

Table of Contents

Introduction	<u>ii</u>
Note from the Editor	<u>v</u>

**DIGEST OF
UNITED STATES PRACTICE
IN INTERNATIONAL LAW**

2018

CarrieLyn D. Guymon
Editor

Office of the Legal Adviser
United States Department of State

Introduction

It is my pleasure to introduce the 2018 edition of the *Digest of United States Practice in International Law*. This volume reflects the work of the Office of the Legal Adviser during calendar year 2018, under the leadership of Legal Adviser Jennifer Newstead. The *Digest* also covers some international legal developments within the purview of other departments and agencies of the United States, such as the U.S. Trade Representative, the Department of the Treasury, the Department of Justice, and others with whom the Office of the Legal Adviser collaborates. The State Department publishes the online *Digest* to make U.S. views on international law quickly and readily accessible to our counterparts in other governments, and to international organizations, scholars, students, and other users, both within the United States and around the world.

This volume features explanations of U.S. international legal views in 2018 delivered by representatives of the U.S. government. The Trump administration announced a new U.S. policy regarding the International Criminal Court (“ICC”), advising that it would use any means necessary to protect citizens of the United States, and other non-parties to the Rome Statute, from unjust prosecution by the ICC. The United States formally commented on two projects of the International Law Commission (“ILC”) in 2018: the Draft Conclusions on the Identification of Customary International Law and the Draft Conclusions on Subsequent Agreements and Subsequent Practice. Jennifer Newstead also delivered remarks on the ILC’s 70th anniversary, addressing concerns regarding the working methods of the ILC, discussing generally the topics on its current program of work, and expressing concerns about some new proposed areas of work. The State Department repeated U.S. support for the territorial integrity of Ukraine and again condemned Russia’s purported annexation of Crimea in a 2018 statement, “Crimea is Ukraine” and Secretary of State Pompeo’s “Crimea Declaration,” as well as several statements at the UN. The State Department released a report documenting atrocities committed against residents in Burma’s northern Rakhine State during the course of violence in the previous two years. The President provided a report to Congress on the “legal and policy frameworks guiding the United States’ use of military force and related national security operations,” updating the previous report provided in 2016. The administration’s views were also conveyed in Congressional communications, including letters regarding U.S. authority to prosecute the campaign against ISIS.

There were numerous developments in 2018 relating to U.S. international agreements, treaties and other arrangements. U.S. extradition treaties with the Republic of Kosovo and the Republic of Serbia received the U.S. Senate’s advice and consent to ratification. U.S. maritime boundary treaties with Kiribati and Micronesia also received advice and consent to ratification in 2018. The U.S.-Mexico-Canada Agreement (“USMCA”) was concluded to replace the North American Free Trade Agreement (“NAFTA”). The United States, Mexico, and Canada also concluded a trilateral agreement on environmental cooperation. The Department of State provided testimony to the Senate in support of the Marrakesh Treaty to Facilitate Access to Public Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The United

States terminated, withdrew from, suspended its obligations or participation under, or announced its withdrawal from: the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes; the U.S.-Iran Treaty of Amity, Economic Relations, and Consular Rights; the Universal Postal Union; the Intermediate-Range Nuclear Forces (“INF”) Treaty; the U.S.-Ecuador Bilateral Investment Treaty; and the Joint Comprehensive Plan of Action (“JCPOA”) with Iran. The United States entered into new arrangements in 2018, including new air transport agreements with the Netherlands with regard to Bonaire, St. Eustatius, and Saba; Grenada; Belize; the United Kingdom; and Haiti. The United States and Canada began a series of negotiations in 2018 to modernize the Columbia River Treaty regime. The United States extended two international agreements and entered into one new agreement pursuant to the 1970 UNESCO Cultural Property Convention. And the UN Convention on International Settlement Agreements Resulting from Mediation was concluded at the 68th session of UNCITRAL Working Group II in 2018 with U.S. support.

In the area of diplomatic relations, the United States reestablished a permanent diplomatic presence in Somalia in 2018. Representatives of the United States government actively and repeatedly called out the Maduro regime in Venezuela through statements and resolutions at the Organization of American States, the UN, and through U.S. sanctions. The Department of State declared the chargé d’affaires of the Venezuelan Embassy and the deputy consul general of the Venezuelan Consulate in Houston *persona non grata*. The ordered departure of U.S. Embassy Havana staff instituted in 2017 ended on March 4, 2018, when a new staffing plan went into effect. The State Department announced the expulsion of 48 Russian officials serving at Russia’s bilateral mission to the United States and twelve intelligence operatives as well as the required closure of the Russian Consulate General in Seattle in response to several destabilizing actions taken by the Russian government. As announced in 2017, the United States proceeded with the opening of the U.S. Embassy to Israel in Jerusalem and the merger of U.S. Embassy Jerusalem and U.S. Consulate General Jerusalem in 2018.

The U.S. government participated in litigation in U.S. courts in 2018 involving issues related to foreign policy and international law. In *Trump v. Hawaii*, the Supreme Court held that Proclamation 9645 was a lawful exercise of the broad discretion granted to the President to suspend the entry of aliens into the United States. The executive branch complied with a federal court’s preliminary injunction by extending Temporary Protected Status (“TPS”) for Sudan, Nicaragua, Haiti, and El Salvador. In *Animal Science Products v. Hebei Welcome Pharmaceutical Co.*, the United States filed an amicus brief in the Supreme Court and the Supreme Court determined the proper weight to give to a foreign government’s representation of its law. The Supreme Court held in *Jesner v. Arab Bank* that foreign corporations are not proper defendants in actions under the Alien Tort Statute. The Supreme Court issued its opinion in *Rubin v. Iran*, agreeing with the U.S. view that Section 1610(g) of the FSIA does not provide a freestanding basis for attaching and executing against the property of a foreign state. The United States filed briefs in several cases in which courts are considering whether they may dismiss, or decline to exercise jurisdiction over, claims based on the doctrines of international comity and *forum non conveniens*, even when the claims are brought under the expropriation exception in the FSIA. The United States filed a brief opposing a petition for certiorari in

Paracha v. Trump, a case brought by a detainee at Naval Station Guantanamo Bay, and the Supreme Court denied the petition for certiorari.

The United States government also participated in a variety of international court proceedings and arbitrations in 2018. The United States made non-disputing party submissions in dispute settlement proceedings in cases in 2018 under NAFTA, the Dominican Republic-Central America-United States-Free Trade Agreement (“CAFTA-DR”), and the United States-Panama Trade Promotion Agreement (“U.S.-Panama TPA”). The Iran-U.S. Claims Tribunal began a series of hearings in 2018 on Case B/1, pertaining to Iran’s former participation in the U.S. Foreign Military Sales program. The United States was very active at the International Court of Justice (“ICJ”) in 2018. The United States made oral submissions at The Hague in two cases brought by Iran against the United States: *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* and *Certain Iranian Assets*. Legal Adviser Jennifer Newstead urged the ICJ to dismiss a case brought against the United States by the Palestinians (*Relocation of the U.S. Embassy to Jerusalem*) because consent to the Court’s jurisdiction is lacking in the absence of treaty relations between the United States and the Palestinians. And the United States submitted two written statements and made an oral presentation in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, a case instituted upon a request for an advisory opinion, which was also discussed in *Digest 2017*.

The *Digest* also discusses U.S. participation in international organizations, institutions, and initiatives. At the 61st UN Commission on Narcotic Drugs, the United States advocated for a global response to the opioid crisis. Later in the year, the United States co-hosted a high-level event at the UN to announce the “Global Call to Action on the World Drug Problem.” The United States withdrew from the Human Rights Council. The United States continued its active participation in the Organization of American States’ Inter-American Commission on Human Rights through written submissions and participation in a number of hearings.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2018 volume, attorneys whose early and voluntary contributions to the *Digest* were particularly significant include Violanda Botet, Mike Coffee, Jeremy Freeman, Jennifer Gergen, Peter Guthrie, Meredith Johnston, Emily Kimball, Benjamin Levin, Oliver Lewis, Michael Mattler, Shana Rogers, Shubha Shastry, and Gene Smilansky. Sean Elliott at the Foreign Claims Settlement Commission also once again provided valuable input. I express very special thanks to Mae Bowen, Andrew Bulovsky, Jarrod Carman, Rebecca Childress, Emma DiNapoli, Mahad Ghani, and Rodolfo Martinez-Don for their review of the *Digest* chapters, and to Jerry Drake, Rickita Smith, and Nicholas Stampono for their technical assistance in transforming drafts into the final published version of the *Digest*. Finally, I thank CarrieLyn Guymon for her continuing, outstanding work as editor of the *Digest*.

Marik String
Acting Legal Adviser
Department of State

Note from the Editor

The official version of the *Digest of United States Practice in International Law* for calendar year 2018 is published exclusively on-line on the State Department's website. I would like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible and aided in the release of this year's *Digest*.

The 2018 volume follows the general organization and approach of past volumes. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Introductions (in Calibri font) prepared by the editor are distinguishable from excerpts (in Times Roman font), which come from the original sources. Some of the litigation-related entries do not include excerpts from the court opinions because most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs. Bracketed insertions indicate editorial clarification or correction to the original text.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through May 2019) are provided in footnotes. For example, we note the release of U.S. Supreme Court and other court decisions, as well as other noteworthy developments occurring during the first several months of 2019 where they relate to the discussion of developments in 2018.

Updates on most other 2019 developments are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross-references to related entries within the volume and to prior volumes of the *Digest*.

As in previous volumes, our goal is to ensure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided a specific internet citation in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily accessible elsewhere, we have placed them on the State Department website, which was updated in 2019, at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>, where links to the documents are organized by the chapter in which they are referenced.

Other documents are available from multiple public sources, both in hard copy and from various online services. The United Nations Official Document System makes UN documents available to the public without charge at <https://www.un.org/en/sections/general/documents/index.html>. For UN-related information generally, the UN's home page at www.un.org also remains a valuable source. Legal texts of the World Trade Organization ("WTO") may be accessed through the WTO's website, at https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

The U.S. Government Printing Office ("GPO") provides electronic access to government publications, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports;

the U.S. Code, Public and Private Laws, and Statutes at Large; Public Papers of the President; and the Daily Compilation of Presidential Documents. The Federal Digital System, available at <https://www.govinfo.gov>, is GPO's online site for U.S. government materials.

On treaty issues, this site offers Senate Treaty Documents (for the President's transmittal of treaties to the Senate for advice and consent, with related materials), available at <https://www.govinfo.gov/app/collection/CDOC>, and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at <https://www.govinfo.gov/app/collection/CRPT>. In addition, the Office of the Legal Adviser provides a wide range of current treaty information at <https://www.state.gov/bureaus-offices/treaty-affairs/> and the Library of Congress provides extensive treaty and other legislative resources at <https://www.congress.gov>.

The U.S. government's official web portal is <https://www.usa.gov>, with links to government agencies and other sites. The State Department's home page (recently modernized in 2019) is <http://www.state.gov>. The website of the U.S. Mission to the UN (also recently modernized) is <https://usun.usmission.gov>.

While court opinions are most readily available through commercial online services and bound volumes, individual federal courts of appeals and many federal district courts now post opinions on their websites. The following list provides the website addresses where federal courts of appeals post opinions and unpublished dispositions or both:

U.S. Court of Appeals for the District of Columbia Circuit:

<https://www.cadc.uscourts.gov/bin/opinions/allopinions.asp>;

U.S. Court of Appeals for the First Circuit:

<http://media.ca1.uscourts.gov/opinions/>;

U.S. Court of Appeals for the Second Circuit:

<http://www.ca2.uscourts.gov/decisions.html>;

U.S. Court of Appeals for the Third Circuit:

<http://www.ca3.uscourts.gov/search-opinions>;

U.S. Court of Appeals for the Fourth Circuit:

<http://www.ca4.uscourts.gov/opinions/search-opinions>;

U.S. Court of Appeals for the Fifth Circuit:

<http://www.ca5.uscourts.gov/electronic-case-filing/case-information/current-opinions>;

U.S. Court of Appeals for the Sixth Circuit:

<https://www.ca6.uscourts.gov/opinions>;

U.S. Court of Appeals for the Seventh Circuit:

<http://media.ca7.uscourts.gov/opinion.html>;

U.S. Court of Appeals for the Eighth Circuit:

<https://www.ca8.uscourts.gov/all-opinions>;

U.S. Court of Appeals for the Ninth Circuit:

<https://www.ca9.uscourts.gov/opinions/>;

U.S. Court of Appeals for the Tenth Circuit:

<https://www.ca10.uscourts.gov/opinion/search>;

U.S. Court of Appeals for the Eleventh Circuit:

<http://www.ca11.uscourts.gov/published-opinions>;

U.S. Court of Appeals for the Federal Circuit:

<http://www.cafc.uscourts.gov/opinions-orders/0/all>.

The official U.S. Supreme Court website is maintained at www.supremecourtus.gov. The Office of the Solicitor General in the Department of Justice makes its briefs filed in the Supreme Court available at <https://www.justice.gov/osg>. Many federal district courts also post their opinions on their websites, and users can access these opinions by subscribing to the Public Access to Electronic Records (“PACER”) service. Other links to individual federal court websites are available at <http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links>.

Selections of material in this volume were made based on judgments as to the significance of the issues, their possible relevance for future situations, and their likely interest to government lawyers, especially our foreign counterparts; scholars and other academics; and private practitioners.

As always, we welcome suggestions from those who use the *Digest*.

CarrieLyn D. Guymon