Table of Contents

CHAPTER 4

Treaty Affairs

A. CONCLUSION, ENTRY INTO FORCE, AND RESERVATIONS

1. Treaties and International Agreements Generally

On December 13, 2017, Acting Legal Adviser Richard Visek testified before the U.S. Senate Committee on Foreign Relations on five treaties under consideration by the Committee: extradition treaties with Kosovo and Serbia; maritime boundary delimitation treaties with Kiribati and the Federated States of Micronesia; and the UN Convention on the Assignment of Receivables in International Trade. Excerpts follow from Mr. Visek's December 13, 2017 testimony.

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The Administration appreciates the Committee's prioritization of these treaties. Individually and collectively, these treaties advance U.S. interests. The extradition treaties will enhance our ability to combat transborder criminal activity. The maritime boundary treaties will improve our ability to explore, benefit from, conserve, and manage the natural resources of our maritime areas. And the Receivables Convention will help U.S. businesses gain access to capital. The Administration supports each of these treaties, and urges the Senate to provide its advice and consent to their ratification. During the remainder of my testimony, I will discuss the five treaties in additional detail.

Extradition Treaties with Kosovo and Serbia

The two extradition treaties pending before the Committee will update our existing treaty relationships with two important law enforcement partners—Kosovo and Serbia. The continuing growth in transborder crime, including terrorism, other forms of violent crime, drug trafficking, cybercrime, and the laundering of the proceeds of criminal activity, underscores the need for

increased international law enforcement cooperation. Extradition treaties are essential tools in that effort. The U.S. extradition relationships with Kosovo and Serbia are currently governed by the Treaty Between the United States of America and the Kingdom of Servia for the Mutual Extradition of Fugitives from Justice, signed on October 25, 1901 ("the 1901 Treaty"). We have found that this treaty is not as effective as the modern treaties we have in force with other countries in ensuring that fugitives may be brought to justice. The two treaties now before the Committee would establish modern extradition relationships with both countries, thereby allowing us to engage in closer and more effective law enforcement cooperation. Replacing outdated extradition treaties with modern ones (as well as negotiating extradition treaties with new partners where appropriate) is necessary to create a seamless web of mutual obligations to facilitate the prompt location, arrest and extradition of international fugitives. As a result, these treaties are an important part of the Administration's efforts to ensure that those who commit crimes against American victims will face justice in the United States.

Both new treaties contain several important provisions that will substantially serve our law enforcement objectives:

First, these treaties define extraditable offenses to include conduct that is punishable by imprisonment or deprivation of liberty for a period of one year or more in both states. This is the so-called "dual criminality" approach. Our older treaties, including the 1901 Treaty, provide for extradition only for offenses appearing on a list contained in the instrument. The problem with this approach is that, as time passes, the lists grow increasingly out of date. The dual criminality approach eliminates the need to renegotiate treaties to cover new offenses in instances in which both states pass laws to address new types of criminal activity. By way of illustration, so called "list Treaties" from the beginning of the 20th century do not cover various forms of cybercrime or money laundering. The new treaties with Kosovo and Serbia would fix this problem.

Second, these treaties address one of the most difficult and important issues in our extradition treaty negotiations—the extradition of nationals. As a matter of long-standing policy, the U.S. Government extradites United States nationals and strongly encourages other countries to extradite their nationals. Both of the treaties before the Committee contemplate the unrestricted extradition of nationals by providing that nationality is not a basis for denying extradition. This provision is particularly important in the context of Kosovo and Serbia because of certain provisions in their domestic law. Kosovo's Supreme Court has ruled that its new constitution only permits the extradition of Kosovo nationals where required by international agreement. Kosovo has been clear that this provision in the treaty will overcome that obstacle, allowing them to extradite their nationals to the United States. Similarly, Serbia has domestic legislation that also permits extradition of nationals only pursuant to an obligation of a treaty to which Serbia is a party. Similarly, they have been clear that the provision on extradition of nationals in the new treaty overcomes this obstacle.

Third, the treaties include a modern "political offense" exception that states that extradition shall not be granted if the offense for which extradition is requested is a political offense, but establishes a number of categories of offenses that shall not be considered political offenses. These categories of offenses cover a range of violent crimes, including murder, kidnapping and hostage taking, and the use of various kinds of explosive devices. These categories of offenses, which did not exist in earlier extradition treaties, constitute exceptions to the political offense exception and align with a major longstanding priority of the United States to ensure that an overbroad definition of "political offense" does not impede the extradition of terrorists.

Fourth, unlike the 1901 Treaty, these new treaties contain a provision that permits the temporary surrender of a fugitive to the Requesting State when that person is facing prosecution for, or serving a sentence on, charges within the Requested State. This provision can be important to the Requesting State (and in some cases the fugitive) so that, for example: (1) charges pending against the person can be resolved earlier while evidence is fresh, or (2) where the person sought is part of a criminal enterprise, he can be made available for assistance in the investigation and prosecution of other participants in the enterprise.

Fifth, both of these treaties incorporate a number of procedural improvements over the 1901 Treaty, including direct transmission of provisional arrest requests through Justice Department channels, waiver and consent to extradition, and clear statements of the required materials to be included in a formal extradition request.

For all these reasons, U.S. ratification of the extradition treaties with Kosovo and Serbia will help us and our colleagues at the Justice Department further develop two important law enforcement relationships and advance our objective of combatting transnational crime.

Maritime Boundary Treaties with Kiribati and the Federated States of Micronesia

In an area where more than one country has maritime entitlements under international law, maritime boundaries are needed to clarify where each country may exercise its sovereignty, sovereign rights, and jurisdiction as a coastal State. In this connection, it is often noted that "good fences make good neighbors." Delimited boundaries also provide legal certainty that enhances our ability to explore, benefit from, conserve, and manage the natural resources of our maritime areas, including with respect to our fisheries. Resolving the outstanding maritime boundaries of the United States around the world remains an ongoing project, with about a dozen such boundaries yet to be fully agreed with our neighbors.

These two treaties delimit the exclusive economic zone (or "EEZ") and continental shelf between the United States and Kiribati, and between the United States and the Federated States of Micronesia (FSM), on the basis of equidistance. (Every point on an equidistance line is equal in distance from the nearest point on the coastline of each country.) This approach is wholly in line with international law and practice, and moreover serves to formalize the longstanding status quo regarding each side's asserted rights and jurisdiction in these maritime areas. Accordingly, with appropriate technical adjustments, each treaty formalizes boundaries that have been informally adhered to by the Parties, and that are very similar to the existing limit lines of the EEZ asserted by the United States for decades and published in the Federal Register. Because of improved calculation methodologies and minor coastline changes, the four new maritime boundaries in these two treaties will result in a small net gain, primarily with respect to the Kiribati boundaries, of United States EEZ and continental shelf area relative to the existing limit lines of our EEZ.

The treaty with FSM establishes a single maritime boundary between Guam and several FSM islands. The boundary is approximately 447 nautical miles with 16 turning and terminal points. The treaty with Kiribati establishes three maritime boundaries in the Pacific with respect to the EEZ and continental shelf generated by various Kiribati islands and by each of the U.S. islands of Palmyra Atoll, Kingman Reef, Jarvis Island, and Baker Island. Specifically, the treaty with Kiribati defines three distinct boundary lines: for the boundary line between the United States' Baker Island and the Kiribati Phoenix Islands group, six points are connected by geodesic lines that measure 332 nautical miles in total; for the boundary line between the United States' Jarvis Island and the Kiribati Line Islands group, ten points are connected by geodesic lines that measure 548 nautical miles in total; and for the boundary line between the U.S. islands of

Palmyra Atoll and Kingman Reef and the Kiribati Line Islands group, five points are connected by geodesic lines that measure 383 nautical miles in total.

The form and content of the two treaties are very similar to each other, and to previous maritime boundary treaties between the United States and other Pacific island countries that have entered into force after receiving the Senate's advice and consent. Each of the two treaties consists of seven articles, which set out the purpose of each treaty; the technical parameters; the geographic location of the boundary lines; standard language indicating the agreement of the Parties that, on the opposite side of each maritime boundary, each Party will not "claim or exercise for any purpose sovereignty, sovereign rights, or jurisdiction with respect to the waters or seabed or subsoil"; a clause that the establishment of the boundaries will not affect or prejudice either side's position with respect to the rules of international law relating to the law of the sea; a provision for dispute settlement by negotiation or other peaceful means agreed upon by the Parties; and a provision that entry into force would follow an exchange of notes indicating that each side has completed its internal procedures. For the purpose of illustration only, the boundaries are depicted on maps attached to the treaties.

The treaties do not limit how we may choose to manage, conserve, explore, or develop the U.S. EEZ and continental shelf consistent with international law; they merely clarify the geographic scope of our sovereign rights and jurisdiction consistent with international law and with longstanding unilateral U.S. practice, and they reinforce other countries' recognition of the U.S. EEZ and continental shelf entitlements around the U.S. islands in question.

United Nations Convention on the Assignment of Receivables in International Trade

The United Nations Convention on the Assignment of Receivables in International Trade establishes uniform international rules governing a form of financing widely used in the United States involving the assignment of receivables. Expanded access to receivables financing in international trade, which the Convention would promote, will provide American businesses an additional source of capital at no cost to the U.S. taxpayer and require no material change to existing U.S. laws. This should particularly benefit small and medium-sized businesses that use receivables financing.

The Convention, which is largely based on U.S. law, provides modern, uniform rules for transactions in which businesses either sell their rights to payments from their customers (known as "receivables") to a bank or other financial institution, or use their rights to these payments as collateral for a loan from a lender (the businesses selling or using their receivables as collateral are referred to as "assignors" and buyers and lenders are referred to as "assignees"). Such transactions enable businesses to obtain greater access to credit at lower cost and thereby expand their operations.

These so-called "assignments of receivables" transactions are well established in the United States as a method of obtaining low-cost credit, and are governed by Article 9 of the Uniform Commercial Code (UCC), which has been adopted by all U.S. States and the District of Columbia, Puerto Rico, and the Virgin Islands. The Convention provides economically-useful rules for cross-border transactions involving receivables typically generated in the exchange of goods or services for payment and from other commercial transactions.

The assignment of these types of receivables is common and relatively easy to effect in the United States when only domestic assignors and domestic receivables are involved. When these transactions cross international boundaries, however, determining whether U.S. law or the law of another country applies is fraught with uncertainty—not only as to which country's laws apply but also the nature of those laws. In addition, even if one can determine which country's

laws apply and what those laws say, those laws may not be very helpful for receivables financing. The Convention addresses both aspects of these problems—the conflict of laws problem and substantive legal rules problem.

1. The Key Conflict of Laws Provision

The Convention governs assignments of receivables that have an international dimension. In particular, the Convention applies both to assignments of receivables when the assignor and the debtor on the receivables ("account debtor" for U.S. law purposes) are located in different countries and to the assignment of receivables when the assignor and the assignee of the receivables are located in different countries. In either case, without the benefit of the Convention, the fact that the transaction involves more than one country creates uncertainty as to which country's substantive law governs because the conflict of laws rules that would determine the answer vary significantly from one country to another. Even after determining which country's law governs, one must determine what that law is and how it applies to the transaction. This uncertainty adds significant risk to these international transactions, making credit based on them harder to obtain and more costly.

One of the most important aspects of the Convention is Article 22, which sets forth a clear rule as to which country's substantive law governs the priority of an assignee's interest in receivables as against competing claimants. Competing claimants may include other assignees of the same receivable, creditors of the assignor who have obtained rights in the receivable, or a bankruptcy trustee of the assignor. Article 22 provides that the law of the country in which the assignor of the receivable is located governs the priority of the assignment against competing claimants. This is critically important because assignees are unlikely to enter into receivables financing transactions on favorable credit terms if there is uncertainty as to the priority of their claim to the receivables.

2. Substantive Rules Governing the Assignment of Receivables

In addition to the conflict of laws rule, the Convention also provides a set of clear substantive rules governing important aspects of receivables financing, including practices that facilitate receivables financing and provide for a predictable resolution of issues that follows the general approach of UCC Article 9. Those Convention rules would override limitations in effect in many countries that restrict the usefulness of receivables financing (but not United States law under UCC Article 9, because the Convention rules are largely consistent with UCC Article 9). For example, Article 8 of the Convention, consistent with UCC Article 9, makes effective (1) the assignment of existing and future receivables to secure current and future advances, (2) the bulk assignment of receivables, and (3) the assignment of partial and undivided interests in receivables even if a country's internal law (unlike the United States) would otherwise restrict these transactions. It also reduces the need for excessive formality and documentation costs by permitting the receivables that are assigned to be described generally in the contract of assignment, which is consistent with UCC Article 9.

For assignments within the scope of the Convention, Article 9 of the Convention, like Article 9 of the UCC, overrides certain contractual limitations on assignments of trade receivables. Consistent with UCC Article 9, the treaty provides that the assignment of such a receivable is effective notwithstanding any agreement between the account debtor (i.e. the debtor on the receivable) and the assignor (i.e. the account debtor's creditor) limiting the assignor's right to assign that receivable. This provision is particularly useful in transactions in which a business assigns a large number of its receivables created under a number of transactions because

it avoids the otherwise hefty costs of the lender examining each contract creating a receivable to see if the contract limits assignment of the receivable.

The Convention also sets out certain rights and obligations of the assignor and assignee that flow from the assignment of the receivables. For example, under Article 13, the assignee may notify the debtor and request payment. Article 14 sets out the assignee's right as against the assignor to proceeds of receivables (such as cash payments when the receivable has been collected).

Because the Convention contains rules reflecting modern receivables financing practices consistent with those in UCC Article 9, widespread ratification of the Convention will help countries outside the United States modernize their receivables financing laws and enable this type of access to credit for companies engaged in cross-border trade without causing disruption to businesses in the United States that rely on, and have mastered, the rules in UCC Article 9.

3. Relationship to U.S. Law

There is a strong correspondence between the Convention and U.S. law. Negotiation of the Convention was supported by the leadership of the Uniform Law Commission (ULC) and members of the American Law Institute (ALI) (the ULC's partner in developing the UCC). Members of both organizations participated in the U.S. delegation to the United Nations Commission on International Trade (UNCITRAL) as the Convention was being negotiated. In fact, the timing of the Convention coincided with the domestic revision of UCC Article 9, and many of the participants in the U.S. law reform project also participated in the preparation of the Convention.

After the Convention was adopted, a ULC Committee, along with experts from the ALI, reviewed the Convention for the purpose of determining its suitability for ratification by the United States. They issued a committee report, which was approved by the ULC, proposing formulations for declarations and understandings, aimed at assuring consistency with practice under UCC Article 9 and facilitating application of the Convention in the United States.

As reflected in the treaty transmittal package, the executive branch has proposed declarations and understandings to accompany the Senate's advice and consent to the Convention. These proposed declarations and understandings are consistent with the recommendations of the ULC and ALI committee of experts. They would provide additional clarity about how the United States will implement the Convention domestically and facilitate its application in a manner consistent with existing practice in the United States under UCC Article 9. Proposed understandings address the scope of the Convention (including its inapplicability to securities and to rights other than contractual rights to payment under intellectual property licenses), the ability of states to provide additional rights to an assignee with respect to the proceeds of a receivable beyond the minimum level of rights required by the Convention, and the meanings of certain terms used in the Convention. Proposed declarations address how the Convention will apply in the context of certain insolvency proceedings, how it will apply to certain contracts entered into by governmental entities or other entities constituted for a public purpose, and rules for determining which U.S. state laws will apply in circumstances where the Convention requires reference to applicable U.S. law. In addition, a proposed declaration provides that the United States will not be bound by optional provisions of the Convention addressing choice of law rules. These proposed understandings and declarations are discussed in detail in the treaty transmittal package.

The treaty would be self-executing, which is consistent with the recommendation of the ULC Committee. There is no need for federal or state implementing legislation. Ratification of the Convention would not change U.S. practice in this area in any material respect. The Convention's rules are largely based on U.S. law and will produce substantially the same results as those under the UCC Article 9.

4. Benefits of U.S. Ratification

Widespread ratification of the Convention would help businesses in the United States gain access to capital to conduct international trade. The importance of these benefits is underscored by the support the Convention has received from the U.S. business community. Industry associations that have written to the Committee to express their support for the Convention include the Financial Services Roundtable, the U.S. Chamber of Commerce, the Bankers Association for Trade and Finance, the Commercial Finance Association, the Equipment Leasing and Finance Association, and the U.S. Council for International Business. The American Bar Association and the Uniform Law Commission have also expressed their support for the Convention.

Because the Convention is based on U.S. law, and because of the leading role the United States has played in receivables financing, other countries will be less likely to join the Convention if the United States declines to ratify it. Currently, one country—Liberia—has ratified the Convention. Five countries must ratify it in order for it to enter into force. U.S. ratification could have a particularly important leadership impact in this regard. There are currently a number of regional initiatives underway focused on reforming the law of secured transactions, including in Latin America, Africa, and the Asia-Pacific region. Expanded ratification of the Convention in the near term has the potential to influence these initiatives and to expand the acceptance and use of the Convention's framework for receivables financing in these regions. In addition, the European Union (EU) is currently involved in an effort to develop an internal legal framework concerning the law applicable to third party effects of the assignment of receivables. While there is significant support in the EU for the approach taken in the Convention (and thus under U.S. law), there is also some support for alternative choice of law rules in some cases that would be inconsistent with the Convention and would thus introduce uncertainty into receivables financing governed by the alternative rules. U.S. ratification could helpfully influence the EU process to ensure that the framework adopted is consistent with the Convention (and therefore U.S. law).

In summary, ratification of the Convention is an important step to providing American businesses a significant additional source of capital at no cost to the U.S. taxpayer and no material change to existing U.S. laws. These benefits will be particularly important for small and medium sized businesses that use receivables financing. Widespread ratification of the Convention would give American businesses an additional advantage in international transactions as the Convention mirrors American law and practices.

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Deputy Assistant Attorney General for the Criminal Division Bruce Swartz also testified before the Committee at the hearing on treaties on December 13, 2017 with respect to the two extradition treaties under consideration. Mr. Swartz's testimony is excerpted below.

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Mr. Chairman and members of the Committee, I am pleased to appear before you today to present the views of the Department of Justice on extradition treaties between the United States and the Republics of Kosovo and Serbia. These historic treaties directly advance the interests of the United States in fighting terrorism and transnational crime.

At the outset, I wish to note that the decision to proceed with the negotiation of law enforcement treaties such as these is made jointly by the Departments of State and Justice, after careful consideration of our international law enforcement priorities. The Departments of Justice and State also participated together in the negotiation of each of these treaties. Accordingly, we join the Department of State today in urging the Committee to report favorably to the Senate and recommend its advice and consent to ratification.

The Departments of Justice and State have prepared and submitted to the Committee detailed analyses of the extradition treaties in the Letter of Submittal. In my testimony today, I will concentrate on why these updated extradition treaties are important instruments for United States law enforcement agencies engaged in investigating and prosecuting terrorism and other serious criminal offenses.

The U.S.-Republic of Kosovo Extradition Agreement

At the outset, I must note for this Committee that the United States and Kosovo currently operate under the 1901 extradition treaty between the United States and the Kingdom of Servia. Kosovo is treated as a successor state under that instrument. The "list" treaty is antiquated and limited, and is not suitable for meeting 21st Century law enforcement challenges. I will further elaborate on this point later in my testimony.

Pursuant to a June 1999 United Nations Security Council resolution, the UN established an international civil and security presence in Kosovo, the UN Interim Administrative Mission in Kosovo (UNMIK), which still exists today. In September 2012, international supervision ended, and Kosovo became responsible for its own governance. While an UNMIK team had been handling prosecutions in Kosovo, the Kosovars have now assumed most of this responsibility. Despite being relatively new, Kosovar prosecutors are competent, establishing fair jurisprudence, and observing fundamental due process.

To fully empower both Kosovar and U.S. law enforcement officials with the tools that they need to combat global crime, a new extradition treaty is necessary. The Extradition Treaty before this Committee includes both substantive and procedural "improvements" from the 1901 treaty. Allow me now to highlight a few of these critical improvements.

Substantive Improvements

The Extradition Treaty before this Committee contains new substantive provisions that did not exist in the 1901 extradition treaty. Perhaps most importantly, the new Extradition Treaty accommodates the requirements of the Kosovar constitution to permit extradition of nationals. The Kosovo Supreme Court has ruled that citizens of Kosovo cannot be extradited under the language of the 1901 treaty, because the treaty provides that neither country is bound to extradite its nationals, and the Kosovo constitution prohibits the extradition of nationals in the absence of a bilateral extradition treaty requiring such extraditions. As a consequence, in recent years, Kosovo denied a U.S. extradition request where the U.S. sought a fugitive for murder. The denial was premised on the fugitive's Kosovo citizenship. Under the new Extradition Treaty, extradition can no longer be refused solely on the basis of the nationality of the person sought.

Moreover, the new Extradition Treaty not only allows for the extradition of nationals, but expands the types of crimes for which extradition can be sought. While the existing 1901 extradition treaty defines extraditable offenses by reference to a list of crimes enumerated in the treaty itself, the treaty before this Committee reflects the reality that crimes have become increasingly complex over the last century. A "list treaty" may present limits to extradition for newly emerging forms of criminality that the United States has a strong interest in pursuing, such as cybercrime and environmental offenses. The new Extradition Treaty will replace the old list of offenses with a modern "dual criminality" provision. This means that the obligation to extradite applies to all offenses that are punishable in both countries by a minimum term of imprisonment of more than one year. This is a critical improvement, since extradition will be possible in the future with respect to the broadest possible range of serious offenses, without the need to repeatedly update treaties as new forms of criminality are recognized.

This expansive provision is material to our extradition requests for extraterritorial offenses. For the United States, extraterritorial jurisdiction is important in two areas of particular concern: drug trafficking and terrorism. Under the 1901 treaty, Kosovo recently denied our extradition request for a fugitive wanted for prosecution on charges of providing material support for terrorism—having facilitated the travel of foreign fighters—although communicating from Kosovo with other facilitators via the Internet. The Supreme Court of Kosovo held that the language of the 1901 extradition treaty did not provide for extradition of a person for a crime committed in the requested state. Under the new Extradition Treaty, Kosovo will no longer be able to deny our extradition requests on the sole basis that a criminal act occurred in Kosovo, not in the United States.

Furthermore, the new Extradition Treaty ensures that the only applicable statute of limitations is that of the country making the extradition request. Accordingly, this provision ensures that the U.S. prosecutors will maintain procedural control over the viability of their cases, rather than being at the mercy of foreign statutes of limitations.

Procedural Improvements

In addition to the substantive improvements, the Extradition Treaty before this Committee includes procedural enhancements, which streamline the extradition process. For example, the Treaty contains a "temporary surrender" provision, which allows a person found extraditable, but already in custody abroad for another criminal charge, to be temporarily surrendered for purposes of trial. Absent temporary surrender provisions, we face the problem of delaying the fugitive's surrender, sometimes for many years, while the fugitive serves out a sentence in another country. As a result, during this time, the U.S. case against the fugitive becomes stale, and the victims are delayed justice for the crimes committed against them.

Further, the Extradition Treaty also allows the fugitive to waive extradition, or otherwise agree to immediate surrender, thereby substantially speeding up the fugitive's return in uncontested cases. The Treaty also streamlines the channels for seeking "provisional arrest"—the process by which a fugitive can be immediately detained while documents in support of extradition are prepared, translated, and submitted through the diplomatic channel—and the procedures for supplementing an extradition request that already has been presented to the requested country.

Together, the procedural and substantive improvements to the Extradition Treaty will ensure that U.S. prosecutors and law enforcement officials are better positioned to combat crime in an ever globally integrated and interdependent world.

The U.S.-Republic of Serbia Extradition Agreement

The United States and Serbia also operate pursuant to the same 1901 extradition treaty between the United States and the Kingdom of Servia.

However, unlike Kosovo, as applied to Serbia, the 1901 treaty is augmented by the extradition provisions applicable under multilateral conventions to which Serbia and the United States are parties. As a practical matter, this permits both countries to extradite fugitives for a broader scope of conduct apart from the enumerated list of crimes in the 1901 treaty. For example, both countries are party to the United Nations Transnational Organized Crime Convention, the UN Convention against Corruption, and the 1988 Vienna Drug Convention, all of which serve to augment the provisions in existing bilateral extradition treaties.

Nevertheless, none of these multilateral treaties addresses one of the most important aspects of modern extradition practice: allowing for the extradition of nationals. In contrast, much like the proposed U.S.-Kosovo Extradition Treaty, the U.S.-Serbia Extradition Treaty before this Committee, allows for the extradition of nationals.

Furthermore, unless the U.S. and Serbia become parties to an exhaustive list of multilateral conventions that cover every possible crime, we leave ourselves vulnerable to the possibility of gaps. The U.S.-Serbia Extradition Treaty before this Committee minimizes the possibility of these gaps. As is found in the proposed U.S.-Kosovo Extradition Treaty, the U.S.-Serbia Treaty under consideration includes a "dual criminality" provision, which allows extradition with regards to all offenses that are punishable in both countries by a minimum term of imprisonment of more than one year.

In addition to the provision which allows extradition of nationals, and the inclusion of the critical "dual criminality" method, the U.S.-Serbia Extradition Treaty before this Committee includes all of the substantive and procedural improvements as contained in the proposed U.S.-Kosovo Extradition Treaty.

Conclusion

In conclusion, Mr. Chairman, we appreciate the Committee's support in our efforts to strengthen the framework of treaties that assist us in combatting international crime. For the Department of Justice, modern extradition treaties are particularly critical law enforcement tools. To the extent that we can update our existing agreements in a way that enables cooperation to be more efficient and effective, we are advancing the protection of our citizens. Accordingly, we join the State Department in urging the prompt and favorable consideration of these law enforcement treaties. I would be pleased to respond to any questions the Committee may have.

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2. ILC Work on the Law of Treaties

See Chapter 7 of this *Digest* for U.S. remarks at the General Assembly Sixth Committee meeting on the work of the International Law Commission ("ILC") at its 69th session, which include discussion of the topic of provisional application of treaties.

On October 20, 2017, U.S. Minister Counselor to the UN Mark Simonoff addressed a Sixth Committee meeting on the effects of armed conflicts on treaties and in particular what should be done with the ILC's draft articles on the subject. Mr. Simonoff's remarks are excerpted below and available at https://usun.state.gov/remarks/8045.

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The United States once again extends its congratulations to the International Law Commission, ILC, for completing, in 2011, its work on the draft articles and commentaries on the effects of armed conflicts on treaties. As the United States has noted previously, the draft articles reflect the continuity of treaty obligations during armed conflict when reasonable, take into account particular military necessities, and provide practical guidance to states by identifying factors relevant to determining whether a treaty should remain in effect in the event of armed conflict.

The Sixth Committee and the General Assembly have considered the future of these draft articles on several occasions. In December 2011, the General Assembly in resolution 66/99 took note of and commended to the attention of governments the draft articles contained in the annex to that resolution, without prejudice to the question of future adoption of the draft articles or other appropriate action. Three years later, in resolution 69/125, the General Assembly again commended the draft articles to the attention of governments, also without prejudice to future action on them.

It has been and remains the United States' view that the draft articles are best used as a resource that states may consider when determining the effect of particular armed conflicts on particular treaties. Moreover, in light of our continued concerns about aspects of the draft articles, we do not support the elaboration of a convention on this topic. For example, we continue to have concerns about the definition of "armed conflict" in draft article 2(b). Rather than defining the term, the better approach would have been to make clear that armed conflict refers to the set of conflicts covered by common articles 2 and 3 of the 1949 Geneva Conventions (i.e., international and non-international armed conflicts), which enjoy nearly universal acceptance among States. Additionally, with respect to draft article 15, we do not believe that it should be interpreted to suggest that illegal uses of force that fall short of aggression would necessarily be exempt from this provision.

The United States believes the action of the General Assembly in 2011 and again in 2014 commending the draft articles to the attention of governments with no further action was the right course. We continue to believe that no further action with regard to the draft articles is necessary.

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B. LITIGATION INVOLVING TREATY LAW ISSUES

1. *Water Splash*: Hague Service Convention

See Chapter 15 for discussion of the *Water Splash* case, involving interpretation of the Hague Service Convention.

2. *Republic of the Marshall Islands*: Litigation Alleging Breach of Non-Proliferation Treaty

In *Republic of the Marshall Islands v. United States*, No. 15-15636, the Republic of the Marshall Islands alleged that the United States was in breach of Article VI of the Non-Proliferation Treaty ("NPT"). As discussed in *Digest 2016* at 872, the district court dismissed the case. On July 31,2017, the Court of Appeals for the Ninth Circuit issued its

decision, affirming the dismissal, among other reasons, because Article VI is non-self-executing and therefore not enforceable in federal court. Excerpts follow from the decision (with footnotes omitted).

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This is not your average treaty case. Unlike the typical treaty-enforcement actions brought by private individuals, this case involves one state party seeking to enforce its treaty rights in the domestic court of another state party. This unorthodox effort fails because the claims are nonjusticiable.

Whether examined under the rubric of treaty self-execution, the redressability prong of standing, or the political question doctrine, the analysis stems from the same separation-of-powers principle—enforcement of this treaty provision is not committed to the judicial branch. Although these are distinct doctrines for addressing treaty enforcement, there is significant overlap. For example, considerations applicable to self-execution, such as whether the judiciary is the appropriate branch for direct enforcement, also play out in the standing and political question analysis. ... As the Supreme Court explained long ago, a treaty will often "depend[] for the enforcement of its provisions on the interest and the honor of governments which are parties to it." *Head Money Cases*, 112 U.S. 580, 598 (1884). If a state party breaches a non-self-executing treaty provision, "its infraction becomes the subject of international negotiations and reclamations," and "the judicial courts have nothing to do and can give no redress." *Id.*

I. Self-Executing Treaties

A. The Doctrine of Self-Execution

Much ink has been spilled on the question of treaty self-execution, which has been called "one of the most confounding in treaty law." *United States v. Postal*, 589 F.2d 862, 876 (5th Cir. 1979). In simple terms, a self- executing treaty is one that is judicially enforceable upon ratification. In contrast, a non-self-executing treaty requires congressional action via implementing legislation or, in some cases, is addressed to the executive branch.

Nearly a decade ago, the Supreme Court finally brought some clarity to this issue in *Medellín v. Texas*, noting that the "Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law" enforceable in domestic courts. 552 U.S. 491, 504 (2008); *see also Bond v. United States*, 134 S. Ct. 2077, 2084 (2014) (recognizing that the Convention on Chemical Weapons "creates obligations only for State Parties and 'does not by itself give rise to domestically enforceable federal law'" (quoting *Medellín*, 552 U.S. at 505 n.2)).

The Supremacy Clause establishes the legal status of all treaties: they are the supreme law of the land, on equal footing with the Constitution and federal statutes. *See* U.S. Const. art. VI, cl. 2. But this elevated status does not answer the question whether a treaty may be enforced in domestic courts. *See United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992). Indeed, "[t]he key is to recognize that the question whether a treaty is supreme law is separate from the question whether its provisions create a rule of decision (meaning a rule capable of resolving disputes) for U.S. Courts." Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-Execution*, 2015 BYU L. Rev. 1639, 1648 (2016). The Marshall Islands conflates these two issues, arguing that "precedent confirms it 'is emphatically the duty' of the federal courts to

interpret the [Treaty], and, because it is a valid law, the Executive 'must' be ordered to comply with it." This approach skims over the fundamental and threshold inquiry of whether the Treaty is self-executing.

The very idea of non-self-execution might at first seem inimical to both Article III and the Supremacy Clause, which unite to extend "[t]he judicial Power … to all Cases … arising under … Treaties," U.S. Const. art. III, § 2, cl. 1, and to make "all Treaties … the supreme Law of the Land," *id.* art. VI, cl. 2. "[B]ut the power to enforce the law of the land was constitutionally allocated to the courts only in 'cases *of a Judiciary nature*.'" Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 713 (1995) (quoting 2 Records of the Federal Convention of 1787, at 430 (Max Farrand ed., rev. ed. 1966)) (emphasis added). Claims seeking to enforce non-self-executing treaties are thus nonjusticiable precisely because their resolution would exceed the court's "judicial Power." *See* U.S. Const. art. III, § 1.

At its core, the question of self-execution addresses whether a treaty provision is directly enforceable in domestic courts. *Cornejo v. Cty. of San Diego*, 504 F.3d 853, 856 (9th Cir. 2007); Restatement (Fourth) of the Foreign Relations Law of the United States: Treaties § 110 cmt. b (Am. Law Inst., Tentative Draft No. 2, 2017) (draft approved at Annual Meeting on May 22, 2017) ("Restatement") ("When a treaty provision is invoked as a rule of decision in a judicial proceeding, the self-execution inquiry focuses on whether the provision is directly enforceable in court."). When courts are asked to enforce a treaty provision, they must determine whether the provision "addresses itself to the political, not the judicial department." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.), *overruled on other grounds by United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). Only if the provision serves as a "directive to domestic courts" may the judiciary enter the fray to enforce it. *Medellín*, 552 U.S. at 508. By contrast, "[a] treaty that is not self-executing . . . is not enforceable in the courts at the behest of anyone, presumably including other nations." Carlos Manuel Vázquez, *Laughing at Treaties*, 99 Colum. L. Rev. 2154, 2179 n.96 (1999).

Because non-self-executing treaty provisions are not judicially enforceable, claims seeking to enforce them are nonjusticiable.

B. Article VI is Non-Self-Executing

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín*, 552 U.S. at 506. We may also look to "the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations" as "aids to . . . interpretation." *Id.* at 507 (citation omitted). This text-focused approach helps answer the ultimate self-execution question: whether the treaty provision is directly enforceable in domestic courts.

Various textual considerations guide our inquiry, depending on the nature of the provision. Apart from the Supreme Court's reference to "aids to . . . interpretation," there is no laundry list of factors to consider. *See id.* (citation omitted). Rather, courts have gleaned interpretive clues from the text and context of treaties. *See Air France v. Saks*, 470 U.S. 392, 397 (1985) (examining "the context in which the written words are used" when construing a treaty). In addition, the recently adopted Restatement lays out "relevant considerations" for evaluation. Some treaties reveal their self-execution by expressly calling for direct judicial enforcement. The Warsaw Convention, which addresses international air travel, provides a well-recognized example. *See* Convention for the Unification of Certain Rules Relating to International Carriage by Air art. 28, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (specifying

how and where an "action for damages" may be brought against air carriers). Because self-execution is not always so explicit, we also assess whether the treaty's text indicates that the provision would have immediate effect or instead anticipates future action by a political branch. *See Doe v. Holder*, 763 F.3d 251, 255 (2d Cir. 2014). Future-oriented provisions are often non-self-executing because they require another branch to take action within its discretion to implement or honor the treaty obligation. *See, e.g.*, *Sanjaa v. Sessions*, – F.3d –, – (9th Cir. 2017); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). Another consideration is whether the treaty provision fails to provide a rule of decision for courts because it contains indeterminate, vague, or aspirational language. *See Doe*, 763 F.3d at 255. Lastly, we must be wary of textual interpretations that would have the judiciary exercise powers constitutionally assigned to another branch; thus, we look for indications of the President's and the Senate's intentions regarding self-execution. *See Medellín*, 552 U.S. at 517, 519, 521. To assist with this textual analysis, we may look to evidence of how the treaty's enforceability was understood both before and after ratification. *Id.* at 507.

Article VI has all the trappings of a non-self-executing treaty provision. The Treaty's text does not explicitly call for direct judicial enforcement of Article VI, and nothing in Article VI suggests that it "was designed to have immediate effect" in domestic courts. *See* Restatement § 110(2). Under Article VI, the United States "undertakes to pursue" future negotiations on "effective measures" to end "the nuclear arms race at an early date" and ultimately "on a treaty on general and complete disarmament." This provision is a prime example of language that offers no "directive to domestic courts" and instead calls for future action by a political branch. *See Medellín*, 552 U.S. at 508.

Foremost, Article VI is addressed to the executive, urging further steps only the executive can take—negotiation with other nations. Even the Marshall Islands appears to recognize as much, admitting that "[t]he text of Article VI placed a legal obligation *upon the Executive* running to" other Treaty parties. Article VI is also addressed implicitly to the Senate because it calls for "a treaty on general and complete disarmament," which would, under the Constitution, require both the President's signature and the Senate's consent. *See* U.S. Const. art. II, § 2, cl. 2 (providing that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"). In context, Article VI's use of the phrase "undertakes to pursue," like the phrase "undertakes to comply" in *Medellín*, is "a *commitment* on the part of [the Treaty parties] to take *future* action through their political branches." *See* 552 U.S. at 508 (citation omitted).

Even if Article VI in some sense created an imminent obligation to negotiate in good faith, the essential details of the negotiations—their time, their place, their nature—was unspecified upon ratification. Thus, the provision is "framed as a promise of future action by the member nations." *Fujii v. California*, 242 P.2d 617, 622 (Cal. 1952). That Article VI also calls for satisfactory results "at an early date"— textbook "language of futurity," *see Robertson v. Gen. Elec. Co.*, 32 F.2d 495, 500 (4th Cir. 1929)—only underscores that it is a non-self-executing provision. *See also* Sloss, *supra*, at 24 ("[I]f a treaty obligates the United States to take unspecified steps toward achieving an agreed objective at an unspecified future time . . . then action by the political branches is necessary to execute the treaty.").

Quite apart from Article VI's prospective focus, the provision's indeterminate language does not provide a rule of decision for courts. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (Marshall, C.J.) (distinguishing between rules of decision for courts and political questions that involve the exercise of nonjudicial discretion). "[A]s the Supreme Court explained

in *Medellín v. Texas*, the absence of mandatory language (i.e., 'must' or 'shall') indicates that a particular provision is not a self-executing directive." *United States v. Bahel*, 662 F.3d 610, 629–30 (2d Cir. 2011) (citation omitted). In context, the state parties' meek agreement that they "undertake[] to pursue" good-faith negotiations is at most a hortatory directive, much like the provision at issue in *Medellín*. *See* 552 U.S. at 500 (interpreting Article 94 of the United Nations Charter, which provides that each state "undertakes to comply with the decision[s]" of the International Court of Justice).

Article VI is also chock-full of vague terms that do not "provide specific standards" for courts to apply. *See Diggs*, 555 F.2d at 851. For example, it calls for negotiations on "effective measures" to cease the nuclear arms race and achieve disarmament, yet what constitutes "effective" is in the eyes of nuclear experts and negotiators. "[T]he use of the nebulous term 'effective'—which is never defined in the treaty—further demonstrates that Article [VI] is not a 'directive to domestic courts' that 'by itself give[s] rise to domestically enforceable federal law.'" *Sanjaa*, – F.3d at – (third alteration in original) (quoting *Medellín*, 552 U.S. at 505 n.2, 508). Although the Treaty's goal of universal nuclear disarmament may be clear, the path to achieving it is perilously uncertain. *See* Carlos Manuel Vázquez, *Four Problems with the Draft Restatement's Treatment of Treaty Self-Execution*, 2015 BYU L. Rev. 1747, 1750 (2016) (pointing to "treaties that require parties to use their best efforts to accomplish certain goals" as examples of those "too vague for judicial enforcement").

Likewise, Article VI's hopeful plea for successful negotiations to culminate "at an early date" is not indicative of self-execution. Nor is the Marshall Islands' position bolstered by the Treaty's preamble, in which the state parties "[d]eclar[e]" their "intention" to end the arms race "at the earliest possible date" and to move "in the direction of nuclear disarmament." "Aspirational language is the hallmark of a non-self-executing treaty . . . ." *Doe*, 763 F.3d at 255. Article 34 of the Refugee Convention, for example, provides that state parties "shall as far as possible facilitate the assimilation and naturalization of refugees." *INS v. Stevic*, 467 U.S. 407, 417 (1984) (citation omitted). The Supreme Court had no trouble concluding that this provision was "precatory and not self-executing." *Id.* at 429 n.22. The same can be said about Article VI. Indeed, the provision's wishful tenor reflects the reality of the Treaty itself: the state parties could agree only that they hoped to usher in a nuclear-free future.

Article VI also has a key hallmark of non-self-execution because the "consequences" of permitting enforcement by domestic courts, especially in the manner urged by the Marshall Islands, would implicate grave constitutional concerns that should "give [us] pause." *See Medellín*, 552 U.S. at 517. A provision cannot be judicially enforced if doing so would compel the courts to assume a role constitutionally assigned to the executive or the legislature. There is perhaps nothing more prototypically political than the negotiation of a multilateral international instrument. Deciding when, where, and whether to negotiate with foreign nations is within the exclusive authority of the executive. *See generally* U.S. Const. art. II, §§2, 3 (assigning the President powers over foreign affairs). Granting the Marshall Islands' requested relief would essentially appoint the district court as a Special Master overseeing the United States' nuclear treaty negotiations. To construe Article VI as self-executing and approve the Marshall Islands' claims would thus violate core separation- of-powers principles.

Last but not least, nothing about Article VI suggests that the President and the Senate intended it to be enforceable in domestic courts. A "treaty that does not evince such executory intentions is non-self-executing." *Cardenas v. Stephens*, 820 F.3d 197, 202 n.5 (5th Cir. 2016); *see also Medellín*, 552 U.S. at 519, 521. Even if we look beyond the text of Article VI itself,

there is no hint that domestic enforcement was envisioned. The Treaty's preamble notes the "intention" of the parties to accomplish nuclear disarmament, towards which the "cooperation of all States" is "[u]rg[ed]." But the Treaty is "silent as to any enforcement mechanism" in the event of noncompliance. *See Medellín*, 552 U.S. at 508. That silence is significant in the context of this treaty and this lawsuit, not least because, in the absence of a specific treaty directive, having states open their domestic courts to other treaty parties would be extraordinary. *See* Woolhandler, *supra*, at 765 ("[F]oreign nations were generally unable to sue in United States courts to enforce general treaty obligations. Indeed, they rarely if ever tried." (footnote omitted)); *cf. The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (Marshall, C.J.) ("One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another . . . .").

Preratification evidence confirms our interpretation of the text. Although the parties have not enlightened us to any specific intentions of President Johnson or President Nixon, contemporaneous testimony tells us something about the Senate's views on the subject. Senator Fulbright, then-Chairman of the Senate Foreign Relations Committee, implied that the entire Treaty was unenforceable as he exhorted his colleagues to give their consent during the ratification debate. *See* 115 Cong. Rec. 6198, 6199–6200, 6204–05 (1969). When pressed on what might happen if the United States breached the Treaty, he replied that, "since we do not belong to a world of law but only of the jungle law, the effect of [breach] would be the same as withdrawal" from the Treaty "because nobody is going to be able to enforce the [T]reaty against us." *Id.* at 6199. He continued to reassure his fellow senators: "A treaty may create certain obligations in the mind of a foreign country, but domestically it does not." *Id.* at 6204. Senator Fulbright's testimony does not "convey[] an intention" that either the Treaty generally, or Article VI specifically, are self-executing or were "ratified on these terms." *See Medellín*, 552 U.S. at 505 (quoting *Igartúa-De La Rosa*, 417 F.3d at 150).

The postratification history is consistent with these contemporaneous comments on the Treaty. Following the Treaty's ratification, Congress explicitly provided that "[t]he Secretary of State, under the direction of the President, shall have primary responsibility for the preparation, conduct, and management of United States participation in all international negotiations and implementation fora in the field of arms control, nonproliferation, and disarmament." *See* 22 U.S.C. §2574(a). "In furtherance of these responsibilities," Congress granted the President power to appoint representatives to conferences and activities "relat[ed] to the field of nonproliferation, such as the preparations for and conduct of the review relating to the Treaty on the Non-Proliferation of Nuclear Weapons." *Id.* In short, the political branches have worked hand in hand to fulfill the United States' obligations under Article VI—and they have done so without giving the slightest hint that the judiciary should play a Big Brother role by supervising negotiations. That same legislation requires the President and the Secretary of State to submit a report to *Congress* that details the United States' "adherence . . . to obligations undertaken in arms control, nonproliferation, and disarmament agreements" and "any ongoing … negotiations." 22 U.S.C. § 2593a(a)(2)–(3).

Similarly, ongoing Treaty review conferences have given no indication that the United States or other state parties contemplate any domestic enforcement mechanism for alleged Article VI violations. In fact, state parties have specifically indicated that "responses to concerns over compliance with any obligation under the Treaty by any State party should be pursued *by diplomatic means*." 2010 Review Conference of the Parties to the Treaty on the Non-

Proliferation of Nuclear Weapons, Final Document, pt. I, p. 3 ¶7, *available at* https://www.nonproliferation.org/wp-content/uploads/2015/04/2010_fd_part_i.pdf (emphasis added). And in conjunction with a 1990 Treaty review conference, the Senate agreed to a concurrent resolution to reaffirm support for the Treaty's objectives only after Senator Boschwitz, the resolution's sponsor, affirmed that the Treaty "is not self-executing." 136 Cong. Rec. 12,723 (1990). Although this congressional interpretation reflects the view of only a single member of Congress, it accords with the executive's present position, to which we give "great weight." *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982).

The Marshall Islands would have us ignore the self-execution question entirely, asserting that it is "[i]rrelevant" because Article VI creates "direct rights" that run from one treaty party to another and does not "concern[] alleged third- party treaty rights." Standing alone, this statement is partially true—the Treaty lays out obligations that run between treaty parties. But this approach evades the threshold issue of *where* and *how* these asserted "rights"— direct or otherwise—may be enforced. Article VI, as a treaty provision for which no domestic enforcement was explicitly or implicitly contemplated, does not provide a basis for justiciable claims in federal court.

II. Redressability

Having done the analytical heavy-lifting in addressing Article VI's status as a non-self-executing provision, we turn briefly to a related reason that the Marshall Islands' claims are nonjusticiable: under standing analysis, the asserted injuries are not redressable. Like the concept of self-execution, the standing requirement springs "[f]rom Article III's limitation of the judicial power to resolving 'Cases' and 'Controversies,' and the separation-of-powers principles underlying that limitation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014). To establish standing, a plaintiff must show injury in fact, causation, and redressability. *See id.* Although the parties and *amici* devote much attention to whether the Marshall Islands established injury in fact, we need not go down that road. Lack of redressability alone deprives the Marshall Islands of standing.

Simply put, the asserted injuries are not redressable because Article VI may not be enforced in federal court. "Redressability requires an analysis of whether the court has the power to right or to prevent the claimed injury." *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (Kennedy, J.). Even assuming that the Marshall Islands has suffered injury in fact, the federal courts have no power to right or to prevent that injury. *See id.* When a state party violates a non-self-executing treaty provision, "the judicial courts have nothing to do and can give no redress." *Head Money Cases*, 112 U.S. at 598.

III. Political Question Doctrine

As with self-execution and redressability in the context of treaty enforcement, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). The Marshall Islands' claims present inextricable political questions that are nonjusticiable and must be dismissed. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 977 (9th Cir. 2007).

It is well settled that not all cases involving foreign relations raise political questions. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229–30 (1986). However, the Supreme Court has recognized that decisions concerning foreign relations are often inherently political: "Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the

Government's views." *Baker*, 369 U.S. at 211 (footnotes omitted). It should be no surprise that the self-execution inquiry in treaty cases will frequently track the analysis of whether the claims raise political questions.

* * * *

The district court relied on the first two *Baker* factors, and we primarily do the same. Indeed, we have recognized that the first two are likely the most important. *See Alperin*, 410 F.3d at 545. Under the first factor, the Marshall Islands' claims involve "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *Baker*, 369 U.S. at 217—namely, the decision of when, where, whether, and how the United States will negotiate with foreign nations to end the nuclear arms race and accomplish nuclear disarmament. *See* U.S. Const. art. II, §§ 2, 3. "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). We simply cannot square "the 'primacy of the Executive in the conduct of foreign relations' and the Executive Branch's lead role in foreign policy," *Taiwan v. U.S. Dist. Court for the N. Dist. of Cal.*, 128 F.3d 712, 718 (9th Cir. 1997) (citation omitted), with an injunction that compels the United States to "*call[] for and conven[e]* negotiations for nuclear disarmament in all its aspects."

The second *Baker* factor offers an additional impediment: the "lack of judicially discoverable and manageable standards for resolving" key issues inextricably intertwined with the relief the Marshall Islands seeks. *See Baker*, 369 U.S. at 217. As we have said, Article VI contains an array of vague terms and a dearth of applicable standards. Our self-execution analysis applies with equal force under this *Baker* factor. *See generally* Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599, 631 (2008) (explaining that treaties that are non-self- executing because they are "too vague for judicial enforcement" are "no different from constitutional and statutory provisions that are regarded as nonjusticiable" under the political question doctrine).

The Marshall Islands and *amici* seek to narrow the scope of our inquiry by focusing only on the part of the complaint that concerns the United States' obligation to negotiate in "good faith," a term they argue is frequently applied by courts in other contexts, such as labor negotiations. This surgical attempt would read that term in isolation and out of context. The question is not just what constitutes "good faith," but also what measures are "effective," what qualifies as the "cessation" of the nuclear arms race, what counts as "an early date," and even what it means to "pursue" these kinds of complex and multilateral negotiations. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc) ("The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion."). Here, only a second's thought brings embedded political questions to the surface, and the remaining *Baker* factors also counsel in favor of demurring.

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3. *Arias Leiva*: Litigation Regarding U.S.-Colombia Extradition Treaty

As discussed in *Digest 2016* at 153-56, the U.S. government submitted evidence (including declarations by Assistant Legal Adviser Tom Heinemann) to counter claims by an individual sought for extradition that the extradition treaty between the United States and Colombia was not in force. *In the matter of the extradition of Andres Felipe Arias Leiva*, No. 16-23468 (S.D. Fla.). On January 13, 2017, the U.S. government filed its supplemental reply brief in further opposition to the motion of defendant Arias Leiva to dismiss the complaint and vacate his arrest warrant. Excerpts follow (with footnotes omitted) from the January 13, 2017 brief regarding claims by the defendant that the court should find the extradition treaty not to be in force. The brief is available in full at https://www.state.gov/s/l/c8183.htm.

* * * *

In his response, Arias Leiva fails to address directly the government's argument that whether a treaty was properly ratified is a nonjusticiable political question. Instead, he attempts to divert the Court's attention by arguing that whether a court has jurisdiction over a case is a justiciable question. …That argument misses the point. The government agrees that this Court must decide whether it has jurisdiction over this case. The government also agrees with Arias Leiva that whether the Court has jurisdiction over this case turns on whether the United States has a valid extradition treaty with Colombia. But, in deciding that issue, the Court must defer to the view of the U.S. Department of State. See *Meza v. U.S. Attorney General*, 693 F.3d 1350, 1358 (11th Cir. 2012). By stating in this case that the United States has a valid extradition treaty with Colombia, the government is not "manufacturing" jurisdiction, as Arias Leiva claims. … Rather, jurisdiction exists because, as evidenced by the declarations submitted by the Department of State (and by the Ministry of Foreign Affairs), the Treaty is in force.

In addition, Arias Leiva suggests that the Supreme Court's decision in *Doe ex dem. Clark v. Braden*, which holds that the issue of ratification is nonjusticiable, and similar decisions by other federal courts, are not on point because they involved "private litigants" claiming that a treaty was not in force. … This contention is flawed. Arias Leiva overlooks *Kastnerova v. United States*, an extradition case cited by the government, in which the Eleventh Circuit quoted the Supreme Court's pronouncement in *Terlinden v. Ames* that the question of "whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and . . . the courts ought not . . . interfere with the conclusions of the political department in that regard." … Moreover, here, it is a private individual—Arias Leiva himself, and not the states—who claims the Treaty is not in force.

Arias Leiva also posits that, because courts may properly interpret a treaty, they may also decide whether a treaty has been duly ratified. But treaty interpretation (what a treaty means) and treaty ratification (whether a treaty has been formally consented to) are decidedly distinct issues, which are treated as such by the courts. *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 690 F.2d 303, 311 (2d Cir. 1982) ("While federal courts are necessarily called upon to interpret treaties, they must observe the line between treaty interpretation on the one hand and negotiation, proposal and advice and consent and ratification on the other."). Moreover, Arias Leiva is wholly incorrect that even in the area of treaty interpretation, courts are free to ignore the view of the

Executive Branch. See, *e.g.*, *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'") (citation omitted).

II. The Treaty Is Not One-Sided, But Even If It Were, It Would Remain in Force

Arias Leiva's assertion that the Treaty is one-sided, and thus invalid, is erroneous as matters of both fact and law. The Treaty obligates both countries to "extradite to each other, subject to the provisions described in this Treaty, persons found in [their] territor[ies] . . . ." Art. 1 of the Treaty. As a legal matter, the nullification of Colombia's implementing legislation does not affect this obligation at the international level, and, as a practical matter, it has not affected Colombia's extradition of fugitives to the United States. Colombia accepts U.S. extradition requests, extradites fugitives to the United States in response to those requests, and understands that its own extradition requests are based on the Treaty and that those requests will be processed in accordance with the Treaty. … Arias Leiva disputes none of these points—nor can he.

Arias Leiva, instead, cherry-picks a handful of cases in which Colombia has denied U.S. extradition requests and offers those in support of the notion that Colombia fails to observe the Treaty. But he offers no explanation as to why those denials actually represent a failure to observe the Treaty. The requests could have been denied for any of the numerous reasons expressly authorized under the Treaty, such as where the offense is of a political character and/or punishable by death, where the statute of limitations has run, and where the fugitive is a citizen of the requested country.

For example, according to the news article provided by Arias Leiva, Colombia denied the United States's request for the extradition of drug kingpin Walid Makled because Venezuela had submitted an earlier request for his extradition. … Such a denial is expressly permitted under Article 14 of the Treaty, which allows "[t]he Executive Authority of the Requested State, upon receiving requests from the other Contracting Party and from a third State . . . for the extradition of the same person . . . [to] determine to which of the Requesting States it will extradite that person." Even if Colombia denies some U.S. extradition requests, it is possible for denials to be consistent with the Treaty, and Colombia thus cannot be said to be failing to observe the Treaty. Even if Colombia did deny U.S. extradition requests for reasons not permitted under the Treaty, such action would not invalidate the Treaty. At most, Colombia would be violating its Treaty obligations. As the Supreme Court stated in *Charlton v. Kelly*, "[w]here a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party …." 229 U.S. 447, 474 (1913) (citation omitted). There, the Supreme Court held that the extradition treaty between the United States and Italy remained in force notwithstanding Italy's refusal to surrender its own citizens because doing so violated its domestic law. *Id*. at 476. The Court reasoned that "extradition treaties need not be reciprocal." *Id*. Arias Leiva's suggestion that Colombia's failure to abide by the Treaty automatically renders it void is nonsensical and, if adopted, could have sweeping implications for all of the United States's treaty relationships, as it would mean that our partners could terminate their treaty obligations simply by failing to comply with them.

III. Under International Law, the Treaty Is in Force

As the Department of State has explained, international law and practice as reflected in the Vienna Convention on the Law of Treaties (the "Vienna Convention"), May 23, 1969, 1155 U.N.T.S. 331, compels the conclusion that the Treaty is in force. …See *United States v. Martinez*, 755 F. Supp. 1031, 1033 (N.D. Ga. 1991) (citing to the Vienna Convention in support of the conclusion that the Treaty "remains in force under principles of international law"). Arias

Leiva's argument to the contrary is incorrect.

First, the Vienna Convention demonstrates that the Treaty entered into force. Under Article 24, "[a] treaty enters into force… upon such date as it may provide," which in this case, under Article 21(2) of the Treaty, is March 4, 1982, "the date of the exchange of the instruments of ratification." Article 2(1)(b) provides that "ratification" is "an international act …whereby a State establishes on the international plane its consent to be bound by a treaty" (it is not that ratification "occurs when" a state establishes such consent, as Arias Leiva represents …. Colombia's exchange of instruments of ratification of the Treaty thus expressed its consent to be bound by the Treaty. Arias Leiva asserts that, because Colombia's ratification was later deemed unconstitutional in Colombia, Colombia has not expressed its consent to be bound, and the Treaty is not in force. But the Vienna Convention provides otherwise.

As a threshold matter, under Article 46, a state "may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest …" meaning "objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith." Here, there was certainly no manifest violation; indeed, the Colombian ratification law was not deemed unconstitutional until over six years after its enactment. Thus, Article 46 prohibits Colombia from seeking to invalidate its consent to be bound by the Treaty (or the Treaty itself) based on the nullification of its ratification law. See U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 251-52 (2003) (quoting U.S. diplomatic note, which rejected Peru's assertion that its consent to be bound by a multilateral agreement was invalid under Article 46 because its ratification of the agreement violated its political constitution). Furthermore, under Articles 65(1) and 67(1) of the Vienna Convention, if Colombia had wanted to "invoke" a purported "defect in its consent to be bound by [the T]reaty or a ground for impeaching the validity of [the T]reaty [or] terminating it," it would have had to "notify the [United States] of its claim" in writing. It has not done so. …

Second, the Vienna Convention also establishes that the Treaty has never been terminated. Article 54 provides two straightforward options for terminating a treaty: (1) exercising the termination procedures set forth in the applicable treaty (here, Article 21 of the Treaty, requiring that one party notify the other of termination), or (2) obtaining the consent of the other party to terminate the treaty. Colombia has pursued neither option. … The extemporaneous statements of the Colombian President and others regarding the invalidity of the Treaty do not in any way affect the operation of the Treaty because, as described above, under Articles 65(1) and 67(1) of the Vienna Convention a party seeking to invalidate or terminate a treaty must do so by notifying the other party in writing.

Thus, as a matter of international law, the Treaty continues in force despite the fact that the Colombian Supreme Court struck down the ratification law, consequently preventing Colombia from applying the Treaty under its domestic law. This situation is analogous to a non-self-executing treaty that lacks implementing legislation in the United States, which cannot be given domestic effect, but the treaty obligations still exist internationally. For example, the Supreme Court in *Medellin v. Texas* held that, even though obligations of the United States under the non-self-executing United Nations Charter, Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, and International Court of Justice ("ICJ") Statute were not enforceable domestically, the United States remained bound by those obligations as a matter of international law. 552 U.S. 491, 522 (2008) ("[W]hile the ICJ's

judgment . . . creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions."). Likewise, Colombia remains bound by the Treaty even though it does not enforce the Treaty domestically. There is, therefore, no question the Treaty remains in force.

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On February 6, 2017, the U.S. district court magistrate judge denied the motion to dismiss the complaint and vacate the arrest warrant in the case of Arias Leiva. Excerpts follow (with footnotes omitted) from the judge's analysis of the claims regarding the effectiveness of the extradition treaty. The court's order and opinion is available in full at https://www.state.gov/s/l/c8183.htm.

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The official positions of the government of the United States and the government of Colombia—that the Extradition Treaty remains in effect—have been established through the declaration of Mr. Heinemann and the Diplomatic Note. Nonetheless, Dr. Leiva insists that there is no extradition treaty in effect between the United States and Colombia. … Dr. Leiva argues that the Extradition Treaty is not in force because, among other things, extradition requests presented by the United States to Colombia are not processed under the Extradition Treaty. … Dr. Leiva insists that this is evidence that the Extradition Treaty, at best, is one-sided and notes that one-sided treaties do not exist.

As evidence that the Extradition Treaty is not in effect, Dr. Leiva cites to several instances where the Colombian government has denied the United States' requests for extradition. … The Court rejects Dr. Leiva's argument that Colombia's denials of these extradition requests is evidence that the Extradition Treaty is an impermissible, one-country treaty. The fact that the Colombian government has, at times, refused some of the United States' requests for extradition is immaterial. It is not out of the ordinary that a country, for a multitude of reasons, refuses an extradition request. In the United States, even after a certificate of extraditability is issued by a United States Magistrate Judge, the Secretary of State retains broad discretion and may ultimately refuse the extradition request. See *Martin v. Warden, Atlanta Pen*, 993 F.2d 824, 829 (11th Cir. 1993). Moreover, it is not for this Court to decide whether Colombia has been complying in good faith with its treaty obligations. See *Charlton v. Kelly*, 229 U.S. 447, 471 (1913).

In *Charlton*, the government of Italy sought the extradition of an American citizen for the murder of his wife. The petitioner filed a writ of habeas corpus arguing, among other things, that because Italy refused to extradite Italian nationals to the United States, "the treaty ha[d] thereby ceased to be of obligation on the United States." *Charlton*, 229 U.S. at 469. The Secretary of State in a memorandum took the position that:

> since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy, even though Italy should not, by reason of the provisions of her municipal law, be able to surrender its citizens to us.

Id. at 476. In light of the Secretary of State's position, the Supreme Court affirmed the dismissal of the petition for writ of habeas corpus, stating:

> The Executive Department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the [petitioner] as one imposed by the treaty [as] the supreme law of the land, and as affording authority for the warrant of extradition.

Id. In the instant case, the United States government has never taken the position that Colombia is in breach of its treaty obligations. To the contrary, it is the position of the executive branches of both governments that the Extradition Treaty remains in effect. Accordingly, the Court will not find that the Extradition Treaty is not in effect on the basis that Colombia has purportedly not complied with its obligations under the Extradition Treaty.

Dr. Leiva also relies on statements made by this Court and the Eleventh Circuit concerning the status of the Extradition Treaty. …

The statements in the[se] …cases concerning the validity of the Extradition Treaty constitute dicta and have no binding effect on this Court. See *United States v. Eggersdorf*, 126 F.3d 1318, 1322 n. 4 (11th Cir. 1997) … None of the cases cited by Dr. Leiva concern the extradition of an individual from the United States to Colombia pursuant to the Extradition Treaty. Thus, in the cases cited by Dr. Leiva, the courts did not have the opportunity to address the issue before this Court: whether the Extradition Treaty is in effect to permit the extradition of a Colombian citizen from the United States to Colombia.

Unlike the cases cited by Dr. Leiva, the government has filed *In the Matter of the Extradition of Maurcio Pardo-Hasche*, No. 01-Misc.Cr.-49-A, Decision & Order (W.D.N.Y. Aug. 30, 2002) which is factually on point because it concerned an individual being extradited to Colombia pursuant to the Extradition Treaty. For this reason and based on *Pardo-Hasche*'s sound analysis, the Court finds the *Pardo-Hasche* decision persuasive.

In *Pardo-Hasche*, a Colombian national (hereinafter "extradite") challenged the validity of the extradition treaty between Colombia and the United States. *Pardo-Hasche*, Decision & Order, at 1. The court presumed that the extraditee had standing to raise that challenge and ruled against the extraditee on the merits. … Despite the Colombian Supreme Court's rulings finding that the treaty had never been ratified, the court in *Pardo-Hasche* concluded that the Extradition Treaty was in effect.…Importantly, the court noted that both the executive branch of the United States and the executive branch of Colombia (through a Memorandum from the Embassy of Colombia) had taken the position that the extradition treaty was valid. In light of the consensus by both countries, the Court ruled that the treaty was in full effect. The fact that Colombia also extradited individuals through means other than the Extradition Treaty did not alter the court's ruling that the treaty was still in effect because:

> [a]s noted in [*United States v.*] *Mitchell*, [No. 83-CR-86, 1990 WL 132573 (E.D.Wis. 1990)] it is not for the United States judiciary to assess the validity of such actions taken by the government of Colombia in this context. The existence of an internal political power struggle which may interfere with the ability of Colombia to effectuate certain terms of the Extradition Treaty relating to the extradition of persons *from* Colombia does not, without more, invalidate the treaty.

Id. at 8 (emphasis in original). Similarly here, the executive branches of the United States and Colombia have stated that it is the understanding of both sovereigns that the Extradition Treaty is currently in effect. Thus, the Extradition Treaty remains in full force and effect.

Finally, Dr. Leiva relies on the Vienna Convention on the Law of Treaties ("Vienna Convention") to support his argument that the Extradition Treaty is not in effect. … The Court finds that the Vienna Convention would not support a finding that the Extradition Treaty remains in effect because neither party has given notice of its intent to terminate the Extradition Treaty.

In sum, the record evidence establishes that it is the official position of the executive branches of the United States and Colombia that the Extradition Treaty remains in full force and effect. …

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Cross References

Draft General Comment on Article 6 of the ICCPR, **Ch. 6.A.2.b.**
U.S. notice of withdrawal from UNESCO, **Ch. 7.A.1.**
ILC's Work at its 69th Session: Provisional Application of Treaties, **Ch. 7.C.1.**
Air transport agreements, **Ch. 11.A.**
Air Line Pilots Ass'n, et al. v. Chao *(U.S.-U.K. Air Transport Agreement)*, **Ch. 11.A.2.**
Interpretation of NAFTA, **Ch. 11.B.**
U.S. notice of intention not to join Trans-Pacific Partnership, **Ch. 11.D.1.**
Cuba maritime boundary agreements, **Ch. 12.A.4.a.**
U.S. notice of intent to withdraw from Paris Agreement, **Ch. 13.A.1.**
Entry into force of Minamata Convention on Mercury, **Ch. 13.A.3.**
U.S. acceptance of amendments to transboundary air pollution convention, **Ch. 13.A.4.**
U.S. ratification of international fisheries agreements, **Ch. 13.B.3.**
U.S.-Mexico water treaty, **Ch. 13.C.2.**
Cultural property MOUs, **Ch. 14.A.**
U.S. rejoining convention relating to international exhibitions, **Ch. 14.E.2**
Securities Convention entry into force, **Ch. 15.A.3.**
Water Splash *case (regarding Hague Service Convention)*, **Ch. 15.C.1.**
U.S. ratification of protocol for Montenegro to join NATO, **Ch. 18.A.3.a.**
Cooper v. TEPCO *(Convention on Supplementary Compensation for Nuclear Damage)*, **Ch. 19.B.2**