Contents

CHAPTER 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

1. UN Convention on the Law of the Sea

a. U.S. comments to the International Law Commission regarding sea-level rise

On February 14, 2020, the United States submitted comments to the International Law Commission ("ILC") regarding sea-level rise in relation to the Law of the Sea. The U.S. comments follow.

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The United States welcomes the opportunity to provide written comments regarding U.S. practice relevant to sea-level rise in relation to the law of the sea. The United States extends its appreciation to the co-chairs of the Study Group on Sea-Level Rise in Relation to International Law, Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patricia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria, as well as to the other members of the Commission who have participated or intend to participate in the Study Group.

The Commission has requested examples from States of their practice that may be relevant (even if indirectly) to sea-level rise or other changes in circumstances of a similar nature. The United States offers the following comments and examples of U.S. practice that may be relevant to the Commission's work on this topic.

The rules governing coastal baselines, from which the seaward limits of maritime zones are measured, are set forth in Part II of the Law of the Sea Convention ("Convention"). The United States considers these rules to reflect customary international law.

The normal baseline is the low-water line along the coast, as described in Article 5 of the Convention. The Convention also permits the method of straight baselines, but only where the coastal geography meets certain geographic conditions set forth in Article 7 of the Convention. The United States, as a matter of longstanding practice, uses the normal baseline. This is the practice of the United States even in locations where the coastal geography meets the conditions specified in Article 7.

Certain artificial structures, such as permanent harbor works, can be considered part of the coast for purposes of determining the low-water line from which a coastal State's maritime zones are measured.[1] The U.S. Supreme Court has concluded that structures and installations that are "part of the land", *i.e.* those that "in some sense enclose[] and shelter[] the waters within", constitute part of the coast for purposes of determining U.S. coastal baselines.[2] In contrast, offshore installations, lighthouses that are unconnected to the land, and structures such as open piers that are elevated above the surface of the water (and that do not enclose and shelter the waters within) are not considered part of the coast and, therefore, are not part of the baseline from which U.S. maritime zones are measured.

Under existing international law, coastal baselines are generally ambulatory, meaning that if the low-water line along the coast shifts (either landward or seaward), such shifts may impact the outer limits of the coastal State's maritime zones.

The United States conducts routine surveys of its coasts and evaluates potential resulting changes to its baselines. For shifts other than de minimis ones (*i.e.*, shifts that are greater than 500 meters), an interagency baseline committee reviews and approves any changes to the U.S. baselines. In these instances, any associated changes to the outer limits of maritime zones are also made on official charts. The baseline committee also reviews and approves closing lines, such as those drawn across the mouths of bays and rivers.

The United States generally considers maritime boundaries established by treaty to be final. A maritime boundary established by treaty would not be affected by any subsequent changes to the baseline points that may have contributed to the construction of a maritime boundary, unless the treaty establishing the boundary provides otherwise.

The United States recognizes that sea-level rise may lead to increases in inundation and coastal erosion, which may result in changes to baselines and the corresponding limits of a coastal State's maritime zones. In this regard, the United States supports efforts to protect States' maritime zones in a manner that is consistent with the rights and obligations of other States. Such efforts could include physical measures for coastal reinforcement, such as the construction of seawalls, and coastal ecosystem protection and restoration. The United States also supports States' negotiation and conclusion of maritime boundary agreements, as well as the delineation and publication of the limits of their maritime zones in accordance with international law as reflected in the Convention.

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b. UN General Assembly Resolution on Oceans and the Law of the Sea

On December 8, 2020, Jennifer Barber, special advisor and public delegate for the U.S. Mission to the UN, delivered remarks at a UN General Assembly debate on oceans and the Law of the Sea and on sustainable fisheries. The portion of the statement relating to oceans and the Law of the Sea is excerpted below. The portion relating to sustainable fisheries is excerpted in Chapter 13. The full statement is available at https://usun.usmission.gov/remarks-at-a-un-general-assembly-debate-on-oceans-and-the-law-of-the-sea-and-on-sustainable-fisheries/.

[1] *See* Convention, Article 11.

[2] *U.S. v. Louisiana*, 394 U.S. 11, 36–37 (1969); *see also U.S. v. Louisiana*, 389 U.S. 155, 158 (1967).

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My delegation is pleased to co-sponsor the General Assembly resolution on oceans and the law of the sea.

The United States underscores the central importance of international law as reflected in the Law of the Sea Convention.

Faced with attempts to impede the lawful exercise of navigational rights and freedoms under international law, it is more important than ever that we remain steadfast in our resolve to uphold these rights and freedoms.

While our concern is global, freedom of the seas is especially threatened in the South and East China Seas. The assertion of unlawful and sweeping maritime claims—including through ongoing intimidation and coercion against long-standing oil and gas development and fishing practices by others—threatens the rules-based international order that has enabled the region to prosper. States are entitled to develop and manage the natural resources subject to their sovereign rights without interference.

Our position in the South China Sea—and elsewhere in the world—is simple: the rights and interests of all nations—regardless of size, power, and military capabilities—must be respected.

As Secretary Pompeo noted in his statement on the U.S. Position on Maritime Claims in the South China Sea on July 13, 2020, "[i]n the South China Sea, we seek to preserve peace and stability, uphold freedom of the seas in a manner consistent with international law, maintain the unimpeded flow of commerce, and oppose any attempt to use coercion or force to settle disputes. We share these deep and abiding interests with our many allies and partners who have long endorsed a rules-based international order."

In this regard, we call on all States to resolve their territorial and maritime disputes peacefully and free from coercion, as well as fashion their maritime claims and conduct their activities in the maritime domain in accordance with international law as reflected in the Convention; to respect the freedoms of navigation and overflight and other lawful uses of the sea that all users of the maritime domain enjoy; and to settle disputes peacefully in accordance with international law. We call on all states to ensure effective implementation of international law applicable to combating piracy, and to unite in the deterrence, prevention, and prosecution of transnational criminal organizations and those engaging in transnational crime at sea.

The United States values the platform that the General Assembly provides to elevate important ocean issues. The annual oceans and the law of the sea resolution serves as an opportunity for the global community to identify key ocean issues and develop constructive ways to address them.

Although this year's resolution is a technical rollover from last year's text because of the pandemic, with much of its text remaining the same as last year, delegations nevertheless succeeded in moving forward important processes and in recognizing a significant achievement in the international community's understanding of the state of our ocean – the second World Ocean Assessment.

The United States expresses its sincere appreciation to the Co-Chairs, the Group of Experts, the Pool of Experts, the Bureau, the Secretariat, and all Member States, who demonstrated a shared commitment to completing the second World Ocean Assessment, and we welcome the beginning of the third cycle of the Regular Process. We believe a solid foundation has been built for the third cycle to make further strides in strengthening the scientific assessment of the state of the marine environment in order to enhance the scientific basis for policymaking. The World Ocean Assessment has a critical role to play in informing us all of the pressures our ocean is facing, and we look forward to continuing to work with our colleagues through the Regular Process to maximize its reach and impact.

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2. Maritime Claims

a. China's unlawful maritime claims

On July 1, 2020, U.S. Representative to the UN Kelly Craft conveyed to UN Secretary-General António Guterres a letter regarding Note Verbale No. CML/14/2019 sent by the People's Republic of China in response to Malaysia's submission to the Commission on the Limits of the Continental Shelf ("CLCS") on December 12, 2019. The letter is excerpted below and available at https://usun.usmission.gov/protesting-chinas-unlawful-maritime-claims-at-the-un/.

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… The present communication concerns only the views expressed by China regarding its maritime claims in the South China Sea and does not comment on Malaysia's submission to the CLCS. As China's note asserts excessive maritime claims that are inconsistent with the international law of the sea as reflected in the 1982 Law of the Sea Convention (hereinafter "the Convention"), and as those claims purport to unlawfully interfere with the rights and freedoms enjoyed by the United States and all other States, the United States considers it essential to reiterate its formal protests of these unlawful assertions and describe the relevant international law of the sea as reflected in the Convention.

In its note, China makes the following assertions:

- China has sovereignty over Nanhai Zhudao, consisting of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao;
- China has internal waters, territorial sea and contiguous zone, based on Nanhai Zhudao;
- China has exclusive economic zone and continental shelf, based on Nanhai Zhudao;
- China has historic rights in the South China Sea.

China made similar assertions immediately following the July 12, 2016 award in *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)* issued by an arbitral tribunal constituted under Part XV of the Convention (hereinafter "the

Tribunal"). The United States objected to those assertions in a demarche and note verbale on December 28, 2016 (enclosed).[3]

The United States reiterates its prior objections to China's maritime claims.

Specifically, the United States objects to China's claim to "historic rights" in the South China Sea to the extent that claim exceeds the maritime entitlements that China could assert consistent with international law as reflected in the Convention.[4] The United States notes in this regard that the Tribunal unanimously concluded in its ruling—which is final and binding on China and the Philippines under Article 296 of the Convention—that China's claim to historic rights is incompatible with the Convention to the extent it exceeds the limits of China's possible maritime zones as specifically provided for in the Convention.

Additionally, the United States reiterates its prior objections to any claim of internal waters between the dispersed islands China claims in the South China Sea, and to any claim of maritime zones derived from treating island groups in the South China Sea as a collective. The Convention clearly and comprehensively regulates the circumstances under which coastal States can deviate from the normal baseline. Article 5 of the Convention provides, in express and unambiguous terms, that the normal baseline applies "*[e]xcept where otherwise provided in this Convention*." No provision of the Convention establishes an applicable exception to the normal baseline that would allow China to enclose within a system of straight or archipelagic baselines the dispersed islands and other features over which China asserts sovereignty in the South China Sea. Moreover, the United States objects to any claimed maritime entitlements based on features that are not islands within the meaning of Article 121(1) of the Convention[5] and thus do not generate maritime zones of their own under international law. China may not assert sovereignty over, or claim maritime zones derived from, entirely submerged features like Macclesfield Bank or James Shoal, or features like Mischief Reef and Second Thomas Shoal, which in their natural state are low-tide elevations[6] that lie beyond a lawfully generated territorial sea entitlement. Such features do not form part of the land territory of a State in a legal sense, meaning that they are not subject to appropriation and cannot generate a territorial sea or other maritime zones under international law.[7] These positions are consistent with the decision of the Tribunal in *The South China Sea Arbitration*.

In asserting such vast maritime claims in the South China Sea, China purports to restrict the rights and freedoms, including the navigational rights and freedoms, enjoyed by all States. The United States objects to these claims to the extent they exceed the entitlements China could

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[3] The note was subsequently published in the *Digest of United States Practice in International Law (2016)*, at 520-22… .

[4] A detailed assessment of China's South China Sea maritime claims was published in 2014 in the U.S. Department of State publication *Limits in the Seas No. 143—China: Maritime Claims in the South China Sea*, available at https://www.state.gov/wp-content/uploads/2019/10/LIS-143.pdf. That publication continues to reflect the views of the United States regarding the unlawfulness of China's claim of "historic rights" in the South China Sea.

[5] An island is defined in Article 121(1) of the Convention as "a naturally formed area of land, surrounded by water, which is above water at high tide."

[6] As reflected in Convention Article 13(1), "[a] low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide."

[7] Thus, with respect to the assertion that "China has sovereignty over Nanhai Zhudao, consisting of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao" the United States observes that while China and other South China Sea claimants assert competing territorial claims to islands situated within the South China Sea, no State could lawfully assert a territorial or sovereignty claim to features that are not islands (within the meaning of Article 121(1) of the Convention) or to maritime areas beyond the territorial sea generated from the normal baseline (or other applicable baseline as reflected in the rules of the Convention) of such individual islands.

claim under international law as reflected in the Convention. The United States notes that the governments of the Philippines,[8] Vietnam,[9] and Indonesia[10] have separately conveyed their legal objections to the maritime claims set out in China's Note Verbale No. CML/14/2019. The United States again urges China to conform its maritime claims to international law as reflected in the Convention; to comply with the Tribunal's July 12, 2016 decision; and to cease its provocative activities in the South China Sea.

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On July 13, 2020, the State Department issued a press statement by Secretary Pompeo repeating the U.S. position on maritime claims in the South China Sea. That statement is available at https://2017-2021.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/ and excerpted below.

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The United States champions a free and open Indo-Pacific. Today we are strengthening U.S. policy in a vital, contentious part of that region — the South China Sea. We are making clear: Beijing's claims to offshore resources across most of the South China Sea are completely unlawful, as is its campaign of bullying to control them.

In the South China Sea, we seek to preserve peace and stability, uphold freedom of the seas in a manner consistent with international law, maintain the unimpeded flow of commerce, and oppose any attempt to use coercion or force to settle disputes. We share these deep and abiding interests with our many allies and partners who have long endorsed a rules-based international order.

These shared interests have come under unprecedented threat from the People's Republic of China (PRC). Beijing uses intimidation to undermine the sovereign rights of Southeast Asian coastal states in the South China Sea, bully them out of offshore resources, assert unilateral dominion, and replace international law with "might makes right." Beijing's approach has been clear for years. In 2010, then-PRC Foreign Minister Yang Jiechi told his ASEAN counterparts that "China is a big country and other countries are small countries and that is just a fact." The PRC's predatory world view has no place in the 21st century.

The PRC has no legal grounds to unilaterally impose its will on the region. Beijing has offered no coherent legal basis for its "Nine-Dashed Line" claim in the South China Sea since formally announcing it in 2009. In a unanimous decision on July 12, 2016, an Arbitral Tribunal

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[8] The Philippines Note No. 000191-2020 (March 6, 2020), available at https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_03_06_PHL_NV_UN_001.pdf.
[9] Vietnam Note No. 22/HC-2020 (March 30, 2020), available at https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf.
[10] Indonesia Note No. 126/POL-703/V/20 (May 26, 2020), available at https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_05_26_IDN_NV_UN_001_English.pdf.

constituted under the 1982 Law of the Sea Convention – to which the PRC is a state party – rejected the PRC's maritime claims as having no basis in international law. The Tribunal sided squarely with the Philippines, which brought the arbitration case, on almost all claims.

As the United States has previously stated, and as specifically provided in the Convention, the Arbitral Tribunal's decision is final and legally binding on both parties. Today we are aligning the U.S. position on the PRC's maritime claims in the SCS with the Tribunal's decision. Specifically:

- The PRC cannot lawfully assert a maritime claim – including any Exclusive Economic Zone (EEZ) claims derived from Scarborough Reef and the Spratly Islands – vis-a-vis the Philippines in areas that the Tribunal found to be in the Philippines' EEZ or on its continental shelf. Beijing's harassment of Philippine fisheries and offshore energy development within those areas is unlawful, as are any unilateral PRC actions to exploit those resources. In line with the Tribunal's legally binding decision, the PRC has no lawful territorial or maritime claim to Mischief Reef or Second Thomas Shoal, both of which fall fully under the Philippines' sovereign rights and jurisdiction, nor does Beijing have any territorial or maritime claims generated from these features.
- As Beijing has failed to put forth a lawful, coherent maritime claim in the South China Sea, the United States rejects any PRC claim to waters beyond a 12-nautical mile territorial sea derived from islands it claims in the Spratly Islands (without prejudice to other states' sovereignty claims over such islands). As such, the United States rejects any PRC maritime claim in the waters surrounding Vanguard Bank (off Vietnam), Luconia Shoals (off Malaysia), waters in Brunei's EEZ, and Natuna Besar (off Indonesia). Any PRC action to harass other states' fishing or hydrocarbon development in these waters – or to carry out such activities unilaterally – is unlawful.
- The PRC has no lawful territorial or maritime claim to (or derived from) James Shoal, an entirely submerged feature only 50 nautical miles from Malaysia and some 1,000 nautical miles from China's coast. James Shoal is often cited in PRC propaganda as the "southernmost territory of China." International law is clear: An underwater feature like James Shoal cannot be claimed by any state and is incapable of generating maritime zones. James Shoal (roughly 20 meters below the surface) is not and never was PRC territory, nor can Beijing assert any lawful maritime rights from it.

The world will not allow Beijing to treat the South China Sea as its maritime empire. America stands with our Southeast Asian allies and partners in protecting their sovereign rights to offshore resources, consistent with their rights and obligations under international law. We stand with the international community in defense of freedom of the seas and respect for sovereignty and reject any push to impose "might makes right" in the South China Sea or the wider region.

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b. Croatia

On February 4, 2020, Croatia delivered Note Verbale No. 591/KM/2020 to the United States about the January 30th passage of the USS Carson City in Croatian territorial waters without what Croatia claimed to be legally required prior notification. The U.S. reply to Croatian officials follows.

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The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs and has the honor to refer to Note Verbale No. 591/KM/2020 regarding the navigation of U.S. warships through Croatia's territorial sea without prior notification to the Republic of Croatia. Under international law as reflected in the 1982 Law of the Sea Convention ("Convention"), all ships, including warships, enjoy the right of innocent passage through the territorial sea. International law does not permit a coastal State to condition the exercise of the right of innocent passage by any ships, including warships, on the provision of prior notification to the coastal State.

In reference to the requirement for prior notification contained in the Maritime Code of the Republic of Croatia for foreign warships exercising the right of innocent passage, the United States considers this requirement to be inconsistent with international law as reflected in the Convention. The United States will continue to exercise the right of innocent passage in accordance with its rights and obligations under international law.

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c. Limits in the Seas Studies

In 2020, the U.S. Department of State published five studies examining the maritime claims and boundaries of coastal States as part of its *Limits in the Seas* series. These studies are issued by the Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs in the Department of State to provide the views of the United States Government regarding the consistency of such claims with international law. The five studies assess the maritime claims and boundaries of the following coastal States: Marshall Islands, Kiribati, Ecuador, Norway, and Spain. The reports are available at https://www.state.gov/limits-in-the-seas/.

3. Maritime Boundaries

On October 1, 2020, the State Department issued a press statement, welcoming the decision by the Governments of Israel and Lebanon to begin discussions on their maritime boundary with the United States as a mediator and facilitator. The press statement, available at https://2017-2021.state.gov/framework-agreement-for-israel-lebanon-maritime-discussions//index.html, notes that the United States brokered the agreement on a framework for discussions after three years of diplomatic engagement. The press statement describes the framework agreement and the ongoing involvement of the United States in the talks:

> The agreement between the two parties on a common framework for maritime discussions will allow both countries to begin discussions, which have the potential to yield greater stability, security, and prosperity for Lebanese and

> Israeli citizens alike. Today's announcement is a vital step forward that serves the interests of Lebanon and Israel, of the region, and of the United States. Both countries requested that the United States participate as mediator and facilitator in the maritime discussions. The United States looks forward to commencement of the maritime boundary discussions soon, to be held in Naqoura, Lebanon under the U.N. flag and hosted by the staff from the Office of the U.N. Special Coordinator for Lebanon (UNSCOL).

Also on October 1, 2020, Assistant Secretary for Near Eastern Affairs David Schenker held a special briefing on the framework agreement for Israel-Lebanon maritime discussions. The transcript of the briefing is available at https://2017-2021-translations.state.gov/2020/10/01/briefing-with-assistant-secretary-for-near-eastern-affairs-david-schenker-on-the-framework-agreement-for-israel-lebanon-maritime-discussions//index.html.

On October 14, 2020, representatives from the governments of Israel, Lebanon, and the United States began discussions on the Israel-Lebanon maritime boundary. A U.S. delegation mediated and facilitated the talks, and UN Special Coordinator for Lebanon ("UNSCOL") Jan Kubis hosted. See joint statement by the United States and UNSCOL, available at https://2017-2021.state.gov/joint-statement-on-the-launch-of-the-israel-lebanon-maritime-talks//index.html.

Negotiations continued October 28 and 29, 2020. See October 29, 2020 joint statement by the United States and UNSCOL, available at https://2017-2021.state.gov/joint-statement-on-the-israel-lebanon-maritime-talks//index.html. On November 11, 2020, further negotiations were held. See November 11, 2020 joint statement, available at https://2017-2021.state.gov/joint-statement-on-the-israel-lebanon-maritime-talks-2//index.html.

As of the end of 2020, the parties remained far apart. See December 22, 2020 State Department press statement, available at https://2017-2021.state.gov/israel-lebanon-maritime-negotiations//index.html. The December 22, 2020 press statement also offers that, "The United States remains ready to mediate constructive discussions and urges both sides to negotiate based on the respective maritime claims both have previously deposited at the United Nations."

4. Marine Scientific Research

On September 9, 2020, President Donald J. Trump signed Proclamation 10071, "Revision to United States Marine Scientific Research Policy," which revised U.S. policy on marine scientific research ("MSR"). 85 Fed. Reg. 59,165 (Sep. 18, 2020). The revised policy provides, in Section 1 of the Proclamation that,

> The United States will exercise its right to regulate, authorize, and conduct marine scientific research, with a specific requirement to authorize, in advance, all instances of foreign marine scientific research, in the United States [exclusive

> economic zone, or "EEZ"] and on its continental shelf to the extent permitted under international law.
>
> With respect to the applicable international law, the Proclamation refers to the 1982 UN Convention on the Law of the Sea, which "generally reflects customary international law." Part XIII of the Convention governs matters related to MSR. The text of the Proclamation is excerpted below.
>
> The revised policy covers areas of U.S. continental shelf, including continental shelf areas beyond 200 nautical miles from the territorial sea baselines. Because the outer limits of the U.S. continental shelf beyond 200 nautical miles have not yet been published, the Department has provided guidance to applicants with respect to any MSR conducted on the U.S. continental shelf beyond 200 nautical miles from the territorial sea baselines in the Arctic Ocean, Atlantic Ocean, Bering Sea, and Gulf of Mexico. The guidance is available at https://www.state.gov/research-application-tracking-system/. On September 16, 2020, the State Department issued a media note regarding the revised U.S. marine scientific research policy, available at https://2017-2021.state.gov/on-presidential-revisions-to-the-u-s-marine-scientific-research-policy-by-the-president-of-the-united-states/ (not excerpted herein).

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The United Nations Convention on the Law of the Sea of 10 December 1982 (Convention) generally reflects customary international law. Section 3 of Part XIII of the Convention provides that coastal states, in the exercise of their jurisdiction, have the right to regulate, authorize, and conduct marine scientific research in their Exclusive Economic Zone (EEZ) and on their continental shelf. Marine scientific research in the EEZ or on the continental shelf shall be conducted with the consent of the coastal state.

In Proclamation 5030 of March 10, 1983 (Exclusive Economic Zone of the United States of America), the President announced the establishment of the EEZ of the United States. The Proclamation asserts the sovereign rights and jurisdiction of the United States in its EEZ and confirms the rights and freedoms of all states, as provided under international law. In an accompanying Presidential Statement of March 10, 1983 (United States Oceans Policy), the President acknowledged that international law allows coastal states to exercise jurisdiction over marine scientific research in their respective EEZs, but stated that the United States had elected not to do so to the fullest extent permitted under international law, in an effort to encourage such research. Presidential Decision Directive–36 of April 5, 1995 (United States Policy on Protecting the Ocean Environment), emphasizes that the policy of the United States is to protect and monitor the ocean and coastal environment and conserve living marine resources, recognizing that doing so, in an open and collaborative manner, supports our economic and national security interests.

In Executive Order 13840 of June 19, 2018 (Ocean Policy to Advance the Economic, Security, and Environmental Interests of the United States), I reaffirmed that the United States will continue to promote lawful use of the ocean by agencies, including the Armed Forces, and

that the United States will continue to exercise its rights and jurisdiction and perform duties in accordance with applicable international law, including customary international law. Further, the United States will use the best available ocean-related science and knowledge, in partnership with the science and technology communities, to inform decisions and enhance entrepreneurial opportunities. In the Presidential Memorandum of November 19, 2019 (Ocean Mapping of the United States Exclusive Economic Zone and the Shoreline and Nearshore of Alaska), I affirmed the importance of understanding our ocean systems and natural resources to our security, economic, and environmental interests.

Likewise, the exercise of jurisdiction by the United States over marine scientific research in its EEZ and on its continental shelf will result in greater access to data collected during such research and will increase maritime domain awareness, thereby reducing potential exposure to security, economic, and environmental risks.

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Sec. 2. Implementation. The Secretary of State (Secretary) shall have lead responsibility for implementing this proclamation, in consultation with relevant executive departments and agencies (agencies) and with the Ocean Policy Committee established in Executive Order 13840 (Ocean Policy Committee).

Sec. 3. Intelligence. The Intelligence Community of the Federal Government shall support the implementation of this proclamation, as appropriate.

Sec. 4. Information Sharing. To facilitate the process for reviewing applications for marine scientific research, agencies not part of the Intelligence Community shall share information related to marine scientific research with the Department of State, to the maximum extent authorized by law.

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5. Maritime Drug Law Enforcement

On March 18, 2020, the United States filed a brief in the U.S Court of Appeals for the First Circuit in *United States v. Aybar-Ulloa*, No. 15-2377, a case involving international law issues related to the U.S. exercise of jurisdiction over persons on stateless vessels found to be engaged in drug trafficking. Excerpts follow from the U.S. brief. The First Circuit heard oral argument on the case on June 23, 2020.[*]

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For 40 years, the Maritime Drug Law Enforcement Act (MDLEA) and its predecessor have played a vital role in law-enforcement efforts to curtail maritime drug trafficking, an activity that Congress has found to present "a serious international problem" and "a specific threat to the security and societal well-being of the United States." 46 U.S.C. § 70501(1). Congress was

[*] Editor's note: The First Circuit Court of Appeals issued its en banc decision on January 25, 2021, affirming the conviction of Aybar-Ulloa.

particularly focused on the need to prosecute those who traffic drugs aboard stateless vessels in cases where evidence of a U.S. destination or other U.S. nexus may be lacking. *See United States v. Howard-Arias*, 679 F.2d 363, 369-72 (4th Cir. 1982). For the last four decades, the federal courts of appeals have uniformly upheld Congress's authority to reach that core class of misconduct, both under Article I of the Constitution and under principles of international law governing stateless vessels. *See* U.S. Supp. Br. 1.

Aybar offers no sound reason for this Court to deviate from that consensus. His argument that the Felonies Clause is limited to crimes that have a case-specific nexus to the United States or have attained universal jurisdiction under international law finds no support in the Clause's text and is in tension with its drafting history and actions of the First Congress. International law does not limit Congress's Felonies Clause power, but even assuming it did, application of the MDLEA in this case conforms to the settled principle that all nations have the authority to apply their criminal laws to a stateless vessel and its crew operating beyond the territorial waters of any nation. Application of the MDLEA in this case is also consistent with the protective principle, especially in light of Congress's findings. Aybar provides no basis to conclude otherwise, and he likewise cannot justify jettisoning the soundly reasoned precedents that have governed these issues for decades. As did the panel, *United States v. Aybar-Ulloa*, 913 F.3d 47 (1st Cir. 2019), the *en banc* Court should reaffirm that the MDLEA is a constitutional exercise of Congress's Article I powers as applied to Aybar and should affirm his convictions.

ARGUMENT

I. Although The Felonies Clause Does Not Incorporate International-Law Limits, The MDLEA Would Satisfy Any Such Limit When Applied To Drug Trafficking Aboard A Stateless Vessel On The High Seas.

As explained in the government's supplemental brief (at 18-20), the Felonies Clause in Article I, § 8, cl. 10 does not incorporate international-law limits on prescriptive jurisdiction. Aybar's contrary position engrafts onto the Felonies Clause words not found in the constitutional text and lacks support in the Clause's drafting history. But to the extent this Court holds or assumes that principles of prescriptive jurisdiction under international law are relevant in construing the Felonies Clause, those principles are satisfied in cases involving drug trafficking aboard stateless vessels operating beyond the territorial sea of any state.

A. Congress's Authority Under The Felonies Clause Is Not Limited By International Law

Article I, § 8, cl. 10 of the Constitution empowers Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." Aybar urges (Supp. Br. 5-6, 8-9) this Court to read international law limits into this provision by restricting Congress's powers under the Felonies Clause to offenses that have "attained universal jurisdiction" or involve conduct that "bears a nexus to the United States." His arguments do not withstand scrutiny.

Aybar's argument—which tracks the panel dissent and a previous dissent by Judge Torruella, *see United States v. Cardales-Luna*, 632 F.3d 731, 740-45 (1st Cir. 2011)—relies on two law review articles by the same law professor. *See* E. Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 Minn. L. Rev. 1191 (2009); E. Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. Rev. 149 (2009).

As Professor Kontorovich himself acknowledges, however, his interpretation encounters a serious threshold problem: it finds little support in the constitutional text. *See Define and Punish Clause*, *supra*, at 152 ("the text itself * * * contains no explicit jurisdictional limits"); *Article I Horizon*, *supra*, at 1195 (interpretation is "only suggested by the text"); *id.* at 1208 (accepting that "the evidence for this proposition as an original matter is not entirely compelling"). This Court has previously recognized that the nexus requirement Aybar proposes lacks a basis in the constitutional text, explaining that "the [Felonies] Clause does not explicitly require a nexus between the unlawful conduct committed on the high seas and the United States be established before Congress can punish that conduct." *United States v. Nueci-Peña*, 711 F.3d 191, 198 (1st Cir. 2013); *see United States v. Saac*, 632 F.3d 1203, 1209-10 (11th Cir. 2011) (same); *cf. Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (explaining that the Commerce Power, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution").

Aybar's proposed universality limitation fares no better. Textually, the provision at issue references international law ("Law of Nations") in the Offences Clause but not in the Felonies Clause. Moreover, the Framers deliberately empowered *Congress* to "define" felonies on the high seas. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158-59 (1820). The term "felony" had no settled international definition at the Founding, and Framers such as James Madison resisted enshrining in the Constitution even the British understanding of the term, which would have been most familiar to that generation. *See* U.S. Supp. Br. 17-19; *see also, e.g.*, S. Cleveland & W. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 Yale L.J. 2202, 2226 (2015) (Madison "did not think that felonies should be defined by English law"). And, while Professor Kontorovich makes much of the Felonies Clause's placement alongside the universally punishable crime of piracy, *see Define and Punish Clause*, *supra*, at 167-68, he does not provide a sound explanation for why Founders who declined to adopt the relatively familiar British definition of felony would have instead tied Congress's powers to the more amorphous body of international law—much less to a jurisdictional basis (universality) that remained unsettled well into the 20th century. *See* Restatement (Second) of the Foreign Relations Law of the United States § 34 reporters' n.2 (1965).

Aybar's (and Kontorovich's) proposed universality limitation has two additional problems. First, it is hard to square with legislation enacted by the First Congress, a source the Supreme Court has afforded significant weight in construing the Constitution. *See Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986) (decisions by the First Congress "provide[] contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument") (internal quotation marks omitted). Pertinent here, the Crimes Act of 1790 included a provision punishing "any seaman or other person [who] commit[s] manslaughter upon the high seas." Ch. 9, § 12, 1 Stat. 112, 115; *see United States v. Campbell*, 743 F.3d 802, 811 (11th Cir. 2014); *United States v. Suerte*, 291 F.3d 366, 372 (5th Cir. 2002). Congress would have enacted this prohibition under the Felonies Clause, since manslaughter was neither piracy, *see Smith*, 18 U.S. (5 Wheat.) at 160, nor an offense against the law of nations, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004). And because manslaughter was not (and is not) a universal-jurisdiction crime, *see* Restatement (Fourth) § 413, Congress could have used its Felonies Clause power in this way only if, contrary to Aybar's contention, that Clause does *not* contain an implicit universal-jurisdiction limit.

Second, the proposed universality limitation would lead to stark—and potentially anomalous—consequences. It would at a minimum mean that Congress cannot criminalize under the Felonies Clause drug trafficking aboard a vessel lacking a nexus to the United States even when the vessel's flag state consents to the United States' exercise of authority. *But see United States v. Robinson*, 843 F.2d 1, 4 (1st Cir. 1988) (Breyer, J.) (deeming consent sufficient under international law); *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) (same); Restatement (Fourth) § 406 reporters' n.2 (same).

The remaining consequences of Aybar's rule would depend on whether his limitation reflects universal jurisdiction as understood at the Founding or instead extends to "all offenses that the contemporary international law treats as universally cognizable." *Article I Horizon*, *supra*, at 1218. As Professor Kontorovich acknowledges, if Congress is limited to the Founding-era understanding, then "piracy is the one and only offense which Congress can ever punish without a U.S. nexus," *id.* at 1217-18; on that view, the Felonies Clause would add no additional authority. But even if universality expanded "to keep up with external changes in international law," *id.* at 1218, Aybar's position would still mean that Congress is disabled from acting under the Felonies Clause unless and until an international consensus develops that particular misconduct satisfies the criteria for universal jurisdiction—something that can take decades, if not centuries, to materialize. *Compare id.* at 1215-17 (explaining Congress's efforts to ban the slave trade in the early 1800s), *with* Restatement (Second) § 34 reporters' n.2 (as of 1965, the "universal interest in the suppression of slavery * * * ha[d] not as yet been carried to the point of recognizing * * * the principle of universal jurisdiction").

The series of Supreme Court decisions cited by Aybar (and the panel dissent, 913 F.3d at 59-60) also do not support his proposed rule. Decisions such as *United States v. Palmer*, 16 U.S. (3 Wheat) 610 (1818), and *United States v. Furlong*, 18 U.S. (5 Wheat) 184 (1820), centered on questions of statutory construction under early federal laws criminalizing piracy and murder. *See Nueci-Peña*, 711 F.3d at 198 n.7 (discussing *Furlong*); *Saac*, 632 F.3d at 1209-10 (same); *Campbell*, 743 F.3d at 811-12 (*Palmer*). They did not address Congress's constitutional authority generally or its Felonies Clause power specifically. *See Smith*, 18 U.S. (5 Wheat.) at 158 (noting that, "notwithstanding a series of contested adjudications" under the early piracy law, "no doubt has hitherto been breathed of its conformity to the constitution"). Indeed, to the extent those decisions are relevant here, it is because they reflect the application of federal laws to acts aboard ships equivalent to today's stateless vessels, even where those same laws did not extend to analogous acts aboard a foreign-flagged ship. *See* U.S. Supp. Br. 37-38.

B. Longstanding Principles Recognizing Jurisdiction Over Stateless Vessels Satisfy Any International-Law Limits Applicable To The Felonies Clause

Even if Congress's powers under the Felonies Clause are limited by principles of prescriptive jurisdiction under international law, Aybar fails to establish that universal jurisdiction is the only category relevant to sustaining the MDLEA's application to his criminal conduct—*viz.*, drug trafficking on a stateless vessel. As the government has explained (U.S. Supp. Br. 21-28), the statute's application here is fully consistent with the longstanding recognition in international law that any nation may apply its laws to a stateless vessel operating beyond the territorial sea of any state. *See also id.* at 28-35; Part II, *infra* (addressing the protective principle). Aybar's efforts to avoid that settled principle are unavailing.

1. Aybar contends (Supp. Br. 40-41) that a nation cannot assert authority over a vessel based on its stateless status because the operation of a stateless vessel, without more, is not a universal jurisdiction crime. That contention rests on the mistaken premise that a state's authority

over a vessel and its crew must fall within one of the five "traditional bases of prescriptive jurisdiction" under international law, *United States v. Matos-Luchi*, 627 F.3d 1, 11 n.10 (1st Cir. 2010) (Lipez, J., dissenting)—and, in particular, the universality principle. As the government has shown, international law treats state authority over vessels as a "*sui generis*" category that "do[es] not map neatly onto the general bases of prescriptive jurisdiction." Restatement (Fourth) § 408 cmt. b; *id.* § 407 cmt. c; *accord* Restatement (Third) of the Foreign Relations Law of the United States § 402 reporters' n.4 (1987). And the relevant rule within that *sui generis* category is "that international law permits any nation to subject stateless vessels on the high seas to its jurisdiction." *United States v. Marino-Garcia*, 679 F.2d 1373, 1383 (11th Cir. 1982); *see United States v. Victoria*, 876 F.2d 1009, 1010-11 (1st Cir. 1989) (Breyer, J.) (same, and collecting cases).

In resisting that rule, Aybar faults (Supp. Br. 39-40) the pathmarking decision in *Marino-Garcia* for equating "the lack of a restriction" on a nation's authority to regulate stateless vessels with an affirmative "grant of authority." That line of argument inverts the foundational *Lotus* principle of international law, under which state actions not barred by a specific international rule are generally permitted. *See* U.S. Supp. Br. 47. Regardless, the Eleventh Circuit in *Marino-Garcia* identified a specific domestic law grant of authority, *see* 679 F.2d at 1382 n.16 (citing U.S. Const. art. I, § 8, cl. 10), and relied on treatises that themselves speak of state authority in affirmative terms. *See* H. Meyers, *The Nationality of Ships* 320 (1967) ("[A]ny state may prescribe [law] for the ship-users [of a stateless vessel], and the state first to take action on board may take enforcement measures."); M. McDougal & W. Burke, *The Public Order of the Oceans*: *A Contemporary International Law of the Sea* 1084 (1962) ("So great a premium is placed upon the certain identification of vessels for purposes of maintaining minimum order upon the high seas * * * that extraordinary deprivational measures are permitted with respect to stateless ships.").

Those sources, moreover, accord with developments indicating that an international legal consensus with respect to stateless vessels had further crystallized by the time Congress enacted the MDLEA in 1986. *See* U.S. Supp. Br. 24 n.10. Specifically, while Article 22(1) of the 1958 High Seas Convention had recognized a nation's authority to board a foreign ship on the high seas in only three situations, the 1982 U.N. Convention on the Law of the Sea (UNCLOS) added "[r]ight of visit" authority to board a vessel when the approaching ship has "reasonable ground for suspecting that * * * the ship is without nationality." UNCLOS, Art. 110(1). The strong "implication" of that provision, as another treatise recognizes, is that "any State may assert legislative and enforcement jurisdiction over the [stateless] vessel and its crew." 1 T. Schoenbaum, *Admiralty & Maritime Law* § 2:19 (6th ed. 2018).

Echoing the panel dissent, Aybar also asserts (Supp. Br. 41) that applying the MDLEA to those aboard a stateless vessel "would convert the operation of [such a] vessel into a universal jurisdiction crime." *Aybar-Ulloa*, 913 F.3d at 63 (Torruella, J., dissenting). That is incorrect. The MDLEA proscribes not the operation or "piloting" of a ship, *see id.*, but *drug trafficking* aboard certain vessels, including ones that qualify as stateless ("without nationality"). 46 U.S.C. §§ 70502(b) & (c), 70503(a)(1). The vessel's stateless status is simply what renders it "subject to action by all nations proscribing certain activities aboard stateless vessels and subjects those persons aboard to prosecution for violating th[ose independent] proscriptions." *Marino-Garcia*, 679 F.2d at 1383.

2. Aybar separately contends (Supp. Br. 31-32, 39-43) that, even if international law recognizes a nation's authority over stateless vessels, the MDLEA exceeds the bounds of that

rule because its definition of a "vessel without nationality," 46 U.S.C. § 70502(d)(1), is broader than statelessness under international law. As the government has explained, this Court should not reach that contention, which Aybar did not develop until the *en banc* stage. U.S. Supp. Br. 24-25. In any event, the argument lacks merit. *See id.* at 25-28.

According to Aybar (Supp. Br. 41-42), the MDLEA provision relevant here (46 U.S.C. § 70502(d)(1)(B)) contravenes international law by placing the burden on the vessel's occupants to establish its nationality, thereby permitting the United States to treat as stateless a vessel that actually has a nationality but is unable to demonstrate it. The scenario that Aybar describes is a far cry from the facts of his as-applied constitutional challenge. AA70; SA169. And he identifies no case in which a vessel's master refused to make a claim of nationality "on request of [the U.S.] officer," 46 U.S.C. § 70502(d)(1)(B), but the MDLEA defendant later asserted—and a foreign country validated—a claim of vessel nationality for the first time in advance of trial.

Regardless, the applicable MDLEA provision conforms to international law. As this Court explained in *Matos-Luchi*, it is not enough under international law "that a vessel have a nationality; she must claim it and be in a position to provide evidence of it." 627 F.3d at 6 (quoting Anderson, *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, 13 J. Mar. L. & Com. 323, 341 (1982)); *accord* John Colombos, *The International Law of the Sea* 289 (6th ed. 1967) ("[E]very ship which sails the high seas must possess a national character *and be in a position to provide evidence of it*.") (emphasis added); N.P. Ready, *Ship Registration* 1 (3d ed. 1998) (describing a 1995 British law as precluding port clearance "for any ship until the master has declared to an officer of customs the name of the nation to which he claims [the ship] belongs"). Were it otherwise, then a vessel's occupants could avoid the authority of a country conducting a legitimate right-of-visit approach—and undermine the vessel identification regime critical to maintaining order at sea, *see* McDougal & Burke, *supra*, at 1084—simply by staying silent. U.S. Supp. Br. 27.

Neither international law as reflected in Conventions pertaining to the law of the sea nor the cases cited by Aybar (Supp. Br. 41-43) support his contrary position. He relies in particular on provisions in UNCLOS (Arts. 91, 94) and the 1958 High Seas Convention (Arts. 5, 10) that "enacted requirements only upon the signatory States, not the master of the vessel." Supp. Br. 42. But those show simply that the Conventions operate as international agreements generally do—they address the obligations of states, rather than individuals. *See Humane Soc'y of the U.S. v. Glickman*, 217 F.3d 882, 887 (D.C. Cir. 2000) ("Treaties are undertakings between nations; the terms of a treaty bind the contracting powers."). Accordingly, the fact that the Conventions oblige *states* to establish rules for conferring vessel nationality and to provide supporting documentation does not create a negative inference that *vessels* navigating on the high seas cannot be required to claim such nationality or support that claim with relevant state-issued documentation.

Aybar also misreads (Supp. Br. 41) then-Judge Alito's opinion in *United States v. Rosero*, 42 F.3d 166 (3d Cir. 1994), as announcing an all-encompassing definition of statelessness that clashes with the MDLEA. *Rosero* did not take that approach. Rather, it described a "residual" category of vessels qualifying as stateless under international law, *id.* at 171, *in addition* to the situations expressly listed in the MDLEA. *See Matos-Luchi*, 627 F.3d at 4 (reading *Rosero* to stand for the proposition that "Congress intended to include in section 70502(d), in addition to the specific examples given, those vessels that could be considered stateless under customary international law"). In so doing, the Third Circuit disclaimed any suggestion that its description was "comprehensive." 42 F.3d at 171. And it in no way

implied that the MDLEA's criteria for classifying a vessel as without nationality ran afoul of international law. To the contrary, the court *applied* the MDLEA definition of "vessel without nationality"—including the provision applicable to Aybar's case, 46 U.S.C. § 70502(d)(1)(B)—in rejecting the defendants' challenge to the sufficiency of the evidence. 42 F.3d at 174. *Rosero*, in short, reflects the MDLEA's conformity with, not any deviation from, international law.4

II. In Light Of Congress's Findings In 46 U.S.C. § 70501(1), The Protective Principle Provides An Additional Basis For Jurisdiction Under International Law.

The protective principle of "[i]nternational law recognizes a state's jurisdiction to prescribe law with respect to certain conduct outside its territory by [foreign] nationals that is directed against the security of the state or against a limited class of other fundamental state interests." Restatement (Fourth) § 412. The government's supplemental brief shows (at 28-35) that, to the extent that international law matters in construing the Felonies Clause, the protective principle provides additional support for the MDLEA's application to Aybar, especially in light of Congress's finding that maritime drug trafficking "presents a specific threat to the security and societal well-being of the United States." 46 U.S.C. § 70501(1). This Court has so held in *Cardales* and several other cases, *e.g.*, *United States v. Bravo*, 489 F.3d 1, 7-8 (1st Cir. 2007), and Aybar's arguments do not support a contrary conclusion.

Aybar does not dispute that Congress's findings in the MDLEA track the criteria for protective-principle jurisdiction set forth in the Restatement and case law. *See* U.S. Supp. Br. 30. Relying on decisions interpreting the Commerce Clause, however, he suggests (Supp. Br. 33-35) that those findings are not determinative and that this Court must conduct an "independent evaluation" of the threats maritime drug trafficking poses. He does not address more recent Supreme Court authority that has exhibited deference to the national-security judgments of the political branches, including assessments made in statutory findings. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 29-30, 33-34 (2010). And the result would be same under the precedents Aybar invokes, because Congress had "a rational basis," *e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *United States v. Lopez*, 514 U.S. 549, 557 (1995), for determining that maritime drug trafficking presents a threat to the security of the United States, when judicial decisions at the time shared that assessment, the international community has taken multiple steps to address the threat, and current data continue to support the same conclusion. *See* U.S. Supp. Br. 30-33.5

Aybar's other main arguments misapprehend the potential relevance of the protective principle to this case and the role of the Restatement in describing that principle. On the first point, Aybar appears to view (Supp. Br. 19-21) this Court's precedents as having relied on the protective principle to *expand* Congress's Article I powers. But as the Court identified in its *En Banc* Order, the relevant question is whether international-law concepts such as the protective principle define (and therefore *limit*) Congress's authority to enact legislation under the Felonies Clause despite the absence of any such limitation in the constitutional text itself. *See United States v. Dávila-Reyes*, 937 F.3d 57, 62 (1st Cir. 2019) (addressing defendants' argument "that Congress's authority under the Felonies Clause is *limited* by the principles of international law") (emphasis added).

On the second point, Aybar parses the Restatement (Fourth)'s description of the protective principle as if it were a statute, urging the Court to apply to it the doctrine of "constitutional avoidance" and the canon that statutes must be read as a whole. Supp. Br. 22-24. The Restatement, however, is not a statute. It is a "kind of treatise or commentary" that, by "provid[ing] evidence of the practice of States," sheds light on principles "of customary

international law." *United States v. Yousef*, 327 F.3d 56, 99, 101 & n.31 (2d Cir. 2003) (discussing the Restatement (Third)). A federal court therefore need not wait for the latest Restatement to list a particular statute as supported by the protective principle—or any other specific jurisdictional basis—before determining that the statute falls within the bounds of that principle.

In any event, Aybar's cited Restatement footnote overstates the supposed circuit disagreement "on whether the protective principle properly extends to narcotics trafficking." Restatement (Fourth) § 402 reporters' n.9. A footnote in *United States v. Wright-Barker*, 784 F.2d 161 (3d Cir. 1986), said that the protective principle "[a]rguably" applied to drug trafficking, and concluded only that "*international agreements* ha[d] yet to recognize drug smuggling as a threat to a nation's security * * * warranting protective jurisdiction." *Id.* at 167 n.5 (emphasis added; internal quotation marks omitted). And in *United States v. Perlaza*, 439 F.3d 1149, 1162-63 (9th Cir. 2006), the Ninth Circuit noted its previous statement that "[d]rug trafficking presents the sort of threat to our nation's ability to function that merits application of the protective principle," but declined to read that statement as obviating otherwise-applicable prerequisites for establishing jurisdiction over a defendant on a foreign-flagged vessel. Neither of these decisions purported to resolve definitively whether the protective principle applies to narcotics trafficking.

The protective principle also does not, as Aybar contends, require a showing that an individual defendant's "particular conduct endangered the United States." Supp. Br. 27 (quoting *United States v. Angulo-Hernández*, 576 F.3d 59, 61 (1st Cir. 2009) (Torruella, J., dissenting)). The "particular conduct" gloss originated in one of Professor Kontorovich's articles, which acknowledges that "[m]ost courts" take a different view and interpret the protective principle to permit "jurisdiction over conduct of the general kind that could endanger the United States." *Article I Horizon*, *supra*, at 1230. That understanding aligns with the Eleventh Circuit's pre- MDLEA view—which this Court has cited with approval, *United States v. Vilches-Navarrete*, 523 F.3d 1, 22 (1st Cir. 2008)—that the protective principle applies so long as the extraterritorial conduct has a "potentially adverse effect" on the nation's security interests. *United States v. Gonzalez*, 776 F.2d 931, 939 & n.11 (11th Cir. 1985) (citing Restatement (Second) § 33 & cmt. c).

Gonzalez is instructive in another regard as well. Quoting early observations by Chief Justice Marshall, the court in *Gonzalez* explained that, while a state has the right under international law to act extraterritorially to protect itself and its citizens from harm, a nation's exercise of that right "will be resisted" by other countries if it is "extended too far." 776 F.2d at 939 (quoting *Church v. Hubbart*, 6 U.S. (2 Cranch.) 187, 235 (1804)). The court further explained that what counts as "too far" in the high-seas context depends on the circumstances, and it emphasized that foreign nations had recognized the reasonableness of the United States' pre-MDLEA enforcement efforts in Caribbean waters beset by "the massive drug trade." *Id.* Post- MDLEA developments—including the U.N. Convention Against Illicit Traffic and an array of bilateral and multilateral agreements pledging cooperation in interdiction efforts,6 U.S. Supp. Br. 7-8—underscore the continued international acceptance of U.S. efforts in this field. And they dispel any concern that reaffirming this Court's application of the protective principle fails "to respect the sovereignty of other nations." *Dávila-Reyes*, 937 F.3d at 70 (Lipez, J., concurring). These include bilateral agreements with Aybar's country of origin (Dominican Republic) and that of one of his co-defendants (Venezuela). The agreement with Venezuela—which is publicly available, *contra* Supp. Br. 12—notes that the need for international

cooperation in thwarting maritime drug trafficking is reflected not only in the U.N. Convention Against Illicit Traffic but in two earlier Conventions: "the 1961 Single Convention on Narcotic Drugs and its 1972 Protocol, [and] in the 1971 Convention on Psychotropic Substances." Agreement Between the Government of the United States of America and the Government of the Republic of Venezuela to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances By Sea, T.I.A.S. No. 11827, 1991 WL 538877, at *1.

III. Congress May Proscribe Drug Trafficking On A Stateless Vessel Operating Beyond The Territorial Sea Of Any State Without Requiring Proof Of A Geographic Or Other Nexus Between The Defendants' Criminal Conduct And The United States.

The government has shown (U.S. Supp. Br. 35-45) that (A) the text and structure of the Felonies Clause do not support limiting Congress's powers under that Clause to conduct having a geographic or other nexus to the United States; and (B) if the nexus concept is relevant, it is as a proxy for a due process fundamental fairness standard that is amply satisfied in cases involving maritime drug trafficking aboard stateless vessels beyond the territorial sea of any state. Aybar does not raise the due-process issue, and his arguments under the Felonies Clause are addressed above in Part I. One additional point, however, warrants brief mention. Specifically, Aybar's discussion of *United States v. Smith*, 680 F.2d 255 (1st Cir. 1982), highlights the difficulties that this Court would face if it adopts his proposed nexus requirement. Aybar stresses (Supp. Br. 38) that *Smith* satisfied that requirement because it involved a U.S. vessel, U.S.-citizen crew, "and a 100 mile proximity to the [U.S.] coast." But Aybar does not address whether that proximity alone is sufficient to establish a nexus, or whether additional proof the drugs were destined for the United States would be required. Nor does he address whether it would be enough that a boat in the Caribbean Sea "appeared * * * to be sailing towards Florida," *Victoria*, 876 F.2d at 1011, if a navigational chart on board indicated a course similarly consistent with a destination of "the northern Bahamas," *id.* at 1010. *Cf. Aybar-Ulloa*, 913 F.3d at 61 (Torruella, J., dissenting) (suggesting that the facts of *Victoria* sufficed to show a nexus). These are the types of questions that courts faced with a nexus requirement would have to sort through, raising the very proof problems that Congress sought to eliminate when it dispensed with a nexus requirement in 1980. *See* U.S. Supp. Br. 2, 35.

IV. A State's Authority Under International Law To Exercise Jurisdiction Over A Stateless Vessel Includes The Authority To Exercise Domestic Criminal Jurisdiction Over Its Foreign National Crewmembers.

The government's supplemental brief shows (at 41-45) that, contrary to the panel dissent, international law does not recognize a distinction between a nation's authority over a stateless vessel and its authority over the vessel's crew, and that this Court therefore correctly stated the governing international-law rule in *Victoria*, 876 F.2d at 1010. *See also United States v. Juda*, 46 F.3d 961, 967 (9th Cir. 1995) (a nation's authority "over stateless vessels * * * extends to individuals arrested on board a stateless vessel"). Because Aybar does not take up the distinction proposed in the panel dissent, *Aybar-Ulloa*, 913 F.3d at 62, the government rests on the arguments in its Supplemental Brief.

* * * *

B. OUTER SPACE

1. Artemis Accords

In an October 13, 2020 press release, NASA announced that seven countries had signed bilateral agreements with the United States implementing the "Artemis Accords." The press release is excerpted below and available at https://www.nasa.gov/press-release/nasa-international-partners-advance-cooperation-with-first-signings-of-artemis-accords. The signed Artemis Accords document is available at https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords-signed-13Oct2020.pdf. Further information about the Artemis Accords is available at https://www.nasa.gov/specials/artemis/.

* * * *

International cooperation on and around the Moon as part of the Artemis program is taking a step forward today with the signing of the Artemis Accords between NASA and several partner countries. The Artemis Accords establish a practical set of principles to guide space exploration cooperation among nations participating in the agency's 21st century lunar exploration plans.

"Artemis will be the broadest and most diverse international human space exploration program in history, and the Artemis Accords are the vehicle that will establish this singular global coalition," said NASA Administrator Jim Bridenstine. "With today's signing, we are uniting with our partners to explore the Moon and are establishing vital principles that will create a safe, peaceful, and prosperous future in space for all of humanity to enjoy."

While NASA is leading the Artemis program, which includes sending the first woman and next man to the surface of the Moon in 2024, international partnerships will play a key role in achieving a sustainable and robust presence on the Moon later this decade while preparing to conduct a historic human mission to Mars.

The founding member nations that have signed the Artemis Accords, in alphabetical order, are: Australia, Canada, Italy, Japan, Luxembourg, United Arab Emirates, United Kingdom, United States of America.

NASA announced it was establishing the Artemis Accords earlier this year to guide future cooperative activities, to be implemented through bilateral agreements that will describe responsibilities and other legal provisions. The partners will ensure their activities comply with the accords in carrying out future cooperation. International cooperation on Artemis is intended not only to bolster space exploration but to enhance peaceful relationships among nations.

"Fundamentally, the Artemis Accords will help to avoid conflict in space and on Earth by strengthening mutual understanding and reducing misperceptions. Transparency, public registration, deconflicting operations—these are the principles that will preserve peace," said Mike Gold, NASA acting associate administrator for international and interagency relations. "The Artemis journey is to the Moon, but the destination of the Accords is a peaceful and prosperous future."

The Artemis Accords reinforce and implement the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, otherwise known as the Outer Space Treaty. They also reinforce the commitment by the U.S. and partner nations to the Registration Convention, the Agreement on the Rescue of Astronauts, and other norms of behavior that NASA and its partners have supported, including the public release of scientific data.

The principles of the Artemis Accords are:

- **Peaceful Exploration:** All activities conducted under the Artemis program must be for peaceful purposes
- **Transparency:** Artemis Accords signatories will conduct their activities in a transparent fashion to avoid confusion and conflicts
- **Interoperability:** Nations participating in the Artemis program will strive to support interoperable systems to enhance safety and sustainability
- **Emergency Assistance:** Artemis Accords signatories commit to rendering assistance to personnel in distress
- **Registration of Space Objects:** Any nation participating in Artemis must be a signatory to the Registration Convention or become a signatory with alacrity
- **Release of Scientific Data:** Artemis Accords signatories commit to the public release of scientific information, allowing the whole world to join us on the Artemis journey
- **Preserving Heritage:** Artemis Accords signatories commit to preserving outer space heritage
- **Space Resources:** Extracting and utilizing space resources is key to safe and sustainable exploration and the Artemis Accords signatories affirm that such activities should be conducted in compliance with the Outer Space Treaty
- **Deconfliction of Activities:** The Artemis Accords nations commit to preventing harmful interference and supporting the principle of due regard, as required by the Outer Space Treaty
- **Orbital Debris:** Artemis Accords countries commit to planning for the safe disposal of debris

Additional countries will join the Artemis Accords in the months and years ahead, as NASA continues to work with its international partners to establish a safe, peaceful, and prosperous future in space. Working with emerging space agencies, as well as existing partners and well-established space agencies, will add new energy and capabilities to ensure the entire world can benefit from the Artemis journey of exploration and discovery.

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2. Gateway Partnership

As part of NASA's "Artemis Program" of exploration, NASA intends to construct a habitable station in orbit around the Moon to support human and robotic exploration of the Moon and provide a training ground for future missions to Mars. This station—named "Gateway"—will be constructed and operated by an international group of partners.

On December 16, 2020, NASA issued a press release announcing the signing of an agreement between the United States and Canada (through the Canadian Space Agency of "CSA"), relating to cooperation in constructing the Gateway station in orbit

around the Moon. The press release is available at https://www.nasa.gov/press-release/nasa-canadian-space-agency-formalize-gateway-partnership-for-artemis-program. The Gateway "will provide vital support for a sustainable, long-term return of astronauts to the lunar surface as part of NASA's Artemis program" and will "demonstrate technologies needed for human missions to Mars." As further explained in the press release:

> Under this agreement, CSA will provide the Gateway's external robotics system, including a next-generation robotic arm, known as Canadarm3. CSA also will provide robotic interfaces for Gateway modules, which will enable payload installation including that of the first two scientific instruments aboard the Gateway. The agreement also marks NASA's commitment to provide two crew opportunities for Canadian astronauts on Artemis missions, one to the Gateway and one on Artemis II.
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> Approximately one-sixth the size of the International Space Station, the Gateway will function as a way station located tens of thousands of miles at its farthest distance from the lunar surface, in a near-rectilinear halo orbit. From this lunar vantage, NASA and its international and commercial partners will conduct unprecedented deep space science and technology investigations. It will serve as a rendezvous point for astronauts traveling to lunar orbit aboard NASA's Orion spacecraft and Space Launch System rocket prior to transit to low-lunar orbit and the surface of the Moon.

On October 27, 2020, NASA announced the signing of an agreement with ESA (European Space Agency) regarding ESA's contributions to the Gateway program, including habitation and refueling modules, and enhanced lunar communications and service modules for Orion. See NASA press release, available at https://www.nasa.gov/press-release/nasa-european-space-agency-formalize-artemis-gateway-partnership. Further information about the Gateway program is available at https://nasa.gov/gateway.[**]

3. U.S. National Space Policy

On December 9, 2020, President Trump issued a memorandum regarding U.S. national space policy. 85 Fed. Reg. 81,755 (Dec. 16, 2020). See also December 10, 2020 State Department press statement on the President's national space policy, available at

[**] Editor's note: The United States signed an agreement with Japan for its cooperation on the Gateway program early in 2021. See press release, available at https://www.nasa.gov/press-release/nasa-government-of-japan-formalize-gateway-partnership-for-artemis-program.

https://2017-2021.state.gov/the-presidents-national-space-policy/index.html. Included in the memorandum is the following regarding international law:

> 4. As established in international law, outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means. The United States will pursue the extraction and utilization of space resources in compliance with applicable law, recognizing those resources as critical for sustainable exploration, scientific discovery, and commercial operations.
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> 5. All nations have the right to explore and to use space for peaceful purposes and for the benefit of all humanity, in accordance with applicable law. Consistent with that principle, the United States will continue to use space for national security activities, including for the exercise of the inherent right of self-defense. Unfettered access and freedom to operate in space is a vital national interest.
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> 6. The United States considers the space systems of all nations to have the right to pass through and conduct operations in space without interference. Purposeful interference with space systems, including supporting infrastructure, will be considered an infringement of a nation's rights. Consistent with the defense of those rights, the United States will seek to deter, counter, and defeat threats in the space domain that are hostile to the national interests of the United States and its allies. Any purposeful interference with or an attack upon the space systems of the United States or its allies that directly affects national rights will be met with a deliberate response at a time, place, manner, and domain of our choosing.

4. Weapons in Outer Space

On April 6, 2020, Assistant Secretary of State Christopher Ashley Ford addressed the Center for Strategic and International Studies on arms control in outer space. His remarks are available at https://2017-2021.state.gov/whither-arms-control-in-outer-space-space-threats-space-hypocrisy-and-the-hope-of-space-norms/, and excerpted below.

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I. The Threat

One cannot have a coherent discussion about outer space security solutions without understanding the problem, so let me first outline the nature and gravity of the space threats that Russia and the PRC present today to every country that depends upon space-based assets. …

… It is clear that Beijing conceives of outer space as a critical warfighting domain, and that it expects to escalate in this arena very quickly in wartime. Military and strategic thinkers in

the PRC now openly talk and write about their intentions to move against U.S. satellites early in any future conflict.

… [H]owever, it is Russia that enjoys the dubious honor of being the poster child for dangerous and provocative space postures. Nor do the Russians bother to hide it, instead openly bragging about their development of counterspace capabilities. …

…Thanks to observations and analyses by amateur astronomers, commercially provided information, and the orbital data that the U.S. Government releases to the public, it is now possible to talk at the unclassified level about Russia's apparent *development of in-orbit anti-satellite weaponry.*

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II. Dangerous and Hypocritical Answers

…Russia and the PRC are offering what they describe as a draft "Treaty on the Prevention of Placement of Weapons in Outer Space," or PPWT—an instrument that purports to help solve the problems that its drafters have themselves worked hard to create. They also proffer something Russia calls the "No First Placement" initiative, in which countries voluntarily agree not to be the "first" to place weapons in space.

… The draft PPWT would by careful design fail to address in any meaningful fashion the terrestrially-based ASAT systems that both Russia and China have long since developed and deployed. As for Russia's initiative about not placing weapons *in* space, a more accurate term for this efforts might be the "No *Second* Placement" initiative, for the point of this diplomatic overture seems simply to be propaganda, or worse. In the spirit of Moscow's so-called "moratorium" on intermediate-range nuclear forces in Europe, the effort apparently aims to lock in unilateral military advantage—that is, to persuade other countries *not* to do in space what Russia gives every sign of already having done itself.

It's … hard not to come to a conclusion that this call for quick negotiations looks like an attempt by Russia and the PRC to constrain the United States and our allies without either Moscow or Beijing having the slightest intention of abiding by the commitments they are proffering.

… So how are we in the United States approaching these challenges?

III. A Better Way Forward

To answer that question, let me begin by mentioning what we are doing in order to protect our security interests and deter outer space-related provocations directly before turning to our diplomatic efforts.

A. Deterrence

First and foremost, we are working to deter aggression and dangerous, escalatory provocations in outer space. First and foremost, you can see how serious an issue this is in the President's creation of the U.S. Space Force as a sixth branch of the armed services. Additionally, the **U.S. National Security Strategy** (NSS) makes clear that "[t]he United States considers unfettered access to and freedom to operate in space to be a vital interest," and that "[a]ny harmful interference with or an attack upon critical components of our space architecture that directly affects this vital U.S. interest will be met with a deliberate response at a time, place, manner, and domain of our choosing." This covers not just attacks upon assets that are themselves *in* space, but also attacks upon any aspects of our space architecture, including ground systems. Our potential adversaries need to know that there

is nothing "different" in this respect about any component of the U.S. space architecture: if you attack it, you are attacking *us*.

Indeed, we have made clear that we do not rule out even the use of nuclear weapons in response to a sufficiently severe attack upon critical aspects of our space architecture. The latest **U.S. Nuclear Posture Review** (NPR) declares that "[t]he United States would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States, its allies, and partners." As you'll recall, our space architecture is specified in the NSS as a "vital U.S. interest." This is no coincidence.

In fact, the NPR goes on to clarify that the "extreme circumstances" in which the United States will not rule out nuclear weapons use "could include significant non-nuclear strategic attacks." …

…Any harmful interference with or attacks upon such components of our space architecture at any time, even if undertaken only with non-nuclear tools, thus starts to move into "significant non-nuclear strategic attack" territory, and would lead to a significant and potentially drastic escalation of a crisis or conflict. …

B. Normative Development

That said, our hope is to do much more than just *deter* the worst sorts of behavior in outer space. We also hope to build broad international support for norms of responsible behavior that will help forestall problems and reduce escalation and accident risks in this rapidly evolving domain.

…I am convinced, however, that it remains possible to develop better and better *normative expectations* in outer space—just as we have been making progress on doing in the even faster-moving arena of cyberspace during the last few U.N.-sponsored cyberspace Groups of Governmental Experts (GGEs). U.S. diplomats are looking, in other words, to work constructively with their counterparts in other spacefaring nations to develop approaches to outer space norms that will help improve predictability and collective "best practices" in the space domain.

There is nothing untoward about trying to develop normative expectations in outer space. Important standards for space-related behavior already exist. Some have grown from *legally*-binding instruments, such as the Outer Space Treaty (which bars placing nuclear weapons into orbit, or on celestial bodies), or the Registration Convention (which calls for registration of all space objects). In the interests of preserving the efficacy of arms control verification, a number of arms control precedents between the United States and the USSR or the Russian Federation prohibited interference with space-based "national technical means" of verification. The Constitution of the International Telecommunications Union (ITU) and its Radio Regulations articulate a norm against harmful interference with space radiocommunications services, while there are also legally binding rules against nuclear testing in outer space written in to the Limited Test Ban Treaty (LTBT).

As a consensus study in 2013 by a UN Group of Government Experts noted, moreover, norms and transparency and confidence building measures (TCBMs) do not have to be legally-binding or be articulated in legally-binding instruments in order to be useful and contribute to constructive behavior and the promotion of global "best practices" for governmental and a broadening range of private sector space activities. The Hague Code of Conduct (HCoC), for instance, urges the provision of Pre-Launch Notification (PLNs) for missile tests in order to improve trust and confidence and reduce the risk of inadvertent escalation. The 2019 United Nations Committee on Peaceful Uses of Outer Space

(UNCOPUOS) process guidelines on the Long-term Sustainability (LTS) of the Outer Space Environment Activities, the U.N. S2007 COPUOS Space Debris Mitigation Guidelines, and the recently updated U.S. Orbital Debris Mitigation Standard Practices are also articulations of expected "best practices" that are proving helpful in the outer space domain.

There is also constructive thinking underway in both government and the private sector about how to formulate analogous best practices in areas such as satellite collision avoidance, and on-orbit rendezvous and servicing operations and utilization of space resources. As a result, U.S. diplomatic engagements on these issues rely on extensive and thoughtful inputs provided by American companies and academic experts.

So far, however, none of these various efforts, as salutary as they are, have yet directly addressed the *security* problems that are emerging as a result of ongoing Russian and PRC weaponization of the space domain and placement of weapons in outer space. We clearly need to do more to develop non-legally-binding international norms of responsible behavior that are complementary to the existing legal regime – both through "bottom-up" best practices developed cooperatively with other the full range of established and emerging space actors, and through "top-down' voluntary, non-legally binding TCBMs. And we need to do this in the security arena, in order to cope with the challenges presented by Russian and Chinese space weaponry.

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Why not, for instance, start where the cyberspace GGEs did, in acknowledging that there's nothing special about outer space that would make it an arena of warfare different from any other with regard to the applicability of International Humanitarian Law (IHL) — and that, therefore, traditional IHL principles of humanity, necessity, proportionality, and distinction between combatants and non-combatants apply in outer space? Is it possible also for the space domain to follow the Cyber GGEs in articulating a nonbinding norm against peacetime attacks upon critical civilian infrastructure that is largely owned and operated by the private sector? And what about those Russian satellites that appear to be capable of firing projectiles but yet maneuver up alongside of other countries' satellites? Is it possible to articulate a standard for what constitutes responsible — and thus, impliedly, *irresponsible* — behavior in proximity operations?

…[P]erhaps we could consider whether it would be beneficial to establish a norm that it is irresponsible to conduct on-orbit experiments such as the ones Russia did recently in close proximity to another country's satellites without prior consultations. That sort of behavior is easy to detect. The establishment of such a norm, coupled with the fact that this sort of orbital "pattern of life" is increasingly easy to detect and assess, would enable the international community to develop a response – and perhaps we could thereby help deter such irresponsible behavior.

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Cross References

Cyprus Center for Land, Open-seas, and Port Security ("CYCLOPS"), **Ch. 9.B.6**
UN General Assembly on oceans and sustainable fisheries, **Ch. 13.B.1**
China sanctions related to the South China Sea, **Ch. 16.A.4.c**
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