

various exceptions to immunity set forth in the FSIA, including Section 1605B.³⁰ Aside from these efforts to hold China accountable under existing exceptions in the FSIA, some legislators have signaled their interest in amending the FSIA to strip China of sovereign immunity relating to its handling of the coronavirus pandemic.³¹ In fact, two legislators, Representative Dan Crenshaw and Senator Tom Cotton, have already introduced bills that would amend the FSIA to include a proposed Section 1605C, allowing foreign states to be sued for spreading COVID-19 and tortious acts relating to the concealment of the existence of COVID-19.³²

INTERNATIONAL ORGANIZATIONS

Trump Administration Submits Notice of U.S. Withdrawal from the World Health Organization Amid COVID-19 Pandemic

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President Trump decided in mid-April of 2020 to suspend U.S. funding for the World Health Organization (WHO) and to have his administration review its performance, contending that it was biased in favor of China and inept in its handling of the COVID-19 pandemic. In a letter to the WHO director-general a month later, Trump informed the director-general that his administration's review confirmed his accusations. He threatened that, unless the WHO implemented significant reforms, the United States would reconsider its membership in the organization. Less than two weeks later, on May 29, 2020, Trump announced his decision to terminate the U.S. relationship with the WHO. On July 6, the administration gave formal notice of U.S. withdrawal to the UN secretary-general, the depositary for the WHO Constitution. Assuming certain legal preconditions are satisfied and the notice of withdrawal is not revoked, the withdrawal will take effect on July 6, 2021.

³⁰ *Id.* at 11–14 (invoking 28 U.S.C. § 1605(a)(2) (commercial activity exception); § 1605(a)(5) (exception for personal injury or death or property damage occurring within the United States caused by certain tortious activity of the foreign state or its officials); § 1605B (the JASTA's exception)); *see also* First Amended Class Action Complaint at 22, *Bella Vista LLC v. People's Republic of China*, No. 220–0574 (D. Nev. Mar. 23, 2020) (invoking these same provisions); Class Action Complaint at 3, *Buzz Photos v. People's Republic of China*, No. 320–0656 (N.D. Tex. Mar. 17, 2020) (asserting the Court has subject matter jurisdiction under “the Justice Against Sponsors of Terrorism Act (“JASTA”) exception” and separately invoking 28 U.S.C. § 1605); Class Action Complaint at 10, *Benitez-White v. People's Republic of China*, No. 420–1562 (S.D. Tex. May 3, 2020) (maintaining that China is not entitled to sovereign immunity under the JASTA).

³¹ Sean Mirski, *Senate Judiciary Committee Examines the Foreign Sovereign Immunities Act and Coronavirus-Related Suits Against China*, *LAWFARE* (June 30, 2020), at <https://www.lawfareblog.com/senate-judiciary-committee-examines-foreign-sovereign-immunities-act-and-coronavirus-related-suits>; Comm. on the Judiciary, *The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability* (June 23, 2020), at <https://www.judiciary.senate.gov/meetings/the-foreign-sovereign-immunities-act-coronavirus-and-addressing-chinas-culpability>.

³² *Holding the Chinese Communist Party Accountable for Infecting Americans Act of 2020*, S. 3662, 116th Cong. § 4 (2020); *Holding the Chinese Community Party Accountable for Infecting Americans Act of 2020*, H.R. 6519, 116th Cong. § 4 (2020).

The WHO was established on April 7, 1948, when the WHO Constitution entered into force.¹ Because the WHO Constitution does not provide for withdrawal,² when the United States sought membership in the WHO, the House and the Senate stipulated in a joint resolution authorizing U.S. membership that:

In adopting this joint resolution the Congress does so with the understanding that, in the absence of any provision in the World Health Organization Constitution for withdrawal from the Organization, the United States reserves its right to withdraw from the Organization on a one-year notice: *Provided, however*, That the financial obligations of the United States to the Organization shall be met in full for the Organization's current fiscal year.³

President Truman made explicit that he was “acting pursuant to the authority granted by the joint resolution of the Congress . . . and subject to the provisions of that joint resolution” when he submitted the instrument of U.S. acceptance to the WHO Constitution.⁴ A copy of the joint resolution was enclosed with this instrument of acceptance.⁵ At the First World Health Assembly on July 2, 1948, the Assembly unanimously adopted a resolution that “[r]ecognized the validity of the ratification of the Constitution by the United States of America.”⁶ This resolution passed after a short discussion in which the desirability of U.S. admission to the WHO was emphasized even though, as the UK representative put it, “[t]here [was] nothing to be gained by attempting to deny that certain conditions are attached to the ratification.”⁷

In confronting the novel coronavirus, the WHO has faced a pandemic unparalleled in the modern era.⁸ Trump began criticizing the WHO's response to the outbreak beginning in late March of 2020, voicing concerns that the Organization had “very—very much sided with China.”⁹ Trump's criticisms of the WHO escalated in early April when he warned that he would be “put[ting] a hold on” funding to the Organization because it had purportedly

¹ United Nations Depository Status for the Constitution of the World Health Organization, at https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IX-1&chapter=9&lang=en [hereinafter Depository Status for the WHO Constitution].

² See generally Constitution of the World Health Organization, *opened for signature* July 22, 1946, 62 Stat. 2679, 14 UNTS 185.

³ Act of June 14, 1948, Pub. L. No. 80–643, § 4, 62 Stat. 441 [hereinafter Joint Resolution Authorizing WHO Membership]. For more on how this provision came to be included in the joint resolution, see Jean Galbraith, *The US Cannot Withdraw from the WHO Without First Paying Its Dues*, JUST SECURITY (May 26, 2020), at <https://www.justsecurity.org/70384/the-us-cannot-withdraw-from-the-who-without-first-paying-its-dues>.

⁴ 62 Stat. 2792 (1948) (reproducing Truman's acceptance of the WHO Constitution on behalf of the United States) [hereinafter U.S. Acceptance of the WHO Constitution].

⁵ 62 Stat. 2792–93 (1948).

⁶ *Id.* (reproducing a communication made by the UN secretary-general to the U.S. secretary of state); see also World Health Assembly Res. WHA1.76, para. 1 (July 2, 1948).

⁷ World Health Assembly, 1st Sess., 10th plen. mtg. at 77–80 (1948), available at https://apps.who.int/iris/bitstream/handle/10665/85592/Official_record13_eng.pdf?sequence=1&isAllowed=y [<https://perma.cc/LXL9-Y83J>].

⁸ Tedros Adhanom Ghebreyesus, Dir.-Gen., World Health Org., Opening Remarks at the Member State Briefing on the COVID-19 Pandemic Evaluation (July 9, 2020), at <https://www.who.int/dg/speeches/detail/who-director-general-opening-remarks-at-the-member-state-briefing-on-the-covid-19-pandemic-evaluation-9-july-2020> (calling the coronavirus pandemic an “unprecedented threat”).

⁹ Remarks at a White House Coronavirus Task Force Press Briefing, 2020 DAILY COMP. PRES. DOC. 190, at 11 (Mar. 25).

mishandled the coronavirus outbreak.¹⁰ He criticized the WHO for not declaring the coronavirus outbreak a pandemic sooner,¹¹ “minimiz[ing] the threat very strongly,”¹² announcing in January that the virus could not be transmitted between humans,¹³ and criticizing his decision to restrict travel from China.¹⁴ On April 14, Trump announced that he was “instructing my administration to halt funding of the World Health Organization while a review is conducted to assess [its] role in severely mismanaging and covering up the spread of the coronavirus.”¹⁵ His response immediately drew criticism from foreign leaders.¹⁶ Closer to home, leading congressional Democrats described Trump’s decision as an “abdication of international responsibility and leadership” and an attempt to deflect attention from how the “White House . . . grossly mishandled this crisis from the beginning, ignoring multiple warnings and squandering valuable time, dismissing medical science, [and] comparing COVID-19 to the common cold.”¹⁷

On the first day of the Seventy-third World Health Assembly held virtually on May 18, Trump sent a four-page letter to the WHO director-general.¹⁸ In the letter, Trump

¹⁰ Remarks at a White House Coronavirus Task Force Press Briefing, 2020 DAILY COMP. PRES. DOC. 247, at 4 (Apr. 7).

¹¹ *Id.* (“[The WHO] really—they missed the call. They could have called it months earlier. They would have known, and they should have known.”).

¹² Remarks at a White House Coronavirus Task Force Press Briefing, 2020 DAILY COMP. PRES. DOC. 250, at 5 (Apr. 8).

¹³ *Id.*

¹⁴ *Id.* For an analysis of the validity of Trump’s criticisms at the April 8 briefing, see Aaron Blake, *Trump vs. the WHO: Breaking Down the President’s Claims and the WHO’s Actions*, WASH. POST (Apr. 9, 2020), at <https://www.washingtonpost.com/politics/2020/04/09/trump-vs-who> (noting, for example, that the WHO had not announced in January that the virus could not be transmitted between humans, but rather stated only that Chinese investigations had “found no clear evidence of human-to-human transmission”).

¹⁵ The President’s New Conference, 2020 DAILY COMP. PRES. DOC. 266, at 1 (Apr. 14); see also White House Press Release, President Donald J. Trump Is Demanding Accountability from the World Health Organization (Apr. 15, 2020), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-demanding-accountability-world-health-organization> [<https://perma.cc/G2E9-FSWL>] (listing the Trump administration’s criticisms of the WHO’s handling of the coronavirus pandemic and “structural issues and necessary reforms”). As of July 2020, the United States has an outstanding balance of almost \$58 million with the WHO for the current year. World Health Org., Assessed Contributions Overview for All Member States (July 31, 2020), at https://www.who.int/about/finances-accountability/funding/AC_Status_Report_2020.pdf?ua=1 [<https://perma.cc/3RTD-TCGJ>]. Taking into account its outstanding balance from years prior, the United States has a total outstanding balance of \$99 million. *Id.* In addition, the United States has historically made even larger voluntary contributions to the WHO—contributions which from fiscal years 2012 to 2018 averaged around \$254 million per year. LUISA BLACHFIELD & TIJAJI SALAAM-BLYTHER, CONG. RESEARCH SERV., IN11369, U.S. FUNDING TO THE WORLD HEALTH ORGANIZATION 1 (2020), at <https://crsreports.congress.gov/product/pdf/IN/IN11369> [<https://perma.cc/5PR2-4TSV>].

¹⁶ Rick Noack, *After Trump Suspends Payments to WHO, Other Countries Rally Behind the Agency*, WASH. POST (Apr. 15, 2020), at https://www.washingtonpost.com/world/after-trump-suspends-payments-to-who-other-countries-rally-behind-the-agency/2020/04/15/1a2ec7c6-7f0e-11ea-84c2-0792d8591911_story.html (reporting that officials from the EU, Iran, New Zealand, and Russia criticized the decision, while other officials reaffirmed their support for the WHO).

¹⁷ Justin Wise, *Democrats Blast Trump’s Move to Suspend WHO Funding*, THE HILL (Apr. 14, 2020), at <https://thehill.com/homenews/House/492839-democrats-blast-trump-move-to-suspend-who-funding> (quoting Representative Karen Bass and Senator Patrick Leahy).

¹⁸ Letter from Donald J. Trump, President of the United States, to Tedros Adhanom Ghebreyesus, Dir.-Gen., World Health Org. (May 18, 2020), available at <https://www.whitehouse.gov/wp-content/uploads/2020/05/Tedros-Letter.pdf> [<https://perma.cc/2YXG-8GDT>] [hereinafter U.S. Letter to the WHO]. Although Trump was invited to speak at the Seventy-third World Health Assembly, he declined the request. Gerry Shih, Emily Rauhala & Josh Dawsey, *China’s Xi Backs WHO-Led Review of COVID-19 Outbreak*, WASH. POST (May 18,

asserted that his administration's review of the Organization's handling of the pandemic "confirmed many of the serious concerns I raised last month . . . especially the World Health Organization's alarming lack of independence from the People's Republic of China."¹⁹ The letter largely reiterated Trump's previous criticisms of the WHO, but in more detail.²⁰ He also accused the WHO of ignoring early reports of the virus's spread in Wuhan and not investigating the situation, improperly praising China for its transparency despite irregularities in China's reporting of information to the WHO, and issuing "grossly inaccurate or misleading" information of the coronavirus.²¹ Trump concluded the letter with an ultimatum that "if the World Health Organization does not commit to major substantive improvements within the next 30 days, I will make my temporary freeze of United States funding to the World Health Organization permanent and reconsider our membership in the organization."²²

On May 29, just eleven days after sending the letter to the WHO, Trump announced that he would be "terminating" U.S. engagement with the WHO.²³ Trump stated:

We have detailed the reforms that it must make and engage with them directly, but they have refused to act. Because they have failed to make the requested and greatly needed reforms, we will be today terminating our relationship with the World Health Organization and redirecting those funds to other worldwide and deserving, urgent, global public health needs.²⁴

Then, on July 6, the Trump administration formally submitted the U.S. notice of withdrawal from the WHO Constitution to the UN secretary-general, the depositary for the WHO Constitution.²⁵ The following day, the spokesperson for the secretary-general stated:

2020), at https://www.washingtonpost.com/world/asia_pacific/chinas-xi-backs-who-led-review-of-covid-19-outbreak-proposes-aid-for-developing-world/2020/05/18/911a1544-98df-11ea-ad79-eef7cd734641_story.html.

¹⁹ U.S. Letter to the WHO, *supra* note 18, at 1; *but see* Pien Huang, *Fact-Checking and Assessing Trump's Letter of Rebuke to WHO*, NPR (May 20, 2020), at <https://www.npr.org/sections/goatsandsoda/2020/05/20/858911395/fact-checking-and-assessing-trumps-letter-of-rebuke-to-who> (critiquing the accuracy of various claims in the letter).

²⁰ U.S. Letter to the WHO, *supra* note 18, at 1–4.

²¹ *Id.* at 1–3. In addition to these criticisms of the WHO's handling of the pandemic, the Trump administration has also condemned the Organization for excluding Taiwan from the World Health Assembly, accusing the director-general of yielding to pressure from Beijing. Michael R. Pompeo, Sec'y of State Press Release, Taiwan's Exclusion from the World Health Assembly (May 18, 2020), at <https://www.state.gov/taiwans-exclusion-from-the-world-health-assembly> [<https://perma.cc/AQ7X-5QZC>].

²² U.S. Letter to the WHO, *supra* note 18, at 4. At the World Health Assembly, U.S. Secretary of Health and Human Services Alex Azar leveled further criticisms against the WHO, attributing the scale of the pandemic to the WHO's "failure . . . to obtain the information that the world needed, and that failure cost many lives." Plenary Statement from U.S. Secretary of Health and Human Services Alex M. Azar II to the World Health Assembly, at 1, at https://apps.who.int/gb/statements/WHA73/PDF/United_States_of_America.pdf [<https://perma.cc/G26H-S6WP>].

²³ Remarks on United States Actions Against China, 2020 DAILY COMP. PRES. DOC. NO. 405, at 1 (May 29).

²⁴ *Id.*

²⁵ Stéphan Dujarric, Spokesman for the Sec'y-Gen. Press Release, Note to Correspondents in Answer to Questions Regarding the World Health Organization (July 7, 2020), at <https://www.un.org/sg/en/content/sg/note-correspondents/2020-07-07/note-correspondents-answer-questions-regarding-the-world-health-organization> [<https://perma.cc/3KVN-SVS3>] [hereinafter UN Acknowledgement of U.S. Notice of Withdrawal].

[O]n 6 July 2020, the United States of America notified the Secretary-General . . . of its withdrawal from the World Health Organization, effective on 6 July 2021.

The United States is a party to the World Health Organization Constitution since 21 June 1948. The United States' participation in the World Health Organization was accepted by the World Health Assembly with certain conditions set out by the US for its eventual withdrawal from the World Health Organization. The said conditions include giving a one-year notice and fully meeting the payment of assessed financial contributions.

The Secretary-General, in his capacity as depository, is in the process of verifying with the World Health Organization whether all the conditions for such withdrawal are met.²⁶

In a communication to the other treaty parties on July 14, 2020, the secretary-general stated that the withdrawal “would take effect for the United States of America on 6 July 2021 pursuant to the provisions of the Joint Resolution of the Congress of the United States to which the acceptance of the Constitution of the World Health Organization by the United States is subject.”²⁷

After the initial announcement in late May, the director-general of the WHO stated that the Organization “wish[es] for this collaboration to continue” with the United States.²⁸ Other foreign leaders and health officials criticized the U.S. decision. The president of the European Commission issued a statement urging the United States to reconsider,²⁹ and the health minister of South Africa labelled the decision “unfortunate.”³⁰ The notice of withdrawal received strong criticism domestically, with House Speaker Nancy Pelosi calling it “an act of true senselessness” that “is crippling the international effort to defeat the virus.”³¹ Others have observed that the U.S. withholding of funds and withdrawal from the WHO would severely undermine not just the Organization's short-term initiatives addressing the COVID-19 pandemic, but also its long-term public health initiatives around the world.³²

²⁶ *Id.*

²⁷ United Nations, Depository Notification C.N.302.2020.TREATIES-IX.1 (July 14, 2020), available at <https://treaties.un.org/doc/Publication/CN/2020/CN.302.2020-Eng.pdf> [hereinafter Depository Notification].

²⁸ Pien Huang, *WHO's Measured Reaction to Trump's Pledge to Cut U.S. Ties to the Agency*, NPR (June 1, 2020), at <https://www.npr.org/sections/goatsandsoda/2020/05/29/865816855/whos-muted-reaction-to-trumps-pledge-to-withdraw-u-s-from-the-u-n-agency>.

²⁹ European Commission Press Release, STATEMENT/20/983, US Announcement on Breaking Ties with the World Health Organisation: Statement by the President of the Commission Ursula Von Der Leyen and High Representative/Vice-President Josep Borrell (May 30, 2020), at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_983 [<https://perma.cc/5MHX-YJWW>].

³⁰ Karla Adam, *Trump's Exit from WHO Met with Dismay from Global Health Experts*, WASH. POST (May 30, 2020), at https://www.washingtonpost.com/world/trump-world-health-organization-criticism/2020/05/30/a9650984-a26b-11ea-be06-af5514ee0385_story.html.

³¹ Nancy Pelosi (@SpeakerPelosi), TWITTER (July 7, 2020 5:20 PM), at <https://twitter.com/SpeakerPelosi/status/1280612714570813448>; see also *Coronavirus: Backlash After Trump Signals US Exit from WHO*, BBC (May 30, 2020), at <https://www.bbc.com/news/world-us-canada-52862588> (reporting that Republican Senator Lamar Alexander and Democratic Senator Elizabeth Warren both issued statements criticizing Trump's announcement of the termination of U.S. relations with the WHO).

³² See, e.g., *Freezing World Health Organization Funding is Dangerous*, 580 NATURE 431, 431 (2020) (arguing that the loss in U.S. funding threatens the WHO's ability to work on its more than thirty-five emergency operations around the world and other ongoing programs targeting infectious diseases); see also Elijah Wolfson, *Trump Said He Would Terminate the U.S. Relationship with the W.H.O. Here's What That Means*, TIME (June 4, 2020), at

As a matter of international law, the United States is in a special posture relative to other WHO member states because of the conditional right of withdrawal that it incorporated into its original instrument of acceptance—and because of the WHO Assembly’s subsequent acceptance of this instrument. When the WHO Constitution entered into force in 1948, international law was unsettled with respect to withdrawal from treaties that did not provide for withdrawal or termination.³³ In 1949, when the WHO received purported withdrawals from the Soviet Union and various of its allies, the WHO director-general responded that “because [the] Constitution of WHO makes no such provision [for withdrawal] I cannot accept your communication as withdrawal from the Organization.”³⁴ Unlike these countries, however, the United States reserved a right of withdrawal in its original instrument of acceptance.³⁵ While customary international law regarding the status of reservations and their acceptance was not clearly fixed in 1948,³⁶ the unanimous acceptance of the U.S. ratification by the WHO Assembly provides strong legal grounds for treating this right of withdrawal as valid.³⁷

Although the United States thus appears to have a distinctive right of withdrawal as a matter of international law, this right is bounded by the prerequisites to withdrawal stipulated in

<https://time.com/5847505/trump-withdrawl-who> (noting that withdrawal from the WHO not only undermines WHO programs on “tropical disease research, HIV and hepatitis, and tuberculosis,” but would also hinder U.S. public health researchers’ access to internally shared data among WHO members).

³³ Laurence R. Helfer, *Terminating Treaties*, in THE OXFORD GUIDE TO TREATIES 634, 637–40 (Duncan B. Hollis ed., 2012) (noting that even in the late 1950s before the codification of the Vienna Convention on the Law of Treaties, there were various views among international law jurists on whether states could withdraw from treaties without provisions for termination or withdrawal). The Vienna Convention later came to provide that, where a treaty does not include a withdrawal provision, withdrawal is only available in certain contexts, such as if “the parties intended to admit the possibility of denunciation or withdrawal; or a right of denunciation or withdrawal may be implied by the nature of the treaty.” Vienna Convention on the Law of Treaties, Art. 56, *opened for signature* May 23, 1969, 1155 UNTS 331 [hereinafter VCLT].

³⁴ EDWIN C. HOYT, THE UNANIMITY RULE IN THE REVISION OF TREATIES: A RE-EXAMINATION 70–71 (2012) (discussing this incident, including the later return of these countries to active participation in the WHO, and quoting a communication by the director-general); see also Catherine M. Brölmann, Richard Collins & Ramses A. Wessel, *Exiting International Organizations: A Brief Introduction*, 15 INT’L ORGS. L. REV. 243, 249 (2018) (footnote omitted) (“Practice is not entirely conclusive as to the consequences of these notifications, but arguably suggests that such withdrawal is unlawful, or in any case without legal effect”). That the WHO considered these members inactive is reflected in the resolution passed at the Third World Health Assembly. World Health Assembly Res. WHA3.84, para. 3 (May 19, 1950) (emphasis added) (“Resolves that . . . the World Health Organization will always welcome the *resumption* by these Members of full co-operation in the work of the Organization . . .”). The United Nations depository status page for the WHO Constitution indicates that Russia joined the WHO on March 24, 1948, rather than when the Soviet Union announced it was rejoining the Organization in July 1955. Depository Status for the WHO Constitution, *supra* note 1. Similarly, the Republic of China sought withdrawal from the WHO in May 1950, to which the Assembly resolved that “*resumption* by China of full participation in the work of the Organization will be welcomed.” World Health Assembly Res. WHA3.90, paras. 1, 4 (May 25, 1950) (emphasis added). When the Republic of China rejoined the WHO, the Assembly “welcome[d] the return of China to *active* participation.” World Health Assembly Res. WHA6.6, para. 1 (May 15, 1953) (emphasis added).

³⁵ See U.S. Acceptance of the WHO Constitution, *supra* note 4 (conditioning the U.S. acceptance on the provisions set forth in Congress’s joint resolution).

³⁶ See Report of the International Law Commission to the General Assembly, 21 UN GAOR Supp. No. 9, at 35, UN Doc. A/6309/Rev.1 (1966), *reprinted in* [1966] 2 Y.B. INT’L L. COMM’N 203, UN Doc. A/CN.4/SER.A/1966/Add.1 (footnotes omitted) (noting that “[t]he subject of reservations to multilateral treaties has been much discussed in recent years and has been considered by the General Assembly itself on more than one occasion, as well as by the International Court of Justice . . .”).

³⁷ This process conformed with the procedure that would later be set out in the VCLT. See VCLT, *supra* note 33, Art. 20.3 (providing that “[w]hen a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization”).

the joint resolution.³⁸ Consistent with one of these prerequisites, the Trump administration has given a year's notice of the U.S. withdrawal.³⁹ This notice could be revoked before effectuated—including if Trump is not reelected in the U.S. presidential election in November of 2020.⁴⁰ As to another specified prerequisite—the provision that U.S. “financial obligations . . . shall be met in full for the Organization’s current fiscal year”⁴¹—it remains to be seen whether or how this will be satisfied by the United States. The United States carries an outstanding balance with the WHO of almost \$58 million in the current year and more than an additional \$41 million from prior years.⁴²

In addition to these international legal limitations, the Trump administration’s decision to withdraw the United States from the WHO raises issues of domestic law. One issue is whether the executive branch can unilaterally withdraw the United States from the WHO Constitution without congressional approval. The United States joined the WHO not through the treaty process specified in Article II of the Constitution, but rather “pursuant to the authority granted” by the joint resolution passed by Congress.⁴³ On rare occasions in the past, U.S. presidents have unilaterally withdrawn the United States from international organizations that the United States joined through such joint resolutions.⁴⁴ The legality of this practice as a matter of domestic law remains untested in the courts.

A second set of domestic legal issues stems from the conditions on withdrawal set forth in the text of the joint resolution.⁴⁵ As international legal limits on the president’s withdrawal power, these conditions may similarly serve as domestic legal limits.⁴⁶ Moreover, as a general

³⁸ See Depository Notification, *supra* note 27.

³⁹ See Joint Resolution Authorizing WHO Membership, *supra* note 3, § 4; UN Acknowledgement of U.S. Notice of Withdrawal, *supra* note 25.

⁴⁰ Revoking a notice of withdrawal before it takes legal effect is permissible under international law. See VCLT, *supra* note 33, Art. 68. Joe Biden, the Democratic presidential nominee, has announced that he would return the United States to the WHO on the first day of his presidency. Joe Biden (@JoeBiden), TWITTER (July 7, 2020, 4:44 PM), at <https://twitter.com/JoeBiden/status/1280603719831359489>.

⁴¹ Joint Resolution Authorizing WHO Membership, *supra* note 3, § 4.

⁴² Assessed Contributions Overview for All Member States, *supra* note 15; see also BRANDON J. MURRILL & NINA M. HART, CONG. RESEARCH SERV., LSB10489, WITHDRAWAL FROM THE WORLD HEALTH ORGANIZATION: LEGAL BASIS AND IMPLICATIONS 3 (2020), at <https://crsreports.congress.gov/product/pdf/LSB/LSB10489> (observing that “[i]t is unclear whether the ‘current fiscal year’ [language from in the joint resolution] refers to the fiscal year in which the United States submits a twelve-month notice of intent to withdraw or the fiscal year in which the twelve-month notice period expires” but that “[i]n either case . . . it would appear that the notice cannot legally take effect until the United States pays all current obligations”).

⁴³ U.S. Acceptance of the WHO Constitution, *supra* note 4.

⁴⁴ Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. 1615, 1639 & nn. 98, 99 (2018) (noting that this occurred with respect to the International Labor Organization (ILO) and twice with respect to the United Nations Educational, Scientific and Cultural Organization (UNESCO)). With respect to both the ILO and the first UNESCO withdrawal, subsequent presidents rejoined the United States to these international organizations without reobtaining congressional approval. See *id.*

⁴⁵ Joint Resolution Authorizing WHO Membership, *supra* note 3, § 4. Additionally, Congress could further challenge the withdrawal by legislating to prevent withdrawal. See A Bill to Prohibit the Use of Funds to Withdraw the United States from the World Health Organization, S. 4240, 116th Cong. § 4 (2020) (proposing that Congress prohibit the Trump administration from using congressional appropriated funds to withdraw from the WHO). In the absence of a supermajority of support in both houses of Congress, however, such a bill would be difficult to enact given the president’s veto power.

⁴⁶ With respect to treaties entered into pursuant to the process set forth in Article II of the U.S. Constitution, the *Restatement (Fourth) of Foreign Relations Law* indicates that the “established practice” of unilateral presidential treaty withdrawal is limited to situations where this withdrawal is justified under international law. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 313 (2018); see also *id.*, § 313 reporters’ note 5 (noting that, in contrast,

principle of U.S. constitutional law, the president's "power is at its lowest ebb" when "tak[ing] measures incompatible with the . . . will of Congress."⁴⁷ Should Trump seek to effectuate the U.S. withdrawal without fulfilling all the conditions set forth in the joint resolution, he would be acting in violation of a congressional mandate.⁴⁸

INTERNATIONAL ECONOMIC LAW

United States-Mexico-Canada Agreement Enters into Force

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On November 30, 2018, Canada, Mexico, and the United States signed an agreement renegotiating the North American Free Trade Agreement (NAFTA). By the spring of 2020, all three countries had approved this agreement—known in the United States as the United States-Mexico-Canada Agreement (USMCA)¹—through their respective domestic ratification processes. The USMCA entered into force on July 1, 2020, amid extended U.S.-Mexico and U.S.-Canada border restrictions due to the COVID-19 pandemic. On August 6, 2020, President Trump imposed tariffs on Canadian aluminum—tariffs that his administration had previously put in place in 2018 but had removed in 2019 in order to smooth the USMCA's path to ratification.

The negotiation of the USMCA took place over the first two years of the Trump administration. The agreement, signed on November 30, 2018, changed some of NAFTA's key provisions, including eliminating investor-state dispute settlement between the United States and Canada and modifying the rules of origin for automobiles.² The USMCA also added new provisions "address[ing] intellectual property rights, rights for indigenous persons, rules for trade negotiations with non-market countries, and the agreement's termination."³

"withdrawals that fail . . . to identify [a] justification under international law . . . assert an authority that the Senate likely did not contemplate when approving the treaty").

⁴⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

⁴⁸ See MURRILL & HART, *supra* note 42, at 3 (observing that "the President arguably may lack the authority to withdraw from the WHO if he does not adhere to these conditions because Congress enacted them using its constitutional Spending Clause power"); cf. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW, *supra* note 46, § 313 reporters' note 6 (noting that if the power to withdraw from Article II treaties is not exclusive to the president, Congress may have the power to limit withdrawals through statutes).

¹ The agreement is referred to as the United States-Mexico-Canada Agreement (USMCA), the Canada-United States-Mexico Agreement (CUSMA), or Tratado entre México, Estados Unidos y Canadá (T-MEC), depending on the country referring to the agreement. See Office of the U.S. Trade Rep. Press Release, United States-Mexico-Canada Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement (Oct. 2018), at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing> [<https://perma.cc/F67G-XN5L>]; Gov't of Canada Press Release, A New Canada-United States-Mexico Agreement (Aug. 20, 2020), at <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng> [<https://perma.cc/77Z8-L96P>]; Gov't of Mexico Press Release, Textos Finales del Tratado Entre México, Estados Unidos y Canadá (T-MEC), at <https://www.gob.mx/t-mec/acciones-y-programas/textos-finales-del-tratado-entre-mexico-estados-unidos-y-canada-t-mec-202730?state=published>.

² Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 150, 150 (2019).

³ *Id.* at 155. For further discussion of the USMCA's content, see *id.* at 150–59.