

Table of Contents

CHAPTER 4	103
Treaty Affairs	103
A. TREATY LAW IN GENERAL	103
1. Treaties and International Agreements Generally	103
2. ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice	104
B. CONCLUSION, ENTRY INTO FORCE, ACCESSION, WITHDRAWAL, TERMINATION	112
1. Termination of Treaty of Amity with Iran.....	112
2. Withdrawal from Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes	113
3. Withdrawal from the Universal Postal Union.....	113
4. Efforts of the Palestinian Authority to Accede to Treaties	114
5. Testimony in Support of U.S. Ratification of the Marrakesh Treaty.....	115
6. Suspension of Obligations under the INF Treaty	117
C. LITIGATION INVOLVING TREATY LAW ISSUES	118
1. <i>Texas v. New Mexico</i>	118
2. <i>Center for Biological Diversity</i>	121
Cross References	124

CHAPTER 4

Treaty Affairs

A. TREATY LAW IN GENERAL

1. Treaties and International Agreements Generally

Julian Simcock, Deputy Legal Adviser for the U.S. Mission to the United Nations, delivered remarks on October 5, 2018 at a Meeting of the Sixth Committee on “Agenda Item 91: Debate on Strengthening and Promoting the International Treaty Framework.” His remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-91-debate-on-strengthening-and-promoting-the-international-treaty-framework/>.

* * * *

We welcome the opportunity to address issues related to treaties. Treaties provide an important means by which states can establish frameworks to advance their common interests. The United States works actively to identify areas in which treaty relationships can enhance our cooperative efforts. We utilize treaties to promote law enforcement cooperation to fight crime and protect our citizens, to promote mutually beneficial terms for international trade, to coordinate efforts for mutual defense and security, and for many other important purposes. In the United States, we’ve been pleased this year that our Senate has provided advice and consent to ratification of five new treaties, addressing extradition, maritime boundaries, and intellectual property rules. We look forward to continued engagement with other states to make our treaty relationships effective and mutually beneficial.

In the context of considering means of strengthening the international treaty system, we have taken note of ideas for potential changes to regulations under Article 102 of the Charter regarding the registration of treaties. As we noted when the Secretary-General first addressed

possible changes to the regulations in 2016, we believe this Committee should focus its attention on proposals that could further contribute to efficiency, particularly through the effective use of information technology, and make the most productive use of available resources. At the same time, we would have concern about proposals that could have the effect of limiting the accessibility and usefulness to member states of information and treaty texts made available by the Secretary-General. More generally, we continue to believe that consideration of any such changes should proceed cautiously, and that the Committee should take careful account of the views of the Secretariat with regard to any implementation issues or challenges that might be posed by particular proposals. We look forward to further opportunities to give these important issues the careful and rigorous consideration they merit.

* * * *

2. ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice

The United States also submitted formal written comments on the International Law Commission's ("ILC") Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, and accompanying commentaries, which were also adopted on first reading in 2016. Excerpts follow (with footnotes omitted) from the U.S. comments, which are available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

[T]he United States agrees with most of the black letter rules set forth in the Draft Conclusions themselves. We have had greater difficulty in evaluating the commentaries, given their length and breadth. ...[W]e believe the ILC product would be more useful to readers if the commentaries were limited to material that explains and supports the Draft Conclusions. Material deleted to produce a more focused final commentary would remain available to researchers and others who desire to explore the issue more deeply in the Commission's report from 2016.

Further, given their extensiveness, our failure to comment on any particular aspect of the commentaries should not be taken as U.S. agreement with it.

We take this opportunity to address the most significant of our concerns regarding the Draft Conclusions and commentaries that we have been able to identify.

Approach

Before addressing specific Draft Conclusions and commentaries, the United States would like to make a general comment about the interpretative approach that has been adopted. The United States notes that this ILC topic primarily addresses a question of how best to interpret certain provisions of a particular treaty, the Vienna Convention on the Law of Treaties ("the Vienna Convention" or "VCLT"), *i.e.*, what do Articles 31(3)(a) and (b) and 32 mean? Secondly, this topic concerns how to understand the customary international law rules reflected in those provisions. Therefore, we believe that the Draft Conclusions and commentaries would be strengthened by explicit analyses of the meaning of Articles 31(3)(a) and (b) and 32

that apply the whole of Article 31 (and Article 32, where appropriate), as well as greater evidence of State practice and *opinio juris* establishing that the principles set forth in the Draft Conclusions are consistent with customary international law.

Comments on Specific Provisions of the Draft Conclusions or commentaries

Draft Conclusion 3 (Subsequent agreements and subsequent practice as authentic means of interpretation), commentary paragraphs 4–7, and paragraph 24 of the commentary to Draft Conclusion 7

The United States appreciates the Commission’s effort in paragraphs 4-7 of the commentary to Draft Conclusion 3 to distinguish between (1) subsequent agreements and subsequent practice under Article 31, paragraphs 3(a) and (b), that do not necessarily have a conclusive legal effect on the interpretation of the treaty, and (2) cases in which a subsequent interpretive agreement is itself a legally binding instrument or a conclusive interpretation of the treaty. In particular, the United States agrees with the reference to and description of Article 1131(2) of the North American Free Trade Agreement (NAFTA) as an example of the latter. It is an explicit treaty mechanism for arriving at binding subsequent interpretive agreements.

Paragraph 24 of the commentary to Draft Conclusion 7, however, referencing, e.g., *ADF Group Inc. v. United States* in footnote 678, states that “informal agreements that are alleged to derogate from treaty obligations should be narrowly interpreted.” The United States disagrees with this statement and believes it should be deleted from the commentary as lacking in adequate support. The terms of a treaty should be interpreted pursuant to the interpretive rules described in Articles 31 and 32 of the VCLT. Moreover, the *ADF* tribunal was discussing a binding (*i.e.*, “formal”) interpretation under NAFTA Article 1131(2), not an informal one. Second, the *ADF* tribunal was clear that it would not entertain the claimant’s allegation that the interpretation was an “amendment” of the NAFTA. Third, merely because an “alleg[ation]” of derogation has been put forward does not mean a narrow interpretation should follow. The remaining citations in footnote 678 similarly fail to support the proposition quoted above.

Draft Conclusion 4 (Definition of subsequent agreement and subsequent practice), commentary paragraphs 8-11

The United States also appreciates the effort reflected in Draft Conclusion 4 and its commentary to define and clarify the terms “subsequent agreement” and “subsequent practice” in Article 31, paragraphs 3(a) and (b), respectively. However, the United States does not believe that the conclusion drawn in paragraphs 8-11 of the commentary is supported by the material cited. Paragraph 9 of the commentary states that the reasoning of the NAFTA tribunal in *CCFT v. United States* “suggests that one difference between a ‘subsequent agreement’ and ‘subsequent practice’... lies in the different *forms* that embody the ‘authentic’ expression of the will of the parties” (emphasis added). Paragraph 10 states further that “[s]ubsequent agreements and subsequent practice ... are *hence* distinguished based on whether an agreement of the parties can be identified as such, in a *common act*...” (emphasis added). Yet the *CCFT* tribunal neither uses the terms “form” and “common act” nor suggests that they are what distinguishes subsequent agreements and subsequent practice. Indeed, the tribunal suggests that an additional, unilateral statement from Canada (albeit in the same form as the Mexican submission already before the tribunal, but different in form from the U.S. pleadings) might have been sufficient for it to conclude that a subsequent agreement had been reached.

Further, even if the *CCFT* tribunal had addressed the issues of form and a common act, a ruling of a single arbitral tribunal is not sufficient to support the conclusions reached in the commentary. (As noted in the discussion below concerning Draft Conclusion 10, a significant difference between a subsequent agreement and subsequent practice is rather that a subsequent agreement requires a common understanding regarding the interpretation of a treaty that the parties are aware of and accept, whereas subsequent practice does not.)

* * * *

Draft Conclusion 4 (Definition of subsequent agreement and subsequent practice), commentary paragraph 20

Paragraph 20 of the commentary to Draft Conclusion 4 contains a misreading of Article 31 of the Vienna Convention. Paragraph 20 states:

The requirement that subsequent practice in the application of a treaty under article 31, paragraph 3 (b), must be “regarding its interpretation” has the same meaning as the parallel requirement under article 31, paragraph 3 (a) (see paragraphs (13) and (14) above). It may often be difficult to distinguish between subsequent practice that specifically and purposefully relates to a treaty, that is “regarding its interpretation”, and other practice “in the application of the treaty”. The distinction, however, is important because only conduct that the parties undertake “regarding the interpretation of the treaty” is able to contribute to an “authentic” interpretation, whereas this requirement does not exist for other subsequent practice under article 32.

However, Article 31(3)(b) does not require that the parties’ practice be regarding its interpretation. Rather, Article 31(3)(b) requires that the practice be in the application of the treaty and that it establish an agreement of the parties regarding the treaty’s interpretation. This is clear from the language of Article 31(3), which states in pertinent part:

3. There shall be taken into account, together with the context:

- (a) ...;
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) ...

A State’s application of a treaty may reflect a view as to the State’s interpretation of a treaty provision, even where that practice does not involve a specific articulation of the interpretation in question (or, in the words of the commentary, involve practice specifically “regarding the interpretation of the treaty”). Such practice in the application of the treaty, together with similar practice by other States, could serve to establish the agreement of the parties regarding the interpretation of a treaty within the meaning of Article 31(3)(b).

The United States believes that the necessary corrections should be made throughout the commentaries.

Draft Conclusion 5 (Attribution of subsequent practice)

The United States also disagrees with the text of the first paragraph of Draft Conclusion 5, which states that subsequent practice “may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.” Paragraph 2 of the commentary explains that this language borrows from article 2(a) of the draft articles on responsibility of States for internationally wrongful acts, and covers not only conduct of a State,

but also conduct by others that is attributable to a State under international law. In our view, it is not appropriate to apply rules designed to address situations of State responsibility to questions of treaty interpretation as there are many acts that are attributed to a State for purposes of holding a State responsible that would not evidence a State's views regarding the meaning of a treaty to which it is party. An example would be the actions of a State agent contrary to instructions. Therefore, paragraph 1 of the Draft Conclusion should be revised to remove the reference to attribution.

The *Kasikili/Sedudu Island* case cited in the commentary is not to the contrary. In that case, the International Court of Justice found that the use of the disputed island by a local tribe did *not* constitute subsequent practice within the meaning of Article 31(3)(b). In doing so, it focused on the conduct and legal views of the parties in that case with respect to the actions of the tribe. It stated:

To establish such practice, at least two criteria would have to be satisfied: first, that the occupation of the Island by the Masubia was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the southern channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary.

Further, language similar to the attribution language in Draft Conclusion 5 was removed—properly in the U.S. view—from the Draft Conclusions on the Identification of Customary International Law. We believe that the two sets of Draft Conclusions should be consistent.

* * * *

The United States is also concerned about the commentary to paragraph 2 of Draft Conclusion 5. We agree that the conduct of entities other than parties to a treaty may be relevant to assessing the practice of the parties in the application of a treaty. For example, if the International Committee of the Red Cross (ICRC) proposes an interpretation of a treaty and the parties to the treaty respond, the ICRC's proposed interpretation contributes to the generation of, or may help in the assessment of, the practice of those parties. Similarly, where a treaty provides a role for non-party States with their consent, or otherwise intends to incorporate practice of non-party States, their conduct may be relevant to the interpretation of the treaty.

However, we believe that paragraphs 12 to 18 of the commentary need to be reworked to avoid suggesting that non-parties and their practice ha[ve] a role in the interpretation of a treaty that is inconsistent with Article 31 of the Vienna Convention. In particular, it should be made clear that non-party international organizations, the ICRC, and other non-parties may collect evidence of practice that may be a useful starting point in identifying the practice of the parties in the application of the treaty, or those non-parties may inspire the parties to engage in practice that constitutes subsequent practice, as in the ICRC example above. However, it is what the parties do in the application of the treaty that is relevant subsequent practice in interpreting the treaty. The views or conduct of a non-party as such have no such direct role in the interpretation of a treaty under either Articles 31 or 32. Nor should it be suggested that the views of certain international organizations “may enjoy considerable authority in the assessment of such practice” as stated in paragraph 15 of the commentary, as there is no support for that proposition.

Regarding paragraph 16 of the commentary's discussion of the role of the ICRC, we are concerned that it may be misunderstood by readers as endorsing the view that the ICRC has a mandate to interpret authoritatively the 1949 Geneva Conventions and their Additional Protocols. The mandate from the Statutes of the Movement does not have the legal effect of authorizing the ICRC to issue binding interpretations of the 1949 Geneva Conventions, which the term "interpretative guidance" may suggest. Moreover, the specific example of interpretive guidance provided in paragraph (16) was widely criticized. Thus, we recommend the commentary be revised to reflect that this example prompted criticism by States, including descriptions of contrary State practice.

Conclusion 6 (Identification of subsequent agreements and subsequent practice), Paragraphs 15-18 of the commentary

We appreciate the discussion of Article 118 of the Third Geneva Convention as a useful example that demonstrates, as noted in draft commentary paragraph 18, "the need to identify and interpret carefully subsequent agreements and subsequent practice, in particular to ask whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty or whether they are motivated by other considerations." However, we recommend refining the discussion of this example.

First, the discussion seems to focus on the issue of whether "the declared will of the prisoner of war must always be respected." However, the more significant issue of treaty interpretation presented by Article 118 is whether the wish of the POW not to be repatriated may be considered at all, consistent with the terms of the treaty provision.

Second, footnote 603 of the commentary cites "the United States manual," by reference to a quote found in the ICRC's study on Customary International Humanitarian Law. The actual manual being cited is a U.S. Department of the Army Field Manual last issued in 1976, and the effect of that manual must be considered in light of changes to U.S. law and Department of Defense procedures since that time. Moreover, the provision of that manual being cited is based on Article 109 of the Third Geneva Convention, not Article 118. The misinterpretation of U.S. practice in the draft commentary is understandable given that the ICRC study on Customary International Humanitarian Law does not provide this background when it presents what the ICRC regards as U.S. practice. The United States has indicated significant concerns with the methodology used in the ICRC's study, including its use of military manuals.

We recommend citing the U.S. Department of Defense Law of War Manual, June 2015, Updated December 2016, section 9.37.4.2., rather than what is currently provided in footnote 603. That discussion makes clear that a neutral intermediary other than the ICRC could be used and supports the interpretation offered by the United Kingdom.

Draft Conclusion 8 (Interpretation of treaty terms as capable of evolving over time)

The United States believes that Draft Conclusion 8 should be revised to eliminate the reference to the "presumed intention" of the parties. Although discerning the intent of the parties is the broad purpose of treaty interpretation, that purpose is served through the specific means of treaty interpretation set forth in Articles 31 and 32 of the Vienna Convention. In other words, intent is discerned by applying the approach set out in those articles, not through an independent inquiry into intent or "presumed intent." We believe that Draft Conclusion 8 is confusing in appearing to distinguish between the "intent" of the parties and their "presumed intent" and that it may be misinterpreted to suggest that a separate inquiry as to the "presumed intent" is appropriate, undercutting the interpretative rules of the Vienna Convention.

Although the United States appreciates the clarifying language in paragraph 9 of the commentary, we do not believe that it is sufficient to remove the potential for confusion from the term “presumed intent,” which we note does not appear to be supported by the text of the VCLT, its negotiating history, State practice, or tribunals’ interpretations of the VCLT.

* * * *

Draft Conclusion 10 (Agreement of the parties regarding the interpretation of a treaty), paragraphs 4 and 10 of the commentary

The United States believes that the text of paragraph 1 of Draft Conclusion 10 and at least two paragraphs of the commentary are incorrect and should be revised.

First, paragraph 1 of the Draft Conclusion and paragraph 8 of the commentary erroneously indicates that an agreement under article 31, paragraph 3(a) and (b), requires a common understanding regarding the interpretation of a treaty that the parties are aware of and accept. Paragraph 8 of the commentary offers the explanation that “it is not sufficient that the positions of the parties regarding the interpretation of the treaty happen to overlap, the parties must also be aware of and accept that these positions are common.” Although these statements are correct with regard to subsequent agreements under Vienna Convention Article 31(3)(a), they are not correct with respect to subsequent practice under subparagraph (b). Rather, the parties’ parallel practice in implementing a treaty, even if not known to each other, may evidence a common understanding or agreement of the parties regarding the treaty’s meaning and fall within the scope of Vienna Convention Article 31(3)(b). Indeed, we believe that that is one of the primary differences between a subsequent agreement and subsequent practice, i.e., subsequent practice “establishes” (to use the term in Vienna Convention Article 31(3)(b)) the agreement of the parties; the Vienna Convention does not require that the agreement exist independently.

Further, the International Court of Justice’s judgment in the *Kasikili/Sedudu Island* case does not support the language of paragraph 8. Rather than indicating that—for the purposes of Vienna Convention Article 31(3)(b)—the two parties had to be aware of their common interpretation, as suggested in the commentary, the passages cited simply require that both parties have engaged in subsequent practice evidencing their interpretation of the treaty.

Second, the last sentence of paragraph 4 of the commentary, regarding treaties “characterized by considerations of humanity or other general community interests,” should be deleted because there is no basis in the rules of treaty interpretation described in the Vienna Convention (whether applied as conventional or customary international law) for interpreting such treaties differently from any other treaty; nor would it be clear in all instances which treaties would fall within such a category. The draft commentary does not provide any legal support for the proposition set forth in that sentence.

* * * *

In addition, the United States questions whether there is sufficient practice and authority to support the conclusions in paragraph 25 of the commentary to Draft Conclusion 10 and believes it should be deleted if it cannot be better supported.

Draft Conclusion 11 (Decisions adopted within the framework of a Conference of States Parties)

With respect to Draft Conclusion 11, we are concerned that the Draft Conclusion and commentary may be understood to mean that the work of Conferences of States Parties (COPs) commonly involves acts that may constitute subsequent agreements or subsequent practice in the interpretation of a treaty. Subject to the terms of the treaty at issue, it is possible that a COP may produce a decision that constitutes a subsequent agreement of the parties regarding the interpretation of a treaty provision, if such a decision clearly reflects the agreement of all the treaty's parties (and not just those present at the COP), or that the parties may engage in actions within the COP that constitute subsequent practice within the meaning of Article 31(3)(b). However, those results are by far the rare exception, not the rule, with regard to the activities of COPs. Therefore, the general language of Draft Conclusion 11 should be modified to indicate that these results are neither widespread nor easily demonstrated.

* * * *

In addition, paragraph 3 of Draft Conclusion 10 may be particularly difficult for a reader to understand due to the placement of "including by consensus" at the end of the sentence. We understand from paragraphs 30 and 31 of the commentary that the phrase was added to make clear that a decision by consensus is not necessarily sufficient for a decision to constitute an agreement under VCLT Article 31(3). We agree with that view. However, the placement of the phrase "including by consensus" does not make that point. The commentary on Draft Conclusion 10 may also be confusing in that it cites a number of examples of consensus decisions before clarifying in paragraphs 30 and 31 that consensus is not necessarily sufficient. As such, either those examples should be deleted or an explanation should be added regarding how the examples are consistent with the recognition that consensus is not necessarily sufficient for a decision to constitute an agreement under VCLT Article 31(3).

* * * *

Draft Conclusion 12 (Constituent instruments of international organizations)

The United States agrees with paragraph 1 of Draft Conclusion 12, which states:

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.

However, the United States has a number of concerns regarding other aspects of the Draft Conclusion. Our first concern is with regard to paragraph 2, which reads:

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

The United States agrees that the practice of an international organization may trigger practice by the parties to a treaty that constitutes subsequent practice for the purposes of Article 31(3) or that the parties to the treaty may potentially act within an international organization in a way that constitutes subsequent practice. International organizations may also report on the subsequent practice of the parties. However, we believe it is important to recognize that it is only the practice of the parties to a treaty that constitutes subsequent practice within the meaning of Article 31(3)(b) and that paragraph 2 (including its reference to the “practice” of an international organization) should not be understood to suggest a broader role for the practice of an international organization.

Second, the United States remains very concerned regarding paragraph 3 of Draft Conclusion 12, which states that the “[p]ractice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.”

The draft commentary explains that the purpose of this provision is to address the role of the practice of an international organization “as such” in the interpretation of the instrument by which it was created. In other words, it refers, not to the practice of the parties to the treaty creating the international organization, but to the conduct of the international organization itself. See paragraph 26 of the commentary. In citing Articles 31(1) and 32 of the Vienna Convention, the Commission recognized that the practice of that international organization is not “subsequent practice” for the purposes of the rule reflected in Article 31(3)(b). We believe that that conclusion is correct because the international organization itself is not a party to the constituent instrument and its practice as such, therefore, cannot contribute to establishing the agreement of the parties.

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

Paragraph 1 of Article 31 is not relevant in this context and, therefore, reference to it should be deleted. Paragraph 1 reads: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose.” The factors to be considered pursuant to Article 31(1)—“ordinary meaning,” “context,” and “object and purpose”—do not encompass consideration of subsequent practice regardless of whether the actor is a party or the international organization. The draft commentary fails to explain how Article 31(1) can properly be interpreted in this way, consistent with the Vienna Convention itself. Indeed, it provides no support for this proposition; the decisions cited do not even appear to mention Article 31(1). Indeed, there may even be a risk that such “practice,” if located along with “text” in Article 31(1), might be viewed as superior to “subsequent practice” identified in Article 31(3), an outcome that is clearly not intended.

The United States accepts that Article 32 of the Vienna Convention, in certain circumstances, may provide a basis for considering the practice of an international organization with respect to the treaty by which it was created, particularly where the parties to the treaty are aware of and have endorsed the practice. As such, we can support retention of this reference. Of course, under Article 32, recourse may only be had to supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable. The practice of the international organization would be on par with the *travaux* of the treaty in this regard. We

believe that the circumstances in which the practice of the international organization may fall within Article 32, however, would need to be better explained in the commentary.

* * * *

Draft Conclusion 13 (Pronouncements of expert treaty bodies)

The United States also recognizes that the work of expert treaty bodies, like that of the international organizations addressed in Draft Conclusion 12, “may give rise to, or refer to” a subsequent agreement or subsequent practice by parties to the treaty within the scope of Article 31(3). See paragraph 3 of the Draft Conclusion. However, we believe that this is not a frequent occurrence or easily demonstrated. Moreover, as with Draft Conclusion 12, it is important that it be understood that it is only the practice of the parties in the application of a treaty that constitutes subsequent practice within the meaning of Article 31(3)(b). Paragraph 9 of the commentary appropriately emphasizes this important point, stating “[a] pronouncement of an expert treaty body cannot as such constitute subsequent practice under article 31, paragraph 3(b), since this provision requires a subsequent practice of the parties that establishes their agreement regarding the interpretation of the treaty.” The reference in Paragraph 3 to the possibility that a statement of an expert treaty body may “give rise to, or refer to” subsequent practice by the parties should not be understood to suggest a broader role for expert treaty bodies, and it is on that understanding that we support that aspect of paragraph 3 to the Draft Conclusion.

However, three clarifying edits are required to the text of Draft Conclusion 13. First, Draft Conclusion 13 is titled and refers throughout to “pronouncements” of expert treaty bodies. The United States believes that the term “pronouncements” carries with it an inappropriate implication of authority. We believe that a more neutral term, like “views” or “statements,” should be used instead.

Second, we believe the reference to the “rules” of a treaty in paragraph 2 is likely to be confusing and believe “terms” should be used instead.

Third, the important, clarifying language from paragraph 9 of the commentary, quoted above, should be broadened and included as a new paragraph *2bis* to the Draft Conclusion.

* * * *

B. CONCLUSION, ENTRY INTO FORCE, ACCESSION, WITHDRAWAL, TERMINATION

1. Termination of Treaty of Amity with Iran

On October 3, 2018, Secretary of State Michael R. Pompeo announced that the United States was terminating the 1955 Treaty of Amity with Iran. See Chapter 9 for further discussion of the Secretary’s announcement. See Chapter 7 for discussion of proceedings before the International Court of Justice in which Iran alleged that the United States was violating the Treaty. The text of the October 3, 2018 diplomatic note from the U.S. Department of State to the Ministry of Foreign Affairs of the Islamic Republic of Iran providing notice of the termination of the Treaty follows.

* * * *

The U.S. Department of State refers the Ministry of Foreign Affairs of the Islamic Republic of Iran to the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, signed at Tehran on August 15, 1955 (“the Treaty”).

The policies and actions of the Government of the Islamic Republic of Iran against regional and international peace and security, including its material, financial, and other support for attacks and other hostile actions against United States persons, officials, and property, as well as United States partners and interests, have produced a situation which is incompatible with normal commercial and consular relations under a Treaty of Amity, Economic Relations and Consular Rights and with the peace and friendship which provided the basis on which the parties consented to be bound by the Treaty.

Accordingly, in accordance with Article XXIII, paragraph 3 of the Treaty and with its rights in light of the fundamental change in circumstances which has occurred with regard to those existing at the time of the conclusion of the Treaty, the United States hereby gives notice of the termination of the Treaty.

* * * *

2. Withdrawal from Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes

On October 12, 2018, the United States effected its withdrawal from the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes by letter to the Secretary-General of the United Nations, acting as depositary. The text of the letter so notifying the Secretary-General is available at <https://treaties.un.org/doc/Publication/CN/2018/CN.487.2018-Eng.pdf>, and states:

I have the honor on behalf of the Government of the United States of America to refer to the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, done at Vienna on April 18, 1961.

This letter constitutes notification by the United States of America that it hereby withdraws from the aforesaid Protocol. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.

3. Withdrawal from the Universal Postal Union

As discussed in Chapter 11, President Trump directed the Department of State to file notice that the United States will withdraw from the Universal Postal Union (“UPU”), beginning a one-year withdrawal process, in accordance with the UPU Constitution. The Trump Administration indicated that it may rescind the notice of withdrawal depending on the outcome of negotiations for bilateral and multilateral agreements to resolve U.S. concerns with the current system of reimbursement for the delivery of mail. The

October 15, 2018 letter from Secretary Pompeo to Bishar Abdirahman Hussein, Director General of the International Bureau of the UPU in Berne, Switzerland, states as follows:

I have the honor on behalf of the Government of the United States of America to refer to the Constitution of the Universal Postal Union adopted at Vienna, July 10, 1964, as amended (the UPU Constitution).

This letter constitutes notification by the Government of the United States of America that it hereby denounces the UPU Constitution and, thereby, withdraws from the Universal Postal Union. Pursuant to Article 12 of the Constitution, the withdrawal of the United States shall be effective one year after the day on which you receive this notice of denunciation. I respectfully request your written confirmation of receipt of this notice.

4. Efforts of the Palestinian Authority to Accede to Treaties

The United States has consistently objected to efforts by the Palestinian Authority to accede to international treaties, purporting to act as the “State of Palestine.” See, *e.g.*, *Digest 2015* at 120. On June 18, 2018, the Secretary-General of the UN as depositary for the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, communicated his receipt of the following notification from the United States (available at <https://treaties.un.org/doc/Publication/CN/2018/CN.295.2018-Eng.pdf>):

The United States Mission to the United Nations presents its compliments to the Executive Office of the Secretary-General of the United Nations and refers to the U.N. Secretary-General’s depositary notification C.N.250.2018.TREATIES-XXVI.3, dated May 18, 2018, regarding the purported accession of the ‘State of Palestine’ to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Geneva September 3, 1992 (the Convention), for which the Secretary-General of the United Nations is the depositary.

The Government of the United States of America does not believe the ‘State of Palestine’ qualifies as a sovereign State and does not recognize it as such. Accession to the Convention is limited to sovereign States. Therefore, the Government of the United States of America believes that the ‘State of Palestine’ is not qualified to accede to the Convention and affirms that it will not consider itself to be in a treaty relationship with the ‘State of Palestine’ under the Convention.

A similar depositary notification was communicated by the UN Secretary-General on May 1, 2018 regarding the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, done at Geneva September 7, 1956 (the Convention). That communication is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.229.2018-Eng.pdf>. Also on May 1, 2018, the U.S. objection to purported accession by the “State of Palestine” to the Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes was conveyed by the UN Secretary-General, and that communication is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.228.2018-Eng.pdf>.

The United States notified the Secretary-General of its objection to the Palestinian efforts to accede to multiple treaties on April 4, 2018. The communication regarding the Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V) is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.191.2018-Eng.pdf>. The

communication regarding the United Nations Convention on Contracts for the International Sale of Goods is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.177.2018-Eng.pdf>. The

communication regarding the United Nations Convention Against Illicit Traffic in Narcotic Drugs and psychotropic Substances is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.185.2018-Eng.pdf>. The

communication regarding the Single Convention on Narcotic Drugs is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.176.2018-Eng.pdf>. The

communication regarding the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.175.2018-Eng.pdf>. The

communication regarding the Convention on Psychotropic Substances is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.172.2018-Eng.pdf>. The

communication regarding the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.170.2018-Eng.pdf>. The

communication regarding the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (TIR Convention) is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.169.2018-Eng.pdf>. The

communication regarding the International Convention for the Suppression of Acts of Nuclear Terrorism is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.168.2018-Eng.pdf>. The

communication regarding the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.192.2018-Eng.pdf>.

5. Testimony in Support of U.S. Ratification of the Marrakesh Treaty

On April 18, 2018, Assistant Secretary of State for Economic and Business Affairs Manisha Singh testified at the Senate Foreign Relations Committee hearing on the Marrakesh Treaty to Facilitate Access to Public Works for Persons Who Are Blind,

Visually Impaired, or Otherwise Print Disabled, Done at Marrakesh on June 27, 2013 ([Treaty Doc.: 114-6](#)); Submitted to the Senate on February 10, 2016. For background on the Marrakesh Treaty, see *Digest 2016* at 507; and *Digest 2013* at 335-36. Assistant Secretary Singh's testimony in support of the Marrakesh Treaty is excerpted below and available at <https://www.foreign.senate.gov/hearings/treaties-041818>.

* * * *

...Today, there is a shortage of print materials formatted to be accessible for the many millions of people around the world, including Americans at home and abroad, who are blind, visually impaired, or who have other disabilities that prevent them from reading standard formats. Less than 10 percent of books published worldwide every year are available in braille, large print, or accessible digital files, according to figures compiled by the World Intellectual Property Organization. This lack of resources creates a deficit of information, culture, and education for persons with what are known as “print disabilities.”

The Marrakesh Treaty addresses the gap in access to print materials for these persons by providing, with appropriate safeguards, that copyright restrictions should not impede the creation and distribution of copies of published works in specialized formats accessible to individuals who are blind, visually impaired, or with other print disabilities. It also fosters the cross-border exchange of such accessible format copies internationally.

I would now like to say a bit about the history of the Treaty and what accession would mean in terms of U.S. law.

The United States was actively involved in the preparatory work for the treaty over a number of years and played a leadership role at the Diplomatic Conference in the successful negotiation of the treaty, culminating with its adoption by consensus, on June 27, 2013 in Marrakesh, Morocco, at a gathering of 600 representatives from World Intellectual Property Organization (WIPO) member states.

This achievement was a tribute to the sustained commitment, effort and engagement of a number of U.S. federal agencies as well as stakeholders from the private and non-profit sectors. In particular, the U.S. Patent and Trademark Office led the U.S. negotiating team, assisted and joined by experts from the U.S. Copyright Office, the Office of the United States Trade Representative, the Department of State, the Department of Justice, the Department of Education, and the Institute of Museum and Library Services.

Our negotiators consulted closely throughout with U.S. stakeholders representing intellectual property rights-holders, blind and other individuals with print disabilities, libraries, and other organizations that play a vital role in distributing copies of accessible format materials. Many of them were in Marrakesh when the Treaty was finalized, and it is a pleasure to see a number of them here in the room today.

The United States signed the Marrakesh Treaty in October 2013 and, in February 2016, it was transmitted by the White House to the Senate for its advice and consent to ratification. The Treaty entered into force on September 30, 2016 when Canada became the 20th nation to ratify. Today, 35 countries have ratified or acceded to the Treaty. But none has the range of print materials that the United States has.

The Marrakesh Treaty contains two principal obligations. First, it requires parties to provide exceptions in their national copyright laws for the creation and distribution of accessible format copies for persons with print disabilities. Second, it requires parties to allow the cross-border dissemination of accessible format copies, increasing the number of accessible works available in each country, including the United States.

The provisions of the Treaty keep the scope of the required exception within the parameters of existing international copyright agreements and are generally compatible with existing U.S. law. The Treaty requires other countries to adopt exceptions modeled closely on exceptions already found in U.S. law. Since 1996, section 121 of the Copyright Act (the Chafee amendment) has provided a copyright exception that permits authorized entities, such as libraries, to reproduce and distribute accessible format copies to persons who are blind or visually impaired.

This Treaty is seen as critical to providing access to learning by the blind community and individuals with other print disabilities worldwide. Ratification by the United States of the Marrakesh Treaty, together with enactment of implementing legislation that has been proposed, will have a significantly positive effect. It will allow Americans who are blind or visually impaired or with other print disabilities to access an estimated 350,000 additional works that they currently cannot read.

* * * *

6. Suspension of Obligations under the INF Treaty

On December 4, 2018, Secretary Pompeo announced that the United States had found Russia in material breach of the Intermediate-Range Nuclear Forces (“INF”) Treaty and planned to suspend its obligations under the Treaty as a remedy effective in 60 days unless Russia returned to full and verifiable compliance. See Chapter 19 for further discussion of the U.S. determination regarding the INF Treaty. The text of the diplomatic note provided by the U.S. Embassy to the Russian Federation follows. Similar notes were transmitted to the other parties to the INF Treaty.

* * * *

The Embassy of the United States of America ... refers to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles signed at Moscow December 8, 1987 (INF Treaty).

For a number of years, the Russian Federation has not been complying with its obligations under the Treaty not to possess, produce, or flight-test a ground-launched cruise missile with a range capability equal to or in excess of 500 kilometers but not in excess of 5,500 kilometers or to possess or produce launchers of such missiles. The Russian Federation continues to produce and field new units of a missile system, known as the 9M729, covered by these obligations. As of late 2018, the Russian Federation has fielded multiple battalions of the 9M729 missile system.

The United States engaged the Russian Federation repeatedly since 2013 in an effort to find a diplomatic resolution to its compliance concerns regarding the 9M729 system. These concerns were raised in numerous senior political engagements and at least five meetings of technical experts, including two sessions of the INF Treaty’s Special Verification Commission convened at U.S. request in 2016 and 2017. Notwithstanding these sustained efforts on the part of the United States, the Russian Federation failed to take steps to return to verifiable compliance. The United States has concluded that the current situation, in which the Russian Federation continues to violate the Treaty while the United States abides by it, is untenable. In such circumstances, remaining bound by Treaty obligations that the Russian Federation is not complying with on a reciprocal basis would threaten the security of the United States.

The United States considers that the Russian Federation’s continued production, possession, and deployment of an intermediate-range ground-launched cruise missile system, as described above, constitutes a material breach of the Russian Federation’s obligations to the United States under Articles I, IV, and VI of the Treaty. These obligations not to possess, produce, or flight-test intermediate-range ground-launched cruise missiles, or to possess or produce launchers of such missiles, are central obligations under the Treaty and are essential to the accomplishment of the Treaty’s object and purpose. As a consequence, and in view of the urgent need to pursue expeditiously all measures necessary to protect its national security, the United States will suspend its obligations under the Treaty between the United States and other Treaty Parties, effective on the date that is 60 days from the date of this note, unless the Russian Federation returns to full and verifiable compliance.

* * * *

C. LITIGATION INVOLVING TREATY LAW ISSUES

1. *Texas v. New Mexico*

On December 21, 2018, the United States filed a brief in support of its motion for judgment on the pleadings in a case in the U.S. Supreme Court in which New Mexico brought counterclaims against Texas and the United States. *Texas v. New Mexico*, No. 141. The portion of the U.S. brief relating to the claim with regard to U.S. enforcement of the U.S.-Mexico water convention (“1906 Convention”) is excerpted below. The brief is available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

New Mexico’s Ninth Claim alleges that the United States has failed to enforce the 1906 Convention with Mexico, to stop the pumping of groundwater hydrologically connected to the Rio Grande and unauthorized surface diversions from the Rio Grande that allegedly have “greatly increased in Mexico above Fort Quitman, Texas, since 1906.” N.M. Countercls. ¶ 126. New Mexico alleges that such groundwater pumping and unauthorized diversions in Mexico have exceed the 60,000 acre-feet of Rio Grande water to which Mexico is entitled annually under the 1906 Convention (*id.*) and have created “deficits in the shallow alluvial aquifer that have

reduced Project efficiency, impacted Project releases, reduced return flows, and decreased the amount of water in Project Storage available for future use.” *Id.* However, New Mexico’s Prayer for Relief does not seek relief specific to the 1906 Convention and references the United States’ alleged failure to enforce the Convention only insofar as the failure allegedly resulted in the United States’ violation of the Compact. *See* N.M. Countercls., Prayer for Relief, ¶ J (“Declare that the United States, its officers, and its agencies have violated the Compact by failing to enforce the 1906 Convention”). Thus, it is unclear whether New Mexico intends to assert its Ninth Claim as a separate and distinct claim upon which relief may be granted or if the alleged failure to enforce the 1906 Convention is asserted only as part of New Mexico’s claim that the United States has violated the Compact.

- a. New Mexico’s Ninth Claim fails to state a claim for relief under the 1906 Convention

Assuming New Mexico intends to challenge the United States’ alleged failure to enforce Article IV of the 1906 Convention as a separate and distinct cause of action, the Ninth Claim fails to state a cognizable cause of action against the United States. The Ninth Claim is premised on New Mexico’s allegation that Mexico has received “in excess of the 60,000 acre-fee annually guaranteed to” it under the Convention, which in turn has had a “negative effect on Project deliveries.” *Id.* ¶¶ 125, 127-29. New Mexico appears to allege that, by receiving the allegedly excess water, Mexico has violated Article IV of the Convention, in which it agreed to “waive[] any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the present Mexico Canal and Fort Quitman, Texas.” *Id.* To the extent there is any allegation of a violation of the 1906 Convention, it is not against the United States but against Mexico.

Nonetheless, New Mexico’s Ninth Claim includes assertions that the United States has “failed to enforce” Article IV of the Convention. *Id.* Even assuming Mexico’s actions as alleged by New Mexico could support a finding that Mexico is in violation of Article IV of the 1906 Convention, New Mexico’s attempt to challenge an alleged failure by the United States to take action against Mexico in response to any such violation fails to state a claim upon which relief may be granted. As observed by this Court, “[a] treaty is, of course, ‘primarily a compact between independent nations.’” *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). A treaty will often “depend[] for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.” *Id.* Any alleged breach of a treaty obligation, then, “becomes the subject of international negotiations and reclamations ... [and] ... the judicial courts had nothing to do and can give no redress.” *Id.* (citations and internal quotation marks omitted).

The authority to decide whether a foreign state has breached a treaty obligation in fact owed to the United States and, if so, what if any action to take in response lies exclusively with the President. U.S. Const. art. II, §§ 2, 3 (assigning the President powers over foreign affairs); *Goldwater v. Carter*, 617 F.2d 697, 706 (D.C. Cir. 1979) (acknowledging executive’s power to terminate a treaty because of breach), *vacated on other grounds*, 444 U.S. 996 (1979); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 335 cmt. (b) (1987) (“Under United States law, the President has exclusive authority to determine the existence of a material breach by another party and to decide whether to invoke the breach as a ground for terminating or suspending the agreement.”); *cf.* *Charlton v. Kelly*, 229 U.S. 447, 473 (1913) (If the U.S. treaty partner violated an “obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its

abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which, in its judgment, had occurred, and conform to its own obligation as if there had been no such breach.”). Even assuming New Mexico has sufficiently alleged facts that would provide the United States with a legally sufficient basis upon which to find Mexico in breach of Article IV of the 1906 Convention, the decision to declare Mexico in violation of the treaty and to respond are committed to the President’s sole authority and discretion.

b. The 1906 Convention does not provide for a private right of action for which the Court can provide relief

That enforcement of Article IV of the 1906 Convention lies solely with the Executive is further underscored by the fact that the 1906 Convention does not provide a private right of action for which the Court can provide relief. Treaties are presumed not to create rights that are privately enforceable in the federal courts:

[T]he background presumption is that international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts. Accordingly, a number of the [United States] Courts of Appeals have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary.

Medellin v. Texas, 552 U.S. at 506 n.3 (2008) (citations and quotation marks omitted); *see, e.g., Garza v. Lappin*, 253 F.3d 918, 924 (7th Cir. 2001) (“[A]s a general rule, international agreements, even those benefitting private parties, do not create private rights enforceable in domestic courts.”).

Consistent with this presumption, at least one federal district court has held that the 1906 Convention “contains no ‘specific provision permitting a private action, or one to be clearly inferred.’” *EPCWID v. Int’l Boundary & Water Comm’n*, 701 F. Supp. 121, 124 (W.D. Texas 1988) (quoting *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 546 (D.D.C. 1981), *aff’d*, 726 F.2d 774 (D.C. Cir. 1981)). In that case, the district court dismissed EPCWID’s claim under the 1906 Convention, holding that the plaintiffs “failed to demonstrate that the [1906 Convention] under which it claims its rights arise does, indeed, confer rights upon it.” *Id.* at 125. New Mexico points to nothing to show to the contrary here. There is no indication that the Executive Branch contemplated that Article IV of the 1906 Convention granted any private individual rights or remedies at all, let alone a right of action to enforce Mexico’s agreement to waive any additional claims to Rio Grande waters as consideration for the United States’ agreement to deliver 60,000 acre-feet.

For the foregoing reasons, New Mexico’s Ninth Claim fails to state a claim against the United States for which this Court can provide relief, and should be dismissed.

* * * *

2. *Center for Biological Diversity*

In April 2018, the Center for Biological Diversity (“CBD”) filed suit against the Department of State in the U.S. District Court for the District of Columbia, alleging in part that the Department failed to comply with a reporting deadline under the United Nations Framework Convention on Climate Change (“UNFCCC”). In briefs filed by the U.S. Government in 2018, the Government argued, among other things, that in order for CBD to have a claim enforceable in U.S. courts, CBD would need to demonstrate both that any obligation to meet a reporting deadline under the UNFCCC was self-executing and that the UNFCCC provided for a private right of action in U.S. courts. Excerpts follow from the U.S. Government’s motion to partially dismiss CBD’s complaint, filed on August 29, 2018. *Center for Biological Diversity v. United States Department of State*, No. 1:18-cv-99563. The brief is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

In the absence of legislation requiring the United States to comply with the UNFCCC reporting provisions, such provisions must themselves constitute a “directive to domestic courts” to enforce them. *Id.* at 508. While the United States fully recognizes and does not dispute that Articles 4 and 12 of the Convention include certain international obligations, those provisions (and indeed the entire UNFCCC) are non-self-executing as a matter of U.S. law. Nothing in these provisions suggests that they were “designed to have immediate effect” in domestic courts, *Republic of Marshall Islands*, 865 F.3d at 1195 (citation omitted), even with the benefit of suitable interpretive aids. Rather, the UNFCCC and its reporting provisions amount to “a compact between independent nations.” *Medellin*, 552 U.S. at 505 (citations and internal quotation marks omitted). They are enforceable only as between the “governments which are parties to it.” *Id.* Any alleged breach of the obligation, then, “becomes the subject of international negotiations and reclamations ... [and] ... the judicial courts have nothing to do and can give no redress.” *Id.* (citations and internal quotation marks omitted).

The Second Amended Complaint points to only two articles in the UNFCCC to support its claims: Articles 4 and 12. Article 4 requires Annex I parties to “[c]ommunicate to the Conference of the Parties information related to implementation, in accordance with Article 12.” UNFCCC, Art. 4.1(j). Article 12 elaborates on this requirement and specifies that Annex I parties “shall communicate to the Conference of the Parties, through the Secretariat” various categories of information. *See generally id.*, Art. 12.1-3 (emphasis added). With respect to timing, Article 12 provides that the first communication was to be submitted “within six months of the entry into force” of the UNFCCC for that Party. *Id.* Art. 12.5. Thereafter, “[t]he frequency of subsequent communications by all Parties shall be determined by the Conference of the Parties.” *Id.*

Plaintiff claims a single deadline for submitting the UNFCCC Reports that the Federal Defendants allegedly missed: January 1, 2018. *See, e.g.*, SAC ¶¶ 2, 21, 25. Plaintiff does not identify a UNFCCC provision that creates this deadline. Rather, Plaintiff alleges that this purported deadline is established from a 2012 “decision” document of the UNFCCC Conference of the Parties, *i.e.*, Decision 2/CP.17. *Id.* ¶ 21. The Federal Defendants agree that the UNFCCC

itself does not establish the January 1, 2018, date at issue in this case. Nor does the UNFCCC establish the particular form of reports described in the Second Amended Complaint (*i.e.*, the “national communication” and “biennial report”). Rather, the decision by the Conference of the Parties for Parties to submit these particular reports by this particular date was established in Decision 2/CP.17 (well after the UNFCCC itself was ratified in 1992). ...

Plaintiff points to nothing in the relevant UNFCCC provisions suggesting that any aspect of the Convention’s reporting obligations are self-executing and therefore enforceable in domestic courts, let alone a “directive to domestic courts” to enforce them. *Medellín*, 552 U.S. at 508. Neither article contains an indication of domestic enforcement. Rather, both are “silent as to any enforcement mechanism” in the event of a delay in submitting the reports. *Id.* In particular, Article 12, the *only* provision addressing the timing and other details of submissions by Parties, “is not a directive to domestic courts” at all but, instead, only “call[s] upon governments to take certain action.” *Id.* (quoting *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988)).

* * * *

As the Supreme Court has explained, “[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’” *Id.* at 506 n.3 (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907, cmt. a (1987)). The D.C. Circuit “presume[s] that treaties do not create privately enforceable rights in the absence of *express language* to the contrary.” *Id.* (citing *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980)) (emphasis added). As the D.C. Circuit has observed, treaties that only set forth substantive rules of conduct, and do not explicitly call upon the courts for enforcement of such rules, do not create private rights of action. *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488-89, 491 (D.C. Cir. 2008) (“In the absence of a textual invitation to judicial participation, we conclude the President and the Senate intended to enforce the Treaty of Amity through bilateral interaction between its signatories”); *see also Diggs*, 555 F.2d at 851 (after finding Security Council resolution provisions at issue to be non-self-executing, observing that the provisions “do not by their terms confer rights upon individual citizens; they call upon governments to take certain action. The provisions deal with the conduct of our foreign relations, an area traditionally left to executive discretion.”). Therefore, even if the UNFCCC reporting obligations were self-executing—and thus “ha[d] the force and effect of a legislative enactment,” *Medellín*, 552 U.S. at 505-6 (citation omitted)—Plaintiff could not seek relief pursuant to those provisions in this Court unless the treaty explicitly provided a cause of action to do so.

Importantly, on this definitive point warranting dismissal in its own right, Plaintiff has conceded in prior briefing that that the UNFCCC *does not* confer a private right of action. ... In any case, ... Plaintiff points to nothing in the Convention, or anything in its drafting or negotiating history, to support the existence of a private right of action under the UNFCCC. This is unsurprising. As discussed in Section II.B.2 *supra*, the provisions that Plaintiff relies upon evince an intention to operate on the international plane. They involve only the UNFCCC Conference of the Parties, the secretariat, and the various UNFCCC subsidiary bodies charged with implementing elements of the treaty. Indeed, the text of the reporting provisions makes clear that the reports are for submission to, and the primary benefit of, Parties, the secretariat, and various multilateral subsidiary bodies under the Convention, not private parties like Plaintiff.

Cf. Art. 12.1 (specifying that Annex I parties “shall communicate to the Conference of the Parties, through the Secretariat” the various categories of information comprising the national communication). As such, if the UNFCCC provisions at issue establish a substantive rule, they do not provide for that rule to be enforced in national courts. *See McKesson*, 539 F.3d at 488-89; *cf. Comm. of U.S. Citizens Living in Nicaragua*, 859 F.2d at 938 (“We find in these clauses no intent to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government. The words of Article 94 do not by their terms confer rights upon individual citizens; they call upon governments to take certain action.”). Moreover, courts are to “give ‘great weight’” to the views of the United States with regard to whether a treaty provides a private right of action. *See McKesson*, 539 F.3d at 474.

Plaintiff simply has failed to identify a right stemming from the UNFCCC that is enforceable in this Court or a cause of action to enforce that alleged right. Nor is there a federal implementing statute that could supply Plaintiff a private right of action. Consequently, Plaintiff’s claims premised on the UNFCCC should be dismissed for this additional reason.

* * * *

Cross References

Extradition Treaties, **Ch. 3.A.1.**

Agreement to amend the Compact Review Agreement with Palau, **Ch. 5.E**

U.S. comments on the ILC's Draft Conclusions on the Identification of Customary International Law, **Ch. 7.C.1**

ILC's 70th Session (including work on interpretation of treaties), **Ch. 7.C.2**

Termination of Treaty of Amity with Iran, **Ch. 9.A.2**

Russian purported agreement with South Ossetia, **Ch. 9.B.2**

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

U.S.-Mexico-Canada Agreement, **Ch. 11.D.2**

U.S.-Korea Free Trade Agreement, **Ch. 11.D.3**

Termination of U.S.-Ecuador BIT, **Ch. 11.D.5**

Universal Postal Union, **Ch. 11.F.2**

Maritime Boundary Treaties, **Ch. 12.A.4**

Cultural property MOUs, **Ch. 14.A**

Iran/JCPOA, **Ch. 16.A.1.a**

Bilateral and multilateral defense agreements and arrangements, **Ch. 18.A.3**

Nonproliferation Treaty, **Ch. 19.B.1**

Treaty on the Prohibition of Nuclear Weapons, **Ch. 19.C.1.a**

Comprehensive Nuclear Test Ban Treaty, **Ch. 19.C.2**

New START Treaty, **Ch. 19.C.4**

INF Treaty, **Ch. 19.C.5**

Open Skies Treaty, **Ch. 19.C.6**

Biological Weapons Convention, **Ch. 19.D.6**