

international agreement to regulate space resources. The head of the U.S. delegation explained: “Of course, the Outer Space Treaty does not provide a comprehensive international regime for space resource utilization activities. At this stage, the United States sees neither a need nor a practical basis to create such a regime. We do, however, see an urgent need to ensure that all nations engaged in space resource activities share a common set of fundamental beliefs: in the rule of law, in transparency, and in peaceful purposes. The Artemis Accords underscores these critical principles, and forms the starting point for future work on space resources.”⁴⁰

INTERNATIONAL ECONOMIC LAW

The United States Establishes Fund for the Afghan People from Frozen Afghan Central Bank Assets

doi:10.1017/ajil.2022.87

On September 14, 2022, the United States established a Fund for the Afghan People (Afghan Fund) with \$3.5 billion of the approximately \$7 billion of Da Afghanistan Bank (DAB) assets that were frozen by the Treasury Department on August 15, 2021, and blocked by President Joseph R. Biden, Jr. on February 11, 2022.¹ Created “in coordination with international partners including the government of Switzerland and Afghan economic experts,” the Afghan Fund, a non-profit Swiss foundation located in Geneva,² aims to “receive, protect, preserve, and disburse assets for the benefit of the Afghan people, including foreign exchange rate and price stabilization objectives in Afghanistan.”³ The ultimate disposition of the frozen assets had been debated within the U.S. government, subjected to contentious litigation in U.S. courts, and was the object of diplomatic negotiations between the United States and the Taliban. In establishing the Fund, the United States and its partners have sought to maintain the funds so that they will be used to stabilize the Afghan economy while not supporting or recognizing the authority of the Taliban (still designated Specially Designated Global Terrorists). The other \$3.5 billion remains potentially available to terrorist victims to recover the damages that they have been awarded in suits against the Taliban.⁴

⁴⁰ U.S. Mission to International Organizations in Vienna, 2022 COPUOS LSC – U.S. on the Utilization of Space Resources (Mar. 28, 2022), at <https://vienna.usmission.gov/2022-copuos-lsc-u-s-on-space-resources> [<https://perma.cc/26ZM-HNMT>].

¹ U.S. Dep’t of the Treasury Press Release, Joint Statement by U.S. Treasury and State Department: The United States and Partners Announce Establishment of Fund for the People of Afghanistan (Sept. 14, 2022), at <https://home.treasury.gov/news/press-releases/jy0947> [<https://perma.cc/ECU3-58YG>] [hereinafter Joint Statement].

² Joint Statement, *supra* note 1; Swiss Confederation, Federal Office of Justice, Central Business Name Index, at <https://www.zefix.ch/en/search/entity/list/firm/1551977> [<https://perma.cc/9THL-FSDS>].

³ Fund for the Afghan People, Statutes of September 2, 2022, Art. 4.2, at <https://ge.ch/hrcintapp/rdfisFile?id=2081488440000066031012> [hereinafter Fund Statutes].

⁴ The Taliban were designated in 2002. See Exec. Order 13268, 67 Fed. Reg. 44,751 (July 2, 2002) (amending Exec. Order 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001)).

When the Taliban toppled the Afghan government on August 15, 2021, approximately \$9 billion in Afghan central bank assets were held overseas, roughly \$7 billion of which, in bonds, cash, and gold, were deposited in the Federal Reserve Bank of New York (FRBNY).⁵ Immediately, the Treasury Department froze the U.S.-based assets to prevent the Taliban, a group subject to U.S. sanctions that the United States refuses to recognize as the government of Afghanistan, from gaining control over them.⁶ There was, according to Treasury, “uncertainty regarding who could authorize transactions on DAB’s accounts.”⁷ The freezing of DAB assets contributed to Afghanistan’s economic instability and humanitarian crisis, but it was also an opportunity for U.S. plaintiffs who had (or expected to have) monetary judgments against the Taliban. Since the September 11, 2001 attacks on the United States, thousands of victims, family members of victims, property owners, and insurance companies, have filed lawsuits against the Taliban, alleging that the Taliban provided support to Al Qaeda. Other cases assert Taliban responsibility for subsequent terrorist acts.⁸ Some have resulted in default judgments, now totaling well in excess of \$7 billion (others are pending).⁹ The Taliban had no assets in the United States, so the judgment creditors had no way to satisfy the awards in their favor.¹⁰ But after the Taliban seized power in August 2021, the judgment creditors initiated litigation against the DAB assets in the United States. Reportedly, there were negotiations between attorneys representing the claimants and the U.S. government regarding a possible agreement to divide up the assets between the plaintiffs and Afghan humanitarian aid, though the legality of such a deal was uncertain.¹¹

President Biden signed Executive Order 14064 on February 11, 2022 blocking “[a]ll property and interests in property of DAB that are held, as of the date of this order, in the United States by any United States financial institution” and ordering the prompt transfer of the

⁵ See Eshe Nelson & Alan Rappeport, *U.S. and I.M.F. Apply a Financial Squeeze on the Taliban*, N.Y. TIMES (Aug. 18, 2021), at <https://www.nytimes.com/2021/08/18/business/afghan-central-bank.html>.

⁶ Other governments (including Germany, Switzerland, the United Arab Emirates, and the United Kingdom) also froze the \$2 billion of DAB assets located in their jurisdictions. See Graeme Smith, *Afghanistan’s Central Bank Needs Its Assets Back*, ECONOMIST (Oct. 12, 2022), at <https://www.economist.com/by-invitation/2022/10/12/afghanistans-central-bank-needs-its-assets-back-argues-graeme-smith>. The Treasury Department did not indicate the legal basis for its action, though a former senior adviser to the director of OFAC suggested that there was sufficient authority under Executive Order 13268, *supra* note 4. See Jeff Stein, *Biden Administration Freezes Billions of Dollars in Afghan Reserves, Depriving Taliban of Cash*, WASH. POST (Aug. 17, 2021), at <https://www.washingtonpost.com/us-policy/2021/08/17/treasury-taliban-money-afghanistan>.

⁷ Joint Statement, *supra* note 1.

⁸ See, e.g., Complaint, John Does 1 Through 7 v. The Taliban, Al-Qaeda, and the Haqqani Network, Case 4:20-cv-00605-P (N.D. Tex.), at <https://pacer-documents.s3.amazonaws.com/168/333420/177113335476.pdf> [<https://perma.cc/8TUG-743D>].

⁹ The plaintiffs in one case alone, *Havlish v. Bin Laden*, had a judgment that nearly equaled the full amount of the frozen assets. See Order and Judgment, In Re Terrorist Attacks on September 11, 2001 (SDNY Oct. 12, 2012), at <https://pacer-documents.s3.amazonaws.com/119/242129/127111473167.pdf> [<https://perma.cc/7HCN-GAYH>].

¹⁰ Recognition and enforcement of default judgments abroad in terrorism cases is difficult. See Stephanie Law, Vincent Richard, Edoardo Stoppioni & Martina Mantovani, *The Aftermath of the 9/11 Litigation: Enforcing the U.S. Havlish Judgments in Europe* (Dec. 2019), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521222.

¹¹ See Charlie Savage, *Taliban and 9/11 Families Fight for Billions in Frozen Afghan Funds*, N.Y. TIMES (Nov. 29, 2021), at <https://www.nytimes.com/2021/11/29/us/politics/taliban-afghanistan-911-families-frozen-funds.html>.

blocked property to a consolidated account at the FRBNY.¹² The White House explained that “[t]he Administration will seek to facilitate access to \$3.5 billion of those assets for the benefit of the Afghan people and for Afghanistan’s future pending a judicial decision.”¹³ Biden further noted in the order that he “understand[s] that various parties, including representatives of victims of terrorism, have asserted legal claims against certain property of DAB or indicated in public court filings an intent to make such claims.”¹⁴ The fact sheet indicated that “[e]ven if funds are transferred for the benefit of the Afghan people, more than \$3.5 billion in DAB assets would remain in the United States and are subject to ongoing litigation by U.S. victims of terrorism. Plaintiffs will have a full opportunity to have their claims heard in court.”¹⁵ The executive order sought to balance the humanitarian needs of Afghanistan with the moral and political imperative of allowing terrorist victims and their families the opportunity to have their claims to the DAB assets heard in court, and split the money accordingly.¹⁶

That same day, in accordance with the executive order, the Treasury Department’s Office of Foreign Assets Control issued a license to the FRBNY “to transfer up to \$3,500,000,000.00 . . . for the benefit of the people of Afghanistan, including to an international financing mechanism (in which the United States is a member) holding and disbursing funds for the benefit of the people of Afghanistan, or to a United Nations fund, programme, specialized agency, or other entity or body for the benefit of the people of Afghanistan.”¹⁷ Also that day, the United States submitted its statement of interest in the judgment creditors’ litigation against the assets. The United States argued that, under Second Circuit precedent interpreting the Terrorism Risk Insurance Act (which served as the legal basis for the creditors’ writs of execution), “the portion of the DAB Assets authorized by the OFAC License to be transferred for the benefit of the Afghan people, in view of the urgent humanitarian and economic crisis in Afghanistan, is not properly subject to attachment in this litigation.”¹⁸

¹² Exec. Order 14064, 87 Fed. Reg. 8391 (Feb. 11, 2022), at <https://www.federalregister.gov/documents/2022/02/15/2022-03346/protecting-certain-property-of-da-afghanistan-bank-for-the-benefit-of-the-people-of-afghanistan> [<https://perma.cc/795X-H3NW>]. Biden based his authority on the provisions of the International Emergency Economic Powers Act, 50 U.S.C. 1701 et seq., and the National Emergencies Act, 50 U.S.C. 1601 et seq.

¹³ White House Press Release, Fact Sheet: Executive Order to Preserve Certain Afghanistan Central Bank Assets for the People of Afghanistan (Feb. 11, 2022), at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/11/fact-sheet-executive-order-to-preserve-certain-afghanistan-central-bank-assets-for-the-people-of-afghanistan> [<https://perma.cc/474K-KCJT>].

¹⁴ Exec. Order 14064, *supra* note 12.

¹⁵ Fact Sheet, *supra* note 13.

¹⁶ See White House Press Release, Background Press Call by Senior Administration Officials on U.S. Support for the People of Afghanistan (Feb. 11, 2022), at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/11/background-press-call-on-u-s-support-for-the-people-of-afghanistan> [<https://perma.cc/YQG8-7CXG>].

¹⁷ The license was issued pursuant to the executive order and 50 USC 1601-51, 1701-06. See License No. DABRESERVES-EO-2022-886895-1 (Feb. 11, 2022), at <https://s3.documentcloud.org/documents/21226931/ex-b-ofac-license.pdf> [<https://perma.cc/5X8J-SM7N>] [hereinafter License].

¹⁸ See Statement of Interest of the United States of America, at 4, Case Nos. 20 Misc. 740 (KPF), 03 MD 1570 (GBD) (SN), 03 Civ. 9848 (GBD) (SN) (SDNY Feb. 11, 2022), at <https://int.nyt.com/data/documenttools/usg-statement-of-interest-dab-assets-havlish-doe/cbc6788de125cbd2/full.pdf> [<https://perma.cc/VK85-SAMJ>]. The Statement of Interest also argued that the scope of the writs was too broad because the Terrorism Risk Insurance Act (TRIA) “permits claimants to attach assets only to satisfy judgments for compensatory—rather than punitive—damages.” *Id.* at 4. The Statement did not take a position on the merits regarding the legal claims made by the creditors regarding the assets that were not licensed but were within TRIA’s scope. Indeed, the government made a point of arguing that the court should provide the plaintiffs with “full opportunity . . . to submit

Two weeks later, on February 25, Magistrate Judge Sarah Netburn, with the parties' consent, ordered "that the assets of Da Afghanistan Bank . . . regulated by the Office of Foreign Assets Control's [license] of February 11, 2022 . . . are not judicially restrained."¹⁹ The remaining DAB assets remained under judicial restraint, however, and litigation continues on the judgment creditors' attempt to attach them.²⁰

With the writs lifted on the licensed portion of the DAB assets, those funds could be transferred. Negotiations for the transfer of all or part of those assets to the DAB, perhaps by means of a trust fund (that had not yet been established), took place through the summer. Talks broke down, however, after the United States learned that the Taliban had allowed Al Qaeda leader Ayman al-Zawahiri to live freely in Kabul.²¹ The United States killed al-Zawahiri in a drone strike on July 31.²² Thomas West, special representative for Afghanistan and deputy assistant secretary for South and Central Asian affairs, said in mid-August: "We do not see recapitalization of the Afghan central bank as a near-term option. . . . We do not have confidence that that institution has the safeguards and monitoring in place to manage assets responsibly. . . . And needless to say, the Taliban's sheltering of al Qaeda leader Ayman al-Zawahiri reinforces deep concerns we have regarding diversion of funds to terrorist groups."²³ Reportedly, though, talks resumed a short time later.²⁴

their arguments" that "the unlicensed DAB assets are 'blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party).'" *Id.* at 19 (quoting TRIA, Sec. 201(a)). The United States, the statement stressed, "has a compelling interest in permitting victims of terrorism to obtain compensation to the greatest degree permitted under the law." *Id.* However, the statement went on to identify the many factual, statutory, international law, constitutional (especially the president's authority to recognize foreign governments), and foreign policy considerations implicated in the claimants' attempt to attach the DAB assets, concluding that "the Judgment Plaintiffs must establish a theory of ownership by the Taliban that would not require this Court—either expressly or by implication—to make its own determination as to the identity of Afghanistan's government or to make its own determination as to whether Afghanistan is a state sponsor of terrorism." *Id.* at 27.

¹⁹ Entry No. 7701 (Feb. 25, 2022), In Re: Terrorist Attacks on September 11, 2001, Docket No. 1:03-MD-01570 (S.D.N.Y.).

²⁰ See *id.* On August 26, 2022, Judge Netburn recommended the denial of the judgment creditors' motions under Section 201(a) of the Terrorism Risk Insurance Act of 2002 to compel the FRBNY to turn over the remaining blocked DAB assets to satisfy their judgments. The judgment creditors have filed objections to the magistrate judge's recommendation. See In re Terrorist Attacks on September 11, 2001, 2022 WL 4643442 (SDNY 2022), at <https://s3.documentcloud.org/documents/22271691/netburn-recommendation-report-afghan-central-bank-funds.pdf> [<https://perma.cc/QS6E-EM7W>]. For analysis of the legal issues, see Ingrid (Wuerth) Brunk, *The Fate of the Afghan Central Bank Assets—State of Play*, TRANSNAT'L LIT. BLOG (Dec. 8, 2022), at <https://tlblog.org/the-fate-of-the-afghan-central-bank-assets-state-of-play> [<https://perma.cc/NBZ2-Y5FF>].

²¹ See Lynne O'Donnell, *Afghanistan Still Wants Its Frozen Funds*, FOR. POL'Y (July 21, 2022), at <https://foreign-policy.com/2022/07/21/afghanistan-taliban-economy-reserves-central-bank-finance>; Jessica Donati & Margherita Stancati, *U.S. Rules Out Releasing Billions in Afghan Funds After Strike*, WALL ST. J. (Aug. 15, 2022), at <https://www.wsj.com/articles/u-s-rules-out-releasing-billions-in-afghan-funds-after-strike-11660564801>.

²² See Jessica Donati, Nancy A. Youssef & Warren P. Strobel, *U.S. Says Drone Strike Killed al Qaeda Leader Ayman al-Zawahiri*, WALL ST. J. (Aug. 1, 2022), at <https://www.wsj.com/articles/u-s-carried-out-first-known-terrorist-strike-in-afghanistan-since-exit-11659391683>.

²³ Peter Baker, *U.S. Will Not Release \$3.5 Billion in Frozen Afghan Funds for Now, Citing Terror Fears*, N.Y. TIMES (Aug. 15, 2022), at <https://www.nytimes.com/2022/08/15/us/politics/us-afghanistan-funds-taliban.html>.

²⁴ See Jonathan Landay & Charlotte Greenfield, *U.S. Commits to Afghan Asset Talks Despite Frustration with Taliban*, REUTERS (Aug. 22, 2022), at <https://www.reuters.com/world/asia-pacific/exclusive-us-commits-afghan-asset-talks-despite-frustration-with-taliban-sources-2022-08-22>.

The Afghan Fund was registered on September 5,²⁵ and \$3.5 million in DAB assets were subsequently deposited in its account at the Bank of International Settlements.²⁶ In a joint statement announcing the Fund on September 14, the Treasury and State Departments stated that the “\$3.5 billion of Afghan central bank reserves [are] to be used for the benefit of the people of Afghanistan while keeping them out of the hands of the Taliban and other malign actors. The Afghan Fund will protect, preserve, and make targeted disbursements of that \$3.5 billion to help provide greater stability to the Afghan economy.”²⁷ To achieve its purpose, the Fund may, among other things, “use assets to provide Afghan banking sector liquidity, keep Afghanistan current on its debt service obligations, support exchange rate stability, transfer funds, as appropriate, to public Afghan financial institutions, including Afghanistan’s central bank.”²⁸ In the short term, the board will “promote monetary and macroeconomic stability . . . [including by] paying for critical imports like electricity, paying Afghanistan’s arrears at international financial institutions to preserve their eligibility for financial support, paying for essential central banking services like SWIFT payments.”²⁹ In the long term, the aim is for the funds “to be preserved to return to DAB.”³⁰ The United States has stipulated, however, that it “will not support the return of these funds until DAB: (1) Demonstrates its independence from political influence and interference; (2) Demonstrates it has instituted adequate anti-money laundering and countering-the-financing-of-terrorism ([anti-money laundering and countering terrorist finance]) controls; and (3) Completes a third-party needs assessment and onboards a reputable third-party monitor.”³¹

The Fund’s statutes set out its organization. Fund decisions are to be made unanimously by its board of trustees.³² Though the Fund’s statutes do not specify the board’s composition, beyond setting the minimum number of its members and how they are chosen, it is drafted in a way that anticipates that the United States will appoint a member.³³ And in fact one of the board’s inaugural four members is Scott Miller, the U.S. ambassador to Switzerland, who also

²⁵ See Swiss Official Gazette of Commerce (Sept. 8, 2022), at <https://www.shab.ch/shabforms/servlet/Search?EID=7&DOCID=1005558096> [<https://perma.cc/RJ2U-35N6>].

²⁶ In accordance with the license, the two individuals who founded the Fund, Anwar Ahady and Shah Mehrabi, were certified “as having authority to receive, control, or dispose of” the transferred assets in accordance with Section 25B(3) of the Federal Reserve Act, as amended by the Edge Act. See 12 USC 632; Joint Statement, *supra* note 1; Steve Coll, *Some Hope for Afghans in Need*, NEW YORKER (Sept. 14, 2022), at <https://www.newyorker.com/news/daily-comment/some-hope-for-afghans-in-need> [<https://perma.cc/GGG9-KBRE>]. That section requires that the certification of those individuals must be made by “a representative of [the] foreign state [the assets of which are held by the Federal Reserve bank] who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States.” 12 USC 632. By following this procedure, the transfer of funds is “conclusively presumed to be lawful and . . . constitute[s] a complete discharge and release of any liability of [the Federal Reserve] bank for or with respect to such property.” *Id.* The name of the accredited representative of Afghanistan who certified Ahady and Mehrabi has not been disclosed, though it was not a representative of the Taliban. See Statement of Interest, *supra* note 18, at 8.

²⁷ Joint Statement, *supra* note 1. The fund may receive contribution from third parties, and thus, as the Joint Statement notes, “can also serve as a vehicle to protect and disburse other Afghan central bank foreign reserves currently held in additional countries.” See Fund Statutes, *supra* note 3, Art. 8.2; Joint Statement, *supra* note 1.

²⁸ Fund Statutes, *supra* note 3, Art. 5.2.

²⁹ Joint Statement, *supra* note 1.

³⁰ *Id.*

³¹ *Id.*

³² Fund Statutes, *supra* note 3, Art. 16.1.

³³ See *id.* Arts. 6.2, 12.3. The board may adopt by-laws that “provide for the . . . composition of the Board.” *Id.* Art. 23.1.

serves as the board's chair.³⁴ Effectively, then, the United States controls the board's agenda, through the chair, and is given a veto over the board's decisions, through the unanimity requirement. The board's other members are the Fund's founders Anwar Ahady, former governor of the DAB and Afghan finance minister, and Shah Mehrabi, a current member of the DAB Supreme Council, as well as Alexandra Baumann, head of the Prosperity and Sustainability Division of the Swiss Federal Department of Foreign Affairs.³⁵ The board met for the first time on November 21.³⁶ It "took steps to further operationalize" the Fund, including agreeing "to the principle of initial Afghan co-chairmanship and to the establishment of an Afghan Advisory Committee."³⁷

The Taliban denounced the establishment of the Afghan Fund as an "illegal venture" and a "violation of international norms."³⁸ Afghan Foreign Ministry Spokesperson Abdul Qahar Balkhi stated, "Disbursing these reserves for other purposes without the express agreement of the Afghan people is a negative step against Afghan economic stability taken by the United States."³⁹ China has also criticized the creation of the Afghan Fund, and Chinese Foreign Ministry Spokesperson Mao Ning indicated that the United States should lift all "unilateral sanctions" on Afghanistan as the funds are the "national property" of Afghanistan.⁴⁰ Afghans and foreign policy experts have argued that the assets need to be returned to the DAB as soon as possible since an operational central bank is essential to a functioning economy.⁴¹ They note that the assets belong to the people of Afghanistan, and not the U.S. government or the U.S. courts.

The United States Announces Export Controls to Restrict China's Ability to Purchase and Manufacture High-End Chips

doi:10.1017/ajil.2022.89

On October 7, 2022, the Department of Commerce's Bureau of Industry and Security (BIS) announced an interim final rule (IFR)¹ that "restrict[s] the [People's Republic of

³⁴ See Central Business Name Index, *supra* note 2.

³⁵ See *id.*

³⁶ See U.S. Dept. of the Treasury Press Release, Readout of Fund for the Afghan People Board Meeting (Nov. 21, 2022), at <https://home.treasury.gov/news/press-releases/jy1122> [<https://perma.cc/3H46-WX2T>].

³⁷ *Id.*

³⁸ Ayaz Gul, *Taliban Rebuke US for Afghan Assets' Transfer to Swiss-Based Trust Fund*, VOA NEWS (Sept. 16, 2022), at <https://www.voanews.com/a/taliban-rebuke-us-for-afghan-assets-transfer-to-swiss-based-trust-fund/6750232.html> [<https://perma.cc/5HJ9-5F9M>]. The DAB issued a statement to the same effect when the executive order was issued. See Press Release of Da Afghanistan Bank on the Decision of United States of America Regarding the Foreign Exchange Reserves of Afghanistan (Feb. 12, 2022), at <https://www.dab.gov.af/press-release-da-afghanistan-bank-decision-united-states-america-regarding-foreign-exchange> [<https://perma.cc/CT3H-KH78>].

³⁹ Imtiaz Tyab, *U.S. Sets Up \$3.5 Billion Fund to Aid Afghanistan Using Frozen Bank Reserves*, CBS NEWS (Sept. 15, 2022), at <https://www.cbsnews.com/news/afghan-fund-us-aid-afghanistan-under-taliban> [<https://perma.cc/6YHZ-2YTL>].

⁴⁰ Gul, *supra* note 38.

⁴¹ See Smith, *supra* note 6.

¹ Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, 87 Fed. Reg. 62,186 (Oct. 13, 2022), at <https://www.govinfo.gov/content/pkg/FR-2022-10-13/pdf/2022-21658.pdf> [<https://perma.cc/GZU6-MSQB>] [hereinafter IFR]. Some provisions of the rule became effective immediately,