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CHAPTER 4

Treaty Affairs

A. TREATY LAW IN GENERAL

1. Senate Advice and Consent to Ratification of Treaties

On July 16, 2019, the U.S. Senate passed a resolution providing advice and consent to ratification of the Protocol Amending the Convention between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and its Protocol, signed at Madrid on February 22, 1990. Treaty Doc. 113-4. 165 Cong. Rec. S4850 (2019). The text of the treaty and the resolution of advice and consent are available at <https://www.congress.gov/treaty-document/113th-congress/4>.

On July 17, 2019, the U.S. Senate provided advice and consent to ratification of the Protocol Amending the Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, signed at Washington on October 2, 1996, signed on September 23, 2009, at Washington, as corrected by an exchange of notes effected November 16, 2010 and a related agreement effected by an exchange of notes on September 23, 2009. Treaty Doc. 112-1. 165 Cong. Rec. S4875 (2019). The text of the treaty and the resolution of advice and consent are available at <https://www.congress.gov/treaty-document/112th-congress/1>.

Also on July 17, 2019, the U.S. Senate provided advice and consent to ratification of the Protocol Amending the Convention between the Government of the United States of America and the Government of Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and a related agreement entered into by an exchange of notes, both signed on January 24, 2013, at Washington, together with correcting notes exchanged March 9 and March 29, 2013. Treaty Doc. 114-1. 165 Cong. Rec. S4876 (2019). The text of the treaty and the resolution of advice and consent are available at <https://www.congress.gov/treaty-document/114th-congress/1>.

And, also on July 17, 2019, the Senate provided advice and consent to ratification of the Protocol Amending the Convention between the Government of the

United States of America and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed on May 20, 2009, at Luxembourg and a related agreement effected by the exchange of notes also signed on May 20, 2009. Treaty Doc. 111-8. 165 Cong. Rec. S4771 (2019). The text of the treaty and the resolution of advice and consent are available at <https://www.congress.gov/treaty-document/111th-congress/8>.

On October 22, 2019, the U.S. Senate provided its advice and consent to ratification of the Protocol to the North Atlantic Treaty of 1949 (“NATO”) on the Accession of North Macedonia. 165 Cong. Rec. S5942 (2019). The text of the treaty and the resolution of advice and consent are available at <https://www.congress.gov/treaty-document/116th-congress/1/>. See also discussion in Chapter 18.

2. ILC Draft Guide to Provisional Application of Treaties

On December 15, 2019, the United States provided comments on the International Law Commission’s draft Guide to Provisional Application of Treaties, as adopted by the ILC on first reading in 2018 (“draft guidelines”). Excerpts follow (with most footnotes omitted) from the U.S. comments on the draft guidelines.

* * * *

General Observation

According to the Commission, the purpose of the draft guidelines is “to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties.”

The United States considers the meaning of “provisional application” to be clear, settled, and generally well understood.³ At its core, provisional application means that a State agrees to apply the treaty, or certain provisions thereof, on a legally binding basis prior to the treaty’s entry into force for that State. It differs from entry into force of a treaty in one seminal respect: as a general matter, a State or international organization may terminate obligations arising from the provisional application of a treaty more easily than terminating the treaty after its entry into force.

The United States is pleased that the draft guidelines are in general accord with this view of provisional application. While we believe that the draft guidelines helpfully confirm the basic

³ Article 25 of the Vienna Convention on the Law of Treaties of 1969 (the “1969 Vienna Convention”), which the United States considers to reflect customary international law, provides that:

1. A treaty, or a part of a treaty is applied provisionally pending its entry into force if:
 - a. the treaty itself so provides; or
 - b. the negotiating States have in some other manner agreed.
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is applied provisionally of its intention not to become a party to the treaty

features of the legal regime regarding provisional application of treaties, we have concerns that in some areas, the draft guidelines and accompanying commentary make claims that are not supported by State practice. In these areas, we have concerns that the draft guidelines risk creating confusion about the state of the law and undermining the draft guidelines' purpose. Our observations focus on those draft guidelines and accompanying commentary that most implicate those concerns.

General Commentary

As with any Commission project, a threshold question arises regarding the character of the draft guidelines. The Commission has not proposed the draft guidelines as draft articles for a treaty on the provisional application of treaties, which might entail a corresponding recommendation to States that they consider adopting such a treaty. Rather, the draft guidelines appear to reflect observations by the Commission on questions related to provisional application. In some instances, the Commission finds support for these observations in examples of State practice with regard to provisional application. In other instances, as acknowledged by the Commission in the commentary to particular draft guidelines, the draft guidelines address topics on which the Commission has identified little or no relevant State practice.

Against this background, aspects of the Commission's commentary raise questions about the character of the draft guidelines. On the one hand, paragraph 4 of the General Commentary states that "[a]lthough the draft guidelines are not legally binding as such, they elaborate upon existing rules of international law in the light of contemporary practice." On the other hand, paragraph 5 goes on to state that, in elaborating the guidelines, the Commission sought to "avoid any temptation to be overly prescriptive" and observes that "in line with the essentially voluntary nature of provisional application ... the guide recognizes that States ... may set aside, *by mutual agreement*, the solutions identified in the draft guidelines if they so decide." (Emphasis added.)

The United States agrees that the guidelines cannot be legally binding as such. There is therefore no basis for the suggestion that States would need specifically to agree to set aside the solutions identified in the draft guidelines in order to avoid those solutions applying. Except to the extent that the Commission's observations on a particular point reflect extensive and virtually uniform State practice such that States should regard the matter as having a customary character, States and the Commission should regard the observations contained in the Commission's draft guidelines as reflecting only the Commission's own views. While States may consider the guidelines as they see fit, they do not represent default rules that should be understood to apply unless States opt out of them.

More generally, the United States notes that the value of the draft guidelines depends principally on the extent to which the Commission has compiled examples of State practice to support them. Where the Commission has compiled such examples, the guidelines can usefully illustrate how States have approached particular issues. For clarity, it would be helpful for the Commission to indicate any instances in which it believes such State practice and accompanying *opinio juris* meets the standard required to establish a customary law rule, and to distinguish those from instances in which there is insufficient practice and/or *opinio juris* to establish a customary rule. Even where no customary rule exists, the Commission's work to compile relevant practice in the area may nonetheless be helpful to States, as such practice may prove persuasive as they make their own decisions about how to handle analogous circumstances. Draft guidelines that are supported by limited or no State practice have much less utility, and the United States encourages the Commission to consider carefully whether they merit inclusion in the project at all. Guidelines not supported by significant State practice can only be understood

as reflecting the Commission's own views for the progressive development of the law, and should be clearly identified as such if the Commission decides to include them.

Comments on Specific Provisions of the Draft Guidelines, accompanying commentary or both.

Draft Guideline 3 - General Rule

The Commission's approach to draft guideline 3 raises two principal matters of concern: the necessary parties to an agreement for a treaty to be provisionally applied and whether a State may provisionally apply a treaty pending its entry into force for that State after the treaty has entered into force for other States.

First, we address the "necessary parties" concern. As expressed in Article 25(1) of the 1969 Vienna Convention, a treaty is applied provisionally if the treaty itself so provides or if "the negotiating States have in some other manner so agreed." Draft Guideline 3 omits the reference to "the negotiating States" and in so doing creates uncertainty and potential confusion about the necessary parties to an agreement regarding provisional application of a treaty. The United States understands the reference to "the negotiating States" to be designed to ensure that all those States that would have rights or obligations under the provisional application of a treaty have consented to such provisional application. The issue of the necessary parties to an agreement for the provisional application of a treaty is a fundamental one, and the United States regards it as essential that the Commission accurately address it in a draft guideline purporting to articulate the "general rule" with regard to provisional application.

Second, the draft guideline does not make clear that a State may provisionally apply a treaty pending the treaty's entry into force for that State, even if the treaty has entered into force for other States. Draft guideline 3 does not address this particular circumstance. Yet there is ample support for States provisionally applying treaties that are in force for other States, and the Commission acknowledges as much in paragraph 5 of the commentary. That acknowledgement, without addressing in the guideline itself the matter described in the first sentence of this paragraph, is not sufficient.

In order to address these concerns, we recommend that the Commission revise the draft guideline to read as follows, and delete paragraph 5 of the commentary in its entirety:

"A treaty or part of a treaty may be provisionally applied by a State or international organization, pending its entry into force for that State between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed by all States or international organizations incurring rights and obligations pursuant to the provisional application of the treaty.

Third, we have concerns about the following observation contained in paragraph 7 of the commentary that accompanies this draft guideline:

"Furthermore, the draft guideline envisages the possibility of a third State or international organization, completely *unconnected to the treaty*, provisionally applying it after *having agreed in some other manner with one or more States* or international organizations concerned." (Emphasis added.)

It is unclear what this sentence means, and the commentary cites no examples of State practice involving the provisional application of a treaty in the manner described. What does it

mean to have a State “unconnected to the treaty” provisionally apply the treaty? What does “having agreed in some manner with one or more States or international organizations concerned” mean in this context? Would it be legally sufficient for a third State completely unconnected to the treaty to provisionally apply the treaty with the agreement of one, but not all, other States that are incurring rights and obligations pursuant to such provisional application? These are but few of the questions raised and left unanswered by paragraph 7 of the Commission’s commentary. Accordingly, in the absence of language in the commentary that adequately addresses these questions, or otherwise clarifies the Commission’s thinking in a manner that treaty law and practice support, we strongly urge the deletion of this sentence.

Draft Guideline 4 – Form of Agreement

We have several concerns regarding draft guideline 4, which is intended to address the form of agreement that could effectuate the provisional application of a treaty or parts thereof. This guideline attempts to explain the reference to “in some other manner it has been so agreed” as it appears in draft guideline 3 and in Article 25, paragraph 2, of the 1969 Vienna Convention.

The principal substance of the draft guideline is contained in subparagraph (b), which makes the assertion that two specific forms of “means or arrangements” may satisfy the Vienna Convention standard:

- “a resolution adopted by an international organization or at an intergovernmental conference”; and
- “a declaration by a State or international organization that is accepted by the other States or international organizations concerned.”

The United States is concerned about the draft guideline’s treatment of each of these elements.

First, the discussion of resolutions adopted by an international organization or at an intergovernmental conference risks creating confusion as to the applicable standard for an agreement to apply a treaty provisionally. In particular, the draft guideline suggests that there is some particular significance to resolutions adopted at international conferences for the purposes of establishing valid agreements for provisional application of treaties. An agreement to apply a treaty provisionally requires the consent of all States (and international organizations) assuming rights and obligations pursuant to that provisional application. A resolution adopted at an international conference can establish provisional application obligations only if all such States express their consent to its adoption. Resolutions adopted by an international conference that do not reflect the consent of all States assuming rights and obligations pursuant to provisional application – such as those adopted without the participation of or without the consent of all relevant States – would not establish a valid agreement for provisional application in respect of those States. The key consideration is not the mechanism through which States reach an agreement to apply a treaty provisionally, but rather whether all the necessary parties have consented to the agreement.

In this regard, the United States does not regard many of the examples cited in the commentary as meeting this condition. The commentary does not discuss whether all States among whom provisional application rights and obligations are asserted to have been created participated in the adoption of the resolutions discussed. Moreover, the commentary does not identify instances in which States – as opposed to international organizations – have sought to rely on provisional application rights or obligations asserted to have been created in the instances

it cites, and thus the effectiveness of the resolutions in establishing such rights and obligations has not been demonstrated.

In a number of other instances, the examples cited in footnote 1020 to the commentary do not support the view that States have used resolutions as means of establishing provisional application where not otherwise provided for in the treaty. For example:

- The agreements on Olive Oil and Table Olives, Tropical Timber, and Cocoa, all provide for provisional application in the terms of the treaties themselves, rather than provisional application being established by resolution outside the treaty.
- The commentary misattributes views expressed in a working paper prepared by the Secretariat of the UN Framework Convention on Climate Change as representing the views of the parties to the Kyoto Protocol. The Secretariat paper was prepared two years prior to the adoption of the amendments to the Kyoto Protocol and does not represent views or language adopted by the Parties, nor does it reflect what Parties decided to do two years later when they adopted the amendment at issue. Moreover, as noted above, there is no evidence that all States that would potentially incur rights or obligations under the provisional application regime actually consented to the adoption of the resolution. In any case, it appears that no State has, in fact, submitted a declaration claiming to apply the amendment provisionally, so there is no practice to illustrate whether and to what extent legally effective provisional application obligations would be created through this mechanism.
- The Comprehensive Nuclear-Test-Ban Treaty (CTBT) example does not involve provisional application based on agreement reached ‘in some other manner,’ or support the proposition of ‘implied provisional application.’ As footnote 1020 of the commentary acknowledges, there is no consensus that the 1996 resolution of the CTBT States Signatories that founded the CTBTO Preparatory Commission in fact provisionally applied the treaty, such that CTBT obligations became binding on signatories prior to entry into force of the treaty. No such intention to provisionally apply the treaty’s provisions is clearly stated in the resolution itself, and it would be surprising if such an intention *was* stated, given that the negotiating States had affirmatively decided against including a mechanism for provisional application in the treaty.
- The Inmarsat example similarly does not involve “provisional application” based on agreement reached “in some other manner.” In 1998, the Twelfth Session of the Inmarsat Assembly of Parties, adopted amendments to the Convention deemed necessary to effect Inmarsat’s privatization. Recognizing that the time involved to formally bring the amendments into force would substantially delay the privatization, the Parties reached a separate legally-binding agreement to “rapidly implement” amendments deemed necessary to effect Inmarsat’s privatization, to the extent permitted by their respective national constitutions, laws and regulations. In the lead up to the Assembly, the Parties had debated whether “provisional application” was the means through which privatization would be effected. The United States, among others, argued against use of that term to characterize what the Parties were contemplating. Implicit in the concept of provisional application is the notion that a Party may at any point, prior to the entry into force of a treaty, express its intent not to be bound by the treaty or amendments thereto. In the case of Inmarsat, it would have been difficult, if not impossible, for a Party that had agreed to Inmarsat’s privatization

at the Assembly thereafter to express its intent not to be bound to that agreement without there being a fundamental change to the pre-privatization status quo. There was nothing provisional about what was agreed at the Assembly.

In sum, we believe that the examples cited in footnotes to this draft guideline should be reviewed carefully and maintained only to the extent that they support the proposition for which they are cited. If the Commission cannot establish that they are reflective of provisional application as understood under current law or State practice, it should omit them altogether.

The draft guideline's assertion with respect to the second alternative form for establishing a provisional application agreement – a declaration by a State or international organization that is accepted by the other States or international organizations concerned – is not grounded in law or practice. The commentary to the draft guideline acknowledges the lack of support for this claim by noting that practice relating to provisional application through such declarations “is still quite exceptional.” The commentary cites only one example of practice to support this assertion. However, the example it cites – related to a declaration of the Syrian Arab Republic in respect of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction – does not involve the provisional application of a treaty. The Convention does not contain a provision on provisional application. In the example cited by the Commission, Syria deposited an instrument of accession stating that it “shall comply with the stipulations contained [in the Convention] and observe them faithfully and sincerely, applying the Convention provisionally pending its entry into force for the Syrian Arab Republic.” In the U.S. view, the Syrian statement constituted a unilateral undertaking on the part of Syria that did not afford Syria rights *vis-à-vis* the States Parties to the Convention, nor impose obligations on them. As noted in the commentary itself, this is a case “in which the treaty does not require the negotiating or signatory States to apply it provisionally, but leaves open the possibility for each State to decide whether or not it wishes to apply the treaty.” Whatever set of legal relationships are established by such an arrangement, they are not those of provisional application as that term is understood in the context of Article 25 of the 1969 Vienna Convention and customary international law.

For these reasons, the United States does not support inclusion of specific reference in draft guideline 4 to resolutions adopted by international organizations or conferences or to declarations made by States. We believe that, at a minimum, subparagraph (b) should be revised to make the limited statement that provisional application may be agreed through any means or arrangements other than a separate treaty that are accepted by *all* States or international organizations assuming rights or obligations in connection with the provisional application of the treaty. We recognize, however, that if limited in this way, the draft guideline would add little to the material already addressed in draft guideline 3. For this reason, the Commission may find it more appropriate to omit this draft guideline altogether.

Draft Guideline 6 – Legal Effect of Provisional Application

The United States appreciates the Commission's efforts to clarify the text of draft guideline 6, especially with regard to whether the provisional application of a treaty is the same as its entry into force. We concur with the Commission's view that these are separate concepts. However, we continue to have concerns about two aspects of the commentary accompanying this draft guideline.

First, for the reasons discussed above, we have concerns about the reference to draft guideline 4 that appears in the third sentence of paragraph 2 of the commentary. That sentence states, in relevant part, that the agreement to apply provisionally a treaty “may be expressed in

the forms identified in draft guideline 4.” In light of our concerns regarding draft guideline 4, we recommend deletion of the clause “which may be expressed in the forms identified in draft guideline 4.”

Second, we doubt the necessity and utility of paragraph 6 of the commentary. As the Commission itself notes the “formulation adopted for draft guideline 6 was considered to be sufficiently comprehensive to deal” with the point whether provisional application can result in the modification of the content of a treaty. It is therefore difficult to understand the purpose that paragraph 6 serves and we therefore recommend its deletion.

Draft Guideline 7 - Reservations

The United States does not support including this draft guideline and urges its deletion. As reflected in its associated commentary, the Commission has not identified any State practice with respect to the making of reservations in the context of provisional application of treaties. This calls into question the relevance of the draft guideline, as it addresses an issue that States do not appear to encounter in practice. It also highlights that the draft guideline and accompanying commentary are not grounded in any actual legal authority, but instead represent the Commission’s speculative thoughts on essentially academic questions.

Even if taken only as the Commission’s own views, the Commission’s draft guideline is not particularly helpful. It is premised on the unexplained and unsupported assertion that particular rules of the 1969 Vienna Convention should be understood to apply *mutatis mutandis* to the provisional application of treaties. The Commentary states that this is “meant to indicate the application of some, but not necessarily all, of the rules of the 1969 Vienna Convention applicable to reservations in the case of provisional application.” However, the Commentary does little to explain what criteria should be used to determine which of those rules should be understood to apply and which should not. This approach does little to provide States a reasoned basis for assessing the value of the Commission’s proposals on these points. Moreover, the Commission leaves unanswered how a hypothetical regime for reservations to provisional application would work in practice, including how such reservations might be filed, what rights other States might have to comment or object to them, and how those might be exercised.

For these reasons, we strongly share the views of those members of the Commission who have argued that a draft guideline and accompanying commentary on these issues are neither appropriate nor necessary, and we urge that they be deleted in their entirety.

Draft Guideline 9 – Termination and suspension of provisional application

The United States has concerns with paragraph 3 of this draft guideline, and paragraphs 7, 8, 9 and 10 of the accompanying commentary.

Paragraph 3 provides in relevant part that “[t]he present draft guideline is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in Part V, Section 3 of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension.”

The Commission in this instance states that its “without prejudice” formulation is:

intended to preserve the possibility that provisions pertaining to termination and suspension in the 1969 Vienna Convention may be applicable to a provisionally applied treaty. However, the provision does not aspire to definitively determine which grounds in section 3 might serve as an additional basis for the termination of provisional application, or in which scenarios and to what extent those grounds would be applied.

Instead, the rules of the Vienna Convention are to be ‘applied *mutatis mutandis*’ depending on the circumstances.

The Commission itself acknowledges, however, an “apparent lack of relevant practice” with regard to these issues. Accordingly, as with draft guideline 7, paragraph 3 and its accompanying commentary, draft guideline 9, paragraph 3, appears not to be grounded in any actual legal authority or practice.

In any case, we doubt whether it is necessary to “preserve the possibility that provisions pertaining to termination and suspension in the 1969 Vienna Convention may be applicable to provisional application.” Article 25, paragraph 2 of the Vienna Convention on the Law of Treaties, which the United States considers to be reflective of customary international law, expressly addresses the circumstances under which States may terminate provisional application. A State may terminate provisional application by notifying the other States that are provisionally applying the treaty of its intent not to become a party to the treaty. There is no need for additional, rules for termination of provisional application and, in fact, State practice appears to support the proposition that these rules are unnecessary.

Furthermore, paragraph 3 and the accompanying commentary contain little in the way of analysis or explanation to give States a basis for understanding the Commission’s proposal. The draft guideline makes a blanket assertion that the provisions Part V, paragraph 3 of the Vienna Convention may apply generally to the termination and suspension of provisional application, but makes little attempt to explain why this should be so, or what application of these provisions would entail in practice. Rather than providing useful guidance or suggestions on how States might approach these issues, paragraph 3 would create substantial confusion by suggesting the application of a set of legal rules that the Commission is unwilling or unable to explain.

For these reasons, the United States urges that the Commission delete paragraph 3 of the draft guideline, and paragraphs 7, 8, 9 and 10 of the accompanying commentary, in their entirety.

Draft Guidelines 10 and 11 – Internal law of States and rules of international organizations, and the observance of provisionally applied treaties, and Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

The United States does not have substantive concerns with the statements contained in draft guidelines 10 and 11. We note, however, that the Commission cites no State practice or other authority to support either guideline. Thus, while the positions reflected in these draft guidelines are sensible, we understand them to reflect the Commission’s observations based on abstract reasoning rather than rules reflecting settled law.

Draft Model Clauses

Separately from the Draft Guidelines adopted by the Commission on first reading, the Special Rapporteur has also proposed in the Commission’s 2019 annual report, for the Commission’s consideration in 2020, draft model clauses on the provisional application of treaties. The United States does not find the proposed draft clauses particularly useful. They appear designed to serve as one size-fits-all formulations to address scenarios with multiple potential variations, and to apply uniformly to bilateral and multilateral treaties. The resulting clauses would require further adaptation and elaboration in just about any case in which they were to be used, substantially limiting their value as drafting models.

If the Commission wished to provide assistance to States in drafting provisional application clauses, a more useful approach would be to identify key elements that are frequently

part of provisional application clauses, and to list examples of ways in which those elements have been addressed in actual treaties, including both bilateral and multilateral treaties. Such an exercise could be further enhanced by commentary that provides insight on whether particular formulations have proven more effective than others, and identifies particular interpretive difficulties States might wish to keep in mind when drafting clauses addressing such elements.

* * * *

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

1. United States Withdrawal from the INF Treaty

On February 2, 2019, the United States gave notice of its withdrawal from 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 Washington December 8, 1987 (“INF Treaty”). The operative paragraphs of the February 2, 2019 diplomatic note from the Department of State to the Embassy of the Russian Federation follow. For U.S. communications in 2018 regarding Russia’s breach of the INF Treaty, see *Digest 2018* at 117-18 & 769-74. See Chapter 19 of this *Digest* for statements by the Secretary of State regarding U.S. withdrawal from the INF Treaty.

* * * *

In December 2018, the United States informed INF Treaty Parties that, as a consequence of the Russian Federation’s material breach of its obligations under the INF Treaty, and in view of the urgent need to pursue expeditiously all measures necessary to protect U.S. national security, the United States would suspend its obligations under the Treaty as between the United States and other Treaty Parties, effective 60 days from December 4, unless the Russian Federation returns to full and verifiable compliance. As of February 2, 2019, it is apparent that the Russian Federation has failed to return to full and verifiable compliance with its obligations under the Treaty. To the contrary, the Russian Federation has continued to produce and field new units of the INF Treaty-noncompliant 9M729 missile system. Accordingly, the United States has suspended its obligations under the Treaty effective February 2.

Article XV, Paragraph 2, of the INF Treaty gives each Party the right to withdraw from the Treaty if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized its supreme interests. Taking into account the foregoing, and referring to Diplomatic Note No. 123/2018, the United States has decided that extraordinary events related to the subject matter of the Treaty arising from Russia’s continued noncompliance have jeopardized the United States’ supreme interests. The current situation, in which the Russian Federation continues to violate the Treaty while the United States abides by it, is untenable. Therefore, in the exercise of the right to withdraw from the Treaty provided in Article XV, Paragraph 2, the United States hereby give notice of its withdrawal from the Treaty. In accordance with the terms of the Treaty, U.S. withdrawal will be effective six months from the date of this note.

* * * *

2. Postal Services

As discussed in *Digest 2018* at 113-14 and 472-75, the United States sought modernization of the Universal Postal Union (“UPU”) and provided notice of its withdrawal, set to take effect in October 2019, unless appropriate reforms were made to the system of reimbursement for the delivery of international mail. Specifically, the United States sought the ability to self-declare its reimbursement rates for the delivery of inbound international bulky letters and small packages, rather than having those rates set by the UPU. In September 2019, the UPU convened an Extraordinary Congress in Geneva, Switzerland--only the third in its history--to discuss the reforms sought by the United States.

At that Congress, the UPU adopted by consensus reforms to the system for reimbursement of international mail, allowing the United States to self-declare its rates for inbound bulky letters and small packages from many countries, starting in July 2020. The United States accordingly revoked its withdrawal from the UPU and remained a member of that organization. On October 16, 2019, President Trump met with Bishar Abdirahman Hussein, Director General of the International Bureau of the UPU, and presented him with a letter from Secretary Pompeo officially revoking the United States' denunciation of the UPU Constitution. The text of that letter 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).

By letter dated October 15, 2018, I provided notification, on behalf of the United States of America, of its denunciation of the UPU Constitution and, thereby, its withdrawal from the Universal Postal Union. Pursuant to Article 12 of the UPU Constitution, the withdrawal of the United States was to become effective one year from the date of that notification.

This letter constitutes notification by the Government of the United States of America that it hereby revokes its previously communicated denunciation of the UPU Constitution, effective immediately. Accordingly, the denunciation shall not take effect and the United States shall remain a party to the UPU Constitution and a member of the Universal Postal Union. I respectfully request your written confirmation of receipt of this notice.

* * * *

On November 15, 2019, the Department of State announced the renewal of the charter of the Advisory Committee on International Postal and Delivery Services (“IPODS”) for an additional two years, until November 14, 2021. See November 15, 2019 media note, available at <https://www.state.gov/renewal-of-the-charter-for-the->

[advisory-committee-on-international-postal-and-delivery-services/](#). As explained in the media note:

IPODS assists the Department in maintaining constructive interaction with the U.S. Postal Service and other international postal service providers. It provides advice on U.S. foreign policy related to international postal and other delivery services.

3. Marrakesh Treaty

For background 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, see *Digest 2018* at 116-17 (State Department testimony in support of the treaty); *Digest 2016* at 507; and *Digest 2013* at 335-36.

The Marrakesh Treaty received Senate advice and consent to ratification on June 28, 2018. After the President and Secretary of State signed the instrument of ratification for the Marrakesh Treaty in January 2019, the U.S. Mission in Geneva deposited the instrument at the World Intellectual Property Organization (“WIPO”) on February 8, 2019. The United States became the 50th member to join the Marrakesh Treaty. By its terms, the Treaty entered into force for the United States on June 8, 2019.

4. Arms Trade Treaty

For background on the Arms Trade Treaty, see *Digest 2016* at 926-27; *Digest 2015* at 883-84; *Digest 2013* at 710-15; and *Digest 2012* at 674-79. On April 29, 2019, the President sent a message to the Senate indicating that:

I have concluded that it is not in the interest of the United States to become a party to the Arms Trade Treaty (Senate Treaty Doc. 114-14, transmitted December 9, 2016). I have, therefore, decided to withdraw the aforementioned treaty from the Senate and accordingly request that it be returned to me.

165 Cong. Rec. S2483 (Apr. 29, 2019).

On June 15, 2019, Secretary of State Michael R. Pompeo sent a letter to UN Secretary-General António Guterres to inform him that the United States would not become a party to the Arms Trade Treaty. The body of the letter follows.

* * * *

This is to inform you, in connection with the Arms Trade Treaty, done at New York on April 2, 2013, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on September 25, 2013.

The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty, and all other publicly available media relating to the treaty be updated to reflect this intention not to become a party.

* * * *

C. LITIGATION INVOLVING TREATY LAW ISSUES

1. *Nagarwala*: Federal Prosecution for Female Genital Mutilation

In *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018), the defendants challenged the constitutionality of a federal statute under which they were indicted for their involvement in female genital mutilation ("FGM") procedures performed on girls. The United States argued that the federal criminalization of FGM was necessary and proper in carrying out the treaty power, specifically to implement certain provisions in the International Covenant on Civil and Political Rights ("ICCPR"). The U.S. District Court for the Eastern District of Michigan rejected the U.S. government's arguments regarding the constitutionality of the statute and granted defendants' motion to dismiss the relevant counts of the indictment. Excerpts follow from the district court's opinion, in which the court discusses the necessary and proper clause of the U.S. Constitution and the relationship of the statute to identified provisions of the ICCPR. The opinion is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

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Article I, Section 8, Clause 18 of the Constitution grants Congress the power

[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The Necessary and Proper Clause is not an independent grant of power, but it permits Congress to legislate to carry out powers enumerated elsewhere in the Constitution. *See United States v. Comstock*, 560 U.S. 126, 134 (2010) (noting that "whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power").

In the present case, the government argues that the relevant enumerated power resides in Article II, Section 2, Clause 2, which gives the President "Power, by and with the Advice and

Consent of the Senate to make Treaties, provided two thirds of the Senators present concur.” Congress may pass legislation to effectuate a treaty, *see, e.g., Missouri v. Holland*, 252 U.S. 416 (1920), but only to the extent that the two are rationally related. *See United States v. Lue*, 134 F.3d 79, 84 (2nd Cir. 1998) (citing *McCulloch v. Maryland*, 17 U.S. 316 (1819)). Further, “no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.” *Reid v. Covert*, 354 U.S. 1, 16 (1957). The treaty on which the government relies in the present case is the International Covenant on Civil and Political Rights (“ICCPR”), which the Senate ratified in 1992.

Specifically, the government points to two provisions of this treaty: Article 3, which calls on the signatories to “ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”; and Article 24, which states that “[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.” The government argues that Congress, by enacting the FGM statute, acted reasonably to carry out these two treaty obligations.

The Court rejects the government’s argument for two reasons. First, there is no rational relationship between the FGM statute and Article 3, which obligates member states “to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.” This article seeks to ensure equal civil and political rights (e.g., the freedom of expression, the right to participate in elections, and protections for defendants in criminal proceedings) for men and women, while the FGM statute seeks to protect girls aged seventeen and younger from a particular form of physical abuse. There is simply no rational relationship between Article 3 and the FGM statute. The latter does not effectuate the purposes of the former in any way.

The relationship between the FGM statute and Article 24 is arguably closer. As noted, that article states that “[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.” Still, the relationship between the FGM statute and Article 24 is tenuous. Article 24 is an anti-discrimination provision, which calls for the protection of minors without regard to their race, color, sex, or other characteristics. As laudable as the prohibition of a particular type of abuse of girls may be, it does not logically further the goal of protecting children on a nondiscriminatory basis.

Second, even assuming the treaty and the FGM statute are rationally related, federalism concerns deprive Congress of the power to enact this statute. In adopting the ICCPR, each member state obligated itself to “take the necessary steps, in accordance with its constitutional processes . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” ICCPR Art. 2 ¶ 2. The constitutional processes in the United States include the important—indeed, foundational—division of authority between the states and the federal government, as recognized in the report of the Senate Committee on Foreign Relations, which recommended that the Senate ratify this treaty subject to various reservations, understandings, and declarations. One of these understandings was

[t]hat the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction

over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriated [sic] measures for the fulfillment of the Convention.

Defs.' Ex. S at 23 (Report of the Senate Committee on Foreign Relations dated Mar. 2, 1992). This understanding comported with one recommended by the Bush Administration, *see id.* at 9, which offered the following explanation:

In light of Article 50 ("The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions"), it is appropriate to clarify that, even though the Covenant will apply to state and local authorities, it will be implemented consistent with U.S. concepts of federalism.

The proposed understanding serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between the State and Federal governments or to use the provisions of the Covenant to "federalize" matters now within the competence of the States.

Id. at 17-18.

One aspect of this constitutional balance is that the "States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993). In the same vein, the Supreme Court has noted that in the area of "criminal law enforcement ... States historically have been sovereign," *United States v. Lopez*, 514 U.S. 548, 564 (1995), and that "[t]he Constitution ... withhold[s] from Congress a plenary police power." *Id.* at 566. In *United States v. Morrison*, 529 U.S. 598, 615, 618 (2000), the Court noted the "Constitution's distinction between national and local authority" and that "[t]he regulation and punishment of intrastate violence ... has always been the province of the States." Further, "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* at 618.

In *Bond v. United States*, 572 U.S. 844 (2014), the Supreme Court commented on the interplay between Congress' authority to implement a treaty and the restraint on that authority imposed by federalism concerns. In that case, defendant was charged with violating the Chemical Weapons Convention Implementation Act, which Congress passed to effectuate the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. The Court found it unnecessary to rule on the constitutionality of the statute, as it determined that defendant's use of certain chemicals did not come within the statute's definition of a chemical weapon. Nonetheless, the Court's comments on the federalism issue bear repeating:

There is no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond's common law assault.

Even if the treaty does reach that far, nothing prevents Congress from implementing the Convention in the same manner it legislates with respect to

innumerable other matters—*observing the Constitution’s division of responsibility between sovereigns and leaving the prosecution of purely local crimes to the States*. The Convention, after all, is agnostic between enforcement at the state versus federal level: It provides that “[e]ach State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention.” Art. VII(1), 1974 U.N.T.S. 331 (emphasis added); see also Tabassi, National Implementation: Article VII, in Kenyon & Feakes 205, 207 (“Since the creation of national law, the enforcement of it and the structure and administration of government are all sovereign acts reserved exclusively for [State Parties], it is not surprising that the Convention is so vague on the critical matter of national implementation.”).

Fortunately, we have no need to interpret the scope of the Convention in this case. Bond was prosecuted under section 229, and the statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure.

The Convention provides for implementation by each ratifying nation “in accordance with its constitutional processes.” Art. VII(1), 1974 U.N.T.S. 331. As James Madison explained, the constitutional process in our “compound republic” keeps power “divided between two distinct governments.” The Federalist No. 51, p. 323 (C. Rossiter ed. 1961). If section 229 reached Bond’s conduct, it would mark a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States. Absent a clear statement of that purpose, we will not presume Congress to have authorized such a stark intrusion into traditional state authority.

Id. at 856, 866 (emphasis added). Characteristically, Justice Scalia’s concurring opinion made the argument somewhat more pointedly:

Holland places Congress only one treaty away from acquiring a general police power.

The Necessary and Proper Clause cannot bear such weight. As Chief Justice Marshall said regarding it, no “great substantive and independent power” can be “implied as incidental to other powers, or used as a means of executing them.” *McCulloch v. Maryland*, 4 Wheat. 316, 411, 4 L.Ed. 579 (1819); see Baude, Rethinking the Federal Eminent Domain Power, 122 Yale L.J. 1738, 1749–1755 (2013). *No law that flattens the principle of state sovereignty, whether or not “necessary,” can be said to be “proper.”* As an old, well-known treatise put it, “it would not be a proper or constitutional exercise of the treaty-making power to provide that Congress should have a general legislative authority over a subject which has not been given it by the Constitution.” 1 W. Willoughby, *The Constitutional Law of the United States* § 216, p. 504 (1910).

Id. at 879 (Scalia, J., concurring in the judgment) (emphasis added; footnotes omitted).

Application of these principles to the present case leads to the conclusion that Congress overstepped its bounds by legislating to prohibit FGM. Like the common law assault at issue in *Bond*, FGM is “local criminal activity” which, in keeping with longstanding tradition and our federal system of government, is for the states to regulate, not Congress. *Id.* at 848. Therefore, even accepting the government’s contention that the criminal punishment of FGM is rationally related to the cited articles of the ICCPR, federalism concerns and the Supreme Court’s

statements regarding state sovereignty in the area of punishing crime—and the federal government’s lack of a general police power—prevent Congress from criminalizing FGM. “[T]he principle that [t]he Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States is deeply ingrained in our constitutional history.” *Morrison*, 529 U.S. at 618 n.8 (internal quotation marks omitted). The FGM statute cannot be sustained under the Necessary and Proper Clause.

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On April 10, 2019, the U.S. Department of Justice wrote to the U.S. Congress, consistent with 28 USC 530D, to inform Congress of the Department’s decision not to appeal the district court’s decision in *Nagarwala* and to propose amendments to address the constitutionality of the statute criminalizing FGM. The proposed amendments address the commerce clause as a purported basis for federal legislation, rather than the necessary and proper clause. The letter is excerpted below and available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

Consistent with 28 U.S.C. 530D, I write to call your attention to the above-referenced decision of the United States District Court for the Eastern District of Michigan. A copy of the decision is attached.

This case is the first federal prosecution under 18 U.S.C. 116(a), which prohibits female genital mutilation (FGM). Section 116(a) makes it a criminal offense to “knowingly circumcise[], excise[], or infibulate[] the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years.” *Ibid.* The district court dismissed the FGM charges, holding that Section 116(a) is beyond Congress’s power. First, the court concluded that Section 116(a) is not necessary and proper to effectuate an international treaty under *Missouri v. Holland*, 252 U.S. 416 (1920). The court rejected the government’s argument that the provision was rationally related to implementing the United States’ obligations under the International Covenant on Civil and Political Rights (ICCPR), *done*, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368. Second, the court relied on *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), to hold that Section 116(a) was beyond Congress’s power under the Commerce Clause. The court found that FGM was not an economic activity but was instead a form of physical assault, and that the statute adding Section 116(a) to the U.S. Code was unaccompanied by detailed, record-based findings from which a court could determine that FGM substantially affects interstate commerce. The court further emphasized that, unlike many federal criminal statutes, Section 116(a) does not include any jurisdictional elements, such as a requirement that the charged offense have an explicit connection with, or effect on, interstate commerce.

Section 116(a) targets an especially heinous practice—permanently mutilating young girls—that should be universally condemned. FGM is a form of gender-based violence and child abuse that harms victims not only when they are girls, suffering the immediate trauma of the act, but also throughout their lives as women, when it often results in a range of physical and

psychological harms. See Act of Sept. 30, 1996, Pub. L. 104-208, Div. C., Tit. VI, § 644(a), 110 Stat. 3009-708 (18 U.S.C. 116 note). The Centers for Disease Control and Prevention estimates that half a million women and girls in the United States have already suffered FGM or are at risk for being subjected to FGM in the future. See Howard Goldberg et al., Centers for Disease Control and Prevention, *Female Genital Mutilation/Cutting in the United States*, 131 Public Health Reports 340 (2016). The Department therefore condemns this practice in the strongest possible terms.

That said, the Department has reluctantly determined that—particularly in light of the Supreme Court’s decision in *Morrison*, which was decided after Section 116(a)’s enactment—it lacks a reasonable defense of the provision, as currently worded, and will not pursue an appeal of the district court’s decision. Instead, we urge that Congress act forthwith to address the constitutional problem, by promptly enacting the attached legislative proposal, which, in our view, would clearly establish Congress’s authority to criminalize FGM of minors and ensure that this practice is prohibited by federal law.

First, the Department has determined that it lacks an adequate argument that Section 116(a), as it is currently written, is necessary and proper to the regulation of interstate commerce. Pursuant to the Commerce Clause, Congress can regulate and protect the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that “substantially affect interstate commerce.” *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Unlike many federal criminal statutes, however, Section 116(a) does not require proof of any nexus between the conduct at issue (performing FGM on minors) and interstate commerce—the critical defect found by the Supreme Court in *Morrison* and *Lopez*. Furthermore, although FGM can be performed in circumstances with commercial characteristics, FGM itself does not appear to be inherently an economic activity, and when performed purely locally, FGM does not appear to be “part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.” *Ibid*.

Second, the Department has determined that it does not have an adequate argument that Section 116(a) is within Congress’s authority to enact legislation to implement the ICCPR, which does not address FGM. None of the ICCPR’s provisions references FGM at all. Nor do they provide a basis for the federal government itself (rather than the individual States) to criminalize FGM of minors by private parties. This case is therefore not analogous to *Holland*, which involved a treaty that more directly addressed the parties’ obligation to protect certain migratory birds and to propose legislation to do so. See 252 U.S. at 431. Thus, even maintaining the full continuing validity of *Holland*, the Department does not believe it can defend Section 116(a) on this ground.

Although the Department has determined not to appeal the district court’s decision, it recognizes the severity of the charged conduct, its lifelong impact on victims, and the importance of a federal prohibition on FGM committed on minors. Accordingly, the Department urges Congress to amend Section 116(a) to address the constitutional issue that formed the basis of the district court’s opinion in this case. Specifically, concurrently with submitting this letter, the Department is submitting to Congress a legislative proposal that would amend Section 116(a) to provide that FGM is a federal crime when (1) the defendant or victim travels in or uses a channel or instrumentality of interstate or foreign commerce in furtherance of the FGM; (2) the defendant uses a means, channel, facility, or instrumentality of interstate commerce in connection with the FGM; (3) a payment is made in or affecting interstate or foreign commerce in furtherance of the FGM; (4) an offer or other communication is made in or affecting interstate or foreign commerce in furtherance of the FGM; (5) the conduct occurs within the United States’ special maritime and

territorial jurisdiction, or within the District of Columbia or a U.S. territory; or (6) the FGM otherwise occurs in or affects interstate or foreign commerce. In our view, adding these provisions would ensure that, in every prosecution under the statute, there is a nexus to interstate commerce.

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2. *Center for Biological Diversity*

As discussed in *Digest 2018* at 118-20, 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”). On June 12, 2019, the court granted the U.S. motion to partially dismiss and denied CBD’s motion for partial summary judgment. *CBD v. United States*, No. 18-cv-563 (D.D.C. 2019).

3. *United States v. Park*

On September 13, 2019, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *United States v. Joseph Park*, 938 F.3d 354 (D.C. Cir.) The Court reversed the district court’s dismissal of Park’s indictment. Park, a U.S. citizen and convicted sex offender, moved to Vietnam in 2003. In 2017, a grand jury in D.C. indicted Park on one count of violating 18 U.S.C. 2423(c) (“the PROTECT Act”), which prohibits a U.S. citizen who “resides in a foreign country” from engaging in “illicit sexual conduct,” including non-commercial sexual abuse of a minor and production of child pornography. Following his deportation from Vietnam and Thailand, Park returned to the United States, where he was arrested. The district court granted Park’s motion to dismiss the indictment on the grounds that the statute exceeds Congress’s authority. On appeal, the U.S. government argued: (1) Congress may regulate the production of a commodity (child pornography) as economic activity under the Foreign Commerce Clause; (2) even non-commercial sexual abuse has a “demonstrable effect” on foreign commerce, including sex tourism and child trafficking; (3) the prohibition on producing child pornography is a valid exercise of Congress’s treaty power to implement the Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, which specifically calls on states to ban child pornography production; and (4) for the same reasons non-commercial child sexual abuse affects commerce, it is within the sphere of conduct the Optional Protocol sought to eradicate and also falls within the treaty power.

Excerpts follow from the discussion of the treaty power in the opinion of the D.C. Circuit panel, which adopts the arguments in the U.S. government’s brief. The separate concurrence (not excerpted herein) relates not to the treaty discussion but to the foreign commerce clause.

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The government argues on appeal that Congress’s treaty power and the Foreign Commerce Clause support the application of 18 U.S.C. § 2423 to Park’s conduct in Vietnam. Accordingly, we must determine whether the PROTECT Act, as applied to Park, is a “necessary and proper means to” implement the Optional Protocol, *Missouri v. Holland*, 252 U.S. 416, 432 (1920), or whether it falls within the scope of Congress’s foreign commerce powers. Our review is de novo. See *Hodge v. Talkin*, 799 F.3d 1145, 1155 (D.C. Cir. 2015); *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488 (D.C. Cir. 2008).

We start from the premise that “the ‘question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.’” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). A court must be able to discern a basis for Congress’s exercise of an enumerated power, but that does not mean that a “law must be struck down because Congress used the wrong labels” or failed to identify the source of its power. *Id.* at 569- 70. ...

Congress’s power to legislate may also stem from more than one enumerated power. See *United States v. Morrison*, 529 U.S. 598, 607 (2000) (noting that “[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution”); ... Where, as here, Congress’s treaty and Commerce Clause powers dovetail, both powers may provide support for the constitutionality of Congress’s actions, see *Lara*, 541 U.S. at 200-02, which in our view makes it appropriate to examine all potential sources...

A. Congress’s treaty power reaches Park’s conduct.

Article II of the Constitution empowers the President to make treaties with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. The Necessary and Proper Clause, U.S. Const. art I, § 8, cl. 18, in turn, confers on Congress the “power to enact such legislation as is appropriate to give efficacy to ... treat[ies]” made by the President with the advice and consent of the Senate. *Neely v. Henkel*, 180 U.S. 109, 121 (1901). In Justice Holmes’s memorable formulation, “[i]f the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.” *Holland*, 252 U.S. at 432. Congress’s power to enact legislation it deems necessary and proper to implement a valid treaty is commonly referred to as the “treaty power.” *Lara*, 541 U.S. at 201.

“[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.” *United States v. Comstock*, 560 U.S. 126, 134 (2010) (citing *Sabri v. United States*, 541 U.S. 600, 605 (2004)). The inquiry is “simply ‘whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end.’” *Id.* at 135 (quoting *Raich*, 545 U.S. at 35 (Scalia, J., concurring in judgment)). In this case, the “legitimate end” is implementation of the Optional Protocol. If it is apparent that the means Congress has chosen are “convenient, or useful, or conducive” to effectuate a valid treaty, *id.* at 134-35 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 413), then “the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone,” *id.* at 135 (quoting *Burroughs v. United States*, 290 U.S. 534, 548 (1934)).

Accordingly, to determine whether the challenged provisions as applied to Park are within the scope of federal authority, we consider whether they are rationally related to implementing the Optional Protocol's goals. These goals include not only, as the district court observed, 297 F. Supp. 3d at 180, combating the "international traffic of children," but also "eliminat[ing] ... child prostitution and child pornography," and addressing international "sex tourism," Optional Protocol, preamble. Because the government charged Park with only one count, which encompasses both Park's child pornography production and child sex abuse, the indictment stands so long as Congress had the authority to reach either type of conduct. We hold that both applications are constitutionally valid exercises of Congress's treaty power.

Each of the provisions under which he is charged—criminalizing production of child pornography by a U.S. citizen residing abroad, 18 U.S.C. §§ 2423(c), (f)(3), and non-commercial child sexual abuse by a U.S. citizen residing abroad, *id.* §§ 2423(c), (f)(1)—helps to eradicate the sexual exploitation of children that the Optional Protocol targets. Each provision is therefore rationally related to fulfilling the United States' obligations under the treaty.

1. The PROTECT Act's prohibition against United States citizens producing child pornography while residing abroad is rationally related to implementing the Optional Protocol.

The PROTECT Act's prohibition against U.S. citizens producing child pornography while residing abroad rationally relates to two aspects of the Optional Protocol. First, the Optional Protocol requires the States Parties to criminalize the production of child pornography. Second, it empowers them to exercise jurisdiction over the pertinent offenses of their nationals regardless of where the offenses occur. The Protocol thus constitutionally supports indictment of Park, a U.S. citizen, for producing child pornography in Vietnam.

The Optional Protocol directs the States Parties to criminalize the production of child pornography. Each State Party "shall prohibit ... child pornography as provided for by the present Protocol," Optional Protocol, art. 1, including specifically prohibiting the "[p]roducing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography," *id.* art.3(1)(c). By criminalizing the "production of child pornography" by U.S. citizens abroad, 18 U.S.C. § 2423(f)(3), the PROTECT Act is rationally related to implementing the Optional Protocol.

Park objects that the Optional Protocol is concerned only with commercial child pornography, so the PROTECT Act's ban on child pornography homemade for one's own use, not bought or sold—*i.e.*, the type of conduct alleged against Park—is not rationally related to the implementation of the Protocol. The Protocol is not so confined. It calls on States Parties to prohibit the production of child pornography without limitation to any proven commercial conduct or plans.

"When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used," applying all "general rules of construction" to aid our understanding. *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (internal quotation marks and citation omitted). The preamble to the Optional Protocol states an ultimate goal of "elimination of ... child pornography," without limitation to commercially traded images, such that even non-commercial production falls within its scope. Optional Protocol, preamble. The Optional Protocol also capaciously defines "child pornography" as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts." *Id.* art. 2(c).

The States Parties chose not to limit the Optional Protocol to commercial child pornography production for obvious reasons. As a practical matter, the line between possession of and trade in pornographic images is exceedingly fine and fragile. “[C]hild pornography is now traded with ease on the Internet” and, in the digital age, “the number of still images and videos memorializing the sexual assault and other sexual exploitation of children, many very young in age, has grown exponentially.” *Paroline v. United States*, 572 U.S. 434, 440 (2014) (quoting Patti B. Saris et al., U.S. Sentencing Comm’n, *Federal Child Pornography Offenses* 3 (2012)). Child pornography stored online can be distributed worldwide almost instantaneously. *United States v. Sullivan*, 451 F.3d 884, 891 (D.C. Cir. 2006).

Commercial transactions in child pornography can be difficult if not impossible to establish where no traceable payment means is used. ...Criminalizing production only where there is proof of a monetary transaction or commercial purpose would be a mere half measure toward halting the supply of child pornography available to the illegal market, and so fall short in serving one of the primary purposes of the treaty: “the elimination ... of child pornography.” Optional Protocol, preamble.

That the treaty requires the criminalization of “[p]roducing, distributing, disseminating, importing, exporting, offering, selling or possessing *for the above purposes* child pornography,” *id.* art. 3(1)(c) (emphasis added), does not, as Park suggests, limit its terms to child pornography produced for commercial distribution. He reads the phrase “for the above purposes” as confined to either the other “purposes” expressly identified in Article 3—“sexual exploitation of the child,” “transfer of organs of the child for profit,” or “engagement of the child in forced labor,” *id.* art. 3(1)(a)(i)—or the general activities listed in subsections (a) and (b) of Article 3—the sale of children and child prostitution, *id.* art. 3(1)(a), (b). However, we typically apply the “rule of the last antecedent” when interpreting a text that “include[s] a list of terms or phrases followed by a limiting clause.” *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016). Thus, “a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). As used here, the phrase “for the above purposes” modifies only the last antecedent, “possessing,” and references the listed purposes of “producing, distributing, disseminating, importing, exporting, offering, [and] selling” child pornography. UNICEF adopts this reading, in fact recognizing it as the one most protective of potential offenders: “Interpreted strictly, article 3(1)(c) of the [Protocol] obliges States Parties to punish the possession of child pornography only when this possession is ‘for the above purposes’—producing, distributing, disseminating, importing, exporting, offering or selling.” UNICEF, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography* 12 (2009); *see also id.* (noting that the “Committee on the Rights of the Child has nevertheless encouraged countries to prohibit simple possession”). Given its narrow scope, the phrase “for the above purposes” in no way limits to commercial production the Protocol’s prohibition against “producing” child pornography.

Because the Optional Protocol, by its terms, reaches both commercial and non-commercial production of child pornography, the PROTECT Act’s criminalization of non-commercial child pornography production plainly implements the treaty and is constitutional as applied to Park.

Congress’s decision to apply the PROTECT Act to Americans who “reside[], either temporarily or permanently, in a foreign country,” 18 U.S.C. § 2423(c), similarly fulfills the Optional Protocol’s expectation that States Parties will take jurisdiction over the misdeeds of their nationals wherever they occur.

The Optional Protocol reflects agreement that each State Party “may take such measures as may be necessary to establish its jurisdiction” over offenses “[w]hen the alleged offender is a national of that State.” Optional Protocol, art. 4(2). This type of jurisdiction, where a country prescribes law with respect to the “conduct, interests, status, and relations of its nationals and residents outside its territory,” is known as “active personality jurisdiction” or “nationality jurisdiction.” Restatement (Fourth) of Foreign Relations Law of the United States, § 402(1)(c), cmt. g & rep. note 7 (Am. Law Inst. 2018). Under international law, every nation has “jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy,” and the United States is no exception. *Blackmer v. United States*, 284 U.S. 421, 437 n.2 (1932) (quoting L. Oppenheim, 1 *International Law* 281 (4th ed. 1926)). Congress retains authority over U.S. citizens residing abroad “[b]y virtue of the obligations of citizenship.” *Id.* at 436; accord *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936).

When the United States originally ratified the Protocol, however, it chose not to exercise its nationality jurisdiction over its citizens’ conduct abroad. See Protocol Analysis at *23. The United Nations twice criticized the United States for that reticence, stressing that the United States must “establish its jurisdiction in all cases listed under article 4” of the Optional Protocol in order to “strengthen the framework for prosecution and punishment.” 2013 Concluding Observations ¶ 39-40; 2008 Consideration of Reports ¶ 35-36. Congress could have rationally concluded that, to fully implement the United States’ obligations under the Protocol, it needed to respond to international opprobrium by expanding the coverage of section 2423(c) to criminalize child pornography produced by U.S. citizens residing abroad. Indeed, in 2016, the United States cited the revised version of section 2423(c), reaching offenses by U.S. citizens residing abroad, as evidence of its continuing efforts to fulfill its responsibilities under the Optional Protocol. See Dep’t of State, *Combined Third and Fourth Periodic Report of the United States of America on the Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Sale of Children, Child Prostitution, and Child Pornography*, ¶ C-57 (Jan. 22, 2016).

Park objects that the PROTECT Act does not implement the Optional Protocol because, in his view, the “Protocol ‘does not require the United States to criminalize the production of child pornography in *another* country.’” Appellee Br. 50 (quoting *Park*, 297 F. Supp. 3d at 181) (emphasis in *Park*). He contends that the Optional Protocol addresses only child pornography produced domestically within the United States or produced “transnationally,” which he somewhat awkwardly reads to mean “between the United States and another nation.” *Id.* at 45 (quoting Optional Protocol art. 3(1)). But “transnationally” is often used to mean simply “reaching beyond national boundaries,” see, e.g., Philip Jessup, *Transnational Law* 2 (1956) (defining “transnational law” to “include all law which regulates actions or events that transcend national frontiers”); *Transnational*, Black’s Law Dictionary (2019) (defining “transnational” as “[i]nvolving more than one country”). The Protocol’s coverage of both domestic and transnational offenses is naturally read as exhaustive, encompassing, for example, both what a citizen of one country does within his own country and what he does abroad. Indeed, this reading accords with the view of the United Nations itself, which has observed that “[e]xtraterritorial legislation is one of the key tools in combating [child sex tourism], as it allows legal authorities to hold nationals and citizens accountable for crimes committed abroad.” 2012 U.N. Report at 11. The full text of the sentence Park quotes shows an intent to sweep broadly. In requiring States Parties to criminalize the specified conduct whether it is “committed domestically or transnationally or on an individual or organized basis,” Optional Protocol, art. 3(1), the treaty

calls for bans on that conduct no matter where it is committed, or by one person or many. The PROTECT Act's prohibition on the production of child pornography by U.S. citizens abroad is rationally related to the implementation of this final clause.

Moreover, it is unlikely that the States Parties intended Park's crabbed and ineffectual reading, which would criminalize domestic and "transnational" activity but not the acts of U.S. citizens within foreign countries. A "treaty is a contract . . . between nations," and its "interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent." *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014). Here, the text itself encourages the States Parties to go further than its bare terms. The same sentence on which Park relies also states that "[e]ach State Party shall ensure that, *as a minimum*" the conduct described is criminalized. Optional Protocol, art. 3(1). The preamble to the Optional Protocol further recognizes that "the elimination of the sale of children, child prostitution and child pornography" would require "a holistic approach." *Id.*, preamble. Where the text of a treaty "create[s] a floor, not a ceiling" in this manner, Congress may properly implement the treaty's intent by going further in its implementing legislation. *United States v. Belfast*, 611 F.3d 783, 807 (11th Cir. 2010). Accordingly, the "extraterritorial application" of the PROTECT Act, 18 U.S.C. § 2423(c), to Park's conduct while he was residing abroad is expressly permitted by the Optional Protocol.

2. The PROTECT Act's prohibition of child sexual abuse by United States citizens residing abroad is rationally related to implementing the Optional Protocol.

The Optional Protocol prohibits the "[o]ffering, obtaining, procuring or providing a child for child prostitution," Optional Protocol art. 3(1)(b), and defines "child prostitution" as "the use of a child in sexual activities for remuneration or any other form of consideration," *id.* art. 2(b). As such, the Protocol does not itself specifically address non-commercial child sexual abuse. Nevertheless, the PROTECT Act's broader prohibition on child sex abuse by U.S. citizens residing abroad, including non-commercial crimes, 18 U.S.C. §§ 2424(c), (f)(1), was appropriate to combat commercial child sex tourism and control the problem of American sex offenders relocating and sexually abusing children abroad, thereby closing enforcement gaps that otherwise could have hindered the objectives of the Optional Protocol.

The Necessary and Proper Clause empowers Congress to fill "regulatory gaps" that could otherwise be left by its exercise of constitutionally enumerated legislative powers. *Sabri v. United States*, 541 U.S. 600, 607 (2004); *see United States v. Kebodeaux*, 570 U.S. 387, 395 (2013). Here, the Optional Protocol's goal of eliminating commercial child sexual exploitation, including global sex tourism, could be undercut if Congress failed to criminalize non-commercial child sex abuse by U.S. residents abroad. This is so for at least three reasons.

First, as a general matter, such a "loophole in the law" could encourage American sex tourists—who by some estimates comprise one quarter of all sex tourists globally—to go abroad seeking *non*-commercial sex with minors that, had it occurred in the United States, would be criminalized as statutory rape. "If Americans believe that traveling to a particular foreign country includes the opportunity for unregulated, non-commercial illicit sexual conduct, they may travel to that country when they otherwise would not . . ." *United States v. Lindsay*, 931 F.3d 852, 863 (9th Cir. 2019); *see also United States v. Pendleton*, 658 F.3d 299, 311 (3d Cir. 2011). The "Constitution does not envision or condone" such "a vacuum" of power in which "citizens may commit acts abroad that would clearly be crimes if committed at home." *Bollinger*, 798 F.3d at 219.

Second, and relatedly, Congress might well have concluded that the PROTECT Act's prohibition of non-commercial sexual exploitation of minors by U.S. residents abroad was

appropriate to ameliorate a specific externality of the United States' intensified domestic policing of child sexual abuse: the relocation to other countries of registered U.S. sex offenders and the risks such offenders may pose there. Until 2016, SORNA did not require registered sex offenders in the United States to update their sex offender registrations when they moved abroad. *See, e.g., Nichols*, 136 S. Ct. at 1118. Consequently, "known child-sex offenders [were] traveling internationally," International Megan's Law § 2, and some relocated abroad to get out from under SORNA's registration requirements, *see, e.g., Nichols*, 136 S. Ct. at 1117-18; *Lunsford*, 725 F.3d at 861-62. (After the events at issue here, Congress took further steps to address this externality, amending the law to require registered U.S. sex offenders to update their SORNA registrations when they plan to travel outside the United States, *see* 34 U.S.C. § 20914(a)(7); 18 U.S.C. § 2250(b).) When domestic legislation creates or exacerbates identified risks to treaty partners—*e.g.* when domestic counter-recidivism measures like SORNA lead U.S.-citizen sex offenders to move overseas and commit the very crimes the Protocol aims to eliminate—Congress's treaty power authorizes it to address that danger.

Third, Congress rationally could have concluded that the Optional Protocol's goal of eliminating global sex tourism involving minors would be undermined unless putatively non-commercial sex with minors were also criminalized. Congress was well aware that the *quid-pro-quo* in child prostitution is typically more indirect or hidden than for prostitution involving adults. If a U.S. national could travel overseas and entice a child with inchoate favors, valuable experiences, promised future benefits, meals, or other gifts—any of which might be difficult to establish as "consideration" in support of a child prostitution charge—deterrents against traveling internationally to sexually abuse children would be significantly weakened. The statutory prohibition against non-commercial child sex abuse is therefore a "vital component" in the "PROTECT Act's larger scheme" to "curb the supply and demand in the sex tourism industry." *Durham*, 902 F.3d at 1214.

Congress's power to give the treaty practical effect against conduct like Park's is not confined to the Optional Protocol's minimum requirements. Again, the Protocol identifies the child sexual exploitation it targets and specifies "a floor, not a ceiling" on how signatories should address such exploitation by their nationals abroad. *See Belfast*, 611 F.3d at 807; *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998). The States Parties to the Optional Protocol recognized that the "elimination of . . . child prostitution" would require national lawmakers to take "a holistic approach, addressing the contributing factors," including "irresponsible adult sexual behaviour." Optional Protocol, preamble. The treaty therefore stipulates that criminalizing the conduct it identifies is "only a 'minimum' requirement." *Bollinger*, 798 F.3d at 219 (quoting Optional Protocol art. 3). In view of the Protocol's purpose and scope, it was reasonable for Congress in enacting the PROTECT Act "to determine that the non-commercial abuse of children is a factor that contributes to commercial sexual exploitation, and to regulate non-commercial conduct accordingly." *Id.* And it was therefore constitutional for Congress to reach Park's alleged conduct in this case.

Our conclusions regarding the treaty power comport with the fundamental constitutional principle that Congress may legislate only within the scope of its constitutionally conferred powers. The government may not simply point to any tangentially related treaty to defend a constitutionally suspect statute. There are at least two recognized limits to what Congress may legislate in the name of implementing a treaty. First, to be a valid exercise of the Necessary and Proper Clause, the treaty itself must be "legitimate," and the statute must be "plainly adapted to" the treaty. *McCulloch*, 17 U.S. (4 Wheat.) at 421. Second, implementing legislation must be both

“not prohibited” by the Constitution and “consistent with the letter and spirit of the Constitution.” *Id.* It is “well established that ‘no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.’” *Boos v. Barry*, 485 U.S. 312, 324 (1988) (quoting *Reid v. Covert*, 354 U.S. 1, 16 (1957)). Though this inquiry is deferential, it is not toothless. Here, the PROTECT Act is plainly necessary and proper to implement the goals of the Optional Protocol.

Park argues for an additional limit. He claims that we must first assess “whether a statute is in fact implementing legislation,” and argues that “§ 2423(c), originally and as amended, contains no indication that it is implementing the Protocol.” Appellee Br. 38. To the extent any such nexus is required—and Park provides no support for this proposition—we find it satisfied here. The House Judiciary Committee recommended passage of what became the PROTECT Act just six days after the Senate ratified the Optional Protocol. And, as discussed, Congress passed later amendments to the PROTECT Act to address loopholes in the international regulatory scheme.

In addition, Park passingly suggests that Congress’s treaty power is confined to helping the President make treaties, and that “[o]nce a treaty has been made, Congress’s power to do what is ‘necessary and proper’ to assist the making of treaties drops out of the picture.” *Id.* at 37 (quoting *Bond v. United States*, 572 U.S. 844, 876 (2014) (Scalia, J., concurring in the judgment)). According to that view, Congress “must rely upon its independent ... Article I, § 8, powers” in order to “legislate compliance with the United States’ treaty obligations.” *Bond*, 572 U.S. at 876. But under *Missouri v. Holland*, 252 U.S. at 433-34, that is not the law. Under long established treaty power doctrine, the PROTECT Act is constitutional as applied to Park’s conduct abroad.

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Cross References

Asylum Cooperative Agreements, **Ch. 1.C.3.**

Hague Abduction Convention cases, **Ch. 2.B.2.c.**

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

Aguasvivas v. Pompeo (extradition treaty case), **Ch. 3.A.4.**

Renegotiating Compacts of Free Association, **Ch. 5.E.**

ILC Draft Articles on Crimes Against Humanity, **Ch. 7.C.1.**

Inter-American Treaty of Reciprocal Assistance, **Ch. 7.D.1.**

Air transport agreements, **Ch. 11.A.1.**

U.S.-Mexico-Canada Agreement, **Ch. 11.D.3**

Tax treaties, **Ch. 11.F.2**

Maritime boundary treaties, **Ch. 12.A.3.**

Central Arctic Fisheries Agreement, **Ch. 13.B.1.a.**

Protocol to Amend the Atlantic Tunas Convention, **Ch. 13.B.1.b.**

Columbia River Treaty, **Ch. 13.C.5.**

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

Singapore Convention on Mediation, **Ch. 15.A.2.**

UN Convention on the Assignment of Receivables in International Trade, **Ch. 15.A.3.**

GE France v. Outokumpu Stainless USA, **Ch. 15.C.**

North Macedonia Accession to NATO, **Ch. 18.A.4.a.**

Agreements on nuclear safety, **Ch. 19.B.4.d.**

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