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CHAPTER 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Air Transport Agreements

Information on U.S. air transport agreements is available at https://www.state.gov/subjects/air-transport-agreements/. The United States signed new air transport agreements in 2018 with the Netherlands with regard to Bonaire, St. Eustatius, and Saba; Grenada; Belize; the United Kingdom; and Haiti; and agreed to amend the agreements with Jamaica and Colombia. The United States also reached important understandings with Qatar and the UAE aimed at ensuring a level playing field in the civil aviation sector, while also maintaining the "Open Skies" framework of U.S. international aviation policy.

On January 17, 2018 the United States signed a new bilateral Open Skies Agreement with the Kingdom of the Netherlands, with regard to Bonaire, St. Eustatius, and Saba ("the BES Islands"). See State Department media note, available at https://www.state.gov/air-transport-agreement-between-the-united-states-and-the-kingdom-of-the-netherlands-in-respect-of-the-caribbean-part-of-the-netherlands-of-january-17-2018/. As explained in the media note, the dissolution of the Netherland Antilles and the new legal status of the BES Islands as special municipalities of the Netherlands necessitated the new agreement. The media note explains further:

> This Agreement replaces in part the 1998 Air Transport Agreement between the United States and the Kingdom of the Netherlands, with respect to the Netherlands Antilles. The new Agreement will enter into force soon after an exchange of diplomatic notes between United States and the Netherlands.

On January 29, 2018, the United States and Qatar reached a set of Understandings on civil aviation. See State Department media note, available at https://www.state.gov/understandings-with-qatar-seek-level-playing-field/. As explained in the media note:

> On January 29, U.S. and Qatari delegations reached a set of Understandings to address concerns that U.S. carriers have raised with respect to government support of Qatar's flagship carrier, Qatar Airways. Anchored in our two countries' close bilateral economic and strategic relationship, the Understandings represent a set of important, high-level political commitments. They affirm both governments' intention to promote best practices for marketplace participation by their airlines providing scheduled passenger service under the 2001 U.S.-Qatar Air Transport Agreement.

On April 10, 2018, the United States and Grenada signed a new Open Skies Air Transport Agreement. See State Department media note, available at https://www.state.gov/u-s-grenada-open-skies-agreement-of-april-10-2018/. As described in the media note, the new agreement:

> permits greater opportunities for airlines, travelers, businesses, shippers, airports and localities by allowing unrestricted reciprocal market access for passenger and cargo airlines to fly between the two countries and beyond, and commits both governments to high standards of safety and security. In doing so, the new Agreement will facilitate future travel and commerce between the United States and Grenada. The Agreement entered into force upon signature of both governments on April 10, 2018. This Agreement replaces an older, more restrictive air transport agreement.

On May 10, 2018, representatives of the United States and Jamaica signed an agreement to amend the U.S.-Jamaica Air Transport Agreement of 2008 to include seventh-freedom rights for all-cargo operations, effective as of the date of signing. As explained in the State Department media note, available at https://www.state.gov/new-all-cargo-rights-added-to-u-s-jamaica-air-transport-agreement/:

> Seventh-freedom rights permit flights between a second and third country without touching the airline's home country. These rights facilitate the efficient and cost-effective movement of goods, strengthen global express delivery cargo networks, enhance connectivity and competitiveness, and promote economic growth.

On May 18, 2018, the U.S. Department of State released the "Record of Discussion" between the United States and the United Arab Emirates ("UAE") affirming their strong commitment to maintain the U.S.-UAE Air Transport Agreement of 2002. See State Department media note, available at https://www.state.gov/r/pa/prs/ps/2018/05/282253.htm, and ROD at https://www.state.gov/record-of-discussion-between-the-united-states-and-the-united-arab-emirates-of-may-11-2018/. The media note further conveys that

> the UAE government informed the U.S. government that its air carriers have no current plans to make any changes to the [f]ifth[-][f]reedom services that they operate in accordance with that Agreement, stipulating that nothing in their communication amends or otherwise changes the 2002 Agreement or any rights therein.
>
> We welcome this positive outcome for the strong and multi-faceted bilateral relationship between the United States and the United Arab Emirates and reaffirm that the Department of State will continue to ensure our Open Skies policy benefits U.S. stakeholders as intended.

On October 16, 2018, the United States and Belize signed a new Air Transport Agreement. See State Department media note, available at https://www.state.gov/r/pa/prs/ps/2018/10/286672.htm. The media note states:

> This Open Skies Agreement expands the two countries' already strong commercial and economic ties by facilitating greater air travel and commerce. It will benefit airlines, travelers, businesses, shippers, airports, and localities by permitting unrestricted reciprocal market access for passenger and all-cargo airlines to fly between our two countries and beyond. The Agreement further commits both governments to high standards of safety and security. The Agreement entered into force today upon signature, superceding the U.S.-UK Air Services Agreement that has applied to U.S.-Belize air services since 1977.

On November 28, 2018, the United States and the United Kingdom concluded negotiations on a bilateral air transport agreement to take effect when the U.S.-EU Air Transport Agreement ceases to apply to the UK. The text of the agreement is available at https://www.state.gov/memorandum-of-consultations-of-november-28-2018/. The November 29, 2018 media note announcing the conclusion of the negotiations is available at https://www.state.gov/united-states-and-united-kingdom-complete-talks-on-post-brexit-aviation-agreement/, and includes the following:

> The agreement will ensure that the U.S. aviation industry and its workforce will be able to continue providing air services to the United Kingdom uninterrupted in this vital transatlantic market that sees an estimated 20 million passengers and 900,000 tons of cargo transit annually. The agreement also will further open all-cargo service opportunities for both sides and will cover the UK's overseas territories and crown dependencies.

During the week of December 10-14, 2018, an interagency U.S. delegation attended the eleventh annual International Civil Aviation Organization Air Services Negotiation Event ("ICAN 2018") in Nairobi, Kenya. See December 14, 2018 State Department media note, available at https://www.state.gov/advancing-u-s-interests-at-international-civil-aviation-event-in-kenya/. As described in the media note:

The delegation negotiated new bilateral Open Skies Agreements, expanded and modernized existing agreements, pressed for fair treatment of U.S. companies, and promoted dialogue on new commercial aviation opportunities worldwide.

On December 12, the U.S. and Haitian delegations agreed, ad referendum, on the text of their first bilateral Open Skies Air Transport Agreement. Such agreements establish fair ground rules to facilitate growth of an efficient, international aviation network.

On December 14, the U.S. and Colombian delegations agreed, ad referendum, to amend the 2011 U.S.-Colombia Air Transport Agreement to permit seventh-freedom rights for all-cargo operations, allowing flights between a second and third country without touching the airline's home country, and to modernize air charter provisions.

2. The Downing of Malaysia Airlines Flight MH17 in Ukraine

As discussed in *Digest 2017* at 485, the State Department expressed support for the Joint Investigative Team ("JIT") report on the downing of Malaysian Airlines flight MH17 in Ukraine, including the recommendation that those responsible be prosecuted in Dutch courts.

On May 24, 2018, the State Department issued a press statement expressing the "complete confidence" of the United States in the JIT's findings, as presented by the Dutch Public Prosecutor, that "the missile launcher used to shoot down Malaysia Airlines Flight MH17 originated from the 53rd Anti-aircraft Brigade of the Russian Federation, stationed in Kursk." The press statement, available at https://www.state.gov/the-shoot-down-of-malaysia-airlines-flight-mh17/, goes on to say:

> We recall the UN Security Council's demand that "those responsible … be held to account and that *all States* cooperate fully with efforts to establish accountability." We call upon Russia, in particular, to respect and adhere to UN Security Council Resolution 2166 (2014). It is time for Russia to cease its lies and account for its role in the shoot down.
>
> We remain confident in the ability of the Dutch criminal justice system to prosecute those responsible in a manner that is fair and just.

On May 25, 2018, the Department issued an additional press statement on calling Russia to account for its role in the downing of Flight MH-17. The May 25th statement, available at https://www.state.gov/calling-russia-to-account-for-malaysia-airlines-flight-mh-17/, includes the following:

We strongly support the decisions by the Netherlands and Australia to call Russia to account for its role in the July 2014 downing of Malaysia Flight #17 (MH-17) over eastern Ukraine and the horrific deaths of 298 civilians. It is time for Russia to acknowledge its role in the shooting down of MH-17 and to cease its callous disinformation campaign.

As the findings of the Joint Investigative Team made clear, the BUK missile launcher used to bring down the passenger aircraft is owned by the Russian Federation and was assigned to the Russian 53rd anti-aircraft brigade near Kursk. It was *brought* into sovereign Ukrainian territory from Russia, was *fired* from territory controlled by Russia and Russia-led forces in eastern Ukraine, and was then *returned* to Russian territory. We urge Russia to adhere to UNSCR 2166 and respond to Australia's and the Netherlands' legitimate requests.

Russia's aggression in Ukraine since 2014 has led to more than 10,300 conflict-related deaths, including those lost in the MH-17 tragedy. It is more than time for Russia to end this violence.

B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS

1. Non-Disputing Party Submissions under Chapter 11 of the North American Free Trade Agreement: *B-Mex v. Mexico*

Article 1128 of NAFTA allows NAFTA Parties who are not parties to a particular dispute to make submissions to a Tribunal hearing that dispute on questions of interpretation of NAFTA. On February 28, 2018, the United States made an Article 1128 submission in *B-Mex, LLC and others v. Mexico*. Submissions in and further information about the case are available at https://www.state.gov/b-mex-llc-and-others-v-government-of-mexico/. Claimants allege that their investments in the gaming industry were harmed due to actions in violation of Article 1102 (National Treatment), Article 1103 (Most Favored Nation), Article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation). Excerpts follow (with footnotes omitted) from the first U.S. submission.

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* * * *

Article 1122(1) (Consent to Arbitration)

2. A State's consent to arbitration is paramount. Indeed, given that consent is the "cornerstone" of jurisdiction in investor-State arbitration, it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent to arbitrate.

3. Article 1122 (Consent to Arbitration), paragraph (1), provides that: "Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." Thus, the NAFTA State Parties have only consented to arbitrate investor-State disputes under Chapter 11, Section B, where an investor submits a "claim to arbitration in accordance with the procedures set out in this Agreement." And, an agreement to arbitrate is

formed upon the investor's corresponding consent to arbitrate *in accordance with those procedures*. Thus, the NAFTA Parties have explicitly conditioned their consent upon satisfaction of the relevant procedural requirements. All three NAFTA Parties agree on this point.

4. The "procedures set out in this Agreement" required to engage the NAFTA Parties' consent and form the agreement to arbitrate are found principally in Articles 1116-1121. Notably, the *Methanex* tribunal, in examining whether the "necessary consensual base for its jurisdiction [wa]s present" explained that:

> In order to establish the necessary consent to arbitration [under Chapter 11], it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that *all pre-conditions and formalities required under Articles 1118-1121 are satisfied*). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.

5. Moreover, by conditioning their consent in Article 1122(1) upon the satisfaction of the "procedures set out in this Agreement", the NAFTA Parties explicitly made the satisfaction of these procedures jurisdictional (not admissibility) requirements.

Article 1119 (Notice of Intent to Submit a Claim to Arbitration)

6. Article 1119 (Notice of Intent to Submit a Claim to Arbitration) is another example of a procedural condition which must be satisfied before a NAFTA Party's consent to arbitrate under Article 1122(1) is engaged. Article 1119 provides that:

> The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:
>
> (a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise;
>
> (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;
>
> (c) the issues and the factual basis for the claim; and
>
> (d) the relief sought and the approximate amount of damages claimed.

7. A disputing investor who does not deliver a Notice of Intent ninety (90) days before it submits a Notice of Arbitration or Request for Arbitration fails to satisfy this procedural requirement and fails to engage the respondent's consent to arbitrate. Under such circumstances, a tribunal will lack jurisdiction *ab initio*. As discussed below with respect to Article 1121(3), a respondent's consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration. Unlike the Claimant's consent required by Article 1121(3), however, which must accompany and be in conjunction with a Notice of Arbitration, satisfaction of the requirements of Article 1119 through submission of a valid Notice of Intent must *precede* submission of a Notice of Arbitration by 90 days.

8. The procedural requirements in Article 1119 are not merely technical "niceties" but are explicit treaty requirements (*i.e.*, "shall deliver;" "shall specify") that serve important functions. These functions include allowing a NAFTA Party time to identify and assess potential disputes, coordinate among relevant national and subnational officials, and to consider, if they so choose, amicable settlement or other courses of action prior to arbitration. Such courses of action may include preservation of evidence and/or the preparation of a defense. As recognized by the tribunal in *Merrill & Ring v. Canada*, rejecting a belated attempt to add a claimant in that case, the safeguards found in Article 1119 (among other requirements) "cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim [.]"

9. For all of the foregoing reasons, a tribunal cannot simply overlook an investor's failure to comply with the procedural requirements of Article 1119, including in the context of determining whether the receipt of a Notice of Arbitration constitutes the valid and timely submission of a claim. Articles 1116(2) and 1117(2) provide that investors may not make a claim if more than three years have elapsed from the date on which the investor or enterprise first acquired, or should have first acquired, knowledge of the alleged breach and loss. Because an Article 1119 Notice of Intent must precede a Notice of Arbitration by 90 days, an investor has two years and 275 days to take steps that can lead to the submission of a valid and timely claim to arbitration under Chapter Eleven. Thus, for example, claimants or claims included in a Notice of Arbitration that were not included in a Notice of Intent delivered at least 90 days earlier have not been validly submitted to arbitration, and that Notice of Arbitration cannot toll the period of limitations for those claims or claimants. As the *Grand River* and *Feldman* NAFTA tribunals observed, the time-limitations provisions contained in Articles 1116(2) and 1117(2) are "clear and rigid" and not subject to any "suspension," "prolongation," or "other qualification."

Article 1121 (Conditions Precedent to Submission of a Claim to Arbitration)

10. As noted above, some of the procedural requirements upon which the NAFTA Parties have conditioned their consent can be found in Article 1121. Article 1121(1) and (2) provide that a disputing investor may submit a claim to arbitration "*only if*" the investor (or the investor and the enterprise) "consents to arbitration in accordance with the procedures set out in this Agreement." Further, Article 1121(3) requires that "[a] consent and waiver required by this Article [1] shall be in writing, [2] shall be delivered to the disputing Party and [3] shall be included in the submission of a claim to arbitration." The three requirements found in Article 1121(3) apply to both the consent and the waiver.

11. Each claimant must satisfy the requirements of Article 1121 for the tribunal to have jurisdiction over the NAFTA Party with respect to that claimant's putative claims. As the text of Article 1121(3) makes clear, a consent must be "included in the submission." Article 1137(1)(b) further states that, with respect to arbitrations proceeding under the ICSID Additional Facility Rules, a claim is "submitted to arbitration" when the Notice of Arbitration is received by the ICSID Secretary-General. Thus consent must accompany and take place in conjunction with the Notice of Arbitration. Additionally, the "consent" required by Article 1121 must be "clear, explicit and categorical[.]" If the requirements regarding a claimant's "consent" have not been satisfied, the NAFTA Party's consent is not engaged, and the tribunal lacks jurisdiction *ab initio*. A Notice of Arbitration unaccompanied by valid consent does not present a claim that is capable of being submitted to arbitration.

12. A tribunal may determine whether a disputing investor has consented in accordance with the requirements of Article 1121. However, a tribunal itself has no authority to remedy an invalid consent. The discretion whether to permit a claimant either to proceed under or remedy an ineffective consent lies with the respondent as a function of the respondent's general discretion to consent to arbitration and not with a tribunal. Where a valid consent is filed subsequent to the Notice of Arbitration, the claim will be considered submitted to arbitration on the date on which the valid consent was filed, assuming all other requirements have been satisfied, and not the date of the Notice of Arbitration.

Article 1139 (Definition of "Investment")

13. Article 1139 provides an exhaustive, not illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven. Article 1139(g) defines "investment" as "real estate or other property, tangible or intangible, acquitted in the expectation or used for the purpose of economic benefit or other business purposes[.]" In this connection, Chapter Eleven tribunals have consistently declined to recognize as "property" mere contingent "interests." Moreover, it is appropriate to look to the law of the host State for a determination of the definition and scope of the "property right" at issue.

14. In order to bring a claim under Chapter Eleven, a claimant has the burden of proving that its proffered investment or investments fall within one of the enumerated categories of investments listed in Article 1139. In the context of an objection to jurisdiction, the burden is on the claimant to prove the necessary and relevant facts to establish that a tribunal has jurisdiction to hear its claim. Further, it is well-established that where "jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage." As the tribunal in *Bridgestone v. Panama* recently stated when assessing Panama's jurisdictional objections regarding a claimant's purported investments under the U.S.-Panama Trade Promotion Agreement, "[b]ecause the Tribunal is making a final finding on this issue, the burden of proof lies fairly and squarely on [the claimant] to demonstrate that it owns or controls a qualifying investment."

Article 1117 (Claim by an Investor of a Party on Behalf of an Enterprise)

15. Article 1117 further authorizes an investor of a Party to bring a claim on behalf of an enterprise that the investor "owns or controls directly or indirectly." The NAFTA does not define "control." The omission of a definition for "control" accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.

* * * *

On August 17, 2018, the United States made a further Article 1128 submission in *B-Mex v. Mexico*. Excerpts follow (with footnotes omitted) from the second U.S. submission.

____

* * * *

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

2. Procedural Order No. 5 asks about the relevant point(s) in time at which an investor of a Party, making a claim under Article 1117 on behalf of an enterprise of another Party, must own or control that enterprise directly or indirectly. Article 1117(1) provides, in pertinent part, that "[a]n *investor of a Party*, on behalf of an enterprise of *another Party* that is a juridical person that the

investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under" Chapter Eleven, Section A.[2]

3. An investor of a Party—other than the respondent NAFTA Party—must own or control directly or indirectly the relevant enterprise continuously between three critical dates: the time of the purported breach, the submission of a claim to arbitration, and the resolution of the claim.

Time of the Purported Breach

4. As provided in Article 1117, in pertinent part, an investor of a Party may submit to arbitration a claim that "*the other Party has breached*" an obligation under Section A. (Emphasis added.) Article 1101 (Scope and Coverage) clarifies that Chapter Eleven applies to measures adopted or maintained by a Party relating to, *inter alia*, "investors of *another Party*" and "investments of investors of *another Party* in the territory of the Party[.]" "[A]n enterprise is an 'investment'" as defined in Article 1139. Thus, because the substantive obligations of Section A apply to "investors of *another Party*," or "investments of investors of *another Party* in the territory of the Party," an investor of another Party, *i.e.,* a Party other than the respondent Party, must own or control directly or indirectly the investment [*i.e*., the enterprise] at the time of the purported breach. If the requisite difference in nationality does not exist, there can be no breach, as there was no obligation under Chapter Eleven, Section A at the time of the purported breach. And pursuant to Article 1117, what may be submitted to arbitration under Chapter Eleven, Section B, are claims that the respondent State "*has breached*" an obligation under Section A.[6]

Submission of the Claim to Arbitration

5. An investor of a Party other than the respondent Party must also own or control the enterprise directly or indirectly at the time of submission of the claim to arbitration: "[a]n investor of a Party, on behalf of an enterprise of another Party that… the investor *owns or controls* directly or indirectly, *may submit to arbitration under this Section* a claim that the other Party has breached an obligation under" Chapter Eleven, Section A.[7]

6. As the use of the present tense of "owns or controls" indicates, an investor of a Party other than the respondent NAFTA Party, must own or control the enterprise directly or indirectly at the time of submission of the claim to arbitration. Indeed, the tribunal in *Loewen v. United States of America* held that it lacked jurisdiction over Raymond Loewen's Article 1117 claim (premised on indirect ownership or control of a U.S. enterprise through the Loewen Group, Inc., or "TLGI") because he could not show the requisite ownership or control at the time the claim was submitted to arbitration.

Date of the Resolution of the Claim

7. An investor of a Party other than the respondent Party must also own or control the relevant enterprise directly or indirectly through the resolution of the claim. Article 1117's reference to "this Section" is a reference to Section B, which encompasses relevant dispute settlement procedures leading up to, during, and through the resolution of a claim. In this connection, multiple articles concerned with aspects of the dispute settlement process subsequent to the submission of a claim refer to the "disputing investor" or the "disputing parties." "Disputing parties" are defined in Article 1139 as a "disputing investor" and the disputing [NAFTA] Party, and a "disputing investor" is further defined as an investor "that makes a claim under Section B" (*i.e*., "an investor of *another Party*").

8. Article 1136(5), for example, provides that a "Party whose investor was a party to the arbitration" can invoke the procedures of NAFTA Chapter Twenty and seek a decision from a panel established by the Free Trade Commission enforcing the award against the "disputing Party." The procedure established by this provision, which is analogous to a traditional espousal

claim, assumes a continuing connection between an investor of a Party other than the respondent Party and such non-disputing Party through the time of the award, so as to allow that non-disputing Party to pursue a State-to-State arbitration on behalf of the investor.

9. The conclusions above are consistent with the well-established principle of international law that an individual or entity cannot maintain an international claim against its own State. As the United States has long maintained with respect to the rule of "continuous nationality," and as the tribunal in *Loewen v. United States of America* explained: "In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*."

Article 1121: Conditions Precedent to Submission of a Claim to Arbitration & Article 1122: Consent to Arbitration

10. In Procedural Order No. 5, the Tribunal asked about the disputing investor's consent to arbitration and the NAFTA Party's consent to the submission of a claim to arbitration "*in accordance with the procedures set out in this Agreement*," as stated in Article 1121(1) and (2) and Article 1122(1).

11. Article 1121 (Conditions Precedent to Submission of a Claim to Arbitration) provides in pertinent part that a disputing investor "may submit a claim to arbitration *only if*" the investor (or both the investor and the enterprise) "*consent[s] to arbitration in accordance with the procedures set out in this Agreement*" and waives its/their right to pursue redress in other fora. (Emphasis added.) By comparison, Article 1122 (Consent to Arbitration) provides in pertinent part that "[e]ach [NAFTA] Party *consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement*." (Emphasis added.) Article 1121 addresses the disputing investor's consent in the context of a requirement for submitting a claim, and Article 1122 addresses the consent of the NAFTA Parties to the submission of a claim in the context of their standing offer to arbitrate. In each case, consent is qualified, and is only applicable "in accordance with the procedures set out in this Agreement."

12. The phrase "in accordance with the procedures set out in this Agreement," in both Articles 1121 and 1122, refers to all procedures relevant to arbitrating a Section B claim—wherever those procedures appear in the NAFTA. While these procedures are principally set out in Section B, the ordinary meaning of "procedures set out in this Agreement" includes relevant procedures found elsewhere in the NAFTA and cannot be read as limited to those procedures set forth in Articles 1123-1138. For example, relevant procedures found elsewhere in the Agreement include those detailed in Article 2103(6). Also known as NAFTA's "tax filter," that provision sets out detailed procedures that an investor must follow before it may invoke Article 1110 (Expropriation and Compensation) as a basis for a claim involving taxation measures. Specifically, the investor must refer the issue of whether a taxation measure is not an expropriation for a determination to the competent authorities "at the time that it gives notice under Article 1119." Only where the competent authorities do not agree to consider the issue, or having agreed to consider it, fail to agree that the measure is not an expropriation within six months of referral, may the investor then "submit its claim to arbitration under Article 1120."

13. By expressing consent to arbitration "in accordance with the procedures set out in this Agreement," as Article 1121 requires the investor to do, an investor consents to and accepts all of the procedures in the NAFTA that may be relevant to arbitration under Chapter Eleven, Section B. As explained by the tribunal in *ICS Inspection and Control Services*, a disputing

investor may only accept or decline a State Party's standing offer to arbitrate "but cannot vary its terms[:]"

> The investor, regardless of the particular circumstances affecting the investor or its belief in the utility or fairness of the conditions attached to the offer of the host State, must nonetheless contemporaneously consent to the application of the terms and conditions of the offer made by the host State, or else no agreement to arbitrate may be formed.

14. The NAFTA Parties' standing offer of consent to the submission of a claim to arbitration in Article 1122(1) is also provided only "in accordance with the procedures set out in this Agreement." …

15. Thus, Articles 1119-1120 (among other provisions) contain procedures that must be complied with in order to engage the consent of the NAFTA Party to the submission of a claim to arbitration. …

* * * *

17. The Tribunal in the present case has also inquired as to whether the principle of "*effet utile*" requires a treaty interpreter to give effect to the Parties' choice to use the term "conditions precedent" in the header of Article 1121, but not in the headers of Articles 1119 and 1120. Article 31(1) of the Vienna Convention on the Law of Treaties provides 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." The interpretations that the United States has set forth herein comport with this general rule of interpretation.

* * * *

The United States submitted a third non-disputing party submission in *B-Mex v. Mexico* on December 21, 2018, providing U.S. interpretive views on Article 1117 ("own [ ] or control [ ] directly or indirectly") and Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("VCLT"). Excerpts follow (with footnotes omitted) from the third U.S. submission.

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* * * *

2. Procedural Order No. 7 notes that the Tribunal "must determine the proper interpretation" of the phrase "own [ ] or control [ ] directly or indirectly" in NAFTA Article 1117. The Tribunal refers in this connection to Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("VCLT"), which provides that: "[t]here shall be taken into account, together with the context: …any relevant rules of international law applicable in the relations between the parties." …

3. For the following reasons, the United States does not view the definition contained in Article XXVIII(n) of the GATS as a relevant rule of international law, within the meaning of the VCLT Article 31(3)(c), that the Tribunal is required to take into account in interpreting NAFTA Article 1117.

4. The United States observes that Article 31(3)(c) operates as only one part of the treaty interpretation framework reflected in the VCLT. In other words, reference to relevant rules of international law applicable in the relations between the parties to a treaty may provide one means of helping to interpret a treaty provision. But Article 31(3)(c) may not be applied to the exclusion of other means of determining a treaty's meaning, including in particular Article 31(1) of the VCLT, which provides the general rule 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 [the treaty's] *object* and *purpose*." (Emphasis added.)

5. For a rule of international law to be "taken into account" for the purposes of Article 31(3)(c), it must be, among other considerations, "relevant." Here, the external treaty provision cited by the Tribunal—i.e., the definition of "juridical person" in Article XXVIII(n) of the GATS—does not constitute a "relevant" rule of international law applicable between the parties that must be taken into account under Article 31(3)(c) when interpreting NAFTA Article 1117(1).

6. Properly understood, NAFTA Article 1117(1) and the definition of "juridical person" in Article XXVIII(n) of the GATS are distinct. (By contrast, as discussed further below, the customary international law rules governing the status of corporations with respect to international claims are rules applicable in the relations between the parties that must be taken into account.)

7. NAFTA Articles 1116 and 1117 are jurisdictional standing provisions, located in Section B—Settlement of Disputes between a Party and an Investor of Another Party, and claims brought thereunder are limited to the type of loss or damage available under the particular Article invoked. Articles 1116 and 1117 "set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by an investor." As the United States has explained on several occasions, these articles were carefully and purposefully drafted against the background of two existing principles of customary international law addressing the status of corporations with respect to international claims. The first of these principles is that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. The second principle is that no international claim may be asserted against a State on behalf of the State's own nationals.

8. Article 1117(1) provides a limited carve-out to these background principles of customary international law, which principles should be taken into account in interpreting Article 1117(1). In this sense, those background principles of customary international law are "relevant rules of international law applicable in the relations between the [NAFTA] parties" consistent with VCLT Article 31(3)(c).

9. Without Article 1117(1)'s carve-out, the application of these background principles would leave a common situation without a remedy. Investors often choose to make an investment through a separate enterprise, such as a corporation, incorporated in the host State. If the host State were to injure that enterprise in a manner that does not directly injure the investor, no remedy would ordinarily be available under customary international law. In such a case, the loss or damage is directly suffered only by the enterprise. As the investor has not suffered a direct loss or damage, it cannot bring an international claim. Nor may the enterprise maintain an international claim against the State of which it is a national under the principle of non-responsibility. However, Article 1117(1)'s carve-out to customary international law is

purposefully limited by the requirement that the "investor own[] or control[] directly or indirectly" the enterprise, thereby excluding non-controlling minority shareholders, who are limited to bringing claims under Article 1116. This carefully crafted dichotomy between the types of claims that may be brought against a NAFTA Party pursuant to Articles 1116(1) and 1117(1) serves also to reduce the risk of multiple actions with respect to the same disputed measures.

10. Article 1117(1) does not include a definition of what constitutes ownership or control, whether direct or indirect, of the enterprise. As the United States has previously explained, the omission of a definition for "control" in the NAFTA accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.

11. By contrast, Article XXVIII(n) of the GATS provides specific definitions and thresholds for determining whether a "juridical person" is "owned" or "controlled" by "persons of a Member." A "juridical person" is "owned" by persons of a WTO Member if more than 50 percent of the equity interest in the juridical person is beneficially owned by persons of that Member, whereas a juridical person is "controlled" by persons of a WTO Member "if such persons have the power to name a majority of its directors or otherwise to legally direct its actions."

12. These definitions appear in a multilateral agreement—the GATS—that is concerned with, among other things, the liberalization of trade in services among WTO Members. The chapeau of Article XXVIII ("Definitions") provides that such definitions are "[f]or the purpose of this Agreement[.]" Article XXVIII(n) defines thresholds for ownership and control for the purpose of determining the scope and applicability of the GATS and the obligations and specific commitments made under it. Thus, these definitions are building blocks for multilateral services rules, and reflect the logic and architecture of the GATS as a whole.

13. Moreover, the GATS definitions form part of rules whose alleged breach can only be adjudicated through state-to-state dispute settlement. The WTO dispute settlement system does not permit individuals or companies to assert claims. In contrast, as discussed above, NAFTA Article 1117(1) is a jurisdictional standing provision designed to address and differ from customary international law rules with respect to corporate ownership, to enable qualifying investors to bring individual claims for damages on behalf of an enterprise.

14. These differences, among others, confirm that GATS Article XXVIII(n) is not a relevant rule of international law, within the meaning of the VCLT Article 31(3)(c), that the Tribunal is required to take into account in interpreting NAFTA Article 1117.

* * * *

2. Non-Disputing Party Submissions under other Trade Agreements

a. CAFTA-DR: Ballantine v. The Dominican Republic

Chapter Ten of the Dominican Republic-Central America-United States-Free Trade Agreement ("CAFTA-DR") contains provisions designed to protect foreign investors and their investments and to facilitate the settlement of investment disputes. Article 10.20.2 of the CAFTA-DR, like Article 1128 of NAFTA, allows for non-disputing Party submissions. The United States filed such a submission in 2018 in an arbitration initiated by Michael

Ballantine and Lisa Ballantine ("the Ballantines"), alleging that the Dominican Republic's Ministry of the Environment, and the City of Jarabacoa, wrongly refused them approvals needed to continue their development of the Jamaca de Dios gated community in the Dominican Republic's central mountain range. The Ballantines allege CAFTA-DR violations of Article 10.3 (national treatment), Article 10.4 (most-favored nation treatment), Article 10.5 (minimum standard of treatment), Article 10.7 (expropriation), and Chapter 18 (transparency). The July 6, 2018 U.S. submission is excerpted below (with footnotes omitted). The submission, in its entirety, is available at https://www.state.gov/michael-ballantine-lisa-ballantine-and-rachel-ballantine-v-the-dominican-republic/.

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* * * *

Dominant and Effective Nationality Requirement for Claims Under Chapter Ten

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5. Where the requisite nationality does not exist at the operative times…, the respondent Party has not consented to the submission of a claim to arbitration at the outset, and the tribunal therefore lacks jurisdiction *ab initio* under Article 10.17: "Each Party consents to the submission of a claim to arbitration under this Section [B] in accordance with this Agreement." …

6. The conclusions above are consistent with the well-established principle of international law that an individual or entity cannot maintain an international claim against its own State. As the United States has long maintained with respect to the rule of "continuous nationality" and as the tribunal in *Loewen v. United States of America* explained: "In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*." In the absence of continuous nationality of the claimant as set forth above, a tribunal lacks jurisdiction over the relevant claim.

Article 10.18: Conditions and Limitations on Consent of Each Party (Limitations Period)

* * * *

8. As is made explicit by Article 10.18, the CAFTA-DR Parties did not consent to arbitrate an investment dispute if "more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach" and "knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage." …[A] claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.

* * * *

10. With regard to knowledge of the "breach" under Article 10.18.1, a "breach" of an international obligation exists "when an act of th[e] State is not in conformity with what is required of it by that obligation." Thus, with respect to a claim under a given article in Chapter Ten, a claimant has actual or constructive knowledge of the alleged "breach" once it has (or should have had) knowledge of all elements required to make a claim under the article in question. In other words, the operative date is the date on which the claimant first acquired actual or constructive notice of facts sufficient to make a claim under the article.

11. With regard to knowledge of "incurred loss or damage" under Articles 10.18.1, the term "incur" broadly means to "to become liable or subject to." Therefore, an investor may "incur" loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate. As the *Grand River* tribunal correctly held, "damage or injury may be incurred even though the amount or extent may not become known until some future time."

Article 10.3 (National Treatment)

* * * *

14. …[T]he appropriate comparison is between the treatment accorded to the Party's investment or investor and a national investment or investor *in like circumstances.* As one tribunal has observed, "[i]t goes without saying that the meaning of the term ['in like circumstances'] will vary according to the facts of a given case. By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations." The United States understands the term "circumstances" to denote conditions or facts that *accompany* treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the "in like circumstances" analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics. Simply being in the same sector, or selling the same product, is not alone sufficient to demonstrate like circumstances. When determining whether the claimant was in like circumstances with alleged comparators, the Party's investor or investment should be compared to a national investor or investment that is alike in all relevant respects but for nationality of ownership. Moreover, whether treatment is accorded in "like circumstances" under Article 10.3 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

15. Nothing in Article 10.3 requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any national investor or any investment of a national. The appropriate comparison is between the treatment accorded a foreign investment or investor and a national investment or investor *in like circumstances*. This is an important distinction intended by the Parties. Thus, a CAFTA-DR Party may adopt measures that draw distinctions among entities without necessarily violating Article 10.3.

Article 10.5 (Minimum Standard of Treatment)

* * * *

17. …. 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."

18. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, expressly addressed in Article 10.5.2, concerns the obligation to provide "fair and equitable treatment," which includes "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world." Other areas included within the minimum standard of treatment concern the obligation not to expropriate covered investments except under the conditions specified in Article 10.7, and the obligation to provide "full protection and security," which, as stated in Article 10.5.2(b), "requires each Party to provide the level of police protection required under customary international law."

19. Annex 10-B to the CAFTA-DR addresses the methodology for interpreting customary international law rules covered by the agreement. The annex expresses the CAFTA-DR Parties' "shared understanding that 'customary international law' generally and as specifically referenced in Article 10.5 . . . results from a general and consistent practice of States that they follow from a sense of legal obligation." This two-element approach—State practice and *opinio juris*—is "widely endorsed in the literature" and "generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice."

* * * *

21. The concept of "transparency" has not crystallized as a component of "fair and equitable treatment" under customary international law giving rise to an independent host-State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation of host-State transparency under the minimum standard of treatment.

22. Moreover, as Article 10.5.3 makes clear: "A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article." In this connection, a Chapter Ten tribunal does not have jurisdiction to address matters that arise under Chapter Eighteen ("Transparency"). 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. An investor bringing an Article 10.5 claim may not invoke an alleged host State violation of an international obligation owed to another State or to the investor's home State, including, for example, an obligation contained in another treaty or another Chapter of CAFTA-DR such as Chapter Eighteen. A violation of Chapter Eighteen, which is subject to the State-to-State dispute resolution provisions of Chapter Twenty, may be the basis of a claim by one CAFTA-DR 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 Ten, Section A.

23. The concept of "legitimate expectations" is also not a component element of "fair and equitable treatment" under customary international law that gives rise to an independent host State obligation. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate

investors' expectations; instead, something more is required, such as a complete repudiation of a contract.

24. In addition, the customary international law minimum standard of treatment set forth in Article 10.5.1 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination. As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently. To the extent that the customary international law minimum standard of treatment incorporated in Article 10.5 prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings or access to judicial remedies or treatment by the courts, as well as the obligation of States to provide full account for violating the customary minimum standard of protection … [N]either Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments.").

25. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond what is required by customary international law. The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 10.5, in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum standard of treatment. Thus, arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 10.5.34 Likewise, decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State practice" for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice. A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 10.5.1.

Conclusions on the application of Article 10.5

26. The Treaty Parties thus expressly intended Article 10.5 to afford the minimum standard of treatment to covered investments, as that standard has crystallized into customary international law through general and consistent State practice and *opinio juris*. For alleged standards that are not specified in the treaty, a claimant must demonstrate that such a standard has crystallized into an obligation under customary international law.

27. To do so, the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*. "The party which relies on a custom," therefore, "must prove that this custom is established in such a manner that it has become binding on the other Party." …

28. Once a rule of customary international law has been established, the claimant must then show that the State has engaged in conduct that violates that rule. Determining a breach of the minimum standard of treatment "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders."

Article 10.7 (Expropriation and Compensation)

29. As the Parties confirm in CAFTA-DR Annex 10-C, Article 10.7.1 "is intended to reflect customary international law concerning the obligation of States with respect to expropriation," and addresses two situations: "The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure. The second situation … is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."

* * * *

31. Under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory. CAFTA-DR Annex 10-C, paragraph 4, provides specific guidance as to whether an action, including a regulatory action, constitutes an indirect expropriation.

* * * *

36. Annex 10-C, paragraph 4(b), further provides that "[e]xcept in rare circumstances, nondiscriminatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations." This paragraph is not an exception, but rather is intended to provide tribunals with additional guidance in determining whether an indirect expropriation has occurred.

* * * *

b. U.S.-Panama TPA: Bridgestone v. Panama

Chapter Ten of the United States-Panama Trade Promotion Agreement ("U.S.-Panama TPA") contains provisions designed to protect foreign investors and their investments and to facilitate the settlement of investment disputes. Article 10.20.2 of the U.S.-Panama TPA, like Article 1128 of NAFTA, allows for non-disputing party submissions. On December 7, 2018, the United States made its third non-disputing party submission in *Bridgestone v. Panama*, addressing interpretation of the minimum standard of treatment, national treatment, and most favored nation treatment provisions in the U.S.-Panama FTA. The submission also discusses proximate causation. The submission is excerpted below (with footnotes omitted) and available in its entirety at https://www.state.gov/bridgestone-licensing-services-inc-and-bridgestone-americas-inc-v-the-republic-of-panama/. See *Digest 2017* at 500-04 for discussion of the previous U.S. submissions.

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3. As a threshold matter, Article 10.5.1 requires a Party to accord "treatment" to a covered investment. Article 10.5.1 differs from other substantive obligations (*e.g*., 10.3, 10.4 and 10.6) in that it obligates a Party to accord treatment only to a "covered *investment.*" The minimum standard of treatment under Article 10.5.1 includes the obligation to provide "fair and equitable treatment," which, as explained in 10.5.2(a), includes the customary international law obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Therefore, to establish a breach of Article 10.5.1 on the basis of denial of justice, a claimant must establish that the treatment accorded to its covered investment rose to the level of a denial of justice under customary international law.

4. 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." 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." A manifestly unjust judgment is one that amounts to a travesty of justice or is grotesquely unjust. As the United States has explained elsewhere, to be manifestly unjust a court decision must amount "to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man[.]" 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 or 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.10 In this connection, it is well-established that international tribunals, such as U.S.-Panama TPA Chapter Ten tribunals, are not empowered to be supranational courts of appeal on a court's application of domestic law.

* * * *

7. Articles 10.3 (National Treatment) and 10.4 (Most-Favored-Nation Treatment) require the Parties to the Agreement to accord to investors of the other Party and to covered investments treatment no less favorable than that accorded to a Party's own investors and investments, or the investors or investments of a non-Party, respectively, to the extent they are in like circumstances. If a Party does not "accord … treatment" to an investor of the other Party or to a covered investment, there can be no breach of these provisions.

8. Articles 10.3 and 10.4 are intended to prevent discrimination on the basis of nationality between domestic investors (or investments) and investors (or investments) of the other Party, in the case of Article 10.3, and between investors (or investments) of the other Party and investors (or investments) of a non-Party, in the case of Article 10.4, that are in "like circumstances." They are not intended to prohibit all differential treatment among investors or investments. Rather, they are designed only to ensure that the Parties do not treat entities that are "in like circumstances" differently based on nationality.

9. As the United States has previously explained in the NAFTA context, one of the steps required to establish a National Treatment violation is to identify domestic investors or investments in like circumstances (sometimes referred to as "comparators") with the claimant or

claimant's investments. If the claimant does not identify any domestic investor or investment as allegedly being in like circumstances, no violation of Article 10.3 can be established.

10. The steps required to establish a Most-Favored-Nation Treatment violation are the same as those required to establish a National Treatment violation, except that the applicable comparators are investors or investments of non-Parties. Thus, as is the case for a claim under Article 10.3, if a claimant does not identify such non-Party investors or investments as allegedly being in like circumstances with the claimant or claimant's investments, no violation of Article 10.4 can be established.

11. As the United States has previously explained in the context of the National Treatment obligation in the NAFTA (Article 1102), the ordinary meaning of the term "like products" in trade agreements such as the General Agreement on Tariffs and Trade 1994 ("GATT 1994") is not the same as "like circumstances." The phrase "in like circumstances" contemplates that broad account be taken of the circumstances of the treatment, the investor and the investment. This is a fact-specific inquiry, requiring consideration of more than just the business or economic sector, but also the legal and regulatory frameworks which apply to or govern the conduct of investors or investments (including any relevant policy objectives), among other possible relevant characteristics.

12. Articles 10.3 and 10.4 of the U.S.-Panama TPA address discrimination on the basis of the *nationality of investors and their investments*, and do not address discrimination based on the origin of goods. As a result, decisions interpreting the term "like products" in the GATT 1994 are inapposite in ascertaining whether an investor or an investment has been accorded less favorable treatment within the meaning Articles 10.3 and 10.4 of the U.S.-Panama TPA.

Article 10.16.1 (Proximate Causation)

13. Article 10.16.1 provides in relevant part (emphases added):

> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached [a relevant obligation] and (ii) that the claimant *has incurred loss or damage by reason of, or arising out of, that breach;* and
>
> (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim (i) that the respondent has breached [a relevant obligation] and (ii) that the enterprise *has incurred loss or damage by reason of, or arising out of, that breach.*

14. As the United States has previously explained with respect to substantively identical language in NAFTA Articles 1116(1) and 1117(1), the ordinary meaning of "by reason or arising out of" requires an investor to demonstrate proximate causation. In this connection, NAFTA tribunals have consistently imposed a requirement of proximate causation under NAFTA Articles 1116(1) and 1117(1). For example, the *S.D. Myers* tribunal held that damages may only be awarded to the extent that there is a "sufficient causal link" between the breach of a specific NAFTA provision and the loss sustained by the investor, and then subsequently clarified that "[o]ther ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the *proximate* cause of the harm."

15. Indeed, proximate causation is an "applicable rule[] of international law" that under the U.S.-Panama TPA Article 10.22.1 must be taken into account in fixing the appropriate amount, if any, of monetary damages. Article 10.16.1 contains no indication that the Agreement Parties intended to vary from this established rule. Accordingly, any loss or damage cannot be based on an assessment of acts, events, or circumstances not attributable to the alleged breach. Injuries that are not sufficiently "direct," "foreseeable," or "proximate" may not, consistent with applicable rules of international law, be considered when calculating a damage award.

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C. WORLD TRADE ORGANIZATION

The following discussion of developments in select WTO dispute settlement proceedings involving the United States in 2018 is drawn largely from Chapter V "The World Trade Organization" of the Annual Report of the President of the United States on the Trade Agreements Program ("Annual Report"), released in March 2019 and available at https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf. WTO legal texts referred to below are available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

1. Disputes brought by the United States

a. China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States (DS427)

As discussed in *Digest 2013* at 319 and *Digest 2011* at 372-72, a panel of the WTO concluded in 2013 that U.S. complaints about anti-dumping and countervailing duties imposed by China on U.S. broiler products were valid. China agreed to implement the panel's findings by 2014. However, the United States requested a compliance panel in 2016 after deeming China's actions to comply with the panel report inadequate. As summarized in the Annual Report at 157, the compliance panel issued its report on January 18, 2018 and found China to be in continuing breach of its obligations by, *inter alia*:

> Continuing to levy countervailing duties on U.S. producers in excess of the amount of subsidization; Continuing to rely on flawed price comparisons for its determination that China's domestic industry had suffered injury; Continuing to not properly allocate costs in calculating U.S. producers' cost of production while declining to use the books and records of two major U.S. producers in calculating costs of production; Improperly resorting to facts available for a U.S. respondent that had submitted appropriate and verifiable data.

The compliance panel report was adopted by the WTO Dispute Settlement Body ("DSB") on February 28, 2018. China removed the duties that gave rise to the dispute.

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

As discussed in *Digest 2016* at 494-95 and *Digest 2011* at 373-74, a panel of the WTO and the Appellate Body agreed with U.S. claims that subsidies provided by the EU, France, Germany, Spain, and the United Kingdom to Airbus were inconsistent with WTO obligations. The EU and EU member states purported to comply with the findings but the matter was referred back to the panel, which found that the EU and certain EU member states continued to breach the Subsidies and Countervailing Measures ("SCM") Agreement. The EU appealed the compliance panel's report. The Appellate Body issued its report on May 15, 2018. The Annual Report, at page 165, summarizes the Appellate Body's conclusions:

> The Appellate Body confirmed that the EU and certain EU member States failed to comply with the earlier WTO determination finding launch aid inconsistent with their WTO obligations. The Appellate Body further confirmed that almost $5 billion in new launch aid for the A350 XWB was WTO-inconsistent. The Appellate Body found that the WTO- inconsistent subsidies continue to cause significant lost sales of Boeing aircraft in the twin-aisle and very large aircraft markets, and that these subsidies impede exports of Boeing 747 aircraft to numerous geographic markets. The Appellate Body also found that, due to the passage of time, the EU no longer needed to take action regarding some of the earlier (*i.e.*, pre-A380) launch aid subsidies previously found to be WTO-inconsistent.

Arbitration proceedings regarding the level of countermeasures, which were suspended in 2012, resumed at the request of the United States and a decision is expected in 2019.

2. Disputes brought against the United States

a. *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, *Digest 2015* at 478-79, *Digest 2016* at 496, and *Digest 2017* at 513, Mexico challenged U.S. dolphin-safe labeling requirements for tuna and tuna products. The dispute came to an end in 2018 with the December 14, 2018 appellate report upholding all aspects of the previous analysis by the WTO panels in the dispute, including findings that the dolphin-safe labeling measure was not inconsistent with Article 2.1 of the Technical Barriers to Trade ("TBT") Agreement and was justified under Article XX of the GATT 1994. See Annual Report at 180-81.

b. *Countervailing Duty Measures on Certain Products from China (DS437)*

As discussed in *Digest 2014* at 475, China challenged certain U.S. countervailing duty determinations in which the U.S. Department of Commerce considered Chinese state-owned enterprises to be public bodies under the SCM Agreement. The panel findings only partially agreed with China and both the United States and China appealed. The Appellate Body reversed several of the panel's findings. China sought review by a compliance panel after the United States implemented the DSB recommendations. The Annual Report, at page 188, summarizes the March 21, 2018 report of the compliance panel and next steps in the case:

> …The compliance Panel found that Commerce's redeterminations that certain state-owned enterprises were "public bodies" were not inconsistent with Article 1.1(a)(1) of the SCM Agreement, and Commerce's Public Bodies Memorandum is not inconsistent with the SCM Agreement, "as such". The compliance Panel also upheld Commerce's redetermination concerning regional specificity. However, the compliance Panel found in favor of China with respect to China's claims regarding Commerce's calculation of benchmarks and its input specificity analysis.
>
> On April 27, 2018, the United States appealed certain findings of the compliance Panel regarding the Public Bodies Memorandum, Commerce's benchmark and input specificity redeterminations, and whether certain Commerce determinations were within the compliance Panel's terms of reference. On May 2, 2018, China appealed certain findings of the compliance Panel regarding Commerce's redeterminations that certain state-owned enterprises were "public bodies", the Public Bodies Memorandum, and the legal interpretation of Articles 1.1(b) and 14(d) of the SCM Agreement. The appellate proceedings are ongoing.

c. *Anti-Dumping Measures on Oil Country Tubular Goods from Korea (DS488)*

As discussed in *Digest 2017* at 514-15, the panel in this dispute brought by Korea found some of the U.S. measures to be WTO-inconsistent but also rejected some of Korea's claims. On January 12, 2018, the DSB adopted the panel's report. The Annual Report, at page 192, conveys that Korea and the United States agreed that the reasonable period of time for the United States to implement the DSB's recommendations and rulings would be January 12, 2019, subsequently extended by agreement to July 12, 2019.

d. *Countervailing Measures on Supercalendered Paper from Canada (DS505)*

As discussed in the Annual Report at 193, Canada brought claims related to U.S. countervailing duties on supercalendered paper. On July 5, 2018, the panel circulated its report, upholding Canada's claims "with respect to the U.S. Department of Commerce

treatment of subsidies that exporters refused to disclose in response to Commerce questionnaires, but which Commerce subsequently discovered during the course of the countervailing duty investigation." The United States has appealed the panel's findings regarding the treatment of undisclosed subsidies.

e. Countervailing Measures on Certain Pipe and Tube Products from Turkey (DS523)

As discussed in the Annual Report at 196, a WTO panel circulated its report on December 18, 2018, upholding some of the claims by Turkey that the Department of Commerce had acted inconsistently with its WTO obligations in imposing countervailing duty measures on certain pipe and tube products. The Annual Report details the panel's findings as follows:

> With respect to public body, the panel found that Commerce acted inconsistently with Article 1.1(a)(1) by failing to apply the standard set out previously by the Appellate Body, and failing to establish based on record evidence that the relevant entities were public bodies. With respect to benchmarks as such, the panel rejected Turkey's claims that Commerce has a practice of rejecting in-country benchmarks solely based on majority or substantial government ownership or control of the market. For benchmarks as applied, the panel declined to make a finding under Article 14(d) of the SCM Agreement because the relevant determination had ceased to have legal effect prior to the panel's establishment. With respect to specificity, the panel found that Commerce acted inconsistently with Articles 2.1(c) and 2.4 of the SCM Agreement by failing to identify and clearly substantiate the existence of a subsidy program, and failing to take into account the extent of diversification of Turkey's economy and the length of time in which the program had been in place. With respect to facts available, the panel found the U.S. Department of Commerce acted inconsistently with Article 12.7 of the SCM Agreement by failing to do a comparative process of reasoning and evaluation before selecting from the facts available in certain circumstances. With respect to injury, the panel found that Article 15.3 of the SCM Agreement does not permit the U.S. International Trade Commission (USITC) to assess cumulatively the effects of imports not subject to countervailing duty investigations with the effects of imports subject to countervailing duty investigations. The panel thus found cross-cumulation by the USITC, both in the original investigations at issue and as a practice, to be inconsistent with Article 15.3. With respect to cross-cumulation in sunset reviews, the panel found the USITC did not act inconsistently with Article 15.3 of the SCM Agreement, either "as such" or in connection with the sunset review at issue.

D. INVESTMENT TREATIES, TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Africa Growth and Opportunity Act

In Proclamation 9771 of July 30, 2018, the President determined that the Republic of Rwanda (''Rwanda'') is not meeting the requirements to be a beneficiary sub-Saharan African country for purposes of section 506A(a)(1) of the Trade Act of 1974 (19 U.S.C. 2466a(a)(1)), as added by section 111(a) of the African Growth and Opportunity Act ("AGOA"), and therefore suspended the application of duty-free treatment for all AGOA-eligible goods in the apparel sector from Rwanda. 83 Fed. Reg. 37,993 (Aug. 2, 2018). The same proclamation also modified the Harmonized Tariff Schedule of the United States ("HTS") to reflect changes made to the United States-Bahrain Free Trade Agreement (''USBFTA'') after Proclamation 9549 of December 1, 2016, as well as other provisions in the HTS.

On November 2, 2018, the President announced his intention to terminate the AGOA beneficiary status of Mauritania due to its failure to establish, or make continual progress toward establishing, the protection of internationally recognized worker rights, including its insufficient progress toward combatting forced labor practices. See White House announcement, available at https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-senate-45/; see also USTR press release, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/november/president-trump-terminates-trade. In Proclamation 9834 of December 21, 2018, the President terminated Mauritania's AGOA beneficiary status effective January 1, 2019. 84 Fed. Reg. 35 (Jan. 7, 2019). In the same proclamation, the President also took other actions with regard to trade with Israel, trade preferences for Nepal, and changes relating to the Panama Trade Promotion Agreement, the United States–Korea Free Trade Agreement ("KORUS"), and the Morocco Free Trade Agreement. https://www.whitehouse.gov/presidential-actions/presidential-proclamation-take-certain-actions-african-growth-opportunity-act-purposes-4/.

2. NAFTA/U.S.-Mexico-Canada Agreement ("USMCA")

As discussed in *Digest 2017* at 516, the Trump Administration notified Congress of its intent to renegotiate the North American Free Trade Agreement ("NAFTA") and released negotiation objectives. On August 31, 2018, the President notified Congress of his intent to enter into a trade agreement with Mexico, "and with Canada if it is willing." 83 Fed. Reg. 45191 (Sep. 5, 2018). On September 30, 2018, U.S. Trade Representative Robert Lighthizer and Canadian Foreign Affairs Minister Chrystia Freeland issued a joint statement announcing that Canada had also joined the agreement, to be called the U.S.-Mexico-Canada Agreement ("USMCA"). The joint statement is available at

https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/joint-statement-united-states.

On November 30, 2018, U.S. Trade Representative Robert Lighthizer, Canadian Foreign Affairs Minister Chrystia Freeland, and Mexican Economy Secretary Ildefonso Guajardo signed the Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada in Buenos Aires, Argentina.

3. U.S.-Korea Free Trade Agreement ("KORUS")

The United States published in September 2018 the outcomes of negotiations with the Republic of Korea on amendments and modifications to the U.S.-Korea Free Trade Agreement ("KORUS") and its implementation. See September 3, 2018 USTR press release, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/ustr-publishes-agreed-outcomes-us. The two sides engaged in their respective domestic procedures throughout the remaining months of 2018 in preparation for bringing the outcomes of their negotiations into force in 2019. The text of the agreement as amended and modified, along with the related letter exchanges and understandings, is available at https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/ .

4. Asia-Pacific Economic Cooperation

On November 19, 2018, at the conclusion of the Asia-Pacific Economic Cooperation ("APEC") meetings, the State Department issued a press statement on the failure to reach consensus at the meetings on draft statements agreeing to promote free and fair trade in the region. The press statement is available at https://www.state.gov/u-s-position-on-apec-statements/. As described in the press statement, "the United States was … fully prepared to join consensus on the draft APEC statements…. It is unfortunate that not all economies—despite their rhetoric—could support these positions."

5. Termination of U.S.-Ecuador BIT

On May 18, 2018, the U.S. Department of State and Office of the U.S. Trade Representative published notification of the termination of the U.S.-Ecuador Bilateral Investment Treaty ("BIT"). 83 Fed. Reg. 23,327 (May 18, 2018). The Government of Ecuador delivered notice dated May 18, 2017, to the United States that it was terminating the BIT. The BIT terminated pursuant to the terms of the treaty one year later, on May 18, 2018, except for investments made or acquired prior to the date of termination, to which it applies for 10 years. Supplementary information in the Federal Register notice follows:

> The Treaty was signed at Washington on August 27, 1993, and entered into force on May 11, 1997. Under the terms of the Treaty, either Party may terminate the Treaty at the end of the initial ten-year period, or any time thereafter, by giving one year's written notice to the other Party. The provisions of the Treaty will continue to apply for an additional 10 years to all investments made or acquired prior to the date of termination and to which the Treaty otherwise applies. The Treaty provides protections to cross-border investment between the two countries and the option to resolve investment disputes through international arbitration. The Department of State and the Office of the U.S. Trade Representative, which co-lead the U.S. bilateral investment treaty program, are providing this notice so that existing or potential U.S. investors in Ecuador can factor the termination of the Treaty into their business planning, as appropriate.

E. IMPORT ADJUSTMENTS BASED ON U.S. NATIONAL SECURITY

Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862), as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security. The President acted pursuant to Section 232 in 2018 with respect to imports of aluminum, steel, and automobiles.

1. Aluminum

On March 8, 2018, the President issued Proclamation 9704, "Adjusting Imports of Aluminum Into the United States." 83 Fed. Reg. 11619 (Mar. 15, 2018). Excerpts follow from the Proclamation.

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* * * *

1. On January 19, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of aluminum … under section 232 …

2. The Secretary found and advised me of his opinion that aluminum is being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States. The Secretary found that the present quantities of aluminum imports and the circumstances of global excess capacity for producing aluminum are "weakening our internal economy, leaving the United States "almost totally reliant on foreign producers of primary aluminum" and "at risk of becoming completely reliant on foreign producers of high-purity aluminum that is essential for key military and commercial systems." Because of these risks, and the risk that the domestic aluminum industry would become "unable to satisfy existing national security needs or respond to a national security emergency that requires a large increase in domestic production," and taking into account the close relation of the economic welfare of the Nation to our national security, *see* 19 U.S.C. 1862(d), the Secretary

concluded that the present quantities and circumstances of aluminum imports threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

3. In light of this conclusion, the Secretary recommended actions to adjust the imports of aluminum so that such imports will not threaten to impair the national security. Among those recommendations was a global tariff of 7.7 percent on imports of aluminum articles in order to reduce imports to a level that the Secretary assessed would enable domestic aluminum producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production. The Secretary has also recommended that I authorize him, in response to specific requests from affected domestic parties, to exclude from any adopted import restrictions those aluminum articles for which the Secretary determines there is a lack of sufficient U.S. production capacity of comparable products, or to exclude aluminum articles from such restrictions for specific national security-based considerations.

4. I concur in the Secretary's finding that aluminum articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and I have considered his recommendations.

* * * *

7. In the exercise of these authorities, I have decided to adjust the imports of aluminum articles by imposing a 10 percent ad valorem tariff on aluminum articles, as defined below, imported from all countries except Canada and Mexico. In my judgment, this tariff is necessary and appropriate in light of the many factors I have considered, including the Secretary's report, updated import and production numbers for 2017, the failure of countries to agree on measures to reduce global excess capacity, the continued high level of imports since the beginning of the year, and special circumstances that exist with respect to Canada and Mexico. This relief will help our domestic aluminum industry to revive idled facilities, open closed smelters and mills, preserve necessary skills by hiring new aluminum workers, and maintain or increase production, which will reduce our Nation's need to rely on foreign producers for aluminum and ensure that domestic producers can continue to supply all the aluminum necessary for critical industries and national defense. Under current circumstances, this tariff is necessary and appropriate to address the threat that imports of aluminum articles pose to the national security.

8. In adopting this tariff, I recognize that our Nation has important security relationships with some countries whose exports of aluminum to the United States weaken our internal economy and thereby threaten to impair the national security. I also recognize our shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of the national security. Any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country. Should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on aluminum articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.

9. I conclude that Canada and Mexico present a special case. Given our shared commitment to supporting each other in addressing national security concerns, our shared commitment to addressing global excess capacity for producing aluminum, the physical proximity of our respective industrial bases, the robust economic integration between our countries, the export of aluminum produced in the United States to Canada and Mexico, and the close relation of the economic welfare of the United States to our national security, *see* 19 U.S.C. 1862(d), I have determined that the necessary and appropriate means to address the threat to the national security posed by imports of aluminum articles from Canada and Mexico is to continue ongoing discussions with these countries and to exempt aluminum articles imports from these countries from the tariff, at least at this time. I expect that Canada and Mexico will take action to prevent transshipment of aluminum articles through Canada and Mexico to the United States.

10. In the meantime, the tariff imposed by this proclamation is an important first step in ensuring the economic viability of our domestic aluminum industry. Without this tariff and satisfactory outcomes in ongoing negotiations with Canada and Mexico, the industry will continue to decline, leaving the United States at risk of becoming reliant on foreign producers of aluminum to meet our national security needs—a situation that is fundamentally inconsistent with the safety and security of the American people. It is my judgment that the tariff imposed by this proclamation is necessary and appropriate to adjust imports of aluminum articles so that such imports will not threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

* * * *

In Proclamation 9776 of August 29, 2018, the President determined that the measures imposed by Proclamation 9704 should be maintained in light of national security interests. 83 Fed. Reg. 45,019 (Sep. 4, 2018). Proclamation 9710 of March 22, 2018 temporarily exempted some countries pending discussions. Proclamation 9739 of April 30, 2018 also temporarily exempted some countries pending discussions (and setting time limits for some). And Proclamation 9758 of May 31, 2018 set quotas for Argentina, exempted Australia, and subjected all others to the duties.

2. Steel

On March 8, 2018, the President issued Proclamation 9705, "Adjusting Imports of Steel Into the United States." 83 Fed. Reg. 11625 (Mar. 15, 2018). Excerpts follow from the Proclamation.

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* * * *

1. On January 11, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of steel mill articles (steel articles) … under section 232 …

2. The Secretary found and advised me of his opinion that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States. The Secretary found that the present quantities

of steel articles imports and the circumstances of global excess capacity for producing steel are "weakening our internal economy," resulting in the persistent threat of further closures of domestic steel production facilities and the "shrinking [of our] ability to meet national security production requirements in a national emergency." Because of these risks and the risk that the United States may be unable to "meet [steel] demands for national defense and critical industries in a national emergency," and taking into account the close relation of the economic welfare of the Nation to our national security, *see* 19 U.S.C. 1862(d), the Secretary concluded that the present quantities and circumstances of steel articles imports threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

3. In reaching this conclusion, the Secretary considered the previous U.S. Government measures and actions on steel articles imports and excess capacity, including actions taken under Presidents Reagan, George H.W. Bush, Clinton, and George W. Bush. The Secretary also considered the Department of Commerce's narrower investigation of iron ore and semi-finished steel imports in 2001, and found the recommendations in that report to be outdated given the dramatic changes in the steel industry since 2001, including the increased level of global excess capacity, the increased level of imports, the reduction in basic oxygen furnace facilities, the number of idled facilities despite increased demand for steel in critical industries, and the potential impact of further plant closures on capacity needed in a national emergency.

4. In light of this conclusion, the Secretary recommended actions to adjust the imports of steel articles so that such imports will not threaten to impair the national security. Among those recommendations was a global tariff of 24 percent on imports of steel articles in order to reduce imports to a level that the Secretary assessed would enable domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production. The Secretary has also recommended that I authorize him, in response to specific requests from affected domestic parties, to exclude from any adopted import restrictions those steel articles for which the Secretary determines there is a lack of sufficient U.S. production capacity of comparable products, or to exclude steel articles from such restrictions for specific national security-based considerations.

5. I concur in the Secretary's finding that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and I have considered his recommendations.

* * * *

8. …I have decided to adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles, as defined below, imported from all countries except Canada and Mexico. In my judgment, this tariff is necessary and appropriate in light of the many factors I have considered, including the Secretary's report, updated import and production numbers for 2017, the failure of countries to agree on measures to reduce global excess capacity, the continued high level of imports since the beginning of the year, and special circumstances that exist with respect to Canada and Mexico. This relief will help our domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production, which will reduce our Nation's need to rely on foreign producers for steel and ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense. Under current circumstances, this tariff is necessary and appropriate to address the threat that imports of steel articles pose to the national security.

9. In adopting this tariff, I recognize that our Nation has important security relationships with some countries whose exports of steel articles to the United States weaken our internal economy and thereby threaten to impair the national security. I also recognize our shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of the national security. Any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country. Should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.

10. I conclude that Canada and Mexico present a special case. Given our shared commitment to supporting each other in addressing national security concerns, our shared commitment to addressing global excess capacity for producing steel, the physical proximity of our respective industrial bases, the robust economic integration between our countries, the export of steel articles produced in the United States to Canada and Mexico, and the close relation of the economic welfare of the United States to our national security, *see* 19 U.S.C. 1862(d), I have determined that the necessary and appropriate means to address the threat to the national security posed by imports of steel articles from Canada and Mexico is to continue ongoing discussions with these countries and to exempt steel articles imports from these countries from the tariff, at least at this time. I expect that Canada and Mexico will take action to prevent transshipment of steel articles through Canada and Mexico to the United States.

11. In the meantime, the tariff imposed by this proclamation is an important first step in ensuring the economic viability of our domestic steel industry. … It is my judgment that the tariff imposed by this proclamation is necessary and appropriate to adjust imports of steel articles so that such imports will not threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

* * * *

The President issued several additional proclamations on adjusting imports of steel. Proclamation 9711 of March 22, 2018 noted the continuing discussions between the United States and Argentina, Australia, Brazil, Canada, Mexico, South Korea, and the European Union on other means of addressing the threat to U.S. national security posed by imports of steel and exempted steel from those countries from the tariff in Proclamation 9705 until May 1, 2018. 83 Fed. Reg. 13,361 (Mar. 28, 2018).

Proclamation 9740 of April 30, 2018 noted agreements in principle with Argentina, Australia, and Brazil and extended the temporary exemption of these countries from the tariff proclaimed in Proclamation 9705. 83 Fed. Reg. 20,683 (May 7, 2018). And Proclamation 9759 of May 31, 2018 excluded these countries from the tariff proclaimed in Proclamation 9705 on a long-term basis. 83 Fed. Reg. 25,857 (June 5, 2018).

On August 10, 2018, the President issued Proclamation 9772, "Adjusting Imports of Steel Into the United States." 83 Fed. Reg. 40429 (Aug. 15, 2018). Excerpts follow from the Proclamation.

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* * * *

4. The Secretary has informed me that while capacity utilization in the domestic steel industry has improved, it is still below the target capacity utilization level the Secretary recommended in his report. Although imports of steel articles have declined since the imposition of the tariff, I am advised that they are still several percentage points greater than the level of imports that would allow domestic capacity utilization to reach the target level.

5. In light of the fact that imports have not declined as much as anticipated and capacity utilization has not increased to that target level, I have concluded that it is necessary and appropriate in light of our national security interests to adjust the tariff imposed by previous proclamations.

6. In the Secretary's January 2018 report, the Secretary recommended that I consider applying a higher tariff to a list of specific countries should I determine that all countries should not be subject to the same tariff. One of the countries on that list was the Republic of Turkey (Turkey). As the Secretary explained in that report, Turkey is among the major exporters of steel to the United States for domestic consumption. To further reduce imports of steel articles and increase domestic capacity utilization, I have determined that it is necessary and appropriate to impose a 50 percent ad valorem tariff on steel articles imported from Turkey, beginning on August 13, 2018. The Secretary has advised me that this adjustment will be a significant step toward ensuring the viability of the domestic steel industry.

* * * *

On August 29, 2018, the President issued Proclamation 9777, "Adjusting Imports of Steel Into the United States." 83 Fed. Reg. 45025 (Sep. 4, 2018). Excerpts follow from the Proclamation.

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* * * *

3. Consistent with the Secretary's recommendation that I authorize him to exclude from any adopted import restrictions those steel articles for which the Secretary determines there is a lack of sufficient domestic production of comparable products, or for specific national security-based considerations, I have determined to authorize the Secretary to provide relief from quantitative limitations on steel articles adopted pursuant to section 232 of the Trade Expansion Act of 1962, as amended, including those set forth in Proclamation 9740 of April 30, 2018 (Adjusting Imports of Steel Into the United States), and Proclamation 9759 of May 31, 2018 (Adjusting Imports of Steel Into the United States), on the same basis as the Secretary is currently authorized to provide relief from the duty established in clause 2 of Proclamation 9705.

* * * *

3. Automobiles

On May 23, 2018, the Trump Administration initiated a Section 232 investigation into the imports of motor vehicles and automotive parts to determine if those imports threaten to impair U.S. national security. 83 Fed. Reg. 24,735 (May 30, 2018). The investigation was ongoing through the end of 2018.

F. OTHER ISSUES

1. FATCA

As discussed in *Digest 2015* at 487-88 and *Digest 2016* at 503-04, a federal district court dismissed claims challenging the Foreign Account Tax Compliance Act ("FATCA") and the international agreements implementing FATCA ("IGAs") in 2016. *Crawford et al. v. U.S. Dep't. of the Treasury et al.*, No. 3:15-cv-250 (S.D. Ohio). As discussed in *Digest 2017* at 516, the U.S. Court of Appeals for the Sixth Circuit affirmed and rehearing en banc was denied. In 2018, the United States filed its brief in opposition to the petition for certiorari in the U.S. Supreme Court. The brief is excerpted below. On April 2, 2018, the U.S. Supreme Court denied the petition for certiorari in the case. No. 17-911.

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* * * *

2. The court of appeals correctly held that petitioners lack standing to bring their current challenges to FATCA, the IGAs, and the [foreign bank account report or] FBAR requirements and penalties.

a. The court of appeals correctly held that "[n]o [petitioner] has standing to challenge FATCA's individual-reporting requirements or the Passthru Penalty" or the [foreign financial institution or] FFI penalty "because no [petitioner] (or proposed Plaintiff) has alleged of prosecution from noncompliance with FATCA." Pet. App. 32a.

Petitioners do not appear to be subject to FATCA's reporting requirements. Johnson and Zell are the only petitioners who have alleged holding at least $50,000 in foreign accounts, the minimum threshold at which the reporting requirements can apply. Pet. App. 33a; see 26 U.S.C. 6038D(a). Although Johnson alleged that he held at least $75,000 in his accounts, he lives outside the United States, where the reporting threshold is $200,000, or $400,000 if he elects to file a joint return with his wife. 26 C.F.R. 1.6038D-2(a)(3) and (4); see Pet. App. 33a ("[N]ow and at the time [petitioners] filed suit, Johnson is not subject to FATCA."). Zell alleged that he has signatory authority over accounts for the benefit of non-United States persons exceeding $200,000. See Pet. App. 34a. But "FATCA *itself* does not require reporting where, as here, the trust accounts are held entirely for the benefit of non-United States persons," nor does FATCA require "reporting of accounts based on signatory authority." *Ibid.*

Petitioners also lack standing to challenge the penalties and withholding taxes that FATCA requires. No petitioner has alleged “the imposition [against him] of a penalty for noncompliance, or an FFI’s deduction of the Passthru Penalty from a payment to or from a foreign account.” Pet. App. 32a-33a. Nor has any petitioner alleged that he was subjected to “a demand for compliance.” *Id.* at 32a. Petitioners also lack standing to pursue their current challenge to the so-called “FFI Penalty,” that is, the tax withholding “imposed upon financial institutions for their noncompliance with FATCA.” *Id.* at 34a. “[S]uch a challenge would require either that the foreign banks themselves bring suit or that [petitioners] rely on third-party standing, and [petitioners] have made clear that they do not.” *Ibid.*

The court of appeals correctly held that other harms allegedly flowing from FATCA were not fairly traceable to respondents’ conduct. Pet. App. 35a-36a. Crawford alleged that Saxo Bank had refused to allow his firm, Aksioner, to accept American clients. *Id.* at 35a. Yet even if that refusal could qualify as a cognizable injury, “it is not fairly traceable to FATCA but rather *** to Saxo Bank’s own independent actions” in choosing how the bank complies with FATCA. *Ibid.*; see *Allen,* 468 U.S. at 758 (describing as “entirely speculative” plaintiffs’ allegation that withdrawal of an allegedly unconstitutional tax exemption from non-party private school “would lead the school to change its policies”). For similar reasons, neither Adams’s and Zell’s alleged difficulties in obtaining banking services from FFIs, nor the decision of Zell’s foreign clients not to do business with him for fear of being forced to disclose information, gives petitioners standing to sue. Rather, “a foreign bank’s choice either not to do business with Adams or Zell, or (as in Zell’s case) to require Zell’s non-United States clients to make financial or other disclosures even though these clients are not subject to FATCA, is a choice voluntarily made by the bank and is not fairly traceable to FATCA.” Pet. App. 35a-36a. Nor may Johnson challenge FATCA on the basis of his own decision to separate his assets from his wife’s in order to avoid disclosure of her finances. “[T]here is no allegation that FATCA has actually compelled any such disclosure,” and the decision to separate their finances “is traceable to the Johnsons’ own independent actions, not to FATCA.” *Id.* at 35a.

Petitioners’ other allegations relating to FATCA are similarly deficient. Nelson, who is not a United States citizen and is not subject to FATCA, “has stated no facts whatsoever indicating that her account information was disclosed because of FATCA.” Pet. App. 35a. Kuettel’s alleged difficulty in trying to refinance his mortgage—in addition to being “traceable only to the foreign banks and not to FATCA because nothing in FATCA prevented the foreign banks from refinancing Kuettel’s mortgage”—at most constitutes past harm that would be insufficient to warrant prospective injunctive relief. *Id.* at 36a. Finally, petitioners’ other alleged injuries, such as Kish’s marital discord, and “discomfort” on the part of Crawford and Johnson regarding FATCA’s disclosure requirements, are “not the sort of concrete injury that can give rise to standing.” *Ibid.*

b. The court of appeals correctly held that petitioners lacked standing to challenge the IGAs. Senator Paul is the only petitioner who has “alleged injuries that are traceable to the IGAs.” Pet. App. 38a. Senator Paul claims that he “has been denied the opportunity to exercise his constitutional right as a member of the U.S. Senate to vote against the FATCA IGAs.” *Id.* at 37a (citation omitted). This Court has held, however, that “the abstract dilution of institutional legislative power” does not cause cognizable injury to an individual legislator. *Raines,* 521 U.S. at 826. The court of appeals also correctly held that Senator Paul does not fall within the rule of *Coleman v. Miller,* 307 U.S. 433 (1939), in which this Court upheld the standing of a group of 20 state senators whose votes were “overridden and virtually held for naught.” *Id.* at 438. It was

crucial to this Court's resolution of the standing issue in *Coleman* that "the plaintiff-legislators' votes would have been sufficient to defeat the contested legislation." Pet. App. 37a; see *Coleman,* 307 U.S. at 438 ("[I]f [the state legislators] are right in their contentions their votes would have been sufficient to defeat [the challenged law]."). Senator Paul, by contrast, "has not pleaded that his vote on its own would have been sufficient to forestall the IGAs." Pet. App. 37a.

c. The court of appeals correctly held that petitioners do not have standing to challenge the FBAR requirement or the penalty for willful violations. Several petitioners have alleged that they hold foreign bank accounts with more than $10,000, so that the requirement applies to them. Pet. App. 38a. But no petitioner has alleged "both an intent to violate the FBAR requirement and a credible threat of the imposition of a failure-to-file penalty," which would be necessary to maintain standing for a pre-enforcement challenge to the requirement. *Ibid.* Only Zell has alleged that he intends to violate the requirement, yet he "has not alleged any facts that would show a credible threat of enforcement against him." *Ibid.* And even if he had plausibly alleged that the requirement will be enforced against him, the penalty is discretionary: "Zell has not alleged any facts that show that the Willfulness Penalty, as opposed to the lower ordinary penalty (which [petitioners] do not challenge), would be imposed." *Ibid,* (citation omitted). Finally, the desire of Daniel Kuettel's daughter to hold her college fund in her own name does not give her or her father standing to challenge the FBAR requirement. Her alleged injury "is traceable to Daniel Kuettel's personal choice not to transfer the account, and not to the FBAR." *Id.* at 39a.

3. Petitioners' contrary arguments (Pet. 17-34) lack merit.

a. Petitioners principally contend (Pet. 17-19) that the court of appeals adopted an impermissibly restrictive approach to determining whether a plaintiff has standing to raise a pre-enforcement challenge seeking injunctive relief based on the threat of criminal prosecution. Petitioners assert that the court adopted a "rule that 'the threat of prosecution 'must be *certainly impending,,*' with 'a *certain* threat of prosecution,' " Pet. 17 (quoting Pet. App. 26a), whereas this Court's decision in *Driehaus* requires only an allegation of "'certainly impending' future harm *or* a 'substantial risk' thereof," such as "'a credible threat of prosecution,'" *ibid.*(quoting *Driehaus,*134S.Ct. at 2341-2342). Petitioners assert that the decision below conflicts with *Driehaus* and with decisions of other courts of appeals that have "followed *Driehaus*'s credible-threat-of-prosecution test for pre-enforcement challenges." See Pet. 19 (citing cases).

Petitioners' argument reflects a misunderstanding of the court of appeals' ruling. The court correctly recognized that, "[i]n a pre-enforcement challenge to a federal statute, the Supreme Court has held that a plaintiff satisfies the injury requirement of standing by alleging 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and that there exists a credible threat of prosecution thereunder.'" Pet. App. 25a-26a (quoting *Driehaus,* 134 S. Ct. at 2342) (brackets omitted). The court of appeals further explained, however, that no matter how committed the plaintiff may be to engaging in the forbidden conduct, "[t]he mere possibility of prosecution *** does not amount to a 'credible threat' of prosecution. Instead, the threat of prosecution 'must be certainly impending to constitute injury in fact.'" *Id.* at 26a (quoting *Clapper,* 568 U.S. at 410). The court's statement later in the same paragraph that "there must be a certain threat of prosecution," *ibid.,* was simply a paraphrase of this Court's statement in *Clapper* and other decisions that the "threatened injury must be *certainly impending* to constitute injury in fact." 568 U.S. at 409 (citation omitted). The court of appeals did not announce a new, substantively different test. Petitioners could not satisfy their own preferred test.

b. In holding that no petitioner has standing to challenge the FBAR requirement, the court of appeals explained that, "[o]ther than Zell, no [petitioner] has alleged any intent to violate" the requirement, and that "Zell has not alleged any facts that would show a credible threat of enforcement against him." Pet. App. 38a. Petitioners assert (Pet. 20) that "numerous Petitioners verified that they don't *want* to file FBAR reports, believing them unconstitutional, and wouldn't file them if not required." Petitioners contend on that basis (Pet. 20-21) that petitioners other than Zell have adequately alleged an intent to violate the FBAR requirement, and that the decision below conflicts with *Driehaus.* Although petitioners' argument is not entirely clear, petitioners appear to attribute to the court a holding that, in order to establish standing to challenge an allegedly invalid law, a plaintiff must allege that he intends to violate the law *even if* 'the court declines to declare the law invalid.

Nothing in the court of appeals' opinion supports that characterization. And the question whether the court correctly construed the complaint in stating that "[o]ther than Zell, no [petitioner] has alleged any intent to violate the FBAR requirement," Pet. App. 38a, has no significance beyond the circumstances of this case. In any event, the court acknowledged that Zell had adequately alleged an intent to violate the law, and it held that he lacked standing on the separate ground that he "ha[d] not alleged any facts that would show a credible threat of enforcement against him." *Ibid.* Petitioners identify no reason to believe that the court would have reached a different conclusion if it had examined whether other petitioners had adequately alleged a credible threat that the FBAR requirement would be enforced against them.

c. Petitioners contend (Pet.225) that they have suffered an "indirect injury" from the legal requirements imposed on FFIs. Pet. 21 (capitalization altered). Petitioners assert (Pet. 22) that the restrictions on FFIs under FATCA and the IGAs have resulted in "FFIs *** declining to provide financial services to Americans abroad," including some petitioners. Petitioners claim (Pet. 21) that they therefore have standing to challenge FATCA and the IGAs under the theory that a "third-party withholding of a service due to a law gives persons denied the service standing to challenge the law." Petitioners rely on *Roe v. Wade,* 410 U.S. 113 (1973), in which the Court held that "Jane Roe had standing to challenge" a law that penalized doctors performing abortions "because physicians wouldn't provide her an abortion." Pet. 22. Petitioners assert (*ibid.*) that, under *Roe,* they similarly have standing in light of the "coercive effect of FATCA and the IGAs."

As the court of appeals correctly recognized, petitioners' challenge is fundamentally dissimilar to the challenge in *Roe.* See Pet. App. 29a & n.8. There, neither a woman seeking an abortion, nor a doctor who desired to perform one, could have accomplished those ends without violating the law. *Ibid.* In the present case, by contrast, there is "a third option available" to FFIs, which is to "comply with FATCA and do business with United States persons—without imposing additional requirements on their clients beyond what FATCA and the IGAs themselves require." *Id.* at 29a. Petitioners have alleged that some FFIs have made a "voluntary choice to go above and beyond FATCA and the IGAs," including in some instances by declining to do business with United States citizens. *Id.* at 30a. Any ensuing injury to petitioners, however, cannot be attributed to the challenged laws, but rather results from the FFIs' "own independent actions." *Id.* at 35a.

d. Petitioners contend (Pet. 25-28) that the court of appeals failed to accept their allegations as true and to construe the complaint in their favor, as required by *Warth v. Seldin,* 422 U.S. 490 (1975). Although petitioners acknowledge that the court articulated the correct standard, see Pet. App. 32a, they claim (Pet. 26) that the court "didn't do as required." Petitioners

point in particular to the court's conclusion that any FFI denying service to a petitioner did so based on a "voluntary and independent" choice, which was not "traceable to the IGAs." Pet. 27 (quoting Pet. App. 30a, 38a) (emphasis omitted). That conclusion was improper, petitioners argue (*ibid.*), because "Petitioners said denial of services by FFIs was *because* of FATCA/IGAs."

Petitioners' assertions of traceability, however, are not the sort of "nonconclusory factual allegation[s]" that a court must take as true in ruling on a motion to dismiss. *Ashcroft v. Iqbal,* 556 U.S. 662, 680 (2009). The court of appeals did not dispute petitioners' *factual* allegation that some FFIs have reacted to FATCA and the IGAs by declining service to Americans. See Pet. App. 35a-36a. The court held, however, that those choices were "voluntary," and therefore not "traceable to FATCA" or the IGAs as a *legal* matter, because neither FATCA nor the IGAs compelled them. *Id.* at 36a.

The court's application of the traceability requirement is consistent with this Court's instruction that the requirement is not satisfied "if the injury complained of is the result of the independent action of some third party not before the court." *Bennett,* 520 U.S. at 169…

* * * *

2. Universal Postal Union ("UPU")

On August 23, 2018, the President issued a memorandum on "Modernizing the Monetary Reimbursement Model for the Delivery of Goods Through the International Postal System and Enhancing the Security and Safety of International Mail." 83 Fed .Reg. 47,791 (Sep. 19, 2018). Excerpts follow from the memorandum.

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* * * *

Sec. 2. *Policy.* (a) The UPU was established in 1874 by 21 countries. The United States played an integral role in the UPU's creation and, since that time, the United States has actively participated in all phases of the UPU's work. The United States is a party to the current Constitution of the UPU—which was adopted in 1964—and intends to continue to participate fully in and financially contribute to the UPU, as provided in Article 21 of the UPU Constitution. As a member country of the UPU, the United States recognizes the importance of this longstanding organization and is proud of the United States' unbroken record of participation in it.

The Congress has provided that the Secretary of State (Secretary), in concluding postal treaties, conventions, or other international agreements, shall, to the maximum extent practicable, take measures to encourage governments of other countries to make available to the United States Postal Service (USPS) and private companies a range of nondiscriminatory customs procedures that will fully meet the needs of all types of American shippers (39 U.S.C. 407(e)(3)).

The Congress has likewise directed that responsible officials shall apply the customs laws of the United States and all other laws relating to importation or exportation of goods in the same manner to shipments of goods that are competitive products of the USPS and to similar shipments by private companies (39 U.S.C. 407(e)(2)).

It is the policy of the United States to promote and encourage the development of an efficient and competitive global system that provides for fair and nondiscriminatory postal rates.

(b) It is in the interest of the United States to:

(i) promote and encourage communications between peoples by efficient operation of international postal services and other international delivery services for cultural, social, and economic purposes (39 U.S.C. 407(a)(1));

(ii) promote and encourage unrestricted and undistorted competition in the provision of international postal services and other international delivery services, except where provision of such services by private companies may be prohibited by the laws of the United States (39 U.S.C. 407(a)(2));

(iii) promote and encourage a clear distinction between governmental and operational responsibilities with respect to the provision of international postal services and other international delivery services by the Government of the United States and by intergovernmental organizations of which the United States is a member (39 U.S.C. 407(a)(3)); and

(iv) participate in multilateral and bilateral agreements with other countries to accomplish these objectives (39 U.S.C. 407(a)(4)).

(c) Some current international postal practices in the UPU do not align with United States economic and national security interests:

(i) UPU terminal dues, in many cases, are less than comparable domestic postage rates.

As a result:

(A) the United States, along with other member countries of the UPU, is in many cases not fully reimbursed by the foreign postal operator for the cost of delivering foreign-origin letter post items, which can result in substantial preferences for foreign mailers relative to domestic mailers;

(B) the current terminal dues rates undermine the goal of unrestricted and undistorted competition in cross-border delivery services because they disadvantage non-postal operators seeking to offer competing collection and outward transportation services for goods covered by terminal dues in foreign markets; and

(C) the current system of terminal dues distorts the flow of small packages around the world by incentivizing the shipping of goods from foreign countries that benefit from artificially low reimbursement rates.

(ii) The UPU has not done enough to reorient international mail to achieve a clear distinction between documents and goods. Without such a distinction, it is difficult to achieve essential pricing reforms or to ensure that customs requirements, including provision of electronic customs data for goods, are met. Under the current system, foreign postal operators do not uniformly furnish advance electronic customs data that are needed to enhance targeting and risk management for national security and to facilitate importation and customs clearance. My Administration's Initiative to Stop Opioids Abuse and Reduce Drug Supply and Demand, launched in March of this year, requires accurate advance electronic customs data for 90 percent of all international mail shipments that contain goods and consignment shipments within 3 years, so that the Department of Homeland Security can better detect and flag high-risk shipments.

(d) It shall be the policy of the executive branch to support efforts that further the policies in this memorandum, including supporting a system of unrestricted and undistorted competition between United States and foreign merchants. Such efforts include:

(i) ensuring that rates charged for delivery of foreign-origin mail containing goods do not favor foreign mailers over domestic mailers;

(ii) setting rates charged for delivery of foreign-origin mail in a manner that does not favor postal operators over non-postal operators; and

(iii) ensuring the collection of advance electronic customs data.

Sec. 3. *Relations with the UPU.* (a) The United States must seek reforms to the UPU that promote the policies outlined in this memorandum. Such reforms shall provide for:

(i) a system of fair and nondiscriminatory rates for goods that promotes unrestricted and undistorted competition; and

(ii) terminal dues rates that:

(A) fully reimburse the USPS for costs to the same extent as domestic rates for comparable services;

(B) avoid a preference for inbound foreign small packages containing goods that favors foreign mailers over domestic mailers; and

(C) avoid a preference for inbound foreign small packages containing goods that favors postal operators over private-sector entities providing transportation services.

(b) If negotiations at the UPU's September 2018 Second Extraordinary Congress in Ethiopia fail to yield reforms that satisfy the criteria set forth in subsection (a) of this section, the United States will consider taking any appropriate actions to ensure that rates for the delivery of inbound foreign packages satisfy those criteria, consistent with applicable law.

Sec. 4. *Actions by the Secretary.* (a) The Secretary shall notify the Director General of the UPU of the policies and intentions of the United States described in this memorandum.

(b) The Secretary or his designee shall, consistent with 39 U.S.C. 407(b)(1), seek agreement on future Convention texts that comport with the policies of this memorandum in meetings of the UPU, including at the September 2018 Extraordinary Congress.

(c) No later than November 1, 2018, the Secretary shall submit to the President a report summarizing the steps being taken to implement this memorandum. If the Secretary determines that sufficient progress on reforms to promote compatibility of the Acts of the UPU with the policy of this memorandum is not being achieved, the Secretary shall include recommendations for future action, including the possibility of adopting self-declared rates.

* * * *

The Department of State provided the report called for in the August 23, 2018 memorandum, *supra*. On October 17, 2018, President Trump responded to the report, as described in a White House press statement, available at https://www.whitehouse.gov/briefings-statements/statement-press-secretary-38/, and excerpted below. See Chapter 4 for discussion of the U.S. notice of withdrawal from the UPU.

* * * *

…The report noted that sufficient progress has not been made on reforming terms of the Acts of the Universal Postal Union (UPU) in line with the policies of the United States outlined in the Memorandum. The report also recommended steps the United States can take to address the problems identified in the Memorandum.

The President concurs with the Department of State's recommendation to adopt self-declared rates for terminal dues as soon as practical, and no later than January 1, 2020. The Department of State will also file notice that the United States will withdraw from the UPU. This will begin a one-year withdrawal process, as set forth in the UPU Constitution. During this period, the Department of State will seek to negotiate bilateral and multilateral agreements that resolve the problems discussed in the Presidential Memorandum. If negotiations are successful, the Administration is prepared to rescind the notice of withdrawal and remain in the UPU.

* * * *

3. Intellectual Property

a. 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 2018 Special 301 Report in April 2018. The Report is available at https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf. The 2018 Report lists the following countries on the Priority Watch List: Algeria, Argentina, Canada, Chile, China, Colombia, India, Indonesia, Kuwait, Russia, Ukraine, and Venezuela. It lists the following on the Watch List: Barbados, Bolivia, Brazil, Costa Rica, Dominican Republic, Ecuador, Egypt, Greece, Guatemala, Jamaica, Lebanon, Mexico, Pakistan, Peru, Romania, Saudi Arabia, Switzerland, Tajikistan, Thailand, Turkey, Turkmenistan, the United Arab Emirates, Uzbekistan, and Vietnam. See *Digest 2007* at 605–7 and the *2018 Special 301 Report* at 7 and Annex 1 for additional background on the watch lists.

b. Investigation of China's Policies on Technology Transfer, IP and Innovation

On August 14, 2017, the President directed USTR to determine whether to investigate China's laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development. On August 18, 2017, USTR initiated an investigation under section 301 of the Trade Act of 1974, as amended (the "Act") (19 U.S.C. 2411). On March 22, 2018, the President issued a memorandum on the Section 301 investigation of China's laws, policies, practices, or actions related to technology transfer, IP, and innovation. 83 Fed. Reg. 13,099 (Mar. 27, 2018). Excerpts follow from the memorandum.

* * * *

The Trade Representative has advised me that the investigation supports the following findings:

First, China uses foreign ownership restrictions, including joint venture requirements, equity limitations, and other investment restrictions, to require or pressure technology transfer from U.S. companies to Chinese entities. China also uses administrative review and licensing procedures to require or pressure technology transfer, which, inter alia, undermines the value of U.S. investments and technology and weakens the global competitiveness of U.S. firms.

Second, China imposes substantial restrictions on, and intervenes in, U.S. firms' investments and activities, including through restrictions on technology licensing terms. These restrictions deprive U.S. technology owners of the ability to bargain and set market-based terms for technology transfer. As a result, U.S. companies seeking to license technologies must do so on terms that unfairly favor Chinese recipients.

Third, China directs and facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and to generate large-scale technology transfer in industries deemed important by Chinese government industrial plans.

Fourth, China conducts and supports unauthorized intrusions into, and theft from, the computer networks of U.S. companies. These actions provide the Chinese government with unauthorized access to intellectual property, trade secrets, or confidential business information, including technical data, negotiating positions, and sensitive and proprietary internal business communications, and they also support China's strategic development goals, including its science and technology advancement, military modernization, and economic development.

It is hereby directed as follows:

Section 1. *Tariffs.* (a) The Trade Representative should take all appropriate action under section 301 of the Act (19 U.S.C. 2411) to address the acts, policies, and practices of China that are unreasonable or discriminatory and that burden or restrict U.S. commerce. The Trade Representative shall consider whether such action should include increased tariffs on goods from China.

(b) To advance the purposes of subsection (a) of this section, the Trade Representative shall publish a proposed list of products and any intended tariff increases within 15 days of the date of this memorandum. After a period of notice and comment in accordance with section 304(b) of the Act (19 U.S.C. 2414(b)), and after consultation with appropriate agencies and committees, the Trade Representative shall, as appropriate and consistent with law, publish a final list of products and tariff increases, if any, and implement any such tariffs.

Sec. 2. *WTO Dispute Settlement.* (a) The Trade Representative shall, as appropriate and consistent with law, pursue dispute settlement in the World Trade Organization (WTO) to address China's discriminatory licensing practices. Where appropriate and consistent with law, the Trade Representative should pursue this action in cooperation with other WTO members to address China's unfair trade practices.

(b) Within 60 days of the date of this memorandum, the Trade Representative shall report to me his progress under subsection (a) of this section.

Sec. 3. *Investment Restrictions.* (a) The Secretary of the Treasury (Secretary), in consultation with other senior executive branch officials the Secretary deems appropriate, shall propose executive branch action, as appropriate and consistent with law, and using any available statutory authority, to address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States.

(b) Within 60 days of the date of this memorandum, the Secretary shall report to me his progress under subsection (a) of this section.

* * * *

USTR conducted further proceedings in the investigation based on the determination that China's acts, policies, and practices are actionable under section 301(b), including soliciting public comment on the proposed imposition of an additional ad valorem duty of 25% on products from China classified in a list of 1,333 tariff subheadings. 83 Fed. Reg. 14,906 (Apr. 6, 2018).

On May 29, 2018, the President announced that the United States would impose a 25 percent tariff on $50 billion of goods imported from China containing industrially significant technology. Statement available at https://www.whitehouse.gov/search/?s=statement+steps+protect+domestic+technology++intellectual+property+chinas+discriminatory+burdensome+trade+practices.

The additional duties were imposed in two tranches, following public comments and public hearings. Tranche 1 covered 818 tariff subheadings, with an approximate annual trade value of $34 billion. 83 Fed. Reg. 28710 (June 20, 2018). Tranche 2 covered 279 tariff subheadings, with an approximate annual trade value of $16 billion. 83 Fed. Reg. 40823 (August 16, 2018).

In a notice published on September 21, 2018, USTR, at the direction of the President, imposed tariffs on products of China with an annual trade value of approximately $200 billion. 83 Fed. Reg. 47,974 (Sep. 21, 2018). Additional duties of 10 percent were imposed starting on September 24, 2018 and the rate was set to increase to 25 percent on January 1, 2019. *Id*.

On December 19, 2018, USTR published notice of a further modification of the action being taken in the Section 301 investigation, postponing until March 2019 the imposition of the 25 percent duty on products from China determined previously. 83 Fed Reg. 65,198 (Dec. 19, 2018). Excerpts follow from the notice in the Federal Register, explaining the reason for the postponement:

> The United States is engaging with China with the goal of obtaining the elimination of the acts, policies, and practices covered in the investigation. The leaders of the United States and China met on December 1, 2018, and agreed to hold negotiations on a range of issues, including those covered in this Section 301 investigation. … The December 1 Statement notes that the President "agreed that on January 1, 2019, he will leave the tariffs on $200 billion worth of product at the 10% rate, and not raise it to 25% at this time. Both parties agree that they will endeavor to have this transaction completed within the next 90 days. If at the end of this period of time, the parties are unable to reach an agreement, the 10% tariffs will be raised to 25%." The end of the 90-day period mentioned in the December 1 Statement is March 1, 2019.

4. Presidential Permits

a. Keystone XL pipeline

As discussed in *Digest 2017* at 518-19, the State Department issued a permit for the proposed Keystone XL pipeline. The U.S. Department of State announced the availability of the Draft Environmental Assessment ("Draft EA") for the Proposed Keystone XL Pipeline Mainline Alternative Route ("MAR") in Nebraska for public review and comment. 83 Fed. Reg. 36,659 (July 30, 2018). In September, the Department issued a notice of intent to preparea Supplemental Environmental Impact Statement (SEIS) —consistent with the National Environmental Policy Act ("NEPA") of 1969—to analyze the potential environmental impacts of the Keystone XL MAR. 83 Fed. Reg. 46,989 (Sep. 17, 2018). On September 24, 2018, the Department announced the availability for public review and comment of the Draft SEIS for the Keystone XL Pipeline MAR in Nebraska. 83 Fed. Reg. 48,358 (Sep. 24, 2018).

On November 8, 2018, a U.S. district court in Montana issued an order granting partial summary judgment in a case challenging the issuance of the permit for the Keystone XL Pipeline; vacating the record of decision ("ROD") issued on March 23, 2017; and granting plaintiffs' request for an injunction against any activity in furtherance of the construction or operation of the Keystone XL Pipeline until the SEIS is supplemented to comply with requirements of NEPA and the Administrative Procedures Act ("APA"). *Indigenous Environmental Network and North Coast River Alliance* et al.*, v. U.S. Dept. of State and TransCanada,* et al., No. CV-17-29, CV 17-31. Excerpts follow from the court's order.

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* * * *

The Department's purpose, therefore, stems from Keystone's crossing of the international border between the United States and Canada. This crossing requires a cross-border permit. …The Department must put forth a ROD approving or denying TransCanada's cross-border permit application. *Id.* The Department needed to consider Keystone's application and whether it would serve the national interest. *Id.* The Department reached a national interest determination based on its evaluation of the Keystone's potential environmental, cultural, economic, and other impacts. *Id.*

No error exists in the Department's purpose and need statement. The Department possesses broad discretion to define the purpose of its actions. The Department may consider private interests as part of its purpose and need. *See Alaska Survival*, 705 F.3d at 1085. The Department reasonably stated that it sought to determine whether approval of the permit would serve the national interest. …. The Department's purpose and need statement further proves reasonable when it considered both TransCanada's private interests and the Department's own requirements for issuing cross-border permits.

* * * *

The Department adequately examined proposed alternatives and reasonably excluded those that did not meet the Project's purpose and need. The factors that the Secretary deemed relevant to the national interest included the following: "foreign policy; energy security; environmental, cultural, and economic impacts; and compliance with applicable law and policy." … The 2014 SEIS articulated and analyzed the proposed Project and the alternatives. The 2014 SEIS also provided a separate section that detailed the alternatives considered, but excluded from further consideration. *Id.* at 6082. The Department set forth reasonable explanations for why each excluded alternative did not meet the private needs of TransCanada. Further, the Department explained why it excluded the alternatives due to national interest factors including environmental and cultural resources, or increased spill risk. The Department's analysis of both the private interest of TransCanada and the Department's national interest considerations (i.e. environmental and cultural impacts) proves reasonable in its dismissal of alternatives.

* * * *

Defendants argue, and the Court agrees, that the 2014 SEIS contained a full and fair discussion of the market demand for oil. (Doc. 173 at 31.) …

* * * *

The Court must limit its review to determining whether the 2014 SEIS took a "hard look" at the effects of Keystone on oil markets. *See Norton*, 276 F.3d at 1072. The Department met this "hard look" requirement in its market analysis and its conclusion that Keystone would not impact the rate of tar sands extraction. The Department provided sufficient analysis that went beyond mere assumptions of the rate of oil sands extraction rates in 2014. The Court finds no error in the Department's 2014 analysis of the rate of tar sands extraction and its impact on climate change.

2. New Information Since 2014

Plaintiffs argue, however, that significant new information has come forth since 2014 regarding oil markets, rail transportation, and greenhouse gas emissions that requires a supplement of the Project's impacts. (Doc. 140 at 35.) NEPA imposes a continuing duty on federal agencies to supplement new and relevant information. *Price Rd. Neighborhood Ass'n v. U.S. Dep't of Transp*., 113 F.3d 1505, 1508-09 (9th Cir. 1997). NEPA requires a supplemental EIS if an "agency makes substantial changes in the proposed action that are relevant to environmental concerns; or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(i)-(ii). An agency is not required, however, to "supplement an EIS every time new information comes to light after the EIS is finalized." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989). A supplement proves necessary "if the new information [presented] is sufficient to show the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered[.]" *Id.* at 374 (quoting 42 U.S.C. § 4332(2)(C)).

a. Change in Oil Markets

Plaintiffs first argue that the Department failed to consider a decrease in oil prices in the 2014 SEIS. (Doc. 140 at 27.) The 2014 SEIS analyzed the possibility of moderate fluctuations in oil prices and the possibility of a low oil price scenario. The 2014 SEIS failed to address, however,

the significant changes in oil prices that have occurred since 2014. This lack of analysis fails to satisfy NEPA's hard look requirement. The 2014 SEIS stated that "pipeline constraints are unlikely to impact production given expected supply-demand scenarios, prices, and supply costs. Over the long term, lower-than-expected oil prices could affect the outlook for oil sand production[.]" … The Department acknowledges that a significant drop in oil prices materially could change the analysis. The 2014 SEIS conditioned much of its analysis, however, on the price of oil remaining high.

The record demonstrates the need to supplement. The 2014 SEIS stated the price of crude oil would range from $100 per barrel to $140 per barrel over twenty years. *Id.* at 5864. The 2014 SEIS predicts the price of oil needed to fall within the range of $65-$75 per barrel in order for Keystone to break even. *Id.* at 5767. The 2014 SEIS concedes that Keystone would be affected by supply costs if the oil prices fell within or below that range. *Id.*

The United States Energy Information Administration predicts that the price of oil likely will remain below $100 for decades. *Id.* at 1849. The record shows further that a dramatic drop in oil prices occurred soon after publication of the 2014 SEIS that lowered the price to nearly $38 per barrel. The Department suggests that the current price of oil stands at roughly $60 per barrel. (Doc. 173 at 49.) This drop constitutes more than a mere fluctuation in oil prices. Plaintiffs also present evidence that the Environmental Protection Agency called upon the Department to revisit the EIS's conclusions after the 2015 oil prices dropped. … Oil prices have remained below the "break-even" numbers established in the 2014 SEIS. This new and relevant information bears upon the Department's earlier analysis in the 2014 SEIS. The Court makes no suggestion of whether this information should alter the Department's analysis. Such an analysis proves material, however, to the Department's consideration of Keystone's impact on tar sands production.

* * * *

c. Greenhouse Gas Emissions

Plaintiffs next allege that the Department violated NEPA by failing to evaluate the cumulative climate impacts of Keystone in combination with other pipelines. …

* * * *

Defendants failed to analyze cumulative climate impacts along with the pending Alberta Clipper expansion. The Court considers the Department's analysis of Keystone in the Alberta Clipper EIS as a cumulative action. *See* 40 C.F.R. § 1508.7. The Department similarly should have analyzed the Alberta Clipper pipeline's emissions in the Keystone SEIS. The Department argues that the Keystone SEIS obtained a full picture of the pipeline's climate change impacts. (Doc. 173 at 43.) The Department also admits, however, that the 2014 SEIS failed to analyze greenhouse gas emissions associated with the Alberta Clipper. (Doc. 173 at 50-51.) The Department thus failed to paint a full picture of emissions for these connected actions, and, therefore, ignored its duty to take a "hard look." *See Norton*, 276 F.3d at 1072.

* * * *

The Keystone SEIS indicated that greenhouse gas emissions associated with the pipeline would range annually from 1.3 to 27.4 MMTCO2e. The Alberta Clipper EIS determined that combined greenhouse gas emissions associated with both pipelines would range annually from 2.1 to 49.9

MMTCO2e. A difference of this magnitude cannot be dismissed simply as harmless error. The error left out significant information from the climate analysis in the Department's possession. The Department should have considered the cumulative impacts of both projects. The Court recognizes the Department's decision to issue the permit regarding the Alberta Clipper expansion. The Court cannot assume without reasoned analysis, however, that the Department would reach the same conclusion for the Keystone permit. The Department must supplement this analysis to include the same information. Further, the Department must supplement the environmental analysis to include the same updated GREET model analysis used in the Alberta Clipper EIS.

D. Impacts in Canada

Plaintiffs next argue that the Department violated NEPA by failing to consider sufficiently potential environmental impacts in Canada. …

* * * *

… The 2014 SEIS's incorporation of the Canadian government's environmental review sufficiently informed officials and citizens of impacts in Canada before the Department made a decision and took action on Keystone. *See Id.*

E. Other Environmental Impacts

Plaintiffs allege three additional areas where the Department failed to provide a "full and fair discussion." These areas include Keystone's impacts to cultural resources, the adequacy of comment responses, and oil spills.

1. Cultural Resources

NEPA requires agencies to analyze impacts to cultural resources. 40 C.F.R. §§ 1502.16(g), 1508.8. Plaintiffs argue that Keystone poses risks of direct damage to cultural resources within the Project area. (Doc. 146 at 36.) Plaintiffs contend that the social, cultural, and health impacts run the length of Keystone, and that over 1,000 acres remain unsurveyed for potential cultural resources. *Id.*

* * * *

The Department appears to have jumped the gun when it issued the ROD in 2017 and acted on incomplete information regarding potential cultural resources along the 1,038 acres of unsurveyed route. The Department must supplement the information on the unsurveyed acres to the 2014 SEIS's cultural resources analysis, in order to comply with its obligations under NEPA. *See* 40 C.F.R. §§ 1502.16(g), 1508.8.

2. Comments

Plaintiffs next argue that Defendants failed to respond adequately to public comments that it received on the Draft 2014 SEIS. …

The 2014 SEIS adequately addressed the comments. The 2014 SEIS first organized comments into themes based on subject matter. The 2014 SEIS dedicated a significant portion to responding to the categories and opposing viewpoints. …The Department did not violate NEPA in its comments analysis.

3. Oil Spills

Plaintiffs next allege that the Department failed to consider new information regarding oil spills. …

* * * *

The major spills that occurred between 2014 and 2017 qualify as significant. The Department would have evaluated the spills in the 2014 SEIS had the information been available. Further, the risk of spills likely would affect Keystone's potential impact on other areas of the ROD's analysis, including risks to water and wildlife. These new spills and the information provided by them warrant an update.

The ROD similarly fails to show how the 2014 SEIS adequately addressed the NAS study regarding tar sands oil. The ROD merely asserts that Keystone has agreed to consult with local emergency responders and update its mitigation response plans as new information becomes available. This conclusory statement fails to meet NEPA's "hard look" requirement. The absence of this information from the 2014 SEIS's mitigation measures demonstrates that the agency acted upon incomplete information in setting forth its mitigation measures. *Marsh*, 490 U.S. at 371. The Department must supplement this information.

Plaintiffs also argue that the Department failed to analyze sufficiently potential impacts of Keystone's spills and leaks to water resources. The Court's determination that the Department must supplement information regarding spills allows the Department to address how the updated information on spills will impact water resources.

F. The Department's Change in Course Between 2015 and 2017

An agency must provide a detailed justification for reversing course and adopting a policy that "rests upon factual findings that contradict those which underlay its prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Agency action qualifies as "arbitrary and capricious if the agency has … offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Org. Vill. of Kake v. U.S. Dept. of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)).

1. Compliance with the APA standard for a policy change

The United States Supreme Court established a four part test in *Fox* to determine whether a policy change complies with the APA: (1) the agency displays "awareness that it is changing position;" (2) the agency shows that "the new policy is permissible under the statute;" (3) the agency "believes" the new policy is better; and (4) the agency provides "good reasons" for the new policy. *Fox*, 556 U.S. at 515-16; *See also Kake*, 795 F.3d at 966. The new policy must include "a reasoned explanation… for disregarding facts and circumstances that underlay or were engendered by the prior policy," if the new policy rests upon factual findings that contradict those underlying its prior policy. *Id.*

* * * *

Here, as in *Kake*, the central issue involves whether the 2017 ROD rests on factual findings that contradict those in the 2015 ROD. And if the 2017 ROD's factual findings contradict the 2015 ROD, the Court must analyze whether the 2017 ROD contains a "reasoned explanation." *Id.* at 967.

2. The Department's Conclusions on Climate Change

The Department denied the permit in its 2015 ROD. The Department relied heavily on the United States's role in climate leadership. … The Department issued a new ROD in 2017. The new ROD noted that "there have been numerous developments related to global action to address climate change, including announcements by many countries of their plans to do so" since the 2015 ROD. *Id.* at 2518. Moreover, the new ROD suggested that "a decision to approve

[the] proposed Project would support U.S. priorities relating to energy security, economic development, and infrastructure." *Id.* The Department argues that this about-face constitutes a mere policy shift, and that on its own, cannot be found arbitrary and capricious. (Doc. 173 at 88.) The Department possesses the authority to give more weight to energy security in 2017 than it had in 2015. *See Kake*, 795 F.3d at 968. *Kake* and *State Farm* make clear, however, that "even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation." *Id.* The Department did not merely make a policy shift in its stance on the United States's role on climate change. It simultaneously ignored the 2015 ROD's Section 6.3 titled "Climate Change-Related Foreign Policy Considerations."

Section 6.3 of the 2015 ROD determined that the United States's climate change leadership provided a significant basis for denying the permit. The Department acknowledged science supporting a need to keep global temperature below two degrees Celsius above pre-industrial levels *Id.* at 1182-83. The Department further recognized the scientific evidence that human activity represents a dominant cause of climate change. *Id.* The Department cited trans-boundary impacts including storm surges and intense droughts. *Id.* And finally, the Department accepted the United States's impact as the world's largest economy and second-largest greenhouse gas emitter. *Id.*

The 2017 ROD initially tracked the 2015 ROD nearly word-for-word. The 2017 ROD, without explanation or acknowledgment, omitted entirely a parallel section discussing "Climate Change-Related Foreign Policy Considerations." The 2017 ROD ignores the 2015 ROD's conclusion that 2015 represented a critical time for action on climate change. The 2017 ROD avoids this conclusion with a single paragraph. The 2017 ROD simply states that since 2015, there have been "numerous developments related to global action to address climate change, including announcements by many countries of their plans to do so." *Id.* at 2518. Once again, this conclusory statement falls short of a factually based determination, let alone a reasoned explanation, for the course reversal. "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." *Fox*, 556 U.S. at 573.

The Department's 2017 conclusory analysis that climate-related impacts from Keystone subsequently would prove inconsequential and its corresponding reliance on this conclusion as a centerpiece of its policy change required the Department to provide a "reasoned explanation." *See Kake*, 795 F.3d 968. The Department instead simply discarded prior factual findings related to climate change to support its course reversal.

* * * *

CONCLUSION AND REMEDIES

Plaintiffs have asked the Court to issue an injunction that would require the Department to comply fully with NEPA, the ESA, and the APA. Plaintiffs have asked the Court to enjoin and set aside the Department's cross-border permit and ROD. …Finally, Plaintiffs have requested that the Court prohibit activity in furtherance of construction or operation of Keystone and associated facilities.

An agency action is deemed invalid when not promulgated in compliance with the APA. *Kake*, 795 F.3d at 970. Upon remand, a court should provide the agency with specific instructions to address its errors. *Alliance for the Wild Rockies v. Zinke*, 265 F.Supp.3d 1161, 1181 (D. Mont. 2017). The Court provides the following instructions.

Claim 1: The Department's "purpose and need" statement in the 2014 SEIS did not violate NEPA. The Department's range of alternatives analyzed in the 2014 SEIS did not violate NEPA. 40 C.F.R. §§ 1502.1, 1502.13, 1502.14. Further, the Department did not violate NEPA when it set forth its no-action alternative in the 2014 SEIS. Similarly, the Department did not violate NEPA in its analysis of transportation of crude oil by rail in the 2014 SEIS. The Department's response to public comments on the draft 2014 SEIS comported with its obligations under NEPA. And finally, the Department's incorporation of the CNEB's analysis of impacts in Canada satisfied NEPA.

The Department's analysis of the following issues fell short of a "hard look" and requires a supplement to the 2014 SEIS in order to comply with its obligations under NEPA:

- The effects of current oil prices on the viability of Keystone (Section I (C)(2)(a));
- The cumulative effects of greenhouse gas emissions from the Alberta Clipper expansion and Keystone (Section I (C)(2)(c));
- A survey of potential cultural resources contained in the 1,038 acres not addressed in the 2014 SEIS (Section I (E)(1)); and
- An updated modeling of potential oil spills and recommended mitigation measures (Section I (E)(3)).

These omissions require a remand with instructions to the Department to satisfy its obligations under NEPA to take a "hard look" at the issues through a supplement to the 2014 SEIS.

Claim 2: Plaintiffs' second group of claims relate to the need for TransCanada to obtain a right of way across BLM-owned land. The parties' current motions for summary judgment do not address these claims. The Court defers ruling on these claims until the parties have submitted motions and supporting briefs.

Claim 3: NEPA and the APA require a detailed justification for reversing course and adopting a policy that "rests upon factual findings that contradict those which underlay its prior policy." *Fox*, 556 U.S. at 515. The Department must give "a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Kake*, 795 F.3d at 996. The Court previously determined in its Order denying Defendants' Motion to Dismiss (Doc. 99) that it possessed jurisdiction to review the ROD as a final agency action under NEPA and the APA. *Id.* at 8-9. The Department failed to comply with NEPA and the APA when it disregarded prior factual findings related to climate change and reversed course. The Court vacates the 2017 ROD and remands with instructions to provide a reasoned explanation for the 2017 ROD's change in course. *Kake*, 795 F.3d at 996.

Claims 4 and 5: Section 7(a)(2) of the [Endangered Species Act, or] ESA requires that an agency ensure its actions are not likely to jeopardize the continued existence of endangered or threatened species, and are not likely to destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). The agency must rely on the best available science and commercial data available in reaching its conclusions. 16 U.S.C. § 1533(b)(1)(A). The Department did not violate the ESA when it did not use the telemetry data to assess potential harm to whooping cranes. The Department did not violate the ESA when it put forth mitigation measures related to the western prairie fringed orchid. The Department did not violate the ESA in its analysis of the black-footed ferret, the rufa red knot, the northern long-eared bat or terns and plovers. Further, the Department did not violate the ESA when it did not apply Section 7 in Canada.

The Department's 2012 [Biological Assessment, or] BA, and [the Forest and Wildlife Service's, or] FWS's 2013 [Biological Opinion, or] BiOp and concurrence shall be set aside and remanded to the Department with instructions to consider potential adverse impacts to

endangered species from oil spills associated with Keystone in light of the updated data on oil spills and leaks. The Court declines at this time to require the Department to re-initiate formal consultation with FWS pending the outcome of FWS's updated analysis of the oil spill data.

* * * *

b. Borrego Crossing Pipeline

The Secretary of State issued a Presidential permit to Borrego Crossing Pipeline, LLC (''Borrego'') on May 25, 2018, authorizing Borrego Pipeline facilities at the U.S.-Mexico border near Laredo, Texas, for the export of refined petroleum products. 83 Fed. Reg. 28,485 (June 19, 2018). The Secretary made the decision under E.O. 13337, and after taking into consideration: environmental effects, consistent with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1536), and other statutes relating to environmental concerns; as well as the National Historic Preservation Act of 1966 (U.S.C. 470f *et seq.*); and the views of members of the public, various federal and state agencies, and various Indian tribes. *Id*.

5. Corporate Responsibility Regimes

a. 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, i.e. 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 2016* at 511-12; *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.

Consistent with prior practice, the United States sent a delegation to the 2018 Kimberley Process Plenary in Brussels, Belgium. The Final Communiqué from the 2018 Plenary is available at https://www.kimberleyprocess.com/en/2018-final-communique-brussels-belgium.

b. Business and Human Rights

See Chapter 6.

6. Committee on Foreign Investment in the United States

On March 12, 2018, President Trump issued an order "Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited." 83 Fed. Reg. 11,631 (Mar. 15, 2018), excerpted below. The order cites "credible evidence" that Broadcom, a company organized under the laws of Singapore, through exercising control of Qualcomm, might

take action that threatens to impair the national security of the United States. In accordance with the Defense Production Act of 1950, the order prohibits the proposed takeover of Qualcomm by Broadcom. It further requires Broadcom and Qualcomm to certify in writing to the Committee on Foreign Investment in the United States ("CFIUS") that the proposed takeover has been terminated.

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* * * *

Section 1. Findings. (a) There is credible evidence that leads me to believe that Broadcom Limited, a limited company organized under the laws of Singapore (Broadcom), along with its partners, subsidiaries, or affiliates, including Broadcom Corporation, a California corporation, and Broadcom Cayman L.P., a Cayman Islands limited partnership, and their partners, subsidiaries, or affiliates (together, the Purchaser), through exercising control of Qualcomm Incorporated (Qualcomm), a Delaware corporation, might take action that threatens to impair the national security of the United States; 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) of the Defense Production Act of 1950, as appropriate, and pursuant to my authority under applicable law, including section 721, I hereby order that:

(a) The proposed takeover of Qualcomm by the Purchaser is prohibited, and any substantially equivalent merger, acquisition, or takeover, whether effected directly or indirectly, is also prohibited.

(b) All 15 individuals listed as potential candidates on the Form of Blue Proxy Card filed by Broadcom and Broadcom Corporation with the Securities and Exchange Commission on February 20, 2018 (together, the Candidates), are hereby disqualified from standing for election as directors of Qualcomm. Qualcomm is prohibited from accepting the nomination of or votes for any of the Candidates.

(c) The Purchaser shall uphold its proxy commitments to those Qualcomm stockholders who have returned their final proxies to the Purchaser, to the extent consistent with this order.

(d) Qualcomm shall hold its annual stockholder meeting no later than 10 days following the written notice of the meeting provided to stockholders under Delaware General Corporation Law, Title 8, Chapter 1, Subchapter VII, section 222(b), and that notice shall be provided as soon as possible.

(e) The Purchaser and Qualcomm shall immediately and permanently abandon the proposed takeover. …

* * * *

On August 13, 2018, President Trump signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, which included (at Subtitle A of Title XVII of Division A) the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"). On that date, Treasury Secretary Mnuchin, the Chair of the inter-agency

Committee, issued a statement, available at https://home.treasury.gov/news/press-releases/sm457, that includes the following:

> FIRRMA delivers much-needed reforms that will ensure CFIUS has the tools necessary to identify, examine, and address national security concerns arising from foreign investment. America is a vibrant place to invest, and better protecting critical U.S. technology and infrastructure will ensure it stays that way. FIRRMA passed with overwhelming bipartisan support, and I am extremely proud of the work between Treasury and Congress to reach this historic agreement."

In 2018 the Department of the Treasury issued two sets of CFIUS regulations implementing FIRRMA:

- Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 83 Fed. Reg. 51316, amending 31 CFR Part 800 (Oct. 11, 2018), and
- Determination and Temporary Provisions Pertaining to a Pilot Program To Review Certain Transactions involving Foreign Persons and Critical Technologies, 83 Fed. Reg. 51322, adding 31 CFR Part 801 (Oct. 11, 2018).

Cross References

Withdrawal from the Universal Postal Union, **Ch. 4.B.3**
Marrakesh Treaty to Facilitate Access to Public Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, **Ch. 4.B.5**
Animal Science Products, Inc. v. Hebei Welcome Pharm. Co., **Ch. 5.A.1**
Detroit International Bridge Co. v. Canada, **Ch. 5.A.2**
Business and Human Rights, **Ch. 6.G**
*Libya claims litigation (*Aviation *and* Alimanestianu*)*, **Ch. 8.D.2**
Environmental cooperation agreement for USMCA, **Ch. 13.A.3**