-Colombia Extradition Treaty

On October 26, 2016, Assistant Legal Adviser for Law Enforcement and Intelligence Tom Heinemann provided a supplemental declaration in an extradition case in which the individual sought for extradition (Andres Felipe Arias Leiva) claimed that the extradition treaty between the United States and Colombia was not in force. Excerpts follow from Mr. Heinemann’s October 26 declaration.

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1. On April 20, 2016, in my capacity as the Assistant Legal Adviser for Law Enforcement and Intelligence in the Office of the Legal Adviser, Department of State, Washington, D.C., the office responsible for extradition requests, I executed a declaration based upon my personal knowledge and upon information made available to me in the performance of my official duties, affirming that the relevant and applicable provisions of the extradition treaty between the United

States of America and the Republic of Colombia are in full force and effect. This declaration is intended to supplement the declaration previously submitted by me in order to provide additional information related to the validity of an extradition treaty between the United States of America and Colombia.

2. As stated in paragraph 3 of my declaration of April 20, 2016, the Extradition Treaty between the United States of America and the Republic of Colombia (the “Treaty”) is the relevant and applicable treaty in relation to the extradition case of Andres Felipe Arias Leiva.

3. Colombia ratified the Treaty on November 3, 1980. The United States Senate gave advice and consent to ratification on December 2, 1981, and the President of the United States ratified the Treaty on January 4, 1982. The Treaty entered into force March 4, 1982, when the parties exchanged instruments of ratification. It was proclaimed by the President of the United States on March 25, 1982.

4. Article 21 of the Treaty governs its ratification, entry into force, and termination. Pursuant to this article, the Treaty “shall enter into force on the date of the exchange of instruments of ratification.” Either Party may terminate the Treaty “by giving notice to the other Party, and the termination shall be effective six months after the date of receipt of such notice.”

5. Since the Treaty’s entry into force, neither the United States nor Colombia has given the notice of termination specified in Article 21. Therefore, the Treaty remains in force between the United States and Colombia.

6. The decisions of the Colombian Supreme Court of December 12, 1986 and June 25, 1987 did not terminate or suspend the operation of the Treaty. The two court decisions ruled invalid the relevant Colombian legislation approving and giving domestic effect to the Treaty. Whatever the effect of those decisions may have been under the internal law of Colombia, the United States has never considered that the Colombian court’s decisions had the effect of terminating or suspending the operation of the Treaty, either as a matter of international law generally or under the express terms of Article 21.

7. Under international treaty law and Practice, a treaty that has entered into force remains in force, unless it is set aside on one of the grounds and under the conditions provided for in international law.<sup>1</sup> The United States considers that the Vienna Convention on the Law of Treaties, to which Colombia but not the United States is a party, provides an authoritative guide to international treaty law and practice on the validity and termination of treaties.<sup>2</sup> Article 46 of the Vienna Convention provides that a State may not invoke a violation of its internal law as invalidating its consent to be bound “unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”<sup>3</sup> A violation would be “manifest” only “if it would be objectively evident” to any State acting “in accordance with normal practice and in good faith.” The circumstances relied upon in the Colombian Supreme Court’s decisions do not meet this threshold. Moreover, Articles 65 and 67 of the Convention provide that a State wishing to invalidate, terminate or suspend a treaty on one of the grounds specified in the Convention must

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<sup>1</sup> See Sinclair, *The Vienna Convention on the Law of Treaties* (2d ed. 1984) 162-63, quoting from *Yearbook of the International Law Commission* (1966) 236. See also Aust, *Modern Treaty Law and Practice* (3d ed. 2013) 273-74.

<sup>2</sup> See, *Restatement (Third) of the Foreign Relations Law of the United States*, Part III, *International Agreements*, 145-146.

<sup>3</sup> *Accord* *Restatement (Third) of the Foreign Relations Law of the United States* § 311, paragraph 3.

provide a written notification to the other Party.<sup>4</sup> Colombia has not provided such a notification to the United States.

8. In conclusion, notwithstanding the Colombian court's decisions, Colombia has not provided the United States either a notice of termination under Article 21 of the Treaty, or a notice of invalidity or termination under the principles set forth in the Vienna Convention. In the view of the United States, the obligations of the Treaty remain legally binding upon both Parties. This has been the consistent view of the United States since the Supreme Court rulings, and the United States—both at the executive and judicial level—has relied on the Treaty numerous times since 1987 as the authority for approving extraditions to Colombia.

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On December 16, 2016, Assistant Legal Adviser Heinemann provided a second supplemental declaration in the Arias Leiva case. Excerpts follow from Mr. Heinemann's December 16 declaration. The declaration and its attachments are available at <https://www.state.gov/s/l/c8183.htm>.

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2. On December 2, 2016, the Embassy of Colombia presented my office with Diplomatic Note S-EUSWHT-16-1982, which forwarded a copy of Diplomatic Note S-DM-16-109804, dated December 2, 2016, from the Director of the Office of International Judicial Affairs of the Ministry of Foreign Affairs of Colombia, as well as a courtesy translation. Copies of these documents are attached to this declaration.

3. Diplomatic Note S-DM-16-109804 confirms that the Government of Colombia shares the same position as the United States (as stated in my declaration of October 26) with regard to the status of the Extradition Treaty between the United States of America and the Republic of Colombia (the "Treaty"). Specifically, the Government of Colombia has confirmed that it agrees that the treaty remains in force "in accordance with the [sic] international law, and as provided by the Article 21(4) of the same Treaty and of the Article 54 of The Vienna Convention on the Law of Treaties, as neither the Republic of Colombia nor the United States of America have notified themselves their intention of terminating it." Furthermore, the Government of Colombia has confirmed that it made its request for the extradition of Mr. Andres Felipe Arias Leiva to the United States of America under the Treaty and that it expects that the United States would process the request based on the Treaty. Because these views come from the Ministry of Foreign Affairs of Colombia and were formally transmitted via diplomatic note, the Department of State considers them to be the official views of the Government of Colombia.

4. It is also important to note that the fact that Colombia's domestic law implementing the Treaty was struck down by the Colombian Supreme Court does not mean that the Government of Colombia is failing to fulfill its international legal obligation to extradite under the Treaty.

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<sup>4</sup> *Accord* Restatement (Third) of the Foreign Relations Law of the United States § 337, paragraph 1 and comment (b).

Colombia routinely acts on U.S. extradition requests and, in fact, consistently extradites more fugitives annually to the United States than any other country.

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**Cross References**

*Extradition treaties*, **Chapter 3.A.1.**

*Mutual Legal Assistance Treaties (MLATs)*, **Chapter 3.A.2.**

*National practice in treaty implementation*, **Chapter 7.A.7.**

*Russian ratification of “treaty” with Abkhazia*, **Chapter 9.B.2.**

*Warfaa v. Ali*, **Chapter 10.C.2.**

*Dogan v. Barak*, **Chapter 10.C.3.**

*Air transport agreements*, **Chapter 11.A.**

*Interpretation of NAFTA*, **Chapter 11.B.**

*Transmittal of IP-related treaties*, **Chapter 11.H.1.**

*Transmittal of maritime boundary treaties*, **Chapter 12.A.4.a.**

*UN Framework Convention on Climate Change*, **Chapter 13.A.1.a**

*Port State Measures Agreement*, **Chapter 13.B.1.b.**

*Treaty on Plant Genetic Resources*, **Chapter 13.C.1.**

*CITES—rules of procedure for regional economic integration organizations*, **Chapter 13.C.2.**

*Cultural Property MOUs*, **Chapter 14.A.**

*Private international law conventions transmitted to Senate*, **Chapter 15.A.3.**

*Hague Securities Convention*, **Chapter 15.A.4.**

*Ratification of Child Support Convention*, **Chapter 15.B.**

*Entry into force of amendment to CPPNM*, **Chapter 19.B.4.a.**