Contents

CHAPTER 11 432

TRADE, COMMERCIAL RELATIONS, INVESTMENT, AND TRANSPORTATION 432

A. TRANSPORTATION BY AIR 432

1. Air Transport Agreements 432

a. Kazakhstan 432

b. The Bahamas 433

c. Kenya 433

d. Japan 433

e. Qatar 434

f. Bangladesh 434

g. United Kingdom 434

2. The Downing of Malaysia Airlines Flight MH17 in Ukraine 436

3. Restrictions on Air Service to Cuba 437

B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS 438

1. Non-Disputing Party Submissions under Chapter 11 of the North American Free Trade Agreement 438

a. B-Mex v. Mexico 438

b. Tennant Energy v. Canada 442

c. Resolute v. Canada 444

2. Non-Disputing Party Submissions under other Trade Agreements 444

a. U.S.-Korea FTA: Elliott v. ROK 444

b. U.S.-Panama TPA: Omega v. Panama 446

c. U.S.-Peru TPA: Renco v. Peru 448

d. U.S.-Colombia TPA: Carrizosa v. Colombia 450

e. U.S.-Morocco FTA: Carlyle Group v. Morocco 454

C. WORLD TRADE ORGANIZATION 456

1. Disputes brought by the United States 456

China – Domestic Supports for Agricultural Producers (DS511) 456

2. Disputes brought against the United States 456

a. Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (EU) (DS353) 456

b. Anti-Dumping Measures on Oil Country Tubular Goods from Korea (DS488) 457

c. Countervailing Measures on Supercalendered Paper from Canada (DS505) 457

d. Countervailing Measures on Softwood Lumber from Canada (DS533) 457

e. Tariff Measures on Certain Goods from China (DS543) 458

D. INVESTMENT TREATIES, TRADE AGREEMENTS AND TRADE-RELATED ISSUES 458

1. Africa Growth and Opportunity Act 458

2. United States-Mexico-Canada Agreement ("USMCA") 458

3. U.S.-Kenya Trade Agreement 459

E. IMPORT ADJUSTMENTS BASED ON U.S. NATIONAL SECURITY 459

F. INTELLECTUAL PROPERTY AND SECTION 301 OF THE TRADE ACT 460

1. Special 301 Report and Notorious Markets Report 460

2. Investigation of China's Policies on Technology Transfer, IP and Innovation 460

3. Investigation of Digital Services Taxes 461

4. Section 301 investigation to enforce U.S. WTO rights in the Large Civil Aircraft dispute 461

5. World Intellectual Property Organization 461

G. OTHER ISSUES 462

1. Actions related to U.S. investors and Chinese companies 462

2. Data Privacy 464
3. Telecommunications 465
4. Corporate Responsibility Regimes 468
a. Energy Resource Governance Initiative 468
b. Kimberley Process 468
c. Business and Human Rights 468
5. Presidential Permits 469
a. Policy Guidance on Cross-Border Fiber Optic and Other Telecommunications Cables 469
b. Cross-border petroleum pipelines 470
6. Committee on Foreign Investment in the United States 471
CROSS REFERENCES 473

CHAPTER 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Air Transport Agreements

An air transport agreement ("ATA") is a bilateral, or occasionally multilateral, agreement allowing, and setting the terms for, international commercial air transportation services between or among signing States. Under the longstanding U.S. Open Skies policy, the United States generally seeks to conclude ATAs that allow airlines to make commercial decisions based on market demand, without intervention from government regulators. Air carriers can provide more affordable, convenient, and efficient air services to consumers and shippers, thereby promoting travel and trade. Information on U.S. ATAs is available at https://www.state.gov/subjects/air-transport-agreements/. In 2020, U.S. air transport agreements with The Bahamas, Qatar, and Bangladesh entered into force. In 2020, the United States negotiated new air transport agreements with Kazakhstan and the United Kingdom and negotiated and signed or initialed amendments to the agreements with Kenya and Japan.

a. Kazakhstan

On January 6, 2020, the State Department announced in a media note, available at https://2017-2021.state.gov/the-united-states-and-kazakhstan-sign-open-skies-agreement/, the signing of an ATA with Kazakhstan on December 30, 2019, at Nur-Sultan. The media note states:

> The Agreement establishes a modern civil aviation relationship with Kazakhstan, consistent with U.S. Open Skies international aviation policy. It includes unrestricted capacity and frequency of services, open route rights, a liberal charter regime, and open code-sharing opportunities. The Agreement will enter into force upon an exchange of diplomatic notes between the two governments.

b. The Bahamas

On January 27, 2020, the Air Transport Agreement between the Government of the United States of America and the Government of the Commonwealth of The Bahamas was signed in Nassau. The State Department media note on the signing of the ATA, available at https://2017-2021.state.gov/the-united-states-and-the-bahamas-sign-air-transport-agreement/, notes that it is the first ATA negotiated by the two countries. The Agreement entered into force upon signature. The Bahamas-U.S. ATA is available at https://www.state.gov/u-s-the-bahamas-air-transport-agreement-of-january-27-2020/.

c. Kenya

On February 5, 2020, representatives of the U.S. and Kenyan governments signed an amendment to the U.S.-Kenya Air Transport Agreement at the Department of State in Washington, DC. The State Department media note on the amendment, available at https://2017-2021.state.gov/the-united-states-and-kenya-add-all-cargo-rights-to-air-transport-agreement/, explains that:

> The Amendment adds seventh-freedom traffic rights for all-cargo operations to the bilateral Air Transport Agreement and will enter into force following an exchange of diplomatic notes. It has been applied on the basis of comity and reciprocity since it was negotiated on December 4, 2019.
>
> The rights in the Amendment facilitate the movement of goods throughout the world by providing air carriers greater flexibility to meet their cargo and express delivery customers' needs more efficiently. Specifically, the Amendment allows U.S. all-cargo airlines to fly between Kenya and a third nation without needing to stop in the United States, an important right if operating a cargo hub. Kenyan all-cargo carriers have reciprocal rights to serve the United States. …

d. Japan

On March 23, 2020, the United States and Japan exchanged diplomatic notes to amend their ATA to increase access by U.S. and Japanese carriers to operate between the United States and Haneda Airport in Tokyo. The March 24, 2020 State Department media note announcing the amendment, available at https://2017-2021.state.gov/united-states-and-japan-expand-airlines-access-to-tokyos-haneda-airport/, states that it "provides for 12 new daytime slot pairs each for U.S. and Japanese air carriers to operate between the United States and Tokyo International Airport (Haneda), the busiest in Japan." The media note further explains:

> These flights are expected to begin as early as the 2020 International Air Transport Association spring season, starting March 29. This change increases the number of slot pairs available to U.S. airlines for service to and from Haneda

> from the current total of six to 18. Several U.S. carriers have expressed strong interest in offering additional daytime service to Haneda, in part due to its central location near downtown Tokyo.

e. Qatar

On August 27, 2020, the Department of State delivered a responsive diplomatic note to the Embassy of the State of Qatar, acknowledging Qatar's prior note indicating it had completed all internal procedures for entry into force of the U.S.-Qatar ATA, and confirming that the United States had also completed all such internal procedures. As a result, consistent with the terms of the ATA, it entered into force on the date of the U.S. note, August 27, 2020.

f. Bangladesh

On September 30, 2020, the U.S. Ambassador to Bangladesh and the Bangladeshi Senior Secretary for the Ministry of Aviation and Tourism signed a U.S.-Bangladesh Air Transport Agreement in Dhaka. The ATA had been applied on the basis of comity and reciprocity since 2013, but with its signing, immediately entered into force. The agreement is available at https://www.state.gov/air-transport-agreements/u-s-bangladesh-air-transport-agreement-of-september-30-2020/.

g. United Kingdom

On November 17, 2020, the Governments of the United States and the United Kingdom of Great Britain and Northern Ireland completed the process for signing a civil air transport agreement. The November 17, 2020 State Department media note on the signing, available at https://2017-2021.state.gov/united-states-and-united-kingdom-sign-civil-air-transport-agreement/, explains that the U.S. government representatives signed the agreement on November 10 in Washington and the UK government representative signed on November 17. The media note further states:

> The Agreement includes all of the essential elements of Open Skies, such as unrestricted capacity and frequency, open routes, open code-sharing opportunities, a liberal charter regime, and market-determined pricing. The Agreement also provides expanded "seventh-freedom" traffic rights for all-cargo carriers and full market access to the UK's overseas territories and crown dependencies. Pending the Agreement's entry into force via an exchange of diplomatic notes, both sides are prepared to apply its terms on the basis of comity and reciprocity as soon as the U.S.-EU Air Transport Agreement no longer applies to the United Kingdom.

On December 3, 2020, at the 23rd Meeting of the U.S.-EU Joint Committee, the United States issued a statement on Brexit and U.S.-EU ATAs. The statement follows and is available at https://2017-2021.state.gov/u-s-statement-on-brexit-and-u-s-eu-atas/.

_____

* * * *

The U.S. delegation would like to make a statement for the record on the legal implications of Brexit with respect to the 2007 U.S.-EU Air Transport Agreement, as amended and the 2011 Four-Part ATA ("U.S.-EU ATAs").

- The U.S. delegation takes note of the position of the European Union that EU law continues to apply in and to the UK during the transition period, and that such law includes, inter alia, the U.S-EU ATAs.
- Although the United States does not share this view as a legal matter, during the transition period the United States has endeavored, and will continue to endeavor, wherever possible, to afford the UK the same treatment it would receive, in this case, if the U.S.-EU ATAs applied to it, subject to relevant legal and policy considerations.
- Once the transition period ends, the United States shares the view that the U.S.-EU ATAs will have no application or relevance to U.S.-UK civil aviation relations.
- We expect that, for all practical purposes and to maintain the current transatlantic market, the status quo for the UK will remain until the transition period ends. Preparations are under way to ensure that, after that date, the air transport agreement that the United States and the UK have negotiated bilaterally and signed will govern U.S.-UK civil aviation relations.
- We look forward to hearing what the future UK-EU relationship will be, and how it may affect the transatlantic and global aviation market.

* * * *

On December 18, 2020, the U.S. Department of State conveyed a letter to the UK Department of Transportation on the application of the U.S.-UK ATA on the basis of comity and reciprocity. The letter is excerpted below

_____

* * * *

I acknowledge the receipt of your letter of November 30, 2020, which reads as follows:

> I refer you to the Memorandum of Consultations signed on November 28, 2018, by delegations representing the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America in conjunction with the initialling of the ad referendum text of a new Air Transport Agreement ("Agreement") between our two countries. In paragraph 5 of the Memorandum, both

delegations expressed their expectation that, pending the entry into force of the Agreement, their respective aeronautical authorities will permit operations consistent with the Agreement on the basis of comity and reciprocity from a date specified by both governments.

Consistent with the intent of the Memorandum of Consultations, on behalf of the UK Government I can now confirm that UK aeronautical authorities are prepared to permit operations consistent with the Agreement on the basis of comity and reciprocity as of January 1, 2021, as the sole basis of U.S.-UK air service relations. If the U.S. Government can provide the same confirmation with respect to U.S. aeronautical authorities, I suggest this letter and your reply to that effect will place on record the joint understanding of our two Governments that our respective aeronautical authorities will permit operations consistent with the Agreement on the basis of comity and reciprocity from January 1, 2021, as the sole basis of U.S.-UK air service relations, until the Agreement enters into force.

The U.S. Department of Transportation, i.e., the U.S. aeronautical authority, has reviewed its contents and expressed its favorable views in response thereto. I am therefore able to confirm on behalf of the U.S. Government that the U.S. aeronautical authority is prepared to permit operations consistent with the Agreement on the basis of comity and reciprocity as of January 1, 2021, as the sole basis of U.S.-UK air services relations. Therefore, we confirm that your letter and this reply place on the record the joint understanding of our two Governments that our respective aeronautical authorities will permit operations consistent with the Agreement on the basis of comity and reciprocity from January 1, 2021, as the sole basis of U.S.-UK air services relations, until the Agreement enters into force.

* * * *

2. The Downing of Malaysia Airlines Flight MH17 in Ukraine

As discussed in *Digest 2019* at 390, *Digest 2018* at 439-40, and *Digest 2017* at 486, the State Department expressed support for, and confidence in, the Joint Investigative Team ("JIT") investigating the downing of Malaysian Airlines flight MH17 in Ukraine. On March 8, 2020, in a press statement from Secretary Pompeo, available at https://2017-2021.state.gov/trial-of-four-suspects-in-mh17-case/, the United States welcomed the beginning of the criminal trial in the Netherlands of four suspects in the downing of Malaysia Airlines Flight MH17. The press statement continues:

> As the trial begins, we recall the UN Security Council's demand that "those responsible … be held to account and that all States cooperate fully with efforts to establish accountability." All of those indicted are members of Russia-led forces in eastern Ukraine. We call upon all States to cooperate in efforts to establish accountability, in accordance with UN Security Council Resolution 2166.
>
> This trial is a critical moment in the search for justice for the families and friends of the 298 individuals who lost their lives on July 17, 2014.

> We have the utmost confidence in the Dutch legal system to establish the truth and to do justice in this case. We support the ongoing investigatory work of the Joint Investigation Team comprised of the Netherlands, Australia, Belgium, Malaysia, and Ukraine. We again urge Russia to cease its continuing aggressive and destabilizing activities in Ukraine.

3. Restrictions on Air Service to Cuba

As discussed in *Digest 2019* at 391, the United States suspended scheduled commercial air service between the United States and Cuban international airports, other than Havana's José Martí International Airport, in 2019. In a January 10, 2020 press statement from Secretary Pompeo, available at https://2017-2021.state.gov/united-states-further-restricts-air-travel-to-cuba/, the State Department announced further restrictions, suspending all public charter flights between the United States and Cuban destinations other than José Martí. The press statement explains:

> Nine Cuban airports currently receiving U.S. public charter flights will be affected. Public charter flight operators will have a 60-day wind-down period to discontinue all affected flights. Also, at my request, DOT will impose an appropriate cap on the number of permitted public charter flights to José Martí International Airport. DOT will issue an order in the near future proposing procedures for implementing the cap.
>
> … In suspending public charter flights to these nine Cuban airports, the United States further impedes the Cuban regime from gaining access to hard currency from U.S. travelers.

On August 13, 2020, Secretary Pompeo requested that DOT suspend all private charter flights to Cuba, including to Havana, excerpt for flights "for emergency medical purposes, search and rescue, and other travel deemed in the interest of the United States." The press statement, available at https://2017-2021.state.gov/suspension-of-private-charter-flights-between-the-united-states-and-cuba/, is excerpted below.

> The Cuban military and intelligence services own and operate the great majority of hotels and tourism infrastructure in Cuba. We urge travelers of all nationalities to consider this and to make responsible decisions regarding travel to Cuba. The suspension of private charter flights will deny economic resources to the Castro regime and inhibit its capacity to carry out abuses.

B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS

1. Non-Disputing Party Submissions under Chapter 11 of the North American Free Trade Agreement

Article 1128 of NAFTA allows NAFTA Parties who are not parties to a particular dispute to make submissions to a Tribunal hearing that dispute on questions of interpretation of NAFTA. The Permanent Court of Arbitration ("PCA") and the International Centre for Settlement of Investment Disputes ("ICSID") frequently administer the settlement of investor state disputes.

a. B-Mex v. Mexico

On January 10, 2020, the United States filed a statement as an intervener in a set-aside action brought by the Mexican government in Ontario Superior Court after a NAFTA Chapter 11 arbitral tribunal rejected Mexico's preliminary jurisdictional objections. *United Mexican States v Burr*, case no. CV-19-625689-00CL. Excerpts follow from the U.S. intervention, which is available in full at https://www.state.gov/factum-of-the-united-states-of-america/.

* * * *

I. Pursuant to NAFTA Article 1122, the NAFTA Parties Consented to Arbitrate Only Claims Submitted in Accordance with the Procedures Set out in the NAFTA

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

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

10. The NAFTA Parties have therefore explicitly conditioned their consent upon satisfaction of the relevant procedural requirements. All three NAFTA Parties agree on this point, as reflected in their submissions in the *B-Mex* arbitration, as well as in their submissions in previous arbitrations. Pursuant to Article 31 (3)(a)-(b) of the *Vienna Convention on the Law of Treaties*, this subsequent agreement or subsequent practice of the NAFTA Parties "shall be taken into account" in interpreting the NAFTA.

11. The phrase "in accordance with the procedures set out in this Agreement" refers to all procedures relevant to arbitrating a Section B claim and necessarily includes procedures relevant to submitting a claim, *i.e.*, the procedures in Article 1119 (Notice of Intent to Submit a Claim to Arbitration) and Article 1121 (Conditions Precedent to Submission of a Claim to Arbitration).

Notably, the *Methanex* tribunal, in examining whether the "necessary consensual base for its jurisdiction [wa]s present," explained that:

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

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

II. A Claimant Must Satisfy the Requirements of NAFTA Article 1119 in Order to Engage a NAFTA Party's Consent to Arbitrate

13. The requirement under NAFTA Article 1119 for a disputing investor to deliver a Notice of Intent to Submit a Claim to Arbitration is one of the procedural conditions that must be satisfied before a NAFTA Party's consent to arbitrate under Article 1122(1) is engaged. The NAFTA Parties demonstrated agreement on this point in their submissions to the Tribunal.

14. In accordance with NAFTA Article 1119, a disputing investor who does not deliver a Notice of Intent 90 days before submitting a Notice of Arbitration or Request for Arbitration fails to satisfy this procedural requirement, and therefore fails to engage the respondent NAFTA Party's consent to arbitrate. Under such circumstances, a tribunal lacks jurisdiction *ab initio.* A respondent's consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration.

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

16. For the foregoing reasons, the procedural requirements of Article 1119 are mandatory preconditions to Chapter 11 arbitrations. Claimants or claims included in a Notice of Arbitration that were not included in a Notice of Intent delivered at least 90 days earlier have not been validly submitted to arbitration. A tribunal cannot simply overlook this failure to comply with these requirements.

III. A Claimant Must Also Satisfy the Requirements of NAFTA Article 1121 in Order to Engage a NAFTA Party's Consent to Arbitrate

17. NAFTA Article 1121 also contains procedural requirements upon which the NAFTA

Parties have conditioned their consent to arbitrate. The NAFTA Parties also demonstrated agreement on this point in their submissions to the Tribunal.

18. Article 1121 (1) and (2) provide that a disputing investor may submit a claim to arbitration *"only if"* the investor (or the investor and the enterprise) "consents to arbitration in accordance with the procedures set out in this Agreement." Further, Article 1121 (3) requires that "[a] consent and waiver required by this Article [1] shall be in writing, [2] shall be delivered to the disputing Party and [3] shall be included in the submission of a claim to arbitration." The three requirements found in Article 1121 (3) apply to both the consent and the waiver.

19. Each claimant must satisfy the requirements of Article 1121 for the tribunal to have jurisdiction over the NAFTA Party with respect to that claimant's putative claims. As the text of Article 1121 (3) makes clear, a consent must be "included in the submission." Article 1137(1)(b) further states that, with respect to arbitrations proceeding under the ICSID Additional Facility Rules, a claim is "submitted to arbitration" when the Notice of Arbitration is received by the ICSID Secretary-General. Thus, consent must accompany and take place in conjunction with the Notice of Arbitration. Additionally, the "consent" required by Article 1121 must be "clear, explicit and categorical[.]" If the requirements regarding a claimant's "consent" have not been satisfied—including both the fact of consent and the manner in which consent is communicated – the NAFTA Party's consent is not engaged, and the tribunal lacks jurisdiction *ab initio.* As will be discussed in more detail in Section IV.B below, there is no basis in the text of Article 1121 for the Tribunal's conclusion that, while a failure to provide consent in the specified manner may affect a claim's admissibility, it does not deprive the Tribunal of jurisdiction over the claim. A claimant does not have the option to comply with some of Article 1121's requirements and ignore others, as the Tribunal concluded.

20. A tribunal is required to determine whether a disputing investor has consented in accordance with the requirements of Article 1121 and must look to the disputing investor's submissions to make that determination. However, a tribunal itself has no authority to remedy an invalid consent under Article 1121. The discretion to permit a claimant either to proceed under or remedy an invalid consent lies with the respondent NAFTA Party as a function of the respondent's general discretion to consent to arbitration, not with a tribunal.

IV. The Tribunal's Interpretation of The Requirements of Articles 1119 and 1121

A. The Requirements in Article 1119 Are Jurisdictional

21. The Tribunal majority stated that "[a]rbitration being a creature of consent, lack of consent equates lack of jurisdiction." The Tribunal then concluded, however, that "the Respondent's consent in Article 1122 is not conditioned upon the satisfaction of the requirement of Article 1119(a) ...."

22. The Tribunal majority's conclusion rested primarily on three reasons: (1) the requirements of Article 1119 are, at most, procedures "to be followed *prior to* an arbitration" and not procedures, by contrast to those specified in Articles 1123 to 1136, "with which the subsequent *arbitration* itself, if any, must accord"; (2) unlike Article 1121, Article 1119 is not expressly identified as a condition precedent to submission of a claim to arbitration nor, unlike Articles 1116 and 1120, does it expressly bar the submission of a claim that does not comply with its requirements; and (3) the NAFTA's objectives would not be "furthered" by a strict application of Article 1119. The conclusion of the Tribunal on each of these points is flawed.

23. *First,* the Tribunal's purported distinction between procedures prior to arbitration and procedures for arbitration has no textual support in the NAFTA. The language of Article 1122 is framed broadly to encompass "the procedures set out in this Agreement," *i.e.,* the NAFTA, and

there is no distinction, express or implied, between procedures relevant to the submission of a claim and procedures relevant to the conduct of an arbitration once a claim has been submitted. If, by contrast, the NAFTA Party's standing offer of consent were understood to refer only to the subset of procedures set forth in Articles 1123 to 1136, as the Tribunal majority stated, the NAFTA Party would be consenting in advance to arbitrate claims with investors *regardless* of their compliance even with the waiver requirement in Article 1121. Such an interpretation is untenable and contrary to the decisions of multiple NAFTA tribunals finding that compliance with the waiver requirement is a prerequisite to engage the NAFTA Party's consent. Other tribunals interpreting nearly identical provisions in other treaties are in accord.

24. *Second*, whether Article 1119 is expressly labeled a condition precedent to submission of a claim to arbitration is irrelevant. As explained above, Article 1121 requires that an investor consent to arbitrate "in accordance with the procedures set out in this Agreement." This condition means that the investor must accept all procedures in the NAFTA that may pertain to arbitration under Chapter Eleven, Section B, including but not limited to, the procedures in Article 1119. An investor that has not accepted the NAFTA procedures has not consented to arbitration under Chapter Eleven. Because the acceptance of these procedures forms part of the investor's consent as a "condition precedent" to arbitrate, there is no need to insert the phrase "conditions precedent" in the header of each and every relevant NAFTA article containing a procedure that could be relevant to an arbitration under Chapter Eleven, Section B. The status of the NAFTA procedures as conditions precedent is thus clear from the header of Article 1121, combined with that Article's incorporation through the investor's consent of all "the procedures set out in this Agreement."

25. Likewise, nothing can be inferred from Article 1119 not explicitly stating the consequences for a failure to comply with its terms. As noted, Article 1119 frames, in mandatory terms, both the requirement to deliver the Notice and the required content of the Notice: "[t]he disputing investor *shall* deliver to the disputing Party written notice of its intention to submit a claim to arbitration" and the "notice *shall* specify ..." (emphasis added). Thus, there is no question that the disputing investor *must* deliver the Notice and that the Notice *must* contain the specified information. In addition, Article 1119 provides a timeframe for delivering a valid Notice that establishes the Notice as a prerequisite for filing a claim: the disputing investor must deliver the Notice "at least 90 days before the claim is submitted." In other words, the disputing investor cannot submit a claim unless:

> (1) it has delivered a valid Notice to the disputing NAFTA Party; and (2) 90 days have passed since delivery of the Notice. A failure by the disputing investor to comply with Article 1119 will bar such investor from submitting a claim.

26. *Third*, the Tribunal majority substituted its own judgment about what constitutes a fair and effective dispute resolution mechanism for the judgment of the NAFTA Parties with respect to whether the requirements of Article 1119 are jurisdictional. The NAFTA Parties made the submission of a valid Notice under Article 1119 mandatory to the dispute resolution process, and the Tribunal is not empowered to waive or disregard this requirement. Furthermore, as explained above, the Notice serves a number of important purposes which would be undermined by permitting disputing investors to proceed with a claim without meeting the requirements of Article 1119.

27. Finally, the Tribunal majority failed to address the non-disputing NAFTA Parties' submissions under Article 1128. As the United States explained in its Article 1128 submissions, it has long maintained that the "procedures set out in this Agreement" that are required to engage the NAFTA Parties' consent and form the agreement to arbitrate necessarily include Articles 1116 to 1121. As noted above, all three NAFTA Parties agree that their consent to the submission of any claim to arbitration is conditioned upon the satisfaction of the relevant procedural requirements. In accordance with Article 31(3)(a)-(b) of the *Vienna Convention on the Law of Treaties,* the NAFTA Parties' common, concordant, and consistent views form a subsequent practice that "shall be taken into account" by the Tribunal in interpreting the NAFTA. As the recent decision of the *Mobil II* tribunal correctly noted after examining the views (many contained in nondisputing Party submissions) of "all three NAFTA Parties in their practice subsequent to the adoption of NAFTA," subsequent practice establishing agreement of the parties regarding the interpretation of the treaty is "entitled to be accorded considerable weight." Other tribunals have reached the same conclusion.

28. The Tribunal majority, however, gave no weight to the NAFTA Parties' agreement on the proper role of Article 1119; indeed, the Tribunal did not even mention the nondisputing NAFTA Parties' Article 1128 submissions. This is inconsistent with customary international law principles of treaty interpretation, as reflected in Article 31(3)(a)-(b) of the *Vienna Convention on the Law of Treaties.*

B. The Requirements in Article 1121 Are Jurisdictional

29. The Tribunal concluded that Article 1121(1) "sets out two substantive conditions precedent that an investor must satisfy before it can pursue a claim in arbitration: consent and waiver," and that "a NAFTA Party cannot be compelled to arbitrate where those·conditions are not met." The Tribunal then determined, however, that "the requirements of Article 1121(3) as to the manner in which that consent is to be conveyed to the Respondent do not bear on the Tribunal's jurisdiction."

30. Having acknowledged the jurisdictional requirements of the first paragraph of Article 1121, the Tribunal's conclusions with respect to the requirements imposed by the third paragraph of Article 1121 are unsupported by treaty analysis or customary international law principles of treaty interpretation reflected in the Vienna Convention on the Law of Treaties.

31. Article 1121 does not distinguish between requirements that are jurisdictional and requirements that potentially could be relevant only to the admissibility of a claim. All requirements in the Article should be treated as "conditions precedent to submission of a claim to arbitration." Again, the Tribunal cannot substitute its judgment for the judgment of the NAFTA Parties, as memorialized in the text of the treaty itself, on the issue of what should be a "condition precedent to submission of a claim to arbitration."

* * * *

b. Tennant Energy v. Canada

On January 15, 2020, the United States made an oral submission at a hearing in the NAFTA Chapter 11 arbitration filed by Tennant Energy against Canada. *Tennant Energy v. Canada*, PCA Case No. 2018-54. The U.S. previously made a written submission on November 27, 2019. See *Digest 2019* at 391-93. Excerpts follow from the U.S. oral submission.

---

* * * *

In our Written Submission, we set out the U.S. position on the proper interpretation of Article 1134, and I do not intend to reiterate or expand on that issue now. Instead, I will briefly address the proper role of the NAFTA Party's Submissions in the interpretation of the NAFTA, particularly where, as here, all parties are in agreement as to how the treaty provision at issue should be read.

States are well-placed to provide authentic interpretation of their treaties, including in proceedings before investor-State Tribunals like this one. NAFTA Article 1128 ensures the Non-Disputing NAFTA Parties have an opportunity to provide their views on the correct interpretation of the NAFTA. The NAFTA Parties consider Non-Disputing Party Submissions to be an important tool in this respect, and the United States consistently includes provision for such submissions in its Investment Agreements.

Article 31 of the Vienna Convention on the Law of Treaties recognizes the important role that the States Parties play in the interpretation of their Agreements. In particular, Paragraph 3 states that: "In interpreting a treaty, there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation of the Treaty or the application of its provisions and any subsequent practice in the application of the Treaty which establishes the agreement of the Parties regarding its interpretation."

Article 31 of the Vienna Convention, which reflects customary international law, is framed in mandatory terms. Subsequent agreements between the parties and subsequent practice of the parties *shall* be taken into account. Thus, if the Tribunal concludes that there is either a subsequent agreement between the NAFTA Parties or subsequent practice that establishes such an agreement, it must take that into account in its interpretation of Article 1134.

In addition, there is no hierarchy of importance amongst the elements of interpretation listed in Article 31. Accordingly, the Tribunal must consider any subsequent agreement of the Parties and any subsequent practice of the Parties alongside the Treaty's text, context, and object and purpose. Where the submissions by the three NAFTA Parties demonstrate that they agree on the proper interpretation of a given provision, the Tribunal must, in accordance with Article 31(3)(a) take this agreement into account.

In addition to reflecting an agreement under Article 31(3)(a), the NAFTA Parties' concordant interpretations may also constitute subsequent practice under Article 31(3)(b). The International Law Commission has commented that subsequent practice may include "statements in the course of a legal dispute." Accordingly where the NAFTA Parties' submissions in an arbitration evidence a common understanding of a given provision, this constitutes subsequent practice that must be taken into account by the Tribunal under Article 31(3)(b). Several Tribunals have agreed that submissions by the NAFTA Parties in arbitrations under Chapter 11, including non-disputing party submissions may serve to form subsequent practice. For example, the *Mobil v. Canada* Tribunal recently found that arbitral submissions by the NAFTA Parties constituted subsequent practice and observed that: "The subsequent practice of the parties to a treaty, if it establishes the Agreement of the parties regarding the interpretation of the Treaty, is entitled to be accorded considerable weight."

I will point you to Paragraphs 103, 104, and 158-160 of the *Mobil v. Canada* Decision on Jurisdiction and Admissibility dated July 13, 2018.

The Tribunal in *Bilcon v. Canada* reached a similar conclusion at Paragraphs 376-379 of its January 10, 2019 Award on Damages, as did the Tribunal in *Canadian Cattleman for Fair Trade v. The United States* at Paragraphs 188-189 of its January 28, 2008, Award 1 on Jurisdiction.

Whether the Tribunal considers the interpretations the NAFTA Parties have presented in Chapter Eleven Cases as a subsequent agreement under 31(3)(a) or subsequent practice under 31(3)(b) or both, the outcome is the same. Here each of the NAFTA Parties has, through its respective submissions, expressed a concordant interpretation of Article 1134, namely that it permits a Tribunal to order Security for Costs subject to the applicable Arbitration Rules.

Canada expressed this view in its initial request for Security for Costs, and México and the United States expressed consistent views in their Article 1128 Submissions.

Finally, in Paragraph 2 of its response to the Non-Disputing Parties Submissions, Canada correctly noted all three NAFTA Parties agree that NAFTA Chapter Eleven Tribunals may order Security for Costs under NAFTA Article 1134, subject to the applicable Arbitration Rules.

In accordance with the treaty interpretation principles that I have outlined, the Tribunal must take the NAFTA Parties' common understanding of Article 1134 as evidenced by their submissions in this arbitration into account.

* * * *

c. Resolute v. Canada

On April 20, 2020, the U.S. made its second non-disputing Party submission in *Resolute Forest Products, Inc. v. Canada*, PCA Case No. 2016-13. The submission is available in full at https://www.state.gov/wp-content/uploads/2020/04/Resolute-Article-1128-Submission-FINAL-508.pdf. The statement in the submission on "Proportionality" follows.

> 23. The United States has long observed that State practice and *opinio juris* do not establish that the minimum standard of treatment of aliens imposes a general obligation of proportionality on States. To the contrary, and as noted below, the minimum standard of treatment affords every State "wide discretion with respect to how it carries out [its] policies by regulation and administrative conduct" and tribunals do "not have an open-ended mandate to second-guess government decision-making."

2. Non-Disputing Party Submissions under other Trade Agreements

a. U.S.-Korea FTA: Elliott v. ROK

Chapter Eleven of the United States-Korea Free Trade Agreement ("KORUS") contains provisions designed to protect foreign investors and their investments and to facilitate the settlement of investment disputes. Article 11.20.4 of the KORUS, like Article 1128 of

NAFTA, allows for non-disputing Party submissions. On February 7, 2020, the United States made a non-disputing Party submission in *Elliott v. ROK*, PCA Case No. 2018-51. Excerpts follow from the discussion of "attribution," in the U.S. submission. The submission is available at https://www.state.gov/wp-content/uploads/2020/02/US-Article-II204-Submission-Elliott-v-ROK-020720-508.pdf.

---

* * * *

2. KORUS Article 11.1.3 provides that:

> measures adopted or maintained by a Party means measures adopted or maintained by:
> (a) central, regional, or local governments and authorities; and
> (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.

3.Article 11.1.3(a) confirms that measures adopted or maintained by any government or authority of a Party are attributable to that Party. The term "governments and authorities" means the organs of a Party, consistent with the principles of attribution under customary international law. As the text of Article 11.1.3(a) makes clear, this rule of attribution applies to any State organ at the central, regional, or local level of government. The text of Article 11.1.3(a) does not draw distinctions based on the type of conduct at issue.

4. Pursuant to Article 11.1.3(b), attribution of conduct of a non-governmental body to a Party requires that both (i) the conduct is governmental in nature and (ii) the measures adopted or maintained by the non-governmental body are undertaken "in the exercise of powers *delegated* by" the government or an authority of a Party. (Emphasis added.) Article 16.9 of the Korus defines "delegation," for purposes of the chapter on competition-related matters, as including, *inter alia*, "a legislative grant, and a government order, directive, or other act, transferring to the . . . state enterprise, or authorizing the exercise by the . . . state enterprise of, governmental authority." If the conduct of a non-governmental body falls outside the scope of the relevant delegation of authority, such conduct is not a "measure[] adopted or maintained by a Party" under Article 11.1.

5. A non-governmental body such as a state enterprise may exercise regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges. These examples illustrate circumstances in which a non-governmental body such as a state enterprise is exercising governmental authority delegated by a Party in its sovereign capacity.

* * * *

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

Chapter Ten of the United States-Panama Trade Promotion Agreement ("U.S.-Panama TPA") contains provisions designed to protect foreign investors and their investments and to facilitate the settlement of investment disputes. Article 10.20.2 of the U.S.-Panama TPA, like Article 1128 of NAFTA, allows for non-disputing Party submissions.

On February 3, 2020, the United States made a non-disputing Party submission in *Omega Eng'g and Rivera v. Panama*, ICSID Case No. ARB/16/42, pursuant to Article 10.20.2 of the U.S.-Panama TPA and the Treaty between the United States of America and the Republic of Panama concerning the Treatment and Protection of Investment, with Agreed Minutes, as amended ("U.S.-Panama BIT") (or jointly,"the Agreements"). This is the first non-disputing party submission by the United States made pursuant to an older BIT. The U.S. submission is available at https://www.state.gov/wp-content/uploads/2020/03/US-Submission-in-Omega-Mr.-Rivera-v.-Panama-508.pdf. The submission addresses topics including the minimum standard of treatment (including fair and equitable treatment and full protection and security) in bilateral investment treaties ("BITs") having the same meaning as in customary international law; and expropriation likewise having the same meaning in BITs as it does in customary international law. Excerpts below relate to most-favored nation ("MFN") treatment, the obligations to accord treatment to investments or investors, and to moral damages.

* * * *

Most-Favored-Nation-Treatment (Article 10.4 of the U.S.-Panama TPA)

2. Article 10.4 of the U.S.-Panama TPA provides:

> 1.Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2.Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. (Emphases added.)

3. To establish a breach of most-favored-nation treatment ("MFN") under Article 10.4, a claimant has the burden of proving that it or its investments: (1) were accorded "treatment"; (2) were in "like circumstances" with investors or investments ("comparators") of a third State (*i.e.*, of a State which is not a Party to the U.S.-Panama TPA); and (3) received treatment "less favorable" than that accorded to such investors or investments. As the *UPS v. Canada* tribunal noted with respect to the national treatment obligation of NAFTA Article 1102, "[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts. . . ."

4. Article 10.4 is intended to prevent discrimination on the basis of nationality by the Party that is hosting the investment between investors (or investments) of the other Party and investors (or investments) of a third State. It is not intended to prohibit all differential treatment among investors or investments. Rather, it is designed only to ensure that the Parties do not treat entities that are "in like circumstances" differently based on nationality. A claimant is not required to establish discriminatory intent.

5. As indicated above, the appropriate comparison is between the treatment accorded to a claimant or its investment, on one hand, and the treatment accorded to a third-State investor or investment in like circumstances, on the other. It is therefore incumbent upon the claimant to identify third-State investors or investments as comparators. If the claimant does not identify any third-State investor or investment as allegedly being in like circumstances, no violation of Article 10.4 can be established.

6. Determining whether a domestic investor or investment identified by a claimant is in "like circumstances" to the claimant or its investment is a fact-specific inquiry. As one tribunal observed, "[i]t goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations." The United States understands the term "circumstances" to denote conditions or facts that accompany treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the "like circumstances" analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other relevant characteristics. When determining whether a claimant was in like circumstances with comparators, it or its investment should be compared to a national investor or investment that is alike in all relevant respects but for nationality of ownership. Moreover, whether treatment is accorded in "like circumstances" under Article 10.4 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.

7. Nothing in Article 10.4 requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any third-State investor or any investment of a national. The appropriate comparison is between the treatment accorded a foreign investment or investor in like circumstances. This is an important distinction intended by the Parties. Thus, the Parties may adopt measures that draw distinctions among entities without necessarily violating Article 10.4.

8. With respect to the third component of an MFN claim noted in paragraph 3, a claimant must also establish that the alleged non-conforming measure(s) that constituted "less favorable" treatment are not subject to the reservations contained in Annex II of the U.S.-Panama TPA, as set forth in Article 10.13.2. In particular, both Parties reserved "the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement(s) in force or signed prior to the date of entry into force of this Agreement."

9. A claimant must meet the basic requirement of Article 10.4 to identify a comparator "in like circumstances." The MFN clause of the U.S.-Panama TPA expressly requires a claimant to demonstrate that investors of another Party or a non-Party "in like circumstances" were afforded more favorable treatment. Ignoring the "in like circumstances" requirement would serve impermissibly to excise key words from the Agreement.

10. Nor can Article 10.4 be used to alter the substantive content of the fair and equitable treatment or full protection and security obligations under Article 10.5. As noted in the submissions on Article 10.5 below, Article 10.5.2 clarifies that the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. Article 10.5.3 further

clarifies that a "breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article."

* * * *

Requirement to Accord Treatment to Investments and/or Investors

46. Some obligations in the Agreements require a Party to accord treatment to both investors and investments, whereas other obligations in the Agreements only require a Party to accord treatment to an investment. For example, the Agreements require the Parties to accord "fair and equitable treatment" only to investments, not to investors. In contrast, the Agreements require the Parties to accord "national treatment" to both investors and investments. In accordance with this distinction, for the Agreements' obligations which only extend to investments, a claimant (*i.e.*, an investor) must establish that a Party's treatment was accorded to an investment and violated the relevant obligation.

Damages

47. Both of the Agreements authorize claimants to seek damages for alleged breaches of specified obligations in the Agreements. However, in accordance with the discussion above in paragraph 46, for TPA or BIT obligations that only extend to investments, a tribunal may only award damages for violations where the investment incurred damages. A tribunal has no authority to award damages that a claimant allegedly incurred in their capacity as an investor for violations of obligations that only extend to investments.

* * * *

c. U.S.-Peru TPA: Renco v. Peru

Chapter Ten of the U.S.-Peru Trade Promotion Agreement ("TPA") contains provisions similar to those in other trade agreements, to protect investors and facilitate dispute settlement. Article 10.20.2 of the U.S.-Peru TPA, like Article 1128 of NAFTA, allows for non-disputing Party submissions. On March 6, 2020, the United States made a non-disputing Party submission in *Renco v. Peru*, PCA Case No. 2019-46. The U.S. submission is available at https://www.state.gov/wp-content/uploads/2020/05/U.S.-Submission-Renco-II-508.pdf. Excerpts below discuss the relationship of a denial of justice claim to the time bar and non-retroactivity.

_____

* * * *

Article 10.18.1 (Limitations Period)

2. Article 10.18.1 of the U.S.-Peru TPA provides:

> No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

3. Article 10.18.1 imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute. As is made explicit by Article 10.18.1, the Parties did not consent to arbitrate an investment dispute if "more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach" and "knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage." Accordingly, a tribunal must find that a claim satisfies the requirements of, *inter alia*, Article 10.18.1 in order to establish a Party's consent to (and therefore the tribunal's jurisdiction over) an arbitration claim. Because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1, the claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.

4. This limitations period is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification." An investor or enterprise first acquires knowledge of an alleged breach and loss under Article 10.18.1 as of a particular "date." Such knowledge cannot *first* be acquired on multiple dates or on a recurring basis. As the *Grand River* tribunal recognized in interpreting the nearly identical limitations provisions under Articles 1116(2) and 1117(2) of the NAFTA, subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby. To allow otherwise would permit an investor to evade the limitations period by basing its claim on the most recent transgression in that series, rendering the limitations provisions ineffective.

5. With regard to knowledge of "incurred loss or damage" under Article 10.18.1, a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date. Moreover, the term "incur" broadly means to "to become liable or subject to." Therefore, an investor may "incur" loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate.

6. With regard to "knowledge of the breach alleged" under Article 10.18.1, a "breach" of an international obligation exists "when an act of th[e] State is not in conformity with what is required of it by that obligation." It is well-established that the international responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. Thus, non-final judicial acts have not ripened into the type of final act that is sufficiently definite to implicate state responsibility, unless further recourse is obviously futile or manifestly ineffective.

7. In the context of a claim of denial of justice, therefore, the three-year limitations period set out in Article 10.18.1 will not begin to run until the date on which the investor or enterprise first acquired, or should have acquired, knowledge that either the breach has occurred—*i.e.*, when all available domestic remedies have been exhausted, unless obviously futile or manifestly ineffective—or the claimant or enterprise has incurred loss or damage, whichever is later.

Article 10.1.3 (Non-Retroactivity)

8. Article 10.1.3 states: "[f]or greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement." The phrase "for greater certainty" signals that the sentence it introduces reflects what the agreement would mean even if that sentence were absent.

9. A host State's conduct prior to the entry into force of an obligation may be relevant in determining whether the State subsequently breached that obligation. Given the rule against retroactivity, however, there must exist "conduct of the State after that date which is itself a breach." As the *Berkowitz* tribunal observed, "pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right. Pre-entry into force acts and facts cannot . . . constitute a cause of action." Further, "[t]he mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct."

* * * *

d. U.S.-Colombia TPA: Carrizosa v. Colombia

Article 10.20.2 of the United States-Colombia Trade Promotion Agreement ("U.S.-Colombia TPA" or "Agreement") authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement.

On May 1, 2020, the United States made a non-disputing Party submission in *Astrid Carrizosa v. Colombia*, ICSID Case No. ARB/18/05, a proceeding under Chapter Twelve (Financial Services) of the U.S.-Colombia TPA. Article 10.20 is part of Section B of Chapter Ten, and thus incorporated into Chapter Twelve by Article 12.1.2(b). The May 1, 2020 submission is available at https://www.state.gov/wp-content/uploads/2020/06/U.S.-Submission-in-Carrizosa-v.-Colombia-ICSID-Case-No.-ARB-18-05-508.pdf. Also on May 1, 2020, the United States made similar points in its submission in *Alberto Carrizosa Gelzis et al v. Colombia*, PCA Case No. 2018-56, involving similar claims brought under Chapter Twelve by different members of the Carrizosa family, pursuant to different rules. The ICSID and PCA cases proceeded concurrently. The U.S. submission in the PCA case is available at https://www.state.gov/wp-content/uploads/2020/06/U.S.-Submission-in-Carrizosa-v.-Colombia-Case-No.-2018-56-508.pdf, and excerpted below.

---

* * * *

ARTICLE 12.1: SCOPE OF COVERAGE AND INVESTOR-STATE ARBITRATION

7. Article 12.1.1 (Scope of Coverage), provides *inter alia* that Chapter Twelve "applies to measures adopted or maintained by a Party relating to; (a) financial institutions of another Party; [and] (b) investors of another Party, and investments of such investors, in financial institutions in the Party's territory[.]" If a claim falls within the scope of Chapter Twelve, it may not be arbitrated under any other Chapter of the U.S.-Colombia TPA.

8. The chapeau of Article 12.1.2 further provides in relevant part that Chapter Ten applies to "measures described in paragraph 1 ***only to the extent that***" Chapter Ten or Articles thereof "are incorporated into this Chapter." (Emphasis added.) Article 12.1.2.(b) then goes on to incorporate into Chapter Twelve the dispute resolution provisions of Chapter Ten, Section B, "solely" with respect to claims brought under the specific Chapter Ten Articles incorporated into

Chapter Twelve. Thus, Article 12.1.2(b) provides that:

> Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter **solely** for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements), as incorporated into this Chapter. (Emphasis added.)

9. By using the word "solely," the Parties expressly identified the only obligations found in Chapter Ten that they were willing to arbitrate under Chapter Twelve. The Parties did not consent to arbitrate any investor claims based on other substantive obligations found in Chapter Ten. Nor did the Parties consent to arbitrate investors' claims based on any of the substantive obligations contained in Chapter Twelve, which remain subject only to State-to-State dispute resolution in Chapter Twenty-One.

10. The NAFTA was the first international trade and investment agreement of the United States to provide for investor-State arbitration of financial services matters in a separate chapter. Financial Services matters, including investor-State arbitration, are contained in Chapter Fourteen of the NAFTA. The *Fireman's Fund* tribunal considered the scope of NAFTA Chapter Fourteen and explained how the NAFTA Parties arrived at the more limited scope of investor-State arbitration for claims falling within the scope of that chapter than for NAFTA's Investment Chapter:

> The regulations concerning financial services were not the same in all three countries, but each of the State Parties was clear that challenges to such regulations or interpretations of the regulations and the relevant authorities should not be committed to investor-State arbitration under the NAFTA. On the other hand, investment in financial institutions across borders was to be encouraged, and investors were to be protected through the NAFTA from expropriation and measures tantamount to expropriation.
>
> The solution arrived at in the NAFTA was to include a separate Chapter Fourteen on Financial Services. The expropriation provisions of the NAFTA as set out in Chapter Eleven, including the provisions for investor-State arbitration, were made applicable to claims under Chapter Fourteen, but claims based on other provisions designed to protect cross-border investors and investments, including provisions for National Treatment and Most-Favored-Nation Treatment, are excluded from the competence of an arbitral tribunal in a case involving investment in financial institutions. Chapter Fourteen contains no counterpart to Article 1105 concerning Minimum Standard of Treatment.

11. Further, the *Fireman's Fund* tribunal correctly noted that the NAFTA Parties did not consent to arbitrate National Treatment claims or Minimum Standard of Treatment claims for financial services matters. Rather, such claims were subject to State-to-State dispute resolution, not investor-State dispute resolution. The *Fireman's Fund* tribunal explained:

> Several provisions of Chapter Eleven [the Investment Chapter] are incorporated into Chapter Fourteen, including, as here relevant, Article 1110 concerning Expropriation and Compensation, and Articles 1115-1138 concerning the procedural aspects of dispute resolution by a tribunal such as the present one. Article 1102 on National Treatment and

> Article 1105 on Minimum Standard of Treatment are not incorporated into Chapter Fourteen. Accordingly, if the measures alleged to have been taken on behalf of the Government of Mexico are covered by Chapter Fourteen, this Tribunal lacks jurisdiction of the claims under Articles 1102 and 1105. Chapter Fourteen contains no counterpart to the Minimum Standard of Treatment provision of Chapter Eleven; it does contain, in Article 1405, a counterpart to the national treatment provision in Chapter Eleven, and indeed a claim for breach of Article 1405 is made in the present arbitration. However, Article 1405 is not included among the provisions to which the procedural provisions of Chapter Eleven apply (Articles 1115-1138), and Article 1414 makes clear that claims under Article 1405 are subject to state-to-state dispute settlement pursuant to Chapter Twenty, not to investor-state dispute settlement under Chapter Eleven.
>
> In sum, if the measures challenged in this arbitration are covered by Chapter Fourteen, the claims brought under Articles 1102, 1105, and 1405 must be dismissed, and only the claim for expropriation pursuant to Article 1110 remains to be decided by this Tribunal.

12. Likewise here, the Parties to the U.S.-Colombia TPA did not consent to investor-State arbitration of any claims other than those explicitly incorporated into Chapter Twelve via Article 12.1.2(b). Therefore, an investor-State tribunal has no jurisdiction to consider claims not explicitly set out in 12.1.2(b).

13. The U.S.-Colombia TPA Parties did agree, however, to subject such claims to State-to-State dispute resolution, just as the NAFTA Parties did. Pursuant to Article 21.2.1, the U.S.-Colombia TPA Parties subjected disagreements regarding "all disputes between the Parties regarding the interpretation or application of" the TPA to State-to-State dispute resolution procedures. Chapter Twenty-One of the TPA sets forth the procedures for State-to-State dispute resolution, although the procedures are modified with respect to disputes arising under Chapter Twelve pursuant to Article 12.18.

MOST-FAVORED-NATION (MFN) TREATMENT

14. Article 12.3.1 provides:

> Each Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of any other Party or of a non-Party, in like circumstances.

15. As a threshold matter, as discussed above in paragraphs 8, 9 and 12, no claim brought via Article 12.3.1 may be brought by an investor against a State Party to the TPA. Thus, an MFN claim brought via Article 12.3.1 alleging that a Party extended more favorable treatment to a third-Party investor or investment than was accorded to the investor or investment of the other Party cannot be the subject of investor-State arbitration. As a result an investor-State Tribunal has no jurisdiction to consider any procedural or substantive treatment extended by a TPA Party to a third-State investor or investment through a multilateral or bilateral agreement that a TPA Party has with a third State. Any other conclusion would eviscerate the carefully crafted decision the TPA Parties made to make only certain obligations in the financial services sector subject to

investor-State arbitration. Rather, the TPA Parties agreed that any MFN claims may only be subject to State-to-State dispute resolution.

16. In the context of a State-to-State claim, the requirements to establish a breach of Article 12.3.1 with respect to an investor or investment are summarized as follows: a complaining State has the burden of proving that an investor of that State or that investor's investment (1) was accorded "treatment"; (2) was in "like circumstances" with the identified non-Party investors or investments; and (3) received treatment "less favorable" than that accorded to the identified non-Party investors or investment.

17. With respect to the third component of an MFN claim noted in the preceding paragraph, pursuant to Article 12.9.3, a complaining State must also establish that the alleged nonconforming measures (NCM) that constituted "less favorable" treatment are not subject to the reservations contained in Annex II of the TPA. In particular, in Annex II both Parties "reserve[d] the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement." Thus, a tribunal has no jurisdiction to consider any more favorable treatment extended pursuant to such agreements.

DEFINITION OF "INVESTMENT"

18. Footnote 15 to Article 10.28(g) (Definitions) explains that "[t]he term "investment" "does not include an order or judgment entered in a judicial or administrative action.

19. Footnote 15 applies to investor-State arbitration conducted pursuant to Chapter Twelve of the U.S.-Colombia TPA by virtue of Article 12.20, which defines "investment" to mean the same as that in Article 10.28, with certain exceptions not relevant here.

* * * *

The United States made oral submissions in both *Carrizosa* cases, in November in the ICSID case, and on December 15, 2020 in the PCA case. The transcript in the PCA case is available at https://www.state.gov/wp-content/uploads/2021/04/Carrizosa-PCA-oral-NDP-508.pdf. Excerpts follow from the transcript of the U.S. oral submission in the PCA case. (The U.S. oral submission in the ICSID case also includes these arguments.)

---

* * * *

The first issue concerns Footnote 2 to Article 10.4 and the significance of the words "for greater certainty" at the beginning of that footnote . As a general practice, the United States uses the words "for greater certainty" in its International Trade Investment Agreements to introduce confirmation regarding the meaning of "agreement." In U.S. practice, the phrase "for greater certainty" signals that the sentence it introduces reflects the understanding of the United States and the other agreement party or parties of what the provisions of the Agreement would mean even if that sentence were absent.

As a consequence, "for greater certainty" sentences also serve to spell out more explicitly the proper interpretation of similar provisions mutatis mutandis and other agreements or in the same agreement .

* * * *

The third issue we would like to address concerns the shared interpretations of the State Parties to the TPA as to its provisions and Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties. Although the United States is not a party to the Vienna Convention, we consider that Article 31 reflects customary international law on treaty interpretation .

Dates are well placed to provide authentic interpretation of their treaties, including in proceedings before investor-State tribunals like this one. TPA Article 1022 ensures the non-disputing TPA Party has an opportunity to provide its views on the correct interpretation of the TPA. And the United States consistently includes provision for such submissions in its Investment Agreements .

Article 31 of the Vienna Convention on the Law of Treaties recognizes the important role that the States Parties play in the interpretation of their agreements. In particular, Paragraph 3 states that, "in interpreting a treaty, there shall be taken into account, together with the context, any subsequent agreement between the Parties regarding the interpretation of the Treaty or application of its provisions and any subsequent practice in the application of the Treaty which establishes the agreement of the Parties regarding its interpretation."

Article 31 of the Vienna Convention is framed in mandatory terms. Subsequent agreements between the Parties and subsequent practice of the Parties shall be taken into account. Notably, several Investment Tribunals constituted under the NAFTA have agreed that submissions by the NAFTA Parties in arbitrations under Chapter 11, including non-disputing party submissions may serve to form subsequent practice.

For example , the *Mobil v. Canada* Tribunal found that arbitral submissions by the NAFTA Parties constituted subsequent practice and observed that: "The subsequent practice of the Parties to a treaty, if it establishes the agreement of the Parties regarding the interpretation of the Treaty, is entitled to be accorded considerable weight." And I would point you to Paragraphs 103, 104 , and 158-160 of the *Mobil v. Canada* Decision on Jurisdiction and Admissibility of 2018 .

The Tribunal in *Bilcon v. Canada* reached a similar conclusion …

* * * *

e. U.S.-Morocco FTA: Carlyle Group v. Morocco

Article 10.19.2 of the United States-Morocco Free Trade Agreement ("U.S.-Morocco FTA" or "Treaty") allows submissions by non-disputing Parties on questions of interpretation of the Treaty. On December 4, 2020, the United States made such a submission in the case, *Carlyle Group v. Morocco*, ICSID Case No. ARB/18/29. The U.S. submission is available at https://2017-2021.state.gov/wp-content/uploads/2020/12/U.S.-Article-10.19.2-Submission_The-Carlyle-Group-LP-and-others-v.-Kingdom-of-Morocco-508.pdf and excerpted below.

---

* * * *

Article 10.15.1 (Submission of a Claim to Arbitration)

2. The U.S.-Morocco FTA provides two separate jurisdictional bases for investors to bring claims against a Treaty Party: Articles 10.15.l(a) and 10.15.l(b). Articles 10.15.l(a) and 10.15 .1 (b) serve to address discrete and non-overlapping types of injury. Where the investor seeks to recover loss or damage that it incurred directly, it may bring a claim under Article 10.15.l(a). However, where the alleged loss or damage is to "an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly," the investor's injury is only indirect. Such derivative claims must be brought, if at all, under Article 10.15.1(b).

* * * *

Article 10.27 (Definition of "Investment")

"Characteristics of an investment"

12. Article 10.27 defines "investment" … This definition encompasses "every asset" that an investor owns or controls, directly or indirectly, that has the characteristics of an investment. The "[f]orms that an investment may take include" the categories listed, which are illustrative and non-exhaustive. The enumeration of a type of an asset in Article 1, however, is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

13. Article 10.27's use of the word "including" in relation to "characteristics of an investment" indicates that the list of identified characteristics, i.e., "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk," is not an exhaustive list; additional characteristics may be relevant.

14. With respect to debt instruments and loans, for example, Article 10.27 provides that the "[f]orms that an investment may take include: ... bonds, debentures, other debt instruments, and loans .... "However, footnote 9, which is appended to subparagraph (c), clarifies that:

> Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

15. Consistent with the distinction drawn in footnote 9, certain shorter-term forms of debt, in contrast to, *e.g.,* long-term notes, are less likely to have the characteristics of an investment.

Meaning of "control"

16. Article 10.27 of the FTA defines "investment" to mean "every asset that an investor owns *or controls*, directly or indirectly, that has the characteristics of an investment." The term "control" is not defined in the Treaty. The omission of a definition for "control" accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.

* * * *

C. WORLD TRADE ORGANIZATION

The following discussion of developments in 2020 in select WTO dispute settlement proceedings involving the United States is drawn from Chapter II.D, "WTO Dispute Settlement," of the Annual Report of the President of the United States on the Trade Agreements Program ("Annual Report"), released in March 2021 and available at https://ustr.gov/sites/default/files/files/reports/2021/2021%20Trade%20Agenda/Online%20PDF%202021%20Trade%20Policy%20Agenda%20and%202020%20Annual%20Report.pdf. WTO legal texts referred to below are available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

1. Disputes brought by the United States

China – Domestic Supports for Agricultural Producers (DS511)

The United States pursued action in one WTO proceeding in 2020. June 30, 2020 marked the end of the "reasonable period of time" for China to comply with WTO rules with regard to its provision of domestic support for producers of wheat, Indica rice, Japonica rice, and corn. (Originally, the reasonable period of time was to expire on March 31, 2020, as discussed in *Digest 2019* at 408, but China and the United States agreed to extend it.) As explained in the Annual Report at 57:

> In July 2020, the United States requested authorization to suspend the application to China of tariff concessions and other obligations at an estimated level of $1.3 billion for 2020. China objected to the U.S. request, automatically referring the matter to arbitration.

2. Disputes brought against the United States

a. Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (EU) (DS353)

See the Annual Report at 75-79 for the history of this dispute. On October 13, 2020, the arbitration regarding the level of suspension of concessions requested by the EU, pursuant to Article 22.6 of the Dispute Settlement Understanding ("DSU"), concluded that the adverse effects caused by the Washington State tax rate reduction during an historical 2012 reference period is commensurate with $3.99 billion annually in countermeasures. On October 26, 2020, the WTO authorized the EU to take countermeasures accordingly. However, as explained in the Annual Report at 79, "the Washington State tax rate reduction was repealed effective April 1, 2020," leaving the EU with "no legal basis to maintain countermeasures on U.S. goods."

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

As discussed in the Annual Report at 86-87, the United States and the Republic of Korea disagree on whether the United States has fully complied with the Dispute Settlement Body's ("DSB's") recommendations and rulings in the case, resulting in the matter being referred to arbitration in 2019. The Annual Report relates that:

> On February 6, 2020, Korea and the United States reached an understanding regarding procedures under Articles 21 and 22 of the DSU, under which each party agreed it would accept a report by the compliance panel without appeal.

c. Countervailing Measures on Supercalendered Paper from Canada (DS505)

As discussed in the Annual Report at 87-88, the United States appealed certain of the Panel's findings in the case. The appellate document, issued on February 6, 2020, maintains the findings of the Panel. The United States objected to adoption of the document as an Appellate Body report because there was a Chinese national affiliated with the Government of China serving on the appeal, contrary to Article 17.3 of the DSU. As explained in the Annual Report:

> The United States explained that because there was no valid Appellate Body report in this dispute, the document and report could only be adopted by positive consensus. Because there was no consensus on adoption, the DSB did not validly adopt any document and report in this dispute, and therefore there was no valid recommendation of the DSB with which to bring a measure into conformity with a covered agreement.
>
> On June 18, 2020, Canada requested authorization to suspend concessions and other obligations pursuant to Article 22.2 of the DSU. On June 26, 2020, the United States objected to Canada's request, referring the matter to arbitration pursuant to Article 22.6 of the DSU. On August 6, 2020, the WTO notified the parties that the arbitration would be carried out by the panelists who served during the panel proceeding: Mr. Paul O'Connor, Chair; and Mr. David Evans and Mr. Colin McCarthy. The arbitration proceedings are ongoing.

d. Countervailing Measures on Softwood Lumber from Canada (DS533)

As discussed in the Annual Report at 91, the panel circulated its report in this dispute on August 24, 2020.

> The panel found that Commerce's determinations regarding benchmarks for stumpage, log export permitting processes, and non-stumpage programs were inconsistent with the SCM [Subsidies and Countervailing Measures] Agreement. The panel effectively applied the WTO Appellate Body's flawed test for using out-of-country benchmarks in its analysis of benchmarks from within Canada

that Commerce used to measure the benefit of subsidies. The panel also applied a heightened level of scrutiny in its review of Commerce's determination, in essence putting itself in the place of the investigating authority, contrary to the terms of the SCM Agreement.

On September 28, 2020, the United States notified the DSB of its decision to appeal certain issues of law covered in the panel report.

e. Tariff Measures on Certain Goods from China (DS543)

As discussed in the Annual Report at 93, the panel circulated its report on September 15, 2020.

The panel concluded that the tariff measures at issue are inconsistent with Article I:1 of the GATT 1994 (MFN), because they fail to provide treatment for Chinese products that is no less favorable than that granted to like products originating from other WTO Members, and with Articles II:1(a) and (b) of the GATT 1994, because the additional duties are in excess of the bound rates found in the U.S. Schedule.

On October 27, 2020, the United States notified the DSB of its decision to appeal certain issues of law covered in the panel report.

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

1. Africa Growth and Opportunity Act

The U.S. Trade Representative ("USTR") determined that imports of eligible products from Mali qualify for the textile and apparel benefits provided under the African Growth and Opportunity Act ("AGOA") based on Mali's effective procedures for preventing unlawful transshipment and the use of counterfeit documents in connection with the shipment of such articles, and progress in complying with the custom procedures required by AGOA. 85 Fed. Reg. 44140 (July 21, 2020).

In a December 22, 2020 proclamation, President Trump determined that the Democratic Republic of the Congo ("DRC") meets the eligibility requirements set forth in section 104 of the AGOA and the eligibility criteria set forth in section 502 of the Trade Act, and designated the DRC as a beneficiary sub-Saharan African country. 85 Fed. Reg. 85,491 (Dec. 29, 2020). The President also designated the DRC as a ''lesser developed beneficiary sub-Saharan African country'' under section 112(c) of the AGOA. *Id*.

2. United States-Mexico-Canada Agreement ("USMCA")

As discussed in *Digest 2019* at 413-14, *Digest 2018* at 460-61 and *Digest 2017* at 516, the Trump Administration renegotiated the North American Free Trade Agreement ("NAFTA"), replacing it with the United States-Mexico-Canada Agreement ("USMCA").

The U.S. Senate approved the United States-Mexico-Canada Agreement Implementation Act on January 16, 2020. See January 16, 2020 State Department press statement, available at https://2017-2021.state.gov/u-s-senate-passage-of-the-united-states-mexico-canada-agreement/ (noting that Mexico had previously ratified the USMCA, and that the Canadian Parliament was considering the agreement). On January 29, 2020, President Trump signed the United States-Mexico-Canada Agreement Implementation Act into law. Pub. L. No. 116-113, 134 Stat. 11. See State Department press statement, available at https://2017-2021.state.gov/president-trump-initiates-a-new-chapter-in-trade-policy-by-signing-into-law-the-united-states-mexico-canada-agreement/. The USMCA entered into force on July 1, 2020. See State Department press statement, available at https://2017-2021.state.gov/entry-into-force-of-the-united-states-mexico-canada-agreement/. The text of the USMCA is available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

3. U.S.-Kenya Trade Agreement

On March 17, 2020, USTR notified Congress of the Administration's intent to enter into negotiations with the Republic of Kenya ("Kenya") for a U.S.-Kenya trade agreement. 85 Fed. Reg. 16,451 (Mar. 23, 2020). On March 23, 2020, the Office of the U.S. Trade Representative (USTR) solicited comments and announced that the Trade Policy Staff Committee would hold a public hearing on a proposed U.S.-Republic of Kenya trade agreement. 85 Fed. Reg. 16,450 (Mar. 23, 2020). The hearing was canceled due to the COVID-19 pandemic and the period for the submission of written comments was extended.

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

Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862), as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security. The President acted pursuant to Section 232 when he took actions to adjust the imports of aluminum and steel articles in 2018, and automobiles and automobile parts in 2019. Further adjustments were made to the steel and aluminum measures in 2019 and 2020.

As discussed in *Digest 2018* at 462-64, and *Digest 2019* at 414-15, the United States took measures in 2018 to adjust aluminum imports and subsequently modified the measures so they no longer applied to Canada, Mexico, Argentina and Australia. In 2020, however, the United States temporarily re-imposed measures on certain aluminum imports from Canada. Likewise, as discussed in *Digest 2018* at 464-67 and *Digest 2019* at 415-16, the United States took actions to adjust imports of steel, and subsequently modified those measures so they no longer applied to Canada, Mexico, Argentina, Australia, Brazil, and Korea.

On January 24, 2020, the President determined in Proclamation 9980 that it was necessary and appropriate, in light of U.S. national security interests, to impose tariffs on certain derivatives of aluminum articles and steel articles under Section 232. 85 Fed. Reg. 5281 (Jan. 29, 2020). Annex I to Proclamation 9980 specifies the derivatives of aluminum articles subject to tariff measures and Annex II specifies the affected derivatives of steel articles. *Id*. Canada, Mexico, Argentina, and Australia are exempted from the tariffs on derivative aluminum articles. Canada, Mexico, Argentina, Australia, Brazil, and South Korea are exempted from the tariffs on derivative steel articles.

F. INTELLECTUAL PROPERTY AND SECTION 301 OF THE TRADE ACT

1. Special 301 Report and Notorious Markets Report

The "Special 301" Report is an annual congressional report that in effect reviews the global state of intellectual property rights ("IPR") protection and enforcement. USTR provides information about the Special 301 Report on its website at https://ustr.gov/issue-areas/intellectual-property/Special-301.

USTR issued the 2020 Special 301 Report in April 2020. The Report is available at https://ustr.gov/sites/default/files/2020_Special_301_Report.pdf. The 2020 Report lists the following countries on the Priority Watch List: Algeria, Argentina, Chile, China, India, Indonesia, Russia, Saudi Arabia, Ukraine, and Venezuela. It lists the following on the Watch List: Barbados, Bolivia, Brazil, Canada, Colombia, Dominican Republic, Ecuador, Egypt, Guatemala, Kuwait, Lebanon, Mexico, Pakistan, Paraguay, Peru, Romania, Thailand, Trinidad and Tobago, Turkey, Turkmenistan, the United Arab Emirates, Uzbekistan, and Vietnam. See *Digest 2007* at 605–7 and the *2020 Special 301 Report* at 4-11 and Annex 1 for additional background on the watch lists.

USTR also released its "Review of Notorious Markets for Counterfeiting and Piracy," available at https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf. The Review highlights 38 online markets and 34 physical markets that are reported to engage in or facilitate substantial trademark counterfeiting and copyright piracy. See April 29, 2020 USTR press release, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/ustr-releases-annual-special-301-report-intellectual-property-protection-and-review-notorious.

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

As discussed in *Digest 2019* at 421 and *Digest 2018* at 475-77, USTR determined that China's laws, policies, practices, and actions related to technology transfer, IP, and innovation are actionable under section 301 of the Trade Act of 1974, as amended, (the

"Act") (19 U.S.C. 2411) and the United States imposed (and subsequently increased) tariffs on certain goods imported from China. USTR announced that the rate of additional duty on certain products from China was reduced from 15 percent to 7.5 percent effective February 14, 2020. 85 Fed. Reg. 3741 (Jan. 22, 2020). In 2020, USTR continued its product exclusion process under which several exclusions were granted or extended. See, *e.g.*, 85 Fed. Reg. 6674 (Feb. 5, 2020); 85 Fed. Reg. 7816 (Feb. 11, 2020); 85 Fed. Reg. 9921 (Feb. 20, 2020); 85 Fed. Reg. 10,808 (Feb. 25, 2020); 85 Fed. Reg. 15,244 (Mar. 17, 2020); 85 Fed. Reg. 17,936 (Mar. 31, 2020); 85 Fed. Reg. 72,748 (Nov. 13, 2020); 85 Fed. Reg. 73,590 (Nov. 18, 2020); 85 Fed. Reg. 85,831 (Dec. 29, 2020).

3. Investigation of Digital Services Taxes

As discussed in *Digest 2019* at 421, USTR previously investigated the digital services tax ("DST") under consideration by the Government of France. On June 5, 2020, USTR announced an investigation into the DSTs adopted or under consideration by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom. 85 Fed. Reg. 34,709 (June 5, 2020). The Federal Register notice identifies the primary concerns that will be the focus of the investigation:

> Discrimination against U.S. companies; retroactivity; and possibly unreasonable tax policy. With respect to tax policy, the DSTs may diverge from norms reflected in the U.S. tax system and the international tax system in several respects. These departures may include: Extraterritoriality; taxing revenue not income; and a purpose of penalizing particular technology companies for their commercial success.

4. Section 301 investigation to enforce U.S. WTO rights in the Large Civil Aircraft dispute

USTR completed a review of the Section 301 action to enforce U.S. WTO rights in the Large Civil Aircraft dispute and decided to increase the rate of additional duties on certain large civil aircraft, and modify the list of other products of certain current and former EU member States subject to additional 25 percent duties. 85 Fed. Reg. 10,204 (Feb. 21, 2020).

5. World Intellectual Property Organization

On March 4, 2020, the State Department issued a press statement from Secretary Pompeo, available at https://2017-2021.state.gov/election-of-daren-tang-of-singapore-as-director-general-of-the-world-intellectual-property-organization/index.html, congratulating Daren Tang for his election as Director General of the World Intellectual Property Organization ("WIPO"). Secretary Pompeo stated:

> Mr. Tang is an effective advocate for protecting intellectual property, a vocal proponent of transparency and institutional integrity, and a leader who can unify WIPO member states by forging consensus on difficult issues. We look forward to working closely with him during his tenure as Director General to advance WIPO's core mission of safeguarding intellectual property as a means of driving innovation, investment, and economic opportunity.

On March 5, 2020, Secretary Pompeo reiterated U.S. congratulations for Mr. Tang's election in remarks to the press, available at https://2017-2021.state.gov/secretary-pompeos-remarks-to-the-press/index.html.

G. OTHER ISSUES

1. Actions related to U.S. investors and Chinese companies

On June 4, 2020, the President issued a memorandum on "Protecting United States Investors From Significant Risks From Chinese Companies." 85 Fed. Reg. 35,171 (June 9, 2020). Section 1 of the memorandum identifies the risks posed to U.S. investors due to the Chinese government preventing Chinese companies "from abiding by the investor protections that apply to all companies listing on United States stock exchanges." Excerpts follow from the memorandum.

---

* * * *

…[W]e must take firm, orderly action to end the Chinese practice of flouting American transparency requirements without negatively affecting American investors and financial markets. We must ensure that laws providing protections for investors in American financial markets are fully enforced for companies listed on United States stock exchanges.

Sec. 2. *President's Working Group on Financial Markets*. Executive Order 12631 of March 18, 1988 (Working Group on Financial Markets), established the President's Working Group on Financial Markets (PWG), which is chaired by the Secretary of the Treasury, or his designee, and includes the Chairman of the Board of Governors of the Federal Reserve System, the Chairman of the SEC, and the Chairman of the Commodity Futures Trading Commission, or their designees. The Secretary of the Treasury shall convene the PWG to discuss the risks to investors described in section 1 of this memorandum and other risks to American investors and financial markets posed by the Chinese government's failure to uphold its international commitments to transparency and accountability and its refusal to permit companies to comply with United States law.

Sec. 3. *Report*. Within 60 days of the date of this memorandum, the PWG shall submit to the President, through the Assistant to the President for National Security Affairs and the Assistant to the President for Economic Policy, a report that includes:

(a) Recommendations for actions the executive branch may take to protect investors in United States financial markets from the failure of the Chinese government to allow PCAOB-registered audit firms to comply with United States securities laws and investor protections;

(b) Recommendations for actions the SEC or PCAOB should take, including inspection or enforcement actions, with respect to PCAOB-registered audit firms that fail to provide requested audit working papers or otherwise fail to comply with United States securities laws; and

(c) Recommendations for additional actions the SEC or any other Federal agency or department should take as a means to protect investors in Chinese companies, or companies from other countries that do not comply with United States securities laws and investor protections, including initiating a notice of proposed rulemaking that would set new listing rules or governance safeguards. Any such actions should take into account the impact on investors and ensure the continued fair and orderly operation of United States financial markets.

* * * *

Also on June 4, 2020, the State Department issued a press statement by Secretary Pompeo, applauding the requirement that companies listed on the Nasdaq comply with international and reporting standards. The press statement, available at https://2017-2021.state.gov/new-nasdaq-restrictions-affecting-listing-of-chinese-companies/, further states:

> Nasdaq's announcement is particularly important given a pattern of fraudulent accounting practices in China-based companies. To protect American investors and U.S. national security, President Trump moved to stop the investment of U.S. federal employee retirement funds into Chinese companies. The President also instructed the Presidential Working Group on Financial Markets to study the differing practices of Chinese companies listed on the U.S. financial markets.

On June 24, 2020, August 27, 2020, and December 3, 2020, the Department of Defense released its first three lists of companies designated as Communist Chinese military companies pursuant to section 1237 of the Fiscal Year 1999 National Defense Authorization Act, P.L. 105-261 (Oct. 17, 1998), as amended. 50 U.S.C. 1701, notes. The three lists are available at https://media.defense.gov/2020/Aug/28/2002486659/-1/-1/1/LINK_2_1237_TRANCHE_1_QUALIFIYING_ENTITIES.PDF, https://media.defense.gov/2020/Aug/28/2002486689/-1/-1/1/LINK_1_1237_TRANCHE-23_QUALIFYING_ENTITIES.PDF, and https://media.defense.gov/2020/Dec/03/2002545864/-1/-1/1/TRANCHE-4-QUALIFYING-ENTITIES.PDF.

On November 12, 2020, President Trump issued Executive Order 13959, "on Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies," prohibiting certain investments by U.S. persons in publicly traded securities, or any securities that are derivative of, or are designed to provide investment exposure to such securities, of Communist Chinese military companies, including companies designated as such by DOD under section 1237. 85 Fed. Reg. 73,185 (Nov. 17, 2020). The prohibitions take effect on various dates starting January 11, 2021. On December 28, 2020, the Treasury Department issued its first set of "Frequently Asked Questions" ("FAQs"), providing clarifying details on implementation of the E.O. Those

and subsequently issued FAQs are available at https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/5671.*

On December 8, 2020, the State Department released a "Fact Sheet: U.S. Investors Are Funding Malign PRC Companies on Major Indices," available at https://2017-2021.state.gov/u-s-investors-are-funding-malign-prc-companies-on-major-indices/index.html. On December 28, 2020, Secretary of State Pompeo issued a press statement, "Protecting U.S. Investors from Financing Communist Chinese Military Companies," available at https://2017-2021.state.gov/protecting-u-s-investors-from-financing-communist-chinese-military-companies/index.html.

2. Data Privacy

On July 17, 2020, the State Department issued a press statement from Secretary Pompeo expressing disappointment that the European Court of Justice ("ECJ") invalidated the EU-U.S. Privacy Shield framework. The press statement is available at https://2017-2021.state.gov/european-court-of-justice-invalidates-eu-u-s-privacy-shield/index.html.

> The United States shares the values of rule of law and protection of our democracies with our partners in the European Union (EU). Therefore, we are deeply disappointed that the Court of Justice of the European Union ("ECJ") has invalidated the EU-U.S. Privacy Shield framework. The United States is reviewing this outcome and the consequences and implications for more than 5,300 European and U.S. companies, representing millions of transatlantic jobs and over $7.1 trillion in commercial transactions.
>
> The United States and the EU have a shared interest in protecting individual privacy and ensuring the continuity of commercial data transfers. Uninterrupted data flows are essential to economic growth and innovation, for companies of all sizes and in every sector, which is particularly crucial now as both our economies recover from the effects of the COVID-19 pandemic. This decision directly impacts both European companies doing business in the United States as well as American companies, of which over 70 percent are small and medium enterprises. The United States will continue to work closely with the EU to find a mechanism to enable the essential unimpeded commercial transfer of data from the EU to the United States.

* Editor's note: There were several further developments in this area in early 2021, including the issuance of Executive Order 13974 (Jan. 13, 2021), amending E.O. 13959; the issuance by Treasury of several general licenses and additional FAQs by Treasury throughout January 2021; the release of an additional list of designated companies by DoD on January 14, 2021; and the release by the State Department on January 15, 2021 of a "fact sheet" listing many subsidiaries of designated companies.

3. Telecommunications

On August 5, 2020, the State Department issued a press statement announcing the expansion of the "Clean Network" to protect the privacy of U.S. companies and citizens from intrusions by malign actors into U.S. critical telecommunications and technology infrastructure. The press statement is available at https://2017-2021.state.gov/announcing-the-expansion-of-the-clean-network-to-safeguard-americas-assets/ and excerpted below. The Department also issued a fact sheet on the Clean Network on August 11, 2020, which is available at https://2017-2021.state.gov/the-clean-network-safeguards-americas-assets/. Further information on the Clean Network is available at https://2017-2021.state.gov/5g-clean-network/.

---

* * * *

These programs are rooted in internationally accepted digital trust standards and built upon the 5G Clean Path initiative, announced on April 29, 2020, to secure data traveling on 5G networks into U.S. diplomatic facilities overseas and within the United States.

The five new lines of effort for the Clean Network are as follows:

- Clean Carrier: To ensure untrusted People's Republic of China (PRC) carriers are not connected with U.S. telecommunications networks. Such companies pose a danger to U.S. national security and should not provide international telecommunications services to and from the United States.
- Clean Store: To remove untrusted applications from U.S. mobile app stores. PRC apps threaten our privacy, proliferate viruses, and spread propaganda and disinformation. American's most sensitive personal and business information must be protected on their mobile phones from exploitation and theft for the CCP's benefit.
- Clean Apps: To prevent untrusted PRC smartphone manufacturers from pre-installing –or otherwise making available for download – trusted apps on their apps store. Huawei, an arm of the PRC surveillance state, is trading on the innovations and reputations of leading U.S. and foreign companies. These companies should remove their apps from Huawei's app store to ensure they are not partnering with a human rights abuser.
- Clean Cloud: To prevent U.S. citizens' most sensitive personal information and our businesses' most valuable intellectual property, including COVID-19 vaccine research, from being stored and processed on cloud-based systems accessible to our foreign adversaries through companies such as Alibaba, Baidu, and Tencent.
- Clean Cable: To ensure the undersea cables connecting our country to the global internet are not subverted for intelligence gathering by the PRC at hyper scale. We will also work with foreign partners to ensure that undersea cables around the world aren't similarly subject to compromise.

Momentum for the Clean Network program is growing. More than thirty countries and territories are now Clean Countries, and many of the world's biggest telecommunications companies are Clean Telcos. All have committed to exclusively using trusted vendors in their Clean Networks.

The United States calls on our allies and partners in government and industry around the world to join the growing tide to secure our data from the CCP's surveillance state and other malign entities. Building a Clean fortress around our citizens' data will ensure all of our nations' security.

* * * *

In 2020, the United States published numerous bilateral memoranda of understanding ("MOUs") and joint statements on the security of fifth generation wireless communication networks ("5G") including with Albania, the Republic Bulgaria, the Czech Republic, Kosovo, Latvia, Lithuania, the Republic of North Macedonia, the Slovak Republic, Slovenia and Taiwan. For example, on September 17, 2020, the State Department released in a media note the text of the MOU between the United States of America and the Republic of Lithuania on the security of 5G. The media note providing the text of the MOU is excerpted below and available at https://2017-2021.state.gov/united-states-republic-of-lithuania-memorandum-of-understanding-on-5g-security/.

---

* * * *

Taking into account that secure fifth generation wireless communications networks (5G) will be vital to both future prosperity and national security, the Republic of Lithuania and the United States declare their desire to strengthen cooperation on 5G. 5G will enable a vast array of new applications, including the provision of critical services to the public, which will benefit our citizens and our economies. Increased amounts of data on 5G networks will further interconnect the economies of the world, including the Republic of Lithuania and the United States, and facilitate cross-border services and commerce. Protecting these next generation communications networks from disruption or manipulation and ensuring the privacy and individual liberties of the citizens of the Republic of Lithuania and the United States are vital to ensuring that our citizens are able to take advantage of the tremendous economic opportunities 5G will enable.

Therefore, the Republic of Lithuania and the United States welcome efforts such as the Council of the European Union "Conclusions on the significance of 5G to the European economy and the need to mitigate security risks linked to 5G" and the "Prague Proposals" as important steps toward developing a common approach to 5G network security, and ensuring a secure, resilient, and trustworthy 5G ecosystem. These proposals emphasize the need to develop, deploy, and commercialize 5G networks based on the foundation of free and fair competition, transparency, and the rule of law.

The Republic of Lithuania and the United States emphasize the importance of encouraging the participation of reliable and trustworthy network hardware and software suppliers in 5G markets, taking into account risk profile assessments, and promoting frameworks that effectively protect 5G networks from unauthorized access or interference. The Republic of Lithuania and the United States further recognize that 5G suppliers should provide products and services that enable innovation and promote efficiency. These products and services should also

enable fair competition and encourage downstream development by the maximum number of market participants. The Republic of Lithuania and the United States each expressed their belief that all governments have a shared responsibility to undertake a careful, balanced evaluation of 5G hardware and software suppliers and supply chains to promote a secure and resilient 5G architecture.

To promote a vibrant and robust 5G ecosystem, a rigorous evaluation of suppliers should take into account the rule of law; the security environment; ethical supplier practices; and a supplier's compliance with secure standards and industry best practices. Specifically, evaluations should include the following elements:

1) Whether network hardware and software suppliers are subject, without independent judicial review, to control by a foreign government;

2) Whether network hardware and software suppliers are financed openly and transparently using standard best practices in procurement, investment, and contracting;

3) Whether network hardware and software suppliers have transparent ownership, partnerships, and corporate governance structures; and

4) Whether network hardware and software suppliers exemplify a commitment to innovation and respect for intellectual property rights.

The Republic of Lithuania and the United States believe that it is critical for countries to transition from untrusted network hardware and software suppliers in existing networks to trusted ones through regular lifecycle replacements. Such efforts will not only improve national security, but also provide opportunities for private sector innovators to succeed under free and fair competition and benefit our respective digital economies.

The Republic of Lithuania and the United States intend to cooperate in promoting investments and information sharing in the areas of information and communication technologies and cybersecurity to decrease the security risks in developing, deploying and operating 5G networks and future communication technologies. Further the Republic of Lithuania and the United States intend to collaborate on raising awareness of the importance of 5G security among the North Atlantic Treaty Organization (NATO) Allies.

* * * *

The State Department announced in a July 14, 2020 media note that the International Telecommunication Advisory Committee ("ITAC") has been renamed the International Digital Economy and Telecommunication Advisory Committee ("IDET") and its charter has been renewed for two years. The media note is available at https://www.state.gov/renaming-of-the-international-telecommunication-advisory-committee-as-the-international-digital-economy-and-telecommunication-advisory-committee-and-renewal-of-charter/, and excerpted below.

> The IDET will provide views and advice to the Department of State on international policy issues related to the digital economy, digital connectivity, economic aspects of emerging digital technologies, telecommunications, and communication and information policy matters. The IDET includes members of the telecommunications industry; organizations, institutions, or entities with specific interests in digital economy, digital connectivity, economic aspects of emerging digital technologies, and communications and information policy

matters; academia; civil society; and officials of interested government agencies. The IDET intends to meet at least three times per year.

4. Corporate Responsibility Regimes

a. Energy Resource Governance Initiative

On October 21, 2020, representatives of the governments of the United States, Peru, and Botswana signed the Energy Resource Governance Initiative ("ERGI") memorandum of understanding ("MOU"). Australia and Canada previously signed the ERGI MOU with the United States. The media note on the signing of the MOU with Peru and Botswana, available at https://2017-2021.state.gov/united-states-signs-memorandum-of-understanding-with-peru-and-botswana-on-critical-energy-minerals/, explains that the MOU provides a framework for cooperating to meet the increasing global demand for critical energy minerals. The media note also states:

> The Energy Resource Governance Initiative (ERGI) promotes sound mining sector governance and resilient energy mineral supply chains. This initiative brings countries together to advance governance principles, share best practices, and encourage a level playing field for investment.

b. Kimberley Process

The Kimberley Process ("KP") is an international, multi-stakeholder initiative created to increase transparency and oversight in the diamond industry in order to eliminate trade in conflict diamonds, i.e., rough diamonds sold by rebel groups or their allies to fund conflict against legitimate governments. For background on U.S. participation in the KP, see *Digest 2016* at 511-12; *Digest 2014* at 506-07; *Digest 2013* at 183; *Digest 2004* at 653-54; *Digest 2003* at 704-709; and *Digest 2002* at 728-29.

On August 21, 2020, the Kimberley Process approved an administrative decision to postpone Russia's chairmanship until 2021, due to the COVID-19 pandemic, putting Russia in the role of "caretaker" for 2020. The administrative decision is available at https://www.kimberleyprocess.com/en/ad-postponement-russias-chairmanship-2021-and-botswanas-chairmanship-2022.

c. Business and Human Rights

See Chapter 6.

5. Presidential Permits

a. Policy Guidance on Cross-Border Fiber Optic and Other Telecommunications Cables

On September 4, 2020, the White House issued interim no-action guidance relating to Presidential permit requirements for certain cross-border fiber optic and other telecommunication cable under E.O. 13867. The text of the policy guidance, "Presidential permits for cross-border infrastructure: interim White House policy concerning certain terrestrial cross-border fiber optic and other telecommunications cables," follows.

_____

* * * *

In Section 2(b) of Executive Order (E.O.) 13867 (Apr. 10, 2019), the President designated the Secretary of State to receive applications for the issuance or amendment of Presidential permits for the construction, connection, operation, or maintenance of certain infrastructure projects at an international border of the United States. The Department of State (DOS) has recently received inquiries as to whether such permits are required for certain terrestrial telecommunications cable infrastructure crossing the U.S. border.

In 2001, the Under Secretary of State for Economic, Business and Agricultural Affairs issued guidance to the effect that a Presidential permit would not be required with respect to cross-border fiber optic and other telecommunications cables that are wrapped in protective material and laid in a trench or that are "wholly encased" in a tunnel or pipe (that is, a conduit – a tunnel or pipe with sufficient space to contain only the enclosed cables and no other items). Office of the Legal Adviser, U.S. DOS, Digest of United States Practice in International Law, 566-68 (2001), https://2009-2017.state.gov/documents/organization/139600.pdf (pdf pp. 590-92). Inquiries have been received about the status of this guidance in light of E.O. 13867, which revoked and superseded prior executive orders on which the 2001 guidance was based (*see* E.O. 11423 (Aug. 16, 1968), *as amended by* E.O. 12847 (May 17, 1993), and E.O. 13337 (Apr. 30, 2004)).

As further described below, the substance of the 2001 guidance remains in effect, as an interim White House policy, at this time. This interim White House policy does not apply to all terrestrial cross-border fiber optic or other telecommunications cables. Instead, the interim White House policy applies only to a cross-border fiber optic or other telecommunications cable that either (a) is wrapped in protective material and laid in a trench or (b) is wholly encased in a tunnel or pipe that acts as a conduit (that is, a tunnel or pipe with sufficient space to contain the enclosed cables and no other items). For example, the interim White House policy does not apply to tunnels that do not "wholly encase" telecommunications cables, or to tunnels that are proposed to be used for dual purposes.

If a person or entity (party) seeks to place fiber optic or other telecommunications cable infrastructure across the U.S. border that would otherwise comport with the interim White House policy, the party should comply with the following conditions:

1. The party should provide a notice to the Secretary of State specifying

(a) the nature and location of the proposed crossing (including a description of the cable and related infrastructure);
(b) the purpose of the proposed crossing; and
(c) information identifying all direct or indirect owners of a material interest in, and any persons or entities holding or exercising a material degree of control of, the cable and any related infrastructure (including details regarding place of incorporation or organization; ultimate ownership; ownership or control by any non-U.S. person; any special arrangements regarding control; and other relevant information, including transfer instruments as relevant).

If such information changes before or after the connection is made, the owner or operator should promptly provide supplemental notices to the Secretary of State providing such new information.

2. Owners and operators of existing and new terrestrial fiber optic or other telecommunications cable connections at the United States border may be requested at any time to provide additional information to the United States Government concerning their operations and activities.
3. The party connecting, operating, or maintaining a cross-border tunnel or pipe that wholly encases the cable should notify the Secretary of State upon cessation of the operation, connection, or maintenance of the cross-border tunnel or pipe for the transmission of data over the cable.
4. Independent of the Presidential permitting process, approval of the International Boundary and Water Commission (for the U.S.-Mexico boundary) and other appropriate authorities is required for all structures, cables, tunnels and other such facilities that cross the U.S. border.
5. The interim White House policy does not create any enforceable rights and is subject to revocation or other change at any time. For example, in the future, a Presidential permit application may be required not only for new cross-border terrestrial telecommunications cables, but for cross-border terrestrial telecommunications cables that have been laid during this interim period and for previously laid cross-border terrestrial telecommunications cables, notwithstanding the length of time that may have passed since a cable was initially connected.

* * * *

b. Cross-border petroleum pipelines

Pursuant to E.O. 13867, the Secretary of State received applications for, and provided foreign policy recommendations with respect to, several Presidential permits for cross-border petroleum pipelines that were issued in 2020. *See* NuStar Presidential Permit, issued October 5, 2020 (https://trumpwhitehouse.archives.gov/presidential-actions/presidential-permit-100520-3/); Front Range Pipeline Presidential Permit, issued October 5, 2020 (https://trumpwhitehouse.archives.gov/presidential-actions/presidential-permit-100520-2/); Express Pipeline Presidential Permit, issued October 5, 2020 (https://trumpwhitehouse.archives.gov/presidential-

actions/presidential-permit-100520/); Keystone Presidential Permit, issued July 29, 2020 (https://trumpwhitehouse.archives.gov/presidential-actions/presidential-permit-072920-4/); NuStar Presidential Permit, issued July 29, 2020 (https://trumpwhitehouse.archives.gov/presidential-actions/presidential-permit-072920-3/); NuStar Presidential Permit, issued July 29, 2020, https://trumpwhitehouse.archives.gov/presidential-actions/presidential-permit-072920/

6. Committee on Foreign Investment in the United States

In a Presidential Order of March 6, 2020, "Regarding the Acquisition of StayNTouch, Inc. by Beijing Shiji Information Technology Co., Ltd.," the President found there to be credible evidence that the acquisition of StayNTouch, Inc. ("StayNTouch"), a Delaware corporation, by Beijing Shiji Information Technology Co., Ltd., a public company organized under the laws of China, and its wholly owned direct subsidiary Shiji (Hong Kong) Ltd., a Hong Kong limited company, threatens to impair the national security of the United States; and therefore blocked the StayNTouch transaction. 85 Fed. Reg. 13,719 (Mar. 10, 2020). The Order further directs divestment and certain notifications and certifications to the Committee on Foreign Investments in the United States ("CFIUS"). *Id*.

In an August 14, 2020 Presidential Order, "Regarding the Acquisition of Musical.ly by ByteDance Ltd.," the President found there was credible evidence that ByteDance Ltd. ("ByteDance"), an exempted company with limited liability incorporated under the laws of the Cayman Islands, through acquiring all interests in musical.ly, an exempted company with limited liability incorporated under the laws of the Cayman Islands, might take action that threatens to impair the national security of the United States. 85 Fed. Reg. 51,297 (Aug. 19, 2020). As a result of the acquisition, ByteDance merged its TikTok application with musical.ly's social media application to create a single integrated social media application. *Id*. The order prohibits the transaction to the extent that musical.ly or any of its assets is used in furtherance or support of, or relating to, musical.ly's activities in interstate commerce in the United States, and requires ByteDance, on any conditions that CFIUS may impose, to divest all interests and rights in certain assets or property used to enable or support ByteDance's operation of TikTok in the United States, and any data obtained or derived from TikTok or musical.ly application users in the United States. *Id*. ByteDance and TikTok Inc., a U.S. subsidiary, filed a legal action challenging the order; that action is pending in the D.C. Circuit Court of Appeals.**

** Editor's note: As a separate action also involving TikTok, on August 6, 2020, President Trump signed Executive Order 13942, "Addressing the Threat Posed by TikTok ..." 85 Fed. Reg. 48,637 (Aug. 11, 2020). The order prohibits certain transactions, to be identified at a later date by the Secretary of Commerce, between persons subject to the jurisdiction of the United States and ByteDance Ltd. On September 24, 2020, the Secretary of Commerce issued an "Identification of Prohibited Transactions To Implement Executive Order 13942..." 85 Fed. Reg. 60,061.

In 2020, the Department of the Treasury issued several sets of new regulations, principally to further implement provisions of the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"). See *Digest 2018* at 486-87 for background on FIRRMA. These include:

- Regulations issued January 17, 2020, effective February 13, 2020, revising and replacing 31 CFR Part 800 and amending 31 CFR Part 801, regarding investment transactions (following a proposed rule published September 24, 2019). 85 Fed. Reg. 3112 (Jan. 17, 2020).
- Regulations issued January 17, 2020, effective February 13, 2020, creating a new 31 CFR Part 802 for real estate transactions (following a proposed rule published September 24, 2019). 85 Fed. Reg. 3158 (Jan. 17, 2020),
- Regulations issued July 28, 2020, effective August 27, 2020, revising the definition of ''principal place of business'' (as initially adopted in interim rules in the two sets of January 17 regulations, effective February 13, 2020) and establishing a filing fee (as proposed in a notice of proposed rulemaking of March 9, 2020, and initially adopted in an interim rule published April 29, 2020, effective May 1, 2020). 85 Fed. Reg. 45,311 (July 28, 2020).
- Regulations issued September 15, 2020, effective October 15, 2020, modifying the investment regulations including their mandatory declaration provisions (as proposed in a notice of proposed rulemaking of May 21, 2020). 85 Fed. Reg. 57,124 (Sep. 15, 2020).

In response to several legal challenges to the Executive Order and the Identification of Prohibited Transactions, two federal district courts issued a total of three preliminary injunctions against enforcement of the prohibition. *TikTok v. Trump*, 490 F.Supp.3d 73, (D.D.C., 2020); *Marland v. Trump* 498 F.Supp.3d 624, (E.D. Pa. 2020); *TikTok v. Trump*, --- F.Supp.3d ----, (D.D.C., Dec. 7, 2020). The government appealed all three decisions. Also on August 6, 2020, President Trump signed Executive Order 13943, "Addressing the Threat Posed by WeChat..." 85 Fed. Reg. 48,641 (Aug. 11, 2020). The order prohibits transactions related to WeChat, to be identified at a later date by the Secretary of Commerce, between persons subject to the jurisdiction of the United States and Tencent Holdings Ltd. On September 18, 2020, the Secretary issued an "Identification of Prohibited Transactions to Implement Executive Order 13943," identifying the prohibited transactions. On September 19, 2020, a federal district court issued a preliminary injunction against its enforcement. *U.S. WeChat Users Alliance v. Trump*, 488 F.Supp.3d 912 (N.D. Ca. 2020). The government appealed this preliminary injunction.

Cross References

International crime issues relating to cyberspace, **Ch. 3.B.6**
Business and human rights, **Ch. 6.H**
Country of origin markings for goods originating in the West Bank and Gaza, **Ch. 9.B.8.c**
Expropriation exception to Immunity, **Ch. 10.A.3**
Sanctions related to cyber activity, **Ch. 16.A.8 & 16.A.11**
Export controls relating to Huawei, **Ch. 16.B.1.b**
Export controls relating to theft of trade secrets by China, **Ch. 16.B.1.c**
Applicability of international law to conflicts in cyberspace, **Ch. 18.A.4.b**