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Preface

I am pleased to introduce this latest edition of the *Digest of United States Practice in International Law* for the calendar year 2009. This is the twelfth edition of the *Digest* published by the International Law Institute, and the sixth edition co-published with Oxford University Press. We are very pleased with our co-publishing relationship with them, and look forward to helping them make the Digest even more widely available in the future.

It is my hope that practitioners and scholars will find this new edition of the *Digest*, tracking the most important developments in the state practice of the United States during 2009, to be useful.

As always, the Institute is also very pleased to work with the Office of the Legal Adviser to make the *Digest* available for the use of the international legal community, and we express our greatest appreciation for their commitment to the *Digest*.

Don Wallace, Jr.
Chairman
International Law Institute

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Introduction

I am delighted to introduce the annual edition of the *Digest of United States Practice in International Law* for 2009. This edition provides a historical record of developments that took place during calendar year 2009, my first year as Legal Adviser. This edition is fully available not just in print, but also on the State Department's website (*www.state.gov/s/l*); the volumes for 1989–2008 have been posted on that site as well. By posting the *Digest* online, we seek to ensure that U.S. views of international law are readily accessible to our counterparts in other governments and international organizations, judges, practitioners, legal scholars, students, and other users, both within the United States and around the world.

In 2009, as this volume reflects, a new United States administration, under the Presidency of Barack Obama, took office and pursued important initiatives demonstrating its respect for the rule of law. For instance, the United States has sought to ensure its detention operations, detainee prosecutions, and uses of force are all consistent with the laws of war. In one of his first actions after taking office, President Barack Obama unequivocally banned the use of torture as an instrument of U.S. policy and instructed that all interrogations of detainees be conducted in accordance with Common Article 3 of the Geneva Conventions and with the revised Army Field Manual. The executive branch also articulated a revised, narrower legal basis for its authority to detain individuals, based on the 2001 statutory Authorization for the Use of Military Force ("AUMF"), and made clear that its interpretation of the AUMF would be informed by the law of war. The administration also worked with Congress to improve the legal framework governing military commissions. Finally, as the President made clear in his Nobel lecture, "[w]here force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. . . . [E]ven as we confront a vicious adversary that abides

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by no rules . . . the United States of America must remain a standard bearer in the conduct of war."

The United States also resumed our multilateral engagement in many different diplomatic fora, while remaining fully engaged in others. With the International Criminal Court, the United States participated for the first time as an observer in the Eighth Session of the Assembly of States Parties to the Rome Statute. With the Human Rights Council, the United States became a member of the Council for the first time. With the climate change negotiations, the United States engaged at the highest level, and President Obama and the leaders of key major economies reached consensus on the Copenhagen Accord in December 2009. The United States submitted a written statement and written comments to the International Court of Justice concerning the UN General Assembly's request for an advisory opinion on the question "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law," and I was privileged to deliver an oral statement of the U.S. views to the Court in December.

Promoting the development of international law also played a key part in the United States' economic diplomacy agenda, including in the areas of trade, sanctions, claims settlement, and private international law. Arbitral tribunals issued awards in favor of the United States under the Softwood Lumber Agreement and the North American Free Trade Agreement in 2009, and the Iran–United States Claims Tribunal issued a partial award in favor of the United States. The United States also continued to participate actively in the World Trade Organization's dispute settlement mechanism and received favorable decisions in a number of disputes in that forum. In the area of private international law, the United States signed the United Nations Convention on Contracts for the International Carriage of Goods, Wholly or Partly by Sea ("Rotterdam Rules") and the Hague Convention on Choice of Court Agreements ("Choice of Court Convention") and participated actively in the negotiations concluding the Convention on Substantive Rules for Transfers of Intermediated Securities ("Geneva Securities Convention").

The United States also pursued initiatives to renew the rule of law by reviving our treaty and agreement making process. For example, in 2009, we deposited or exchanged instruments of ratification to bring into force more than 70 advice and consent treaties, which is an all-time annual record for the United States. Among these treaties were crucial law of war instruments, tax treaties, an environmental treaty, and law enforcement treaties, including landmark agreements with the European Union on extradition and mutual legal assistance in criminal matters, which entered into force in early 2010. In addition, we negotiated a new treaty to replace the Treaty on the Reduction and Limitation of Strategic Offensive Arms ("START"), signed the UN Convention on the Rights of Persons with Disabilities—the first new human rights convention of the twenty-first century, and supported the negotiation of a new multilateral agreement to reduce mercury pollution.

In 2009 the United States also sought legal and policy-based solutions to a range of other pressing international problems. For example, the United States took the lead on a Security Council resolution concerning sexual violence in situations of armed conflict, which the Council adopted unanimously on September 30, 2009.

The year also marked several important developments relating to the privileges and immunities of foreign states and foreign officials in the United States. The Supreme Court issued one opinion concerning the effect of Presidential and congressional action on a state's immunity from jurisdiction in the United States (*Iraq v. Beaty*). The Court issued another opinion holding that a U.S. victim of terrorism could not enforce a judgment against Iran by attaching, under the Terrorism Risk Insurance Act of 2002, certain Iranian property that was unblocked at the time of the lower court decision, and that, in any event, the victim had relinquished any right to attach the property by having already accepted payment under the Victims of Trafficking and Violence Protection Act of 2000 (*Ministry of Def. & Support v. Elahi*). Within the executive branch, the State Department announced two significant decisions relating to privileges and immunities of foreign diplomatic or consular missions and their personnel: (1) the Department began

accepting the accreditation of same-sex domestic partners of foreign diplomatic or consular personnel assigned to official duty in the United States, meaning that accredited same-sex domestic partners now have the same privileges and immunities as other accredited family members whom the Department recognizes as forming part of a diplomat's household; and (2) the Department also extended exemptions from real property taxes to residences owned by foreign governments and used to house staff of diplomatic missions to the United Nations and the Organization of American States and consular posts.

As in decades past, the *Digest* continues to reflect the sustained, collaborative effort of many dedicated members of the Office of the Legal Adviser. Among the many volunteers whose significant contributions to the current volume should be acknowledged are Gilda Brancato and David Newman, who provided significant input to the litigation-related entries in chapter 1; Kenneth Propp, who contributed to the entry in chapter 3 on the agreement with the European Union on sharing financial transaction information; Julia Brower, who provided research assistance for chapter 5; Anna Morawiec Mansfield, who assisted with the Geneva-related entries in chapter 6; Susan Benda, who helped prepare the entries on domestic abuse litigation and taxation in chapter 10; Holly Moore and James Gresser, who helped prepare the entries on INTERPOL and foreign officials in chapter 10; Emily Kimball, who drafted the section concerning the Libya Claims Settlement Agreement in chapter 8; JoAnn Dolan, who provided input for chapter 9; Tim Feighery and Patrick Pearsall, who drafted sections of chapter 10 (and in Tim's case, provided input on the Softwood Lumber Agreement arbitration discussed in chapter 11); Kevin Baumert and David Buchholz, who contributed to entries in chapter 12; Keith Benes, who prepared entries on fisheries issues in chapter 13; and Harold Burman and Michael Dennis, who drafted parts of the commercial law section of chapter 15. Chapter 8 also includes an entry that former editor Sally Cummins prepared before her retirement. Once again, I express very special thanks to Joan Sherer, the Department's Senior Reference Librarian, Legal, for her invaluable technical assistance. Above all, I wish to thank Elizabeth Wilcox for her truly exceptional work in editing this volume, and

for ensuring the *Digest* is now more accessible than ever to its readers, present and future. I very much look forward to her continuing work on this important enterprise.

We continue to prize our rewarding collaboration with the International Law Institute and Oxford University Press as co-publishers. The Institute's Director, Professor Don Wallace, and editor William Mays again have our sincere thanks for their superb support and guidance.

Now well into its third century, the United States practice of international law continues to evolve; we hope that that practice should be the subject of continuous global examination, dialogue, and debate. It is the very nature of state practice that it is influenced by the practices and criticism of other nations and legal publicists. For that reason, comments and suggestions from readers are always most welcome.

Harold Hongju Koh
The Legal Adviser
Department of State

Note from the Editor

Publication of the *Digest of United States Practice in International Law* for calendar year 2009, both in print and on the State Department's website, brings the new *Digest* series current for the period 1989–2009. I would like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible. I also would like to express appreciation to the International Law Institute and Oxford University Press for their valuable contributions in publishing the *Digest*.

The 2009 volume follows the general organization and approach adopted in 2000. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context, although in this volume, more of the litigation-related entries do not include excerpts from the opinions themselves since most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through the end of August 2010) are provided in footnotes. For example, as in other volumes, we note the release of several U.S. Supreme Court decisions; this year's volume also notes some other federal court decisions and final rules issued before the end of August 2010. Updates on other 2010 developments, such as the release of annual reports and sanctions-related designations of individuals or entities under U.S. executive orders are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross references to related entries within the volume and to prior volumes of the *Digest*.

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In one organizational change, this year we have relocated the discussion of visa-related restrictions; sanctions relating to terrorism, narcotics, and trafficking in persons; and nonproliferation-related sanctions and export controls from chapters 1, 3, and 18, respectively, to the sanctions chapter (16).

As in previous volumes, our goal is to ensure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided a specific Internet cite in the text. We realize that Internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily accessible elsewhere, we have placed them on the State Department website, at *www.state.gov/s/l/c8183.htm*.

Other documents are available from multiple public sources, both in hard copy and from various online services. The United Nations Official Document System makes UN documents available to the public without charge at *http://documents.un.org*. Resolutions of the UN Human Rights Council can be retrieved most readily by using the search function on the Human Rights Council's website, at *www2.ohchr.org/english/bodies/hrcouncil*. Resolutions of the International Atomic Energy Agency ("IAEA") can be accessed by using the search function on the IAEA's website, at *www.iaea.org*. Legal texts of the World Trade Organization ("WTO") may be accessed through the WTO's website, at *www.wto.org/english/docs_e/legal_e/legal_e.htm*. For UN-related information generally, the UN's home page at *www.un.org* also remains a valuable source.

The U.S. Government Printing Office provides access to government publications at *www.gpoaccess.gov*, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports; the U.S. Code, Public and Private Laws, and Statutes at Large; Public Papers of the President; the Weekly Compilation of Presidential Documents covering 1993 through January 29, 2009; and the new Daily Compilation of Presidential Documents introduced in January 2009.

On treaty issues, this site offers Senate Treaty Documents (for the President's transmittal of treaties to the Senate for advice and

consent, with related materials), available at *www.gpoaccess.gov/serialset/cdocuments/index.html*, and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at *www.gpoaccess.gov/serialset/creports/index.html*. In addition, the Office of the Legal Adviser now provides a wide range of current treaty information at *www.state.gov/s/l/treaty*, and the Library of Congress provides extensive treaty and other legislative resources at *http://thomas.loc.gov*.

The U.S. government's official web portal is *www.firstgov.gov*, with links to government agencies and other sites; the State Department's home page is *www.state.gov*.

While court opinions are most readily available through commercial online services and bound volumes, individual federal courts of appeals and many federal district courts now post opinions on their websites. The following list provides the website addresses where federal courts of appeals post opinions and unpublished dispositions or both:

- U.S. Court of Appeals for the District of Columbia Circuit: *www.cadc.uscourts.gov/bin/opinions/allopinions.asp*;
- U.S. Court of Appeals for the First Circuit: *www.ca1.uscourts.gov/opinions/main.php*;
- U.S. Court of Appeals for the Second Circuit: *www.ca2.uscourts.gov/opinions.htm*;
- U.S. Court of Appeals for the Third Circuit: *www.ca3.uscourts.gov/indexsearch/archives.asp*;
- U.S. Court of Appeals for the Fourth Circuit: *http://pacer.ca4.uscourts.gov/opinions/opinion.htm*;
- U.S. Court of Appeals for the Fifth Circuit: *www.ca5.uscourts.gov/Opinions.aspx*;
- U.S. Court of Appeals for the Sixth Circuit: *www.ca6.uscourts.gov/opinions/opinion.php*;
- U.S. Court of Appeals for the Seventh Circuit: *www.ca7.uscourts.gov/fdocs/docs.fwx?dname=opinion* (opinions) and *www.ca7.uscourts.gov/fdocs/docs.fwx?dname=disp* (non-precedential dispositions);
- U.S. Court of Appeals for the Eighth Circuit: *www.ca8.uscourts.gov/opns/opFrame.html*;

- U.S. Court of Appeals for the Ninth Circuit: *www.ca9.uscourts.gov/opinions* (opinions) and *www.ca9.uscourts.gov/memoranda/* (memoranda and orders—unpublished dispositions);
- U.S. Court of Appeals for the Tenth Circuit: *www.ca10.uscourts.gov/clerk/opinions.php*;
- U.S. Court of Appeals for the Eleventh Circuit: *www.ca11.uscourts.gov/opinions/index.php*;
- U.S. Court of Appeals for the Federal Circuit: *www.cafc.uscourts.gov/index.php?option=com_reports&view=report&layout=search&Itemid=12*.

The U.S. Court of International Trade posts all of its opinions and orders of merits and motions panels at *www.cit.uscourts.gov/slip_op/slip-op.html*. The official U.S. Supreme Court website is maintained at *www.supremecourtus.gov*. The Office of the Solicitor General in the Department of Justice makes its briefs filed in the Supreme Court available at *www.usdoj.gov/osg*.

Many federal district courts also post their opinions on their websites, and users can access these opinions by subscribing free of charge to the Public Access to Electronic Records ("PACER") service. Some district courts post all of their opinions or certain notable opinions without requiring users to register for PACER first. For example, the U.S. District Court for the District of Columbia, whose opinions are discussed in this volume and previous editions, posts its opinions on its website at *www.dcd.uscourts.gov/dcd*. Other links to individual federal court websites are available at *www.uscourts.gov/links.html*.

Selections of material in this volume were made based on judgments as to the significance of the issues, their possible relevance for future situations, and their likely interest to government lawyers, especially our foreign counterparts; scholars and other academics; and private practitioners.

As always, we welcome suggestions from those who use these volumes.

Elizabeth R. Wilcox

Chapter 1

Nationality, Citizenship, and Immigration

A. NATIONALITY AND CITIZENSHIP

1. Non-citizen Nationals: Taiwan Claimants

On April 9, 2009, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a district court's judgment dismissing a case brought by individuals residing on Taiwan who sought a declaratory judgment that they were non-citizen U.S. nationals and asserted that the United States was exercising sovereignty over Taiwan. *Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009). *See* Chapter 9.B. for further discussion.

2. Derivative Citizenship for Children Born Outside the United States

a. Proof of paternal relationship through DNA testing

On August 31, 2009, the U.S. District Court for the Southern District of Texas dismissed a case for lack of subject matter jurisdiction and failure to state a claim. *Parham v. Clinton*, Civ. No. H-09-1105, 2009 WL 2870671 (S.D. Tex., Aug. 31, 2009). The case arose from the Department of State's request that two children conceived out of wedlock and born to a non-U.S. citizen outside the United States undergo DNA testing to prove their eligibility for U.S. citizenship. The plaintiffs, a U.S. citizen (individually and as "next friend" of two children)

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and his Philippine national wife, claimed in part that consular officials at the U.S. Embassy in the Philippines and the Department of State violated their rights by refusing to grant Consular Reports of Birth Abroad for their two children and requiring DNA testing to prove a biological relationship between the U.S. citizen and each of the children. The plaintiffs sought a declaratory judgment that the children's parentage had been established, a court order directing the State Department to issue a Consular Report of Birth Abroad and passports for the children, and other relief and damages. For the reasons discussed in its memorandum and order, the court dismissed the case for lack of jurisdiction or, in the alternative, for failure to state a claim on which relief can be granted. Excerpts below from the court's memorandum and order discuss the legal framework and procedures applicable to proving citizenship at birth for individuals born abroad. The U.S. motion to dismiss, filed on June 19, 2009, is available at *www.state.gov/s/l/c8183.htm*. The plaintiffs' appeal to the U.S. Court of Appeals for the Fifth Circuit was pending at the end of 2009.*

* * * *

A. Citizenship at Birth for Individuals Born Abroad

* * * *

By statute, a person who is born abroad automatically becomes a national and citizen of the United States if both parents are United States citizens and at least one of the parents has had a residence in the United States or one of its outlying possessions prior to the birth of such person. 8 U.S.C. § 1401(c). If one parent is not a United States citizen, however, a person who is born abroad may

* Editor's note: On March 17, 2010, the U.S. Court of Appeals for the Fifth Circuit upheld the dismissal for lack of subject matter jurisdiction and failure to state a claim. *Parham v. Clinton*, 374 Fed. Appx. 503 (5th Cir. 2010); 2010 WL 1141638 (5th Cir. Appx. 2010).

still acquire United States citizenship if the other parent is a United States citizen who has been physically present within the United States for a sufficient length of time prior to the birth. *See* 8 U.S.C. § 1401(g). Congress has delegated the responsibility for administering and enforcing the law relating to nationality to the Secretary of State, whose authority extends to "the determination of nationality of a person not in the United States." 8 U.S.C. § 1104(a). A person's "nationality" in this context is defined to mean citizenship. 22 C.F.R. § 50.1(d) (2009) (defining "national" to mean "a citizen of the United States or a noncitizen owing permanent allegiance to the United States"). . . .

Claims to United States citizenship for persons born abroad are made through an application for registration or a passport, or through an application for a Consular Report of Birth Abroad of a Citizen of the United States of America. 22 C.F.R. § 50.2. Determinations of citizenship may be made abroad by a consular officer or a designated nationality examiner who may approve or disapprove an application for registration or for a passport. *Id.* A Consular Report of Birth Abroad may only be issued by a consular officer . . . and such report will issue only if the consular officer is "satisfied that the claim to nationality has been established." *Id.* The applicant seeking a Consular Report of Birth Abroad must submit proof of the child's birth, identity, and citizenship in compliance with the requirements set forth in the regulations governing passports. *See id.* at § 50.5 (referencing 22 C.F.R. Part 51, Subpart C). Under this section, the applicant has the burden of proving that he or she is a United States citizen. *See id.* at § 51.40. The applicant must provide documentary evidence in support of a claim that he or she is a United States citizen. *Id.* at § 51.41. In addition to the requisite forms of documentary evidence, a State Department official may, as a matter of discretion, "require an applicant to provide *any evidence* that it deems necessary to establish that he or she is a [United States] citizen[.]" *Id.* at 51.45 (emphasis added)[.] A consular official "may issue" a Consular Report of Birth Abroad only upon application and the submission of "satisfactory proof of birth, identity and nationality[.]" *Id.* at § 50.7(a).

To assist consular officials with making determinations regarding applications for citizenship abroad, the United States Department of State provides guidelines in its Foreign Affairs Manual. The State Department's Foreign Affairs Manual deems proof of a "blood relationship" essential to establishing citizenship where a claim is made by a person born abroad:

> The laws on acquisition of United States citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed. It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and parent on whose citizenship the child's own claim is based, United States citizenship is not acquired. The burden of proving a claim to United States citizenship, including blood relationship and legal relationship, where applicable, is on the person making such claim.

7 U.S. Department of State, Foreign Affairs Manual § 1131.4-1(a). Although children born in wedlock "are generally presumed to be the issue of that marriage," the presumption is not determinative in citizenship cases, where "an actual blood relationship to a United States citizen is required." *Id.* at § 1131.4-1(c). In determining the existence of a blood relationship for persons born in wedlock, the State Department applies a preponderance-of-the-evidence standard, in which "evidence of blood relationship is of greater weight than the evidence to the contrary." *Id.* at § 1131.4-1(b)(1). Where a child has been conceived out of wedlock, as [the children] were in this instance, a consular official may investigate to determine the possibility of "paternity fraud." *Id.* at § 1131.5-3(a)(1). To resolve doubts about paternity, a consular officer may request "blood or DNA testing." *Id.* at 1131.5-3(b)(4).

The plaintiffs in this case complain that DNA testing is not expressly authorized by statute and that the defendants' request for proof of paternity is unnecessary. According to information

supplied by the defendants, and the foregoing legal standards, consular officials are "required by law to note evidence of transmission, legitimation, and filiation." (Doc. # 5, Declaration of Edward A. Betancourt). For this purpose, the State Department regularly requires DNA testing of children in cases such as [this one], because such testing "is standard practice worldwide in a case where the children were conceived before the date of marriage." (*Id.*). . . .

* * * *

b. Out-of-wedlock children

On September 28, 2009, the U.S. District Court for the Middle District of Florida granted the government's motion to dismiss a case brought by a plaintiff born out of wedlock outside the United States. *Retuya v. Chertoff*, Case No. 8:08-CV-935-T-17-EAJ (M.D. Fla. 2009). The plaintiff alleged that the Department of State had violated her rights to due process and equal protection under the Fifth Amendment to the U.S. Constitution when a consular official at the U.S. Embassy in the Philippines denied her application for derivative citizenship on the grounds that she was not legitimated under U.S. or Philippines law before the age of 21. The court found that a Florida court order of paternity entered after the applicant was 21 but deemed "retroactive" by the Florida court was insufficient to satisfy the requirement of "legitimation" before the age of 21 contained in 8 U.S.C. § 1409. The U.S. motion to dismiss, filed on August 1, 2008, explained § 1409(a) as follows:

> . . . The version of § 1409(a) that controls in this case, commonly referred to as "old" § 1409(a), provides that a child born out of wedlock outside the United States to a father who is a United States citizen shall likewise be deemed a citizen "if the paternity of such child is established *while* such child is under the age of twenty-one years by legitimation." 8 U.S.C. § 1409(a) (1985) (amended by the Immigration and Nationality Act Amendments of

1986, Pub. L. No. 99-653, 100 Stat. 3655 (1986) (emphasis added).[3]

The court also rejected the plaintiff's equal protection, due process, res judicata, and collateral estoppel claims. The court also held that passport issuance was not subject to mandamus in the case and reaffirmed the principle "that passport issuance is a discretionary function exclusively reserved to the Executive Branch. *Haig v. Agee*, 453 U.S. 280, 293 (1981)." *Retuya v. Chertoff*, Case No. 8:08-CV-935-T-17EAJ, at 9. The U.S. motion to dismiss, the U.S. reply in support of the motion to dismiss, and the court's unpublished order are available in full at *www.state.gov/s/l/c8183.htm*.

B. PASSPORTS

On July 6, 2009, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a district court's judgment dismissing

[3] The 1986 amendments changed the citizenship requirements for an out of wedlock child born abroad to a citizen father as follows:

(1) a blood relationship between the person and the father is established by clear and convincing evidence,
(2) the father had the nationality of the United States at the time of the person's birth,
(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
(4) while the person is under the age of 18 years—
  (A) the person is legitimated under the law of the person's residence or domicile,
  (B) the father acknowledges paternity of the person in writing under oath, or
  (C) the paternity of the person is established by adjudication of a competent court.

Pub. L. No. 99-653, § 13(a), 100 Stat. 3655. Congress further provided that "an individual who is at least 15 years of age, but under 18 years of age as of the date of enactment of this Act may elect to have the old section 309(a) apply to the individual instead of the new section 309(a)." Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2609 (1988). Plaintiff here seeks to proceed under old § 1409(a). Complaint ¶¶ 24, 27.

a lawsuit brought on behalf of a U.S. citizen child born in Jerusalem to compel the State Department to record "Israel" (rather than "Jerusalem") as the child's birthplace in his passport and Consular Report of Birth Abroad. *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009). *See* Chapter 9.C. for discussion.

C. IMMIGRATION AND VISAS

1. Special Immigrant Visas for Afghans

Section 602(b) of the Afghan Allies Protection Act of 2009 authorizes 1,500 special immigrant visas annually for certain Afghans for fiscal years 2009 through 2013. Div. F, Title VI, Pub. L. No. 111-8, 123 Stat. 807. To be eligible, an Afghan must have been employed by or on behalf of the U.S. government in Afghanistan on or after October 7, 2001, for a period of not less than one year, have provided "faithful and valuable service" to the U.S. government, and have experienced or be experiencing "an ongoing serious threat as a consequence of that employment." Spouses and children of eligible Afghans also may receive the visas if they are accompanying or joining the principal visa holder. *See http://travel.state.gov/visa/immigrants/info/info_4495.html.*

2. Visas and Temporary Admission for Nonimmigrant Aliens Infected with HIV

On October 30, 2009, President Barack H. Obama announced that the United States would no longer bar people with HIV from entering the United States, effective in early 2010. President Obama stated:

> Twenty-two years ago, in a decision rooted in fear rather than fact, the United States instituted a travel ban on entry into the country for people living with HIV/AIDS. Now, we talk about reducing the stigma of this disease, yet we've

> treated a visitor living with it as a threat. We lead the world when it comes to helping stem the AIDS pandemic, yet we are one of only a dozen countries that still bar people [with] HIV from entering our own country.
>
> If we want to be the global leader in combating HIV/AIDS, we need to act like it. And that's why on Monday my administration will publish a final rule that eliminates the travel ban effective just after the New Year. Congress and President Bush began this process last year, and they ought to be commended for it. We are finishing the job. . . .

See Daily Comp. Pres. Docs., 2009 DCPD No. 00864, pp. 2–3.

On November 2, 2009, the U.S. Department of Health and Human Services published the final rule. 74 Fed. Reg. 56,547 (Nov. 2, 2009). Excerpts below from the summary and preamble to the final rule provide additional information on the new rule and the legislative and regulatory history of the HIV-related prohibition.

Through this final rule, the Centers for Disease Control and Prevention (CDC), within the U.S. Department of Health and Human Services (HHS), is amending its regulations to remove "Human Immunodeficiency Virus (HIV) infection" from the definition of *communicable disease of public health significance* and remove references to "HIV" from the scope of examinations for aliens.

Prior to this final rule, aliens with HIV infection were considered to have a *communicable disease of public health significance* and were thus inadmissible into the United States per the Immigration and Nationality Act (INA). While HIV infection is a serious health condition, it is not a communicable disease that is a significant threat for introduction, transmission, and spread to the U.S. population through casual contact. As a result of this final rule, aliens will no longer be inadmissible into the United States based solely on the ground that they are infected with HIV, and

they will not be required to undergo HIV testing as part of the required medical examination for U.S. immigration.

* * * *

II. Background

* * * *

B. Legislative and Regulatory History

Beginning in 1952, the language of the INA mandated that aliens "who are afflicted with any dangerous contagious disease" are ineligible to receive a visa and are to be excluded from admission into the United States. In April 1986, prior to the recent developments in medicine and epidemiologic principles concerning HIV infection, HHS published a proposal in the *Federal Register* to include *acquired immunodeficiency syndrome (AIDS)* as a dangerous contagious disease. *See* 51 FR 15354 (April 23, 1986). In June 1987, HHS published a final rule adopting this proposal. *See* 52 FR 21532 (June 8, 1987). Also during this time, HHS separately published a proposed rule to substitute HIV infection for AIDS on the list of dangerous contagious diseases. *See* 52 FR 21607 (June 8, 1987). While this proposed rule was pending public comment, Congress added HIV infection to the list of dangerous contagious diseases. Public Law 100-71, section 518, 101 Stat. 475 (July 11, 1987). In response to the congressional mandate, HHS issued final regulations to that effect in August of that year. *See* 52 FR 32540 (August 28, 1987). Accordingly and immediately, aliens infected with HIV became ineligible to receive visas and were excluded from admission into the United States. *See* INA section 212(a)(6), 8 U.S.C. 1182(a)(6)(1988).

In 1990, Congress amended the INA by revising the classes of excludable aliens to provide that an alien who is determined (in accordance with regulation[s] prescribed by the Secretary of Health and Human Services) to have a *communicable disease of public health significance* is excludable from the United States. Immigration Act of 1990, Public Law 101-649, section 601, 104 Stat. 4978 January 23, 1990; INA section 212(a)(1)(A)(i), 8 U.S.C. 1182(a)(1)(A)(i) (effective June 1, 1991). HHS/CDC subsequently published a proposed rule that would have removed from the list all diseases,

including HIV infection, except for infectious tuberculosis. *See* 56 FR 2484 (January 23, 1991). Based on public comments received on this proposal, and after reconsideration of the issues, HHS published an interim final rule retaining all diseases on the list, including HIV infection, and committed its initial proposal for further study. *See* 56 FR 25000 (May 31, 1991). Congress subsequently amended INA section 212(a)(1) to specify that "infection with the etiologic agent for acquired immune deficiency syndrome" is a *communicable disease of public health significance*, thereby making explicit in the INA that aliens with HIV are ineligible for admission into the United States. National Institutes of Health Revitalization Act of 1993, Public Law 103-43, section 2007, 107 Stat. 122 (June 10, 1993).

In summer 2008, Congress amended the INA by striking "which shall include infection with the etiologic agent for acquired immune deficiency syndrome," thereby leaving to the Secretary of HHS the discretion for determining whether HIV should remain in the definition of *communicable disease of public health significance* provided for in 42 CFR 34.2(b). [Tom Lantos and Henry Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. Law 110-293, section 305, 122 Stat. 2963 (July 30, 2008).]

In a separate action on October 6, 2008, HHC/CDC published an Interim Final Rule (IFR) announcing a revised definition of *communicable disease of public health significance* and revised scope of the medical examination in 42 CFR part 34. This IFR addressed concerns regarding emerging and reemerging diseases in immigrant and refugee populations who are bound for the United States. *See* 73 FR 58047 and 73 FR 62210. With the revision to 42 CFR Part 34, the definition of *communicable disease of public health significance* was modified to include two disease categories: (1) Quarantinable diseases designated by Presidential Executive Order; and (2) a communicable disease that may pose a public health emergency of international concern in accordance with the International Health Regulations of 2005, provided the disease meets specified criteria. Specific illnesses remaining as a *communicable disease of public health significance* were active tuberculosis, infectious syphilis, gonorrhea, infectious leprosy,

chancroid, lymphogranuloma venereum, granuloma inguinale, and HIV infection.

In response to the 2008 amendment to the INA, on July 2, 2009, HHS/CDC published a Notice of Proposed Rule Making (NPRM), which proposed two regulatory changes: (1) The removal of HIV infection from the definition of *communicable disease of public health significance*; and (2) removal of references to serologic testing for HIV from the scope of examinations.

* * * *

3. Exempting Certain Aliens from INA Terrorism-related Provisions

On September 21, 2009, Secretary of State Hillary Rodham Clinton and Secretary of Homeland Security Janet Napolitano exercised their discretion in accordance with their authorities under § 212(d)(3)(B)(i) of the INA, as amended, 8 U.S.C. § 1182(d)(3)(B)(i), to conclude that most of the terrorism-related bars to admission under the INA would not apply to certain aliens, for any activity or association relating to the Iraqi National Congress, the Kurdistan Democratic Party ("KDP"), or the Patriotic Union of Kurdistan ("PUK"). The determination concerning each organization provided the criteria that U.S. Citizenship and Immigration Services ("UCSIS"), in consultation with U.S. Immigration and Customs Enforcement ("ICE"), or U.S. consular officers, as applicable, would apply in assessing a particular alien's eligibility for the exemption. Excerpts below from one of the determinations provide the criteria for determining an alien's eligibility for the exemption. For additional background on the applicable statutory framework, see *Digest 2007* at 70 or *Digest 2008* at 29–30.

The Secretary of Homeland Security and the Secretary of State, following consultations with the Attorney General, hereby conclude, as a matter of discretion in accordance with our respective authorities under section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(d)(3)(B)(i), as amended, as well as the foreign policy and national security interests deemed relevant in

these consultations, that section 212(a)(3)(B) of the INA, excluding subclause (i)(II), shall not apply, with respect to an alien, for any activity or association relating to the Iraqi National Congress (INC), provided that the alien satisfies the relevant agency authority that the alien:

(a) is seeking a benefit or protection under the INA and has been determined to be otherwise eligible for the benefit or protection;
(b) has undergone and passed relevant background and security checks;
(c) has fully disclosed, in applications and/or interviews with U.S. government representatives and agents, the nature and circumstances of activities or associations falling within the scope of section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B);
(d) has not participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons;
(e) poses no danger to the safety and security of the United States; and
(f) warrants an exemption from the relevant inadmissibility provision in the totality of the circumstances.

* * * *

4. First Amendment Challenges to Visa Denials

On July 17, 2009, the U.S. Court of Appeals for the Second Circuit vacated and remanded a district court's decision in a case challenging the Department of State's denial of a visa for Tariq Ramadan, whose visa was revoked in 2006 when he sought to come to the United States to assume a teaching position at the University of Notre Dame and who subsequently was denied a visa when he sought to travel for various speaking engagements. *American Academy v. Napolitano*, 573 F.3d 115 (2d Cir. 2009). The organizations that had invited Ramadan to speak in the United States brought the

lawsuit under the First Amendment to the U.S. Constitution. For prior developments in the case, see *Digest 2006* at 18–29 and *Digest 2007* at 19–26.

The court held that jurisdiction existed to address the First Amendment challenges to the visa denial and, citing *Kleindeinst v. Mandel*, 408 U.S. 753 (1972), required the government to articulate a "facially legitimate and bona fide reason" for the alien's exclusion. The court held that this standard is met if the consular officer's decision is consistent with the statutory ground of inadmissibility on which he relied, such that the court may determine that the officer applied the provision validly, and there are no well-supported allegations of bad faith on the consular officer's part.

In this case, the consular officer denied Ramadan's visa under § 212(a)(3)(B)(iv)(VI)(dd) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd), because he provided material support to two undesignated terrorist organizations (both of which the Treasury Department subsequently designated under Executive Order 13224 as entities that support terrorism). The court noted that the applicable INA provision renders an alien inadmissible for such acts, unless the alien demonstrates by clear and convincing evidence that he did not know, and should not reasonably have known, that the recipient was a terrorist organization. In reviewing the record relative to the various elements of that ground for inadmissibility, the court concluded that:

> . . . the statutory provision expanding visa ineligibility to those who contributed funds to an undesignated terrorist organization before the provision was enacted was validly applied to Ramadan; the knowledge requirement of the statute required the consular officer to find that Ramadan knew his contributions provided material support; and the consular officer was required to confront Ramadan with the allegation against him and afford him the subsequent opportunity to demonstrate by clear and convincing evidence that he did not know, and reasonably should

> not have known, that the recipient of his contributions was a terrorist organization. . . .

American Academy v. Napolitano, 573 F.3d at 118. In conducting "the limited review permitted by *Mandel,*" the court concluded that the record did not establish that the consular officer confronted Ramadan with the allegations supporting denial or gave Ramadan the required opportunity to satisfy his burden. *Id.*

Therefore, the court remanded the case to enable the government to determine whether the consular officer could assure the district court that he or she had confronted Ramadan with the allegations supporting denial and "and provided him some opportunity thereafter to negate such knowledge, or, if not, to conduct a renewed visa hearing now that Ramadan is aware of the knowledge he must negate." *Id.* at 134.

Litigation also continued in 2009 in the U.S. District Court for the District of Massachusetts, in another First Amendment challenge to a visa denial. The case arose after a consular officer denied a visa to Adam Habib, a South African professor, on the basis of 8 U.S.C. § 1182(a)(3)(B)(i)(I). *Habib v. Chertoff*, 588 F. Supp. 2d 166 (D. Mass. 2008) (denying U.S. motion to dismiss but dismissing Michael Chertoff as a defendant and dismissing Habib as a plaintiff and granting U.S. motion to stay the plaintiffs' motion for summary judgment).*

* Editor's note: On January 25, 2010, Secretary of State Clinton exercised her discretionary authority under § 212(d)(3)(B)(i) of the INA, following consultations with the Department of Homeland Security and the Department of Justice, to grant exemptions for Ramadan and Habib, for purposes of any application for non-immigrant visa and for admission as a non-immigrant, establishing that neither would be found inadmissible on the basis of the facts underlying their previous visa denials. *Digest 2010* will provide additional discussion of relevant aspects of Secretary Clinton's determination.

5. Expulsion of Aliens

On October 30, 2009, Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee on the report of the International Law Commission ("ILC" or "Commission") on the work of its sixty-first session. Excerpts follow from Mr. Simonoff's statement, discussing the ILC's draft articles addressing the expulsion of aliens. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*; the ILC report is available at *http://untreaty.un.org/ilc/reports/2009/2009report.htm*.

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The United States would like to express its appreciation for the continued efforts of Special Rapporteur [Maurice] Kamto on the topic of Expulsion of Aliens. The issues addressed by the Rapporteur are complicated ones and we encourage the Rapporteur and other members of the Commission as well as other States to carefully review the draft articles concerning the human rights of aliens subject to expulsion. As the scope of this project continues to expand, our concerns about the possibility that these draft articles could unduly restrain the sovereign rights enjoyed by States to control admission to their territories and to enforce their immigration laws are even more acute. Today I would like to highlight a few issues that demonstrate the need for careful attention to these draft articles.

As a preliminary matter, we would like to highlight an issue regarding methodology and the appropriate sources of international law. We would hope that rather than attempting to articulate new rights specific to the expulsion context and importing concepts from regional jurisprudence (e.g., from the European Commission and Court), reference would be made instead to well-settled principles of law reflected in the precise text of broadly ratified global (i.e., U.N.) human rights conventions.

Additionally, these new draft articles on human rights highlight the need to further refine the scope of these draft articles. We have

previously emphasized the need to clarify that decisions to deny entry do not properly fall within the scope of these draft articles, and that they should not apply to matters governed by specialized bodies of law such as extraditions or other transfers for law enforcement purposes or to expulsions of aliens in situations of armed conflict. For example, extradition must be excluded from the scope of the draft articles; extradition is not expulsion, but the transfer of an individual—both aliens and nationals—for a specific law enforcement purpose. Far from codifying rules of customary international law in this area, many of the proposals would purport to amend the settled practices and obligations of States under multilateral and bilateral extradition treaty regimes. Additionally, it appears that more thought is needed as to how these rules would apply in the situation of an armed conflict.

We have further concerns about the scope of the draft articles regarding the rights of persons who have been expelled. In our view, as a general matter and consistent with the framework adopted in international human rights treaties, these draft articles should apply to individuals within the territory of a State who are subject to a State's jurisdiction. States should not be placed in the situation of being responsible for anticipating conduct by third parties that is beyond their forseeability or control.

Regarding draft article 10, while we of course recognize the importance of including a non-discrimination principle in these draft articles, it should be clear that it applies only to the process afforded to aliens in expulsion proceedings, and should not unduly restrain the discretion enjoyed by States as a result of their sovereign rights to control admission to their territories and to establish grounds for expulsions of aliens under their immigration laws.

Regarding concerns over family unity, the draft article on this subject appears to be based on the emerging jurisprudence of the European Court. In this area and elsewhere we would recommend referring instead to the text of the International Covenant on Civil and Political Rights as well as to state practice to determine how to articulate the scope of the obligations of States.

Finally, we are particularly troubled by Mr. Kamto's incorporation of non-refoulement obligations into numerous provisions, both indirectly by, as previously noted, extending protections to

"persons who have been . . . expelled" in the various provisions and explicitly in draft articles 14 and 15. The Special Rapporteur relies on non-binding opinions of the Human Rights Committee and jurisprudence of the European Court of Human Rights to interpret a non-refoulement obligation and a requirement for assurances against the death penalty into rights where none is expressly provided in the actual texts of Article 6 and 7 of the International Covenant on Civil and Political Rights or any other U.N. convention. Moreover, we are concerned about the proposed obligation in draft article 14 regarding ensuring respect for . . . "personal liberty in the receiving State" as this term is undefined and goes beyond existing obligations regarding non-refoulement assumed by States as parties to global (i.e., U.N.) conventions. Finally, draft article 15(2)'s extension of the non-refoulement protection to protect against risks "emanat[ing] from persons or groups of persons acting in a private capacity" goes far beyond even the express non-refoulement protection regarding torture contained in Article 3 of the CAT [Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment].

* * * *

Cross References

Protection of migrants, **Chapter 6.D.6.**
U.S. legislation on child soldiers and grounds of inadmissibility under the Immigration and Nationality Act, **Chapter 6.G.**
Travel-related restrictions, **Chapter 16.A.1.a.(1), 2.a., 3.a., 3.b., 4.c.(2), 4.d., and 4.e.**
Modification of rules concerning travel-related transactions involving Cuba, **Chapter 16.B.1.**

Chapter 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. *Request for Interpretation of the Judgment in the Case Concerning Avena and Other Mexican Nationals*

On January 19, 2009, the International Court of Justice ("ICJ") or ("Court") issued a judgment in *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, available at *www.icj-cij.org/docket/files/139/14939.pdf*. *See Digest 2008* for discussion of Mexico's June 5, 2008 request; for background on the Court's judgment in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 21 ("*Avena*"), see *Digest 2003* at 43–103 and *Digest 2004* at 37–43. In its 2009 judgment, the Court found, among other things, no interpretive dispute between Mexico and the United States concerning the *Avena* judgment under Article 60 of the Court's Statute. The Court's judgment also included a provision reaffirming the binding nature of the U.S. obligations under paragraph 153(9) of the *Avena* judgment. For written submissions and oral proceedings in the case, see *www.icj-cij.org/docket/index.php?p1=3&p2=3&k=11&case=139&code=musa&p3=0*.

2. Private Right of Action for Money Damages or Other Relief

On August 14, 2009, by order of the U.S. Court of Appeals for the Third Circuit, the United States filed a brief as *amicus*

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curiae in support of a district court judgment dismissing a Jamaican national's claims under the Vienna Convention on Consular Relations, 42 U.S.C. §§ 1983 and 1985,* and the Alien Tort Claims Act, 28 U.S.C. § 1350. *McPherson v. United States*, Case No. 08-3757 (3d Cir.). The complaint sought damages against the United States, two states and counties within the United States, and five law enforcement officials for alleged violations of Article 36 of the Vienna Convention, among other things, but the plaintiff did not appeal the dismissal of his claims against the United States.

In its brief, excerpted below, the United States set forth the view that "the district court correctly dismissed the plaintiff's claims here because the Vienna Convention does not create judicially enforceable individual rights to consular notification and access. Furthermore, even if the Convention did create enforceable rights to consular notification and access, there would be no legal basis for a private suit for money damages for their violation." (Some footnotes are omitted.) Chapter 4.C.2. discusses when a treaty may be found to create judicially enforceable rights. In response to the court's questions, the U.S. brief also expressed the view that *Heck v. Humphrey*, 512 U.S. 477 (1994), does not bar a suit for damages for violation of consular notification and access requirements and that the district court properly dismissed the complaint *sua sponte* on statute-of-limitations grounds. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

* * * *

* Editor's note: 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects . . . any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. § 1985 provides civil remedies for conspiracy to interfere with an individual's civil rights.

I. THE VIENNA CONVENTION DOES NOT CREATE RIGHTS TO CONSULAR NOTIFICATION AND ACCESS THAT MAY BE VINDICATED IN A PRIVATE ACTION FOR MONEY DAMAGES.

A. Article 36 Does Not Confer Any Private Right To Sue To Remedy A Violation Of Consular Notification Requirements.

* * * *

. . . The [Vienna] Convention's text, structure, and history give no indication that Article 36 was intended to create individually enforceable rights.

2. In the context of a federal statute, the statutory text ordinarily "must be phrased in terms of the persons benefitted" before the statute will be found to create private rights that may in turn give rise to a private right of action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). Viewed through that lens, the Vienna Convention cannot be read to provide private rights subject to individual enforcement in court. The text of the Convention explicitly "disclaims any intent to create individual rights." *United States v. Duarte-Acero*, 296 F.3d 1277, 1281–1282 (11th Cir. 2002). The Preamble recognizes that the Convention's purpose is "*not to benefit individuals* but to ensure the efficient performance of functions by consular posts." Although this specific limitation refers to "privileges and immunities," it reflects the broader point that the entire treaty, including Article 36, is intended to enhance States' ability to protect their nationals abroad rather than to create free-standing individual rights. *See, e.g., Mora* [*v. People of the State of New York*], 524 F.3d [183,] 196–197 [2d Cir. (2008), *cert. denied*, 129 S. Ct. 397 (2008)].

Furthermore, while Article 36 uses the term "rights" to refer to a detained foreign national's ability to request that his consulate be notified of his arrest and to have communications forwarded to the consulate, the article "says nothing about the nature of" those rights "or how, if at all, they may be invoked." *Cornejo* [*v. County of San Diego*], 504 F.3d [853,] 859 [9th Cir. (2008)]. Furthermore, the requirement at issue in this case—"a receiving State's obligation to inform a detained foreign national of his 'rights' under paragraph 1(b)—is never itself expressly referred to as a 'right.'"

Mora, 524 F.3d at 194 . . . . In any event, "the text of the Convention is entirely silent as to whether private individuals can seek redress for violations of this obligation—or any other obligation set forth in Article 36—in the domestic courts of States-parties." *Mora*, 524 F.3d at 194.

Significantly, the first protection extended under Article 36 is to consular officials, who "shall be free to communicate with nationals of the sending State and to have access to them." The "rights" of detained foreign nationals were deliberately placed underneath, *see* 1 Official Records, United Nations Conf. on Consular Relations, Vienna, 4 Mar.–22 Apr. (1963), 333 (Chile), signaling what Article 36's introductory clause spells out—that the Article's function is not to create freestanding individual rights, but "to facilitat[e] the exercise of consular functions." *See Mora*, 524 F.3d at 196; *Cornejo*, 504 F.3d at 859–60. As a practical matter, a foreign national's rights are necessarily subordinate to his country's rights, since it is entirely up to a consulate whether to respond to its national's request for assistance. Given that neither a foreign State nor its consular official can sue under the Convention or 42 U.S.C. § 1983 to remedy an alleged violation, *see Breard v. Greene*, 523 U.S. 371, 378 (1998), it follows that an individual alien should not be able to do so either.

Article 36 also provides that consular access rights "shall be exercised in conformity with [domestic law], subject to the proviso * * * that [domestic law] must enable full effect to be given to the purposes for which the rights * * * are intended." The reference to how rights "shall be *exercised*" speaks to how rights will be implemented in practice, *i.e.*, how detainees will be told of the right to contact consular officials, how consular officers will be contacted, and how consular officers will be given access to a detainee. That is quite different from the available *remedies* for a violation. *See Cornejo*, 504 F.3d at 861. For example, when a person seeks damages from an official who has violated his Fourth Amendment rights, he is not exercising those rights in bringing the lawsuit; he is suing to remedy a prior interference with the exercise of those rights. Notably, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), held that the "full effect" provision did not prevent a finding of

procedural default, and also expressed "doubt" that there must be a "judicial remedy" for a violation of Article 36, noting that "diplomatic avenues" were the "primary means" of enforcement. *Id.* at 2680–2687.

Moreover, the Optional Protocol to the Vienna Convention creates a dispute resolution mechanism, and that mechanism may be initiated only by a State party to the Convention. The decision that results has "no binding force except between the parties and in respect to the particular case." Statute of the ICJ, art. 59, 59 Stat. 1062 (1945). The fact that the sole remedy created by the Convention's drafters is both limited to state parties and purely voluntary is not consistent with an argument that Article 36 of the Convention creates enforceable individual rights. *See Mora*, 524 F.3d at 197; *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120–122 (2005).[4]

3. The drafting history of Article 36 and the circumstances of its consideration by the President and the Senate also support the conclusion that it was not understood to create privately enforceable rights.

The initial proposed draft of what is now Article 36 was prepared by the International Law Commission (ILC), members of which recognized that the provision "related to the basic function of the consul to protect his nationals," and that "to regard the question as one involving primarily human rights" was to "confuse the real issue." Summary Records of 535th Mtg., U.N. Doc. A/CN.4/SR.535, at 48–49 (1960) (Sir Fitzmaurice); *see id.* (Mr. Erim) (article "dealt with the rights and duties of consuls and not with the protection of human rights"). Members of the ILC also observed that the proposed article would be subject to the "normal rule" that a country that did not comply with a provision of the Convention would "be estopped from invoking that provision against other participating countries." *Id.* at 49.

The final ILC draft submitted to the United Nations Conference required law enforcement officials to notify consular representatives

[4] On March 7, 2005, the United States gave notice of its withdrawal from the Optional Protocol. *See Medellin v. Texas*, 128 S. Ct. [1346,] 1354 [(2008)].

whenever a foreign national was detained. *See* ILC, Draft Articles on Consular Relations, 112 (1961), available at http://untreaty.un.org/ilc/texts/9_2.htm. Numerous delegates expressed concern that mandatory notice would pose an enormous burden for countries with large tourist or immigrant populations, *see* 1 Official Records at 36–38, 82–83, 81–86, 336–340, and the Conference ultimately compromised by requiring notice to consular representatives only at the foreign detainee's request. *See id.* at 82 (explaining that change would "lessen the burden on the authorities of receiving States"). In this context, and given the stated purpose for its inclusion, Article 36 cannot reasonably be interpreted to create enforceable private rights.

The history of the Convention's consideration by the Senate and subsequent ratification and implementation by the Executive also support the conclusion that Article 36 was not understood to create individually enforceable rights within our domestic legal system. At the time of the Convention's ratification, the State Department and the Senate Committee on Foreign Relations agreed that the Convention would not modify existing law. *See* S. Exec. Rep. No. 9, 91st Cong., 1st Sess., at 2, 18 (1969). The State Department explained that disputes under the Convention "would probably be resolved through diplomatic channels" or, failing resolution, through the process set forth in the Optional Protocol. *Id.* at 19. Consistent with this intent, the State Department's longstanding practice has been to respond to foreign States' complaints about violations of Article 36 by conducting an investigation and, where appropriate, making a formal apology and taking steps to prevent a recurrence.

4. Any ambiguity in the Convention's text or history should be construed in favor of the Executive Branch's construction, which is entitled to "great weight." *United States v. Stuart*, 489 U.S. 353, 369 (1989). The longstanding position of the Executive Branch is that the Vienna Convention's consular notification provisions are not enforceable in actions brought by private individuals or foreign governmental officials. The State Department's practices relating to the Convention also reflect the understanding that it does not create judicially enforceable individual rights.

Thus, the language, context, and history of the Convention do not support a construction that confers individual rights that could in turn be judicially enforced by private parties. Accordingly, the district court's dismissal of the Article 36 claims should be affirmed.

* * * *

[B.]1. The Convention Does Not Create A Private Right Of Action For Money Damages.

Nothing in the text or history of the Vienna Convention suggests that it was intended to create a private right of action for damages for violation of Article 36, and the fact that the drafters found it necessary to create an optional dispute resolution mechanism suggests strongly that no private remedy was envisioned. *Cf. Abrams*, 544 U.S. at 121–123. In 2007, the State Department surveyed U.S. embassies worldwide about other nations' practice in enforcing the Convention's consular notification requirements. Based on the responses to that survey, it appears that, with one possible exception, no country has allowed an individual claim for money damages for violation of consular notification requirements. *Mora*, 524 F.3d at 188 & n.5. In *Sanchez-Llamas*, the Supreme Court emphasized the unlikelihood that Convention signatories would have intended to require a remedy—there, application of the exclusionary rule in criminal proceedings—that was not recognized under those countries' domestic law. 548 U.S. at 343–44. There is no clear evidence that Article 36 was intended to create the highly unusual enforcement mechanism of a retrospective damages remedy and this Court should decline to hold that it did so *sub silentio*.

2. Article 36 Is Not Enforceable Under 42 U.S.C. § 1983.

Section 1983 does not create a money damages remedy against state officials for their failure to comply with Article 36. . . .

The Supreme Court "has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases * * *." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). "The creation of

a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Ibid.* Accordingly, in the context of a federal statute, only "an unambiguously conferred right [will] support a cause of action brought under § 1983." *Gonzaga Univ.*, 536 U.S. at 283; *see also id.* at 289 ("[I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms."); *Sabree v. Richman*, 367 F.3d 180, 187 (3d Cir. 2004) (rights creating language "must clearly impart an individual entitlement, and have an unmistakable focus on the benefitted class." (internal quotations marks and citations omitted)).

Even legislation that benefits an identified class may not be the basis for a § 1983 claim unless Congress intended to create individually enforceable federal rights. *See City of Rancho Palos Verdes,* 544 U.S. at 119–22 (§ 1983 "does not provide an avenue for relief every time a state actor violates a federal law"). This Court should be particularly reluctant to permit private enforcement under § 1983 of rights asserted under an international treaty, which is entered into by the Executive, with the Senate's advice and consent, against an understanding that "treaties, even those directly benefiting private persons, generally do not create private rights," Restatement (Third) of Foreign Relations Law, [§ 907, Comment a (1986)], and is also not the product of bicameral legislation. *Cf. Save Our Valley v. Sound Transit*, 335 F.3d 932, 937–938 (9th Cir. 2003) (private rights enforceable under 42 U.S.C. § 1983 must typically be created by Congress).

Furthermore, a court should be particularly inclined to hold that a § 1983 remedy is unavailable in the area of foreign affairs. *Cf. Allen-Bradley Local No. 1111 v. Wisconsin Emp. Rel. Bd.*, 315 U.S. 740, 749 (1942) (recognizing that courts are more likely to find federal preemption when Congress legislates "in the field that touche[s] international relations" than in an area of traditional police power). Here, the Senate gave its advice and consent to ratification of the Convention and the Optional Protocol, which set out a specific remedial scheme, to be invoked by one state party against another before an international tribunal. That arrangement weighs greatly against recognition of an implicit personal right

that may be enforced by a private person in the domestic courts of one of the parties.

* * * *

B. CHILDREN

1. Adoption

a. Cambodia

On February 11, 2009, U.S. Citizenship and Immigration Services ("USCIS") clarified that it remained unable to approve petitions to adopt children from Cambodia. USCIS explained that the Department of State had determined that Cambodia was not currently meeting its obligations under the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Adoption Convention"); accordingly, USCIS would not approve petitions filed after the Hague Adoption Convention entered into force for the United States in 2008. USCIS also explained that it remained unable to approve adoption petitions filed before the United States became a party to the treaty. The USCIS statement, excerpted below, is available at *www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a6dc85b6a466f110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.*

U.S. Citizenship and Immigration Services (USCIS) today clarified that it continues to be unable to approve any Form I-600, *Petition to Classify Orphan as an Immediate Relative*, filed for a child to be adopted from Cambodia. Also, the Department of State (DOS) has advised USCIS that DOS has determined that Cambodia is not currently meeting its obligations under *The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (Hague Adoption Convention). . . .

Certification of compliance with the Hague Adoption Convention and the Intercountry Adoption Act of 2000 is required under the procedures for Hague Convention adoptee cases. . . .

The Hague Adoption Convention entered into force for the United States on April 1, 2008. The Hague Adoption Convention provides important safeguards to protect the welfare of children, birth parent(s) and adoptive parent(s) engaged in intercountry adoptions. Effective April 1, 2008, new intercountry adoptions between the United States and other Hague Convention countries must comply with the Hague Adoption Convention standards. Cambodia also ratified the Hague Adoption Convention in 2007. In the United States, Hague Convention adoptions are processed on USCIS Forms I-800A and I-800.

Before the United States and Cambodia ratified the Hague Adoption Convention, Cambodian intercountry adoption cases were processed on USCIS Forms I-600A, *Application for Advance Processing of Orphan Petition,* and I-600, *Petition to Classify Orphan as an Immediate Relative*. However, the Immigration and Naturalization Service, USCIS' legacy agency, suspended U.S. orphan visa petition processing in Cambodia on Dec. 21, 2001 due to fraud, irregularities, and allegations of child-buying in the Cambodian adoption process. Because these concerns persist, DOS has determined it is not able to issue Hague Adoption Certificates or Hague Custody Declarations in Cambodia. It is important to note that this Cambodian suspension remains in effect for all Form I-600 (orphan) petitions filed before April 1, 2008.

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b. First Annual Report on Intercountry Adoption

In September 2009 the Department of State submitted to Congress the FY 2008 Annual Report on Intercountry Adoption. As the introduction to the report explained:

> The Secretary of State is required by Section 104 of the Intercountry Adoption Act of 2000 (IAA) (Public Law 106-279), to submit an annual report to the U.S. Congress on

> intercountry adoption. This report provides the required information [fn. omitted] as well as additional information about the Department of State's (Department) activities to implement the Convention.
>
> The IAA mandates submission of the report by the Department "one year after the date of the entry into force of the Convention for the United States and each year thereafter." This is the first report submitted by the Department since the Convention entered into force for the United States on April 1, 2008.
>
> **The report covers April 1, 2008 through September 30, 2008, i.e., the latter half of Fiscal Year (FY) 2008.** However, since the IAA mandated that the Convention could not enter into force for the United States until the Convention system was immediately implementable, the report describes activities that took place before April 1, 2008 to provide background and context. Also detailed are several initiatives that continued after the end of the reporting period. The statistics in the report represent only the final six months of FY 2008 in accordance with standard fiscal year reporting conventions. Subsequent reports will cover full fiscal years.

The full text of the report is available at *http://adoption.state.gov/pdf/Adoption%20Report_v9_SM.pdf*.

2. Abduction

a. Ne exeat *clause*

On June 29, 2009, the Supreme Court granted a petition for writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit. *Abbott v. Abbott*, 129 S. Ct. 2859 (2009). The question presented was "[w]hether a ne exeat clause (that is, a clause that prohibits one parent from removing a child from the country without the other parent's consent) confers a 'right of custody' within the meaning of

> the Hague Convention on International Child Abduction" ("Hague Convention" or "Convention"), T.I.A.S. No. 11,670, 1343 U.N.T.S. 49. The case arose after a mother brought her son to the United States from Chile without the father's consent, as a Chilean *ne exeat* order required. The father brought suit in a federal court in Texas, asserting that the Hague Convention required the child's return to Chile.

At the request of the Supreme Court for its views, the United States filed a brief as *amicus curiae* in support of the petition for certiorari in May 2009 (available at *www.justice.gov/osg/briefs/2008/2pet/6invit/2008-0645.pet.ami.inv.html*). The United States also filed an *amicus curiae* brief at the merits stage in September 2009 (available at *www.justice.gov/osg/briefs/2009/3mer/1ami/2008-0645.mer.ami.html*).

In its September 2009 brief as *amicus curiae*, the United States argued that the Court should reverse and remand the Fifth Circuit's decision because the "[p]etitioner's *ne exeat* right is a right of custody within the meaning of the Hague Convention," and therefore the "respondent's removal of [the child] was wrongful under the Convention." Excerpts follow from the U.S. brief, providing background on the Hague Convention and U.S. implementing legislation and discussing how the text, purposes, and negotiating history of the Hague Convention support the conclusion that custody rights under the Convention include a *ne exeat* right (some footnotes and citations to other submissions in the case omitted). The U.S. brief also discussed the significance of the treaty's post-ratification understanding with respect to a *ne exeat* right, explaining that

> [o]ther States parties to the Convention, whose interpretations of the Convention are "entitled to considerable weight," [citation omitted] have concluded, nearly unanimously, that a *ne exeat* right is a right of custody under the Convention. In addition, the multilateral Special Commission to Review the Operation of the Hague

> Convention (Special Commission), convened by the Permanent Bureau of the Hague Conference on Private International Law, has twice expressed the view—reflecting a consensus among attending States parties—that a *ne exeat* right is a right of custody.

As of the end of 2009, the case remained pending.*

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* * * *

1. The Hague Convention was adopted in 1980 to address the growing problem of international child abduction by persons involved in child custody disputes. *Hague International Child Abduction Convention; Text and Legal Analysis (Convention Text and Legal Analysis)*, 51 Fed. Reg. 10,498 (1986); see The Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention or the Convention), *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 49. To facilitate the international cooperation that is necessary to deter and remedy such abductions, the Convention establishes uniform legal standards and remedies to be employed by States parties when a child is abducted from one country to another. See 42 U.S.C. 11601(a); see also Convention introductory decls., Art. 1. In particular, the Convention provides that children abducted in violation of a parent's custody rights should be promptly returned to their country of habitual residence. See *id.* Art. 1. . . .

The Convention applies to any child under the age of 16 who is "wrongfully removed" from one contracting State to another. Convention Arts. 1(a), 4. Removal is "wrongful[]" if (1) it is "in breach of rights of custody attributed to a person, * * * either jointly or alone, under the law of the State in which the child was habitually resident," *id.* Art. 3(a), and (2) "at the time of removal or retention those rights were actually exercised, either jointly or

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* Editor's note: On May 17, 2010, the Supreme Court held that a *ne exeat* right creates a right of custody. *Abbott v. Abbott*, 130 S. Ct. 1983 (2010). *Digest 2010* will discuss relevant aspects of the decision.

alone, or would have been so exercised but for the removal or retention," *id.* Art. 3(b). "[R]ights of custody," for purposes of the Convention, "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." *Id.* Art. 5(a).

Upon finding that a child's removal was wrongful—that is, that it violated the custody rights of the left-behind parent—authorities in the State where the child has been brought must, subject to certain defenses, "order the return of the child forthwith."[2] Convention Art. 12. That remedy reflects the Convention's premises that custody determinations should be made by the courts in the child's country of habitual residence . . . . Elisa Perez-Vera, *Explanatory Report,* in 3 *Actes et Documents de la Quatorzième Session (Child Abduction)* 426, paras. 16, 19, at 429–430 (Permanent Bureau trans. 1982) (*Explanatory Report*). Accordingly, a court considering a petition for the return of the child is not to adjudicate who should have custody or adjust the parties' respective custody rights, and any decision made concerning return under the Convention "shall not be taken to be a determination on the merits of any custody issue." Convention Arts. 16–17, 19.

The United States participated in the negotiations concerning the Convention's terms, see *Members of the First Commission*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents*, at 253–255, and the Convention entered into force for the United States in 1988. See T.I.A.S. No. 11,670, *supra*. In order to implement the Convention, Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq*., which establishes procedures for requesting return of a child abducted to the United States. In so doing,

[2] In contrast, the Convention does not provide the return remedy for violations of "rights of access," which "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention Art. 5(b). Rather, an individual whose access rights have been violated may petition to "secur[e] the effective exercise of" her rights. *Id.* Art. 21.

Congress found that "concerted cooperation pursuant to an international agreement" and "uniform international interpretation of the Convention" were necessary to combat international child abduction. 42 U.S.C. 11601(a)(3) and (b)(3)(B).

ICARA authorizes "[a]ny person" seeking return of a child pursuant to the Convention to file a petition in state or federal court. 42 U.S.C. 11603(b). The court "shall decide the case in accordance with the Convention." 42 U.S.C. 11603(d). A child determined to have been wrongfully removed is to be "promptly returned," unless the party opposing return establishes the applicability of one of the Convention's "narrow exceptions." 42 U.S.C. 11601(a)(4), 11603(e)(2). Those exceptions—which include situations in which the child would face a "grave risk" of harm upon his or her return, Convention Art. 13(b), the child is old enough to object, *id.* Art. 13, or return would violate "fundamental principles of the requested State," *id.* Art. 20—may be raised as affirmative defenses to the return of the child. 42 U.S.C. 11603(e)(2).

* * * *

I. THE CONVENTION'S TEXT, PURPOSES AND NEGOTIATING HISTORY INDICATE THAT A *NE EXEAT* RIGHT SHOULD BE CHARACTERIZED AS A "RIGHT[] OF CUSTODY"

A. The Convention's Definition Of Rights Of Custody Is Broad And Encompasses Joint And Single Rights

The text of the Convention provides that "the removal * * * of a child is to be considered wrongful where * * * it is in breach of rights of custody attributed to a person * * * either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention." Convention Art. 3(a). The Convention defines "rights of custody" expansively, stating that they "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." See *id.* Art. 5(a). The definition is purposefully phrased in inclusive, rather than exhaustive, language: the

Convention seeks "to protect *all* the ways in which custody of children can be exercised." *Explanatory Report* para. 71.[7]

Consistent with that intent, Article 3(a) explicitly provides that the Convention recognizes "rights of custody" not only when they are vested in a single person holding sole custody, but also when they are held "jointly" with another person. Convention Art. 3(a). Because the Convention's drafters recognized that "courts are increasingly * * * in favour, where circumstances permit, of dividing the responsibilities inherent in custody rights between both parents," the Convention is designed to protect all "types of joint custody" created by "internal law." *Explanatory Report* para. 71. Thus, removal of a child by a parent is "equally wrongful" when the parent shares custody, as when she has none at all, because "such action * * * disregard[s] the rights of the other parent which are also protected by law." *Ibid.*; see 51 Fed. Reg. at 10,506 (Department of State explanation that "[i]f one parent [with joint custody] interferes with the other's equal rights by unilaterally removing * * * the child abroad without consent of the other parent, such interference could constitute wrongful conduct within the meaning of the Convention").

In addition, the Convention contemplates that the "bundle" of custody rights with respect to a child can be divided among two or more people, such that "the violation of a *single* custody right suffices to make removal of a child wrongful." *Furnes v. Reeves*, 362 F.3d 702, 714–715 (11th Cir.), cert. denied, 543 U.S. 978 (2004); *id.* at 722 n.17. For instance, the Explanatory Report notes that a parent has "rights of custody" even if the child possesses the right to determine his own residence, because "the right to decide a child's place of residence is only one possible element of the right to custody." *Explanatory Report* para. 78. Thus, a parent who

[7] Because the *Explanatory Report* is the "official history" and commentary on the Convention and "a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it," 51 Fed. Reg. at 10,503, it is proper to look to the *Explanatory Report* to illuminate the meaning of the Convention's text. See [*Air France v.*] *Saks*, 470 U.S. [392,] 400 [1985]; see also *Croll v. Croll*, 229 F.3d 133, 137 n.3 (2d Cir. 2000) (Explanatory Report is "authoritative" interpretive guide), cert. denied, 534 U.S. 949 (2001).

possesses only one or some custody rights within the bundle may seek a child's return. See *C. v. C.*, [1989] 1 W.L.R. 654, 662 (Neill, L.J.) (Eng. C.A.) (petitioning parent's possession of one right "included" in the definition of rights of custody is sufficient to make the return remedy available); see also *Whallon v. Lynn*, 230 F.3d 450, 457 (1st Cir. 2000) (parent who possessed parental decision making authority, but not physical custody, was entitled to return of child).

In sum, the Convention is intended to encompass *all* of the ways in which the domestic law of the various parties may create—and divide—rights of custody. *Explanatory Report* para. 71; *id.* para. 67; see *Furnes*, 362 F.3d at 716 & n.12; *C.*, 1 W.L.R. at 658 (Butler-Sloss, L.J.) (recognizing "limited rights and joint rights"). As a result, the Convention's definition of custody rights is an "autonomous concept," which may be more expansive than a given participating country's domestic conception of custody. Hague Conference on Private International Law, *Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 29 I.L.M. 219, para. 9, at 222 (1990) (*Conclusions of the Special Commission of October 1989*); see *C.*, 1 W.L.R. at 658 (Butler-Sloss, L.J.) . . . ; *In re D*, [2007] 1 A.C. 619, 635 (H.L.) (U.K.); see also *Furnes*, 362 F.3d at 711.

B. Petitioner's *Ne Exeat* Right Is A Right Of Custody Under Articles 3(a) And 5(a) Of The Convention

* * * *

The *ne exeat* right provides a joint right to "determine" residence within the meaning of Article 5(a) because a parent who holds a *ne exeat* right has the ability to decide whether the child may be taken outside of the country of habitual residence. See *Furnes*, 362 F.3d at 715. If the parent with physical custody wishes to leave the country, any "determin[ation]" as to the child's country of residence will be the result of a decision made jointly with the *ne exeat* holder.[8]

[8] Respondent argued in opposition to certiorari that the *ne exeat* right does not confer sufficient decision-making authority because a Chilean court

Decision-making authority with respect to the child's country of residence pertains to "the child's place of residence" within the meaning of Article 5(a). The phrase "place of residence" encompasses both the country and the more particular locale in which the child lives. See *Furnes*, 362 F.3d at 715; *C.*, 1 W.L.R. at 658. The Convention's essential focus is on the country as a place of residence: its entire purpose is to prevent the wrongful removal of children across international borders. Convention Art. 1(a); see *Explanatory Report* paras. 15, 56. Therefore, "the only logical construction of the term 'place of residence' in the Convention" is that it "necessarily encompass[es] decisions regarding whether [a child] may live outside of" the child's home country. *Furnes*, 362 F.3d at 715. Even viewing a *ne exeat* right as an unadorned power to veto the other parent's decision to remove the child from the country, it affords the parent holding the right significant say over where the child will live—*i.e.*, inside the country or outside of it, with all the difference that entails. See *id.* at 714; *id.* at 716.

Moreover, inherent in the *ne exeat* right is the affirmative ability to take part in more specific decisions about the child's residence (as well as many other matters). In deciding whether to agree to relocation outside the country, a parent with a *ne exeat* right has the opportunity to impose conditions on the relocation, thereby having a say in which new country, or community within that country, a child will reside. See *Furnes*, 362 F.3d at 715; *C.*, 1 W.L.R. at 663 (Neill, L.J.) ("[T]his right to give or withhold consent[,] * * * coupled with the implicit right to impose conditions, is a right to determine the child's place of residence."); *Croll*, 229 F.3d at 145 (Sotomayor, J., dissenting) (parent holding *ne exeat*

may override an unreasonable exercise of the right. But the same can be said of *any* custody right, in that courts generally have the power, upon application, to override or modify a prior grant of custody rights. And regardless of the possibility of judicial override, the parent who wishes to relocate must petition the court for permission, rather than leaving unilaterally, thus giving the *ne exeat* holder a meaningful ability to participate in the decision whether any relocation should occur. *See*, *e.g.*, *C.*, 1 W.L.R. at 663 (Donaldson, M.R.) (*ne exeat* right is a "joint right subject always * * * to the overriding rights of the court," and is a right of custody).

right may influence other parent's "selection of the destination country").

In according a parent effective control over the country in which the child will grow up, a *ne exeat* order gives the parent a substantial say in the child's care and development. The choice of country will determine everything from the child's primary cultural identity—the languages she speaks, the games she plays—to the character of the schools that she attends and the opportunities that she will have as an adult. The *ne exeat* right thus confers on the parent significant, if indirect, "decision-making authority over the child's care." *Furnes*, 362 F.3d at 716 (parent can thus "ensure that [the child] will speak Norwegian, participate in Norwegian culture, enroll in the Norwegian school system, and have Norwegian friends[, and] * * * effectively can decide that [she] will *be Norwegian*."). Petitioner's *ne exeat* right is therefore a right of custody under the Convention.[9]

* * * *

3. Construing the *ne exeat* right as a "right[] of custody" also best effectuates the Convention's underlying purpose that decisions regarding custody rights "should take place before the competent authorities in the State where the child had its habitual residence prior to its removal." *Explanatory Report* para. 19. A *ne exeat* order implicates this principle because, in addition to conferring decision-making authority on its holder, it gives the authorities of the country of habitual residence the opportunity to reconsider custody arrangements—for instance, by lifting or modifying the *ne exeat* order or, alternatively, by granting the *ne exeat* holder additional custody rights—if the parent with physical custody wants to leave the country but cannot obtain the agreement of the *ne exeat* holder. By violating a *ne exeat* order, the parent with physical custody not only disregards the other parent's

[9] The Chilean Central Authority considers the ne exeat right conferred by Chilean law to merit the return remedy under the Convention. . . . Given the Convention's emphasis on promoting uniformity and deterring forum-shopping, 42 U.S.C. 11601(b)(3)(B), the Chilean Central Authority's view that respondent's removal of [the child] was wrongful under the Convention is entitled to weight.

custody rights, but also unilaterally and wrongfully circumvents the authorities of the country of habitual residence. In so doing, she obtains a new, and perhaps more favorable, forum in which to litigate where the child should live. Refusing to order the return of the child in this situation thus disregards the jurisdiction of the country of habitual residence, and permits the abducting parent to seek and potentially obtain greater custody rights than she was accorded in that country. That is precisely the result that the Convention aims to prevent. See *id.* para. 13; *id.* para. 15.

Respondent contends that the return remedy should not be triggered by a violation of a *ne exeat* right because the parent seeking return—the *ne exeat* holder—does not have physical custody rights. See *Croll*, 229 F.3d at 140 . . . . The return contemplated by the Convention, however, is a return to the child's country of habitual residence—not a return to a particular person. See *In re D*, 1 A.C. at 634. The return remedy permits the courts of that country to determine whether the child's custody should be adjusted—including, on the petition of the parent with physical custody, whether the *ne exeat* order should be lifted.

That effectuates one of the purposes for which the *ne exeat* order was imposed in the first place—namely, permitting the home country's authorities to reconsider custodial arrangements if one parent wants to move to another country—as well as the Convention's goal of ensuring the continuing authority of the country of habitual residence. See *Explanatory Report* para. 19; *In re D*, 1 A.C. at 635. And the abducting parent is of course free to return with the child to the country of habitual residence. See *Furnes*, 362 F.3d at 717.

C. The Negotiating History Indicates That The Convention's Drafters Understood A *Ne Exeat* Right To Be A Right Of Custody

"In interpreting a treaty it is proper * * * to refer to the records of its drafting and negotiation." *Saks*, 470 U.S. at 400 (relying on delegates' discussions about treaty language); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 184–187 (1993) (same). Accord Vienna Convention on the Law of Treaties, [*concluded on*

May 23, 1969, Art. 31(1), 1155 U.N.T.S. 331, 340], Art. 32. During the negotiations over the Hague Convention, several of the drafters indicated that they believed that a *ne exeat* right would fall within Article 5's definition of "rights of custody," and that violation of a *ne exeat* order would warrant the Convention's return remedy.

Although the primary abduction scenario envisioned by the Convention's drafters involved an individual without custody rights abducting a child away from her sole custodian, see Adair Dyer, *Report on International Child Abduction by One Parent ('Legal Kidnapping')*, in 3 *Actes et Documents* 12, 19–20, the drafters took care to define custody broadly so that the return remedy would apply beyond that situation. See, *e.g.*, *Procès-verbal No. 4*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 268, 271 (*Procès-verbal No. 4*) (statements of Israeli delegate and Chairman); *Procès-verbal No. 2*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 257, 260 (statement of Chairman that Article 3 should use a "formulation which would embrace as many persons and entities as possible"); *Explanatory Report* para. 71. Thus, the drafters agreed that Article 5 encompassed joint and divisible custody rights, even though the concept of shared or divided custody was relatively new in some States parties' domestic legal systems. *Procès-verbal No. 3*, *Procès-verbaux et Documents de travail de la Première commission*, in 3 *Actes et Documents* 263, 264 (*Procès-verbal No. 3*); *id.* at 267; *Explanatory Report* para. 71.[10]

[10] Although the representative of the Commonwealth Secretariat (an intergovernmental association based in the United Kingdom), who was an observer in the negotiations, suggested that Article 5(a) should be "clarif[ied]" to make explicit its inclusion of "separable" custody rights—for instance, when the right to determine the child's residence and the right to care for the child were vested in different people, *Procès-verbal No. 4*, at 271—the drafting committee ultimately decided not to make any revisions. In reporting that decision, Adair Dyer, First Secretary at the Permanent Bureau, stated that "the existing definition of custody rights embraced the situation where rights of [physical] custody and the right to determine a child's place of residence were vested in different persons." *Procès-verbal No. 14*, *Procès-verbaux*

With respect to *ne exeat* rights specifically, the preliminary questionnaire submitted to the Hague Conference's member States for consideration posited that removing a child in violation of a *ne exeat* order would constitute wrongful removal. Adair Dyer, *Questionnaire on International Child Abduction by One Parent*, in 3 *Actes et Documents* 9, 9 explanatory note D (describing as abduction the removal of a child "by a parent from one country to another in violation of a court order which expressly prohibited such removal"). Prior to drafting the Convention, the Hague Conference's Special Commission on international child abduction met to discuss the questionnaire and other preliminary documents, and concluded that the Convention should be drafted to "cover *all* types" of abduction described in the questionnaire. *Conclusions Drawn from the Discussions of the Special Commission of March 1979 on Legal Kidnapping*, in 3 *Actes et Documents* 162, 162–163 (synthesizing the "discussions held by the Special Commission"); see Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 18 (1999).

When the subject arose during negotiations, the Canadian delegate characterized the *ne exeat* right as a "right[] of access," and urged that violation of a *ne exeat* right should constitute a "wrongful removal" and therefore that Article 3 of the Convention should provide the return remedy for violations of access rights as well as custody rights. *Procès-verbal No. 3*, at 266. The delegate from the Netherlands responded that "under the present terms of the Convention," which included a substantially similar version of Articles 3 and 5(a), "the abducted child would have to be sent back immediately"—thus indicating that he understood the *ne exeat* right to be a "right[] of custody" that would trigger the return remedy. *Ibid.* No other delegate disagreed, and the representative of the Commonwealth Secretariat concurred that "article 5 * * * could cover cases where the non-custodial parent had a right to be consulted."[12] *Ibid.* The Canadian proposal to expand Article 3

et Documents de travail de la Première commission, in 3 *Actes et Documents* 342, 344. No delegate objected to this characterization.

[12] The chair of the negotiations, A.E. Anton, later wrote that it was "less clear" whether a *ne exeat* order should be viewed as a right of custody

to make the return remedy available for access rights was defeated, *id.* at 267, suggesting that the delegates understood the existing language of custody rights in Articles 3 and 5(a) to encompass the rights arising from *ne exeat* orders.

D. The Executive Branch Interprets The Convention To Provide The Return Remedy For *Ne Exeat* Violations

Consistent with this history, the Department of State, whose Office of Children's Issues serves as the Central Authority for the United States under the Convention, has long understood the Convention as including *ne exeat* rights among the protected "rights of custody."[13] The Executive Branch's interpretation of a treaty "is entitled to great weight." *Medellin v. Texas*, 128 S. Ct. 1346, 1361 (2008) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)); see *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999). The Executive Branch's interpretation should not be rejected here, particularly because it is consistent with the interpretation by the great majority of parties that have addressed the issue. As this Court observed in *Sumitomo*, where the States parties are in agreement, the Court's role—absent extraordinary circumstances not present here—is to "giv[e] effect to the intent of the Treaty parties." 457 U.S. at 185.

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under Article 5(a)'s definition, and that "[a] suggestion that the definition of 'abduction' be widened to cover this case was not pursued." A.E. Anton, *The Hague Convention on International Child Abduction*, 30 Int'l & Comp. L.Q. 537, 546 (1981). Anton stressed, however, that his statements reflected his views alone, not those of the drafters. *Id.* at 537 n.*. The negotiating history strongly indicates that the drafters believed that the existing language of Articles 3 and 5(a) was broad enough to encompass the *ne exeat* right.

[13] Prior to the United States' filing, upon the Court's invitation, of a brief amicus curiae supporting certiorari in this case, the State Department had not formally memorialized its interpretation, although that filing in itself represents the Department's "considered judgment on the matter." *Auer v. Robbins*, 519 U.S. 452, 462 (1997). But the State Department has informed this Office that the position set forth in that brief and this one has long been its view.

b. 2009 Hague Abduction Convention Compliance Report

In April 2009 the Department of State forwarded to Congress the 2009 Report on Compliance with the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The report, as required by § 2803 of Public Law 105-277, as amended, 42 U.S.C. § 11611, evaluated each of the countries with which the United States has a treaty relationship for effectiveness in implementing the Hague Abduction Convention with respect to applications for return of or access to children on behalf of parents in the United States. The 2009 report, covering the period October 1, 2007 through September 30, 2008, identified Honduras as "not compliant" with the Hague Abduction Convention and cited "patterns of noncompliance" in Brazil, Chile, Greece, Mexico, Slovakia, Switzerland, and Venezuela.

Excerpts below from the report explain the standards the State Department uses for analyzing states' compliance with the Hague Abduction Convention. The report is available at *http://travel.state.gov/pdf/2009HagueAbductionConventionComplianceReport.pdf*.

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Convention partner countries are evaluated for compliance in three areas: Central Authority performance, judicial performance, and law enforcement performance. . . .

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The report breaks down such countries into two categories, "Countries Not Compliant with the Convention," and "Countries Demonstrating Patterns of Noncompliance with the Convention." These categories derive from the language of 42 U.S.C. § 22611(a)(1) and (2).

The Department bases its analysis of country compliance with the Convention largely on the standards and practices outlined in the *Guide to Good Practice* of the Permanent Bureau of the Hague Conference on Private International Law (referred to in this report as the "Hague Permanent Bureau"). Using the Guide, the Department

analyzed the following three compliance areas to reach its findings for this report:

1) Central Authority performance;
2) Judicial performance; and
3) Law Enforcement performance.

* * * *

NOT COMPLIANT

The designation of "Countries Not Compliant with the Convention" encapsulates the requirement in 42 U.S.C. § 11611(a)(2). Countries which the Department considers to be failing in all three performance areas for the reporting period are listed as "Not Compliant."

PATTERNS OF NONCOMPLIANCE

The designation of "Countries Demonstrating Patterns of Noncompliance" derives from 42 U.S.C. § 11611(a)(3). The Department considers countries in this category to be those that demonstrate a failure to comply with the Convention in one or two of the three performance areas.

* * * *

Cross References

Alien Tort Statute litigation, **Chapter 5.D.2.**
Comity issues in litigation under the Hague Abduction Convention, **Chapter 15.C.2.b.**

Chapter 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. U.S.–EU Extradition and Mutual Legal Assistance Agreements

On October 28, 2009, the United States and the European Union exchanged instruments of ratification for the Agreement on Extradition between the United States of America and the European Union and the Agreement on Mutual Legal Assistance between the United States of America and the European Union ("U.S.–EU Agreements"), both of which were signed at Washington on June 25, 2003. Attorney General Eric Holder delivered remarks, excerpted below, in which he described the agreements and how they would enhance U.S. law enforcement cooperation with the European Union. The full text of Mr. Holder's speech is available at *www.justice.gov/ag/speeches/2009/ag-speech-091028.html*. For background on the two agreements, see S. Treaty Doc. Nos. 109-13 and 109-14 (2006); *Digest 2006* at 127–38 and 139–47; and *Digest 2008* at 56–57 and 78. As of the end of 2009, the two agreements had not yet entered into force.*

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* * * *

These treaties represent a great achievement, both for their practical benefits and in what they symbolize. They give us important

* Editor's note: The agreements entered into force on February 1, 2010.

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new tools to combat crime, including terrorism. Let me list some of these tools:

- The extradition agreement will modernize the existing bilateral extradition treaties with each of the Member States, in many cases replacing lists of offenses that are deemed extraditable with a dual criminality standard.
- The mutual legal assistance agreement contains cutting edge provisions for future legal cooperation. These include authority:
  - to identify the existence of bank accounts associated with the subjects in the other's jurisdiction in terrorism and other serious crimes;
  - to conduct joint task forces across national lines directed against terrorism and serious crime cases rather than merely "coordinating" inquiries;
  - to obtain assistance in administrative matters that may lead to criminal investigations in matters involving terrorism and serious crimes;
  - to acquire evidence, including testimony, by means of video conferencing;
  - to use data acquired via the agreement for additional serious offenses other than just the one triggering the initial request.

But beyond their important practical value, these treaties symbolize the joint resolve of Europe and the United States to fight terrorism and transnational crime.

. . . We look forward to implementing these important instruments in a spirit of mutual respect and cooperation.

In 2009 the United States and each of the 27 EU member states exchanged diplomatic notes concerning or instruments of ratification for the following bilateral extradition and mutual legal assistance instruments:

- Austria: protocols to the extradition and mutual legal assistance treaties, signed July 20, 2005;

- Belgium: instruments as to the application of the extradition and mutual legal assistance treaties, signed December 16, 2004;
- Bulgaria: extradition treaty, signed September 19, 2007, entered into force May 21, 2009, and agreement on certain aspects of mutual legal assistance, signed September 19, 2007;
- Cyprus: instruments as to the application of the extradition and mutual legal assistance treaties, signed January 20, 2006;
- Czech Republic: second supplementary treaty on extradition and supplementary treaty on mutual legal assistance, signed May 16, 2006;
- Denmark: instrument as to the application of the extradition treaty and instrument on mutual legal assistance, signed June 23, 2005;
- Estonia: extradition treaty, signed February 8, 2006, entered into force April 7, 2009, and instrument as to the application of the mutual legal assistance treaty, signed February 8, 2006;
- Finland: protocol to the extradition treaty and treaty on certain aspects of mutual legal assistance, signed December 16, 2004;
- France: instruments as to the application of the extradition and mutual legal assistance treaties, signed September 30, 2004;
- Germany: second supplementary treaty to the extradition treaty, signed April 18, 2006; mutual legal assistance treaty, signed October 14, 2003, and supplementary treaty on mutual legal assistance treaty, signed April 18, 2006, entered into force October 18, 2009;
- Greece: protocols to the extradition and mutual legal assistance treaties, signed January 18, 2006;
- Hungary: protocols to the extradition and mutual legal assistance treaties, signed November 15, 2005;
- Ireland: instruments as to the application of the extradition and mutual legal assistance treaties, signed July 14, 2005; mutual legal assistance treaty, signed January 18, 2001, entered into force August 11, 2009;

- Italy: instruments as to the application of the extradition and mutual legal assistance treaties, signed May 3, 2006;
- Latvia: extradition treaty, signed December 7, 2005, entered into force April 15, 2009, and protocol to the mutual legal assistance treaty, signed December 7, 2005;
- Lithuania: protocols on the application of the extradition and mutual legal assistance treaties, signed June 15, 2005;
- Luxembourg: instruments as to the application of the extradition and mutual legal assistance treaties, signed February 1, 2005;
- Malta: extradition treaty, signed May 18, 2006, entered into force July 1, 2009, and treaty on certain aspects of mutual legal assistance, signed May 18, 2006;
- Netherlands: agreements on the application of the extradition and mutual legal assistance treaties, signed September 29, 2004;
- Poland: agreements on the application of the extradition and mutual legal assistance treaties, signed June 9, 2006;
- Portugal: instruments on extradition and mutual legal assistance, signed July 14, 2005;
- Romania: extradition treaty, signed September 10, 2007, entered into force May 8, 2009, and protocol to the mutual legal assistance treaty, signed September 10, 2007;
- Slovak Republic: instruments on extradition and mutual legal assistance, signed February 6, 2006;
- Slovenia: agreement on the application of the extradition treaty and agreement on mutual legal assistance, signed October 17, 2005;
- Spain: instruments as to the application of the extradition and mutual legal assistance treaties, signed December 17, 2004;
- Sweden: mutual legal assistance treaty, signed December 17, 2001, entered into force June 1, 2009; instruments as to the application of the extradition and mutual legal assistance treaties, signed December 16, 2004; and
- United Kingdom: instruments as to the application of the extradition and mutual legal assistance treaties, signed December 16, 2004.

These bilateral exchanges were a prerequisite for the exchange of instruments of ratification between the United States and the European Union itself with respect to the U.S.–EU Agreements. Most of the above-listed agreements, upon entry into force, will implement the U.S.–EU Extradition Agreement and the U.S.–EU Mutual Legal Assistance Agreement, which require the United States and each EU member state to conclude written instruments confirming that the countries will apply the provisions of the two U.S.–EU Agreements in their bilateral extradition and mutual legal assistance relationships. Apart from the extradition treaties with Bulgaria, Estonia, Latvia, Malta, and Romania; the mutual legal assistance treaties with Ireland and Sweden; and the mutual legal assistance and supplementary mutual legal assistance treaties with Germany, the instruments had not entered into force as of the end of 2009.** For additional background on the bilateral instruments, see *Digest 2006* at 131, 135–38, 139–40, and 146–47. Section B.4. below discusses the Treasury Department's Financial Crimes Enforcement Network's 2009 proposal to permit certain foreign law enforcement agencies to request information from financial institutions, consistent with the U.S.–EU Mutual Legal Assistance Agreement and the related bilateral agreements.

2. U.S.–Malaysia Mutual Legal Assistance Agreement

On January 21, 2009, the United States and Malaysia exchanged instruments of ratification to bring into force the Agreement on Mutual Legal Assistance between the United States of America and Malaysia, signed at Kuala Lumpur on July 28, 2006. S. Treaty Doc. No. 109-22 (2006). For background, see *Digest 2006* at 147–48 and *Digest 2008* at 79.

** Editor's note: The bilateral instruments not in force at the end of 2009 entered into force on February 1, 2010.

3. Extradition of Fugitives Alleging Fear of Torture

a. Trinidad y Garcia v. Benov

During 2009 litigation continued in a challenge to extradition and custody pending extradition before the U.S. District Court for the Central District of California. *Trinidad y Garcia v. Benov*, No. CV 08-07719-MMM (CW) (C.D. Cal.). Hedelito Trinidad y Garcia ("Trinidad") challenged his extradition to the Philippines, claiming, among other things, that it would violate Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). For previous developments in the case, see *Digest 2008* at 57–64. On November 17, 2009, the court granted Trinidad's September 2008 petition for habeas corpus. *Trinidad y Garcia v. Benov*, 2009 U.S. Dist. LEXIS 115843 (C.D. Cal. 2009). The court also ordered Trinidad's release from custody, which was stayed pending resolution of the government's motion for continued detention of Trinidad pending appeal. In its order, the court rejected the U.S. arguments for dismissing Trinidad's petition:

> . . . that district court review of Torture Convention claims is barred by the "REAL ID Act" [fn. omitted]; that judicial review of the Secretary's final extradition decisions is precluded by the "Rule of Non-Inquiry" as reaffirmed in *Munaf v. Geren*, [553 U.S. 674] (2008); that neither the Torture Convention nor the FARR Act overturned the Rule of Non-Inquiry; that the APA does not support judicial review of the Secretary's decisions; and that the suggestion in *Cornejo-Barreto I* [218 F.3d 1004 (9th Cir. 2000)] that the Secretary's decisions are reviewable amounts to non-binding dicta. . . .

Trinidad, 2009 U.S. Dist. LEXIS 115843, at *14.

In an Anticipatory Application filed with the court on August 4, 2009, the United States had argued, among other things, that the court should order Trinidad's continued detention pending the government's appeal and petition for certiorari, if any. In an accompanying declaration, Clifton M. Johnson,

Assistant Legal Adviser, Law Enforcement and Intelligence ("L/LEI"), Department of State, stated the U.S. view that "[t]he release of Trinidad pending appeal, and the resulting likelihood that he would abscond, would have a significant adverse impact on the relationship of the United States with the Government of the Republic of the Philippines, particularly with respect to ongoing law enforcement matters of critical importance to the United States." The full texts of the U.S. Anticipatory Application and accompanying declaration of Clifton M. Johnson are available at *www.state.gov/s/l/c8183.htm*. On November 20, 2009, the court denied the government's motion for continued detention, ordering Trinidad's release from custody subject to a number of conditions, including home detention with electronic monitoring.

The United States filed its notice of appeal on December 10, 2009. As of the end of 2009, the case remained pending before the U.S. Court of Appeals for the Ninth Circuit.*

b. Prasoprat v. Benov

On May 27, 2009, the U.S. District Court for the Central District of California issued an order in a U.S. citizen's long-running effort to challenge his extradition to Thailand based on the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). *Prasoprat v. Benov*, 622 F. Supp. 2d 980 (C.D. Cal. 2009). The case arose out of the Government of Thailand's 2001 request for the extradition of the petitioner on drug charges. In prior proceedings, the petitioner had unsuccessfully sought a writ of habeas corpus, challenging the judicial finding that he was extraditable. After the petitioner exhausted his appeals, the Secretary of State authorized the petitioner's extradition to Thailand and signed a surrender warrant on April 26, 2006.

* Editor's note: In an unpublished opinion issued August 24, 2010, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's judgment. *Trinidad y Garcia v. Benov*, 2010 U.S. App. LEXIS 17840 (9th Cir. 2010).

The district court's May 2009 order addressed the petitioner's second petition for habeas corpus, filed on April 28, 2006, which challenged the surrender decision of the Secretary of State. The court denied the U.S. motion to dismiss but dismissed the petition on the merits with prejudice. In its order, the court adopted a magistrate judge's conclusions in her March 26, 2009 Report and Recommendation. *Prasoprat*, 622 F. Supp. 2d at 981. The magistrate judge found that the "petitioner has set forth a cognizable claim challenging his extradition to Thailand on the ground he 'fears torture' if returned to Thailand, *Prasoprat*, 421 F.3d at 1016 n.5; *Cornejo-Barreto I*, 218 F.3d at 1014–17." *Prasoprat*, 622 F. Supp. 2d at 987. The magistrate judge found without merit the U.S. arguments that the rule of non-inquiry bars judicial review of the Secretary of State's extradition decisions and that the CAT and the Foreign Affairs Reform and Restructuring Act ("FARR Act"), which implements Article 3 of the CAT, prohibit judicial review of extradition decisions. *Id.* at 984. The magistrate judge also concluded that the United States argued incorrectly that the court should disregard the opinion of the U.S. Court of Appeals for the Ninth Circuit in *Cornejo-Barreto v. Siefert*, 218 F.3d 1004, 1016–17 (9th Cir. 2000) ("*Cornejo-Barreto I*"), because it was non-binding dicta. Contrary to the U.S. position, the magistrate judge concluded that the Secretary of State's extradition decisions "may be subject to judicial review," *Prasoprat*, 622 F. Supp. 2d at 985. The magistrate judge also rejected the U.S. contention that the Supreme Court's 2008 decision in *Munaf v. Geren*, 553 U.S. 674 (2008), overruled *Cornejo-Barreto I*. "*Munaf* was not an extradition case," the magistrate judge noted, "and the Supreme Court in *Munaf* specifically declined to consider the FARR Act's applicability in habeas corpus proceedings." *Prasoprat*, 622 F. Supp. 2d at 986.

Lastly, the magistrate judge did not agree with the United States that the amendments to the Immigration and Nationality Act enacted in the REAL ID Act of 2005, Div. B, Pub. L. No. 109-13, 119 Stat. 302, 310, bar district courts from

reviewing challenges to extradition. The magistrate judge stated:

> Section 1252(a)(4) provides:
>
> > Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.
>
> 8 U.S.C. § 1252(a)(4). However, Section 1252(a)(4) does not apply to extradition proceedings or habeas corpus proceedings challenging extradition. [fn. omitted] . . .

Id. at 986.

As to the merits of the petition, however, the magistrate judge concluded that the petitioner had not shown that "it is more likely than not he will be tortured if returned to Thailand . . . so that the State Department's decision to extradite him to Thailand was '"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."' *Id.* at 987 (citations omitted).

On June 12, 2009, the petitioner filed a notice of appeal to the U.S. Court of Appeals for the Ninth Circuit and on November 24, 2009, the petitioner applied for a stay of extradition pending the appellate court's decision. On December 15, 2009, the district court issued an unpublished order denying the application for a stay.**

** Editor's note: The petitioner's motions for a stay of extradition pending appeal were denied, and he was extradited to Thailand on May 8, 2010.

c. Saldana v. United States

On December 30, 2009, the United States filed a motion to dismiss an amended petition for a writ of habeas corpus filed by a Mexican national who claimed he would be tortured if extradited to Mexico to face homicide charges. *Saldana v. United States*, No. 2:09-cv-02786-JPM-cgc (W.D. Tenn. 2009). The petitioner brought claims under the CAT, the FARR Act, the Administrative Procedure Act, and related regulations, seeking judicial review of the Department of State's December 3 decision to issue a surrender warrant authorizing the petitioner's transfer to Mexican custody. The United States argued that "extradition decisions by the Secretary of State, including those that involve torture claims, are nonreviewable" under the rule of non-inquiry, as bolstered by the Supreme Court's 2008 judgment in *Munaf v. Geren*, 553 U.S. 674 (2008); the FARR Act, which implements U.S. obligations under the Convention Against Torture; and the 2005 REAL ID Act, 8 U.S.C. § 1252(a)(4).

The United States stressed that:

> It is important to state at the outset that the United States does not claim that the Secretary of State has a right to extradite petitioner to face torture. Under the Department's own regulations, the Secretary of State will not extradite a fugitive if she finds it is more likely than not that the fugitive will be tortured in the requesting country. This case is therefore not about whether the United States may extradite someone when it believes he is more likely than not to be tortured; it may not. The question before the Court is whether, despite repeated clear direction from Congress and the Supreme Court, and decades of precedent from courts around the country, the Judiciary may second-guess the extradition determinations made by the Secretary of State that are intertwined with sensitive foreign policy determinations and assessments. The answer to that question is no.

Excerpts below from the U.S. memorandum in support of the U.S. motion to dismiss set forth the government's

arguments concerning *Munaf v. Geren* and the REAL ID Act (footnotes omitted). The full texts of the U.S. memorandum and the accompanying declaration of Clifton M. Johnson, Assistant Legal Adviser, Law Enforcement and Intelligence ("L/LEI"), Department of State, are available at *www.state.gov/s/l/c8183.htm.****

* * * *

I. The REAL ID Act Precludes Judicial Review of CAT Claims in The Habeas Context

The REAL ID Act, 8 U.S.C. § 1252(a)(4), requires the dismissal of petitioner's habeas petition opposing the Secretary's extradition determination on grounds that petitioner is more likely than not to face torture. The Act unambiguously provides that "the *sole* and *exclusive* means for judicial review of *any* cause or claim under the [CAT]" is the filing in a court of appeals of a petition for review challenging a final order of removal. 8 U.S.C. § 1252(a)(4) (emphasis added); *see* 8 U.S.C. § 1252(a)(1) (providing review of a "final order of removal"). Congress could not have used more explicit and emphatic terms to show its intention to provide only a single, *exclusive* forum for the judicial review of *any* cause or claim under the CAT. Since the sole means for review of a CAT claim is in the court of appeals upon review of a final order of removal, the clear language of the REAL ID Act necessarily precludes review of a CAT claim under habeas law in connection with an extradition decision. *See Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009) (finding that, pursuant to the REAL ID Act, 8 U.S.C. § 1252(a)(4), jurisdiction over torture claims exists *exclusively* in the court of appeals in connection with immigration proceedings); *Hamid v. Gonzales*, 417 F.3d 642, 647 (7th Cir. 2005) (stating that the REAL ID Act "abolishes habeas review of CAT claims, providing

*** Editor's note: On March 25, 2010, the U.S. District Court for the Western District of Tennessee dismissed Saldana's petition. *Saldana v. United States*, 700 F. Supp. 2d 953 (W.D. Tenn. 2010).

that a petition for review filed with the appropriate court of appeals is (with an irrelevant exception) 'the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture.' . . . 8 U.S.C. § 1252(a)(4) . . . .").

Furthermore, this limitation on jurisdiction exists "notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision." In other words, Congress intended to "override[]" any potentially conflicting law. *Dean v. Veterans Admin. Regional Office*, 943 F.3d 667, 670 (6th Cir. 1991), *vacated and remanded on other grounds*, 503 U.S. 902 (1992); *see Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) ("[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."). The fact that Congress specifically singled out habeas corpus as not being an instance where jurisdiction exists signals its particular intent that there be no jurisdiction over CAT claims in the habeas context, an approach consistent with the FARR Act, which similarly provides no jurisdiction over CAT claims except in the immigration context. Congress also explicitly indicated that the REAL ID Act was intended to supersede statutory *and nonstatutory law*, and that it therefore preempts contrary judicial decisions allowing for jurisdiction over CAT claims outside the specified removal context. Thus, under the plain language of the REAL ID Act, a CAT claim cannot properly be raised under "section 2241 of Title 28, or any other habeas corpus provision," as petitioner has done here.

II. The Principles of *Munaf* Reinforce the Rule of Non-Inquiry and Preclude Judicial Review of the Secretary's Decision to Extradite Petitioner

As the plain language of the REAL ID Act shows, Congress unequivocally intended to limit jurisdiction over CAT claims to the court of appeals in a particular immigration context. Jurisdiction therefore does not exist over the instant habeas petition, and the Court's inquiry should end there. Notwithstanding the REAL ID Act, however, the principles enunciated in *Munaf*, reinforcing the

longstanding principles underlying the Rule of Non-Inquiry, also preclude judicial review of the Secretary's extradition decision. Once a court has determined that a fugitive is extraditable under the relevant treaty and the applicable U.S. law, 18 U.S.C. § 3184, the process moves into the foreign affairs arena, and authority over its pursuit shifts entirely to the Executive Branch. 18 U.S.C. § 3186. At that stage, the Secretary of State exercises her discretion to decide whether, and under what circumstances, a fugitive should be returned to the requesting country. *Kin-Hong*, 110 F.3d at 110–111; *Ahmed*, 910 F.2d at 1066–67. The statutory commitment of this decision to the Secretary's discretion reflects a recognition that the decision necessarily involves the application of particular expertise that is not available in the Judiciary and sensitive foreign relations considerations that are not amenable to review. *Escobedo*, 623 F.2d at 1105.

As stated in *Munaf*, in contrast to the Judiciary, "the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally." 128 S. Ct. at 2226. Therefore, a court should proceed with circumspection when "adjudicating issues inevitably entangled in the conduct of our international relations." *Id.* at 2218; *see Hoxha v. Levi*, 465 F.3d at 563 ("The non-inquiry principle serves interests of international comity by relegating to political actors the sensitive foreign policy judgments that are often involved in the question of whether to refuse an extradition request."); *Blaxland*, 323 F.3d at 1208 ("Unwarranted expansion of judicial oversight may interfere with foreign policy and threaten the ethos of the extradition system."); *Kin-Hong*, 110 F.3d at 110 (stating that the bifurcated procedure reflects the fact that "extradition proceedings . . . implicate questions of foreign policy, which are better answered by the executive branch").

Judicial review of the Secretary's decision would place the Court in an unfamiliar and inappropriate position. For example, if the Secretary accepted the assurance of a foreign government that, despite a history of human rights abuses in that country, a fugitive would not be tortured, and on that basis concluded, consistent with the FARR Act and the CAT, that it was *not* more likely than not that the fugitive would be tortured, a court could

evaluate that decision only by second-guessing the expert opinion of the Department of State that such an assurance can be trusted. *See* Johnson Dec. ¶ 9. It is difficult to contemplate how judges would reliably make such a prediction, lacking any ability to communicate with the foreign country or to weigh the situation there with resources and expertise comparable to those of the Department of State. *See Munaf*, 128 S. Ct. at 2226; *see* Johnson Dec. ¶¶ 13–14.

Moreover, only the Secretary of State has the diplomatic tools at her disposal for protecting a fugitive or assuring humane treatment upon his return. *See* Johnson Dec. ¶¶ 8–10; *Munaf*, 128 S. Ct. at 2225; *Kin-Hong*, 110 F.3d at 110. With respect to torture claims such as those raised here, the Secretary has three options: "to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions." 22 C.F.R. § 95.3(b); Johnson Dec. ¶ 8. The Secretary may decline to surrender the fugitive "on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations." *Kin-Hong*, 110 F.3d at 109; *see also Munaf*, 128 S. Ct. at 2226. In the same vein, the Secretary may attach conditions to the surrender of the fugitive, *id.* at 110, such as demanding that the requesting country provide assurances regarding the individual's treatment. Johnson Dec. ¶ 8; *see Munaf*, 128 S. Ct. at 2226 (noting Solicitor General's explanation that determinations regarding torture are based on the Executive's ability to obtain foreign assurances it considers reliable); *Jimenez v. United States District Court*, 84 S. Ct. 14, 19, 11 L. Ed. 2d 30 (1963) (describing commitments made by foreign government to Department of State as a condition of surrender) (Goldberg, J., in chambers); *Kin-Hong*, 110 F.3d at 110 (stating that the Secretary may also elect to use diplomatic methods to obtain fair treatment for the relator").

Application of the Rule of Non-Inquiry here makes perfect sense in light of the factors involved in extradition determinations and the inherent limits on the ability of courts to adjudicate issues intimately tied in with foreign relations. *See Munaf*, 128 S. Ct. at 2218. The Secretary of State, not the Court, has the responsibility to ensure that all extraditions are legally carried out. In other

words, "[i]t is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed." *Kin-Hong*, 110 F.3d at 111; *see Munaf*, 128 S. Ct. at 2225–26. Petitioner's argument assumes the Secretary will seek to extradite someone to face torture, but petitioner cites no example of such an action having ever occurred nor any reason to believe the Secretary would ever want to do so (in violation of the Department's own regulations). On the contrary, the courts have long recognized the presumption that the decisions of government officials are made in good faith. *United States v. Chemical Found.*, 272 U.S. 1, 14–15 (1926); *see also Jennings v. Mansfield*, 509 F.3d 1362, 1367 (Fed. Cir. 2007).

Cornejo-Barretto v. Seifert, 218 F.3d 1004 (9th Cir. 2000), cited by petitioner, is not binding on this Court, and to the extent the decision ever was valid authority, it has been superseded. In *Cornejo*, a Ninth Circuit panel dismissed a fugitive's habeas petition as unripe because the Secretary of State had not yet determined whether to surrender the fugitive to Mexico. *Cornejo*, 218 F.3d at 1016. However, the panel majority went on to state that, if the Secretary should later decide in favor of surrender, Cornejo-Barreto would be able to file a new habeas action in district court, challenging the validity of the Secretary's decision in relation to the FARR Act under the APA. *Id.* at 1009 n.5, 1016–17. *Cornejo* has been overtaken by the REAL ID Act and by the analysis in *Munaf* reinforcing the Rule of Non-Inquiry, under which the courts lack jurisdiction to consider humanitarian arguments against extradition, which are well-established as within the exclusive province of the Executive Branch. No Court of Appeals has expressly adopted the panel majority's analysis in *Cornejo*. *See, e.g.*, *Mironescu v. Costner*, 480 F.3d at 674 (noting that in reaching its conclusion that the FARR Act permits review of CAT claims, the Ninth Circuit in *Cornejo* failed to discuss whether the relevant language in § 2242(d) constitutes such a preclusion). The decision carries no weight here.

* * * *

4. Role of Geneva Conventions in Extradition: *Noriega v. Pastrana*

On April 8, 2009, the U.S. Court of Appeals for the Eleventh Circuit affirmed a district court's 2008 decision dismissing a petition for a writ of habeas corpus that Manuel Noriega filed in an attempt to prevent his extradition to France. *Noriega v. Pastrana*, 564 F.3d 1290 (11th Cir. 2009). Noriega argued that because a U.S. court had afforded him prisoner-of-war status while he was serving a sentence in the United States for drug-related offenses, his extradition would violate his rights as a prisoner of war under the Third Geneva Convention. For additional background on this case, see *Digest 2007* at 108–17 and *Digest 2008* at 69–70. On July 7, 2009, Noriega filed a petition for writ of certiorari in the Supreme Court, and in September 2009 the United States filed a brief in opposition to the petition for certiorari, arguing that "[t]he court of appeals correctly rejected [Noriega's] claim, and its decision does not conflict with any decision of this Court or any other court of appeals." *Noriega v. Pastrana*, Case No. 09-35. The United States argued further that "the decision below is of limited ongoing significance, because petitioner is the only person currently detained by the United States as a prisoner of war."* Excerpts below from the U.S. brief provide the government's argument that § 5 of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2631, precluded Noriega from invoking the Third Geneva Convention as a source of rights in his habeas corpus petition and that the Third Geneva Convention does not prohibit the extradition of a prisoner of war (citations to the Petition omitted). The full text of the U.S. brief is available at *www.justice.gov/osg/briefs/2009/0responses/2009-0035.resp.html.*

* * * *

* Editor's note: On January 25, 2010, the Supreme Court denied Noriega's petition for a writ of certiorari, and on March 22, 2010, the Court denied Noriega's petition for rehearing. *Noriega v. Pastrana*, 130 S. Ct. 1002 (2010); *Noriega v. Pastrana*, 130 S. Ct. 1942 (2010). On April 26, 2010, Noriega was extradited to France.

1. Section 5 of the [Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2631] provides that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or * * * agent of the United States is a party as a source of rights in any court." MCA § 5(a), 120 Stat. 2631. Petitioner's habeas corpus petition sought to invoke the Third Geneva Convention "as a source of rights" preventing his extradition, and it was therefore precluded by the plain language of Section 5.

Petitioner suggests that Section 5 applies only to certain rights under the convention, such as "the right to counsel, the right to confront [one's] accusers, [and] the right to know the charges against one," but that it does not address the rights he seeks to invoke. That limited reading finds no support in the text of Section 5, and, as the court of appeals noted, it is also inconsistent with the legislative history. That history shows that Congress intended Section 5 to "prohibit any court from treating the Geneva Conventions as a source of rights, directly or indirectly, making clear that the Geneva Conventions are not judicially enforceable in any court of the United States." H.R. Rep. No. 664, 109th Cong., 2d Sess. Pt. 2, at 17 (2006); see H.R. Rep. No. 731, 109th Cong., 2d Sess. 39 (2006) ("Section 5 of the MCA clarifies that the Geneva Conventions are not an enforceable source of rights in any habeas corpus or other civil action or proceeding by an individual in U.S. courts."); 152 Cong. Rec. S10,400 (daily ed. Sept. 28, 2006) (statement of Sen. Kennedy) ("[T]he bill expressly states that the Geneva Conventions cannot be relied upon in any U.S. court as a source of rights.").

Petitioner contends that the court of appeals' interpretation of Section 5 of the MCA results in the "complete repudiation of the Geneva Convention." That is incorrect. A treaty is "primarily a compact between independent nations," and its enforcement is generally a matter of international negotiations, not a subject of redress in domestic courts. *Head Money Cases*, 112 U.S. 580, 598 (1884); see *Medellin v. Texas*, 128 S. Ct. 1346, 1357 & n.3 (2008). This Court has not decided whether the Third Geneva Convention conferred judicially enforceable rights on individuals before the

MCA was enacted, see *Hamdan v. Rumsfeld*, 548 U.S. 557, 626–628 (2006), and the court of appeals had no occasion to resolve that question in this case. Whatever the domestic effect of the Third Geneva Convention before the enactment of the MCA, the court of appeals correctly recognized that "it is within Congress' power to change domestic law, even if the law originally arose from a self-executing treaty." [S]ee *Medellin*, 128 S. Ct. at 1359 n.5 ("[A] later-in-time federal statute supersedes inconsistent treaty provisions."). And, as the court of appeals made clear, its reading of Section 5 of the MCA does not change the international obligations of the United States under the Geneva Conventions. The only result of the enactment of that provision is that "Congress has superseded whatever domestic effect the Geneva Conventions may have had in actions such as this."

Petitioner asserts that the decision of the court of appeals "encroaches upon the powers of the Executive and Legislative branches." But because "a later-in-time federal statute supersedes inconsistent treaty provisions," *Medellin*, 128 S. Ct. at 1359 n.5, the decision below correctly gives effect to the statute that Congress enacted. He also suggests that Section 5 violates the Supremacy Clause, U.S. Const. Art. VI, to the extent that it conflicts with the Third Geneva Convention, but that argument is foreclosed by the well-established principle, noted above, that a later-enacted statute may supersede a treaty.*

2. As the court of appeals recognized, petitioner's claims fail for the independent reason that the Third Geneva Convention does not prohibit the extradition of a prisoner of war to face criminal charges in another country. . . .

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* As petitioner acknowledges, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), invalidated a different provision of the MCA but did not address Section 5. In *Boumediene*, the Court concluded that Section 7 of the MCA, 120 Stat. 2635, violated the Suspension Clause, U.S. Const. Art. I, § 9, because it "deprive[d] the federal courts of jurisdiction to entertain the habeas corpus actions" brought by alien enemy combatants, and the Court held that provision unconstitutional to that extent. *Boumediene*, 128 S. Ct. at 2244, 2274. Unlike Section 7, which was a jurisdiction-stripping provision, Section 5 does nothing to prevent a person from seeking habeas relief. It merely removes "one substantive provision of law upon which a party might rely in seeking habeas relief." *Ibid.*

Petitioner focuses on Article 118 of the Third Geneva Convention, which provides that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." 6 U.S.T. at 3406. But Article 118 is limited by Article 119, which states that "[p]risoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence." 6 U.S.T. at 3408. As the court of appeals noted, Article 119 has allowed the United States to retain custody over petitioner after hostilities in Panama ceased, to try him for the crimes with which he was charged, and to hold him for the duration of his criminal sentence. That provision also permits a party to the convention to honor an extradition treaty by transferring a prisoner of war to another party to the convention to face criminal charges there. See *ibid.* ("Nowhere * * * [in Article 119] is it suggested that a prisoner of war may not be extradited from one party to the Convention to face criminal charges in another.").

The only provision of the Third Geneva Convention to restrict extradition is Article 12, which provides for the transfer of prisoners of war between parties to the convention "after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention." 6 U.S.T. at 3328. In this case, as both the district court and court of appeals confirmed, the conditions specified in Article 12 have been satisfied by means of diplomatic communications between France and the United States. But nothing in Article 12 "implies that a contracting party cannot abide by a valid extradition treaty and extradite a prisoner of war to another contracting party simply because the person is a prisoner of war."

Petitioner maintains that the absence of the term "extradition" in the Third Geneva Convention, along with a specific reference in Article 129 to the transfer from one party to another of war criminals, means that prisoners of war may not be extradited, and that they may only be transferred to another nation if they are war criminals. But that reading of the convention does not comport with Article 12, which places only the two restrictions noted above on the transfer of a prisoner of war: that the transfer be to another

contracting party, and that the transferee country give assurances that the convention will be followed. Article 129 discusses only the ongoing duty of each contracting party to search for war criminals and bring them to justice, and it places no further restrictions on the transfer of prisoners of war. 6 U.S.T. at 3418.

More fundamentally, petitioner's argument based on a lack of "specific authority permitting extradition of prisoners of war" misses the mark. The authority to extradite comes not from the Third Geneva Convention itself but from pre-existing extradition treaties, such as the one between the United States and France that is at issue here. The lack of any indication in the Third Geneva Convention that it is intended to invalidate or supersede such treaties shows that a contracting party to the Convention retains its authority to abide by its other international obligations, including its obligations under valid extradition treaties.

Petitioner also asserts that the courts below should not have relied on language in Article 45 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, which provides for the transfer of civilians between parties to the Convention and specifically provides that it does not bar extradition. The court of appeals, like the district court, recognized that the Third and Fourth Geneva Conventions are distinct, but nevertheless found it persuasive that the parties to the conventions contemplated that "transfer" included extradition. "To conclude otherwise," the court of appeals reasoned, "would mean that a country would be obligated to extradite a civilian, but not a prisoner of war, when they are facing identical criminal charges." It was appropriate for the courts below to support their interpretation of the Third Geneva Convention by reading the Geneva Conventions as a whole and harmonizing provisions with similar underlying principles. . . .

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5. Universal Jurisdiction

On October 21, 2009, Wellington Webb, Senior Adviser, U.S. Mission to the United Nations, delivered a statement during

the General Assembly's Sixth (Legal) Committee's debate on Agenda Item 84: The Scope and Application of the Principle of Universal Jurisdiction. Mr. Webb's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2009/130866.htm*.

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* * * *

From the outset, we wish to note that the definition of "universal jurisdiction" remains unsettled, and we expect that Member States may have differing views about the meaning of this term. . . .

For purposes of this discussion, the United States understands universal jurisdiction to refer to the assertion of criminal jurisdiction by a State, for certain grave offenses, where the State's only link to the particular crime is the presence in its territory of the alleged offender. Under this principle, jurisdiction would be established regardless of where the offense took place, the nationality of either the victim or the perpetrator, or the effect of the crime on the State exercising jurisdiction.

Some criminal conduct comes within the scope of international conventions, such as the UN Convention Against Torture, that expressly authorize parties to assert criminal jurisdiction under the circumstances covered by the convention.

In the view of the United States, it would be beneficial to exchange information about the practice of Member States with regard to the assertion of universal jurisdiction. Under U.S. law, federal courts are empowered to assert jurisdiction over crimes of serious international concern—such as piracy, torture, genocide, and various crimes covered by the counterterrorism conventions—even in the absence of a significant U.S. nexus to the underlying criminal acts. Typically, U.S. courts are empowered to exercise such jurisdiction only where the alleged perpetrator is physically present in the United States.

We would be interested to learn more about how other Member States define the term "universal jurisdiction," and how they have empowered their own domestic courts to exercise universal jurisdiction—for which crimes and under what circumstances.

We believe that gathering such information is necessary prior to any further consideration of this topic.

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6. Visa Waiver Program Agreements on Preventing and Combating Serious Crime

During 2009 the United States signed bilateral agreements with Greece, Italy, Portugal, and Spain on preventing and combating serious crime. The agreements provide a mechanism for the parties' law enforcement authorities to exchange personal data, including biometric (fingerprint) information, for use in detecting, investigating, and prosecuting terrorists and other criminals. These agreements are similar to agreements the United States signed in 2008 with Germany and the eight countries admitted to the Visa Waiver Program in 2008 (the Czech Republic, the Slovak Republic, Estonia, Malta, Lithuania, Latvia, Hungary, and Korea). *Digest 2008* discusses these agreements at 80–83. Negotiations commenced in 2009 with a number of other countries that are also members of the Visa Waiver Program. Such agreements are required to be concluded with all VWP members in coming years.

7. Foreign Evidence Request Efficiency Act

On October 19, 2009, President Barack H. Obama signed into law the "Foreign Evidence Request Efficiency Act of 2009." Pub. L. No. 111-79, 123 Stat. 2086. The statute amended 18 U.S.C. § 2703 ("Required disclosure of customer communications or records") and §§ 2711 and 3127 (both containing definitions of terms). The statute also added new § 3512, "Foreign requests for assistance in criminal investigations and prosecutions." The new section makes it clear that upon the application of foreign authorities, including central authorities under international agreements (which would include central authorities identified under either the UN Convention against Transnational

Organized Crime or the UN Convention against Corruption), federal judges may issue "such orders as may be necessary to execute [the] request for assistance in the investigation or prosecution of criminal offenses, or in proceedings related to the prosecution of criminal offenses, including proceedings regarding forfeiture, sentencing, and restitution." A federal judge may issue a search warrant under § 3512 "only if the foreign offense for which the evidence is sought involves conduct that, if committed in the United States, would be considered an offense punishable by imprisonment for more than one year under federal or state law." In response to a foreign authority's request, a federal district court may issue a search warrant, a warrant or order for the contents of stored wire or electronic communications or related records, a pen register or trap and trace device, or an order requiring the appearance of a person for the purpose of providing testimony or a statement, or requiring the production of documents or other things, or both. An appropriate official of the Department of Justice must authorize a foreign authority's request. In addition § 3512 provides greater flexibility as to venue, so that in most instances requests for evidence can be executed in a single district (rather than requiring execution in each district in which evidence might be located, as under 28 U.S.C. § 1782, which is discussed in Chapter 15.C.5.a.). Finally, where there are related U.S. and foreign cases, the foreign request for assistance can be executed by the U.S. Attorney's Office or prosecuting section at the U.S. Department of Justice in Washington that is handling the case, thus promoting better coordination with counterparts in other countries.

B. INTERNATIONAL CRIMES

1. Terrorism

a. Country reports on terrorism

On April 30, 2009, the Department of State released the 2008 Country Reports on Terrorism. The annual report is

submitted to Congress in compliance with 22 U.S.C. § 2656f, which requires the Department to provide Congress a full and complete annual report on terrorism for those countries and groups meeting the criteria set forth in the legislation. The report is available at *www.state.gov/s/ct/rls/crt/2008*.

b. UN General Assembly

On October 11, 2009, Mary McLeod, Legal Adviser, U.S. Mission to the United Nations, addressed the Sixth (Legal) Committee of the UN General Assembly during its annual debate on terrorism. Excerpts below from Ms. McLeod's statement provide U.S. views on the 16 international instruments concerning terrorism and the principles that must underlie any resolution to the outstanding issues in the negotiations concerning a Comprehensive Convention on International Terrorism. The full text of the U.S. statement is available at *http://usun.state.gov/briefing/statements/2009/130436.htm*.

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. . . [T]he United States reiterates both our firm condemnation of terrorism in all its forms and manifestations as well as our commitment to the common fight to end terrorism. All acts of terrorism—by whomever committed—are criminal, inhumane and unjustifiable, regardless of motivation, especially when they indiscriminately target and injure civilians. An unwavering and united effort by the international community is required if we are to succeed in preventing these heinous acts. In this respect, we recognize the United Nations' central role in coordinating the efforts by member states in countering terrorism and bolstering the ability of states to prevent terrorist acts. We express our firm support for these UN efforts.

Through the UN system, 16 international legal instruments have been completed. These instruments provide a thorough legal framework for cooperation among states directed toward prevention of terrorist acts and ensuring the prosecution and punishment of offenders, wherever found.

We note the ongoing efforts to further enhance this legal framework and promote full and effective implementation of the provisions of these instruments. We believe the four latest counter-terrorism instruments adopted in 2005—the Nuclear Terrorism Convention, the Amendment to the Convention on the Protection of Physical Nuclear Material, and the two Suppression of Unlawful Acts Protocols—are valuable additions to our collective efforts to combat terrorism.

We also note the recent meetings of the Legal Committee of the International Civil Aviation Organization to consider updates to the two civil aviation security Conventions—the 1970 Hague Convention and the 1971 Montreal Convention. We believe this international legal framework for countering terrorism must continue to be supported and developed, with states joining, implementing, and—where needed—refining these existing instruments.

The United States continues to support a Comprehensive Convention on International Terrorism that would strengthen this existing legal regime and reinforce the critical principle that no cause or grievance justifies terrorism in any form. We firmly believe that any successful resolution to the outstanding CCIT issues must be predicated on a shared and clear understanding of two fundamental principles:

- First, a comprehensive convention on terrorism cannot provide a carve-out for terrorist groups to claim their criminal acts are excluded from the scope of the CCIT in the name of national liberation, resistance to foreign occupation, or any other justification or motivation.
- Second, as with other recent counter-terrorism instruments, a comprehensive convention should not reach state military action, which is subject to other international legal regimes.

We continue to believe that the Coordinator's 2002 text best reflects these fundamental principles by incorporating text which 162 states have accepted in the Terrorist Bombings Convention. The text found in the Bombings Convention, as well as four other recent counter-terrorism instruments, was itself the subject of careful compromise. We are not persuaded that there are deficiencies

with this text that need to be remedied. While we appreciate the efforts of those who have attempted to offer proposals to finalize the CCIT text, to date those proposals have not been supported by those who object to the Coordinator's 2002 text. We stand prepared to carefully consider any new proposal that is consistent with the fundamental principles we have outlined, and encourage other states to do likewise.

* * * *

c. ***U.S. actions against support for terrorists***

(1) U.S. targeted sanctions implementing UN Security Council resolutions

As discussed in Chapter 16.A.2.b., the United States imposed targeted sanctions on five additional entities and 16 individuals during 2009 pursuant to Executive Order 13224. As discussed in Chapter 16.B.2., the Treasury Department's Office of Foreign Assets Control removed two entities and one individual from the Treasury Department's list of Specially Designated Nationals and Blocked Persons, where they had been placed as a result of their earlier designations under E.O. 13224.

(2) Foreign Terrorist Organizations

(i) New designations

In 2009 Secretary of State Hillary Rodham Clinton or Deputy Secretary James B. Steinberg designated three additional organizations as Foreign Terrorist Organizations ("FTOs") under § 219 of the Immigration and Nationality Act: Revolutionary Struggle ("RS") (74 Fed. Reg. 23,226 (May 18, 2009)), Kata'ib Hizballah ("KH") (74 Fed. Reg. 31,788 (July 2, 2009)), and al-Qa'ida in the Arabian Peninsula ("AQAP") (75 Fed. Reg. 2920 (Jan. 19, 2010)), along with their associated aliases. U.S. financial institutions are required to block funds of designated FTOs or their agents within their possession or

control; representatives and members of designated FTOs, if they are aliens, are inadmissible to, and in some cases removable from the United States; and U.S. persons or persons subject to U.S. jurisdiction are subject to criminal prohibitions on knowingly providing "material support or resources" to a designated FTO. 18 U.S.C. § 2339B. *See www.state.gov/s/ct/rls/other/des/123085.htm* for background on the legal consequences of designation as an FTO.

(ii) Reviews of FTO designations

During 2009 the Secretary of State continued to review designations of entities as Foreign Terrorist Organizations ("FTOs"), determining that the designations of 12 organizations as FTOs, including Al-Qaeda, should remain in place and revoking the designation of one organization. As discussed in *Digest 2008* at 101–3, the reviews began in 2008 and were conducted consistent with the procedures for reviewing and revoking FTO designations in § 219(a) of the Immigration and Nationality Act ("INA"), as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638. *See Digest 2005* at 113–16 for additional background on the IRTPA amendments.

Notably, on January 7, 2009, the Secretary determined that the FTO designation of the Mujahedin-e Khalq and its associated aliases ("MEK") should remain in place. In 2008 the People's Mojahedin Organization of Iran ("PMOI"), a designated alias of MEK, had submitted a petition requesting revocation of the designation. Section 219(a)(4)(B) of the INA permits an FTO to file a petition for revocation two years after its designation date (or in the case of a redesignated FTO, its most recent redesignation date) or two years after the date of the determination on its most recent petition for revocation. To provide a basis for revocation, the petitioning FTO must provide evidence that the circumstances forming the basis for the designation are sufficiently different to warrant revocation. As explained in the Federal Register notice, the Secretary based her decision to deny the MEK's petition

on a review of the administrative record, including the MEK's petition and related filings, and a conclusion that the facts that formed the basis for the organization's 2003 redesignation as an FTO had not changed in "in such a manner as to warrant revocation." 74 Fed. Reg. 1273 (Jan. 12, 2009). On September 8, 2009, the PMOI filed a petition in the U.S. Court of Appeals for the District of Columbia Circuit under 8 U.S.C. § 1189(b), challenging the Secretary's final determination. *People's Mojahedin Org. of Iran v. Department of State*, No. 09-1059 (D.C. Cir.). On October 23, 2009, the United States filed its brief in response. The redacted, public copy of that brief is available at *www.state.gov/s/l/c8183.htm*.* For discussion of previous litigation concerning MEK's designation as an FTO, see *Cumulative Digest 1991–99* at 483, *Digest 2001* at 109–17, and *Digest 2003* at 176–77.

On April 22, 2009, the Secretary revoked the FTO designation of Revolutionary Nuclei ("RN"). 74 Fed. Reg. 23,226 (May 18, 2009). The revocation was the first of its kind under the new review procedures.

(iii) FTO-related litigation

(A) Petition for review of Secretary's determination to retain FTO designation

See B.1.c.(2)(ii) *supra*.

(B) Litigation challenging U.S. material-support statute

On September 30, 2009, the U.S. Supreme Court granted and consolidated two petitions for certiorari in a case challenging the constitutionality of the provisions of the Antiterrorism

* Editor's note: On July 16, 2010, the U.S. Court of Appeals for the D.C. Circuit issued a Per Curiam opinion, concluding "that the Secretary failed to accord the PMOI the due process protections outlined in our previous decisions" and remanding to the Secretary of State for further proceedings consistent with the opinion. *People's Mojahedin Org. of Iran v. Department of State*, 613 F.3d 220 (D.C. Cir. 2010).

and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, that make it a criminal offense for any person within the United States or subject to U.S. jurisdiction "knowingly" to provide "material support or resources" to a designated foreign terrorist organization ("FTO"). *Holder v. Humanitarian Law Project*, 130 S. Ct. 534 (2009); *Humanitarian Law Project v. Holder*, 130 S. Ct. 534 (2009). The plaintiffs sought to provide money and other support for activities of the Kurdistan Worker's Party ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"), both of which are designated FTOs. For previous developments in the case, see *Digest 2004* at 125–26, *Digest 2005* at 124–28, *Digest 2006* at 180–82, and *Digest 2007* at 143–50. *See* Chapter 16.C.1.b. for discussion of litigation challenging the terrorism-related sanctions the United States imposes pursuant to Executive Order 13224 (2001).

The U.S. petition for certiorari argued that the Ninth Circuit had erred in finding parts of the statute unconstitutionally vague and that the decision warranted review especially "because the statute in question . . . is a vital part of the Nation's effort to fight international terrorism." In summarizing the government's views, the petition stated:

> The court of appeals held that three components of the statutory definition of material support—"training," "expert advice or assistance," and "service"—are unconstitutionally vague. That is incorrect. Each of those terms has an established meaning and is readily understandable by persons of ordinary intelligence. Because the statute provides fair notice of what is prohibited, it satisfies the requirements of the Due Process Clause.
>
> The court of appeals believed that the terms at issue are vague primarily because they could be construed to prohibit speech that is protected by the First Amendment. That conclusion rests on a confusion between the vagueness and overbreadth doctrines. The breadth of a statute, by itself, has nothing to do with whether the statute is vague. In any event, the statute in question regulates conduct, not speech, and does not violate the First

> Amendment in any of its applications. To the extent that there is any doubt about the statute's applicability to constitutionally protected advocacy, the court of appeals could have construed the statute to avoid any constitutional infirmity, and erred in failing to do so.

Excerpts below from the U.S. petition address the importance of the material-support statute to U.S. efforts to combat international terrorism and elaborate more fully the view that the statute does not violate the First Amendment and thus is not overbroad. (Citations to other submissions in the case and internal cross references are omitted.) The full text of the U.S. petition is available at *www.justice.gov/osg/briefs/2008/2pet/7pet/2008-1498.pet.aa.html.* The U.S. reply in opposition to the plaintiffs' conditional cross-petition for certiorari is available at *www.justice.gov/osg/briefs/2009/2pet/7pet/2008-1498.pet.rep.html.**

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* * * *

[A.] This Court's review is particularly appropriate in this case because the material-support statute is an important tool in the Nation's fight against international terrorism. Since 2001, the United States has charged approximately 120 defendants with violations of the material-support provision of 18 U.S.C. 2339B, and approximately 60 defendants have been convicted. Several of those prosecutions have involved the provision of "training," "expert advice or assistance, or "service"—the parts of the statute struck down by the court of appeals in this case. . . . And several of the cases have

* Editor's note: On June 21, 2010, the Supreme Court issued a decision upholding the constitutionality of 18 U.S.C. § 2339B, affirming in part and reversing in part the Ninth Circuit's judgment and remanding the case. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). As to the plaintiffs' due process claims under the Fifth Amendment, the Court limited its decision to the specific activities at issue in the case and held that the statute was not vague as applied. With respect to the First Amendment claim, the Court likewise sustained the statute with respect to the support at issue as striking an appropriate balance between national security imperatives and free speech. *Digest 2010* will discuss relevant aspects of the Court's decision.

involved the provision of material support to the LTTE, one of the terrorist organizations at issue here. See, *e.g.*, *United States v. Osman*, No. 06-cr-00416-CCB-1 (D. Md.); *United States* v. *Sarachandran*, No. 06-cr-00615-RJD-1 (E.D.N.Y.); *United States v. Thavaraja*, No. 06-cr-00616-RJD-JO-1 (E.D.N.Y.). Many of those prosecutions potentially prevented substantial harm to the Nation.

When it enacted the material-support statute, Congress expressly found that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States," and that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct." AEDPA § 301(a)(1) and (7), 110 Stat. 1247 (18 U.S.C. 2339B note) (emphasis added). "[T]he fungibility of financial resources and other types of material support" means that when individuals "supply funds, goods, or services to [a terrorist] organization" to "defray the cost to the terrorist organization of running * * * ostensibly legitimate activities," their contribution "frees an equal sum that can then be spent on terrorist activities." H.R. Rep. No. 383, 104th Cong., 1st Sess. 81 (1995); see *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc) ("Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities.") . . . . Accordingly, Congress has banned a broad range of material support—regardless of whether the terrorist group claims to engage in otherwise lawful activities, and regardless of whether the support is ostensibly given to assist those supposedly lawful activities.

The decision below seriously undermines the statutory scheme created by Congress to address the problem of international terrorism. Under the injunction affirmed by the court of appeals, respondents are free to provide "training," "expert advice or assistance," and "service"—of whatever kind—to the PKK and the LTTE, organizations that the Secretary of State has found to engage in terrorist activity that "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. 1189(a)(1). That result warrants correction by this Court.

* * * *

[B.3.] . . . Contrary to the view of the court of appeals, the statute does not restrict speech that is protected by the First Amendment.

a. Section 2339B is not aimed at speech. Instead, the statute is a regulation of conduct that, as the court below has previously recognized, serves a purpose unrelated to the content of any expression: "stopping aid to terrorist groups." And as a regulation of conduct that only incidentally restricts speech, Section 2339B easily survives review under the longstanding test set out in *United States v. O'Brien*, 391 U.S. 367, 377 (1968)—*i.e.*, that the regulation be within the government's power; that it promote an important interest; that the interest be unrelated to suppressing free expression; and that the regulation restrict First Amendment rights no more than is necessary. As the court of appeals observed, the statute is within the Federal Government's authority to regulate the dealings of its citizens with foreign entities; it promotes an essential government interest "in preventing the spread of international terrorism"; it is aimed at stopping aid to terrorist groups rather than at suppressing expression; and it is reasonably tailored, especially considering the "wide latitude" given to the government in an area "bound up with foreign policy considerations" and considering Congress's conclusion that designated terrorist groups "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." *Humanitarian Law Project*, 205 F.3d at 1136 (internal quotation marks omitted); accord *United States v. Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004) (en banc) ("Section 2339B satisfies all four prongs of the *O'Brien* test."), vacated on other grounds, 543 U.S. 1097 (2005), reinstated in relevant part, 405 F.3d 1034 (4th Cir. 2005).

The same analysis applies whether the material support takes the form of conduct or words, because the statute does not regulate the content of any expression, but only the act of knowingly giving material support. Nor does it matter, when the support takes the form of words, whether those words are intrinsically blameworthy (*e.g.*, training on how to build a bomb) or seemingly benign (*e.g.*, advice on international law, or on how to program a computer). In either instance, the statute's aim is not directed at the content of speech, but at the act of aiding deadly terrorist

organizations. Accordingly, the prohibition does not contravene the First Amendment, as applied to plaintiffs' conduct or otherwise.

b. Because the statute does not violate the First Amendment in any of its applications, it follows *a fortiori* that it is not overbroad. To be overbroad, a statute must prohibit a "substantial" amount of protected expression, judged in absolute terms and in relation to the law's plainly legitimate sweep. [*Virginia v.*] *Hicks*, 539 U.S. [113,] 119–120 [(2003)]; see [*United States v.*] *Williams*, 128 S. Ct. [1830,] 1838 [(2008)]. Even if respondents could show some cases in which the statute would ban protected speech, those instances would not be "substantial" in absolute number, nor would they be "substantial" in relation to the numerous legitimate applications of the statute, such as prohibiting a person from training a terrorist organization on how to build a bomb, use a weapon, fly a plane, or launder money. See *Hicks*, 539 U.S. at 124 . . . .

c. The court of appeals drew a distinction between material support in the form of independent advocacy (which it held could not be prohibited consistent with the First Amendment), and material support provided directly to, or under the control of, a terrorist group (which can permissibly be banned). But the court failed to appreciate that the challenged terms—"training," "expert advice or assistance," and "service"—can easily be construed so as not to prohibit any independent advocacy, and thus so as not to offend the First Amendment even under the court of appeals' theory. . . .

All the terms at issue here imply a relationship to another person or entity. The ordinary meaning of "service," for example, is "an act done * * * at the command of another." *Webster's* 2075. One does not "serve" in the abstract; one serves someone or something. Similarly, "training," "advice," and "assistance" all assume an object—the person to whom or entity to which the training, advice, and assistance are rendered—and some collaboration or other relationship between the giver and the recipient of the type of aid in question. The terms are therefore naturally read, even if not inevitably read, to exclude independent advocacy.

Other parts of Section 2339B also support this interpretation. The key provision of the statute criminalizes only support provided "*to*" a foreign terrorist organization, 18 U.S.C. 2339A(b)(1), 2339B(a)(1) (emphasis added), which suggests that it prohibits

only support that is given directly to a terrorist group or provided with some significant level of collaboration. A person who acts independently to advocate for a terrorist group would not commonly be considered to have knowingly provided something "to" that terrorist organization; if independent support were covered, Congress would have prohibited support "of" or "for" a terrorist group. And the scienter requirement ensures that the individual must knowingly provide support to an organization he or she knows is involved with terrorism, again implying a relationship other than independence between the two.

Accordingly, to the extent that Section 2339B's constitutionality turns on ensuring that its prohibitions do not bar independent advocacy, the statute can easily be construed in such a fashion. And a court would be obliged to adopt that construction if necessary to save the statute, not only under general principles of constitutional avoidance, but also under Congress's specific instruction that the statute not "be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment." 18 U.S.C. 2339B(i). . . .

* * * *

In its December 2009 brief on the merits, the United States addressed, among other things, the plaintiffs' claims that the statute's prohibitions on the provision of "personnel" or "expert advice or assistance" "derived from scientific [or] technical . . . knowledge" violate the First Amendment because they discriminate on the basis of content, are overbroad, and violate associational rights. Excerpts below provide U.S. views on why the term "personnel" in the statute is not unconstitutionally vague under the Fifth Amendment and why the statute does not violate the rights of association protected by the First Amendment. (Footnotes, citations to other submissions in the case, and citations to the Joint Appendix are omitted.) The full text of the U.S. brief is available at *www.justice.gov/osg/briefs/2009/3mer/2mer/2008-1498.mer.aa.html.*

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[I.A.3.]a. Petitioners argue that the term "personnel" is unconstitutionally vague. The court of appeals correctly rejected that argument. . . . [C]onviction under that provision requires a defendant to knowingly provide one or more persons to work under or to supervise a terrorist organization. If an individual acts independently of the organization, he cannot be held liable.

A person of ordinary intelligence would easily understand the statute's distinction between concerted and independent action. . . . Just as, for instance, an ordinary person understands the difference between "concerted effort by more than one entity to fix prices or otherwise restrain trade" and "independent activity by a single entity," *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986), so too he will understand the difference between acting under a foreign terrorist organization's "direction or control" and acting on his own. Indeed, the definition of "personnel" is not significantly different from terms used in other federal statutes that impose criminal liability on persons who act under another's direction or control, see, *e.g.*, 18 U.S.C. 175b(d)(2)(G); 18 U.S.C. 951(d), or on those who manage, supervise, or organize an operation or individual, see, *e.g.*, 18 U.S.C. 225(a)(1); 18 U.S.C. 1169(b)(1); 18 U.S.C. 1960(a).

For that reason, courts have held since IRTPA's enactment that the term "personnel" is not unconstitutionally vague as applied to criminal defendants' intended support to foreign terrorist organizations. See *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 182 (E.D.N.Y. 2008) ("[I]t is clear that the statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited and it also provides explicit standards for those applying it."); *United States v. Warsame*, 537 F. Supp. 2d 1005, 1017–1018 (D. Minn. 2008); *United States v. Shah*, 474 F. Supp. 2d 492, 497 (S.D.N.Y. 2007); *United States v. Awan*, 459 F. Supp. 2d 167, 177–181 (E.D.N.Y. 2006); *United States v. Marzook*, 383 F. Supp. 2d 1056, 1063–1068 (N.D. Ill. 2005); cf. *United States v. Goba*, 220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002) (pre-IRTPA); *United States v. Lindh*, 212 F. Supp. 2d 541, 574 (E.D. Va. 2002) (same).

b. Petitioners argue that "direction or control" could "mean many things of potential, but uncertain, applicability." But the statute is not vague simply because some cases may present a close

question as to whether a person is acting independently. That question is no more than a factual issue to be resolved by the jury in a particular case. . . .

. . . The vagueness doctrine steps in only when a question is indeterminate, not when the known facts make an intelligible question difficult to answer.

c. In any event, any vagueness at the margins of the term "personnel" would not help petitioners. They say that they seek to "engage in political advocacy on behalf of the PKK and the Kurds before the U.N. Commission on Human Rights and the United States Congress; * * * write and distribute publications supportive of the PKK and the cause of Kurdish liberation; * * * advocate for the freedom of political prisoners in Turkey * * *; and * * * assist PKK members at peace conferences and other meetings." Of course, petitioners could conduct all but the last of those listed activities "entirely independently" of the PKK and LTTE, 18 U.S.C. 2339B(h), in which case their conduct would not be criminal. But petitioners do not wish to do so: they sought to enjoin enforcement of the term "personnel" so that they could coordinate those activities with, and carry them out under the direction and control of, the PKK and LTTE. Because those proposed coordinated activities clearly fall within the statutory definition of "personnel," the court of appeals properly rejected petitioners' as-applied challenge.

* * * *

[II. C.] . . . [T]he court of appeals properly rejected petitioners' argument that the material-support statute targets association protected under the First Amendment: "The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. [Petitioners] are even free to praise the groups for using terrorism as a means of achieving their ends. What [the statute] prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions." *Humanitarian Law Project*, 205 F.3d at 1133; see *Hammoud*, 381 F.3d at 329 ("Hammoud's argument fails because § 2339B does not prohibit

mere association; it prohibits the *conduct* of providing material support to a designated [foreign terrorist organization].").

Indeed, Congress took special care not to infringe upon associational rights. Recognizing that "[t]he First Amendment protects one's right to associate with groups that are involved in both legal and illegal activities," *1995 House Report* 43, Congress observed that the statutory ban "only affects one's contribution of financial or material resources" because "[t]he First Amendment's protection of the right of association does not carry with it the 'right' to finance terrorist, criminal activities," *id.* at 44. Congress made clear, however, that "[t]hose inside the United States will continue to be free to advocate, think, and profess the attitudes and philosophies of the foreign organizations." *Id.* at 45. Accordingly, "[t]he basic protection of free association afforded individuals under the First Amendment remains in place." *Id.* at 44.

Petitioners cite a number of cases involving attempts to attach civil or criminal sanctions to membership in the Communist Party. Those cases hold that attaching liability to membership in an organization requires proof of specific intent to further that group's unlawful (rather than its lawful) activities. See *United States v. Robel*, 389 U.S. 258, 262, 265–266 (1967); *Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 609–610 (1967); *Noto v. United States*, 367 U.S. 290, 299–300 (1961). But that specific intent requirement applies only when "liability [is] imposed by reason of association alone." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). Here, Section 2339B does not prevent petitioners from becoming members of the PKK and LTTE or impose any sanction on them for doing so. The provision sanctions an entirely different activity, which need not and often does not have any relation to membership.

Petitioners rely extensively on *De Jonge v. Oregon*, 299 U.S. 353 (1937), which set aside a state criminal conviction "for merely assisting at a meeting called by the Communist Party at which nothing unlawful was done or advocated." *Id.* at 357. But the only assistance involved in that case was advocacy of the Communist Party and its views. As this Court explained, "peaceable assembly for lawful discussion cannot be made a crime." *Id.* at 365. Section 2339B is fully consistent with this principle: it does not prevent petitioners

from peaceably assembling with members of the PKK and LTTE for lawful discussion. It prevents the separate step of rendering material support, in the form of property or services, to these groups based on their demonstrated willingness to commit acts of terror rather than on their political views.

Finally, petitioners argue, in reliance on *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), and *Elrod v. Burns*, 427 U.S. 347 (1976), that Section 2339B directly regulates expressive association. In *Dale*, this Court found that the Boy Scouts of America was "an expressive association" and that a statute forbidding its exclusion of gays and lesbians would "significantly affect its expression." 530 U.S. at 656. The Court therefore concluded that the statute "directly and immediately affect[ed] associational rights," requiring the application of strict scrutiny. *Id.* at 659 . . . . By contrast, Section 2339B does not regulate the membership of any organization, expressive or otherwise. Nor does Section 2339B compel any organization to convey a message at odds with its fundamental beliefs, as did the statute in *Dale*. See 530 U.S. at 653–654. Section 2339B prohibits only the provision of aid to terrorists, and to the extent it burdens associational rights at all, it does so only incidentally.

* * * *

d. Maritime counterterrorism efforts

Section 70108 of the Maritime Transportation Security Act of 2002 ("MTSA"), Pub. L. No. 107-295, 116 Stat. 2066, requires the Secretary of Homeland Security to assess the effectiveness of foreign ports' antiterrorism measures. Section 70110 of the MTSA authorizes the imposition of conditions of entry on vessels arriving from or carrying cargo or passengers originating from or transshipped through any port that the Secretary of Homeland Security has determined "does not maintain effective antiterrorism measures." In 2009 the Coast Guard determined that Venezuela, the Republic of Congo (with the exception of the Djeno Oil Terminal), and Madagascar were not maintaining effective counterterrorism measures.

As a result, the Coast Guard imposed conditions of entry on vessels that have visited the three states' ports during their last five ports of call. 74 Fed. Reg. 3092 (Jan. 16, 2009); 74 Fed. Reg. 45,230 (Sept. 1, 2009); 74 Fed. Reg. 60,283 (Nov. 20, 2009). The Coast Guard's previous determinations with respect to Cambodia, Cameroon, Cuba, Equatorial Guinea, Guinea-Bissau, Indonesia, Iran, Liberia, Mauritania, and Syria remained in effect throughout 2009. *See Digest 2008* at 111–12 for additional background.

e. U.S.–EU agreement on sharing financial transaction information

On November 30, 2009, the United States and the European Union concluded the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Programme ("TFTP agreement"). The TFTP agreement obligated the European Union to ensure that companies in EU territory, which are identified in an annex to the agreement, provide the U.S. Treasury Department with certain financial transaction messaging data for the purposes of investigating, preventing, detecting, and prosecuting terrorism and financing of terrorism through the U.S. Terrorist Finance Tracking Program ("TFTP"). The agreement also required U.S. agencies to provide privacy safeguards to any transferred data.

By its terms, the TFTP agreement was an interim one, with a one-year duration.*It replaced a non-legally binding

* Editor's note: The interim agreement was applied provisionally beginning on February 1, 2010, in accordance with its terms. On February 11, 2010, however, the European Parliament refused to consent to it. Article 218(6) of the Treaty on the Functioning of the European Union, part of the Treaty of Lisbon, which entered into force on December 1, 2009, requires that the Council may "conclude" (i.e., definitively enter into) an international agreement only after obtaining the consent of the Parliament. The Parliament's refusal to grant consent thus resulted in the European Union's terminating

arrangement on financial transaction information sharing that the Treasury Department signed with the European Union in 2007. For background on the 2007 arrangement, see *Digest 2007* at 160–61 and 72 Fed. Reg. 60,054 (Oct. 23, 2007). The 2009 agreement became necessary after the Society for Worldwide Interbank Financial Telecommunication ("SWIFT"), a Belgian company that operates a global messaging system for transmitting financial transaction data, decided to relocate much of the information it had stored in the United States to Europe.

2. Narcotrafficking

a. Majors List certification process

(1) International Narcotics Control Strategy Report

On March 1, 2009, the Department of State released the 2009 International Narcotics Control Strategy Report ("INCSR"), an annual report submitted to Congress in accordance with § 489 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2291h(a). The report described the efforts of key countries to attack all aspects of the international drug trade in Calendar Year 2008. Volume I covered drug and chemical control activities and Volume II covered money laundering and financial crimes. The report is available at *www.state.gov/p/inl/rls/nrcrpt/2009/index.htm*.

provisional application of the interim agreement with the United States. The Council and Commission nonetheless expressed their interest in negotiating a long-term agreement with the United States concerning the sharing of financial transaction information. A new agreement on the processing and transfer of financial messaging data from the European Union to the United States for purposes of the TFTP was signed at Brussels on June 28, 2010, and entered into force on August 1, 2010.

(2) Major drug transit or illicit drug producing countries

On September 15, 2009, President Obama issued Presidential Determination 2009-30, "Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2010." Daily Comp. Pres. Docs., 2009 DCPD No. 00728, pp. 1–4. In this annual determination, the President named Afghanistan, The Bahamas, Bolivia, Brazil, Burma, Colombia, Dominican Republic, Ecuador, Guatemala, Haiti, India, Jamaica, Laos, Mexico, Nigeria, Pakistan, Panama, Paraguay, Peru, and Venezuela as countries meeting the definition of a major drug transit or major illicit drug producing country. The President designated Bolivia, Burma, and Venezuela as countries that have failed demonstrably to adhere to their international obligations in fighting narcotrafficking. Simultaneously, the President determined that "support for programs to aid Venezuela's democratic institutions and continued support for bilateral programs in Bolivia are vital to the national interests of the United States," thus ensuring that such U.S. assistance would not be restricted during fiscal year 2010 by virtue of § 706(3) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1424. As a result of the President's designations, Burma remained ineligible during fiscal year 2010 for most types of U.S. assistance.

b. Interdiction assistance

During 2009 President Obama again certified, with respect to Colombia (74 Fed. Reg. 42,573 (Aug. 24, 2009)) and Brazil (74 Fed. Reg. 54,429 (Oct. 22, 2009)), that (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with

such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft. President Obama made his determinations pursuant to § 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended, 22 U.S.C. §§ 2291–2294, following a thorough interagency review. Background on § 1012 is available in *Digest 2008* at 114.

c. Merida Initiative

In 2009 the United States entered into international agreements with Honduras, El Salvador, Guatemala, Belize, Panama, Nicaragua, Costa Rica, and the Dominican Republic to implement the Merida Initiative, a multi-year effort to counter illicit drugs, trafficking in arms and persons, and organized crime. A State Department fact sheet, excerpted below and issued June 23, 2009, provided additional details on the Merida Initiative. The full text is available at *www.state.gov/p/inl/rls/fs/122397.htm*.

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The Merida Initiative is a multi-year program to provide equipment and training to support law enforcement operations and technical assistance for long-term reform and oversight of security agencies. In 2008, Congress approved an initial $400 million for Mexico and $65 million for Central America, the Dominican Republic, and Haiti. In 2009, Congress approved $300 million for Mexico and $110 million for Central America, the Dominican Republic, and Haiti. In 2010, $450 million for Mexico and $100 million for Central America has been requested from Congress.

* * * *

The Merida Initiative will provide funding for:

- Non-intrusive inspection equipment, ion scanners and canine units for Mexico and Central America to interdict trafficked drugs, arms, cash, and persons.

- Technologies to improve and secure communications systems that collect criminal information in Mexico.
- Technical advice and training to strengthen the institutions of justice—vetting for the new police force, case management software to track investigations through the system, new offices of citizen complaints and professional responsibility, and witness protection programs to Mexico.
- Helicopters and surveillance aircraft to support interdiction activities and rapid response of law enforcement agencies to Mexico.
- Equipment, training, and community action programs in Central American countries to implement anti-gang measures and expand the reach of these measures.

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d. Sanctions

Chapter 16.A.6. discusses the narcotics-related sanctions the United States imposed in 2009, and Chapter 16.B.6. discusses modifications the United States made to its narcotics-related sanctions in 2009.

3. Trafficking in Persons

On June 16, 2009, the Department of State released the 2009 Trafficking in Persons Report pursuant to § 110(b)(1) of the Trafficking Victims Protection Act of 2000 ("TVPA"), Div. A, Pub. L. No. 106-386, 114 Stat. 1464, as amended, 22 U.S.C. § 7107. The report covered the period April 2008 through March 2009, evaluated the anti-trafficking efforts of a greater number of countries (175) than in past years, and focused on the problem of forced labor in greater detail than previous reports. Through the report, the Department designated applicable countries as Tier 1, Tier 2, Tier 2 Watch List, or Tier 3 in relation to their efforts to comply with the minimum standards for the elimination of trafficking in persons as set

out by the TVPA, as amended. The report listed 17 countries as Tier 3 countries, making them subject to sanctions in the absence of a Presidential waiver. *See* Chapter 16.A.7.b. for discussion of the U.S. sanctions imposed in 2009 pursuant to the TVPA. For details on the Department of State's methodology for designating states in the report, see *Digest 2008* at 115–17. The full report is available at *www.state.gov/g/tip/rls/tiprpt/2009/*, and Secretary Clinton's remarks at the release of the report are available at *www.state.gov/secretary/rm/2009a/06/124872.htm*.

4. Money Laundering

On November 16, 2009, the U.S. Department of the Treasury's Financial Crimes Enforcement Network issued a notice of proposed rulemaking to expand its special information procedures to deter terrorism and money laundering. 74 Fed. Reg. 58,926 (Nov. 16, 2009). Among other things, the proposed amendments would permit certain foreign law enforcement agencies to request information from financial institutions. Excerpts below from the preamble to the proposed rule explain the statutory framework and the proposed regulatory provisions relating to foreign law enforcement agencies (footnotes omitted).*

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On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT ACT") Act of 2001, Public Law 107-56 ("the Act"). Title III of the Act amends the anti-money laundering provisions of the Bank Secrecy Act, codified at 12 U.S.C. 1829b and 1951–1959 and

* Editor's note: On February 10, 2010, FinCEN published a final rule that adopted the proposed amendments. 75 Fed. Reg. 6560 (Feb. 10, 2010).

31 U.S.C. 5311–5314 and 5316–5332, to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Regulations implementing the BSA appear at 31 CFR part 103. The authority of the Secretary of the Treasury ("the Secretary") to administer the BSA has been delegated to the Director of FinCEN.

Of the Act's many goals, the facilitation of information sharing among governmental entities and financial institutions for the purpose of combating terrorism and money laundering is of paramount importance. Section 314 of the Act furthers this goal by providing for the sharing of information between the government and financial institutions, and among financial institutions themselves. As with many other provisions of the Act, Congress has charged the U.S. Department of the Treasury with developing regulations to implement these information-sharing provisions.

Subsection 314(a) of the Act states in part that:

> [t]he Secretary shall * * * adopt regulations to encourage further cooperation among financial institutions, their regulatory authorities, and law enforcement authorities, with the specific purpose of encouraging regulatory authorities and law enforcement authorities to share with financial institutions information regarding individuals, entities, and organizations engaged in or reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities.

B. Overview of the Current Regulatory Provisions Regarding the 314(a) Program

On September 26, 2002, FinCEN published a final rule implementing the authority contained in section 314(a) of the Act. That rule ("the 314(a) rule") allows FinCEN to require U.S. financial institutions to search their records to determine whether they have maintained an account or conducted a transaction with a person that a Federal law enforcement agency has certified is suspected based on credible evidence of engaging in terrorist activity or money laundering. Before processing a request from a Federal law enforcement agency, FinCEN also requires the requesting agency

to certify that, in the case of money laundering, the matter is significant, and that the requesting agency has been unable to locate the information sought through traditional methods of investigation and analysis before attempting to use this authority ("the 314(a) program").

Since its inception, the 314(a) program has yielded significant investigative benefits to Federal law enforcement users in terrorist financing and major money laundering cases. . . .

C. Objectives of Proposed Changes

a. Allowing Certain Foreign Law Enforcement Agencies To Initiate 314(a) Queries

In order to satisfy the United States' treaty obligation with certain foreign governments, FinCEN is proposing to extend the use of the 314(a) program to include foreign law enforcement agencies. . . . The U.S.–EU MLAT and all twenty-seven [related] bilateral instruments were ratified by the President on September 23, 2008, upon the advice and consent of the U.S. Senate. [Editor's note: *See* A.1. *supra* for discussion of the U.S.–EU Mutual Legal Assistance Agreement and related bilateral instruments.]

Article 4 of the U.S.–EU MLAT (entitled "Identification of Bank Information") obligates a requested Signatory State to search on a centralized basis for bank accounts within its territory that may be important to a criminal investigation in the requesting Signatory State. Article 4 also contemplates that Signatory States may search for information in the possession of a non-bank financial institution. Under Article 4, a Signatory State receiving a request may limit the scope of its obligation to provide assistance to terrorist activity and money laundering offenses, and many did so in their respective bilateral instruments with the United States. In addition, Article 4 makes clear that the United States and the EU are under an obligation to ensure that the application of Article 4 does not impose extraordinary burdens on States that receive search requests. Certain EU States are expected to accommodate search requests from the United States by querying a single centralized database which identifies all bank accounts within that State. In negotiating the terms of Article 4, the United States expressly envisioned that EU member

States would be able to access the information sharing process created by the implementation of section 314(a) of the Act. Expanding that process to include certain foreign law enforcement requesters would greatly benefit the United States by granting law enforcement agencies in the United States with reciprocal rights to obtain information about matching accounts in EU member States.

Foreign law enforcement agencies would be able to use the 314(a) program in a way analogous to how Federal criminal law enforcement agencies currently access the program. Thus, a foreign law enforcement agency, prior to initiating a 314(a) query, would have to certify that, in the case of a money laundering investigation, the matter is significant, and that it has been unable to locate the information sought through traditional methods of investigation and analysis before attempting to use the 314(a) program. FinCEN also anticipates that the foreign request will be screened initially by a Federal law enforcement official serving as an attaché to the requesting jurisdiction. The application of these internal procedures will help ensure that the 314(a) program is utilized only in significant situations, thereby minimizing the cost on reporting financial institutions.

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5. Corruption

On November 7, 2009, Attorney General Eric Holder addressed the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity in Doha, Qatar. In his speech, excerpted below, Attorney General Holder suggested three steps countries should take to combat corruption. Attorney General Holder's remarks are available in full at *www.justice.gov/ag/speeches/2009/ag-speech-091107.html*. *See also* the U.S. statement to the 18th Commission on Crime Prevention and Criminal Justice, available at *http://vienna.usmission.gov/041609cc.html*.

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* * * *

First, we must renew our efforts for ratification and full implementation of the UN Convention Against Corruption. Seven years after it opened for signature, several of the world's largest economies—including several of our close partners in the G-20—still have not ratified the Convention. Still others that have ratified have not fully implemented the Convention. We again call upon all countries to join and implement the Convention.

And all of us who already are parties to the Convention must put in place an effective, transparent, and inclusive review mechanism. That is the critical question that we face this coming week in the Conference of States Parties. We will have failed our Governments and more importantly our peoples if we do not produce a review mechanism that is itself transparent and inclusive, and that allows our experts to have a candid dialogue about each nation's anti-corruption efforts. I urge the delegations to dedicate themselves to achieving this goal.

Second, we must work together to ensure that corrupt officials do not retain the illicit proceeds of their corruption. . . .

In response to this ongoing challenge, I stand before you to announce a redoubled commitment on behalf of the United States Department of Justice to recover such funds. Indeed, we have scored successes in this regard already. Through enforcement of our asset forfeiture laws, and in close cooperation with our law enforcement partners in other countries, the United States was able to repatriate more than $20 million to the nation of Peru that was looted during the government of Alberto Fujimori and Vladimiro Montesinos—and we have assisted in the repatriation of tens of millions of dollars more. We likewise have forfeited and repatriated more than $100 million to Italy that constituted proceeds of corruption in the judiciary, and have repatriated several million dollars to the Government of Nicaragua traceable to the illicit conduct of the administration of Arnoldo Aleman.

But we—both the United States and all countries here—need to do more. It is only with a truly international and cooperative response that we will be able to achieve success in recovering the proceeds of corruption. Asset recovery requires the dedication and expertise of investigators and prosecutors in both the country victimized by the corrupt acts and in those countries in which

corruption proceeds have been secreted. In that regard, with support from the U.S. Department of State, we will continue and expand our Asset Recovery Mentor Program piloted earlier this year, and—as called for in the Leaders' Statement at the G-20 Summit in Pittsburgh, we will work with the World Bank's Stolen Assets Recovery Program, and with the Financial Action Task Force. I challenge all of my colleagues here today similarly to commit to concerted action in support of asset recovery.

Third, countries must end official impunity with regard to corruption. In a number of countries, immunity for actions of public officials, judges, and parliamentarians has been broadly adopted, often for the legitimate reason of affording officials protection from politically motivated prosecutions. In too many places, however, public officials are given blanket immunity from investigation and prosecution for any action, even where the conduct involves public corruption. In such places, immunity becomes impunity. This cannot stand.

Let me be clear: Swift and effective prosecution of corrupt public officials must be at the core of our broader effort to end corruption. . . .

* * * *

. . . We must vigorously enforce our own laws that prohibit bribery of foreign officials, such as, in the United States, the Foreign Corrupt Practices Act. And we must work together to support our partners in anti-corruption enforcement, and expose all efforts to undermine the effectiveness of anti-corruption initiatives. Together, we can make a difference.

* * * *

As Attorney General Holder discussed at the VI Ministerial Global Forum in Doha, asset forfeiture is an important tool the United States uses to combat corruption. On September 2, 2009, for example, the U.S. Department of Justice announced the transfer to Peru of more than $750,000 in forfeited funds that a Peruvian national had embezzled from the Peruvian government. The Department of Justice's press statement, excerpted

below, explained that the United States had acted at the request of and in cooperation with Peruvian law enforcement authorities. The full text of the statement is available at *www.justice.gov/opa/pr/2009/September/09-crm-909.html*.

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The forfeited funds were taken from the private account of Marco Antonio Rodriguez Huerta, a former Peruvian Army General, who was also on the board of directors of the Peruvian Military and Police Pension Fund in 1996. According to court documents, by abusing those positions, Rodriguez Huerta was able to divert funds intended for use as retirement benefits for retired military and police officers into fraudulent real estate investments. These diverted funds were then transferred into the private accounts of Rodriguez Huerta and other high officials of the Peruvian government. According to court documents, Rodriguez Huerta and his associates utilized banking institutions in the United States to hide their illicit profits from the Peruvian government. For these crimes and other illegal activities, Rodriguez Huerta was arrested and convicted by Peruvian authorities in 2002, and sentenced to 15 years in prison in Peru.

* * * *

In August 2004, the Peruvian government requested ICE assistance in identifying Rodriguez Huerta's assets in the United States which resulted in ICE agents in Miami initiating an asset forfeiture investigation. In December 2004, the U.S. government filed a civil complaint in the Southern District of Florida, and seized three bank accounts under the control of Rodriguez Huerta. Subsequently, the U.S. District Court for the Southern District of Florida issued a final order of forfeiture of these seized funds in 2005.

In May 2008, the government of Peru submitted a petition for remission of the forfeited funds to the U.S. Department of Justice. As a result of the cooperation between the governments of Peru and the United States, the Criminal Division's Asset Forfeiture and

Money Laundering Section (AFMLS) has approved the repatriation of more than $750,000 to the Peruvian government and the Peruvian pension fund.

* * * *

6. Genocide

On December 22, 2009, President Obama signed into law the Human Rights Enforcement Act of 2009, Pub. L. No. 111-122, 123 Stat. 3480. The act amended the federal crime of genocide, 18 U.S.C. § 1091, to cover any person who attempts or conspires to commit an offense described in § 1091. It also expanded jurisdiction over the crime to include offenses, regardless of where they are committed, that are committed by offenders who are nationals or lawful permanent residents of the United States, stateless persons whose habitual residence is the United States, or who are present in the United States, as well as offenses that occur in whole or in part within the United States. Previously, jurisdiction over the crime was limited to offenses committed within the United States, regardless of the perpetrator's nationality, and to offenses committed extraterritorially by U.S. nationals. The act also criminalized the provision of material support for genocide and recruitment of child soldiers.

7. Piracy

On July 9, 2009, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, made a statement during a Security Council debate concerning Somalia. Ambassador Rice stressed the importance of prosecuting suspected pirates, stating:

> The international response to the piracy problem has been impressive. But we still face significant legal, logistical, and political problems over one key component of an effective deterrence strategy: that is, the prosecution of

> suspected pirates. My government believes that states victimized or affected by piracy bear the primary responsibility for prosecuting pirates. These states must step up and shoulder their share of the burden of the prosecutions, as France, the Netherlands, and others have done. In the rare cases in which a state truly cannot prosecute, we applaud the willingness of regional states, such as Kenya, to let themselves be considered as alternative venues. But in such cases, we believe the affected states should be responsible for helping defray the trials' costs.

The full text of the statement is available at *http://usun.state.gov/briefing/statements/2009/july/125867.htm*. For additional discussion of U.S. initiatives in 2009 to counter piracy off the coast of Somalia, see Chapter 12.A.4.

On May 19, 2009, the U.S. Attorney for the Southern District of New York indicted Abduwali Abddukhadir Musé for allegedly participating in the hijacking of the *Maersk Alabama* container ship on April 8, 2009, and taking the ship's captain hostage. The indictment charged Musé with piracy, as well as other offenses, including charges under the U.S. implementing legislation for the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("SUA Convention"), 18 U.S.C. § 2280. A press release issued by the U.S. Attorney's Office on May 19, excerpted below, provided additional background (footnotes omitted). The full text of the press release is available at *www.justice.gov/usao/nys/pressreleases/May09/museabduwaliabdukhadirindictmentpr.pdf*.*

. . . MUSE was taken into custody by the United States Navy on April 12, 2009, while at sea in the Indian Ocean. On April 20, 2009, MUSE was transferred from the custody of the United States

* Editor's note: On May 18, 2010, Musé pled guilty to felony counts of hijacking maritime vessels, hostage taking, and kidnapping in the U.S. District Court for the Southern District of New York. *See http://newyork.fbi.gov/dojpressrel/pressrel10/nyfo051810c.htm*.

Navy to the FBI for transport to the Southern District of New York. On April 21, 2009, following a hearing held before United States Magistrate Judge ANDREW J. PECK at the time of MUSE's presentment on the Complaint in this matter, Magistrate Judge PECK found that MUSE was over 18 years old and could be prosecuted as an adult.

The Indictment filed today in Manhattan federal court charges MUSE with the following offenses:

> . . . Piracy under the law of nations . . .
> . . . Seizing a ship by force . . .
> . . . Conspiracy to seize a ship by force . . .
> . . . Possession of a machinegun during and in relation to seizing a ship by force . . .
> . . . Hostage taking . . .
> . . . Conspiracy to commit hostage taking . . .
> . . . Possession of a machinegun during and in relation to hostage taking . . .
> . . . Kidnapping . . .
> . . . Conspiracy to commit kidnapping . . .
> . . . Possession of a machinegun during and in relation to kidnapping . . .

* * * *

C. INTERNATIONAL, HYBRID, AND OTHER TRIBUNALS

1. International Criminal Court

a. Address to Assembly of States Parties to the Rome Statute

The United States participated for the first time as an observer in the Eighth Session of the Assembly of States Parties to the Rome Statute, held in The Hague, the Netherlands, November 12–26, 2009. On November 19, 2009, Stephen J. Rapp, Ambassador at Large for War Crimes Issues, addressed the Assembly of States Parties

on behalf of the U.S. delegation. In his statement, excerpted below, Ambassador Rapp discussed U.S. efforts to support accountability and end impunity and outlined U.S. concerns about the States Parties' consideration of whether to amend the Rome Statute to incorporate a definition of the crime of aggression. Ambassador Rapp's statement is available in full at *www.state.gov/s/wci/us_releases/remarks/133316.htm*.

. . . It is a pleasure to address you on behalf of the US Delegation, which for the first time is attending a meeting of the Assembly of States Parties as an Observer. Although we have not joined previous meetings of the Assembly, we have not been silent in the face of crimes against the basic code of humanity, crimes that call for condemnation in the strongest possible way. Far from it: We have worked shoulder to shoulder with other states to support accountability and end impunity for hauntingly brutal crimes in the former Yugoslavia, Rwanda, and elsewhere. With special urgency today, we are working to end the impunity that has fostered intolerable crimes of sexual violence in the Democratic Republic of Congo and other countries. As a former prosecutor with the International Criminal Tribunal for Rwanda and former Chief Prosecutor for the Special Court for Sierra Leone, I am especially proud of my country's historic role in demanding justice for those who survived soul-shattering violence in their own countries—and for those who did not survive.

In recent years, we have seen extraordinary achievements of international criminal tribunals. Through their work, these tribunals have not only answered horrific crimes with historic justice, but they have done something of equal importance: they helped foster an expectation among victims that justice would be delivered at home, too, and not just in an international court. We have watched this process play out in several countries and have a deep appreciation of the role that institutions of international justice can play in helping restore accountability and the rule of law to states struggling to emerge from lawless violence. Certainly, the US Government places the greatest importance on assisting countries

where the rule of law has been shattered to stand up their own system of protection and accountability—to enhance their capacity to ensure justice at home.

At the same time, the United States recognizes that there are certain times when justice will be found only when the international community unites in ensuring it, and we have been steadfast in our encouragement for action when the situation demands it. It was with this principle in mind that the United States has encouraged the investigation of the situation in Darfur. In short, the commitment of the Obama Administration to the rule of law and the principle of accountability is firm, in line with my country's historic tradition of support for international criminal justice that has been a hallmark of United States policy dating back at least to the time of Nuremberg.

Having been absent from previous rounds of these meetings, much of what we will do here is listen and learn. Our presence at this meeting, and the contacts that our delegates will seek with as many of you as possible, reflects our interest in gaining a better understanding of the issues being considered here and the workings of the Court.

That said, I would be remiss not to share with you my country's concerns about an issue pending before this body to which we attach particular importance: the definition of the crime of aggression, which is to be addressed at the Review Conference in Kampala next year. The United States has well-known views on the crime of aggression, which reflect the specific role and responsibilities entrusted to the Security Council by the UN Charter in responding to aggression or its threat, as well as concerns about the way the draft definition itself has been framed. Our view has been and remains that, should the Rome Statute be amended to include a defined crime of aggression, jurisdiction should follow a Security Council determination that aggression has occurred.

Although we respect the hard work that has been done in this area by the Assembly of States Parties, we also share the concern that many of you have expressed about the need to address this issue, above all, with extreme care, and the Court itself has an interest in not being drawn into a political thicket that could threaten its perceived impartiality.

In more than eight years as an international prosecutor I have seen how challenging it can be to try persons alleged to bear the greatest responsibility for crimes that shock the universal conscience—those intentionally targeting civilians and other non-combatants. So much remains to be done to achieve justice for the victims of genocide, war crimes, and crimes against humanity. We must not fail them.

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b. Darfur: Issuance of arrest warrant for Sudanese President Bashir

On March 4, 2009, the International Criminal Court ("ICC") issued an arrest warrant for Sudanese President Omar al-Bashir. On the same day, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, issued a statement supporting the ICC's action. Ambassador Rice's statement is set forth below and is also available at *http://usun.state.gov/briefing/statements/2009/march/126539.htm*.

The United States supports the International Criminal Court's (ICC) actions to hold accountable those responsible for the heinous crimes in Darfur. We remain determined in our pursuit of both peace and justice in Sudan. The people of Sudan have suffered too much for too long, and an end to their anguish will not come easily. Those who committed atrocities in Sudan, including genocide, should be brought to justice. U.N. Security Council Resolution 1593, which referred the crimes in Darfur to the ICC, requires the Government of Sudan and all other parties to the conflict to cooperate fully with the ICC and its prosecutor and urges all states and concerned regional organizations to cooperate fully.

The United States expects restraint from all involved—the Government of Sudan, armed rebel groups, and others. No one should use the ICC's decision as a pretext to incite or launch violence against civilians or international personnel. The safety and security of all civilians, international personnel, and UN and

African Union peacekeepers in Sudan must be respected. We will continue to work with all parties for the full implementation of the Comprehensive Peace Agreement to bring an end to the conflict between North and South Sudan. The U.S. urges all parties to engage seriously with the Joint Chief Mediator of the UN and the African Union, Djibril Bassole, as he works to halt the hostilities in Darfur and to forge a political settlement that will bring lasting peace, justice, and security to the people of Darfur.

2. International Criminal Tribunals for the Former Yugoslavia and Rwanda

a. Statement to Security Council

On December 3, 2009, Ambassador Rosemary A. DiCarlo, U.S. Alternative Representative to the United Nations for Special Political Affairs, addressed the Security Council on the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR"). Ambassador DiCarlo's remarks, excerpted below, are available in full at *http://usun.state.gov/briefing/statements/2009/133107.htm*.

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Mr. President, the United States believes it is important to create a residual mechanism to manage the necessary functions of the Tribunals after the completion of their pending trials and appeals. . . .

Mr. President, we must remember why the tribunals were established—to identify and hold accountable those responsible for some of history's worst crimes. We must not lose sight of the historic importance of this task, and we must work to establish residual mechanisms that do not allow the 13 outstanding ICTY and ICTR fugitives to escape justice.

Individuals indicted by the Tribunals who remain at large must be apprehended and brought to justice without further delay. We call on all states to fulfill their legal obligations to cooperate with

the Tribunals and to take the necessary steps to ensure that the remaining fugitives are apprehended.

In particular, let me underscore the need to reinforce efforts to bring the ICTR fugitive Felicien Kabuga to face international justice. We are concerned that the Government of Kenya has not responded to the Tribunal's requests for certain government records relating to Kabuga's assets and has not provided details to support the claim that Kabuga has left Kenya. We urge Kenya to act immediately on the Tribunal's recommendations and to take effective steps to deny Kabuga access to his support networks.

The United States acknowledges Rwanda's desire to receive transferred cases from the ICTR. We commend the Prosecutor's support for that effort, as well as the work by the Rwandan government and others to build up capacity in the Rwandan legal system to make such transfers possible. We welcome the transfer last month of eight individuals convicted by the Special Court of Sierra Leone to Mpanga prison in Rwanda—an achievement that highlights Rwanda's growing capacity and commitment to meeting international standards. The ICTR's ability to transfer cases to Rwanda and other states as appropriate is a critical step toward meeting the Tribunal's completion strategy.

Mr. President, the United States commends states' efforts to cooperate with the ICTY, but vital duties remain unmet. The two remaining fugitives Ratko Mladic and Goran Hadzic must be arrested and transferred to the Tribunal to face justice.

Cooperation with the ICTY remains a fundamental obligation for all states in the region. We commend the Government of Serbia for its improved cooperation, and we urge it to continue to do everything in its power to locate, arrest, and transfer Mladic to the Tribunal. The arrests of Mladic and Hadzic are important for the successful completion of ICTY's mandate, for Serbia's full Euro-Atlantic integration, and for the cause of justice and accountability.

Regarding Croatia, we welcome Croatia's efforts to respond to the Trial Chamber's September 2008 order to deliver artillery documentation from Operation Storm or engage in a credible investigation into its fate. We believe that the Government of

Croatia's latest, ongoing investigation and establishment of a Task Force are significant steps forward in Croatia's cooperation with the ICTY. At the same time, we encourage the Croatian authorities to explore additional measures, such as using outside expertise and more aggressive investigative techniques that might help recover additional documents.

Mr. President, Bosnia-Herzegovina has made great strides to cooperate with the Tribunal and ICTY has done a commendable job in supporting the development of domestic courts. But last month the High Representative for Bosnia-Herzegovina informed us that domestic war crimes prosecutions and reform of the justice sector have suffered due to the inability of leaders to reach political decisions that advance national goals. We note the critically important work that international judges are doing in that country and support the extension of their mandates beyond December. International judges and prosecutors have worked tirelessly to bring justice to the victims, regardless of ethnicity.

* * * *

b. International Criminal Tribunal for the Former Yugoslavia: Prosecution of Radovan Karadzic

(1) Alleged immunity agreement

In July 2008 the Serbian government arrested Radovan Karadzic, former leader of the Bosnian Serbs, and transferred him to the International Criminal Tribunal for the Former Yugoslavia ("ICTY") to face charges of genocide and crimes against humanity. On May 25, 2009, Karadzic filed a motion before the ICTY Trial Chamber, arguing that the ICTY should dismiss his indictment because, as he claimed, in 1996 Ambassador Richard Holbrooke promised him immunity from prosecution in exchange for withdrawing from public life. *Prosecutor v. Karadzic*, Case No. IT-95-5/18-PT, ICTY. The United States has repeatedly made clear that no such agreement was made. A press statement issued by the Department

of State's Office of the Spokesman on June 25 explained the position of the United States. The statement, excerpted below, is available in full at *www.state.gov/r/pa/prs/ps/2009/06a/125410.htm*.

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The United States is aware of [Mr. Karadzic's] allegation and repeatedly has made clear that no agreement ever was made to provide Radovan Karadzic immunity from prosecution. Neither Ambassador Holbrooke nor any United States official was in a position to offer Dr. Karadzic such immunity, and no such offer was made. Dr. Karadzic did sign a statement, the text of which was negotiated in Belgrade on July 18, 1996, by Ambassador Holbrooke and a team of United States government officials with senior Serbian officials at a meeting where Dr. Karadzic was not present. In this statement, Dr. Karadzic pledged to leave office and withdraw from public life. There was no "quid pro quo".

As part of an ongoing commitment to assist the work of the ICTY, the United States regularly provides information to both prosecution and defense counsel. As part of this standard practice and in response to requests from Dr. Karadzic's legal advisor, we have provided a number of documents to Dr. Karadzic, a few of which were cited in the motion filed on May 25. [Editor's note: The documents are available at *www.state.gov/p/eur/rls/or/c31889.htm*.] However, we believe that Dr. Karadzic has mischaracterized the evidentiary import of the information he received.

In the interest of transparency and accuracy, we are making available to the public documents that pertain to the allegation of an immunity agreement and, in particular, demonstrate the lack of an underlying basis for that assertion. As these documents show, the United States Government repeatedly made clear at the time of Dr. Karadzic's agreement to withdraw from public life that it still expected Dr. Karadzic to be tried in The Hague. This position is reflected in both official statements to the press and in private diplomatic communications, including in letters from Secretary of

State Warren Christopher and Ambassador Holbrooke to Serbian President Slobodan Milosevic.

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On July 8, 2009, the Trial Chamber dismissed Karadzic's May 25 motion, and on October 12, 2009, the Appeals Chamber dismissed Karadzic's appeal of the Trial Chamber's decision. The two decisions are available at *www.icty.org/x/cases/karadzic/tdec/en/090708.pdf* (Trial Chamber) and *www.icty.org/x/cases/karadzic/acdec/en/091012.pdf* (Appeals Chamber).

(2) Requests for the United States to produce information

During 2009 the United States responded to a number of requests for information from Radovan Karadzic in connection with his defense. *Prosecutor v. Karadzic*, Case No. IT-95-5/18-PT, ICTY. On June 25, 2009, the United States filed a response to a motion that Karadzic filed on June 17, 2009, requesting the Trial Chamber to issue a subpoena to two U.S. government officials. Karadzic sought information from these individuals in connection with his allegation that in 1996 Ambassador Holbrooke had offered him immunity from prosecution. *See* C.2.b.(1) *supra*. The United States requested that the ICTY deny the motion because it "fail[ed] to meet the requirements for the issuance of a subpoena and constitute[d] an abuse of the United States' good-faith efforts to cooperate with the Tribunal." The U.S. response explained that, before filing the June 17 motion, Karadzic had made multiple requests to the United States for information concerning the alleged immunity agreement, and "the United States ha[d] striven to proceed cooperatively." The United States noted that, "despite serious reservations about the stated purpose of Accused's request—namely, to obtain information about an agreement that was never made," the United States had "gone to extraordinary lengths" to respond to Karadzic's request by conducting government-wide searches for documents, making two high-ranking U.S. officials available for interviews, providing two signed witness statements, and providing

other documents responsive to the request. Further excerpts below from the U.S. response provide the government's views on why Karadzic's request failed to meet the requirements for issuance of a subpoena (most footnotes omitted). The full text of the U.S. response is available at *www.state.gov/s/l/c8183.htm*.

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III. The Request Fails to Meet the Requirements for Issuance of a Subpoena[11]

12. As noted by the Appeals Chamber, under Rule 54 of the Tribunal's Rules of Evidence and Procedure, a Trial Chamber "may . . . issue a subpoena when it finds that doing so is 'necessary for the purposes of an investigation or for the preparation or conduct of a trial.'"

13. An applicant for a subpoena must demonstrate "a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues." That is, an applicant must establish that the information sought is necessary for the resolution of specific issues in the trial (the "legitimate forensic purpose" requirement) and such information must be unavailable through other means (the "last resort" requirement).

14. The Appeals Chamber has further noted that the discretion of a Trial Chamber to issue a subpoena is not unfettered, and

[11] The Appeals Chamber in *Krstic* held that requests to call government officials fall under Rule 54. *Prosecutor v. Krstic*, Decision on Application for Subpoenas, 1 July 2003, para. 10. The United States respectfully believes the case was wrongly decided, and that Rule 54*bis* is the correct framework. This submission, however, follows the analysis used in *Krstic* and subsequent Tribunal decisions; in doing so, the United States reserves its right to seek reconsideration of this question, as necessary. The United States only notes here the potentially unfair and asymmetric consequences of the approach taken by the *Krstic* Chamber: in the event a State refuses to authorize its officials to testify to information acquired in the course of their official duties, under the *Krstic* reasoning the consequences—which could include imprisonment and/or a fine—are borne not by the State but by the individual.

should take into account "not only the interests of the litigants but the overarching interests of justice and other public considerations." As the Appeals Chamber has cautioned, "[s]ubpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction." Trial Chambers should ensure that the compulsive mechanism of a subpoena is "not abused."

a) Legitimate Forensic Purpose

15. Accused has failed to demonstrate *a reasonable basis* for his belief that the prospective witnesses would be *likely to provide material information*. As the United States communicated to Accused's legal associate in writing on June 12, 2009, both [men] have confirmed that they have no knowledge of any immunity agreement, have no notes of the 1996 meeting, and that reports to Washington were delivered orally and via a July 19, 1996 reporting cable. In light of this communication, Accused has no reasonable grounds for believing that the two men are likely to provide material information that may assist him; his assertion that they have such information has no basis in fact or logic and is simply without merit.

16. Accused has also failed to establish that the information sought is *necessary* for the resolution of specific issues in the trial. First, Accused's legal associate has already spoken with three of the seven U.S. officials present at the meeting; the issuance of a subpoena is not justified in situations where the information sought is merely of a cumulative or corroborative nature, as here.

17. Second, the issue of whether factual information concerning the alleged immunity deal may be necessary for the resolution of a specific issue at trial is currently under consideration by the Trial Chamber; at the moment, the only indication the Trial Chamber has offered regarding the potential relevance of an immunity agreement is the statement that if such an agreement existed it *might* be of relevance for mitigation purposes at sentencing, in the event Accused is convicted. Unless it is established that information concerning the alleged agreement is necessary for the resolution of a specific issue at trial, there is no justification for the use of compulsive measures.

b) Last Resort Requirement

18. Accused cannot meet the last resort requirement because the United States has already provided him, in a variety of formats and from a number of sources, the information he seeks about the July 18–19, 1996, meetings. As noted above, he has received a number of documents, and his legal associate has spoken with three of the U.S. officials present at the meeting. Furthermore, in an additional effort to be cooperative, the United States provided Accused in writing with the specific information he claimed to seek from [the two officials]. Thus, the information sought with respect to these two gentlemen was not only obtainable by other means but was actually obtained through the voluntary cooperation of the United States.

19. That Accused has chosen to ignore, disbelieve, or discount the information provided is his decision, but it cannot serve as a basis or justification for a resort to compulsive measures. The United States, despite its serious reservations about the nature of Accused's requests and his distortions in the presentation of that information, has consistently sought to act cooperatively. Under these circumstances, Accused cannot make a good-faith claim that he has been unable to obtain the information he seeks without resort to the coercive powers of the Tribunal.

c) Trial Chamber Discretion and Other Considerations

20. As discussed above, in exercising its discretion on whether to issue a subpoena, a Trial Chamber should take into account "not only the interests of the litigants but the overarching interests of justice and other public considerations." In the present case, beyond Accused's purported needs, there are a couple of issues that deserve consideration.

21. First, as mentioned briefly above, the Trial Chamber currently has pending before it a motion by Accused requesting an evidentiary hearing on the alleged "Holbrooke Agreement" as well as an opposition filed by the Prosecution. Unless and until the Chamber determines that an evidentiary hearing is warranted, it would be particularly inappropriate to issue subpoenas . . . . Issuing subpoenas at this juncture would also constitute a waste of the time and resources of both the Tribunal (which, among other things, is funding Accused's defense) and the United States Government.

22. Second, although the United States firmly believes that Accused deserves a fair hearing, it does not believe that Accused should be given the leeway to abuse the good-faith efforts of a State to cooperate with the Tribunal. Moreover, the Accused—whether through frustration, a desire to seek continued publicity, or for any other reason—should not be able to pursue frivolous and meritless avenues to delay his trial and distract attention from the gravity of the crimes he is alleged to have committed.

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On July 8, 2009, the Trial Chamber denied Karadzic's June 17 motion, finding, among other things, that, at that stage of the proceedings, the subpoenas were not necessary to the defense.

On September 11, 2009, Karadzic's defense counsel filed another motion with the ICTY, requesting that the court, pursuant to Rule 54 *bis*, order the United States to produce information on a number of other topics. On September 29, 2009, the United States filed its response to the motion. As explained in the excerpts set forth below, the United States requested that the ICTY dismiss the motion without prejudice because "the threshold requirement for filing a Rule 54 *bis* motion is absent: as the Appeals Chamber has expressed, such a motion can only be filed *after* a State has declined to cooperate." The full text of the U.S. response is available at *www.state.gov/s/l/c8183.htm.*

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The United States is grateful for the opportunity to assist the Trial Chamber as it reviews this matter. The United States has long been committed to assisting the important work of the International Criminal Tribunal for the former Yugoslavia and to ensuring that the interests of justice are served. This commitment includes cooperating with reasonable and justified requests for information from the Prosecution and Defense. Over the years, the United States has voluntarily provided a significant amount of information to parties before the Tribunal. Indeed, earlier this year, in response to a different

request, we provided Mr. Karadzic with a number of documents and made senior U.S. government officials available for interview.

We were thus somewhat surprised when Mr. Karadzic chose to file the present Motion. The Motion, unfortunately, did not provide to the Trial Chamber the full nature or extent of communications between the United States and Mr. Karadzic. The attached correspondence . . . will provide a more complete picture of the state of affairs, but in essence, at the time of the filing of the Motion, Mr. Karadzic's team and the United States were in the midst of cooperative discussions, the United States had already expended hundreds of hours searching for potentially responsive material, and the United States had identified and expressed a willingness to provide a first tranche of responsive material.

Since the filing of the Motion, we have met with Mr. Karadzic's legal adviser . . . and made some further progress. At that September 25 meeting, [Mr. Karadzic's legal adviser] indicated that his client was unlikely to narrow the request or to provide additional justification, but he did take three positive steps: (1) he agreed to accept, under Tribunal Rule 70, any material provided by the United States in response to the request and to file a motion requesting that the Trial Chamber apply the provisions of Rule 70 to all such materials; (2) he agreed to accept material incrementally and then assess whether the full range of requested materials was necessary; and (3) he agreed to certain measures that would ease some of our national security concerns, including committing to accept documents with some redactions or in alternative formats. [Editor's note: Rule 70 enables a state to share information with a party on a confidential basis, providing for certain protections for that information.] Thus, the dialogue and the cooperative process are ongoing. In fact, despite continued concerns with the nature and excessively broad scope of Mr. Karadzic's request, the United States remains committed to try to resolve these issues cooperatively and voluntarily, without the need for intervention by the Trial Chamber or the imposition of mandatory measures.

Under these circumstances, it is our firm belief that the threshold requirement for filing a Rule 54bis motion is absent: as the Appeals Chamber has expressed, such a motion can only be filed *after* a State has declined to cooperate ("Only after a State declines

to lend the requested support should a party make a request for a Judge or a Trial Chamber to take mandatory action as provided for under Article 29." *Prosecutor v. Milutinovic et al*, Decision on Request of the United States of America for Review (12 May 2006), at para 32.) That is clearly not the case here.

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We would like to assure the Trial Chamber that we remain prepared to cooperate and are moving forward on this information request as expeditiously as we can. But the task is not a simple one. Mr. Karadzic's request is lengthy, extremely broad, and involves a number of different actors . . . . We also continue to have concerns about the request . . . . Nevertheless, the United States has been carefully reviewing the request and searching its holdings to identify responsive information . . . . As indicated to Mr. Karadzic in our letter of September 10, 2009, our efforts continue. Seeking to speed up this process by imposing early deadlines is unlikely to achieve the desired result of providing a comprehensive response to Mr. Karadzic's request, and would only further complicate an already complex and multi-layered endeavor.

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On October 12, 2009, the Trial Chamber for the ICTY denied Karadzic's request, noting that issuing an order to compel the United States to produce the documents was premature since the United States was cooperating with the defense to provide the documents Karadzic sought. The full text of the decision is available at *www.icty.org/x/cases/karadzic/acdec/en/091012.pdf*.

3. Special Court for Sierra Leone

On July 16, 2009, Justice Renate Winter, President of the Special Court for Sierra Leone, and Stephen Rapp, then Prosecutor of the Special Court, briefed the Security Council on the work of the Special Court. Ambassador Rosemary A. DiCarlo, U.S. Alternative Representative to the United Nations for Special Political Affairs, made a statement expressing U.S. support for

the Special Court as it completed its mandate. Ambassador DiCarlo's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2009/july/126128.htm*.

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The briefings today come at a critical juncture as the Court completes the final phase of its mandate. The successful completion of the Court's work and the establishment of a viable Residual Mechanism remain top priorities for the United States.

. . . [T]he United States was instrumental in the establishment of the Special Court for Sierra Leone and has been its largest financial supporter. Since the Court's inception in 2002, the United States has contributed more than $60 million to it. . . .

. . . The Court has been instrumental in contributing to peace and stability in Sierra Leone through the creation of a transparent and independent judicial process. When the Court closes, it will effectively end a chapter in Sierra Leonean history.

The United States fully supports the court's efforts to transfer its institutional knowledge to Sierra Leone authorities. We believe it important to the country's on-going democratic development that all lessons of the past be fully absorbed, and the Special Court has much to offer in this regard. . . .

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. . . The Court has broken new ground in the field of international criminal law, including the recognition of the use of child soldiers as an international crime and sexual slavery as a war crime and crime against humanity. And it has built a powerful legacy by fighting against impunity and working to bring justice to the people of Sierra Leone.

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4. Special Tribunal for Lebanon

The Special Tribunal for Lebanon began operating on March 1, 2009. Robert Wood, Acting Department of State Spokesman,

issued a statement on that day, excerpted below, expressing U.S. support for the tribunal. The full text of the statement is available at *www.state.gov/r/pa/prs/ps/2009/03/119896.htm*. For background on the tribunal, see *Digest 2007* at 190–93.

Today's opening of the Special Tribunal for Lebanon represents an important step toward justice in the 2005 assassination of former Lebanese Prime Minister Rafiq Hariri. . . .

The Tribunal is a clear signal that Lebanon's sovereignty is non-negotiable. Moreover, we hope it will help deter further violence and end a sad era of impunity. . . .

We applaud the brave and tireless work of the UN International Independent Investigation Commission and Lebanese judicial authorities who have brought the investigation and Tribunal this far. We will continue to assist their efforts, and recently pledged another $6 million, pending Congressional approval, towards the Tribunal's operations in addition to the $14 million already contributed.

Cross References

International Covenant on Civil and Political Rights, **Chapter 6.A.3., B.1.c., B.4.b., and B.5.**

Crimes committed against women in conflict zones, **Chapter 6.B.2.b.**

Narcotics-related trade preferences, **Chapter 11.D.4.a.**

Role of diplomatic assurances in implementing policy against transferring detainees to countries where it is determined they are more likely than not to be tortured, **Chapter 18.A.5.c.(4)**

Chapter 4

Treaty Affairs

A. GENERAL

Treaty Priority List

On May 11, 2009, the Department of State provided the Administration's treaty priority list for the 111th Congress in a letter from Richard R. Verma, Assistant Secretary of State for Legislative Affairs, to Senator John F. Kerry (D-Massachusetts), Chairman, Senate Committee on Foreign Relations. As the letter explained, the list was divided into two categories: (1) treaties on which the Administration supported Senate action "at this time;" and (2) treaties on which the Administration did not support Senate action "at this time." The full text of the letter is available at *www.state.gov/s/l/c8183.htm*.

B. CONCLUSION, ENTRY INTO FORCE, RESERVATIONS, APPLICATION, AND TERMINATION

1. Interpretive Declarations and Reservations

On October 30, 2009, Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, addressed the General Assembly's Sixth (Legal) Committee on the report of the International Law Commission ("ILC" or "Commission") on the work of its sixty-first session. Excerpts follow from Mr. Simonoff's statement, addressing the Commission's

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discussions concerning reservations to treaties and interpretative declarations, also known as interpretive declarations. The full text of Mr. Simonoff's statement is available at *www.state.gov/s/l/c8183.htm*; the ILC report is available at *http://untreaty.un.org/ilc/reports/2009/2009report.htm.*

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On the subject of Reservations to Treaties, I would first like to compliment the Special Rapporteur on the impressive work that has gone into the draft guidelines. We are grateful for the scholarship Mr. Pellet has brought to bear on this important topic and although, as has been mentioned before, the United States is skeptical regarding the utility of the formal framework adopted by the Commission for interpretative declarations, Mr. Pellet's Fourteenth Report [U.N. Doc. A/CN.4/614] was excellent and we are looking forward to his continuing inquiry into the validity of reservations and interpretative declarations.

On the subject of interpretative declarations, I would like to mention that we continue to have particular concerns regarding the suggested treatment of *conditional* interpretative declarations as reservations. If the content of a conditional interpretative declaration purports to modify the treaty's legal effects with regard to the declarant, then it is a reservation. If the content of a conditional interpretative declaration merely clarifies a provision's meaning, then it cannot be a reservation, regardless of whether it is conditional. In brief, we disagree with the view that an interpretative declaration that would not otherwise qualify as a reservation could be considered a reservation simply because the declarant makes its consent to be bound by the treaty subject to the proposed interpretation. Subjecting conditional interpretative declarations to a reservations framework, regardless of whether they are in fact reservations, is inappropriate and could lead to overly restrictive treatment of such issues as temporal limits for formulation, conditions of form, and subsequent reactions regarding such declarations.

On the subject of the validity of reservations, the Special Rapporteur's Report regarding the meeting between the

Commission and representatives of the United Nations human rights treaty bodies and regional human rights bodies was of particular interest. We would associate ourselves with the consensus views expressed at this meeting regarding the fact that there is value in the uniform application of rules regarding reservations for all types of treaties and that no special regime is applicable to reservations to human rights treaties.

The discussion by the Commission regarding the role of treaty bodies in examining reservations was also of particular interest. It is a fundamental and long-standing principle of customary international law that treaties are authoritatively interpreted by the Parties themselves, though of course the treaty may be authoritatively interpreted by an international body if and to the extent that the Parties have agreed either in the treaty at issue or through a separate agreement. In our view, the current guidelines properly reflect that any conclusions formulated by a treaty body regarding a particular reservation can only "have the same legal effect as that deriving from the performance" of its duties as established in the treaty itself.

Finally, with respect to the legal effect of invalid reservations, we do not think that if a State has made a prohibited reservation, it is then bound by the treaty without the benefit of that reservation. As treaty law is premised on the voluntary undertaking of treaty obligations, an attempt to assign an obligation expressly not undertaken by a country is inconsistent with that fundamental principle. Instead, the objecting State must determine if it is desirable to remain in a treaty relationship with the reserving State, despite the existence of what it considers to be an impermissible reservation. Alternatively, if the objecting state rejects a treaty relationship with the reserving state on the basis of the objectionable reservation, the reserving state can always withdraw its reservation. From a practical perspective, there are times when it may be better to continue to have a treaty relationship with a State, despite the existence of an impermissible reservation. While this is not an ideal scenario, it is important not to rule this out. We look forward to a continuing dialogue on these important issues.

* * * *

2. Treaty of Amity and Cooperation in Southeast Asia

On July 22, 2009, the United States became a party to the Treaty of Amity and Cooperation in South East Asia ("TAC"), which the members of the Association of South East Asian Nations ("ASEAN") concluded in Indonesia on February 24, 1976. Secretary of State Hillary Rodham Clinton signed the U.S. Instrument of Accession to the TAC during the ASEAN Post-Ministerial Conference and ASEAN Regional Forum ("ARF") ministerial meetings in Thailand, July 22–23. The United States acceded to the agreement as an executive agreement on the basis of the President's constitutional authority. In its diplomatic note to ASEAN defining the terms of U.S. accession, the United States made a reservation to Article 10 of the TAC. Article 10 provides: "Each High Contracting Party shall not in any manner or form participate in any activity which shall constitute a threat to the political and economic stability, sovereignty, or territorial integrity of another High Contracting Party." With respect to Article 10, the U.S. diplomatic note stated that U.S. accession to the TAC "does not limit actions taken by the United States that it considers necessary to address a threat to its national interests." The full text of the U.S. diplomatic note is available at *www.state.gov/documents/organization/130886.pdf*. A Department of State press release of that date, which is set forth below and is also available at *www.state.gov/r/pa/prs/ps/2009/july/126294.htm*, provided additional background on the U.S. action and the agreement.

On July 22, 2009, Secretary of State Hillary Rodham Clinton signed the United States' Instrument of Accession to the Treaty of Amity and Cooperation in Southeast Asia. At the same time, the ten ASEAN Foreign Ministers signed an Instrument of Extension of the Treaty of Amity and Cooperation in Southeast Asia, completing the United States' accession to the Treaty. Among other things, parties to the Treaty pledge to promote perpetual peace, everlasting amity and to cooperate in economic, social, cultural, technical and scientific fields.

During her visit to the ASEAN Secretariat in Jakarta in February of this year, Secretary Clinton announced that the Administration would pursue accession to the Treaty because "we believe that the United States must have strong relationships and a strong and productive presence here in Southeast Asia." Today's signing ceremony successfully completes this Administration initiative.

The speed at which the United States worked together with ASEAN members to realize U.S. accession to the Treaty highlights our re-energized involvement in Southeast Asia, as well as the close mutual ties sought by ASEAN and the United States. U.S. accession is a symbol of the United States' desire to engage more deeply and effectively with ASEAN on regional and global priorities.

The Treaty of Amity and Cooperation in Southeast Asia was signed by the original members of ASEAN in 1976. All ASEAN members have since become parties to the Treaty. In 1987, ASEAN amended the Treaty to invite countries outside of Southeast Asia to accede to the Treaty in order to build confidence, promote peace and security, and facilitate economic cooperation in the region.

Before acceding to the TAC, the executive branch consulted with members of the Senate Committee on Foreign Relations concerning U.S. accession to the agreement as an executive agreement. On July 10, 2009, Senators John F. Kerry (D-Massachusetts), Chairman, Senate Committee on Foreign Relations; Mitch McConnell (R-Kentucky), Republican Leader, U.S. Senate; and Richard G. Lugar (R-Indiana), Ranking Member, Senate Committee on Foreign Relations, wrote Secretary Clinton to express support for the administration's proposal. The letter is set forth below and is also available at *www.state.gov/s/l/c8183.htm*.

We write to you regarding the proposed U.S. accession to the Treaty of Amity and Cooperation in Southeast Asia (TAC). We believe that U.S. accession to the TAC reflects the strong American commitment to the region and to vigorous engagement with the Association of Southeast Asian Nations (ASEAN), both of which we fully support. The U.S. has important foreign policy and economic interests in Southeast Asia which we believe this agreement can further.

There are two important points of clarification, however, that we wish to make as part of the Senate's input in the context of the State Department's congressional consultations. First, we understand that the Department is considering having the United States accede to the TAC in late July as a sole executive agreement, which would not require the advice and consent of the Senate. We note that the title of the agreement refers to the agreement as a "treaty," and we are unaware of any precedent for the United States acceding to an agreement styled as a "treaty" without the advice and consent of the Senate as provided for in Article II, Section 2 of the Constitution. At the same time, we are mindful that other factors apart from the formal name of the agreement could suggest that it is consistent with U.S. practice for the United States to accede to the TAC as an executive agreement. Of particular importance, the agreement is largely limited to general pledges of diplomatic cooperation and would not appear to obligate the United States to take (or refrain from taking) any specific action (with the exception of provisions of Article X which we understand will be the subject of a reservation as discussed below). We also note that the United States did not take part in the negotiations among ASEAN countries leading up to the conclusion of the TAC in 1976, or in the decision to characterize it as a treaty.

In light of these unique considerations, we will not object to the Department's plan to accede to the TAC as an executive agreement. We continue to believe, however, that the use of the term "treaty" in the title of an agreement will generally dictate that Senate advice and consent will be required before the United States may accede to the agreement. In this regard, treatment of the TAC as an executive agreement should not be considered a precedent for treating future agreements entitled "Treaties" as sole executive agreements. To ensure our understanding that the process surrounding this agreement is not misinterpreted in the future as a precedent, we will submit this letter into the *Congressional Record*. We would also request that the State Department include it in the next edition of the *Digest of United States Practice in International Law*.

Second, Article X of the TAC provides that "[e]ach High Contracting party shall not in any manner or form participate in

any activity which shall constitute a threat to the political and economic stability, sovereignty, or territorial integrity of another High Contracting Party." We also note that the U.S. has proposed a reservation to the TAC that states that the TAC, noting in particular Article X, "does not limit actions taken by the United States that it considers necessary to address a threat to its national interests." We interpret this reservation as ensuring that the TAC does not limit the authority of the U.S. government—either the executive branch or the Congress—to take actions that it considers necessary in pursuit of U.S. national interests in the region or with respect to any individual nation.

We thank you for your close consideration of this matter and for the Department's consultation prior to acceding to the TAC.

C. ROLE IN LITIGATION

1. Applicability in U.S. Courts of a Treaty to Which the United States is Not a Party

In an unpublished opinion issued on June 12, 2009, the U.S. Court of Appeals for the Second Circuit vacated and remanded a 2008 district court judgment dismissing a lawsuit brought by Reino de España ("Spain") against ABSG Consulting, Inc., et al. ("ABS") for damages that occurred when the tanker *M.T. Prestige* sank off the coast of Spain. *Reino de España v. ABSG Consulting, Inc.*, 334 Fed. Appx. 383 (2d Cir. 2009); 2009 U.S. App. LEXIS 12618 (2d Cir. 2009). The Second Circuit concluded "that the district court erred in holding that the [International Convention on Civil Liability for Oil Pollution Damage ("CLC"), 973 U.N.T.S. 3, Nov. 29, 1969, as amended, 1956 U.N.T.S. 255, Nov. 27, 1992] deprived it of subject matter jurisdiction." *Reino de España*, 334 Fed. Appx. at 385; 2009 U.S. App. LEXIS 12618, at *6.

The Second Circuit's opinion was consistent with views the United States submitted in a letter brief on March 20, 2009,

in response to questions by the court. The U.S. letter brief summarized the government's views as follows:

> . . . [T]he United States believes that the district court erred to the extent it suggested that dismissal under the International Convention on Civil Liability for Oil Pollution Damage, 1969, as amended by the 1992 Protocol Amending the Convention ("CLC"), was for lack of subject matter jurisdiction. Because the United States is not a party to the CLC, the CLC is not United States law. Accordingly, the treaty cannot deprive a district court of its statutorily conferred jurisdiction. The treaty may, however, be considered by a district court in determining whether to dismiss a case under discretionary doctrines such as *forum non conveniens* or international comity.
>
> To the extent the Court's questions invite the United States to apply the CLC to the facts of this case, the United States respectfully declines to do so. The United States is not a party to the CLC, nor is the United States familiar with the subsequent application of the treaty among States party to the CLC. The State Department has informed us that there is no current Executive Branch position as to the proper construction of the treaty provisions that are the subject of the Court's inquiry, and that the State Department's review of files relating to the CLC did not disclose any materials that, in the State Department's view, would resolve the questions posed by the Court.

In reaching its conclusion, the Second Circuit also noted:

> That does not mean, however, that the district court is required here to exercise its jurisdiction. On remand, it may consider whether principles of *forum non conveniens* or international comity support a discretionary decision not to exercise jurisdiction. . . . ABS's willingness to stipulate to personal jurisdiction in an alternative forum is a relevant factor to any declination of jurisdiction . . . . So too is the possible inequity of a discretionary dismissal at this stage of the litigation . . . .

> If the district court concludes that dismissal under *forum non conveniens* or international comity is not warranted, it should then conduct a conflicts-of-law analysis to determine which law governs this case . . . .

Reino de España v. ABSG Consulting, Inc., 334 Fed. Appx. at 384–85; 2009 U.S. App. LEXIS 12618, at *4–6. Further excerpts follow from the U.S. letter brief (footnotes omitted). The full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

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Under Article III(4) of the CLC,

> No claim for compensation for pollution damage may be made against the owner [of a vessel carrying oil as bulk cargo] otherwise than in accordance with this Convention. [Subject to an exclusion not relevant here,] no claim for compensation for pollution damage under this Convention or otherwise may be made against:
>
> (a) the servants or agents of the owner or members of the crew;
>
> (b) the pilot or any other person who, without being a member of the crew, performs services for the ship . . .
>
> unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

Article IX(1) of the CLC further provides that, "[w]here an incident has caused pollution damage in the territory including the territorial sea of one or more Contracting States, or preventative measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea, actions for

compensation may only be brought in the Courts of any such Contracting State or States."

* * * *

The questions posed by the Court's order of March 4, in particular the question "whether Article IX of the CLC requires that Spain's claim against ABS be adjudicated in a CLC contracting state," implicate the issue of the CLC's legal status in the United States and its effect on actions brought in United States courts. In the United States' view, the district court erred to the extent it held that the CLC deprived it of subject matter jurisdiction over Spain's claims. *See* [*Reino de España v. American Bureau of Shipping Inc.*,] 528 F. Supp. 2d [455,] 461 [(S.D.N.Y. 2008)]. However, a district court may properly look to a treaty such as the CLC in determining whether to decline to exercise its statutory jurisdiction.

As a general rule, "[o]nly Congress may determine a lower federal court's subject matter jurisdiction" or restrict jurisdiction that it has previously granted. *Kontrick v. Ryan*, 551 U.S. 443, 453–54 (2004). Because the United States is not a party to the CLC, the CLC does not establish United States law. Nor has Congress passed any statute that purports to strip federal courts of jurisdiction over claims governed by the CLC. Accordingly, the CLC could not have divested the district court of subject matter jurisdiction over Spain's claims against ABS. Nevertheless, a federal court may consider a treaty to which the United States is not a party a basis for declining to exercising its jurisdiction over particular claims. The United States does not take a position on the applicability of the forum selection clause in the CLC, which concerns the claims of a party State against the citizen of a non-party State based on services performed for a ship registered in a party State. We note as a general matter that a clause of this type may be treated as akin to a forum selection clause in a private contract to which ABS may be a third-party beneficiary. Although a contractual forum selection clause does not oust a federal court of jurisdiction over an action, it may be a basis on which the court declines to exercise its jurisdiction. *See, e.g., New Moon Shipping Co. v. Man B & W Diesel AG*, 121 F.3d 24, 28 (2d Cir. 1997); *see also M/S Bremen* [*v. Zapata Off-Shore Co.*], 407 U.S. [1,] 12–13 [(1972)]. Alternatively, a treaty

provision channeling litigation to the courts of party States might be entitled to deference by a federal court under doctrines such as international comity or *forum non conveniens*. *See, e.g., Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238–39 (11th Cir. 2004); *Bi v. Union Carbide Co.*, 984 F.2d 582, 585–86 (2d Cir. 1993).

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2. Private Right of Action

As discussed in Chapter 2.A.2., on August 14, 2009, by order of the U.S. Court of Appeals for the Third Circuit, the United States filed a brief as *amicus curiae* in support of a district court judgment dismissing a case seeking damages for alleged violations of the Vienna Convention on Consular Relations ("VCCR"), among other claims. *McPherson v. United States*, No. 08-3757 (3d Cir.). Chapter 2.A.2. summarizes the U.S. view that the VCCR's "text, structure, and history give no indication that Article 36 [of the VCCR] was intended to create individually enforceable rights." As excerpted below, the U.S. brief also addressed more generally the issue of when a treaty may be found to create judicially enforceable rights. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

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1. "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. 580, 598 (1884). Violations then may become the subject of international negotiations and other measures between the parties. *Ibid.* "But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law and which are capable of enforcement

as between private parties in the courts of the country." *Ibid*. For example, treaties that establish rules for commercial disputes between individuals or corporations to benefit private parties in their international transactions often provide expressly for individual enforcement in domestic courts of the rights afforded. *See, e.g., Clark v. Allen*, 331 U.S. 503, 507–508 (1947) (treaty providing for inheritance of property by German heirs and for "freedom of access to the courts of justice" to prosecute and defend treaty rights); *accord Head Money Cases*, 112 U.S. at 598; *see also Trans World Airlines, Inc. v. Franklin Mint Corp*., 466 U.S. 243, 252 (1984) (rights invoked under the Warsaw Convention, which explicitly contemplates private enforcement); *Bacardi v. Domenech*, 311 U.S. 150, 159–161 (1940) (finding private right created by treaty providing for international recognition of trademarks).

While some treaties thus are properly construed to provide rights that are judicially enforceable by individuals, "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." Restatement (Third) of Foreign Relations Law of United States § 907, Comment a (1986). In *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 442 & n.10 (1989), for example, the Supreme Court held that treaty language specifying that a merchant ship "shall be compensated for any loss or damage" and that a "belligerent shall indemnify" damage it caused did not create a private right of action for compensation in a U.S. court.

In *Medellin v. Texas*, 128 S. Ct. 1346 (2008), the Supreme Court described the Restatement's observation (quoted above) that treaties generally do not create private rights or provide for a private cause of action in domestic courts as a "background presumption." *Id*. at 1357 n.3. Whatever the precise nature of such a presumption, however, it is not always necessary, in order for a particular treaty to be found to create privately enforceable rights, that the treaty expressly so provide. In certain circumstances, the intent to create such rights may be evidenced by the terms, structure, history, and subject of the treaty. But however that intent may be manifested, it is the private person seeking to enforce a

treaty in court who must demonstrate that the treaty creates in him an individually enforceable right.

. . . [T]hat burden cannot be met in regard to Article 36 of the Vienna Convention. . . .

* * * *

3. Distinction Between a Treaty and a Statute: Vienna Convention on Consular Relations

On December 9, 2009, the U.S. Court of Appeals for the Seventh Circuit affirmed a lower court's dismissal of a Nigerian national's suit against two law enforcement officials in their individual capacities for allegedly violating Article 36 of the Vienna Convention on Consular Relations ("VCCR"). *Sobitan v. Glud*, 589 F.3d 379 (7th Cir. 2009). The Seventh Circuit upheld the district court's decision to dismiss the claim under the Federal Employees Liability Reform and Tort Compensation Act ("Westfall Act"), 28 U.S.C. § 2679. The U.S. brief filed on December 11, 2008, is available at *www.state.gov/s/l/c8183.htm*.

The Seventh Circuit explained the relevant provisions of the Westfall Act as follows:

> Section 2679(b)(1) shelters federal employees from liability "for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission" of the employee "while acting within the scope of his office or employment"; it accomplishes this by transforming the action against the employee into one against the federal Government. There are only two discrete categories of cases to which this protection does not apply: (1) a claim "brought for a violation of the Constitution of the United States," and (2) a claim "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2).

> When a claim of wrongful conduct is brought against a government official in his individual capacity, and the claim does not fall within the specified exceptions to immunity in § 2679(b)(2), the Attorney General's certification that the defendant was acting within the scope of his employment requires substitution of the United States as a defendant. The suit then proceeds as though it had been filed against the United States under the FTCA [Federal Tort Claims Act, 28 U.S.C. § 2675(a)]. As such, it is subject to the "limitations and exceptions" applicable to cases brought pursuant to the FTCA. 28 U.S.C. § 2679(d)(4).

Sobitan, 589 F.3d at 383. Based on its analysis of the plain meaning of the term "statute," the statutory context for the substitution provision in § 2679(b)(2)(B), the authorities cited by the plaintiff-appellant, and other case law, the Seventh Circuit concluded that the Vienna Convention is not a statute for purposes of Westfall Act § 2679(b)(2)(B):

> . . . [T]he term "statute of the United States," as used in § 2679(b)(2)(B), means a law of the United States passed by both houses of Congress and signed by the President; it does not encompass treaties. Thus, Mr. Sobitan's claim for relief for violation of his rights under the Vienna Convention does not fall within an exception to the Westfall Act's substitution provision.

Id. at 388. Having determined that the district court properly substituted the United States as the defendant, the court then considered the plaintiff-appellant's damages claim against the United States. The Seventh Circuit concluded that 28 U.S.C. § 1346(b)'s requirement that the source of substantive law be state tort law ("the law of the place where the act or omission occurred") for a claim to be cognizable against the government, barred the plaintiff's claim because his claim was based on an international treaty rather than state law. *Id.* at 389. Further excerpts below provide the court's analysis in reaching that conclusion (footnotes omitted). *See* C.2. *supra*

and Chapter 2.A.2. for discussion of other litigation concerning Article 36 of the VCCR.*

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. . . 28 U.S.C. § 1346 grants "exclusive jurisdiction" to the district courts for

> civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). The Court has held that "the scope of jurisdiction" set forth in § 1346 is coextensive with the United States' "waiver of sovereign immunity." *F.D.I.C. v. Meyer*, 510 U.S. 471, 479 (1994). In other words, the United States has waived its sovereign immunity only with respect to claims described in § 1346(b), specifically claims for which a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

* * * *

In sum, once the Government has been substituted for a federal officer under 28 U.S.C. § 2679(b), the action must proceed against the United States and is subject to the "limitations and exceptions" for claims brought pursuant to 28 U.S.C. § 1346(b). One limitation is that the source of substantive law on which

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* Editor's note: On April 8, 2010, the plaintiff filed a petition for a writ of certiorari in the U.S. Supreme Court. On July 9, 2010, the United States filed a brief in opposition to the petition for certiorari in the Supreme Court, which is available at *www.justice.gov/osg/briefs/2010/0responses/2009-1214.resp.pdf*.

the plaintiff relies must be "the law of the place where the act or omission occurred," that is, state tort law. If the plaintiff's claim is not cognizable under state tort law, it does not fall within the sovereign's waiver of immunity and must be dismissed.

Here, the source of Mr. Sobitan's claims is not state tort law, but international treaty. His claim, therefore, does not fall within the United States' waiver of its sovereign immunity in § 1346(b), and the district court properly dismissed his claim.

Cross References

Executive branch treaty-making power in negotiating and enforcing extradition treaties and in implementing U.S. obligations under the Convention Against Torture, **Chapter 3.A.3.**

Role of Geneva Conventions in extradition, **Chapter 3.A.4.**

International comity considerations in litigation in U.S. courts, **Chapters 5.C. and 15.C.1., 2.b., and 3.b.**

U.S. objection to amendments adopted under the tacit amendment procedure in the International Convention on the Safety of Life at Sea, **Chapter 12.A.8.**

Forum non conveniens in international civil litigation in U.S. courts, **Chapter 15.C.4.**

Chapter 5

Foreign Relations

A. EXECUTIVE-LEGISLATIVE SEPARATION OF POWERS

On June 1, 2009, the Department of Justice's Office of Legal Counsel ("OLC") issued a memorandum concluding that § 7054 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2009 (Div. H, Pub. L. No. 111-8, 123 Stat. 524) "unconstitutionally infringes on the President's authority to conduct the Nation's diplomacy, and the State Department may disregard it." The State Department requested the opinion concerning § 7054, which provides:

> None of the funds made available under title I of this Act may be used to pay expenses for any United States delegation to any specialized agency, body, or commission of the United Nations if such commission is chaired or presided over by a country, the government of which the Secretary of State has determined, for purposes of section 6(j)(1) of the Export Administration Act of 1979 (50 U.S.C. app. 2405(j)(1)), supports international terrorism.

Title I provides the sole funding for the State Department's delegations to specialized U.N. agencies. The Secretary of State has designated Cuba, Iran, Sudan, and Syria as state sponsors of terrorism under § 6(j)(1) of the Export Administration

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Act ("EAA").* Excerpts follow from the OLC opinion, which is available in full at *www.justice.gov/olc/2009/section7054.pdf* (most footnotes omitted).

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In signing the Omnibus Act, President Obama issued the following statement:

> Certain provisions of the bill, in titles I and IV of Division B, title IV of Division E, and title VII of Division H, would unduly interfere with my constitutional authority in the area of foreign affairs by effectively directing the Executive on how to proceed or not proceed in negotiations or discussions with international organizations and foreign governments. I will not treat these provisions as limiting my ability to negotiate and enter into agreements with foreign nations.

Daily Comp. Pres. Doc. No. 2009-00145 (Mar. 11, 2009) (President Obama's Statement on Signing the Omnibus Appropriations Act, 2009). Section 7054 is within title VII of division H, and purports to "effectively direct[] the Executive on how to proceed or not proceed in negotiations or discussions with international organizations and foreign governments." Thus, although the President's

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* Editor's note: The opinion explained that the EAA's termination on August 20, 2001, did not change its analysis. The opinion stated:

> . . . Since the EAA terminated, the President, acting under the authority of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701–1706 (2000 & West Supp. 2008), has annually issued executive orders that adopt the provisions of the EAA and that continue Executive Branch actions taken initially under the authority of the EAA . . . . Congress has ratified this practice . . . . In light of this history, we believe that Congress intended the reference in section 7054 to determinations "for purposes of 6(j)(1) of the [EAA]" to encompass, at a minimum, determinations that the Secretary made prior to EAA's termination but which retain their force as a result of the President's exercise of his authority under IEEPA.

signing statement did not identify section 7054 specifically, it encompasses that provision.

* * * *

III.

In our view, section 7054 impermissibly interferes with the President's authority to manage the Nation's foreign diplomacy. To be sure, a determination that a duly enacted statute unconstitutionally infringes on Executive authority must be "well-founded," Memorandum for the Heads of Executive Departments and Agencies, Re: Presidential Signing Statements, 74 Fed Reg. 10669 (2009); *see also* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200–01 (1994), and Congress quite clearly possesses significant article I powers in the area of foreign affairs, including with respect to questions of war and neutrality, commerce and trade with other nations, foreign aid, and immigration. As ample precedent demonstrates, however, Congress's power to legislate in the foreign affairs area does not include the authority to attempt to dictate the modes and means by which the President engages in international diplomacy with foreign countries and through international fora. Section 7054 constitutes an attempt to exercise just such authority: It effectively denies the President the use of his preferred agents—representatives of the State Department—to participate in delegations to specified U.N. entities chaired or presided over by certain countries. As this Office has explained, such statutory restrictions are impermissible because the President's constitutional authority to conduct diplomacy bars Congress from attempting to determine the "form and manner in which the United States . . . maintain[s] relations with foreign nations." *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 21 (1992) (citing *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 38 (1990)).

The President's basic authority to conduct the Nation's diplomatic relations derives from his specific constitutional authorities to "make Treaties," to "appoint Ambassadors . . . and Consuls" (subject to Senate advice and consent), U.S. Const. art. II, § 2, cl. 2, and to "receive Ambassadors and other public Ministers," *id.* art. II, 3.

It also flows more generally from the President's status as Chief Executive, *id.* art. II, § 1, cl. 1 and from the requirement in article II, section 3 of the Constitution that the President "shall take care that the Laws be faithfully executed." As a result of these authorities, it is well established that the President is "the constitutional representative of the United States in its dealings with foreign nations." *United States v. Louisiana*, 363 U.S. 1, 35 (1960); *see also Ex Parte Hennen*, 38 U.S. (13 Pet.) 225, 235 (1839)("As the executive magistrate of the country, [the President] is the only functionary intrusted with the foreign relations of the nation.") . . .

In addition, the Executive Branch has long adhered to the view that Congress is limited in its authority to regulate the President's conduct of diplomatic relations. . . .

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In more recent decades, the Executive has continued to object when Congress has attempted to impose limits on the form and manner by which the President exercises his diplomatic powers. In particular, the Executive has asserted on numerous occasions that the President possesses the "'exclusive authority to determine the time, scope, and objectives'" of international negotiations or discussions, including the authority "to determine the individuals who will" represent the United States in those diplomatic exchanges. And this Office has "repeatedly objected on constitutional grounds to Congressional attempts to mandate the time, manner and content of diplomatic negotiations," including in the context of potential engagement with international fora. *See* Memorandum for Alan Kreczko, Legal Adviser, National Security Council, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: WTO Dispute Settlement Review Commission Act* at 3 (Feb. 9, 1995) ("Dellinger WTO Memo").

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Judicial support for the Executive Branch's position can be found in *Earth Island Institute v. Christopher*, 6 F.3d 648 (9th Cir. 1993). In that case, the United States Court of Appeals for the Ninth Circuit struck down a statute purporting to require the Secretary of State to initiate negotiations with, and otherwise engage, foreign

governments for the purposes of developing and entering into international agreements for the protection of sea turtles. The court deemed the statute an unconstitutional "intru[sion] upon the conduct of foreign relations by the Executive." *Id.* at 653 . . . .

That the President possesses the exclusive power to determine how to conduct diplomacy with other nations does not mean that Congress is without relevant authority. For example, the Senate must approve the treaties the President negotiates, *see* U.S. Const. art. II, § 2, cl. 2, and Congress can, by a subsequently enacted statute, limit the effect of treaties, *see Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating that if a treaty and a statute are inconsistent, "the one last in date will control the other"). The Senate may even refuse its consent to a treaty if an international organization makes entry into such treaty a necessary precondition of United States participation in the proceedings of that organization. The statutory limitation at issue here, however, does not constitute such an exercise of Congress's legitimate authority in the area of foreign affairs; rather, it purports to restrict the President from engaging in diplomacy through international fora that are organized pursuant to a treaty to which the United States is a party. *See* United Nations Charter, Jun. 26, 1945, 59 Stat. 1031, 1031, 1213 (noting that Senate consented to ratification of U.N. Charter on July 28, 1948). Section 7054, in other words, seeks to regulate who may participate in the delegations the President may send to the international fora of an organization to which the United States belongs, and at which the United States would be received were its delegations to be sent.

Nor is the impact of section 7054 on the President's discretion to determine the "form and manner" of the Nation's diplomacy merely hypothetical. You have explained to us that "United Nations bodies and affiliated agencies are generally responsible for marshalling United Nations member state responses to issues that fall within their purview." State Request at 3. Accordingly, full U.S. participation in such bodies facilitates the type of direct diplomacy that is critically important to advancing U.S. objectives with respect to the issues under discussion. *Id.* at 4 . . . . That Congress has purported to restrict the President's reliance on the State Department—the lead and most experienced and capable government agency with respect to U.N. relations, *see* 22 U.S.C.

§§ 287, 298a (2006); *see also* State Request at 3–4—further heightens the extent to which section 7054 impermissibly restrains the President's authority. . . .

* * * *

B. CONSTITUTIONALITY OF STATE LEGISLATION CONCERNING FOREIGN AFFAIRS MATTERS

On April 14, 2009, the U.S. District Court for the Southern District of Florida granted summary judgment in a case challenging the constitutionality of amendments to a Florida statute imposing various requirements, including fees, on companies providing travel-related services to any country such as Cuba designated as a state sponsor of terrorism. *ABC Charters, Inc. v. Bronson*, 2009 U.S. Dist. LEXIS 31283 (S.D. Fla. 2009), 21 Fla. L. Weekly Fed. D. 653. The court held that the amendments violated the Supremacy Clause, the Foreign Commerce Clause, and the Interstate Commerce Clause of the U.S. Constitution, as well as the federal government's constitutional authority over foreign affairs, stating, "The State of Florida is not entitled to adopt a foreign policy under our Constitution or interfere with the exclusive prerogative of the United States to establish a carefully balanced approach to relations with foreign countries, including Cuba." *Id.* at *17 (footnote and emphasis omitted). In so holding, the court largely adopted the position of the United States, set forth in a Statement of Interest dated March 20, 2009. Excerpts follow from the court's order, providing additional background on the statutory amendments, summarizing the U.S. position, and setting forth the court's analysis (one footnote and most citations to other submissions omitted). The full text of the U.S. Statement of Interest is available at *www.state.gov/s/l/c8183.htm*. For discussion of U.S. sanctions concerning Cuba, see Chapter 16.B. and C.

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. . . Plaintiffs advanced a facial challenge to the constitutionality of the amendments to the Florida Sellers of Travel Act, Fla. Stat. § 559.926 *et seq*., enacted as SB 1310 ("An Act Relating to Sellers of Travel") effective July 1, 2008 ("Travel Act Amendments") . . . . Plaintiffs are travel agencies and charter companies providing services to individuals traveling to Cuba or who wish to send humanitarian aid or family remittances to Cuba. The Travel Act Amendments, among other things, (1) require companies providing lawful travel related services to Cuba to post a bond in an amount of $100,000 or $250,000 while requiring those companies not offering travel to Cuba or other "terrorist states" to post a bond of $25,000; (2) allow the Defendant to use the bond to pay its own investigatory expenses without any limits to the exposure under the bond and prioritize the payment of the bond funds to the state over compensation to consumers; (3) permit the imposition of higher registration fees and fines on travel providers offering travel to Cuba; (4) automatically make any violation of federal law by Plaintiff a third-degree felony under Florida law; and (5) require disclosure and identification by Plaintiffs of each company with whom each Plaintiff does any Cuba-related business or commerce, and make that information publicly available.

* * * *

. . . In my Preliminary Injunction Order, I concluded that (1) the Travel Act Amendments are designed and structured to end or seriously hamper federally licensed travel from Florida to Cuba, and that such a law is more than just a state consumer protection decision but also a political statement of condemnation of Cuba; (2) the significant burdens on travel and charter service providers impair the ability of this Nation to choose between a range of policy options in developing its foreign relations with Cuba; (3) the Airline Deregulation Act, which extends to indirect air carriers such as Plaintiffs, expressly preempts the Travel Act Amendments because they would have a significant effect on rates, routes or services; (4) the Travel Act Amendments conflict with, and are therefore preempted by, federal laws and regulations including the Trading with the Enemy Act and the Office of Foreign Assets Control's ("OFAC") Cuba Asset Control Regulations;

(5) federal laws and regulations occupy the field as to regulation interactions and transactions with Cuba by persons and businesses in the United States; (6) the Travel Act Amendments impermissibly discriminate against the flow of foreign commerce and regulate conduct outside the borders of the United States; and (7) under the interstate commerce clause, the extensive web of federal laws regulating business with and travel to Cuba displaces state laws such as the Travel Act Amendments.

The United States is in substantial agreement with these conclusions. According to its Statement of Interest, the State of Florida enacted the Travel Amendments "in an attempt to conduct its own foreign policy," and "the very existence of the legislation . . . impairs the federal government's ability to present a single, unified foreign policy on behalf of the United States when dealing with other countries."

> The United States Constitution vests exclusive authority for the conduct of foreign relations in a single, national government. This structure ensures that the United States is able to speak with one voice when managing relations with other nations. Pursuant to its constitutional authority, Congress has enacted numerous federal statutes pertaining to relations with the countries that the Executive Branch designates as state sponsors of terrorism. Some of these federal statutes mandate aspects of the sanctions imposed on the designated states, while others give the Executive Branch broad authority and flexible tools to regulate transactions with these countries. Congress specifically has addressed travel to the designated states under current sanctions regimes. With regard to Cuba, Congress has passed several laws governing permitted travel, while leaving the Executive Branch discretion to adjust many aspects of the travel regulations as circumstances dictate . . . . The Executive Branch has in turn promulgated comprehensive regulations governing . . . travel to Cuba. These regulations are designed to balance multiple, competing foreign policy considerations and achieve important, often changing, foreign policy objectives.

[U.S. Statement of Interest, at 1–2.] The United States argues that the Travel Act Amendments interfere with the exercise of this "exclusive" and "broad" authority. Specifically, federal regulations impose significant restrictions on travel to Cuba, but permit travel to Cuba in instances that promote the goal of a "peaceful transition to democracy" in that country or serve other foreign policy interests. By imposing significant burdens, beyond those already imposed under federal law, on entities that provide travel services to Cuba, the Florida Amendments will limit travel that the federal government has deemed consistent with U.S. foreign policy objectives. Further, the Travel Act Amendments "interfere with federal determinations about the appropriate type of penalties to impose when violations of federal law occur." By allowing Florida to impose its own penalties for the violation of federal laws relating to commerce with designated states, the Florida Amendments undermine the federal government's "calibration of force" and its judgment about the best way to enforce sanctions to achieve U.S. foreign policy objectives.

. . . [R]ecent developments further indicate our nation's changing foreign policy objectives with respect to Cuba, further counseling against permitting the Travel Act Amendments from going into effect. I take judicial notice that OFAC has recently issued, in response to the Omnibus Appropriations Act, 2009, a general license permitting an expanded range of family travel to permit visiting close relatives in Cuba from once every three years to once every year. *General License for Visits to Close Relatives in Cuba*, OFAC Cuban Assets Control Regulations, Mar. 11, 2009.[5] . . . President Barack Obama announced on April 13, 2009 that the restrictions on family travel, and remittances and gifts to Cuba will be lifted and Cuban Americans will now be permitted to travel freely to the island and send as much money as they want to their family members, in a marked reversal of the United States' prior policy. . . . Such changes in foreign policy with respect to Cuba further demonstrate that the Travel Act Amendments interfere with this country's foreign policy objectives. As the United States

[5] Available at *http://www.treas.gov/offices/enforcement/ofac/programs/cuba/gl_omni2009.pdf* (last visited April 13, 2009); *see also* 69 Fed. Reg. 33775 (Jun. 16, 2004).

represented at oral argument, these recent changes aptly demonstrate that the Travel Act Amendments would undermine the power of the federal government to act on behalf of the entire nation with respect to our relations with Cuba.

* * * *

C. INTERLOCUTORY APPEALS PREDICATED UPON FOREIGN RELATIONS IMPACT

On November 30, 2009, at the request of the U.S. Court of Appeals for the Second Circuit, the United States filed a brief as *amicus curiae* arguing that the court did not have jurisdiction over an interlocutory appeal. *In re S. African Apartheid Litig.*, 09-2778-cv (2d Cir.). The defendants sought review of a district court's order in long-running litigation alleging that several multinational companies aided and abetted human rights abuses in apartheid-era South Africa. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009). The district court dismissed some defendants and some claims, including certain aiding and abetting claims for failure to satisfy the court's standard for such liability under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350. The court permitted other aiding and abetting claims to proceed and declined to dismiss the suits entirely based on political question and international comity concerns as the defendants requested. *Id.* at 265–66, 269, 276, 283–84, 285–86, 286 n.259. The defendants sought appellate review of the district court's order, arguing in part that the decision came within the collateral order doctrine because of its effect on the United States' foreign relations. For discussion of prior developments in the litigation, see *Digest 2004* at 354–61, *Digest 2005* at 400–11, *Digest 2007* at 226–27, and *Digest 2008* at 236–38. The *amicus curiae* brief the United States filed in the Second Circuit on October 15, 2005, is available as document 34 for *Digest 2005* at *www.state.gov/s/l/c8183.htm*.

Excerpts below from the brief the United States filed on November 30, 2009, explain the government's view that, consistent with the limits on the collateral order doctrine,

> "an explicit request for dismissal from the United States (as opposed to a request from a private party or another country) is a necessary condition for collateral order appeal in this context." (Footnotes and citations to the parties' filings are omitted.) The full text of the U.S. *amicus* brief is available at *www.state.gov/s/l/c8183.htm*. The litigation remained pending at the end of 2009.

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If an order is not a "final decision" of a district court (28 U.S.C. § 1291) and if the courts have not authorized interlocutory appeal (*see* 28 U.S.C. § 1292(b)), a party generally may not obtain appellate review of the order until the conclusion of the suit in the district court. But appellate jurisdiction under Section 1291 encompasses "a narrow class of decisions that do not terminate the litigation, but are sufficiently important and collateral to the merits that they should nonetheless be treated as final." *Will v. Hallock*, 546 U.S. 345, 347 (2006) (quotation marks omitted). To qualify as a collateral order that is subject to immediate appeal, the order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Id.* at 349 (quotation marks omitted). With regard to the third criterion, the Supreme Court explained that it is principally orders that would impair a right to avoid trial that are effectively unreviewable on appeal from a final judgment. *Id.* at 350–51. But not even all such orders satisfy the third criterion: "[I]t is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Id.* at 353.

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As suggested by the United States' Supreme Court filing in *Exxon Mobil*, we believe that an explicit request for dismissal from the United States (as opposed to a request from a private party or another country) is a necessary condition for collateral order appeal in this context. [Editor's note: *Digest 2008* discusses

the U.S. *amicus curiae* brief in *Exxon Mobil v. Doe*, No. 07-81 (S. Ct. 2008), at 223–27.] That requirement respects the separation of powers under the Constitution and the primary responsibility of the Executive Branch in the conduct of the Nation's foreign affairs. Requiring an explicit request for dismissal by the United States ensures that the Executive Branch has determined that continued adjudication of the particular case will cause a separation-of-powers injury of a magnitude sufficient to merit immediate appeal, should the district court deny defendants' motion to dismiss. This rule thus furthers the ability of the United States to speak with one voice on such matters. And as plaintiffs here note, the requirement also provides litigants and the courts with a bright-line rule, making it relatively easy to determine when the requirements for collateral order appeal are satisfied and avoiding disputes about whether the United States' statement "necessarily implies that the case should be dismissed".

As with the statement of interest in *Exxon Mobil*, the statement of interest and appellate filings the United States submitted in this case did not *explicitly* ask that the suits be dismissed because of their impact on the United States' foreign policy. . . . Indeed, as the district court here recognized, the Government's statement of interest in this case principally expressed reservation about this suit "'[t]o the extent that'" the litigation might impair the United States' foreign relations and its ability to use economic engagement as a foreign policy tool. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 276 (quoting [Letter from William H. Taft IV, Legal Adviser, to Shannen W. Coffin, Deputy Assistant Attorney General (Oct. 27, 2003), at 2]) (emphasis omitted). The United States' previous filings in this case undoubtedly expressed concern about the impact this case would have on the United States' foreign policy and foreign relations. *See, e.g.,* [Brief for the United States as Amicus Curiae In Support of Petitioners, *Am. Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (S. Ct. 2008), at 5]. But . . . [a]t no time has the United States informed the courts that the foreign policy consequences of this litigation are so grave as to call for dismissal on that basis, even if the suit were otherwise proper as a substantive matter, and the United States does not make that representation now. The fact that the United States did not explicitly request that the case be

dismissed predicated on the suit's impact on foreign policy, and that the district court did not deny defendants' motion to dismiss despite such a request, means that the district court's order does not satisfy the third prong of the collateral order doctrine under the standards articulated in the United States' *Exxon Mobil* brief.

Also like *Exxon Mobil*, this suit has significantly changed over the course of the litigation. Although Germany and some other countries continue to raise concerns, most of the defendants have been dismissed voluntarily by plaintiffs, others have been dismissed by the district court, and the claims against the remaining defendants have been narrowed. . . .

The United States previously informed the courts that, in light of South Africa's strong objections, "continued adjudication of [these suits] risks potentially serious adverse consequences for significant interests of the United States." Letter from Taft to Coffin 2. However, the South African Justice Minister recently informed the district court that, by dismissing claims based solely on doing business with the apartheid regime, the district court "addressed some of the concerns which the Government of the Republic of South Africa had." [Letter from J.T. Radebe, Minister of Justice and Constitutional Development, to Hon. Judge Shira A. Scheindlin, U.S. District Court, Southern District of New York (Sept. 1, 2009), at 2]. The Justice Minister further reported that "[t]he Government of the Republic of South Africa, having considered carefully the judgement of the United States District Court, Southern District of New York is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law." *Ibid.* The United States takes at face value these formal statements from a high-level South African government official.

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The United States also stated in part that "the district court's denial of defendants' motion to dismiss on international comity grounds does not provide a basis for this court's interlocutory review." The United States explained that

> orders denying motions to dismiss on international comity grounds are ordinarily not subject to collateral

order appeal. *See Pan Eastern Exploration Co. v. Hufo Oils*, 798 F.2d 837, 843 (5th Cir. 1986). And the approach the United States proposed in its *Exxon Mobil* Supreme Court filing turns on the separation-of-powers harm that would follow from denial of immediate appellate review of a district court order denying a motion to dismiss in a case in which the United States explicitly informed the district court that the case-specific injury to the Nation's foreign policy interests was a sufficient basis for dismissal. In the absence of such an express request for dismissal by the United States, it is our view that a foreign government's policy interests do not implicate the separation of powers in a manner that triggers an immediate right of review under the collateral order doctrine under the United States' *Exxon Mobil* approach. . . .

D. ALIEN TORT CLAIMS ACT AND TORTURE VICTIM PROTECTION ACT

1. Overview

The Alien Tort Claims Act ("ATCA"), also referred to as the Alien Tort Statute ("ATS"), was enacted in 1789 and is now codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." The statute was rarely invoked until *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); following *Filartiga*, the statute has been relied upon by plaintiffs and interpreted by the federal courts in various cases raising claims under international law. In 2004 the Supreme Court held that the ATCA is "in terms only jurisdictional" but that, in enacting the ATCA in 1789, Congress intended to "enable[] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens. In an *amicus curiae* brief filed in the Second

Circuit in *Filartiga v. Pena-Irala,* the United States described the ATCA as one avenue through which "an individual's fundamental human rights [can be] in certain situations directly enforceable in domestic courts." Memorandum for the United States as Amicus Curiae at 21, *Filartiga v. Pena-Irala*, 630 F.2d. 876 (2d Cir. 1980) (No. 79-6090).

The Torture Victim Protection Act ("TVPA"), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against "[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation" for individuals regardless of nationality, including U.S. nationals, who are victims of official torture or extrajudicial killing. The TVPA contains a ten-year statute of limitations.

The following item represents one relevant development during 2009 in litigation in which the United States had provided its views previously.

2. Aiding and Abetting: *Presbyterian Church of Sudan v. Talisman Energy, Inc.*

On October 2, 2009, as amended on November 9, 2009, the U.S. Court of Appeals for the Second Circuit affirmed a lower court's grant of summary judgment to a Canadian energy company, Talisman Energy, Inc. ("Talisman"), the defendant in a suit that nationals of Sudan brought under the ATCA, alleging that Talisman aided and abetted and conspired with the Government of Sudan in committing international law violations. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009). For prior developments in the case, see *Digest 2003* at 383–84; *Digest 2005* at 394–400 and 822–23; and *Digest 2006* at 460–65.

In its 2009 judgment, the Second Circuit followed the holding in *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007), that in the Second Circuit, "a plaintiff may plead a theory of aiding and abetting liability" under the ATCA. *Presbyterian Church of Sudan*, 582 F.3d at 258. Noting that *Khulumani* did not establish a standard for imposing aiding

and abetting liability, the court looked to international law to define that standard. The court concluded that "under international law, a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses," and therefore "the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone." *Id.* at 247, 259. The court applied that standard in affirming the district court, stating that that "plaintiffs have presented no evidence that Talisman acted with the purpose of harming civilians living in southern Sudan." *Id.* at 247–48.*

In so holding, the Second Circuit disagreed with views the United States had presented in an *amicus curiae* brief filed in the case on May 15, 2007. The U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

Cross References

Secretary of State discretionary role in citizenship and passport issues, **Chapter 1.A.2.**

Comity issues in litigation in U.S. courts, **Chapters 4.C.1. and 15.C.1., 2.b., and 3.b.**

Cases presenting non-justiciable political questions, **Chapter 9.B. and C.**

Pre-emption of state and local laws, **Chapter 10.C.1.**

* Editor's note: The plaintiffs-appellants filed a petition for a writ of certiorari in the U.S. Supreme Court on April 15, 2010, and Talisman filed a petition for a writ of certiorari in the U.S. Supreme Court on May 20, 2010.

Chapter 6

Human Rights

A. GENERAL

1. Overview

On assuming office, President Barack H. Obama announced a renewed focus on promoting and protecting human rights. On December 14, 2009, Secretary of State Hillary Rodham Clinton spoke about the "Human Rights Agenda for the 21st Century" at Georgetown University in Washington, D.C. In her remarks, excerpted below, Secretary Clinton outlined four elements of the Obama administration's approach to promoting international human rights, democracy, and development. The full text of Secretary Clinton's speech is available at *www.state.gov/secretary/rm/2009a/12/133544.htm*.

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Our human rights agenda for the 21st century is to make human rights a human reality, and the first step is to see human rights in a broad context. Of course, people must be free from the oppression of tyranny, from torture, from discrimination, from the fear of leaders who will imprison or "disappear" them. But they also must be free from the oppression of want—want of food, want of health, want of education, and want of equality in law and in fact.

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To fulfill their potential, people must be free to choose laws and leaders; to share and access information, to speak, criticize, and debate. They must be free to worship, associate, and to love in the way that they choose. And they must be free to pursue the dignity that comes with self-improvement and self-reliance, to build their minds and their skills, to bring their goods to the marketplace, and participate in the process of innovation. Human rights have both negative and positive requirements. People should be free from tyranny in whatever form, and they should also be free to seize the opportunities of a full life. That is why supporting democracy and fostering development are cornerstones of our 21st century human rights agenda.

This Administration, like others before us, will promote, support, and defend democracy. We will relinquish neither the word nor the idea to those who have used it too narrowly, or to justify unwise policies. We stand for democracy not because we want other countries to be like us, but because we want all people to enjoy the consistent protection of the rights that are naturally theirs, whether they were born in Tallahassee or Tehran. Democracy has proven the best political system for making human rights a human reality over the long term.

But it is crucial that we clarify what we mean when we talk about democracy, because democracy means not only elections to choose leaders, but also active citizens and a free press and an independent judiciary and transparent and responsive institutions that are accountable to all citizens and protect their rights equally and fairly. In democracies, respecting rights isn't a choice leaders make day by day; it is the reason they govern. Democracies protect and respect citizens every day, not just on Election Day. And democracies demonstrate their greatness not by insisting they are perfect, but by using their institutions and their principles to make themselves and their union more perfect, just as our country continues to do after 233 years.

At the same time, human development must also be part of our human rights agenda. Because basic levels of well-being—food, shelter, health, and education—and of public common goods like environmental sustainability, protection against pandemic disease, provisions for refugees—are necessary for people to exercise their

rights, and because human development and democracy are mutually reinforcing. Democratic governments are not likely to survive long if their citizens do not have the basic necessities of life. The desperation caused by poverty and disease often leads to violence that further imperils the rights of people and threatens the stability of governments. Democracies that deliver on rights, opportunities, and development for their people are stable, strong, and most likely to enable people to live up to their potential.

So human rights, democracy, and development are not three separate goals with three separate agendas. That view doesn't reflect the reality we face. To make a real and long-term difference in people's lives, we have to tackle all three simultaneously with a commitment that is smart, strategic, determined, and long-term. We should measure our success by asking this question: Are more people in more places better able to exercise their universal rights and live up to their potential because of our actions?

* * * *

Now, I don't need to tell you that challenges we face are diverse and complicated. And there is not one approach or formula, doctrine or theory that can be easily applied to every situation. But I want to outline four elements of the Obama Administration's approach to putting our principles into action, and share with you some of the challenges we face in doing so.

First, a commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves. On his second full day in office, President Obama issued an executive order prohibiting the use of torture or official cruelty by any U.S. official and ordered the closure of Guantanamo Bay. Next year, we will report on human trafficking, as we do every year, but this time, not only just on other countries, but also on our own. And we will participate through the United Nations in the Universal Periodic Review of our own human rights record, just as we encourage other nations to do.

By holding ourselves accountable, we reinforce our moral authority to demand that all governments adhere to obligations under international law; among them, not to torture, arbitrarily detain and persecute dissenters, or engage in political killings.

Our government and the international community must counter the pretensions of those who deny or abdicate their responsibilities and hold violators to account.

Sometimes, we will have the most impact by publicly denouncing a government action, like the coup in Honduras or violence in Guinea. Other times, we will be more likely to help the oppressed by engaging in tough negotiations behind closed doors, like pressing China and Russia as part of our broader agenda. In every instance, our aim will be to make a difference, not to prove a point.

Calling for accountability doesn't start or stop, however, at naming offenders. Our goal is to encourage—even demand—that governments must also take responsibility by putting human rights into law and embedding them in government institutions; by building strong, independent courts, competent and disciplined police and law enforcement. And once rights are established, governments should be expected to resist the temptation to restrict freedom of expression when criticism arises, and to be vigilant in preventing law from becoming an instrument of oppression, as bills like the one under consideration in Uganda would do to criminalize homosexuality.

We know that all governments and all leaders sometimes fall short. So there have to be internal mechanisms of accountability when rights are violated. Often the toughest test for governments, which is essential to the protection of human rights, is absorbing and accepting criticism. And here too, we should lead by example. In the last six decades we have done this—imperfectly at times but with significant outcomes—from making amends for the internment of our own Japanese American citizens in World War II, to establishing legal recourse for victims of discrimination in the Jim Crow South, to passing hate crimes legislation to include attacks against gays and lesbians. When injustice anywhere is ignored, justice everywhere is denied. Acknowledging and remedying mistakes does not make us weaker, it reaffirms the strength of our principles and institutions.

Second, we must be pragmatic and agile in pursuit of our human rights agenda—not compromising on our principles, but doing what is most likely to make them real. And we will use all

the tools at our disposal, and when we run up against a wall, we will not retreat with resignation or recriminations, or repeatedly run up against the same wall, but respond with strategic resolve to find another way to effect change and improve people's lives.

We acknowledge that one size does not fit all. And when old approaches aren't working, we won't be afraid to attempt new ones, as we have this year by ending the stalemate of isolation and instead pursuing measured engagement with Burma. In Iran, we have offered to negotiate directly with the government on nuclear issues, but have at the same time expressed solidarity with those inside Iran struggling for democratic change. As President Obama said in his Nobel speech, "They have us on their side."

And we will hold governments accountable for their actions, as we have just recently by terminating Millennium Challenge Corporation grants this year for Madagascar and Niger in the wake of government behavior. As the President said last week, "we must try as best we can to balance isolation and engagement; pressure and incentives, so that human rights and dignity are advanced over time."

We are also working for positive change within multilateral institutions. They are valuable tools that, when in their best, leverage the efforts of many countries around a common purpose. So we have rejoined the UN Human Rights Council not because we don't see its flaws, but because we think that participating gives us the best chance to be a constructive influence.

In our first session, we cosponsored the successful resolution on Freedom of Expression, a forceful declaration of principle at a time when that freedom is jeopardized by new efforts to constrain religious practice, including recently in Switzerland, and by efforts to criminalize the defamation of religion—a false solution which exchanges one wrong for another. And in the United Nations Security Council, I was privileged to chair the September session where we passed a resolution mandating protections against sexual violence in armed conflict.

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The third element of our approach is that we support change driven by citizens and their communities. The project of making

human rights a human reality cannot be just one for governments. It requires cooperation among individuals and organizations within communities and across borders. It means that we work with others who share our commitment to securing lives of dignity for all who share the bonds of humanity.

. . . Outside governments and global civil society cannot impose change, but we can promote and bolster it and defend it. We can encourage and provide support for local grassroots leaders, providing a lifeline of protection to human rights and democracy activists when they get in trouble, as they often do, for raising sensitive issues and voicing dissent. This means using tools like our Global Human Rights Defenders Fund, which in the last year has provided targeted legal and relocation assistance to 170 human rights defenders around the world.

And we can stand with these defenders publicly . . . .

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We can give them access to public forums that lend visibility to their ideas, and continue to press for a role for nongovernmental organizations in multilateral institutions like the United Nations and the OSCE. And we can enlist other allies like international labor unions who were instrumental in the Solidarity movement in Poland or religious organizations who are championing the rights of people living with HIV/AIDS in Africa.

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. . . NGOs and civil society leaders need the financial, technical and political support we provide. Many repressive regimes have tried to limit the independence and effectiveness of activists and NGOs by restricting their activities, including more than 25 governments that have recently adopted new restrictions. But our funding and support can give a foothold to local organizations, training programs, and independent media. And of course, one of the most important ways that we and others in the international community can lay the foundation for change from the bottom up is through targeted assistance to those in need, and through partnerships that foster broad-based economic development.

To build success for the long run, our development assistance needs to be as effective as possible at delivering results and paving the way for broad-based growth and long-term self-reliance. Beyond giving people the capacity to meet their material needs for today, economic empowerment should give them a stake in securing their own futures, in seeing their societies become the kind of democracies that protect rights and govern fairly. So we will pursue a rights-respecting approach to development—consulting with local communities, ensuring transparency, midwife-ing accountable institutions—so our development activities act in concert with our efforts to support democratic governance. That is the pressing challenge we face in Afghanistan and Pakistan today.

The fourth element of our approach is that we will widen our focus. We will not forget that positive change must be reinforced and strengthened where hope is on the rise, and we will not ignore or overlook places of seemingly intractable tragedy and despair. Where human lives hang in the balance, we must do what we can to tilt that balance toward a better future.

Our efforts to support those working for human rights, economic empowerment, and democratic governance are driven by commitment, not convenience. But they have to be sustained. They cannot be subject to the whims or the wins of political change in our own country. Democratic progress is urgent but it is not quick, and we should never take for granted its permanence. . . .

And when democratic change occurs, we cannot afford to become complacent. Instead, we have to continue reinforcing NGOs and the fledgling institutions of democracy. . . .

So we stand ready—both in our bilateral relationships and through international institutions—to help governments that have committed to improving themselves by assisting them in fighting corruption and helping train police forces and public servants. And we will support regional organizations and institutions like the Organization of American States, the African Union, and the Association of Southeast Asian Nations, where they take their own steps to defend democratic principles and institutions.

Success stories deserve our attention so they continue to make progress and also serve as a model for others. And even as we reinforce the successes, conscience demands that we are not cowed by

the overwhelming difficulty of making inroads against misery in the hard places like Sudan, Congo, North Korea, Zimbabwe, or on the hard issues like ending gender inequality and discrimination against gays and lesbians, from the Middle East to Latin America, Africa to Asia.

Now, we have to continue to press for solutions in Sudan where ongoing tensions threaten to add to the devastation wrought by genocide in Darfur and an overwhelming refugee crisis. We will work to identify ways that we and our partners can enhance human security, while at the same time focusing greater attention on efforts to prevent genocide elsewhere.

And of course, we have to remain focused on women—women's rights, women's roles, and women's responsibilities. As I said in Beijing in 1995, "human rights are women's rights, and women's rights are human rights," but oh, I wish it could be so easily translated into action and changes. That ideal is far from being realized in so many places around our world, but there is no place that so epitomizes the very difficult, tragic circumstances confronting women than in eastern Congo.

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So those four aspects of our approach—accountability, principled pragmatism, partnering from the bottom up, keeping a wide focus where rights are at stake—will help build a foundation that enables people to stand and rise above poverty, hunger, and disease and that secures their rights under democratic governance. We must lift the ceiling of oppression, corruption, and violence.

And we must light a fire of human potential through access to education and economic opportunity. Build the foundation, lift the ceiling, and light the fire all together, all at once. Because when a person has food and education but not the freedom to discuss and debate with fellow citizens, he is denied the life he deserves. And when a person is too hungry or sick to work or vote or worship, she is denied a life she deserves. Freedom doesn't come in half measures, and partial remedies cannot redress the whole problem.

But we know that the champions of human potential have never had it easy. We may call rights inalienable, but making them so has always been hard work. And no matter how clearly we see our ideals, taking action to make them real requires tough choices. Even if everyone agrees that we should do whatever is most likely to improve the lives of people on the ground, we will not always agree on what course of action fits that description in every case. That is the nature of governing. We all know examples of good intentions that did not produce results, some that even produced unintended consequences that led to greater violations of human rights. And we can learn from the instances in which we have fallen short in the past, because those past difficulties are proof of how difficult progress is, but we do not accept the argument by some that progress in certain places is impossible, because we know progress happens.

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While the work in front of us is daunting and vast, we face the future together with partners on every continent, partners in faith-based organizations, NGOs, and socially responsible corporations, and partners in governments. . . .

In the end, this isn't just about what we do; it is about who we are. And we cannot be the people we are—people who believe in human rights—if we opt out of this fight. Believing in human rights means committing ourselves to action, and when we sign up for the promise of rights that apply everywhere, to everyone, that rights will be able to protect and enable human dignity, we also sign up for the hard work of making that promise a reality.

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On International Human Rights Day, December 10, 2009, various administration officials made statements marking the occasion and summarizing the steps the administration had taken to promote human rights. One of those statements, by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, is excerpted below and available at *http://usun.state.gov/briefing/statements/2009/133354.htm*. This chapter provides additional details on the

initiatives outlined in Secretary Clinton's and Ambassador Rice's statements, as well as other developments during the year.

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In his first days in office, President Obama banned the use of torture, reaffirmed America's commitment to the Geneva Conventions, and ordered the prison at Guantanamo Bay closed. In doing so, the President rejected the false choice between our security and our values and took a significant step toward reestablishing America's leadership on issues of universal human rights.

In March, the United States supported the decision of the prosecutor of the International Criminal Court to issue an arrest warrant for President Bashir of Sudan. [Editor's note: *See* Chapter 3.C.1.b.] We believe it is a vital human rights imperative to hold accountable those responsible for the heinous crimes in Darfur.

In May, the United States was elected to the UN Human Rights Council. While we recognize that it is a flawed body, we are no longer standing on the sidelines. Instead, we are working from within to strengthen and reform the Human Rights Council and help it live up to its potential. In July, I signed, on behalf of the United States, the United Nations Convention on the Rights of Persons with Disabilities, the first new human rights treaty of the 21st Century. . . .

The United States has also led efforts at the United Nations to promote the rights of women. During our Security Council Presidency in September, we secured the adoption of Resolution 1888 to help spur the international community to take action to end gender-based human rights atrocities. The United States also reversed its previous position and announced its support for a General Assembly declaration condemning human rights violations based on sexual orientation and gender identity.

Just last month, in the UN General Assembly's Third Committee, the United States supported resolutions condemning three nations that have egregiously violated the human rights of their

citizens—Burma, North Korea and Iran. And for the first time, the United States joined consensus on General Assembly Resolutions on the right to food and the rights of the child.

Today, we rededicate ourselves to the continuing pursuit of human rights and human dignity for all.

2. Country Reports on Human Rights Practices

On February 25, 2009, the Department of State released the 2008 Country Reports on Human Rights Practices. The Department of State submits the document annually to Congress in compliance with §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961 ("FAA"), as amended, and § 504 of the Trade Act of 1974, as amended. These reports are often cited as a source for U.S. views on various aspects of human rights practice in other countries. At a press briefing on the release of the report, Secretary of State Clinton made remarks stressing the importance of human rights promotion in U.S. foreign policy. The report is available at *www.state.gov/g/drl/rls/hrrpt/2008*; Secretary Clinton's remarks are available at *www.state.gov/secretary/rm/2009a/02/119786.htm*.

3. Human Rights Council

On March 31, 2009, Secretary of State Clinton and Ambassador Rice announced that the United States would seek a seat on the UN Human Rights Council ("Council") for the 2009–2012 term. "The U.S. is seeking election to the Council," Ambassador Rice stated, "because we believe that working from within, we can make the Council a more effective forum to promote and protect human rights." *See www.state.gov/r/pa/prs/ps/2009/03/121049.htm*. *See also* Ambassador Rice's letter of April 22, 2009, to the President of the General Assembly, pledging the U.S. commitment to the promotion and protection of human rights. U.N. Doc. A/63/831.

On May 12 the General Assembly elected the United States to the Council. *See* Ambassador Rice's statement to the press following the vote, available at *http://usun.state.gov/briefing/statements/2009/May/128514.htm.* The United States assumed its seat on June 19.

In a September 30 statement to the Council, Michael H. Posner, Assistant Secretary of State for Democracy, Human Rights and Labor, outlined U.S. objectives for participation in the body. Mr. Posner's statement, excerpted below, is available at *www.state.gov/s/l/c8183.htm. See also* the remarks of Legal Adviser Harold Hongju Koh at a September 28 press conference in Geneva, available at *www.state.gov/s/l/c8183.htm.*

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Last Wednesday, President Obama addressed the U.N. General Assembly and called for a new era of U.S. engagement with the world. He expressed his determination that the United States be a leader in meeting complex challenges to global prosperity and peace. And he emphasized that respect for human rights and democracy is essential to sustained prosperity and lasting security.

In his speech, President Obama highlighted the passage in the U.N. Charter that reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women." He went on to say that "(A)mong those rights is the freedom to speak your mind and worship as you please; the promise of equality of the races, and the opportunity for women and girls to pursue their own potential; the ability of citizens to have a say in how you are governed, and to have confidence in the administration of justice." The President stated that "just as no nation should be forced to accept the tyranny of another nation, no individual should be forced to accept the tyranny of their own government." And he pledged that "America will always stand with those who stand up for their dignity and their rights."

Building on themes he sounded in his speech in Cairo earlier this year, the President has provided clear direction for our approach to the Council's work. [Editor's note: *See* Daily Comp. Pres. Docs., 2009 DCPD No. 00436, pp. 1–11, for President

Obama's speech in Cairo.] It is guided by three tenets: a commitment to principled engagement; [a dedication to] apply consistently international human rights and humanitarian law; and a fidelity to the truth.

The Obama Administration's decision to join the Council is an important part of our engagement. We come here in the spirit of Eleanor Roosevelt, the first chair of the Human Rights Commission, seeking to build on her noble tradition. We will support what the Council does well, but also will challenge those aspects of its work where we see the need for fundamental change. We will look for common ground, but we also will be ready to stand alone when we feel our principles and interests are at stake. We seek to build partnerships that transcend traditional geographic groupings and that are based on an appreciation of shared responsibilities to the world community. . . .

The second tenet is a dedication to apply consistently international human rights and international humanitarian law to all countries in the world, including ourselves. We seek to lead by example, by meeting our own obligations under both domestic and international law. Following the attacks on September 11, 2001 the previous U.S. administration adopted a number of policies and practices that deviated from our founding principles. President Obama's decision on his second day in office to end abusive interrogations, to close the detention facility at Guantanamo and to review security detention policies more generally are emblematic of our commitment to apply these universal principles to ourselves.

By universality we mean that all governments—no exceptions—are responsible for ensuring the rights and freedoms spelled-out in international human rights and humanitarian law. Next year, we will report to the Council through its Universal Periodic Review procedures and to the Human Rights Committee under the International Covenant on Civil and Political Rights. We take these reporting processes seriously and call on all other U.N. members to do the same. Too often in the past, governments with poor human rights records have tried to disable the United Nations' human rights machinery to shield their own practices from criticism. The protection of human rights everywhere is the legitimate

business of everyone. There should be no exceptions to the protection of the rights of women.

It is almost 15 years since the Beijing World Conference and even longer since the Vienna Declaration and Programme of Action proclaimed "the human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women." It is past time for the HRC to bring about women's equality before the law. . . .

The third tenet is fidelity to the truth. We will not hesitate to challenge resolutions and other actions that we believe undermine the effectiveness of the Council and its mandate. We are concerned by efforts by some Council members to eliminate or weaken country mandates. At the same time, the Council's approach to country specific mandates must be objective, unbiased and applied more consistently. We will continue to challenge the Council's disproportionate attention to Israel. This does not mean that we favor ignoring Israel's human rights record or exempting Israel from universal principles.

We also will urge the Council to devote its greatest attention to countries where there is a consistent pattern of gross human rights violations. We will work hard to defend the independence of human rights special procedures and work to ensure that they are given strong mandates, adequate resources and access to do their jobs properly.

Finally, we are concerned by the trend at the United Nations, and at the Council in particular, to marginalize the role and participation of NGOs. As the Council prepares for its 2011 review, we will work to ensure access and participation for civil society in the Council's proceedings.

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a. Human Rights Council resolutions

During the United States' first full session as a member of the Human Rights Council, September 14–October 2, 2009,

the Council adopted 28 resolutions. The United States cosponsored 12 resolutions, voted against three, and abstained from one. The United States delivered nine statements explaining its positions or votes or making general remarks on certain resolutions, as discussed immediately below and in sections B.2.c.(2), C.1., D.1.b., D.2.a., D.3.a., D.4., D.5., and D.6.a. of this chapter. The texts of Human Rights Council resolutions are available by searching the database at *http://ap.ohchr.org/Documents/gmainec.aspx*.

(1) Freedom of opinion and expression

On October 2, 2009, the Human Rights Council adopted by consensus a resolution on freedom of opinion and expression, which the United States and the Arab Republic of Egypt sponsored and 47 other nations cosponsored. U.N. Doc. A/HRC/RES/12/16. On October 6, the Department of State issued a statement, set forth below, noting the significance of the resolution. The statement is also available at *www.state.gov/s/l/c8183.htm*.

The governments of the United States and the Arab Republic of Egypt take this opportunity to underscore the constructive partnership between our two nations in sponsoring the landmark resolution on the freedom of expression passed October 2 by the UN Human Rights Council. The United States and Egypt further note that this important resolution, the first of its kind in many years, enjoyed the co-sponsorship of 49 nations from around the world.

The resolution, through which consensus was restored in the Human Rights Council on an issue marred by controversy in recent years, is a reflection of an open and genuine dialogue on freedom of expression. It unequivocally supports free speech and recognizes the central role open debate plays in combating racism, xenophobia, and other forms of intolerance.

In adopting this resolution, the Human Rights Council gives clear voice to a shared international understanding of the

responsibilities of governments to condemn and address hate speech and to promote respect and tolerance.

(2) Right to truth

On October 20, 2009, the United States cosponsored and joined consensus on a Human Rights Council resolution on the "Right to the truth." U.N. Doc. A/HRC/RES/12/12. The U.S. Mission to Geneva issued a statement explaining the U.S. position on the resolution, which noted that the right to truth "may be characterized differently in various legal systems, such as our own, as the right to be informed or freedom of information or the right to know." *See www.state.gov/s/l/c8183.htm.*

(3) Traditional values

On October 2, 2009, the United States voted against a resolution in the Human Rights Council on "Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind." Douglas M. Griffiths, Chargé d'Affaires, a.i., U.S. Mission to the United Nations, Geneva, delivered a statement, excerpted below, explaining the U.S. vote. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm.* The Human Rights Council adopted the resolution by a vote of 26 in favor and 15 opposed, with six abstentions. U.N. Doc. A/HRC/RES/12/21.

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The United States approached this resolution on traditional values with an open mind and listened carefully to the concerns of others during the course of the negotiations, including the various arguments for and against such a resolution. We, along with others, worked with the Russian delegation to provide language in an

effort to help improve the text and anchor it to international human rights law and the animating principles of this Council. . . .

In the end, however, we are unable to support this resolution as we still have concerns that the concept of traditional values, unmoored to human rights law, could undermine the universal principles enshrined in international human rights instruments, such as women's rights, and the rights of minorities and other vulnerable groups.

We are also concerned that the term "traditional values" has not been clearly defined or understood and is thus so vague and open-ended that it could be used to legitimize human rights abuses.

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(4) Transitional justice

On October 1, 2009, the United States joined consensus when the Human Rights Council adopted a resolution on transitional justice. U.N. Doc. A/HRC/RES/12/11. Excerpts follow from the U.S. statement explaining the U.S. position on the resolution. The full text of the statement is available at *www.state.gov/s/l/c8183.htm*.

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. . . The United States strongly supports transitional justice initiatives and has long supported efforts to hold responsible the perpetrators of atrocities, such as genocide, war crimes, crimes against humanity, and other serious human rights abuses. We are among the largest donors and supporters of post-conflict justice initiatives in the world and will continue our leading role in this regard.

With respect to Operative Paragraph 17 and treatment of amnesties in the Secretary General report entitled "The rule of law and transitional justice in conflict and post-conflict societies" (S/2004/616), we note that transitional justice necessarily incorporates the full range of judicial and non-judicial measures, including

individual prosecutions, reparations, truth-seeking, institutional reform, vetting procedures, or a combination thereof. As a fundamental part of this, truth-seeking mechanisms may, under certain circumstances, grant pardon to certain perpetrators based on their credible participation in a legitimate truth-seeking process.

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Paragraph 17 of the resolution, which the U.S. statement mentioned, called on states to help the United Nations in implementing the recommendations in the Secretary-General's reports on the rule of law and transitional justice (U.N. Doc. S/2004/616) and enhancing UN support for the rule of law (U.N. Doc. A/61/636). The Secretary-General's report on transitional justice found that amnesties could be a means to facilitate the return of displaced persons and former combatants that "should be encouraged," but recommended that amnesties not be allowed in cases of genocide, war crimes, or crimes against humanity.

b. UN Fact Finding Mission on the Gaza Conflict

On January 9, 2009, the UN Human Rights Council held a special session on "violations of human rights in the occupied territories" and mandated that a fact finding mission be sent to investigate "all violations of international human rights law and international humanitarian law" by Israel against the Palestinian people. *See* U.N. Doc. A/HRC/S-9/L1. On September 29, 2009, Justice Richard L. Goldstone, head of the United Nations Fact Finding Mission on the Gaza Conflict, addressed the Human Rights Council on the mission's report ("Goldstone Report"). In connection with Justice Goldstone's briefing, Michael Posner, Assistant Secretary for Human Rights, Democracy and Labor, provided the U.S. assessment of the Goldstone Report in a statement to the Council. Excerpts below provide an overview of the U.S. concerns about the report and views on how the Human Rights Council should address it. Chapter 18.A.1.b.(1) discusses

Mr. Posner's specific comments on the Goldstone Report's allegations of violations of international humanitarian law. The full text of Mr. Posner's statement is available at *www.state.gov/s/l/c8183.htm*.

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. . . I want to set my comments about this report in a broader context. Earlier this year President Obama expressed his deep concern over the loss of life and humanitarian suffering in both Israel and Gaza. He has also made clear his abiding commitment to comprehensive peace in the Middle East, in which two states, Israel and Palestine, live side by side in peace and security.

We have approached this report applying broad principles. First, we are ready to engage in the discussion of this report and the broader issues relating to Israel and the Palestinians in a fair and honest way. Although we believe that the document is deeply flawed and disagree sharply with its methodology and many of its recommendations, including their extraordinarily broad scope, we recognize Justice Goldstone's distinguished record of public service in his own country, South Africa, and in the larger global efforts to promote justice—in the former Yugoslavia, in Rwanda, and elsewhere.

In engaging in discussions over this report, we must step back and take issue with the grossly disproportionate attention the Council pays to one country, Israel. When the United States decided to seek a seat on the Council, we stated our clear intention to address this lack of balance in the Council's proceedings. We urge our fellow members to join us in firmly rejecting this double standard. This is a high priority for us, one which we believe needs to be addressed now. Israel is the only country that has its own agenda item at this Council. In the past 5 years, the Council and its predecessor organization, the UN Commission on Human Rights, have commissioned more than 20 reports on Israel, far more than any other country in the world. Since the Council was created in 2006, it has passed 20 resolutions on Israel, more than the number of resolutions for all 191 other UN members combined. The Council

also has held 11 special sessions, 5 focused exclusively on Israel. This is unfair, and it prevents the Council from devoting adequate time and attention to many other situations around the world that deserve our attention. We hope that Council members will join us in approaching the important work of this Council in a new, constructive spirit that does not seek to vilify any particular UN member nation.

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We urge members of this Council to commit with us to pass a consensus resolution that encourages Israel to investigate and address allegations in the Report thoroughly through credible domestic processes. It should also call on the Palestinians to launch credible investigations to address allegations of Hamas abuses and demand that Hamas stop its clear violations. If undertaken properly and fairly, these reviews can serve as important confidence building measures that will support our larger, essential objective, which is our shared quest for a just and lasting peace in the Middle East.

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On October 15–16, 2009, the Council held its twelfth special session, focusing on the Goldstone Report. Douglas M. Griffiths, Chargé d'Affaires, a.i., U.S. Mission to the United Nations, Geneva, addressed the Council on October 15. Excerpts follow from the U.S. comments on how the Council could move forward constructively, notwithstanding the United States' concerns with the Goldstone Report and its view that the special session was not the appropriate forum for such discussion. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*.

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. . . Fairness must be a hallmark of our approach to this Report, to the conflict it addresses, and indeed to all our work together as a Council. Fairness is the only way that this institution can strengthen its credibility and foster constructive dialogue on the

important issues we must together address. Fairness means an acknowledgment of Israel's fundamental right to self-defense, a right that is at the core of the international system and of each of our obligations as sovereign nations. Fairness also requires recognition of the civilian casualties that resulted from the Gaza conflict, and the destruction of property and livelihoods. The Report makes clear that the Gaza operation was commenced lawfully after civilians in Israel came under sustained attack by Hamas, in violation of international human rights and humanitarian law. The Report looks at allegations on all sides of the conflict, and this body must do the same.

A second key element is the wider context of negotiations in the region. We stand at an important moment, and must all be mindful of the larger context of ongoing efforts to restart permanent status negotiations that would lead to the creation of a Palestinian state. The resolution of the very difficult and painful issues involved will come not in the press, not in a court, and not even in this chamber. It can come only when the needs of both sides to this conflict are met in two states, where Israelis and Palestinians each live in peace and security.

A third key element of our approach is appreciation of the complex interplay of the principle of self-defense and compliance with the laws of war, including responsibilities for civilian protection. If we as a Council insist on oversimplifying or overlooking the difficult challenges of humanitarian protection, we will fail in our duty. . . .

A fourth indispensible element of our approach is accountability. There have been calls for accountability on all sides of this conflict. These calls come not just from political leaders in international organizations and government officials, but from husbands, wives, parents and children who live with the pain of losing innocent loved ones to violence and with the threat of imminent danger to their families. These calls cannot be ignored or deflected. They must be heard, and they deserve a response.

These four principles, a commitment to fairness, an understanding of the wider context of negotiations, an appreciation of the interplay of the right to self-defense, the responsibility for civilian protection and the conduct of hostilities in heavily populated

areas, and an emphasis on accountability should guide this Council in our further deliberations on this Report. Undertaking such deliberations takes time; constructive dialogue cannot be carried out in the heat of confrontation or in a rush to a predetermined conclusion. The central responsibility here lies with the parties themselves, each of whom should uphold its obligation to deal credibly with the allegations through domestic processes. We urge this Council and individual Member States to insist that Hamas cease ongoing violations of international humanitarian law. The Palestinian Authority has institutions that can investigate alleged violations in the West Bank, and we urge it to do so.

Israel enjoys the benefit of a strong, credible legal system, democratic institutions and a vibrant civil society that can ensure thorough, transparent investigations and appropriate follow-up. Responsible countries need and deserve the space to work through what processes will be most effective, and this cannot be dictated from the outside. The benchmark should be a determined, objective effort to get to the truth of what happened and why. Where violations are found, those responsible should be held accountable and systems put in place to prevent recurrence. Jurisdictions that carry out such efforts in a diligent way should not face the threat that their efforts will be overrun by external bodies or foreign governments.

The efforts we describe, in themselves, will not bring an end to the Palestinian Israeli conflict, or satisfy all the calls for justice and accountability. That will require a longer process of peacemaking, one centered in the region and not in Geneva. As a Human Rights Council, we have a choice of whether to advance the protection of human rights through even-handed and serious engagement, or to set it back with politicized debates and unbalanced resolutions. Having made the decision to join this body, we are steadfastly committed to transforming it into a vehicle that advances our shared vision to protect human rights and fundamental freedoms around the world. During this session and in the months to come we hope you will join us in that effort.

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On October 16, 2009, the United States requested a vote and voted against a resolution entitled "The human rights

situation in the Occupied Palestinian Territory, including East Jerusalem." Mr. Griffiths delivered the U.S. explanation of vote, as excerpted below. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*. The Human Rights Council adopted the resolution with 25 states in favor, six opposed, and 11 abstaining. U.N. Doc. A/HRC/RES/S-12/1.

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We take the floor to express our disappointment at the outcome of this session. . . . We regret that the Council chose precipitous action rather than judicious deliberation regarding a 575 page report that has far reaching implications.

Special Sessions of the HRC should be used primarily to deal with urgent human rights crisis situations that require immediate action. We find it unfortunate that this Council agreed to this Special Session without giving the parties to the conflict adequate time to study the report and, in accordance with the principle of complementarity, to conduct their own domestic investigations and follow-up of alleged violations of international law.

Prior to this deferral, the United States discussed elements of a balanced resolution—one that focused on accountability . . . .

Regrettably, this is not the resolution that is before us today.

This resolution goes far beyond even the initial scope of the Goldstone Report into a discussion of elements that should be resolved in the context of permanent status negotiations between the Palestinians and the Israelis.

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The United States has continued to stress the importance of holding all parties to this conflict, and indeed to all conflicts, accountable under international law. We were prepared to accept a resolution that did so in a balanced and constructive manner. Israel is a democracy with strong, independent institutions capable of addressing allegations through credible domestic processes, and we have encouraged it to use those institutions.

The Goldstone Report also called on the Palestinians to launch credible investigations to address allegations of Hamas' abuses and to demand that Hamas stop its clear violations of law. Hamas, a terrorist group, has neither the democratic structures, nor an independent judiciary, nor any demonstrated willingness to examine its violations of international humanitarian and human rights law. Yet these failings should not divert our attention from Hamas' own culpability.

The final, and most important point, I would like to make today is that the United States continues to focus our attention on our main goal: working with Israel and the Palestinian Authority to re-launch successful permanent status negotiations as soon as possible. Resolutions like the one before us today can only exacerbate polarization and divisiveness. . . .

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On November 5, 2009, by a vote of 114 in favor and 18 against, with 44 abstentions, the UN General Assembly adopted a resolution concerning follow up to the fact-finding mission. U.N. Doc. A/RES/64/10. Among other things, the resolution endorsed the Goldstone Report and tasked the Secretary-General to report to the General Assembly within three months on implementation of the resolution. Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, delivered a statement explaining the U.S. vote against the resolution, which is available at *http://usun.state.gov/briefing/statements/2009/131448.htm.*

4. Protection of Persons

On October 30, 2009, Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee on the report of the International Law Commission ("ILC" or "Commission") on the work of its sixty-first session. Excerpts follow from Mr. Simonoff's statement, providing U.S. views on the ILC's consideration of the issue of protection of persons in times

of natural disaster. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*; the ILC report is available at *http://untreaty.un.org/ilc/reports/2009/2009 report.htm*.

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Regarding the topic of Protection of Persons in the Event of Disasters, the United States commends the Commission for its progress in this important topic, including the promulgation of initial draft articles 1 through 5, and congratulates the special rapporteur, Mr. Eduardo Valencia-Ospina, for his diligent stewardship of this topic.

We believe that the current draft articles make important progress in a number of areas. In the past, we have expressed reservations regarding adopting a rights-based approach for this endeavor. We continue to think that the Commission should focus its efforts on providing practical guidance to countries in need of, and providing, disaster relief. As the UN Secretariat has noted, this project could "elaborat[e] a set of provisions which would serve as a legal framework for the conduct of international disaster relief activities . . . thereby creating a legal 'space' in which such disaster relief could take place on a secure footing." Among other goals, the output of the Commission could provide guidance for the myriad agreements that are entered into by relief providers and affected states. We thus welcome that the current draft article 2 emphasizes meeting the "essential needs" of persons affected by disasters.

In particular, we would encourage the Special Rapporteur to consider, in his ongoing work, the possible ways in which core humanitarian principles—neutrality, impartiality and independence—can be given shape in the context of disaster relief by the present project.

At the same time, the current draft articles raise a number of questions that merit additional consideration. While we are pleased that there is agreement that this project should not apply to situations of armed conflict, we believe that the current formulation of Article 4 needs further consideration to ensure that it draws the right line between situations in which the draft articles would—and would not—apply. We would welcome the views of the Special

Rapporteur on the option of delineating the applicability of draft article 4 based on "cases of armed conflict."

Finally, the United States strongly supports international cooperation and collaboration in providing disaster relief. We realize that draft article 5 awaits the elaboration of further articles to provide additional content. In preparing for that work, we would welcome the Special Rapporteur's views on whether the duty to cooperate set forth in draft article 5 should have an identified goal, and whether further work is necessary to define facts that would trigger the duty to cooperate on the part of States.

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B. DISCRIMINATION

1. Race

a. International Convention on the Elimination of All Forms of Racial Discrimination

On January 13, 2009, the United States submitted its one-year follow-up report to the Concluding Observations regarding the Fourth, Fifth, and Sixth Periodic Reports of the United States, which the Committee on the Elimination of Racial Discrimination issued on May 8, 2008. The U.S. follow-up report addressed the Committee's recommendations concerning combating racial profiling, preventing discrimination against non-citizens in the context of anti-terrorism efforts, U.S. compensation to the Western Shoshone Tribe for land claims, life imprisonment without parole for juvenile offenders, efforts to assist people displaced by Hurricane Katrina, and ways that the United States can enhance awareness about U.S. obligations under the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"). The report's discussion of U.S. efforts to promote awareness of the CERD is set forth below. The full text of the follow-up report is available at *www.state.gov/g/drl/rls/cerd_report/index.htm*, along with the Committee's concluding

observations and the previous U.S. reports. For additional background on the U.S. reports, see *Digest 2007* at 293–315 and *Digest 2008* at 275–84.

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Paragraph 36
Recommendation:

The Committee recommends that the State party organize public awareness and education programmes on the Convention and its provisions, and step up its efforts to make government officials, the judiciary, federal and state law enforcement officials, teachers, social workers and the public in general aware about the responsibilities of the State party under the Convention, as well as the mechanisms and procedures provided for by the Convention in the field of racial discrimination and intolerance.

Response:

Since appearing before the Committee in February 2008, the United States has begun efforts to engage in greater publicity, outreach and training regarding U.S. obligations under the various U.N. human rights treaties to which it is party. Now that the United States is current in meeting its reporting obligations under all of the U.N. human rights treaties to which it is party, the United States Department of State is in the process of formally communicating to federal agencies, the fifty states, federally recognized tribes and other appropriate entities and reminding them of U.S. obligations under the underlying conventions, the recent reports the United States government submitted to the Committee Against Torture, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee on the Rights of the Child, and is including in these materials the observations and conclusions issued by the respective committees.

Additionally, the State Department has requested federal agencies with oversight over U.S. laws that implement obligations under the CERD to examine ways in which they can provide

training on the CERD as part of their ongoing training activities. Relevant agencies are currently examining ways in which to incorporate such training.

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b. World Conference Against Racism

(1) Durban Review Conference

On February 14, 2009, Acting State Department Spokesman Robert Wood announced that the Department would send a delegation to the February 16–19 consultations for the April 2009 Durban Review Conference. In 2001, the U.S. delegation had left the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa, due to concerns about the proposed outcome documents for the conference. *See Digest 2001* at 267–68. For the same reasons the United States subsequently voted against several General Assembly resolutions concerning follow up to the Durban Conference's declaration and program of action. *See Digest 2007* at 315–17 and *Digest 2008* at 284–85. In his February 14 announcement, Mr. Wood explained that the United States planned to assess the possibility of U.S. participation in the conference and intended "to work to try to change the direction in which the Review Conference is heading." The full text of Mr. Wood's statement is available at *www.state.gov/r/pa/prs/ps/2009/02/117339.htm*.

Two days later at the Durban Inter-Sessional Open-ended Intergovernmental Working Group Session in Geneva, Mark C. Storella, Chargé d'Affaires, a.i., U.S. Mission to the United Nations, Geneva, and head of the U.S. delegation, expressed U.S. concerns that the draft outcome document for the review conference "singles out Israel for criticism, places unacceptable restrictions on freedom of expression, under the guise of 'defaming religion,' and calls for payment of reparations for slavery." At the same time, he stressed the U.S. belief that "it is important to try to make a positive contribution and to

work with member states of the United Nations who, like us, want this process to achieve a successful review conference that focuses on combating racism and discrimination." Mr. Storella's statement is available at *www.state.gov/s/l/c8183.htm*. The United States subsequently determined that its concerns about the draft outcome document had not been met and decided not to participate in the Durban Review Conference. *See, e.g.*, *www.state.gov/r/pa/prs/ps/2009/04/121876.htm*.

(2) U.S.-hosted panel discussion on race and tolerance in the United States

On June 5, 2009, the United States hosted a panel discussion, "In Pursuit of the Dream: Race and Tolerance in the United States in the 21st Century." The discussion took place in Geneva on the margins of the Human Rights Council's June 2009 session. Esther Brimmer, Assistant Secretary of State, Bureau of International Organization Affairs; Wade Henderson, President and Chief Executive Officer, Leadership Conference on Civil Rights; and Karen Stevens, Counsel to the Assistant U.S. Attorney General for Civil Rights, participated on the panel. Ms. Brimmer explained that in convening the panel, the United States was following up on its assurances during the Durban review consultations that it would continue to work with other states to discuss and address issues of racism. Ms. Brimmer called the panel discussion "just one element in our larger resolve to work actively and constructively on human rights and civil rights issues" and continued:

> Those principles which are clearly articulated in the Universal Declaration of Human Rights are also rooted in ideals that we share in the United States and that we continue to try to realize. Sometimes painfully. Sometimes with difficulty. But succeeding generations of Americans have addressed these issues.
>
> We realize, as the phrase is used, that it's been a long time coming. Some of the issues we've discussed today reveal the long distance we still have to travel before we

> can rest. While the U.S. treasures its freedoms, embraces its rich diversity and celebrates its history of struggle and progress, we know the struggle continues.

Excerpts follow from Ms. Stevens's remarks, providing background on the work of the Department of Justice's Civil Rights Division in combating racial discrimination in the United States. The full text of the panel discussion is available at *www.state.gov/p/io/rm/2009/127180.htm*.

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We enforce laws that prohibit discrimination in several areas in education, in housing, employment, that prohibit cruel and unusual punishment, police misconduct, that address the Constitutional requirements for conditions of confinement in prisons, nursing homes and other state institutions, and we also enforce criminal laws such as hate crimes laws, human trafficking and other criminal civil rights provisions.

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. . . [T]he President has requested an additional $145 million [from Congress] to go to civil rights enforcement in 2010. This is at a time when the United States . . . is suffering a lot of economic challenges and many other agencies and other divisions in the Department of Justice are facing freezes or cutbacks. But the President and the Attorney General made it known very early and very clearly that they wanted more civil rights enforcement. Again, with the action of Congress we expect to have the money and the additional attorneys and the other kinds of resources that will allow us to go out and do more of the kind of work that we all need to do.

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We have a renewed emphasis on employment discrimination. Our traditional employment discrimination [involves] looking into allegations based on race and looking into large-scale systemic problems that are driven by what we call intentional discrimination

but also considering . . . what we call disparate impact which is the more subtle kinds of discrimination that sometimes may be even harder to identify and fight.

We have been working to expand our hate crimes laws so that the existing laws which cover crimes motivated by race, religion and color will be expanded and we will be allowed to enforce more of these cases across the country and not be limited to very particular kinds of crimes that also had to be linked to activities like voting or attending school or going to a restaurant that's open to the public. The hate crimes law would also add new categories such as disability, gender identity and sexual orientation.

We've been talking to minority businesses and their representatives about the programs that are in existence in the United States that allow or require the federal government in some cases to consider and offer additional assistance and sometimes extra consideration to small businesses that are owned by minorities. Those programs have been challenged in the United States very often. We have not been as active in defending those programs. We are now authorized and directed to both defend those programs very vigorously, and also to try and work with the agencies that actually administer the contracts to make sure that the programs are being designed in a way that will make them effective and legal.

We've also been able to meet more often with . . . civil society organizations to get their input and to consult with them so that we can do the work that we need to do in conjunction with them.

We've been continuing work that began in the aftermath of the attacks of September 11th, doing outreach to Muslim, Sikh, Arab-American and others of Middle Eastern or South Asian descent who really faced a backlash and a large increase in targeted attacks following 9/11. There are still sometimes violent attacks . . . on mosques and on individuals and threats, and we continue to investigate those and prosecute them where we can. But we also really established a dialogue.

We have something called the Rights Working Group which brings in probably 20 representatives of these different groups every six to eight weeks, and we sit down with them in a room with representatives of other agencies like the State Department, like our Department of Homeland Security, like our Department of

Transportation that enforces security on the airlines, and with our immigration officers. Again, we in the Civil Rights division aren't empowered to solve the problems that these groups have with those agencies, but what we can do is bring people together in a room, give them an identified contact, try and help them elevate these concerns to the level where they can be addressed and they can at least get an answer even if it's not always the answer they want to hear. . . .

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(3) General Assembly resolution: Durban follow-up

On November 2, 2009, the United States voted in the Third Committee against a resolution entitled "Global efforts for the total elimination of racism, discrimination, xenophobia and related intolerance, and the comprehensive follow-up to the Durban Declaration and Program of Action." John F. Sammis, U.S. Deputy Representative to the Economic and Social Council ("ECOSOC"), provided an explanation of the U.S. vote, which is excerpted below. The full text of the U.S. statement is available at *http://usun.state.gov/briefing/statements/2009/131208.htm*. On December 18, 2009, the General Assembly adopted the resolution by a vote of 128 in favor and 13 opposed, with 143 abstentions. U.N. Doc. A/RES/64/147.

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Recognizing there is much more work to do, my government continues to pay close attention to issues of race, ethnicity and national origin. Just last week, President Obama signed legislation on hate crimes, strengthening the ability of our Justice Department and state and local law enforcement officials to deter and prosecute acts of violence motivated by anger against another's race, ethnicity, gender, or faith.

Just as we believe embracing diversity is essential to the strength of the United States, we also believe it is critical to building a more

peaceful and prosperous world. We are therefore dedicated to working with other nations to address discrimination and negative stereotyping whenever and wherever they occur. In this work, we consider the United Nations a vital partner.

During the June 2009 Human Rights Council session, the United States hosted a side event in which government and civil society representatives explored pitfalls and progress in the fight against racism. And earlier this year, we sent a distinguished delegation to attend negotiations on the draft outcome document for the Durban Review Conference. Our delegates met with over 30 delegations, the UN High Commissioner on Human Rights, and other interested parties. In addition, the State Department consulted with many capitals on our effort.

We are most grateful to the numerous country delegations and senior United Nations officials who worked to improve the review conference outcome document and re-focus the Durban Review Conference on the global fight to eliminate racism and racial discrimination. We regret that we were not able to achieve sufficient changes in the document to be able to participate.

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c. Ad Hoc Committee on the Elaboration of Complementary Standards

The Human Rights Council's Ad Hoc Committee on the Elaboration of Complementary Standards convened two sessions in 2009. The Human Rights Council established the Ad Hoc Committee by its Decision 3/103 of December 8, 2006, to follow up on a decision of the 2001 Durban Conference. The Council directed the Ad Hoc Committee to produce complementary standards that would close the gaps in the CERD and establish new norms to combat racism. The Human Rights Council also directed the Ad Hoc Committee to develop the standards either as a new convention or a protocol to the CERD. On September 28, 2007, the Human Rights Council adopted Resolution 6/21, by a vote of 32 in favor and ten against, with four abstaining. Resolution 6/21 recalled its

earlier decision providing the Ad Hoc Committee's mandate and decided that the Ad Hoc Committee would hold its first session in the first three months of 2008. *See www2.ohchr.org/english/issues/racism/AdHocCommittee.htm*; U.N. Doc. A/HRC/RES/6/21.

Before the Ad Hoc Committee's second session, October 19–30, 2009, the United States submitted written comments for the committee's Chairperson-Rapporteur. The U.S. submission, dated May 29, 2009, is excerpted in major part below. The full text is available at *www.state.gov/s/l/c8183.htm*.

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The United States has learned from the experience in our own country how crucial robust free expression and a thriving marketplace of ideas are to the promotion of tolerance, religious freedom, greater understanding among individuals of different backgrounds, and ultimately to the defeat of racist and discriminatory ideas in societies. Similarly, the United States believes in the importance of engaging in proactive governmental outreach and policies to assure racial, ethnic, and religious groups are protected and respect for diversity is promoted. Such governmental outreach can take a variety of forms, including the holding of town hall meetings and conferences with affected groups to listen and learn of the challenges they face and develop ways for the government to better address their concerns. These actions, which are based upon a moral and social responsibility to combat advocacy to national, racial or religious hatred, rather than a legal obligation to punish hateful expression, are essential to simultaneously maintaining robust free expression and allowing the government to take an active role in the promotion of tolerance and respect.

In addition, the United States believes in the importance of having robust legal regimes in place to deal with acts of discrimination. . . . Prosecuting . . . bias crimes to the fullest extent of federal law is a priority of the United States.

The United States does not believe that amendments to the international human rights legal framework—or new interpretations of

existing legal obligations—are warranted to fight the scourges of racism, racial discrimination, xenophobia and related intolerance. Rather than seeking additional restrictions to expression, the United States advocates for more robust governmental outreach policies with respect to racial, ethnic and religious groups as well as the institution of appropriate legal regimes that deal with discriminatory acts and hate crimes.

The United States views racism, racial discrimination, xenophobia, and related intolerance as serious challenges facing the international community and believes they must be dealt with by the Ad Hoc Committee in a methodical and deliberate manner. The United States submits that this process of self-examination and action by [the] international community begin with greater opportunities to exchange views and address empirical data and practice on matters related to racial, ethnic, and religious diversity, discrimination, and intolerance so as to broaden our common understanding of these important issues and provide a solid foundation for a broad-based consensus for further actions and initiatives.

The United States therefore proposes the following action points to be conducted during a year of study for consideration by the Ad Hoc Committee on the Elaboration of Complementary Standards:

- ***Causes of Advocacy of Hatred:*** A study on the underlying causes of and social pressures contributing to the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The study would seek to elaborate, through a careful analysis of empirical data on the occurrence and nature of such advocacy, tailored, practical recommendations on how best to promote tolerance and diversity without restricting human rights and fundamental freedoms;
- ***Global Trends Related to Such Advocacy:*** Multi-stakeholder workshops and seminars that contribute to this study through, *inter alia*, an examination of current trends related to such advocacy, including state and societal reactions and the factors that help minimize violent societal reaction to such advocacy. Presentations would include the experiences

of groups in various parts of the world facing racism, racial discrimination, xenophobia and related intolerance;

- ***Evolution of Legal and Policy Frameworks:*** An assessment of the evolution of domestic legal and policy frameworks dealing with these issues and how effective they have been in dealing with intolerance and discrimination. Such an assessment would also review any distinctions made within these frameworks between actions taken based upon a moral and social responsibility to combat advocacy to national, racial or religious hatred on the one hand and those based upon a legal obligation to prohibit such advocacy on the other, and analyze the relative results of each;
- ***Compiling Successful and Unsuccessful Approaches:*** A compilation of successful approaches and lessons learned on the ground: what has actually worked in promoting greater tolerance and diversity? Have limitations on hate-filled speech helped to reduce acts of intolerance and promote religiously and racially diverse societies? Are limitations on hate-filled speech implemented in a non-discriminatory manner? What is the correlation in fact between domestic prohibitions on such advocacy and instances or patterns of discrimination and continued allegations of human rights violations?

The United States also strongly recommends the participation and inclusion of contributions of non-governmental organizations to the work of the Ad Hoc Committee in general, and to the above-mentioned studies in particular; such participation would greatly enhance and enrich continued efforts to fight racism, racial discrimination, xenophobia and related intolerance.

On October 19–30, 2009, the United States participated actively in the Ad Hoc Committee's second session. Among other things, the United States presented an "Action Plan to Combat Racial and Religious Discrimination and Intolerance." As the U.S. Mission to Geneva explained in a statement issued on November 9, the Action Plan "begins to lay out a roadmap for practical action, transparent reporting and greater civil society input the international community should

pursue to strengthen compliance with their existing obligations in international law in these areas." The U.S. statement also reiterated the U.S. view that

> existing international treaties, such as the International Covenant on Civil and Political Rights and the International Convention on the Elimination of all Forms of Racial Discrimination, clearly obligate states parties to take effective measures to combat racial and religious intolerance. Amendments to the international human rights legal framework—in the form of new treaties, protocols to existing treaties, or reinterpretations of obligations under those treaties—are not necessary and only divert attention from the real problem.
>
> Simply put, there are evident gaps in effective implementation by governments of their existing obligations under international human rights law. . . . It is our firm belief that concrete actions to better address racial and religious discrimination and intolerance will do more to combat these scourges than years spent negotiating unnecessary legal instruments.

The full texts of the U.S. announcement and the Action Plan are available at *www.state.gov/s/l/c8183.htm*.

d. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

(1) Mission to the United States

On June 16, 2009, Anna Morawiec Mansfield, Deputy Legal Adviser, U.S. Mission to the United Nations, Geneva, addressed the Human Rights Council in response to the report of UN Special Rapporteur Doudou Diene on his mission to the United States. The U.S. statement, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

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My government welcomed the Special Rapporteur's visit and appreciated the opportunity for constructive dialogue. We arranged numerous meetings with various federal government agencies involved in enforcing the nation's civil rights laws and administering the myriad programs whose goals are the elimination of racial discrimination and the promotion of respect for civil rights. . . .

The United States also appreciates the Special Rapporteur's report and its constructive spirit. We note, as the Special Rapporteur did in his report, that the United States is profoundly committed to the fight against racism and racial discrimination, and we are aware of the ongoing challenges in this regard. As described in the report, the United States has made great progress in creating a legal and institutional framework to combat racism and racial discrimination, but we recognize that more needs to be done. We circulated his report to the various government agencies with whom the Special Rapporteur met and they will consider it as they review existing laws, policies and programs in the various areas addressed by his report.

Permit us to briefly highlight some initiatives that respond to issues raised by the Special Rapporteur.

President Obama is committed to reinvigorating traditional civil rights enforcement in the United States and increasing the number of enforcement actions in a variety of areas, including police misconduct and employment discrimination. As evidence of this commitment, the President has requested 145 million dollars for civil rights enforcement by the Department of Justice's Civil Rights Division in 2010.

The Office for Civil Rights and Civil Liberties within the Department of Homeland Security, which is charged with reviewing public complaints of discrimination based on race, color, national origin, religion, and other bases, will strengthen its various programs by hiring additional investigators, immigration experts and other personnel. It will continue to strengthen efforts to engage with various religious and ethnic communities in the United States who have been impacted by government laws and policies enacted after the terrorist attacks of September 11. The Office has also recently created a training module designed to

enhance the cultural competency of DHS personnel, as well as state and local law enforcement and intelligence analysts. Topics of discussion include: misconceptions and stereotypes of members of minority religions; a how-to guide for community interaction; effective policing without the use of ethnic profiling; and the U.S. Government's approach to engagement and outreach.

To bolster enforcement of employment discrimination laws, including the prohibition against race and color discrimination in employment, the President is seeking a 23 million dollar increase in the budget of the Equal Employment Opportunity Commission. This would allow the Commission to hire more front-line investigators and attorneys.

As part of a renewed emphasis on wage protection laws, the President's budget calls for increasing by more than 280 individuals the staff of the Department of Labor's Wage and Hour Division. The laws the Wage and Hour Division enforce protect employees without regard to race or immigration status. In addition, the Division has developed a series of "We Can Help" posters that are available in English and Spanish and that are designed to increase the public awareness of the wage protection laws and the Division's services. These posters supplement workers' rights cards, already provided in a variety of languages, to explain the protections afforded to vulnerable workers by the government's wage protection laws.

The United States continues to look for ways to support school districts seeking to achieve diversity and avoid racial isolation in its schools, as well as reduce the achievement gap between white and minority students. For example, Congress recently appropriated funds under Title Four (IV) of the Civil Rights Act program for technical assistance to school districts seeking to develop and implement student assignment plans to promote diversity and avoid racial isolation. And finally, the American Recovery and Reinvestment Act [Pub. L. No. 111-5, 123 Stat. 115] provides new funding to improve education for at-risk students and to narrow the achievement gap while stimulating the economy.

* * * *

(2) Report to the Human Rights Council

On September 30, 2009, Githu Mugai, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, reported to the Human Rights Council. Sarah Cleveland, State Department Counselor on International Law, delivered a statement on behalf of the United States, stating in part:

> Racism, racial discrimination, xenophobia and related intolerance are serious challenges facing the international community and the United States believes they must be examined methodically and deliberately. The United States submits that this process of self-examination and action by the international community begin with greater opportunities to exchange views and address empirical data and practice on matters related to racial, ethnic, and religious diversity, discrimination, and intolerance—notably through discussions in the Ad Hoc Committee on Complementary Standards—so as to broaden our common understanding of these important issues and provide a solid foundation for a broad-based consensus for further actions and initiatives.

Ms. Cleveland's statement also reiterated U.S. views on the concept of "defamation of religion" and U.S. support for religious freedom. *See* B.4.d. below for discussion of U.S. responses to the Special Rapporteur's findings on the issue of intolerance and discrimination on the basis of religion. The full text of Ms. Cleveland's statement is available at *www.state.gov/s/l/c8183.htm*.

2. Gender

a. Reproductive health: Rescission of Mexico City Policy

On January 23, 2009, President Obama rescinded the "Mexico City Policy," which had directed the U.S. Agency for

International Development to withhold USAID funds from any nongovernmental organization using non-USAID funds to engage in activities relating to abortion. "It is clear that the provisions of the Mexico City Policy are unnecessarily broad and unwarranted under current law, and for the past eight years, they have undermined efforts to promote safe and effective voluntary family planning in developing countries," President Obama stated. "For these reasons, it is right for us to rescind this policy and restore critical efforts to protect and empower women and promote global economic development." President Obama also expressed his intention "to work[] with Congress to restore U.S. financial support for the U.N. Population Fund," thereby "joining 180 other donor nations working collaboratively to reduce poverty, improve the health of women and children, prevent HIV/AIDS and provide family planning assistance to women in 154 countries." The President's statement is available in full at Daily Comp. Pres. Docs., 2009 DCPD No. 00018, p. 1. His accompanying memorandum to the Secretary of State and the Administrator of USAID, excerpted below, is available in full at Daily Comp. Pres. Docs., 2009 DCPD No. 00015, pp. 1–2.

The Foreign Assistance Act of 1961 (22 U.S.C. 2151b(f)(1)), prohibits nongovernmental organizations (NGOs) that receive Federal funds from using those funds "to pay for the performance of abortions as a method of family planning, or to motivate or coerce any person to practice abortions." The August 1984 announcement by President Reagan of what has become known as the "Mexico City Policy" directed the United States Agency for International Development (USAID) to expand this limitation and withhold USAID funds from NGOs that use non-USAID funds to engage in a wide range of activities, including providing advice, counseling, or information regarding abortion, or lobbying a foreign government to legalize or make abortion available. The Mexico City Policy was in effect from 1985 until 1993, when it was rescinded by President Clinton. President George W. Bush reinstated the

policy in 2001, implementing it through conditions in USAID grant awards, and subsequently extended the policy to "voluntary population planning" assistance provided by the Department of State. [Editor's note: *See Digest 2001* at 283–93.]

These excessively broad conditions on grants and assistance awards are unwarranted. Moreover, they have undermined efforts to promote safe and effective voluntary family planning programs in foreign nations. Accordingly, I hereby revoke the Presidential memorandum of January 22, 2001, for the Administrator of USAID (Restoration of the Mexico City Policy), the Presidential memorandum of March 28, 2001, for the Administrator of USAID (Restoration of the Mexico City Policy), and the Presidential memorandum of August 29, 2003, for the Secretary of State (Assistance for Voluntary Population Planning). In addition, I direct the Secretary of State and the Administrator of USAID to take the following actions with respect to conditions in voluntary population planning assistance and USAID grants that were imposed pursuant to either the 2001 or 2003 memoranda and that are not required by the Foreign Assistance Act or any other law: (1) immediately waive such conditions in any current grants, and (2) notify current grantees, as soon as possible, that these conditions have been waived. I further direct that the Department of State and USAID immediately cease imposing these conditions in any future grants.

* * * *

On March 31, 2009, Margaret J. Pollack, Acting Deputy Assistant Secretary of State for the Bureau of Population, Refugees, and Migration, and head of the U.S. delegation to the UN Commission on Population and Development ("Commission"), affirmed the U.S. commitment to promoting reproductive health in a statement to the Commission. Ms. Pollack stated:

> The United States is firmly committed to reproductive health services. In his first week in office, President Obama rescinded the "Mexico City Policy," which had made it more difficult for women in developing countries receiving U.S. assistance to access reproductive health information and

> services. In doing so, the President made clear that we should be supporting programs that help women and their partners make decisions to ensure their health and the health of their families.
>
> In addition, last week we announced that the U.S. will once again fund UNFPA [the UN Population Fund], contributing $50 million this fiscal year as provided in the Omnibus Appropriations Act of 2009 [*see* § 7079 of Public Law No. 111-8, 123 Stat. 909-10], a 130% increase over our last contribution in 2001. Congress has also approved $545 million in bilateral assistance for family planning. This is a significant increase over last year. I highlight this fact to underscore the U.S. commitment to development assistance. Be assured that, even in these uncertain economic times, the U.S. will not retreat from this commitment.

The full text of Ms. Pollack's statement is available at *http://usun.state.gov/briefing/statements/2009/march/131650.htm*.

b. Women and armed conflict

(1) U.S. strategic plan for combating violence against women in Sudan and the Democratic Republic of the Congo

On July 23, 2009, Secretary of State Clinton wrote Senator Jeanne Shaheen (D-New Hampshire), outlining U.S. initiatives to end the use of rape and sexual violence in conflict zones, particularly in Sudan and the Democratic Republic of the Congo ("DRC"). Secretary Clinton's letter attached the proposed "Strategic Plan for Combating Violence Against Women in Sudan and the Democratic Republic of the Congo (DRC)." Secretary Clinton's letter and the accompanying strategic plan, excerpted below, are available in full at *www.state.gov/s/l/c8183.htm*.

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. . . Around the world, women and girls continue to face egregious crimes of sexual violence in conflict zones. This violence both reflects—and reinforces—a culture in which human rights and fundamental freedoms are not fully respected. International human rights law clearly states that countries have a duty to prosecute and punish violence against women. U.S. leadership on this issue is vital, and strong action must match a call for an end [to] this violence. . . .

Although there are no easy solutions for ending the conflicts in Sudan and the DRC, we can—and must—take several steps both now and over the long term. We have successfully fought violence against women by strengthening assistance to survivors and by helping local authorities prosecute perpetrators in both the DRC and Sudan; however, given the rising violence and the extent of the devastation, we need to do more. We are leading efforts in the UN system to address violence against women . . . . We are also proposing a strategy that combines prevention and protection, treatment, prosecution, and partnership . . . .

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Strategic Plan for Combating Violence Against Women in Sudan and the . . . DRC

I. Prevention and Protection

U.S. government programs in Sudan and the DRC continue to use a grassroots approach to identify women and children at risk of rape, while following the four main protection principles: security, confidentiality, non-discrimination, and treatment with dignity. This approach helps to protect populations from reprisals and prevent future sexual violence. The United States is working with a number of UN agencies to help UN missions understand and respond to the specific vulnerabilities of women and girls in conflict situations.

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In order to be effective, peacekeeping forces must also develop appropriate skills and sensitivities regarding violence against women. U.S. peacekeeping training, through the Global Peace Operations Initiative (GPOI) and the Africa Contingency Operations

Training and Assistance (ACOTA) program, incorporates training for peacekeepers in all regions on peacekeeping conduct, human rights, international humanitarian law, and combating sexual violence and trafficking in persons. The United States will incorporate these important human rights modules in all future GPOI-enabled training.

To help address violence against women in Darfur, the United States will continue to call for the United Nations Mission in Darfur (UNAMID) to increase its activities to protect women and girls, particularly those in and around IDP camps. We will also continue to call for all parties to the conflict to respect the rights of women and girls, and we will continue to urge the Government of Sudan to end its support for the *janjaweed* militia.

In the DRC, while keeping in mind the limitations that the current situation places on United Nations Mission in the Democratic Republic of the Congo (MONUC) soldiers in the East, the United States will call for MONUC [to] take a more proactive stance on protection. Initiatives could include increasing the number of full-time protection officers in the East, and establishing more mobile bases and mobile units to protect IDPs, women, and other vulnerable persons where they are most likely to encounter abuse—including military checkpoints, market paths, and firewood patrols. We will also explore ways in which the United States can provide more political support for MONUC's human rights officers who monitor conditions, particularly in light of ongoing harassment by the Congolese Armed Forces (FARDC) and police.

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III. Prosecution

Prosecution

Despite some trials of FARDC soldiers on charges of rape, there is little accountability for violence against women in the DRC. The overwhelming majority of crimes committed by soldiers—including rape—go unreported and unpunished in the absence of a functional or reliable judicial system. The United States continues to support efforts in the DRC to strengthen judicial independence, expand access to justice, build the capacity of

new judiciary personnel, and advocate for human rights. U.S. assistance, for example, was instrumental in the preparation of new laws on magistrates and the passage of a landmark law against sexual violence in 2006. However, impunity for perpetrators of human rights abuses remains a fundamental obstacle to protection. We will continue support for building the capacity of the judiciary and of civil society groups focused on strengthening the judiciary and citizens' access to justice.

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In the DRC, in concert with international partners, the United States will aim to speak out more systematically against the awarding of military posts to well-known or suspected human rights abusers. We will explore how we can encourage the Congolese Justice Ministry to better publicize key convictions of perpetrators of human rights abuses as well as how best to help build capacity of the media to report on such court decisions. Additionally, the United States will explore efforts to assist the government of the DRC in providing witness protection for those seeking justice following rape. Little or no progress will be made on the judicial front without serious investment in this vital element. We will also explore ways to increase and improve coordination efforts with the European Union and other donors regarding judiciary-related initiatives and efforts to fight VAW, not only to avoid duplication, but to maximize synergies and develop a joint strategy for fighting impunity and strengthening the judiciary in the DRC.

Data Collection and Documentation

Statistical reporting is critical to addressing and preventing violence against women. . . .

The United Nations/African Union Mission in Darfur (UNAMID) conducts interviews of victims and witnesses of human rights abuses, including violence against women, and maintains some level of paper documentation and statistics on these cases. The United States will advocate for increased reporting on violence against women by UNAMID. However, UNAMID does not possess the personnel or resources required to document cases

with a view toward eventual prosecution; UNAMID is further constrained by ongoing Sudanese government efforts to restrict its activities. . . .

We are also exploring further ideas for public/private technology collaboration. For example, the State Department could coordinate with private U.S. and African forensic labs to donate equipment and training expertise for biological evidence-testing in the DRC, thereby improving prosecution of sexual violence perpetrators.

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(2) Security Council resolutions

(i) Resolution 1888

On September 30, 2009, the Security Council adopted U.S.-led Resolution 1888, concerning sexual violence in situations of armed conflict. U.N. Doc. S/RES/1888. A September 30 State Department press statement explained that the resolution contained "actions the UN and Member States can take to help prevent conflict-related sexual violence and end impunity" and built upon Security Council Resolutions 1325 (2000) and 1820 (2008). *See www.state.gov/r/pa/prs/ps/2009/sept/129997.htm*; *see also* U.N. Docs. S/RES/1325 and S/RES/1820. Resolution 1325 "requires parties in conflict to respect women's rights and support their participation in peace negotiations and post-conflict reconstruction," and Resolution 1820 "establishes a clear link between maintaining international peace and security and preventing and responding to the use of sexual violence as a weapon of war." *See Digest 2008* at 286–88 for additional discussion of Resolution 1820. The press statement also summarized the key elements of Resolution 1888, which the statement explained:

- Calls for the appointment of a Special Representative to lead, coordinate, and advocate efforts to end conflict-related sexual violence against women and children.

- Requests the Secretary General identify a team of experts to assist governments to prevent conflict-related sexual violence and address impunity, including through strengthening civilian and military justice systems and enhancing national capacity, responsiveness to victims and judicial capacity.
- Requests that UN peacekeeping missions provide information about the prevalence of sexual violence when reporting to the Security Council.
- Requests that UN Security Council Sanctions Committees consider patterns of sexual violence when adopting or targeting sanctions.
- Requests that the Secretary-General identify women's protection advisors in peacekeeping operations in countries where appropriate.
- Calls for the Secretary-General to submit annual reports on the implementation of both this resolution and 1820, as well as for more systematic reporting on conflict-related sexual violence.

Secretary Clinton, who chaired the meeting at which the Security Council unanimously adopted the resolution, stressed its significance in a statement to the Council. Secretary Clinton's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2009/september/130054.htm*.

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. . . [W]e're here to address an issue that has received too little attention, not only in these chambers over the last six decades, but I would suggest in all of our halls of government across the world. It is an important issue that goes to the core of our commitment to ensure the safety of the United Nations member-states and their citizens.

Under the UN Charter, the 15 members of this Council bear primary responsibility for maintaining international peace and security. Now, satisfying that responsibility [impels] us to protect

the lives and physical security of all people, including the women who comprise half the planet's population. This responsibility is particularly acute in circumstances where peace and stability are challenged. Even though women and children are rarely responsible for initiating armed conflict, they are often war's most vulnerable and violated victims.

The resolution we passed today represents a step forward in our global efforts to end violence perpetrated against women and children in conflict zones, and it builds on two prior Security Council resolutions: Resolution 1325, which called on all parties in conflicts to respect women's rights and increase their participation in peace negotiations and post-conflict reconstruction efforts; and Resolution 1820, adopted last year, which affirms the ambitions set out in 1325, and establishes a clear link between maintaining international peace and security, and preventing and responding to sexual violence used as a tactic of war to target civilians. Yet despite these actions by the United Nations Security Council, violence against women and girls in conflict-related situations has not diminished; in fact, in some cases, it has escalated.

Now, reading the headlines, one might think that the use of rape as a tactic of war only happens occasionally, or in a few places, like the Democratic Republic of the Congo or Sudan. That would be bad enough, but the reality is much worse. We've seen rape used as a tactic of war before in Bosnia, Burma, Sri Lanka, and elsewhere. In too many countries and in too many cases, the perpetrators of this violence are not punished, and so this impunity encourages further attacks.

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The dehumanizing nature of sexual violence doesn't just harm a single individual or a single family or even a single village or a single group. It shreds the fabric that weaves us together as human beings, it endangers families and communities, erodes social and political stability, and undermines economic progress. We need to understand that it holds all of us back. Also, our failure as an international body to respond concretely to this global problem erodes our collective effectiveness. So we must act now to end this

crisis not only to protect vulnerable people and promote human security, but to uphold the legitimacy of this body.

Now, the international community has made progress. Many peacekeeping mandates now include Security Council requests for strengthened measures to prevent and respond to sexual violence. In Chad and Sudan, UN peacekeepers have clear instructions underscoring their responsibility to protect local populations against sexual and gender-based violence.

And I recently met with the UN troops in Liberia, who provide an excellent example of the steps a UN mission can take, Mr. Secretary General, both through its own actions and in cooperation with the host government to prevent violence against women and girls. It is also very important that in Liberia, the United Nations mission includes an all-women police unit from India. That all-women police unit has helped to motivate more Liberian women to become police officers, and the mission has launched a joint UN-Liberian campaign against rape.

Now, these steps are essential, but alone they're not sufficient. So this resolution identifies specific steps that the United Nations and member-states can and should take to improve the UN response to sexual violence committed during situations of armed conflict. It calls on the Secretary General to appoint a special representative to lead, coordinate, and advocate for efforts to end sexual violence. We expect that person to engage at high levels with civilian and military leaders to spearhead the UN's activities on this front.

It also calls on the Secretary General to rapidly deploy a team of experts to work with governments to strengthen the rule of law, address impunity, and enhance accountability while drawing attention to the full range of legal venues that can be brought into play, including domestic, international, and mixed courts that bring local and international judges and prosecutors together to strengthen local justice systems.

We must also recognize that ending conflicts outright is the most certain path to ending sexual violence in conflict. So pursuing peace and successful post-conflict transitions should be our highest priority. In states where conflict is taking place and those that are moving beyond it, local police must receive better training, the rule

of law must be strengthened, and survivors must be ensured full access to justice and protection throughout the judicial process. We envision that this team of experts called for in this resolution will help us strengthen initiatives like those.

Now, beyond the measures outlined in the resolution, the Security Council should take additional steps. Protecting women and children should be a critical priority for all troops who wear the blue helmet. To reflect this, new and renewed peacekeeping mandates should include language condemning sexual violence and giving further guidance to peacekeeping missions to work with local authorities to end it.

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In his speech at the General Assembly last week, President Obama challenged nations of the world to assume responsibility for the challenges confronting us. Certainly, the challenge of sexual violence in conflict cannot and should not be separated from the broader security issues confronting this Council. It is time for all of us to assume our responsibility to go beyond condemning this behavior, to taking concrete steps to end it, to make it socially unacceptable, to recognize it is not cultural; it is criminal. And the more we say that over and over and over again, the more we will change attitudes, create peer pressure, and the conditions for the elimination of this violation.

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Also on September 30, 2009, President Obama issued a statement welcoming the Security Council's action. President Obama's statement is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00761, p. 1.

On October 2, 2009, Ambassador-at-Large for Global Women's Issues Melanne Verveer and Ambassador-at-Large for War Crimes Issues Stephen Rapp briefed the press on Resolution 1888. Among other issues, Ambassador Rapp addressed questions about why the International Criminal Court is not the appropriate venue to address the issue of sexual violence in armed conflict and the role of the panel of experts the resolution requested the Secretary-General to convene.

Excerpts follow from Ambassador Rapp's responses concerning those issues and Ambassador Verveer's statements stressing the importance of prosecuting perpetrators of sexual violence in armed conflict. The full text of the press briefing is available at *www.state.gov/s/gwi/rls/rem/2009/130211.htm*.

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QUESTION: . . . [W]hy is the ICC . . . not the right venue for this kind of thing to be done? And [is the United States] at all hamstrung by your non-membership in the ICC, at least in terms of influence?

AMBASSADOR RAPP: Well, first of all, keep in mind that it is indeed within the jurisdiction of the ICC to deal with situations like those in the DRC. But there can only be . . . a relatively handful of cases brought in any place. And in the principle of the ICC is that—the preference is the cases be brought at the national level. And the ICC only becomes involved with high-level individuals, and only those cases that the state doesn't have the capacity or the will to handle itself. In the DRC, the ICC has indicted four individuals, three of whom are now in custody. Thomas Lubanga is on trial. It's part of the allegations and the evidence that's presented against him that he was involved in sexual violence, though the case deals with child soldiers.

There are two other cases that are coming up for trial very soon—Katanga and Ngudjolo, both involved in the DRC and accused of the crime of sexual violence. And there is a fourth case of an individual, Bosco Ntaganda, who is still at large.

In terms of our policy with the ICC, that's under review in our government. We're actively involved in that. . . . [I]n the second term of President Bush, the United States began to take, I think, an approach of greater cooperation with the ICC. As you recall, we didn't oppose the referral of the Darfur situation. And both the last administration and this . . . have opposed any effort to defer the prosecutor's investigation and indictment there that does involve allegations of sexual violence against individuals in Darfur. We'll see in the future, whether it's possible, as we develop our

policy, that we can work constructively with the ICC on cases in other places where it has jurisdiction.

But that said, if it indicts four or five people in the Congo, that alone won't solve the problem. There are all these mid-level commanders and others whose units are committing these acts of gender violence. There are the men themselves that are responsible for those acts. That takes a major push within the national system and with international assistance if you're really going to have accountability. It needs to be a continuum. And there's no problem with us, at the moment, consistent with the work of the ICC, working at that level to develop a response.

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QUESTION: Just from your experiences with the Sierra Leone case, [what] would this type of panel of experts . . . do specifically right now and where?

AMBASSADOR RAPP: . . . [M]any of these courts were preceded by panels or experts that came in and talked about what the problems were and what needed to be done. Then once they come back, it'll be necessary to determine whether, for instance, what happened in Sierra Leone occurred, where there was then a partnership between the government and the United Nations to establish a court that would include international judges and prosecutors, but also include national people.

It may be that that . . . need not be done through a United Nations agreement with the government. It could be done by various countries working together with the Congolese Government to establish, say, a mixed tribunal, where lots of Congolese people could be involved, but also international judges and lawyers and prosecutors and police and security officials could be seconded or detailed in there to assist the process. We want to do it in a cost-effective way.

One of the things you gain with a mixed tribunal—you gain international expertise, but you also gain a measure of independence. . . . If you bring in international players, you can provide a greater level of independence and less of a perception, for instance, of victor's justice.

And so that's one of the options here. But keep in mind whenever you bring internationals in, there's going to come a day when they leave, and you don't want . . . everything to go back the way it was. And that's why it's so important to partner with the local community to transfer the skills, to find in the legal tradition the talent and everything that exists, as I've seen in Africa, everywhere, the strengths that you can build on that would allow you to leave a legacy that will prevent these problems from happening again.

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AMBASSADOR VERVEER: And let me just add that it is absolutely critical in all of these cases, regardless where they occur, that prosecutions take place . . . . Because without that deterrent, we're not going to see the kind of change that we need to see around the world. So it's critically important not just that women who are traumatized and physically harmed in significant ways . . . are enabled to heal but also understand why they need to cooperate with justice to bring these kinds of cases to justice. . . . And that will only be the case to the extent that all the things that have been discussed here in terms of a justice system work their way through, that there is accountability and that the people who perpetrate these crimes are prosecuted for them.

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(ii) Resolution 1889

On October 5, 2009, the Security Council adopted Resolution 1889, which elaborated upon Resolution 1325 (2000) in calling for wide-ranging measures to strengthen women's participation in peace processes. U.N. Docs. S/RES/1889 and S/RES/1325. The resolution followed the Security Council's adoption of Resolution 1888, discussed in B.2.b.(2)(i) *supra*, concerning women and girls in situations of armed conflict. Excerpts follow from the statement Ambassador Rosemary A. DiCarlo, U.S. Alternative Representative to the United Nations for Special Political Affairs, made to the Security Council after adoption of Resolution 1889, expressing strong support for it and stressing the need for implementation of Resolution 1325.

The full text of Ambassador DiCarlo's statement is available at *http://usun.state.gov/briefing/statements/2009/130272.htm*.

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The Secretary-General notes in his recent report [U.N. Doc. S/2009/465] that, while much has been done in response to Resolution 1325 in the nine years since its adoption, armed conflict continues to have a devastating impact on women and girls—all too often leaving them wounded, traumatized, sexually assaulted, socially and economically marginalized or without political power. The United States is in complete agreement with the Secretary-General on a key point: Member States must renew their commitment to Resolution 1325 and intensify their efforts to implement its provisions. We strongly support the Secretary-General's proposals for action and Resolution 1889 which we adopted today.

. . . [W]e have heard many times in this chamber that more women should be included in peace processes and post-conflict deliberations. If a sustainable peace is to be achieved in any post-conflict situation, a peace agreement must take into account the concerns of those most harmed by conflict. But more often than not, women are excluded from peace negotiations and peacebuilding efforts. In fact, the United Nations Development Fund for Women points out that since 1992 only 2.4 percent of signatories to peace agreements were women and women's participation in negotiating delegations averaged about 7 percent.

Women have often led the call for peace in conflict-torn societies. Let us recall the example of Liberia, whose grassroots women's organizations had a direct and visible impact on peace negotiations and post-conflict reconstruction efforts. The activism of these groups—on behalf of the welfare of the average citizen—helped to break the impasse produced by leaders of warring factions in the struggle for political dominance. But to do so, these Liberian women had to travel to Accra, Ghana, and demonstrate outside the seat of negotiations. Women should not have to go to such great lengths to be heard. The Secretary General rightly notes that

Member States should ensure that women participate in decision making. And he adds that that the international community should pursue a strategy to ensure women's participation in all peace processes, including by providing appropriate training and capacity building programs toward this end.

. . . Resolution 1325 emphasizes the responsibility that all States have to put an end to impunity and prosecute those responsible for crimes against humanity and war crimes, including those relating to sexual violence and other assaults against women and girls. Resolution 1820, of 2008, established a clear link between maintaining international peace and security and preventing and responding to the use of sexual violence as a weapon of war.

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. . . We join others in the call for more systematic UN reporting on women's participation and inclusion in peacebuilding and planning and we request the Secretary-General to continue to appoint gender advisers to UN missions and to develop a set of indicators to track implementation of Resolutions 1325 and 1889.

. . . [T]he United Nations must do all it can to keep the issue of women, peace and security in the spotlight, especially as we look to the 10th anniversary of Resolution 1325 and the creation of a composite gender entity, an entity that the United States strongly supports. [Editor's note: For discussion of the composite gender entity, see Chapter 7.B.1.b.] We must all work together to ensure that half of the world's population is accorded fully equal rights and fully equal opportunities and we must work to end violence against women that destroys the very fabric of societies and hinders stability of lasting peace.

c. Human Rights Council

(1) Integration of a gender perspective into the Human Rights Council's work

On September 28, 2009, the U.S. delegate addressed the Human Rights Council during its annual discussion on

integrating a gender perspective into the Council's work, particularly the Council's universal periodic reviews of countries' human rights records. The U.S. statement, excerpted below, addressed the U.S. commitment to promoting human rights for girls and women. The full text of the statement is available at *www.state.gov/s/l/c8183.htm*.

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The U.S is deeply committed to the cause of making human rights a reality for millions of oppressed people around the world. Of particular concern to our Administration is the plight of women and girls, who comprise the majority of the world's unhealthy, unschooled, unfed, and unpaid. If half of the world's population remains vulnerable to economic, political, legal, and social marginalization, our hope of advancing democracy and prosperity will remain in serious jeopardy.

Secretary Clinton has noted, "[s]ocieties where women are accorded their rights and provided with opportunities for basic services—education, health, gainful employment—make progress and expand prosperity."

Earlier this month, the United States indicated its strong support for the "System-Wide Coherence" Resolution adopted at the UNGA. . . .

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(2) Human Rights Council resolution on elimination of discrimination against women

On October 2, 2009, the Human Rights Council adopted a resolution on the elimination of discrimination against women. Among other things, the resolution requested the High Commissioner for Human Rights to produce a study on women's equality under the law that would recommend ways to promote elimination of laws discriminating against women. U.N. Doc. A/HRC/RES/12/17. The United States cosponsored the resolution, which Mexico and Colombia introduced, and

made a statement explaining the U.S. position. The U.S. statement, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

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We believe that the Council should create a new mechanism to address this very important issue, and we hope that this resolution is the beginning of a process that will result in its creation. We would have preferred a stronger mandate in this resolution.

The resolution reinforces the obligation of States to take measures that are appropriate to eliminate discrimination against women. It calls upon States to revoke any remaining laws that discriminate on the basis on sex and to remove gender bias in the administration of justice. It stresses the need to promote equal pay for equal work or for work of equal value, which the United States interprets as calling for non-discrimination in terms of remuneration.

We urge the Council to continue to take strong action to promote and protect the rights of women.

3. Ethnicity

On April 2, 2009, Kyle Scott, Chargé d'Affaires to the Permanent Council of the Organization for Security and Cooperation in Europe ("OSCE"), made a statement to the OSCE in connection with International Roma Day. In his statement, excerpted below, Mr. Scott expressed the U.S. commitment to protecting and promoting the human rights of Roma people. The full text of Mr. Scott's statement is available at *http://osce.usmission.gov/april2009.html*.

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. . . Despite important progress that has been made in the last decade, too many Roma still live on the margins of society.

Roma continue to experience racial profiling, violence, discrimination, and other human rights abuses. Too often, they lack identity documents or citizenship papers, which exclude them from voting, social services, education, and employment opportunities.

During the last year, the participating States and the OSCE have given much-needed attention to the situation of Roma, including through the Supplementary Human Dimension Meeting last July, the visits by the High Commissioner on National Minorities and the ODIHR [OSCE Office for Democratic Institutions and Human Rights] to Italy, and in our Ministerial Decision 6/08 adopted in Helsinki. . . .

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Unfortunately, as Council of Europe Human Rights Commissioner Thomas Hammarberg observed at the 2007 HDIM [Human Dimension Implementation Meeting], even after the genocide of Roma, "there was no genuine change of attitude among the majority population towards the Roma." Today, in some of OSCE participating States, local officials continue to describe Roma as "unadaptable," routinely using a Nazi-era term.

Governments have a special responsibility to ensure that minority communities have the tools of opportunity that they need to succeed as productive and responsible members of society. The United States is deeply concerned about the escalation of anti-Roma hate crimes in some OSCE participating States. In this regard, we would welcome information from the Italian delegation regarding efforts to prosecute individuals for participating in mob attacks on Romani camps in 2007 and 2008, when Italian police provided protection to camp residents. We also support efforts by the Hungarian government to prosecute those responsible for recent violent attacks against Roma . . . .

In closing, the United States urges OSCE participating States to honor their commitment—first made a decade ago at the 1999 Istanbul Summit—to ensure that national laws and policies fully respect the rights of Roma. Furthermore, governments must commit to effectively enforcing these laws.

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4. Religion

a. Designations under the International Religious Freedom Act

On January 16, 2009, the Secretary of State redesignated Burma, China, Eritrea, Iran, North Korea, Saudi Arabia, Sudan, and Uzbekistan, respectively, as a "country of particular concern" under § 402(b) of the International Religious Freedom Act of 1998 (Pub. L. No. 105–292), as amended. The eight states were so designated "for having engaged in or tolerated particularly severe violations of religious freedom." 74 Fed. Reg. 21,843 (May 11, 2009). *See Cumulative Digest 1991–99* at 918–24 for general background on the statutory framework for such designations, as well as the Presidential measures toward designated countries the statute discusses.

b. Annual Report on International Religious Freedom

On October 26, 2009, the Department of State released the 2009 Annual Report on International Religious Freedom, covering the period July 1, 2008 through June 30, 2009, and transmitted the report to Congress pursuant to § 102(b) of the International Religious Freedom Act of 1998 (Pub. L. No. 105-292), as amended, 22 U.S.C. § 6412(b). The report is available at *www.state.gov/g/drl/rls/irf/2008*. In a press briefing on the release of the report, Secretary of State Clinton explained that the report examines "how governments in 198 countries and territories are protecting or failing to protect religious freedom" and noted the 2009 report's "special focus on efforts to promote interfaith dialogues and tolerance." Secretary Clinton stated:

> The right to profess, practice, and promote one's religious beliefs is a founding principle of our nation. . . . It is the first liberty mentioned in our Bill of Rights, and it is a freedom guaranteed to all people in the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights.

> I want to underscore that, because this is not just an American value. This was agreed to be a universal value. . . .

Further excerpts below from Secretary Clinton's statement provide U.S. views on how best to promote religious freedom. The full text of Secretary Clinton's statement is available at *www.state.gov/secretary/rm/2009a/10/130937.htm*.

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I obviously believe that our country has been strengthened by its long tradition of religious pluralism. From the largest denominations to the very smallest congregations, American religious bodies and faith-based organizations have helped to create a more just and compassionate society. Now, some claim that the best way to protect the freedom of religion is to implement so-called anti-defamation policies that would restrict freedom of expression and the freedom of religion. I strongly disagree. The United States will always seek to counter negative stereotypes of individuals based on their religion and will stand against discrimination and persecution.

But an individual's ability to practice his or her religion has no bearing on others' freedom of speech. The protection of speech about religion is particularly important since persons of different faiths will inevitably hold divergent views on religious questions. These differences should be met with tolerance, not with the suppression of discourse.

Based on our own experience, we are convinced that the best antidote to intolerance is not the defamation of religion's approach of banning and punishing offensive speech, but rather, a combination of robust legal protections against discrimination and hate crimes, proactive government outreach to minority religious groups, and the vigorous defense of both freedom of religion and expression.

So it is our hope that the International Religious Freedom Report will encourage existing religious freedom movements around the world and promote dialogue among governments and within societies on how best to accommodate religious communities and protect each individual's right to believe or not believe, as that individual sees fit.

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Following Secretary Clinton's remarks, Michael H. Posner, Assistant Secretary for Democracy, Human Rights, and Labor, answered questions from the press. As excerpted below, Mr. Posner addressed a question seeking greater clarification on the U.S. position concerning debates over freedom of religion and expression at the United Nations. Mr. Posner's comments are available in full at *www.state.gov/g/drl/rls/rm/2009/130948.htm*.

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ASSISTANT SECRETARY POSNER: There are really two separate issues that have been raised and sometimes conflated at the United Nations. I was part of the delegation last month at the Human Rights Council, where we actually joined with Egypt in promoting a resolution on freedom of expression that did, in fact, meet our concerns. [Editor's note: *See* section A.3.a.(1) *supra*.] There was a debate in the context of that about how to deal with issues of defamation, and we agreed after much negotiation, much discussion, that there is a legitimate subject as to whether or not an individual, an individual of any particular faith, can be defamed and whether that kind of harassment or discrimination is to be condemned. It clearly is.

There's a second resolution that was promoted—that's been promoted by the Islamic Conference at the UN, which is a broader defamation of religion resolution. . . . And it goes, we think, too far in restricting free speech—the notion that a religion can be defamed and that any comments that are negative about that religion can constitute a violation of human rights, to us, violates the core principle of free speech which is so central to us in our own system.

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ASSISTANT SECRETARY POSNER: . . . [W]e're trying to keep the two issues separate, to be clear . . . that there are limits to free expression, and there are certainly concerns about people targeting individuals because of their religious belief or their race or their ethnicity. But at the same time, we're also clear that a resolution

broadly speaking that talks about the defamation of a religion is a violation of free speech.

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c. Defamation of religions

(1) U.S. response to UN Office of the High Commissioner for Human Rights

On August 12, 2009, the United States submitted a written response to the UN Office of the High Commissioner for Human Rights, excerpted below, for the High Commissioner's report concerning states' implementation of Human Rights Council Resolution 10/22 of March 26, 2009. U.N. Doc. A/HRC/RES/10/22. The resolution, which the United States voted against, was adopted by 23 votes in favor and 11 opposed, with 12 abstentions, and requested the High Commissioner to report to the Human Rights Council at its twelfth session. The U.S. submission attached the 2007 and 2008 U.S. submissions to the Secretary-General concerning defamation of religion, which are discussed in *Digest 2007* at 324–32 and *Digest 2008* at 288–90. The full text of the 2009 U.S. submission is available at *www.state.gov/s/l/c8183.htm*.

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As stated in its previous submissions to the United Nations, the United States does not believe the concept of "defamation of religions" is consistent with international human rights law. We believe the resolution seeks unacceptable limitations on speech and that such measures do not properly address the underlying concerns emphasized in the text. . . .

The United States understands the primary concern of the resolution to be the negative stereotyping of religious groups, particularly of minority groups, and the contribution of such stereotypes to disrespect and discrimination. The United States shares concerns

about the impact of negative stereotypes, and believes that such stereotyping, particularly when promoted by community, religious, or government leaders, contributes to disrespect, discrimination, and in some cases, to violence.

In his June 4, 2009 speech in Cairo, President Obama stressed that the United States must fight against the negative stereotyping of religion when he stated, "I consider it part of my responsibility as President of the United States to fight against negative stereotypes of Islam wherever they occur." The United States believes that States have the tools to fight these problems at their disposal, and that the best way for governments to address these issues is to develop effective legal regimes to address acts of discrimination and bias-inspired crime; to condemn hateful ideology and proactively reach out to all religious communities, especially minority groups; and to vigorously defend the rights of individuals to practice their religion freely and exercise their freedom of expression.

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Vigorously Defend the Freedoms of Religion, Belief, and Expression

Among the founding principles of the United States is that government should make no law prohibiting the freedom of religion, or abridging the freedom of speech. We strongly believe that protecting freedom of religion and freedom of expression promotes mutual respect and pluralism, and is essential to human dignity, robust civil society, and political and economic development. We firmly believe that all people should be free to choose and practice their faith based upon the persuasion of the mind and heart. Religion, and the freedom of religion, plays an important societal role in many countries, including our own, and is also crucial to the creation of tolerant and respectful societies in which negative stereotypes will carry little weight or meaning.

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As President Obama stated in Cairo, "Suppressing ideas never succeeds in making them go away." Rather than seek restrictions to expression to deal with intolerance and stereotyping, the United

States advocates for more robust governmental outreach policies with respect to racial, ethnic, and religious groups, such as those outlined above, as well as the enforcement of appropriate legal regimes that deal with discriminatory acts and hate crimes.

The President has sought a new beginning between the United States and Muslims around the world, and seeks to collaborate with proponents of this resolution, and with any country that wishes to join us, in an effort to address concerns of stereotyping, discrimination, and violence. In President Obama's words, "Our problems must be dealt with through partnership; our progress must be shared."

(2) General Assembly resolution

On November 12, 2009, the United States voted against a resolution on combating defamation of religion in the General Assembly's Third Committee. John F. Sammis, U.S. Deputy Representative to ECOSOC, delivered a statement explaining the U.S. vote. The U.S. statement, excerpted in major part below, is available at *http://usun.state.gov/briefing/statements/2009/131923.htm*. The General Assembly adopted the resolution on December 18, 2009, by a vote of 80 states in favor, 42 against, and 61 abstaining. U.N. Doc. A/RES/64/156.

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The United States has long had concerns with the concept of defamation of religions, but we have tried, over the course of the last year in Geneva and New York, to articulate an alternative vision to address what we view as the root concerns behind this resolution. We believe that the increasingly splintered views on this resolution, both here and in Geneva, suggest that while a majority of member states may recognize that the underlying issues are extremely important, those issues are not adequately addressed in this resolution, and require careful consideration. We were pleased that we had the opportunity at the last Human Rights

Council session, working in collaboration with our colleagues from Egypt and over 50 co-sponsors from all regions, to come to consensus on another divisive and connected issue, freedom of expression. We regret the early vote on the resolution this year, and more importantly, regret that there has not been an opportunity to address this problem in a spirit of consensus.

"So long as our relationship is defined by our differences," our President noted in June, "we will promote conflict rather than cooperation, and continue to sow the cycle of suspicion and discord."

United States concerns with the concept of the "defamation of religions," and with how it seeks and has resulted in unacceptable restrictions on freedom of religion, and freedom of thought and conscience, are well known. But I would like to emphasize a few points here:

- Freedom of religion is a foundation of civil society; it is a human right, a social good, a source of stability, and a key to international security. The United States believes it is the duty of all governments to respect the ability of every individual to profess and practice his or her own faith, and we applaud the efforts of so many UN Member States that are actively doing so. We recognize, and deeply respect, that religion is a global phenomenon, a key source of identity, and a powerful motivating and mobilizing force around the world.
- We have also seen first hand the discrimination and violence that can be exacerbated by ignorance, intolerance and fear of persons with different religious faiths. We join the call of leaders from all parts of the world in saying that we believe it is incumbent upon governments to model respect and welcome diversity of religious belief.
- We also believe that governments have the tools to address intolerance at their disposal, and that these include a combination of robust legal protections against discrimination and hate crimes, proactive government outreach to minorities—including educating them on their means of redress, and the

vigorous defense of freedom of expression and religion without discrimination.

- We have a good deal to learn from one another about how best to foster interreligious cooperation and dialogue. There are hundreds of thousands, if not more, examples of diverse communities living in peace and partnership in all regions of the world, and we hope that the United Nations will help to give voice to these stories.
- Freedom of expression and freedom of religion are rights enshrined in the Universal Declaration of Human Rights. As many here have recognized in their own countries, we strongly believe that robust protections of speech and free and open dialogue are also an important part of the solution. When held up to the bright light of public scrutiny, hateful ideas are shown for what they are—lacking merit, and based on fear and ignorance. We believe that respectful and welcoming societies are built by the people on the basis of open dialogue and are informed by their experiences; they cannot be imposed by the government's laws about who can say what when.
- We also believe that the United Nations must remain faithful to the central tenet of human rights law. Rights are held by individuals, not by governments or other institutions, and not by religions. We should embark on a conversation on how to build mutual respect and tolerance among the individuals who practice different religions, but in doing so should not lose sight of our overall goal to realize our dream of universal human rights for all individuals, including the rights to both freedom of expression and freedom of religion.

The United States will vote against this resolution because we can not agree that prohibiting speech is the way to promote tolerance, and because we continue to see the "defamation of religions" concept used to justify censorship, criminalization, and in some cases violent assaults and deaths of political, racial, and religious minorities around the world. Contrary to the intentions of most Member States, governments are likely to abuse the rights of individuals in the name of this resolution, and in the name of the

United Nations. We are deeply committed to addressing concerns of intolerance and discrimination and are eager to work with the cosponsors and the rest of this body to address the root concerns behind the resolution in the spirit of consensus. Until then, however, we urge others to join us in voting no.

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d. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

On September 30, 2009, Githu Mugai, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, reported to the Human Rights Council. Sarah Cleveland, State Department Counselor on International Law, delivered a statement on behalf of the United States. Ms. Cleveland's comments on intolerance and discrimination are excerpted below, and the full text of her statement is available at *www.state.gov/s/l/c8183.htm*. Ms. Cleveland's comments on other aspects of the report are discussed in B.1.d.(2) *supra*.

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The United States is committed to the fight against discrimination, intolerance, and xenophobia based on race, religion, or otherwise, and we appreciate the consideration of these issues undertaken by the Rapporteur. . . . [M]y government is strongly committed to religious freedom and has condemned the use of negative and derogatory stereotypes and discrimination and/or discriminatory policies. We recognize that such stereotyping and discrimination affects individuals of all faiths and races, and express our strong condemnation of the types of such intolerance provided in the report.

As the Special Rapporteur noted, we recognize that all religious communities are affected by acts of intolerance and discrimination and believe these instances should be acknowledged and addressed.

As we have pledged at the highest levels, we are committed to fighting against such intolerance and discrimination.

The United States shares the view of the Special Rapporteur that these incidents are rooted in intolerance, and that to tackle the root cause of this problem requires a broad set of policy measures, including in the areas of intercultural dialogue and education. Similarly, as we have learned through our own national experience, the Rapporteur's observation that more speech empowers and gives voice to minorities, educates people about cultural differences, increases acceptance, and is ultimately the strategic response to hate speech was particularly resonant.

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5. Disabilities

On July 30, 2009, the United States signed the UN Convention on the Rights of Persons with Disabilities ("Convention"). In remarks at the signing of the Convention, excerpted below, Ambassador Susan Rice, U.S. Permanent Representative to the United Nations, and White House Senior Advisor Valerie Jarrett described U.S. views on the treaty. The full text of their remarks is available at *http://usun.state.gov/briefing/statements/2009/july/126836.htm*. *See also* the statement of Secretary for Health and Human Services Kathleen G. Sebelius, available at *www.hhs.gov/news/press/2009pres/07/20090730a.html*. For background on the negotiation and adoption of the Convention, see *Digest 2002* at 283; *Digest 2005* at 320–21; and *Digest 2006* at 382–83.

Ambassador Rice

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This Treaty . . . is the first new human rights convention of the 21st century adopted by the United Nations and further advances the

human rights of the 650 million people with disabilities worldwide. It urges equal protection and equal benefits under the law for all citizens, it rejects discrimination in all its forms, and calls for the full participation and inclusion in society of all persons with disabilities.

The United States is very pleased to join the 141 other countries that have signed this Convention in pursuit of a more just world. President Obama will soon submit it to the Senate for its advice and consent.

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We all still have a great deal more to do at home and abroad. As President Obama has noted, people with disabilities far too often lack the choice to live in communities of their own choosing; their unemployment rate is much higher than those without disabilities; they are much more likely to live in poverty; health care is out of reach for far too many; and too many children with disabilities are denied a world-class education around the world. Discrimination against people with disabilities is not simply unjust; it hinders economic development, limits democracy, and erodes societies.

These challenges will not disappear with the stroke of a pen. Our work is not complete until we have an enduring guarantee of the inherent dignity, worth, and independence of all persons with disabilities worldwide. . . .

* * * *

Ms. Jarrett

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. . . This extraordinary treaty calls on all nations to guarantee the rights . . . afforded under the Americans with Disabilities Act, urges equal protection and equal benefit before the law for all citizens, and reaffirms the inherent dignity, worth, and independence of all persons with disabilities worldwide.

It is fitting that we are signing this Convention just a few days after the 19th anniversary of the Americans with Disabilities Act. Due in large part to the ADA, we have made great progress. But as

the President said last Friday, and as the Ambassador just said, we are still not satisfied. We have much work to do.

Today . . . I am pleased to announce the creation of a new, senior level disability human rights position at the State Department. This individual will be charged with developing a comprehensive strategy to promote the rights of persons with disabilities internationally; he or she will coordinate a process for the ratification of the Convention in conjunction with the other federal offices; last but not least, this leader will serve as a symbol of public diplomacy on disability issues, and work to ensure that the needs of persons with disabilities are addressed in international situations. By appointing the necessary personnel to lead and ensure compliance on disability human rights issues, the President reinforces his commitment to the UN Convention.

We look forward to the Senate giving swift consideration and approval to the Convention once the President submits it . . . for their advice and consent.

With this signing, we once again confirm that disability rights are not just civil rights to be enforced here at home; they are universal human rights to be promoted around the world.

On September 2, 2009, Kareem Dale, Special Assistant to the President for Disability Policy, addressed the Second Conference of States Parties to the UN Convention on the Rights of Persons with Disabilities in New York. Mr. Dale's statement, excerpted below, marked the first time the United States had participated in the conference. Mr. Dale's remarks are available in full at *http://usun.state.gov/briefing/statements/2009/september/128605.htm.*

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. . . [The Convention on the Rights of Persons with Disabilities] enlarges the circle of liberty and equality to more fully include the 650 million people around the globe—one tenth of the world's population—who live with a disability. The principles that guide the Convention are powerful ones: a respect for inherent human dignity, worth, independence, and autonomy; the rejection of

discrimination; the shield of equal protection and benefits under law; the call for full participation and inclusion in society; an insistence on equality of opportunity and accessibility; a respect for difference and an embrace of diversity.

These principles resonate profoundly in U.S. disabilities legislation. More than one in five Americans lives with a disability. The Americans with Disabilities Act of 1990 has become a bill of rights for millions of citizens, giving legal force to some of the strongest national protections against discrimination in the world. An important legislative follow-up, the Americans with Disabilities Act Amendments Act of 2008, provides even more powerful guarantees of the rights of citizens living with disabilities. . . .

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. . . [W]e turn ourselves to defend the human rights of citizens with disabilities both because it is wise and because it is just. Let our efforts serve to guarantee the inherent dignity, worth, and independence of all persons with disabilities worldwide. Let our efforts serve as an ongoing source of inspiration to all who cherish the ideals of dignity and equality. And let our efforts serve as a lasting reminder that, when we work together, old barriers can come tumbling down.

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On October 9, 2009, as excerpted below, the Department of State issued answers to frequently asked questions about the Convention. The full text is available at *www.state.gov/s/l/c8183.htm.*

WHAT IS THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES ("Convention")?

The Convention is an international treaty that sets out the obligations of States Parties to the Convention to promote, protect, fulfill, and ensure the human rights of persons with disabilities. The United Nations General Assembly adopted the Convention on December 13, 2006, and it was opened for signature on

March 30, 2007. The Convention entered into force for States Parties on May 3, 2008. . . .

WHAT DOES THE CONVENTION SEEK TO ACHIEVE?

. . . The Convention complements existing international human rights treaties, several of which have already been ratified by the United States, including the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination. . . .

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The Convention's provisions cover a number of key areas such as:

- Equality and non-discrimination
- Participation in political life and access to justice
- Freedom from torture and cruel, inhuman and degrading treatment
- Accessibility, personal mobility, and reasonable accommodation
- Health
- Education
- Employment
- Rehabilitation

At its core, the Convention seeks to ensure that persons with disabilities enjoy the same rights as everyone else and are able to lead their lives as do other individuals, if given the same opportunities.

The United States has always been a world leader in ensuring the rights of individuals with disabilities, through legislation and enforcement measures. The United States has made great progress toward the goals of inclusion, equal opportunity, full participation, independent living, and economic self-sufficiency. By becoming a party to the Convention, the United States will continue its leadership role. And by ratifying and implementing the Convention, the United States is in a position to support, assist, and encourage other States to ratify *and implement* the Convention, contributing

to verifiable improvements in foreign countries in guaranteeing to persons with disabilities equality of opportunity, non-discrimination, accessibility, and reasonable accommodation. This benefits the 650,000,000 people in the world who have a disability, including the vast number of Americans with disabilities who travel and reside abroad. Ultimately, it will be persons with disabilities, both inside and outside the United States, who will benefit from the global acceptance and implementation of this UN Convention.

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WHAT WILL THE CONVENTION REQUIRE OF THE UNITED STATES?

Once the Convention enters into force for the United States, the United States will be required to implement the obligations imposed by the Convention. The Convention contains 33 substantive articles prescribing for States Parties in some detail how internationally recognized civil, political, economic, social and cultural rights are to be interpreted and applied to prevent discrimination against persons with disabilities. By requiring States to give effect to their obligations by "appropriate measures" or by "all appropriate measures", the Convention adopts a broad and flexible approach to implementation that allows for the legal particularities of each State Party to be taken into account. The Convention describes (but does not define) persons with disabilities (Article 1), and defines discrimination and reasonable accommodation (Article 2); requires States Parties to take measures to ensure the protection and enjoyment of civil, political, and economic, social, and cultural (ESC) rights by persons with disabilities on an equal basis with others (ESC rights to be "progressively realized"); and establishes a Committee on the Rights of Persons with Disabilities (Committee) to consider initial and periodic State Party reports on the measures they have undertaken to implement the Convention.

WILL THE CONVENTION REQUIRE CHANGES TO UNITED STATES LAW?

Most provisions of the Convention, which seeks to eliminate discrimination against persons with disabilities, are consistent

with current U.S. federal legislation, which contains a vast and effective array of provisions and programs to fight discrimination against persons with disabilities. These laws include the Rehabilitation Act of 1973, as amended, the Americans with Disabilities Act of 1990, as amended, and the Individuals with Disabilities Education Act, among other laws. . . . [S]ubject to appropriate reservations, treaty ratification would *not* require changes to United States law.

WILL THE CONVENTION HAVE AN EFFECT ON THE LAWS OF THE 50 STATES AND THE DISTRICT OF COLUMBIA?

Many human rights treaties deal with subjects governed principally by state law in the United States. This Convention is different, however, as the rights and protections of persons with disabilities have largely been federalized. The United States has a broad array of federal laws, programs, and benefits designed to advance the human rights of, and eliminate discrimination against, persons with disabilities. These statutes regulate the conduct of the federal government, state and local governments, employers with 15 or more employees, places of public accommodation, and public transport, among others.

Notwithstanding the broad array of federal legislation protecting the rights of persons with disabilities, certain treaty provisions would be implemented largely by state law, including Article 12 on civil capacity, Article 14 on detention and civil commitment, and Article 23 on marriage and family relationships. To the extent that it is not clear that the laws of the 50 states and the District of Columbia are consistent with the Convention's obligations, any gaps may be addressed by a taking a reservation to the relevant treaty provision.

IF THE UNITED STATES RATIFIES THE CONVENTION, WHO OR WHAT WOULD OVERSEE OR ENFORCE THE TREATY?

Articles 31 through 40 of the Convention set out arrangements for monitoring of the Convention on both the national and international levels. At the national level, a State party must designate "one or more focal points within government for matters relating to the implementation of the present Convention." The State Party

may also, if it wishes, designate a coordination mechanism within the government to facilitate related actions under the treaty.

In addition, like other human rights treaties which the United States has ratified, the Disabilities Convention establishes an international treaty monitoring body, called the Disabilities Committee, which receives and reviews initial and periodic Reports from States Parties on how that State Party has implemented its obligations under the Convention. The Committee issues Conclusions and Recommendations with regard to the Report, which typically recommend concrete steps that the State Party can take to improve treaty implementation. These Conclusions and Recommendations, as the names suggest, are recommendations and are *not* binding on the State Party. Similarly, General Comments issued by the Committee to aid in interpretation of the treaty provide guidance but are not binding on States Parties. In short, the United States would look to its domestic laws and domestic federal agencies to ensure treaty compliance.

6. Sexual Orientation

On March 18, 2009, the United States declared its support for the UN Statement on Human Rights, Sexual Orientation, and Gender Identity. The statement of Robert Wood, Acting State Department Spokesman, concerning the U.S. action is set forth below and is also available at *www.state.gov/r/pa/prs/ps/2009/03/120509.htm.*

The United States supports the UN Statement on "Human Rights, Sexual Orientation, and Gender Identity," and is pleased to join the other 66 UN member states who have declared their support of this Statement that condemns human rights violations based on sexual orientation and gender identity wherever they occur.

The United States is an outspoken defender of human rights and critic of human rights abuses around the world. As such, we join with the other supporters of this Statement and we will continue to remind countries of the importance of respecting the human rights of all people in all appropriate international fora.

C. CHILDREN

1. Guidelines for the Alternative Care of Children

On June 15, 2009, the Human Rights Council adopted by consensus a resolution entitled "Guidelines for the Alternative Care of Children." U.N. Doc. A/HRC/11/L.13. In the resolution the Human Rights Council decided to submit the annexed Guidelines for the Alternative Care of Children ("Guidelines"), addressing the care of children who lack or risk lacking parental care, to the General Assembly for adoption. The Guidelines grew out of the Committee on the Rights of the Child's September 2005 Day of General Discussion concerning children without parental care and, among other things, were designed to promote implementation of the Convention on the Rights of the Child. *See* U.N. Doc. CRC/C/153, ¶¶ 686–89.

On June 18, 2009, the U.S. delegation presented a statement in an observer capacity on the resolution and the Guidelines. The U.S. statement, excerpted below, is available in full at *www.state.gov/s/l/c8183.htm*.

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. . . [T]he United States strongly believes in creating healthy, supportive, and safe environments in which children can thrive and grow, particularly those children who lack parental care. We welcome the spirit embodied in the Guidelines for the Alternative Care of Children and believe that the Guidelines offer useful policy orientations for the protection of children without parental care. We would particularly like to thank the Government of Brazil for taking the initiative to craft this document, as well as the group of Friends, UNICEF, and NGOs for their contributions towards these Guidelines.

We remain concerned, however, about the seemingly overbroad scope of the Guidelines, and while we appreciate efforts to come to consensus on the content of the Guidelines, we regret that the timeline for consultations prevented us from fully consulting within our government for views. In addition, we would like to underscore

the purpose and nature of the Guidelines, as stated therein, is to set out desirable orientations for policy and practice. As such, they are not obligatory or binding upon States, but rather reflect useful recommendations to shape the formation of domestic policy affecting children without parental care. In the coming months, we hope to gather more insight from our domestic agencies and work with other Member States on ways in which to further concentrate and refine these Guidelines to improve practicability.

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On November 20, 2009, the UN General Assembly's Third Committee adopted by a consensus a resolution on "Guidelines for the Alternative Care of Children." Among other things, the resolution welcomed the Guidelines as a set of orientations for policy and practice. John F. Sammis, U.S. Deputy Representative to ECOSOC, made a statement explaining the U.S. position on the resolution before the United States joined consensus. Mr. Sammis reiterated U.S. concerns about the scope of the Guidelines, stating:

> . . . In the United States, different aspects of the care of unaccompanied children are formulated locally and different approaches are used to ensure the well-being of unaccompanied children. We would like to underscore that the purpose and nature of the Guidelines, as stated therein, is to set out desirable orientations for policy and practice.
>
> Our understanding . . . is that these Guidelines are not obligatory or binding upon States, but rather reflect useful recommendations states may use as they develop domestic policy affecting children without parental care.

The full text of the U.S. statement is available at *http://usun.state.gov/briefing/statements/2009/132223.htm.* The General Assembly adopted the resolution by consensus on December 18, 2009. U.N. Doc. A/RES/64/142.

2. Child Labor and Forced Labor

On September 10, 2009, the U.S. Department of Labor released three reports on child labor and forced labor around

the world, including a list of 122 goods from 58 countries made using child labor and forced labor. Secretary of Labor Hilda L. Solis issued a statement, excerpted below, concerning the reports. That statement is available at *www.dol.gov/opa/media/press/ilab/ILAB20091111.htm*, and the reports are available at *www.dol.gov/ilab*.

Child labor and forced labor are inexcusable abuses of human rights, and these reports show that they continue to be a problem in 21st century society. We must do everything in our power to end these shameful practices.

While the United States is fundamentally opposed to the exploitation of any worker, the plight of children and adults working in forced labor is especially severe. These individuals are among the world's most vulnerable, and we have a moral duty to help and protect them.

It is also important to note that these are global challenges. All countries—including the United States—face situations of labor abuses. Allowing such practices to persist impedes the development of decent employment that can support families both in the U.S. and abroad.

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There is much we can do together to remedy this problem. The Labor Department's projects around the globe have helped rescue almost 1.3 million children from exploitive labor, offering them new hope through education and training. And, as I engage in a dialogue with my international counterparts, I will continue emphasizing the importance of eradicating forced labor and child labor. After all, ending such practices represents a global challenge, and international cooperation is essential in finding effective and lasting solutions.

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3. General Assembly Resolution on the Rights of the Child

On November 20, 2009, the United States joined consensus when the General Assembly's Third Committee adopted a resolution on the Rights of the Child. The U.S. action

reflected a shift in the U.S. position on the annual resolution, which the United States had voted against from 2001 to 2008. *See Digest 2008* at 317–18 and preceding Digests since 2000. John F. Sammis, U.S. Deputy Representative to ECOSOC, delivered a statement explaining the U.S. position. The U.S. statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2009/132225.htm.* On December 18, 2009, the General Assembly adopted the resolution without a vote. U.N. Doc. A/RES/64/146.

Mr. Chairman, the United States is pleased to join consensus on the Rights of the Child resolution. Our decision reflects our deep commitment to promoting and protecting the rights of children in our own country and around the world.

Among its notable calls, this year's resolution encourages states to protect children from sexual exploitation and human trafficking. The United States has continued to strengthen our protections for children in this area and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 contains many provisions protecting children from severe forms of human trafficking. [Editor's note: *See Digest 2008* at 119–20 for discussion of the legislation.] The United States has also taken the initiative to combat serious child exploitation issues such as child pornography and child labor.

This resolution recognizes the basic needs of children. In the United States, an extensive network of federal, state, and local programs protects children's rights on varied issues such as access to health care, foster care, and education. . . .

This year's resolution also highlights the important issues of [children's] ability to express . . . views in matters that affect them, either directly or through a representative, and their ability to participate in decisions that impact their lives. A number of American states have established offices of child advocates or ombudspersons, and others are considering establishing such offices. These child advocates provide an important vehicle through which children can express their views in crucial matters that affect them such as child custody, foster care, and juvenile justice. This resolution

also stresses the importance of the equal participation of girls. The rights of girls still require special attention, as the majority of children who do not attend primary school around the world are girls and girls around the world are still subjected to trafficking, exploitation, and sexual violence.

This resolution recognizes that the rights of children around the world still have not been fully realized. The United States views UNICEF as a key partner in our global efforts to protect children and fully supports its initiatives to improve children's health care, education, protection from violence and exploitation, and advocacy on behalf of their rights. We particularly appreciate UNICEF's actions on behalf of children in emergency situations, its efforts to eradicate polio, and its work toward achieving the Millennium Development Goals related to basic universal primary education and the elimination of gender disparity in education. As an expression of our support, the United States provides a significant amount of voluntary contributions to UNICEF each year. In addition to its work with UNICEF, the United States works through UN partners like the UN High Commissioner for Refugees and the UN Relief and Works Agency for Palestine Refugees in the Near East to further promote the protection of children.

We join consensus on this resolution today with the express understanding that it does not imply that States must become parties to instruments to which they are not a party or implement obligations under human rights instruments to which they are not a party and, by joining this resolution, we do not recognize any change in the current state of treaty or customary international law. We thank the co-sponsors for their flexibility and hope to continue working with them with regard to PP2 and OP2. [Editor's note: The two paragraphs, among other things, state that the Convention on the Rights of the Child sets the standard for children's rights, reaffirm certain paragraphs from the General Assembly's 2008 resolution on the rights of the child (U.N. Doc. A/RES/63/241), and urge non-parties to the Convention on the Rights of the Child and its Optional Protocols to join the treaty and optional protocols.] We understand the resolution's reaffirmation of prior documents to apply to those who affirmed them initially.

Today marks the 20th anniversary of the adoption of the Convention on the Rights of the Child. While the United States has signed but not yet ratified the Convention, we are a party to its Optional Protocols. Consistent with the goals of the Convention, the United States continues its domestic efforts to strengthen already existing protections for children and to pursue new and innovative ways of ensuring that the rights of children are realized. In the last 20 years, around the world, the United States showed our commitment to the underlying spirit of the Convention, through our efforts to work with the countries represented in this room to improve the lives of children everywhere. We look expectantly towards the next 20 years with the hope and strong belief that by working together, we can build upon the extraordinary progress we have already made for the world's children.

4. Child Soldiers

As discussed in section G. of this chapter, the Human Rights Enforcement Act of 2009, which President Obama signed into law on December 22, 2009, includes provisions concerning the recruitment of child soldiers. *See* Pub. L. No. 111-122, 122 Stat. 3480.

D. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, AND SIMILAR ISSUES

1. Health-related Issues

a. Access to safe drinking water and sanitation

On March 28, 2008, the Human Rights Council adopted Resolution 7/22, which decided to appoint an independent expert to study ways to clarify further human rights obligations concerning access to safe drinking water and sanitation. The resolution directed the expert to reflect the views of governments, among others, in the study and to report to the Human Rights Council. On June 3, 2009,

the United States submitted views to Independent Expert Catarina de Albuquerque. The U.S. submission stated that international human rights law does not provide a "right to sanitation," but affirmed the U.S. view that, as a matter of policy, sanitation is a "fundamental human need" that governments have a responsibility to realize for their people. The U.S. submission is provided below and is available at *www.state.gov/s/l/c8183.htm*. On July 1, 2009, the Independent Expert submitted her report to the Human Rights Council. U.N. Doc. A/HRC/12/24.

The United States takes domestic and international sanitation issues seriously and strongly supports the goal of improved sanitation. The United States likewise recognizes the importance of meeting basic sanitation needs to support human health, economic development, and peace and security.

The United States does not share the view that a "right to sanitation" exists under international human rights law. This view is informed by a review of the relevant instruments of international human rights law. Such a review demonstrates that there is no internationally agreed "right to sanitation." Neither the Universal Declaration of Human Rights (UDHR) nor the International Covenant on Economic, Social, and Cultural Rights (ICESCR) mentions sanitation. Any right to sanitation would need to specify a definition, as well as specify the obligations and duties of governments and the correlative rights of individuals that would be entailed in the creation of such a legal "right".

To say there is not a legal right to sanitation under international law does not detract from our abiding belief that sanitation is a fundamental human need, which countries as a matter of governance have a responsibility to realize for their people. A critical element of our common efforts to ensure basic sanitation around the world is the important role the international community must play in helping countries in need to accomplish this important objective. Ironically, focusing efforts on recognizing the right to sanitation is not, in our view, the most practical or effective way to improve basic sanitation globally. Seeking agreement on the scope

and nature of such a right is likely to detract from valuable, more pragmatic and effective efforts to improve sanitation around the world and shift responsibility for providing these basic services away from national governments.

As noted above, while there is no "right to sanitation" under international law, as a matter of policy and good government it is manifest that governments should take effective action to promote access to basic sanitation. At the same time, access to basic sanitation can advance the realization of certain human rights, such as the right to a standard of living adequate for the health and well-being of all individuals. UDHR, Art. 25. Basic sanitation may also be appropriate or even necessary for the furthering of certain other "economic, social and cultural rights indispensable for [one's] dignity and the free development of [one's] personality."

On October 1, 2009, the United States joined consensus when the Human Rights Council adopted a resolution on "Human rights and access to safe drinking water and sanitation." U.N. Doc. A/HRC/RES/12/8. The United States cosponsored the resolution.

b. Human Rights Council resolution on access to medicine

On October 2, 2009, the United States joined consensus on a Human Rights Council resolution entitled "Access to medicine in the context of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." U.N. Doc. A/HRC/RES/12/24. Before the Council adopted the resolution, Douglas M. Griffiths, Chargé d'Affaires, a.i., U.S. Mission to the United Nations, Geneva, delivered a statement explaining U.S. concerns about aspects of the resolution. The U.S. statement, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

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This resolution addresses an issue of tremendous importance. Improving access to medicines is an important priority for the United States. That is why President Obama has requested $63 billion over the next six years to fight global diseases. Our investments in programs to combat HIV/AIDS, malaria, TB and other diseases save millions of lives, reduce maternal and child mortality, and reflect our nation's leadership as a positive force for progress around the world. A recent example of our commitment is the President's decision to make ten percent of the U.S. H1N1 vaccine supply available to other countries, through the World Health Organization. In concert with partners, we will assist those who would not otherwise have direct access to the vaccine.

The United States has strong concerns with a number of the provisions of the resolution. The United States regrets that the resolution, in the context of human rights, has a select emphasis on issues of intellectual property and trade. There are clearly broader issues and challenges for countries related to access to medicines, including tax and tariff policies and sufficient health systems in place to support health delivery, services, and access at the national level. The United States supports the Doha Declaration on TRIPS [Trade-Related Aspects of International Property Rights] and Public Health and wishes to emphasize that nothing in this resolution is intended to or should be interpreted as altering the scope or meaning of that Declaration. [Editor's note: The Doha Declaration is WTO Doc. WT/MIN(01)/DEC/2, available through *www.wto.org/english/docs_e/docs_e.htm*, the World Trade Organization's documents database.]

In operative paragraph 2, the resolution stresses the responsibility of states to ensure access to all. The U.S. interprets this as a responsibility to be progressively realized and joins with others in aspiring toward achieving such a goal.

The resolution invites the Office of the High Commissioner for Human Rights (OHCHR) to convene an expert consultation on these issues and provide a platform for the exchange of views. If this is to be pursued, the OHCHR needs to recognize that there have been significant discussions in other UN bodies and the World Trade Organization (WTO) on these issues, including a multi-year process at the World Health Organization (WHO) by a Commission

on Public Health, Innovation, and Intellectual Property Rights that resulted in the adoption of the WHO Global Strategy and Plan of Action in 2008. [Editor's note: *See http://apps.who.int/gb/ebwha/pdf_files/A61/A61_R21-en.pdf* for the WHO strategy and action plan.] There are also a number of procedural issues related to forming an appropriately representative expert consultation. We understand that, if this invitation is accepted, the mandate is for a single consultation involving an exchange of views and a summary of the discussions provided by the Special Rapporteur.

We would also like to encourage the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to consider and focus on other areas of his mandate, those that have been more neglected. The Special Rapporteur has already devoted notable time to issues related to IP and trade; the resulting 28-page report from March of this year largely revisited issues that have already been addressed in the WTO and WHO efforts noted previously.

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2. Food

a. Human Rights Council resolution

On October 1, 2009, the United States joined consensus when the Human Rights Council adopted a resolution entitled "Follow-up to the seventh special session of the Human Rights Council on the negative impact of the worsening of the world food crisis on the realization of the right to food for all." U.N. Doc. A/HRC/RES/12/10. The U.S. statement explaining the U.S. position, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

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The United States is pleased to take the significant step of joining consensus on a resolution that discusses such an important

topic. . . . The United States is dedicated to promoting food security around the world. That is why we are committed to the Millennium Development Goal of reducing by half the proportion of people who suffer from hunger and who live in extreme poverty by 2015. The United States agrees with the sentiment in this resolution that the world food situation is a problem of profound significance and we agree with much of what is stated in this resolution, especially the need to work together to ensure greater access to safe and nutritious food.

The Universal Declaration of Human Rights sets forth the right to a standard of living adequate for health and well-being, which includes the opportunity to secure food without discrimination. The International Covenant on Economic, Social, and Cultural Rights provides for a right to an adequate standard of living for health and well-being and provides for a right to be free from hunger, which are to be realized progressively in accordance with available resources, and which means access to food should be non-discriminatory and states who have undertaken a legal obligation to progressively realize these rights should, in accordance with their available resources, aid their citizens that are the most vulnerable to hunger. While the United States is not a party to the International Covenant on Economic, Social and Cultural Rights, and by joining consensus on this resolution does not recognize any change in the current state of conventional or customary international law regarding rights related to food, we are committed to human dignity and have established numerous programs both at the state and federal levels to assist our citizens in accessing food, which are particularly important in this time of economic difficulty. . . .

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b. General Assembly resolution

On November 19, 2009, the United States joined consensus when the General Assembly's Third Committee adopted its annual resolution on the right to food. This was the first time that the United States joined consensus on the right to food

resolution at the General Assembly since the General Assembly began to consider resolutions on this topic in 2001. U.S. Adviser Craig Kuehl's statement explaining the U.S. position on the resolution, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2009/132187.htm*.

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Combating global hunger and promoting food security is a key foreign policy objective of President Obama and his Administration. At this year's "G8 Plus" Summit in L'Aquila, Italy, the United States, along with more than 25 countries and organizations, agreed on principles for a comprehensive and coordinated approach to support country-led food security strategies, and collectively pledged $20 billion over the next three years to that effort. On September 26, Secretary of State Clinton and United Nations Secretary-General Ban Ki-moon co-hosted an event entitled "Partnering for Food Security," attended by more than 130 countries, to build further support for these principles. We look forward to working together with our partners to implement these principles in-country, on the ground. The United States, along with others, has also pledged its commitment to the Millennium Development Goal of reducing by half the proportion of people who suffer from hunger and who live in extreme poverty by 2015.

These lofty goals received additional endorsement during this week's World Food Summit in Rome, where assembled nations declared their commitment to timely and sustained action, emphasized shared accountability for the development and implementation of food security strategies, and underscored the continuing importance of partnering with multilateral institutions. The United States is not a party to the International Covenant on Economic, Social and Cultural Rights, and by joining consensus on this resolution does not recognize any change in the current state of conventional or customary international law regarding rights related to food. It is our objective to achieve a world where everyone has adequate access to food, but we do not treat the right to food as a formal enforceable obligation.

We interpret this resolution's references to the right to food, with respect to States Parties to the aforementioned Covenant, in light of its Article 2(1), in which they undertake to take steps "with a view to achieving progressively the full realization" of economic, social, and cultural rights. We interpret this resolution's references to member States' obligations regarding the right to food as applicable to the extent they have assumed such obligations. And while the United States has for the last decade been the world's largest food aid donor, we do not concur with any reading of this resolution that would suggest that states have particular extraterritorial obligations arising from a right to food.

We interpret this resolution's reaffirmation of previous documents as applicable to the extent countries affirmed those documents in the first place. While we join this resolution's noting with appreciation and welcoming, respectively, work of the Special Rapporteur and the Committee on Economic, Social and Cultural Rights, we note significant disagreements with portions of their recommendatory documents, including the Special Rapporteur's October 2009 report and the Committee's General Comment No. 12.

The United States is committed to international trade liberalization and to achieving an ambitious and balanced conclusion to the World Trade Organization's (WTO) Doha Round negotiations. By joining consensus on this resolution, we support the new market opening that can be achieved through international trade agreements, including the Doha Round, which in turn can generate the economic growth necessary to spur development. At the same time, we wish to clarify that this resolution will in no way undermine or modify the commitments of the United States or any other government to existing trade agreements or the mandates of on-going trade negotiations.

Similarly, the United States wishes to reiterate its view that the implementation of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) supports comprehensive approaches to food security by establishing the necessary incentives for research and development of new plant varieties and investment in biotechnology innovations that can address the challenges faced by farmers and agricultural systems. By joining consensus on this resolution, we support countries' continued implementation

of the TRIPS Agreement, which provides for patent and plant variety protection systems that generate many benefits for researchers, producers, consumers, and society, in the drive to promote global food security.

In this regard, we observe that the Special Rapporteur's report could have been significantly strengthened by presenting a balanced view of the benefits of adequate and effective intellectual property rights and plant variety protection for promoting important research and investment, addressing the needs of farmers, and ensuring food security.

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3. Development

a. Human Rights Council resolution

On October 1, 2009, the United States called a vote in the Human Rights Council and abstained from a resolution on the right to development. U.N. Doc. A/HRC/RES/12/23. Douglas M. Griffiths, Chargé d'Affaires, a.i., U.S. Mission to the United Nations, Geneva, delivered a statement, excerpted below, explaining the U.S. vote on the resolution. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*. Thirty-three states voted in favor of the resolution and 14 abstained.

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The United States has a longstanding and strong commitment to support development. In fact, we are the world's largest bilateral donor of overseas development assistance. Our Secretary of State, Hillary Clinton, has repeatedly emphasized that the promotion of development and human security is one of the crucial pillars of our country's foreign policy.

We reiterate our commitment to the Vienna Declaration and Programme of Action which stated that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. We believe that the creation

of conditions favorable to the development of individuals is the primary responsibility of their States, and can be accomplished through good governance and effective and transparent institutions. We also of course believe that international cooperation can assist in this regard. We believe there is still much debate about the right to development and think it is important to try to find common ground on this topic. In this vein we look forward to working with the Working Group and the High Level Task Force. The new U.S. administration is actively re-evaluating its broader views on this issue; however, at this time we do not think it would be appropriate for any criteria related to right to development to evolve into a basis for consideration of an international legal document of a binding nature. We therefore regret that we must call a vote on this resolution and abstain.

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b. General Assembly resolution

On November 19, 2009, the United States called for a vote and voted against a Third Committee resolution on the right to development. John F. Sammis, U.S. Deputy Representative to ECOSOC, delivered an explanation of the U.S. vote, which is excerpted below and available at *http://usun.state.gov/briefing/statements/2009/132188.htm*. On December 18, 2009, the General Assembly adopted the resolution by a vote of 133 in favor and 22 opposed, with 33 abstentions. U.N. Doc. A/RES/64/176.

. . . In addressing this 64th session of the General Assembly, President Obama spoke of developing a global economy that advances opportunity for all people as one of the four pillars that must fortify our future. He pledged to "integrate more economies into a system of global trade" and to "support the Millennium Development Goals", "setting our sights on the eradication of extreme poverty in our time".

These objectives align closely with the broader thrust of this resolution on the right to development. Notwithstanding, the

United States must call a vote, as we do not believe the current text of the resolution reflects a genuine consensus on how best to achieve these goals. We will be voting no. In particular, at this time, we do not consider it appropriate for any criteria related to the right to development to evolve into a basis for consideration of an international legal standard of a binding nature. We also have concerns about this resolution's numerous extraneous statements about topics that have little to do with the right to development, such as international governance, globalization, WTO negotiations, and indigenous peoples.

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4. Global Economic and Financial Crisis

On October 1, 2009, the United States joined consensus when the Human Rights Council adopted a resolution entitled "Follow up to the 10th special session of the Human Rights Council on the impact of the global economic and financial crises on the universal realization and effective enjoyment of human rights." U.N. Doc. A/HRC/RES/12/28. As excerpted below, the U.S. Mission to the United Nations in Geneva issued an explanation of the U.S. position on the resolution. The full text of the statement is available at *www.state.gov/s/l/c8183.htm*.

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The United States joins consensus on this resolution as we recognize that the current economic and financial crisis presents unique challenges to all countries around the world.

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The United States emphasizes the primary responsibility of states to protect and promote human rights. We note that the current financial crisis may pose challenges to the universal promotion and protection of human rights; however, it is nonetheless imperative that States actively work to protect the human rights of individuals

within their jurisdiction. While we all recognize that development facilitates the enjoyment of all human rights and that the global economic and financial crisis presents unique challenges to the efforts of developing countries to achieve their national development goals, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.

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5. Environmental Issues

On October 2, 2009, the United States joined consensus when the Human Rights Council adopted a resolution on "The adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights." U.N. Doc. A/HRC/RES/12/18. Douglas M. Griffiths, Chargé d'Affaires, a.i., U.S. Mission to the United Nations, Geneva, delivered a statement, excerpted below, expressing U.S. concerns about the resolution's use of the term "dangerous product" and with some of the Special Rapporteur's recommendations. The full text of the statement is available at *www.state.gov/s/l/c8183.htm*.

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The United States joined consensus on this resolution as we recognize that dumping of toxic wastes can have a negative impact on the enjoyment of human rights, including civil, political, economic, social, and cultural rights. We commend the efforts of the delegation of Côte d'Ivoire to forge consensus on this important issue. We would like to offer a point of clarity on the use of the term "dangerous products" throughout the resolution. This term is vague, as any product that is misused may be called "dangerous." We believe the intended focus of the resolution—restricted toxic or hazardous waste—is more limited than that vague term "dangerous" might suggest.

We also note that some of the recommendations in the reports of the Special Rapporteur are problematic. For example, the

recommendations are quite critical of the International Convention For the Safe and Environmentally Sound Recycling of Ships, adopted earlier this year in Hong Kong. The United States believes that Convention will significantly improve the environmental impact from ship recycling worldwide. Indeed, that Convention and the work of IMO have already positively impacted ship recycling.

The United States anticipates a lively discussion during the panel to be held during the 13th session. We encourage the relevant experts to use established international and domestic authorities in this area. The panel should not replicate the role of the Special Rapporteur in proposing measures to reduce and eradicate the negative impact on human rights resulting from movement and dumping of toxic waste, but should be a forum for debate and discussion of challenges with the goal of increasing awareness and facilitating the work of the Special Rapporteur.

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6. Protection of Migrants

a. Human Rights Council

On September 17, 2009, Brandon Prelogar, Special Advisor for Refugee and Asylum Affairs at the Department of Homeland Security, made a statement at a panel discussion on the human rights of migrants in detention centers convened during the Human Rights Council's twelfth session. Mr. Prelogar's statement, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

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The United States endorses the spirit of resolution 11/9 on the human rights of migrants in detention centers. The United States is strongly committed to the protection of human rights of all persons, including in the context of the detention of migrants. We take this responsibility very seriously and urge other States to do so.

I would like to reiterate that all States have the sovereign right to control admission to their territory and to regulate the admission and expulsion of foreign nationals. While international law permits the detention of persons who have violated a country's immigration or criminal laws, we recognize that States must respect the human rights of migrants, consistent with their obligations under international law, in particular under relevant treaties relating to human rights.

The purpose of temporarily detaining immigration violators should not be to imprison them, but to ensure public safety and remove them from the country as expeditiously as possible. As such, we call attention to the well-established principle that States have an affirmative duty to accept the return of their nationals who have been expelled from the territory of another state. The expeditious return of irregular migrants to their countries of origin is key to significantly decreasing detention periods.

Non-citizens enjoy substantial protections under the U.S. Constitution and other domestic laws, regardless of their immigration status. Additionally, many special provisions exist which afford additional protections for especially vulnerable populations like asylum seekers, refugees, victims of domestic violence, victims of particularly severe forms of trafficking, and children.

Notwithstanding that there are already many protections for migrant detainees under United States law, President Obama recently directed a review of our immigration detention system.

The Department of Homeland Security is refashioning its current detention system into a new model that is better suited to the civil detention authority of ICE Immigration and Customs Enforcement agency. It is a model that takes into account the fact that the majority of the ICE detention population is non-criminal, and that the average length of detention is just one month. It will be designed to flexibly adjust the degree and kind of custody used to match the wide variety of aliens ICE detains. In all cases, it will ensure humane treatment of detainees, including access to needed medical care and legal resources.

. . . Further, the ICE reforms underway will be seeking to maximize the availability of alternatives to detention.

The United States is a nation with a strong history of welcoming immigrants, and we are proud of this tradition. Our experience

shows the incredible value of orderly and humane migration. We are committed to protecting the human rights of migrants, and will continue to work vigorously to uphold safe and humane standards in our policies and practices.

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b. General Assembly

On November 12, 2009, the United States joined consensus when the Third Committee adopted a resolution on the protection of migrants. John F. Sammis, U.S. Deputy Representative to ECOSOC, delivered a statement explaining the U.S. position on the resolution. The statement reiterated some of the points the U.S. delegation made during the Committee's consultations on the draft resolution and was substantially similar to U.S. explanations of position concerning previous General Assembly resolutions on the protection of migrants. The statement is available at *http://usun.state.gov/briefing/statements/2009/131924.htm. See also Digest 2008* at 338–39. The General Assembly adopted the resolution without a vote on December 18, 2009. U.N. Doc. A/RES/64/166.

E. INDIGENOUS ISSUES

On September 28, 2009, the United States welcomed the report to the Human Rights Council of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya. *See* U.N. Doc. A/HRC/12/34. The U.S. representative, Ms. Courtney Musser, said the United States was

> encouraged by the Special Rapporteur's efforts to further develop communication with the Permanent Forum and the Expert Mechanism so as to maximize the participation of indigenous groups in attendance at each event. While the Special Rapporteur remains focused principally upon specific cases of alleged human rights violations, the United States appreciates the Special Rapporteur's

> continued contributions to the thematic studies of the Permanent Forum and the Expert Mechanism. . . .

Further excerpts below provide U.S. views on consultations between indigenous people and governments. The full text of the statement is available at *www.state.gov/s/l/c8183.htm*. *See also* U.S. comments on the report of the Expert Mechanism on the Rights of Indigenous People on its Second Session, A/HRC/12/32, available at *www.state.gov/s/l/c8183.htm*.

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We congratulate the Special Rapporteur for drawing attention to the fact that a lack of adequate consultation with indigenous peoples has in some countries led to anger and mistrust, which has spiraled into violence. We appreciate his pragmatic approach in suggesting that the character of consultation procedures and their object are shaped by the specific situation. My government agrees with the importance of adequate consultation to the effective implementation of government programs intended to improve the lives of all citizens, including indigenous peoples. The United States strongly supports the special rapporteur's advice to states that consultation does not accord "indigenous peoples a general "veto power" over decisions that may affect them, but rather establishes consent as the general objective of consultations with indigenous peoples." In the United States we have solicited tribal government views on how to improve the government-to-government relationship and consultation process relative to federal decision-making. It is essential to build confidence among all parties for the best public policies to emerge; the consultation process when properly carried out contributes to confidence building and the formulation of effective policy.

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F. TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

On January 22, 2009, President Obama issued Executive Order 13491, "Ensuring Lawful Interrogations," which

mandates that the Central Intelligence Agency and all other U.S. agencies conduct interrogations of individuals in custody or under the effective control of the United States, in any armed conflict, using only the techniques authorized by or listed in Army Field Manual 2-22.3 on intelligence collection. 74 Fed. Reg. 4893 (Jan. 27, 2009). *See* Chapter 18.A.5.b. for a discussion of the new order.

G. JUDICIAL PROCEDURE, PENALTIES, AND RELATED ISSUES

On December 22, 2009, President Obama signed the Human Rights Enforcement Act of 2009, which among other things requires the Attorney General to establish a section within the Department of Justice's Criminal Division to enforce laws "against suspected participants in serious human rights offenses." Pub. L. No. 111-122, 122 Stat. 3480. The statute authorizes the new section to:

(1) take appropriate legal action against individuals suspected of participating in serious human rights offenses; and
(2) coordinate any such legal action with the United States Attorney for the relevant jurisdiction.

The law defines "serious human rights offenses" to include "violations of Federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code."*

The legislation also amends the U.S. criminal statute on genocide, criminalizes the provision of material support for genocide and recruitment of child soldiers, and makes

* Editor's note: On March 30, 2010, the Department of Justice announced the establishment of the Human Rights and Special Prosecutions Section in the Criminal Division. The new section's responsibilities will include the ones the statute prescribes. A Department of Justice press release, available at *www.justice.gov/opa/pr/2010/March/10-crm-347.html*, provided details on the new section.

conforming amendments to the genocide-related grounds for inadmissibility in § 212(a)(3)(E)(ii) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(3)(E)(ii). The new law also makes the sections of the INA concerning grounds for inadmissibility, removability, and ineligibility for withholding of removal and asylum (8 U.S.C. § 1182(a)(3), 8 U.S.C. § 1227(a)(4), 8 U.S.C. § 1231(b)(3)(B)(iii), 8 U.S.C. § 1158(b)(2)(A)(iii)) applicable to offenses committed before, on, or after the date of enactment of the Child Soldiers Accountability Act of 2008. Pub. L. No. 111-122, 123 Stat. 3480; Pub. L. No. 110-340, 122 Stat. 3735. For additional background on the Child Soldiers Accountability Act, see *Digest 2008* at 312–14.

H. DETENTION AND MISSING PERSONS

On January 22, 2009, in one of his first actions after taking office, President Obama issued Executive Order 13491, "Ensuring Lawful Interrogations." 74 Fed. Reg. 4893 (Jan. 27, 2009). Among other things. the order, set forth standards and practices for interrogation of individuals in U.S. custody or control in armed conflicts and required the Central Intelligence Agency to close as quickly as possible any detention facilities as defined in the order. Chapter 18.A.5.b. provides additional details on the order.

I. RULE OF LAW AND DEMOCRACY PROMOTION

1. Rule of Law at the National and International Levels

On October 14, 2009, Laura G. Ross, Senior Adviser to the Permanent Representative at the U.S. Mission to the United Nations, addressed the Sixth Committee of the UN General Assembly on its consideration of the rule of law at the national and international levels. For the first time since the Sixth Committee added the rule of law item to its agenda, the Committee focused its debate on a sub-topic, "Promoting

the rule of law at the international level." Excerpts below from Ms. Ross's statement describe U.S. views on that sub-topic. The full text of the U.S. statement is available at *http://usun.state.gov/briefing/statements/2009/130581.htm*.

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Underlying the vast multitude of transactions and interactions that take place on a daily level, public and private, large and small, is a complex web of international law. We sometimes take for granted that international trade flourishes, international flights take off and land throughout the world, and millions of other transnational activities occur with often seamless efficiency because people and businesses and countries are complying with the rules that comprise our shared international legal framework.

We rightly rely on the tools of international dispute resolution, whether it be through diplomacy, mediation, conciliation, arbitration or litigation. But we should not lose sight of the invisible web of international law that allows this modern globalized world to thrive, for more often than not, there is no need to resort to dispute resolution, as the wheels of commerce and diplomacy and daily international interaction keep turning.

We should not forget the need to promote the progressive development of international law in areas that need improvement, in areas that could benefit from further refinement or gap-filling. We should remain creative and flexible as we seek to advance and promote the further development of international law, including accepting that in some cases a global multilateral treaty is not necessarily the answer, and that sometimes . . . regional or bilateral or even a non-binding set of understandings can best address a particular need.

Through it all, we should bear in mind the complex and dynamic interaction between the rule of law at the international level and the rule of law at the national level. Compliance with international law at the international level—that constant daily compliance with the vast web of international law that we often take for granted—can lead to a culture of compliance at the domestic level.

And the key to implementation of so many treaties is robust State implementation at the domestic level.

States have a key role to play in promoting respect for and implementation of law at the international level.

The United States has reinvigorated its commitment to the rule of law at the international level, including in the arena of international humanitarian and human rights law and through its participation in the work of multilateral institutions. . . .

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Multilateral institutions matter and, as President Obama and U.S. Permanent Representative Ambassador Susan Rice have stated, the United States is proud to resume its leadership role in multilateral institutions. Robust U.S. participation in multilateral institutions signals U.S. recognition of their potential to contribute to the welfare of individuals worldwide, including through practices such as the adoption and implementation of resolutions that affect the complex web of international law.

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2. Honduras

Following the June 28, 2009 coup d'etat in Honduras that resulted in the removal of the country's democratically elected leader, President Jose Manuel Zelaya, the United States took numerous steps to help restore the country's constitutional and democratic order. On the day of the coup, President Obama called on "all political and social actors in Honduras to respect democratic norms, the rule of law, and the tenets of the Inter-American Democratic Charter. Any existing tensions and disputes must be resolved peacefully through dialog free from any outside interference." Daily Comp. Pres. Docs., 2009 DCPD No. 00516, p. 1.

On the same day, as detailed in Chapter 7.C.1.b., the United States joined consensus when the Permanent Council of the OAS unanimously adopted a resolution condemning the coup, demanding President Zelaya's reinstatement, and

stating that no government arising from the coup would be recognized. In a statement to the General Assembly the following day, Ambassador Rosemary A. DiCarlo, U.S. Alternative Representative to the United Nations for Special Political Affairs, reiterated that, "As stipulated in yesterday's resolution passed by the OAS Permanent Council, we refuse to recognize any Government of Honduras other than the constitutionally legitimate government of President Zelaya." Ambassador DiCarlo continued:

> . . . [W]e call on the international community to support the efforts of the OAS. We call on the international community to join together in solidarity with the Honduran people in demanding the peaceful restoration of democracy and constitutional order in Honduras. And we call on the international community to resist any outside interference in this process.

See http://usun.state.gov/briefing/statements/2009/125797.htm. The United States also joined consensus when the General Assembly adopted a resolution entitled "Situation in Honduras: democracy breakdown" on June 30, 2009. U.N. Doc. A/RES/63/301. Among other things the resolution condemned the coup d'etat and expressed support for the OAS's efforts, pursuant to Chapter VIII of the UN Charter, to resolve the crisis in Honduras. *See* Chapter 7.C.1.b., for discussion of U.S. support for two additional OAS resolutions on Honduras.

Throughout the rest of 2009, the United States actively supported the efforts initially facilitated by Costa Rican President Oscar Arias Sanchez and subsequently by an OAS-sponsored delegation of member state Foreign Ministers to restore democracy in Honduras. As discussed in Chapter 16.A.4.c.(2), in August the United States called the San Jose Accord, proposed by mediator and Costa Rican President Arias, the best solution for restoring Honduras's democratic and constitutional order. The United States expressed concern at the de facto authorities' unwillingness to accept the accord and took visa- and assistance-related measures against the de facto regime. *See* Chapter 16.A.4.c.; *see also* the

October 28 statement to the General Assembly of Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, available at *http://usun.state.gov/briefing/statements/2009/131038.htm*.

On October 30, 2009, Secretary of State Clinton announced that the United States had brokered an agreement between President Zelaya and coup leader Roberto Micheletti to resolve the crisis. Secretary Clinton's statement is available at *www.state.gov/secretary/rm/2009a/10/131078.htm*. The Tegucigalpa/San Jose Agreement for National Reconciliation and the Strengthening of Democracy in Honduras, which was based on the San Jose Accord, provided that the Honduran Congress should make a decision on President Zelaya's restoration. The agreement also provided for the establishment of a government of national unity and a commission for verifying compliance with the agreement, coordinated by the OAS. The agreement also called for the next Honduran government to form a Truth Commission within the first half of 2010. The agreement is available as OAS Doc. CP/INF.5928/09, available at *www.oas.org/CONSEJO/Documents%20INF2009.asp*.

On November 27, 2009, State Department Spokesman Ian Kelly issued a statement affirming the U.S. commitment to the restoration of Honduras's democratic and constitutional order and stressing the importance of the November 29 Honduran elections in that process. Mr. Kelly stated:

> The November 29 national elections are another critical step in the restoration of the democratic and constitutional order in Honduras. The electoral process—launched well before June 28 and involving legitimate candidates representing parties with longstanding democratic traditions from a broad ideological spectrum—is conducted under the stewardship of the multi-party and autonomous Supreme Electoral Tribunal, which was also selected before the coup. The electoral renewal of presidential, congressional and mayoral mandates, enshrined in the Honduran constitution, is an inalienable expression of the sovereign will of the citizens of Honduras. . . .

> The holding of a free, fair and transparent election is necessary but not sufficient for Honduras to reestablish the democratic and constitutional order. In order to help achieve that objective, we will continue, along with others in the Americas, to support the step-by-step implementation of the Tegucigalpa-San Jose Accord as a democratic way forward for the Honduran people. . . .

See www.state.gov/r/pa/prs/ps/2009/nov/132501.htm; *see also* Ian Kelly's statement on the Honduran election, November 29, 2009, available at *www.state.gov/r/pa/prs/ps/2009/nov/132504.htm*.

On December 2, 2009, the Honduran Congress voted against restoration of President Zelaya. The following day, Arturo Valenzuela, Assistant Secretary of State, Bureau of Western Hemisphere Affairs, expressed U.S. disappointment with the Honduran Congress's decision, given the consistent U.S. policy since June 28 of condemning the coup and continuing to accept President Zelaya as Honduras's democratically elected and legitimate leader. Mr. Valenzuela added, however, that "the decision taken by Congress, which it carried out in an open and transparent manner, was in accordance with its mandate in Article 5 of the Tegucigalpa-San Jose Accord." Mr. Valenzuela concluded by stating that the United States would "continue to work with Honduran and international partners to help fulfil our overarching goal of supporting the restoration of democratic and constitutional order." Mr. Valenzuela's remarks are available in full at *www.state.gov/p/wha/rls/rm/2009/133101.htm*.

3. Iran

On December 18, 2009, Deputy State Department Spokesman Robert Wood issued a statement welcoming the General Assembly's adoption of a resolution "calling upon the Government of Iran to respect its human rights obligations fully." U.N. Doc. A/RES/64/175. The General Assembly

adopted the resolution by 74 votes for and 49 votes against, with 59 abstentions. The full text of the statement, which is set forth in major part below, is available at *www.state.gov/r/pa/prs/ps/2009/dec/133898.htm*.

The United States welcomes the United Nations' final passage of the resolution calling upon the Government of Iran to respect its human rights obligations fully. In passing this resolution, the international community has demonstrated once again its deep concern about the deteriorating human rights situation in Iran and the government's failure to uphold its obligations under its own constitution and international human rights law.

The resolution, first adopted last month by the UN Third Committee, expresses deep concern over the brutal response of Iranian authorities to peaceful demonstrations in the wake of the June 12 election. It calls on the Government of Iran to abolish torture and arbitrary imprisonment, as well as any executions carried out without due process of law. Furthermore, it calls for the end of execution of minors, as well as the use of stoning as a means of execution. The resolution also calls on Iran to release political prisoners, including those detained following the June election. Finally, the resolution calls on Iran to cooperate fully with and admit entry to [UN Special Rapporteurs].

Those in Iran who are trying to exercise their universal rights should know that their voices are being heard.

On November 20, 2009, Mr. Wood had issued a similar statement after the Third Committee adopted the resolution. *See www.state.gov/r/pa/prs/ps/2009/nov/132198.htm*.

Cross References

Trafficking in persons, **Chapters 3.B.3. and 16.A.7.**
International, hybrid, and other tribunals, **Chapter 3.C.**
New UN composite entity addressing women's issues, **Chapter 7.B.1.b.**
OAS resolution concerning Cuba, **Chapter 7.C.1.a.**

U.S. support for OAS efforts to restore the democratically elected president of Honduras, **Chapter 7.C.1.b.**
U.S. statements concerning the inviolability of the Brazilian embassy in Honduras, **Chapter 10.B.3.**
Environmental issues, **Chapter 13.**
U.S. sanctions to protest seizures of power by undemocratic means, **Chapter 16.A.4.**
Israeli-Palestinian conflict, **Chapter 17.A.1.**
Detainees at Guantanamo and in Afghanistan, **Chapter 18.A.5.**

Chapter 7

International Organizations

A. GENERAL

Responsibility of International Organizations

On October 27, 2009, Todd Buchwald, Assistant Legal Adviser for United Nations Affairs, Department of State, addressed the UN General Assembly's Sixth (Legal) Committee on the report of the International Law Commission ("ILC" or "Commission") on its sixty-first session, U.N. Doc. A/64/10, available at *http://untreaty.un.org/ilc/reports/2009/2009report.htm*. Excerpts follow from Mr. Buchwald's statement, addressing the ILC's draft articles concerning the responsibility of international organizations. The full text of Mr. Buchwald's statement is available at *http://usun.state.gov/briefing/statements/2009/131022.htm*. *See also Digest 2007* at 399–401 and *Digest 2008* at 381–82.

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With respect to the topic Responsibility of International Organizations, the United States appreciates the Commission's work, and Professor [Giorgio] Gaja's efforts [as Special Rapporteur for the topic] in particular, in generating a common set of articles on the responsibility of international organizations. We remain concerned, however, about the approach that the Commission has taken in this area. Relying too heavily on the articles on State

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Responsibility risks eliding the differences between states and international organizations, not to mention the wide differences among international organizations. The draft articles include provisions that apply to only a small fraction of all international organizations. For example, as the commentary notes, draft article 20, concerning self defense, is likely to be relevant to the acts only of those international organizations that administer a territory or deploy an armed force. We question the utility of including an article of such limited applicability. The draft articles also include provisions that will rarely, if ever, come into play for the vast majority of international organizations. For example, we question the need for draft article 23, concerning distress.

We welcome the principle that appears to underlie draft article 63, which limits the application of the draft articles in areas that are governed by special rules of international law including the rules of particular international organizations. This principle is an important step in addressing the differences among international organizations. We remain uncertain, however, that it will alleviate our concerns regarding the Commission's basic approach, and intend to review carefully this new article, its consequences for the other draft articles, as well as the other new and revised draft articles. We welcome the Commission's invitation to provide more detailed comments and observations by January 1, 2011.

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B. UNITED NATIONS

1. UN Reform

During 2009 the General Assembly continued its considerations of Security Council reform, and the United States, as it had in the past, continued to participate in the discussions. On February 19, 2009, during informal consultations on the issue, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, outlined the principles

that would guide the United States as the General Assembly began the next phase of its work. Among other things, the United States was "not linking Security Council reform to other aspects of UN reform," Ambassador Rice noted. "We view both as important and will pursue them in tandem."
See *http://usun.state.gov/briefing/statements/2009/february/127091.htm*. ***On November 13, 2009, during the General Assembly's annual debate on Security Council reform and the Council's annual report to the Assembly, Ambassador Alejandro D. Wolff, Deputy U.S. Permanent Representative to the United Nations, made a statement elaborating on the themes Ambassador Rice had raised in February. Ambassador Wolff's statement, excerpted below, is available at*** *http://usun.state.gov/briefing/statements/2009/131936.htm*.

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As we stated during the first three rounds of these negotiations and will continue to elaborate in more detail in those negotiations, the United States supports expansion of the Security Council. Such expansion, however, should neither diminish the Council's effectiveness nor its efficiency.

Let me briefly summarize key elements of my government's position:

> The United States is open in principle to a limited expansion of both permanent and non-permanent members.
>
> In terms of categories of membership, the United States strongly believes that any consideration of an expansion of permanent members must be country-specific in nature.
>
> In determining which countries merit permanent membership, we will take into account the ability of countries to contribute to the maintenance of international peace and security and other purposes of the United Nations.

As we have previously stated, the United States is not open to an enlargement of the Security Council by a Charter amendment that changes the current veto structure.

To enhance the prospects for success, whatever formula that emerges for an expansion of Council membership should have in mind Charter requirements for ratification.

We remain committed to a serious, deliberate effort, working with other member states, to find a way forward that both adapts the Security Council to current global realities and enhances the ability of the Security Council to carry out its mandate and effectively meet the challenges of the new century.

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On September 14, 2009, the United States joined consensus when the General Assembly adopted a resolution on "system-wide coherence." U.N. Doc. A/RES/63/311. Most significantly, one section of the resolution focused on ways the United Nations could support gender equality and women's empowerment by strengthening UN institutions. The resolution expressed strong support for a key U.S. objective: the consolidation of four UN offices and divisions addressing women's issues into one composite entity. After the Assembly adopted the resolution, Ambassador Rosemary A. DiCarlo, U.S. Alternate Representative to the United Nations for Special Political Affairs, delivered a statement explaining the U.S. position on the resolution. Excerpts below from Ambassador DiCarlo's statement provide U.S. views on the establishment of a new entity to improve the UN's efforts to assist women. The full text of the U.S. statement is available at *http://usun.state.gov/briefing/statements/2009/september/129219.htm.* ***For additional background, see the June 22 statement of John F. Sammis, Deputy U.S. Representative to the Economic and Social***

Council, during informal consultations of the General Assembly, available at *http://usun.state.gov/briefing/statements/2009/125910.htm.**

. . . The broad support for this resolution is heartening. It shows that after several years of intense consultations, member states have come together to take a number of practical decisions to further our shared objective of a more effective and coherent UN development system.

We strongly endorse the resolution's call for consolidating OSAGI [Office of the Special Adviser to the Secretary-General on Gender Issues and Advancement of Women], UN/DAW [Division for Advancement of Women], UNIFEM [UN Development Fund for Women], and INSTRAW [International Research and Training Institute for the Advancement of Women] into a composite entity headed by an Under Secretary-General. Over the past several months, there has been a growing realization that a composite entity offers the best hope for improving how the UN can help women worldwide.

We are confident that this consolidation will improve the situation in the field. Developing nations stand to gain from the changes that the composite entity will effect on the ground—progress necessary to reach the Millennium Development Goals. All nations will benefit from advances the entity will bring about on women's equality, empowerment, and rights. It is essential that the

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* Editor's note: On July 2, 2010, the United States joined consensus when the General Assembly adopted a resolution to merge the four existing UN bodies addressing women's issues into one new entity, UN Women or the United Nations Entity for Gender Equality and the Empowerment of Women. U.N. Doc. A/RES/64/289. The new consolidated agency is mandated to strengthen gender equality and empower women worldwide, acting both as a secretariat and conducting country-level operational activities. U.S. statements on the General Assembly's action are available at *http://usun.state.gov/briefing/statements/2010/143935.htm* and *http://usun.state.gov/briefing/statements/2010/143927.htm*; *see also* the statement issued by UN Secretary-General Ban Ki-moon, available at *www.unwomen.org/2010/07/statement-by-the-un-secretary-general-on-the-creation-of-un-women*. *Digest 2010* will discuss relevant aspects of the decision.

head of agency be an Under Secretary-General. We ask Secretary-General Ban to move expeditiously on appointing an Under Secretary-General with in-depth knowledge, a strong track record on gender issues, and credibility within the women's movement.

Member states still need to decide on many details involving the composite entity, including questions of staffing, funding, governance, and reporting lines. These are important questions, and the United States stands ready to work with our colleagues on these issues. The sooner the Under Secretary-General is in place, the sooner he or she can offer the benefit of his or her views to member states.

In accordance with OP 3 of the resolution, we look forward to seeing comprehensive proposals on the gender entity developed as quickly as possible within the next UN General Assembly, so that intergovernmental deliberations on the entity's parameters can get underway.

* * * *

On December 24, 2008, the United States joined consensus when the General Assembly adopted a resolution on the reform of the UN's system of internal justice. U.N. Doc. A/RES/63/253. On October 5, 2009, during the Sixth Committee's annual debate on "Administration of Justice," Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, discussed U.S. views on the reform effort. Mr. Simonoff's statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/2009/130295.htm.*

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On December 24, 2008, the United Nations General Assembly adopted Resolution 63/253. This resolution was a landmark achievement for the Administration of Justice at the United Nations, constituting a major milestone in the reform of the United Nations. The resolution, among other things, adopted the statutes

of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal. These two new judicial bodies, together with other innovative reforms, will bring staff dispute resolution at the United Nations into the 21st Century. We are confident that the establishment of the two Tribunals will have a significant positive impact on the transparency, fairness, efficiency, and accountability of the United Nations personnel system.

Article 7, paragraph 1 of the statute of the Dispute Tribunal, and Article 6, paragraph 1 of the statute of the Appeals Tribunal, provided that the rules of procedure of each tribunal shall be subject to approval by the General Assembly. Paragraph 29 of Resolution 63/253 requested the Secretary-General to submit the rules for approval not later than the General Assembly's 64th Session and decided that until then the Tribunals may apply the rules of procedure on a provisional basis. An action item for the Sixth Committee at this session is to review and decide whether to recommend for approval the Rules of Procedure of each Tribunal.

Article 7 of the statute of the Dispute Tribunal and Article 6 of the statute of the Appeals Tribunal mandated that certain provisions be contained in the Rules. As we read them, the Rules of Procedure appear to be consistent with the statute of each Tribunal. We are, of course, interested in the views of other delegations.

The UN Dispute Tribunal and UN Appeals Tribunal, as provided for in Resolution 63/253, only became operational in July of this year. As the General Assembly recognized, the new system needs time before one can make a full assessment of its work. Therefore, the General Assembly requested the Secretary-General to conduct a review of the new system and report thereon to the General Assembly at its 65th Session, rather than at its 64th Session. Similarly, the General Assembly decided to carry out, at its 65th Session, a review of the statutes of the Tribunals, in light of the experience gained.

The Ad Hoc Committee of the Sixth Committee, which met earlier this year, examined outstanding legal aspects of administration of justice, focusing in particular on the scope of the system. At the Ad Hoc Committee, the United States shared some ideas about a possible approach to alternative remedies for personal service

contractors. The Ad Hoc Committee recommended that a working group of the Sixth Committee be established with a view to continuing the discussion of the outstanding legal aspects of the administration of justice, taking into account the deliberations in the Ad Hoc Committee and bearing in mind the decision of the General Assembly to revert to the issue of the scope of the system at its 65th Session. We look forward to participating in further discussions of outstanding legal issues, including scope, at the working group over the next few days. The United States remains interested in exploring feasible alternatives to including non-UN-staff individuals in the formal system, and is interested in the views of other delegations about other alternative approaches to address this issue.

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On October 13, 2009, Mary McLeod, Legal Adviser, U.S. Mission to the United Nations, addressed the General Assembly's Sixth (Legal) Committee on promotion of accountability for crimes committed by UN officials and experts on mission, including those individuals serving on peacekeeping missions. Excerpts follow from Ms. McLeod's statement, which is available in full at *www.state.gov/s/l/c8183.htm.*

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We welcome the Secretary-General's report on Criminal Accountability of United Nations officials and experts on mission, that includes the information provided by some governments on the extent to which they have domestic jurisdiction over crimes of a serious nature committed by their nationals while serving as UN officials or experts on mission. We also appreciate the information submitted by certain governments concerning their cooperation with the United Nations in the exchange of information and the facilitation of investigation and prosecutions of such individuals.

We look forward to learning about efforts undertaken by other governments in that regard.

We commend the United Nations on its efforts to address this important issue, including, in particular, its continued efforts to train UN peacekeepers on proscribed activity for such personnel, with an emphasis on current rules, guidance and procedures relevant to conduct and discipline. We also appreciate the UN's efforts to refer credible allegations against UN officials and experts on mission to the State of the alleged offender's nationality during the July 1, 2008 to June 30, 2009 reporting period. We urge States to which individuals were repatriated during that period to take appropriate action with regard to those individuals and report to the United Nations on the disposition of the cases. States must play a key role in curbing abuses. All UN Member States stand to benefit from the Secretariat's reporting on efforts taken by States to investigate and prosecute referred cases.

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Finally, with respect to the outstanding issue of the possible negotiation of a multilateral convention on criminal accountability of UN staff and experts on mission, we continue to question whether negotiation of such a convention would present the most efficient or effective means through which to ensure accountability. A convention that merely closes theoretical gaps in jurisdiction may not significantly contribute to addressing the crimes at issue, particularly if the impediments to accountability lie elsewhere. We urge States to redouble their efforts to develop practical ways to address the underlying causes of such impediments.

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2. General Assembly Credentials Committee

On September 15, 2009, the UN General Assembly appointed the United States to the Credentials Committee for the General Assembly's sixty-fourth session. Brazil, China, Jamaica, the Philippines, the Russian Federation, Spain, the United Republic of Tanzania, and Zambia also were appointed.

Under Rule 28 of the General Assembly Rules of Procedure, the Credentials Committee is mandated to examine representatives' credentials and to report to the General Assembly. U.N. Doc. A/520/Rev.17.

At the Credentials Committee's meeting on December 8, 2009, some members expressed concerns about accepting the credentials submitted by the governments of Guinea and Madagascar, given the political developments in both states. U.N. Doc. A/64/571. *See* Chapter 16.A.4.b. and 16.A.4.d. for discussion of U.S. measures taken against Guinea and Madagascar in 2009; *www.state.gov/r/pa/ei/bgn/2824.htm* for information concerning the December 2008 coup d'etat in Guinea and subsequent developments; and *www.state.gov/r/pa/ei/bgn/5460.htm* for information concerning the undemocratic transfer of power in Madagascar in March 2009. The United States joined consensus in a Committee decision to accept the Chairperson's proposal to defer the review of the credentials for the two states, on the understanding that both countries' representatives could participate provisionally in the General Assembly session on the same basis as other accredited members until the Committee reviewed the issue and provided a recommendation to the General Assembly. The Committee's report discussed the Chairperson's proposal, the Committee's acceptance of it, and the Committee's agreement to accept member states' credentials for the General Assembly session, subject to the Committee's decision concerning Guinea and Madagascar. U.N. Doc. A/64/571.

On December 16, 2009, the United States joined consensus when the General Assembly adopted a resolution approving the Credentials Committee's report and its recommendations. U.N. Doc. A/RES/64/126.

3. Observer Status at the World Health Organization: Taiwan

In a press statement issued April 29, 2009, Robert Wood, Acting State Department Spokesman, provided U.S. views on

the World Health Organization's invitation to Taiwan to attend its 2009 World Health Assembly as an observer. Mr. Wood stated:

> The United States welcomes the announcement that the World Health Organization (WHO) has invited Taiwan to attend this year's World Health Assembly (WHA), the supreme governing body of the WHO, as an observer under the name "Chinese Taipei." We have long supported Taiwan's meaningful participation in the WHO, including observer status at the WHA. We look forward to the participation of Taiwan at the WHA and the benefits Taiwan's public health expertise will bring to the international community.

The statement is also available at *www.state.gov/r/pa/prs/ps/2009/04/122401.htm*. The World Health Assembly took place May 18–22, 2009.

C. OTHER INTERNATIONAL ORGANIZATIONS

1. Organization of American States

On June 3, 2009, the United States joined consensus when the General Assembly of the Organization of American States ("OAS") adopted a resolution on Cuba. See AG/RES.2438 (XXXIX-O/09), available at *www.oas.org/en/about/general_assembly.asp*. ***Based on a text that Secretary of State Hillary Rodham Clinton proposed, the resolution resolved that the 1962 resolution of the Eighth Meeting of Ministers of Foreign Affairs acting under the Inter-American Treaty of Reciprocal Assistance, which excluded the Cuban government from participation in the Inter-American system, would no longer be effective in the OAS. It also resolved "[t]hat the participation of the Republic of Cuba in the OAS will be the result of a process of dialogue initiated at the request of the Government of Cuba, and in accordance with the practices, purposes, and principles of the OAS." Secretary Clinton issued a statement, set forth below,***

following the OAS action. Secretary Clinton's statement is also available at *www.state.gov/secretary/rm/2009a/06/124305.htm.*

The member nations of the OAS showed flexibility and openness today, and as a result we reached a consensus that focuses on the future instead of the past: Cuba can come back into the OAS in the future if the OAS decides that its participation meets the purposes and principles of the organization, including democracy and human rights. Many member countries originally sought to lift the 1962 suspension and allow Cuba to return immediately, without conditions. Others agreed with us that the right approach was to replace the suspension—which has outlived its purpose after nearly half a century—with a process of dialogue and a future decision that will turn on Cuba's commitment to the organization's values. I am pleased that everyone came to agree that Cuba cannot simply take its seat and that we must put Cuba's participation to a determination down the road—if it ever chooses to seek reentry. If and when the day comes to make that determination, the United States will continue to defend the principles of the Inter-American Democratic Charter and other fundamental tenets of the organization. This outcome is in keeping with our forward-looking, principled approach to relations with Cuba and our hemisphere.

We must now build on this success by meeting our goals with actions that move us beyond rhetoric to results, and advance the mission which each of our nations have pledged to pursue: strengthening good governance, democratic institutions, an unwavering commitment to fundamental human rights and freedoms, and the rule of law—the underpinnings of democracy and the founding principles of this organization.

In a press briefing that day, excerpted below, Ambassador Thomas A. Shannon, Jr., Assistant Secretary of State for Western Hemisphere Affairs, and Dan Restrepo, Special Assistant to the President and Senior Director for Western Hemisphere Affairs at the National Security Council, provided

additional U.S. views on the OAS's action. The full text of the briefing is available at *www.state.gov/p/wha/rls/rm/2009/124309.htm*.

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MR. RESTREPO: . . . Today has been a historic day for the inter-American system. You've seen two things occur in a resolution passed by consensus by the organization, one that leaves without effect the 1962 suspension of the current government of Cuba from participation in the OAS, and second that establishes a path forward that has multiple steps to it, beginning with whether the Cuban Government asks to come back to the organization or not, a question that may be complicated for that government given what it has been saying about the organization in recent weeks and actually throughout the last 40 years, but a process that is clearly enunciated on the face of the resolution that it has to be in accord with the basic principles, purposes, and practices of the OAS, which itself is defined in the resolution to be based on the OAS Charter and other fundamental instruments that defend democracy, self-determination, non-interference, human rights, development, and security.

So what we've seen today is really a testament to the hard work of multilateral diplomacy. A couple of weeks ago, if you had stopped and asked all the countries in the Western Hemisphere what they wanted to do with the 1962 resolution, they would [have] supported a three-line resolution . . . lifting the 1962 resolution and allowing Cuba to automatically return to the OAS. The United States and other countries from various parts in the hemisphere fought, defended, and prevailed in saying that this was not an automatic process, that yes, . . . let's not become prisoners of the past, but let us ensure that we are defending the basic principles of democracy and human rights and non-intervention and non-interference as the path forward to Cuba's return to the organization.

Simply put, for Cuba to return to the organization, the organization has to agree that Cuba is abiding by the same rules that everybody else is abiding by. That is a historic achievement.

We think it is an important day that reflects a policy that listens to the concerns of the region with respect to lifting the '62 suspension and defend[s] the core principles of the Americas shared by the United States, all in defense of ensuring that they are shared by and enjoyed by all the people of the hemisphere, including the people of Cuba. So instead of being focused on an argument that is nearly 50 years old that has done little to advance the cause of freedom for the Cuban people, we can return . . . the focus . . . to the realities of today, and to the realities of the issues not just in Cuba but throughout the Americas.

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ASSISTANT SECRETARY SHANNON: . . . [T]he resolution makes very clear that the process by which Cuba must follow in order to reenter the OAS, requires first that Cuba request permission. Secondly, that it enter into a dialogue with the relevant organs of the OAS, and that that dialogue and the decision rendered by the OAS must be in accord with the practices, purposes, and principles of the OAS. And the resolution makes very clear that the fundamental instruments and documents in the OAS, like the Inter-American Democratic Charter, will be the guiding documents as the OAS engages with Cuba.

. . . [W]e've lifted an historical impediment while facing up to the challenge of today, which is . . . how does the OAS, an organization committed to democracy, relate to a country that is not democratic? And how does the OAS and the inter-American system, which is characterized by open societies and market-based economies, relate to a country that has a closed society and a closed economy? And in this regard, . . . the OAS has remained true to its core principles and purposes. And this was the result of leadership by the United States and by our partner countries, but especially by Secretary Clinton.

And I'd like to highlight the fact that the resolution that was approved today was based on a resolution presented by Secretary Clinton yesterday, following extensive conversation and negotiation with a broad range of partners. And so it is the product of a collaborative dialogue with key partners around the hemisphere. And it was such a powerful document and such a powerful

coalition of countries that those countries that felt uncomfortable with aspects of it, ultimately were not able to change it.

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. . . [I]t's important to understand also that . . . we were able to . . . get the ALBA [Bolivarian Alliance for the Americas: Cuba, Venezuela, Bolivia, Ecuador, Nicaragua, Dominica, Antigua and Barbuda, St. Vincent and the Grenadines] countries to commit to broad instruments . . . like the Inter-American Democratic Charter. But also we were able to strengthen the OAS as an institution, because one of . . . the bigger fears going into this is that a breakdown in talks here was going to provoke divisions in the different sub-regions of the hemisphere, but also within the OAS. And what we have done, I believe, is strengthen the OAS as an institution, and that is an important goal.

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On June 28, 2009, after a coup d'etat in Honduras that resulted in the removal of the country's democratically elected constitutional leader, President Jose Manuel Zelaya, the United States joined consensus when the Permanent Council of the OAS unanimously adopted a resolution condemning the coup, demanding President Zelaya's reinstatement, and stating that no government arising from the coup would be recognized. See CP/RES. 953 (1700/09), available at *www.oas.org/consejo/resolutions/res953.asp*. ***On July 1, 2009, the United States joined consensus when the Thirty-Seventh Special Session of the OAS General Assembly adopted a resolution condemning the coup, reaffirming that President Zelaya was the constitutional President of Honduras, demanding his immediate, safe, and unconditional return to his constitutional functions, and reaffirming that no government arising from the coup would be recognized. The resolution also directed the OAS Secretary General to pursue diplomatic initiatives to secure President Zelaya's reinstatement and the restoration of democracy and the rule of law, and stated that if those efforts did not succeed within 72 hours, the Special General Assembly would suspend Honduras***

from the OAS. See AG/RES. 1 (XXXVII-E/09) rev. 1, available at *www.oas.org/consejo/sp/AG/Documentos/AG04665E04.doc.*

On July 4, 2009, the United States joined consensus when the Thirty-Seventh Special Session of the OAS General Assembly adopted a resolution suspending Honduras from the right to participate in the organization. *See* AG/RES. 2 (XXXVII-E/09) rev. 1, available at *www.oas.org/consejo/sp/AG/Documentos/ag04682e07.doc.* On July 9, 2009, the U.S. Permanent Mission to the OAS delivered a diplomatic note, enclosing an explanation of the U.S. vote in support of the resolution and requesting that it be included in the official proceedings of the special session. The U.S. explanation of vote is set forth below and is also available, together with the diplomatic note, at *www.state.gov/s/l/c8183.htm.* For additional discussion of U.S. statements and actions concerning the coup in Honduras, see Chapters 6.I.2., 10.B.3., and 16.A.4.c.

The United States of America fully supports Resolution AG/RES. 2 (XXXVII-E/09), which suspends the Republic of Honduras from the exercise of its right to participate in the Organization of American States as a result of the interruption of the democratic order of that State. The United States of America regrets the necessity of this measure, and looks forward to its lifting and the resumption by Honduras of its participation as soon as its democratic order is restored.

The United States of America supports the invocation by the Resolution of Articles 20 and 21 of the Inter-American Democratic Charter, and notes that Article 9 of the Charter of the Organization of American States is the source of authority for the suspension of the right of participation of a Member State when its democratically constituted government has been overthrown by force.

2. International Renewable Energy Agency

On June 29, 2009, the United States signed the Statute of the International Renewable Energy Agency ("IRENA"). The IRENA Statute, finalized on January 26, 2009, notes that IRENA will "promote the widespread and increased adoption and the sustainable use of all forms of renewable energy." To accomplish this objective, IRENA will, among other activities, disseminate best practices and policy and regulatory options for adopting renewable energy technologies. As a signatory to the IRENA Statute, the United States is participating in the development of IRENA as a member of its Preparatory Commission. The IRENA Statute will come into force once 25 countries have ratified, which is anticipated to occur in late 2010 or early 2011. The United States will seek to ensure that IRENA's work plan and programs are designed to complement, rather than conflict with, ongoing efforts. In a June 29 statement, excerpted below, Secretary of State Clinton explained the importance of U.S. participation in IRENA. The full text of Secretary Clinton's statement is available at *www.state.gov/secretary/rm/2009a/06/125491.htm*. For additional background on IRENA, see *www.irena.org*.

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IRENA will engage governments around the world in promoting a rapid transition toward the widespread and sustainable use of renewable energy on a global scale. Our government's participation is an important element of the Administration's effort to support clean energy technologies and the development of low carbon economies to address global climate change and to advance our domestic and foreign policy objectives. With more than 130 nations as signatories, IRENA will help ensure that global resources are put to maximum effect, especially in response to the needs of the developing world.

As President Obama has said, the development of clean, renewable sources of energy will be the growth industry of the 21st century.

Not only is this an important step toward creating jobs, it will help safeguard the health of our planet and enhance America's future prosperity and security. For these reasons and more, the State Department will continue to make climate change and clean energy priorities of our foreign policy agenda. The Administration will work closely with other signatories, IRENA's leadership, and Members of Congress to ensure that IRENA's work augments and complements other renewable energy efforts around the world.

* * * *

3. International Hydrographic Organization

On June 3, 2009, the United States deposited its instrument of ratification of the Protocol of Amendments to the Convention on the International Hydrographic Organization ("Protocol"), done at Monaco on April 14, 2005. S. Treaty Doc. No. 110-9 (2007). For background, see *Digest 2007* at 407–10 and *Digest 2008* at 397. As of the end of 2009, the Protocol had not yet entered into force.

Cross References

UN peacekeepers' efforts to protect women and girls from sexual exploitation and abuse, **Chapter 6.B.2.b.(1) and b.(2)(i)**
Immunities of international organizations and their officials, **Chapter 10.D.**
UN peacekeepers and sexual exploitation and abuse by, **Chapter 17.B.2.**

Chapter 8

International Claims and State Responsibility

A. IRAN–U.S. CLAIMS TRIBUNAL

On November 4, 1979, Iranian militants seized the U.S. Embassy in Tehran, holding diplomatic and consular personnel and other persons hostages. *See Case Concerning United States Diplomatic and Consular Staff in Tehran*, 1980 I.C.J. 3, 12. On November 14, 1979, President Jimmy Carter issued Executive Order 12170. This order temporarily blocked all "property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which . . . come within the possession or control of persons subject to the jurisdiction of the United States." 44 Fed. Reg. 65,729 (Nov. 15, 1979).

On January 19, 1981, the United States and Iran entered into an international executive agreement embodied in two declarations of the Government of Algeria, known as the Algiers Accords. Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the United States ("General Declaration") and Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration"). 20 I.L.M. 223 (1981). The Algiers Accords brought about the release of the American hostages and established the Iran–U.S. Claims Tribunal ("Tribunal") at The Hague, the Netherlands, to resolve existing disputes

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between the two countries and their nationals. *See also Cumulative Digest 1991–99* at 1086–87 and *Digest 2001* at 381–82. Under the Algiers Accords, the United States released the vast majority of Iran's blocked assets and transferred them directly to Iran or to various accounts to pay outstanding claims. The claims addressed by the Tribunal include claims of U.S. nationals against the Government of Iran, and government-to-government claims between the United States and Iran. *See III Cumulative Digest 1981–88* at 3189.

On July 17, 2009, the nine-member Tribunal largely rejected a $2.5 billion claim filed by Iran, known as Case B/61, in which Iran alleged that the United States violated the Algiers Accords by failing to arrange the transfer of certain properties (mostly military properties) that Iran purchased from private U.S. companies before the Iranian Revolution. After the Accords were concluded, the United States unblocked Iranian assets located in the United States, but on March 26, 1981, the United States informed Iran, through the Government of Algeria, that the United States would not approve licenses for the export of Iranian military equipment located in the United States because of the export controls imposed by the Arms Export Control Act and its implementing regulations. Iran sought the return of these items, or in the alternative, their alleged replacement value. For prior developments in the case, including the U.S. Rebuttal filed on September 1, 2003, see *Digest 2003* at 441–45.

The Tribunal dismissed Iran's claim for compensation based on the U.S. refusal to license the export of Iran's export-controlled properties, concluding that Iran had failed to establish that U.S. action resulted in any compensable loss to Iran's pre-November 14, 1979 financial position with respect to those properties. Accordingly, the Tribunal did not award any damages to Iran. However, the Tribunal deferred to further proceedings the question of whether certain provisions of the Treasury Department's regulations issued on February 26, 1981 had caused Iran to suffer any harm in connection with its export-controlled properties. In a related case, Case A/15 (II:A), the Tribunal had determined that these regulations were

improper. *See Digest 2003* at 443*n*, 444*n* for discussion of the Tribunal's determination in Case A/15 (II:A). The full text of the Tribunal's partial award in Case B/61 is available at *www.iusct.com/*, the Tribunal's database of awards.On August 3, 2009, Iran requested that the Tribunal reconsider the decision to dismiss Iran's claim to compensation based on the U.S. refusal to license the export of Iran's export-controlled properties.

On August 14, 2009, the United States objected to this request because the Tribunal's Rules of Procedure provide no basis for such a review. The United States also requested that the Tribunal issue an additional award dismissing any Iranian claim with respect to the Treasury Department's regulations.

B. LIBYA CLAIMS SETTLEMENT

During 2009 the United States continued to implement the Claims Settlement Agreement between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya ("Agreement"), signed on August 14, 2008, in Tripoli, Libya. The Agreement, together with the Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999, and Executive Order 13477, 73 Fed. Reg. 65,965 (Oct. 31, 2008), established a framework for resolving claims against Libya brought in U.S. courts by family members of victims of the bombing of Pan Am Flight 103 over Lockerbie, Scotland, and other claims related to other alleged terrorist acts. *See Digest 2008* at 399–410 for background. By the end of 2009, the State Department had distributed slightly more than $1 billion of the approximately $1.5 billion received under the settlement. This distribution included payment of claims from settlements concerning the bombings of Pan Am Flight 103 and the LaBelle Disco, and claims of U.S. nationals who were named parties in wrongful death actions pending in U.S. courts on the date of the LCRA's enactment.

In addition, the State Department defined categories of other terrorism-related claims by U.S. nationals against Libya that would be eligible for compensation and referred those

claims to the Department of Justice's Foreign Claims Settlement Commission ("FCSC") on January 15, 2009. This referral followed the State Department's December 11, 2008 referral of claims of U.S. nationals for physical injury that were pending on the date of enactment of the LCRA. Following a notice and comment period, the FCSC issued its forms and instructions for claims under both referrals and began adjudicating claims in the referred categories. 74 Fed. Reg. 12,148 (Mar. 23, 2009); 74 Fed. Reg. 32,193 (July 7, 2009).

In 2009 the Justice Department also continued efforts to secure the dismissal of terrorism-related lawsuits against Libya involving claims that were settled under the Agreement, consistent with Congress's elimination of jurisdiction over such claims under the Foreign Sovereign Immunities Act pursuant to the LCRA. *See Digest 2008* at 399–402 for discussion of the relevant provision of the LCRA.

C. NAZI ERA CLAIMS

On October 27, 2009, the United States submitted a supplemental letter brief to the U.S. Court of Appeals for the Second Circuit. *In re Assicurazioni Generali S.P.A.*, Nos. 05-5602-cv, 05-5310-cv (2d Cir.). The U.S. submission responded to the court's July 29, 2009 letter to Secretary of State Hillary Rodham Clinton, which asked whether the current administration adhered to the position expressed in a letter brief the United States had submitted on October 30, 2008. *See Digest 2008* at 418–24 for discussion of the 2008 U.S. submission, which is available as document 41 for *Digest 2008* at *www.state.gov/s/l/c8183.htm*. The U.S. supplemental letter brief summarized U.S. views as follows:

> The position of the United States continues to be that set out in our original letter brief. As we explained, "[i]t has been and continues to be the foreign policy of the United States that the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be regarded as the *exclusive forum and remedy* for claims within its purview."

> [citation omitted] Holocaust-era insurance claims against the defendant, Assicurazioni Generali ("Generali"), fall within this category.

The full text of the government's brief is available at *www.state.gov/s/l/c8183.htm*. The case was pending at the end of 2009.*

D. REPUBLIC OF THE MARSHALL ISLANDS

On January 29, 2009, the U.S. Court of Appeals for the Federal Circuit affirmed a lower court's dismissal of claims against the United States in two cases, *Bikini v. United States* and *John v. United States*, consolidated on appeal, concerning claims related to U.S. nuclear testing in the Marshall Islands from 1946–1958. *Bikini v. United States*, 554 F.3d 996 (Fed. Cir. 2009). For prior developments in the two cases, see *Digest 2006* at 316–25, *Digest 2007* at 256–63, and *Digest 2008* at 245–47. The briefs the United States filed in 2008 in both cases are available as documents 22.a. and b. for *Digest 2008* at *www.state.gov/s/l/c8183.htm*.

The court of appeals concluded that the Section 177 Agreement, a claims settlement agreement implementing § 177 of the Compact of Free Association that the United States and the Republic of the Marshall Islands entered into in 1978, removed the jurisdiction of U.S. courts over the claims. As the court explained:

> The Section 177 Agreement states: "This Agreement constitutes the *full settlement* of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or

* Editor's note: On January 15, 2010, the U.S. Court of Appeals for the Second Circuit affirmed the district court's judgment, holding that "under authority of *Garamendi* . . . Plaintiffs' claims . . . are preempted by the foreign policy of the United States." In so holding, the Second Circuit drew upon the views the United States had expressed to the court in 2008 and in 2009. *In re Assicurazioni Generali S.P.A.*, 592 F.3d 113, 120 (2d Cir. 2010). Errata were filed on February 9, 2010.

> are in any way related to the Nuclear Testing Program . . . ." Section 177 Agreement, Art. X (emphasis added). This enacted Agreement has the force of law. Compact Act, § 175.
>
> Addressing the "United States Courts," Article XII of the settlement agreement instructs, "All claims described in Articles X and XI of this Agreement shall be terminated. *No court of the United States shall have jurisdiction* to entertain such claims, and any such claims pending in the courts of the United States *shall be dismissed*." Section 177 Agreement, Art. XII (emphasis added). Article XII thus represents the parties' agreement to extinguish any judicial power to hear these claims.

Id. at 999. Further excerpts follow from the court's opinion. On October 23, 2009, the plaintiffs in the two cases filed separate petitions for certiorari in the U.S. Supreme Court.*

The people and descendants of the Bikini and Enewetak Atolls seek just compensation for the taking of their land and their legal claim by the United States government. The Nuclear Claims Tribunal has awarded, but not completely funded, compensation for the Atolls' inhabitants due to bomb testing in the 1940s and 1950s. Because the parties clearly and unambiguously agreed to extinguish any judicial jurisdiction over the claims presented in these appeals, this court affirms the United States Court of Federal Claims' dismissal of these complaints.

I.

* * * *

The Plaintiffs-Appellants represent the people and descendants of the Bikini and Enewetak Atolls. In the early 1980s, both groups filed claims in the United States Court of Claims. The Plaintiffs

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* Editor's note: The Supreme Court denied certiorari on April 5, 2010. *Bikini v. United States*, 130 S. Ct. 2340 (2010); *John v. United States*, 130 S. Ct. 2340 (2010). *Digest 2010* will discuss relevant aspects of the decision.

sought just compensation for the Fifth Amendment taking of their land and damages for the United States' breach of its fiduciary duties. . . .

The Section 177 Agreement created a Nuclear Claims Tribunal to render final determination upon all "past, present and future" claims related to the Nuclear Testing Program. Congress committed $150 million to initiate a trust fund to support the Tribunal's operations and awards. Section 177 Agreement, Art. I, § 1. Congress designated $45.75 million of that amount for the payment of awards. *Id.* at Art. II, § 6(c). Even from its inception, many critics recognized that the Tribunal fund would not satisfy all of the claims.

On August 3, 2000, the Tribunal awarded the Plaintiffs-Appellants, the People of Enewetak, $385,894,500, including $244,000,000 for past and future loss of Enewetak Atoll, $107,810,000 for restoration costs and radiation cleanup, and $34,084,500 for hardships suffered during the relocation from the atoll. In February 2002 and 2003, the Tribunal paid only $1,078,750 and $568,733 on those awards—less than 1% of their total award.

In March 2001, the Tribunal awarded the Plaintiffs-Appellants, the People of Bikini, $563,315,500 in compensation, including $278,000,000 for the past and future loss of their land. Due to inadequate funding, however, the Tribunal paid only $1,491,809 in 2002, recognizing that the fund is "insufficient to make more than a token payment." The fund made a second payment of $787,370.40 in 2003, approximately 0.4% of the total award. As of October 2006 only $1 million remained in the Tribunal fund.

Article IX of the Section 177 Agreement provides an avenue for seeking additional funding from Congress. A "Changed Circumstances" petition can be submitted to Congress if "such injuries render the provisions of this Agreement manifestly inadequate." Section 177 Agreement, Art. IX. Article IX goes on to say that it "does not commit the Congress of the United States to authorize and appropriate funds." *Id.* The Government of the Marshall Islands submitted a Changed Circumstances petition to Congress requesting additional funding in 2000. To date, Congress has not acted on that petition.

* * * *

II.

* * * *

On appeal, the parties do not contest the amount awarded by the Nuclear Claims Tribunal. Rather they seek enforcement of the award—in spite of the Claims Tribunal's award of amounts beyond the funding limits of the settlement agreement. Moreover the parties contemplated the prospect of inadequate funding for full compensation when entering into the Section 177 Agreement. In the event that "such injuries render the provisions of this Agreement manifestly inadequate," Article IX provides an avenue for submitting a changed circumstances petition to Congress.

The "Changed Circumstances" provision acknowledges that "this Article does not commit the Congress of the United States to authorize and appropriate funds." Section 177 Agreement, Art. IX. The parties expressly agreed to this procedure and in doing so trusted the U.S. Congress to weigh and evaluate and act upon any changed circumstances. Thus, the settlement agreement entrusted the funding remedy to a procedure outside the reach of judicial remedy.

Indeed on that point, the language of the settlement agreement is clear: "All claims described in Articles X and XI of this Agreement shall be terminated. *No court of the United States shall have jurisdiction* to entertain such claims, and any such claims pending in the courts of the United States *shall be dismissed*." Section 177 Agreement, Art. XII (emphasis added). This statement represents not only the United States' removal of its consent to be sued in the courts over these claims but also the claimants' waiver of their right to sue over these claims in any U.S. court. Thus, this court has no authority in this matter, except to dismiss for lack of jurisdiction.

* * * *

. . . The power to conduct foreign relations includes the power to recognize a foreign sovereign and the authority to enter into an international claims settlement on behalf of nationals. *See United States v. Pink*, 315 U.S. 203, 229–30 (1942). The Plaintiffs-Appellants, the People of Enewetak, challenge the validity of

that espousal. However, that challenge raises a political question beyond the power of this or any court to consider. *Id.* at 229 . . . .

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Cross References

Alien Tort Statute litigation, **Chapter 5.D.2.**
Differences between responsibility of states and of international organizations, **Chapter 7.A.1.**
Amendments to terrorism exception of Foreign Sovereign Immunities Act, **Chapter 10.A.1.b.(3), c.(1)(ii), c.(3), and c.(6)**
Litigation relating to issues before Iran–U.S. Claims Tribunal or the Algiers Accords, **Chapter 10.A.1.c.(1) and c.(5)**
Claims under NAFTA, **Chapter 11.B.1.**
Claims under WTO dispute settlement, **Chapter 11.C.**
Arbitration with Canada relating to compliance with Softwood Lumber Agreement, **Chapter 11.D.7.**
U.S. export controls relating to Iran, **Chapter 16.A.1.b.(3)(iv), b.(3)(v), and f.(1)**

Chapter 9

Diplomatic Relations, Succession, and Continuity of States

A. ICJ ADVISORY OPINION ON KOSOVO'S DECLARATION OF INDEPENDENCE

On April 17, 2009, at the invitation of the Court, the United States was among a number of countries that submitted written statements to the International Court of Justice ("ICJ" or "Court") concerning the request by the UN General Assembly for an advisory opinion on the question "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" On July 17, 2009, the United States submitted Written Comments to the Court. On December 8, 2009, Harold Hongju Koh, Department of State Legal Adviser, delivered an oral statement of the U.S. views to the Court. Mr. Koh's statement, set forth below (most footnotes omitted; those that are included follow the numbering in the ICJ verbatim record), is also available at *www.icj-cij.org/docket/files/141/15726.pdf*. The full texts of all of the written submissions and oral proceedings in the case are available

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at *www.icj-cij.org/docket/index.php?p1=3&p2=4&code=kos&case=141&k=21.**

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* * * *

1. Mr. President, honorable Members of the Court, it is a great honor to appear before you today on behalf of the United States of America, a nation born of a declaration of independence more than two centuries ago, to urge this Court to leave undisturbed the Declaration of Independence of the people of Kosovo.

2. The United States appears today as a friend of both Serbia and Kosovo. The people of the United States share a bond of friendship with the people of Serbia marked by co-operation in two world wars and long-standing political and economic ties that date back at least to the bilateral Treaty of Commerce of 1881. Our relationship with the people of Kosovo, strengthened through crisis these last two decades, continues to grow. That said, our sole task today is to address the narrow legal question before this Court.

3. Over the past week, those pleading before you have discussed a broad range of issues, including the validity of recognitions

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* Editor's note: On July 22, 2010, the Court issued its advisory opinion, in which it stated that it was of the opinion that the declaration of independence of Kosovo did not violate international law. In remarks to the press on July 22, 2010, Mr. Koh explained that

> [t]he Court by a vote of 10 to 4 concluded that adoption of Kosovo's declaration of independence did not violate rules of general international law, nor did it violate UN Security Council Resolution 1244 or the constitutional framework that had been established to guide interim stabilization of Kosovo.
>
> With respect to each of its legal conclusions, the Court accepted the views of the authors of Kosovo's declaration of independence, as well as the views of the United States Government which had appeared in support of Kosovo's legal position.

Mr. Koh's remarks are available in full at *http://fpc.state.gov/145040.htm*. *See also* the statement issued by Secretary of State Hillary Rodham Clinton on July 22, available at *www.state.gov/secretary/rm/2010/07/145042.htm*. The Court's advisory opinion is available at *www.icj-cij.org/docket/files/141/15987.pdf*.

of Kosovo, the effectiveness of the United Nations, the legality of military actions in 1999, and the potential responsibility of non-State actors for internationally wrongful acts. Yet the precise question put to this Court is much narrower: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" The answer to that question, we submit, is: Yes. For as a general matter, international law does not regulate declarations of independence, nor is there anything about Kosovo's particular Declaration that would render it not "in accordance with international law." Standing alone, a declaration neither constitutes nor establishes political independence; it announces a political reality or aspiration that must then be achieved by other means. Declaring independence is fundamentally an act of popular will—a political act, made by a body politic, which other States then decide whether to recognize or not.

4. To say that international law does not generally authorize or prohibit declarations of independence signals no lack of respect either for international law or for the work of this Court. Rather, such a statement merely recognizes that international law does not regulate every human event, and that an important measure of human liberty is the freedom of a people to conduct their own affairs. In many cases, including Kosovo's, the terms of a declaration of independence can mark a new nation's fundamental respect for international law. As our own Declaration put it, a "decent respect to the Opinions of Mankind" dictates "that facts be submitted to a candid world." Of the more than 100 declarations of independence issued by more than half of the countries in the world,[20] we know of none that has been held by an international court to violate international law. We submit that this Court should not choose Kosovo's Declaration of Independence as the first case for such unprecedented judicial treatment. For few declarations can match the political legitimacy of Kosovo's peaceful declaration, which issued from a body representing the will of the people, which was born of a successful, decade-long United Nations effort to bring peace and security to the Balkans region, and reflected the capacity of the people of Kosovo to govern themselves. As the

[20] David Armitage, *The Declaration of Independence: A Global History* 3, 20 (2007).

principal judicial organ of the United Nations, this Court should decline the invitation to undo the hard work of so many other parts of the United Nations system, potentially destabilizing the situation and unravelling the gains so painstakingly achieved under resolution 1244.

5. Mr. President, a careful consideration of the pleadings before this Court compels three conclusions, which will structure the rest of my presentation:

– *First*, Kosovo's Declaration of Independence brought a necessary and stabilizing end to a turbulent chapter in the history of the Western Balkans, and made possible a transition to a common European future for the people of Kosovo and their neighbors. The real question this Court faces is whether to support reopening of this tragic past or whether instead to let Kosovo and Serbia look forward to this more promising future.

– *Second*, as a legal matter, there is no inconsistency between Kosovo's peaceful Declaration of Independence and principles of international law, including Security Council resolution 1244. Like others attending these proceedings who participated in these historical events, I attended the Rambouillet negotiations as United States Assistant Secretary of State for Democracy, Human Rights and Labor, and observed the great pains taken to respect international law and to preserve human rights throughout the lengthy diplomatic negotiations that led to resolution 1244, and ultimately to Kosovo's Declaration. We respectfully submit that a Security Council resolution drafted with such an intent did not give birth to a declaration of independence that violates international law.

– *Third*, and finally, we question whether this case—which involves an unprecedented referral of a narrow, anomalous question—marks the appropriate occasion for this Court to exercise its advisory jurisdiction. But should the Court decide that it must render an advisory opinion, the Court would best be served by answering that narrow question in the affirmative: Kosovo's Declaration of Independence *is* in accordance with international law.

I. KOSOVO'S DECLARATION OF INDEPENDENCE

6. Mr. President, you have now heard many times the story of Kosovo's Declaration of Independence and the trauma from which

it was born. That Declaration was the product of not one, but three overlapping historical processes, which did not preordain Kosovo's Declaration, but do help to explain it—the disintegration of Yugoslavia; the human rights crisis within Kosovo; the United Nations response.

7. First, from the *Bosnia* case, this Court knows well the painful story of the Yugoslav process: the rise of Serb nationalism in the 1980s, followed by the break-up first of the Socialist Federal Republic of Yugoslavia (SFRY) in 1991–1992, then of the Federal Republic of Yugoslavia (FRY) more than a decade later. You know of the successive independence of Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, Montenegro and, finally, of Kosovo.

8. Second, you have heard about Kosovo's internal process: the grim, well-chronicled background of atrocities and ethnic cleansing; how the people of Kosovo suffered years of exclusion from public facilities and offices; how some 10,000 people were killed in State-sponsored violence, how 1 million people were driven from the territory, and how the people of Kosovo developed self-government over nearly ten years of separation from Belgrade. You know of the dramatic escalation of oppression by Belgrade in the late 1990s; of the atrocities that were recorded by the United Nations and human rights organizations; of the unsuccessful attempt to achieve a solution acceptable to both Serbia and Kosovo at Rambouillet; of the brutal campaign of ethnic cleansing launched by Belgrade against ethnic Albanians in the spring of 1999; and of the eventual adoption of Security Council resolution 1244 in June of that year.

9. Third, the Declaration at issue did not happen spontaneously; it emerged only after an extended United Nations process, in which a United Nations administration focused on developing Kosovo's self-governing institutions, and a sustained United Nations mediation effort exhausted all available avenues for a mutually agreed solution, before finally concluding—in [Special Envoy] Martti Ahtisaari's words—that "the only viable option for Kosovo is *independence*."

10. By adopting resolution 1244, the Security Council sought to create a framework to promote two goals. The first was to protect the people of Kosovo, by building an interim environment

where they would be protected by an international *security* presence—the NATO-led KFOR—and where they could develop political institutions free from Belgrade's coercion under an international *civil* presence in the form of UNMIK. Second, the resolution authorized the international civil presence to facilitate a political process designed to determine Kosovo's future status, but only at a later stage.

11. This United Nations umbrella and game plan provided critical breathing space for Kosovo to stabilize and develop effective Provisional Institutions of Self-Government (PISG): an elected assembly, a president, a prime minister, ministries and a judiciary. UNMIK steadily devolved authority to those Kosovo institutions, allowing the people of Kosovo to rule themselves free from Belgrade's influence. In 2005, the Secretary-General's Special Envoy Kai Eide found the status quo unsustainable, which led the United Nations Security Council to launch a political process, led by Special Envoy Martti Ahtisaari, to determine Kosovo's future status. But after many months of intensive negotiations involving all interested parties, Special Envoy Ahtisaari concluded in March 2007: (1) that even with autonomy, Kosovo's reintegration with Serbia was "simply not tenable"; (2) that continuing interim administration without resolving Kosovo's future status risked instability; and (3) that further efforts to find common ground between Kosovo and Serbia were futile. In Mr. Ahtisaari's words, "the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted," and "[n]o amount of additional talks, whatever the format, will overcome this impasse." Going forward, the Envoy concluded, "the only viable option for Kosovo is *independence*, to be supervised for an initial period by the international community."

12. While some in these proceedings have questioned the integrity and impartiality of the Special Envoy, a most distinguished Nobel Laureate, the Secretary-General confirmed his full support for the Special Envoy's recommendations, having himself, in the Secretary-General's words, "taken into account the developments in the process designed to determine Kosovo's future status." The entire Contact Group "endorsed fully the United Nations Secretary-General's assessment that the status quo is not sustainable."

And the Council of the European Union—including even those members who would later decline to recognize Kosovo's independence—expressed its "full support" for the Special Envoy and "his efforts in conducting the political process to determine Kosovo's future status."

13. Nevertheless, a "Troika" of senior negotiators was charged to make a last-ditch effort to find a negotiated solution. According to their report, the Troika "left no stone unturned in trying to achieve a negotiated settlement of the Kosovo status question." But when those Troika talks also reached impasse, Kosovo's elected leaders consulted widely and, on 17 February 2008, issued their Declaration announcing Kosovo as "an independent and sovereign state."

14. Like many declarations of independence, Kosovo's Declaration was a general manifesto, published to all the world, that affirmed the new State's commitments as a member of the international community. The Declaration accepted the obligations in the Ahtisaari Plan, and announced Kosovo's desire for friendship and co-operation with Serbia and all States.

15. Today, nearly two years later, we see that the Declaration of Independence was the ultimate product of all three processes I have described: it brought closure to Yugoslavia's disintegration; it enshrined human rights protections for all communities within Kosovo; and it broke the impasse in the United Nations process. Yesterday (CR 2009/29), counsel for Cyprus colorfully but inaptly suggested that the United Nations Security Council was involved in the "amputation" of Kosovo and the "dismemberment" of Serbia. But Cyprus never mentioned that Kosovo became independent not because of unilateral, brutal United Nations action, but through the interaction between a United Nations process that helped end brutality, and the parallel processes of Yugoslavia's disintegration and increasing Kosovo self-governance.

16. The simple fact is that resolution 1244 works. Without preordaining, it permitted Kosovo's independence. Kosovo is now independent and functioning effectively. Kosovo has been recognized by 63 nations, and all but one of its immediate neighbors, including former Yugoslav republics Slovenia, Croatia, Macedonia, and Montenegro. No fewer than 115 of the world's nations have

treated Kosovo as a State, by either formally recognizing it or voting for its admission to international financial institutions. And the 2008 Declaration of Independence has opened the way for a new European future for the people both of Kosovo and the wider Balkans region.

II. LEGAL ARGUMENTS

17. Mr. President, against this reality, Serbia now seeks an opinion by this Court that would turn back time, although doing so would undermine the progress and stability that Kosovo's Declaration has brought to the region. As a legal matter, this Court should find that Serbia's desired outcome is dictated neither by general principles of international law, nor by Security Council resolution 1244.

A. General international law

18. As we detailed in our written pleadings, Kosovo's Declaration of Independence declared a political aspiration, which cannot by itself violate international law. General international law does not as, a general matter, prohibit or authorize declarations of independence.[40] Other nations accept or reject the legitimacy of

[40] See Malcolm Shaw, "Re: Order in Council P.C. 1996-1497 of 30 September 1996," in *Self-Determination in International Law: Quebec and Lessons Learned*, p. 136 (Anne Bayefsky, ed. 2000) ("It is true that the international community is very cautious about secessionist attempts, especially when the situation is such that threats to international peace and security are manifest. Nevertheless, as a matter of law the international system neither authorizes nor condemns such attempts, but rather stands neutral. Secession, as such, therefore, is not contrary to international law."); John Dugard and David Raič, "The Role of Recognition in the Law and Practice of Secession", in *Secession: International Law Perspectives*, p. 102 (Marcelo Kohen, ed. 2006) ("One will search in vain for an explicit prohibition of unilateral secession in international instruments. The same is true for the explicit recognition of such a right."); Daniel Thürer, "Secession", in *Max Planck Encyclopedia of Public International Law* (Rüdiger Wolfrum, ed.) available at *http://www.mpepil.com*, p. 2 ("International law, thus, does not state conditions of legality of a secession, and neither does it provide for a general 'right of secession'. It does not in general condemn movements aiming at the acquisition of independence, either."); see generally US Statement, pp. 50–55; US Comment, pp. 13–14.

a declaration of independence by their willingness or refusal to treat the entity as a State: and that test only confirms the legitimacy of Kosovo's Declaration here. But without citing any authority, Serbia asks this Court to adopt the opposite, sweeping rule: that when territory has not been illegally annexed, Serbia claims, the international law principle of territorial integrity prohibits *all* non-consensual secessions, *a fortiori*, prohibits all declarations of independence, except where domestic law grants a right of secession or the parent State accepts the declaration before or soon after the secession. Yet as our written filings establish, no such general international law rule bars declarations of independence, nor can there be such *ad hoc* exceptions to a general rule that does not exist.

19. To see that international law does not prohibit declarations of independence simply because they were issued without the parent State's consent, one need look no further than Yugoslavia, where the Slovenian and Croatian declarations of independence initiated Yugoslavia's break-up in 1991. When those declarations issued, Belgrade also declared, wrongly, that both declarations violated both Yugoslav and international law. But today, Belgrade no longer makes those claims. To the contrary, Serbia now asserts that Slovenia's and Croatia's secessions were lawful under international law *because* they were permitted under Yugoslav domestic law, although Belgrade took precisely the opposite position at the time.[43] In reversing its position, Belgrade nowhere explains how the international law rule in this area can turn on a question of domestic law that the international community cannot knowledgeably evaluate. And the second *ad hoc* exception that Serbia offers—that a parent State can make lawful an unlawful declaration

[43] Compare Written Comments of the Government of the Republic of Serbia ("Serbia Comments"), para. 201 ("With regard to domestic law, some constitutions provide for a right to secession, as it was the case of the S.F.R.Y., only with regard to the six constituent nations"), with Stands and Conclusions of the S.F.R.Y. Presidency Concerning the Situation in Yugoslavia, 27 June 1991 (reprinted in *Yugoslavia Through Documents: From Its Creation to Its Dissolution*, Snezana Tifunovska (ed.), 1994, p. 305 (describing the Slovenian and Croatian declarations as "anti-constitutional and unilateral acts lacking legality and legitimacy on the internal and external plane").

by later acceptance—conflicts with its own arguments in these proceedings: that the illegality of a declaration cannot be cured by subsequent events.

20. Neither did Kosovo's Declaration violate the general principle of territorial integrity. For that basic principle calls upon States to respect the territorial integrity of *other States*. But it does not regulate the internal conduct of groups *within* States, or preclude such internal groups from seceding or declaring independence.[44] Citing Security Council resolutions, Serbia claims that the obligation to respect territorial integrity also regulates non-State actors and precludes them from declaring independence, whether peacefully or not. But none of the resolutions it cites support that claim. We do not deny that international law may regulate particular declarations of independence, if they are conjoined with illegal uses of force or violate other peremptory norms, such as the prohibition against apartheid. But that is hardly the case here, where those declaring independence did not violate peremptory norms. In fact, Kosovo's Declaration makes such a deep commitment to respect human rights precisely because the people of Kosovo had experienced such egregious human rights abuses.

B. Resolution 1244

21. Mr. President, Kosovo's Declaration of Independence comports not just with general rules of international law, but also with resolution 1244, which—as our written submissions

[44] See Georges Abi-Saab, "Conclusion", in *Secession: International Law Perspectives*, Marcelo Kohen (ed.), 2006, p. 474 ("[I]t would be erroneous to say that secession violates the principle of territorial integrity of the State, since this principle applies only in international relations, i.e. against other States that are required to respect that integrity and not encroach on the territory of their neighbours; it does not apply within the State."); Malcolm Shaw, "Re: Order in Council P.C. 1996-1497 of 30 September 1996", in *Self-Determination in International Law: Quebec and Lessons Learned*, Anne Bayefsky (ed.), 2000, p. 136) ("[I]t must be recognized that international law places no analogous obligation [of respect for territorial integrity] upon individuals or groups within states. The provisions contained in the relevant international instruments bind states parties to them and not persons and peoples within states."); see generally US Comments, pp. 15–20.

detail—anticipated, without predetermining, that independence might be an appropriate outcome for Kosovo's future status.

22. Mr. President, Members of the Court, if you will look with me at the text of resolution 1244, you will see it was overwhelmingly driven by the Council's overriding concern for resolving the humanitarian and human rights tragedy occurring in Kosovo. It demands that the Federal Republic of Yugoslavia "put an immediate and verifiable end to violence and repression in Kosovo" by beginning a verifiable phased withdrawal of security forces on a timetable synchronized with the phased insertion of an international security presence. And the key paragraphs 10 and 11 authorize the establishment of an international civil presence to "[f]acilitat[e] a political process designed to determine Kosovo's future status, *taking into account the Rambouillet accords*."

23. Serbia claims that 1244's explicit reference to Rambouillet "clearly adopt[ed] the principle of the continued territorial integrity and sovereignty of the F.R.Y. over Kosovo." But at the time, Serbia claimed the opposite: it called the Rambouillet Accords an "unprecedented attempt to impose a solution clearly endorsing the separatists' objectives." This is not surprising, because as you heard yesterday from Denmark, a prime objective at Rambouillet was to respect the will of the people of Kosovo. That is why, as we have seen, Rambouillet carefully avoided predetermining any particular political outcome, on the one hand, neither favoring independence, but on the other, never ruling that possibility out.

24. Nor did anything in resolution 1244's description of the future status process give Serbia a veto over a future Kosovo declaration of independence. To the contrary, the Rambouillet Accords, to which resolution 1244 refers, rejected any requirement that the FRY consent to Kosovo's future status. In the negotiations over the Accords—and the four so-called "Hill Agreements" upon which Rambouillet was modeled—the negotiators rejected any requirement that the Federal Republic of Yugoslavia consent before Kosovo's future status could be finally determined. As Professor Murphy explained last Tuesday (CR 2009/25), the first three drafts of the Hill Agreements would have required the FRY's express agreement to change Kosovo's status at the end of the interim period. But, in the fourth draft of the Hill Agreement, that

language was placed in brackets, and no similar requirement for Belgrade's approval of future status appeared in the final version of either the Rambouillet Accords or resolution 1244.

25. Some have claimed during these oral proceedings that the reference in the preamble of resolution 1244 to the "territorial integrity" of the Federal Republic of Yugoslavia proved that the Security Council was foreclosing independence as a possible outcome. During these proceedings, one State that sat on the Security Council at the time suggested that all States understood resolution 1244 to guarantee permanently the "territorial integrity" of the Federal Republic of Yugoslavia. But if that were true, why did the Federal Republic of Yugoslavia protest at the time that the resolution "opens up the possibility of the secession of Kosovo . . . from Serbia and the Federal Republic of Yugoslavia?"[55] And why did nine of the States that were on the Security Council when it adopted resolution 1244—Bahrain, Canada, France, Gambia, Malaysia, Netherlands, Slovenia, the United Kingdom and the United States—later recognize Kosovo, if they had already supposedly voted for a resolution that permanently barred its independence?

26. What Serbia's argument leaves out is the telling silence in resolution 1244, the dog that did not bark. Resolution 1244 said absolutely nothing about the territorial integrity of the Federal Republic of Yugoslavia *beyond the interim period*. Unlike the previous United Nations Security Council resolutions on Kosovo, resolution 1244 qualifies its reference to territorial integrity with the phrase "as set out in Annex 2." But Annex 2 refers to territorial integrity only in paragraph 8, which in turn describes only the political framework agreement that will cover the *interim period*. And while the text of 1244 reaffirms the commitment of "member states"—not internal groups—to the territorial integrity of the FRY, even this it did only *during the interim period*, without limiting the options for future status.

[55] Remarks of Mr. Jovanović, Chargé d'affaires of the Permanent Mission of Yugoslavia to the United Nations, in Security Council debate on adoption of resolution 1244, S/PV.4011, 10 June 1999, p. 6, Dossier No. 33.

27. As important, the resolution refers not to preserving the territorial integrity of Serbia, but the territorial integrity of the *Federal Republic of Yugoslavia*, an entity that no longer exists.[57] Even though the resolution required Kosovo to remain within the FRY, it never required Kosovo to remain within "Serbia." To the contrary, as we have explained, the resolution specifically avoided any such implication, to preserve the possibility of what were called at the time "third republic options," under which Kosovo might end up as a third republic within the borders of a three-republic Federal Republic of Yugoslavia, alongside Serbia and Montenegro.[58]

28. Resolution 1244's reference to territorial integrity was further qualified by the resolution's explicit reference, in preambular paragraph 10, not just to Annex 2, which as I have explained applied only during the interim period, but also to the Helsinki Final Act. The Helsinki reference underscored the Security Council's overriding humanitarian concern with protecting civilians, by keeping Kosovo detached from the Serbia that had so harshly oppressed them. Kosovo had famously suffered massive, systematic human rights abuses throughout the decade, which led the FRY to be suspended from participation in the OSCE. And thus, 1244's pointed reference to the Helsinki Final Act underscored that the Security Council was reaffirming the FRY's territorial integrity, not as an absolute principle, but as only one of many principles—including most obviously, Helsinki human rights commitments—that would need to be considered with each principle—in the Final Act's words—"being interpreted taking into account the others[.]"

29. Serbia and its supporters never specify precisely which words in resolution 1244 they believe that Kosovo violated. But some

[57] No one is challenging that Serbia is the legal continuity of the FRY, but the law of State succession does not mean that all references in international documents to a parent are automatically considered to apply to a continuation State. See US Comments, p. 29.

[58] See US Statement, pp. 74–78; US Comments, pp. 29–31. Our Written Comments describe Belgrade's desire to avoid this possibility. Belgrade called such proposals "the most perfidious fraud Serbia has ever been exposed to", US Comments, pp. 30–31.

suggest that Kosovo violated international law by preventing UNMIK from carrying out its mandate under paragraph 11 *(e)* "to facilitate a political process" designed to determine Kosovo's future status. But that paragraph required only that the international civilian presence facilitate "a" political process—not multiple political processes. And by the time that Kosovo declared independence in February 2008, the specific political process envisioned by resolution 1244 had ended. The future status process had run its course, the negotiations' potential to produce any mutually agreed outcome on Kosovo's status had been exhausted. With the Secretary-General's support, the Special Envoy [Martii Ahtisaari]—who was charged with determining the scope and *duration* of that political process—had announced that "[n]o amount of additional talks, whatever the format, will overcome this impasse," and the Envoy had specifically declared that the only viable option for Kosovo was independence.

30. In these proceedings, some argue that the effort by some States, including the United States, to secure a new Security Council resolution on Kosovo in July 2007[62] somehow proves that we considered a successor resolution to 1244 legally necessary for Kosovo to become independent. But the draft 2007 resolution, like resolution 1244, was entirely "status-neutral." Its central legal purpose was to terminate UNMIK's operations in Kosovo, as the Ahtisaari Plan had envisioned. Nothing in the draft resolution would have decided on, or even endorsed a recommendation for, Kosovo's independence. Its non-enactment meant only that adjustments would be needed in the roles of UNMIK and the international actors envisioned in the Ahtisaari Plan. If anything, the success of the subsequent co-ordination only underscores the consistency of the declaration of independence with the operation of United Nations entities under resolution 1244.

31. In short, by February 2008, the absence of any prospect of bridging the divide between Serbia and Kosovo had rendered any further negotiations pointless. In these proceedings, Serbia ironically charges Kosovo with bad faith, suggesting that Kosovo's

[62] A draft of the resolution is attached as exhibit 36 to Serbia's Statement.

position favoring independence in the negotiations is in "sharp contrast" with 1244's requirements that "the sovereignty and territorial integrity of Serbia should be safeguarded." But neither UNMIK, Ahtisaari, nor the Troika ever suggested that Kosovo was negotiating in bad faith. Serbia claims that Kosovo did not need independence because Serbia had offered Kosovo the "highest degree of autonomy" under resolution 1244. But anyone who has read the factual findings of the Trial Chamber in the *Milutinović* case, who has seen photographs of Serbian tanks stationed outside the Kosovo Assembly building in March 1989, or who followed events in the Balkans during the last two decades, understands why the entire Contact Group identified Belgrade's "disastrous policies of the past [as lying] at the heart of the current problem."[66] The Contact Group admonished Serbia, not Kosovo, "to demonstrate much greater flexibility" and "to begin considering reasonable and workable compromises."[67]

32. Nor would it establish any violation of international law to argue that the Declaration of Independence was an *ultra vires* act by the Kosovo Assembly. For even if it were true that the Declaration somehow exceeded the authority conferred on the Assembly by UNMIK under the Constitutional Framework, that would only amount to a claim that it was issued by the wrong persons in Pristina. But if the Declaration were considered flawed because it issued from the Provisional Institutions of Self-Government, that technicality could now easily be fixed simply by having a different constituent body within Kosovo reissue it. No one doubts that the people of Kosovo wanted independence, or that the Declaration expressed their will. The people of Kosovo declared independence not under a "top-down" grant of domestic law authority from UNMIK, but rather, from a "bottom-up" expression of the will of the people of Kosovo, who left no doubt of their desire for independence.

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[66] Statement by the Contact Group on the Future of Kosovo, London, 31 Jan. 2006, available at *http://pristina.usembassy.gov/press20060131a.html.*

[67] Contact Group Ministerial Statement, Vienna, 24 July 2006, available at *http://www.diplomatie.gouv.fr/en/IMG/pdf/statement_Vienne_24_juillet_version_finale.pdf.*

33. Finally, even assuming for the sake of argument that the Declaration did somehow violate the Constitutional Framework, that Framework, like other regulations adopted by UNMIK, operated as domestic, not international, law.[69] We have previously demonstrated that UNMIK regulations must be domestic law because they operated at the domestic level, replace existing laws, and regulate local matters. In these proceedings Serbia has conceded the accuracy of this point, but argued that UNMIK rules somehow constitute international law because they were issued by the Security Council, an international authority. But just because the Security Council authorized UNMIK to establish Kosovo's domestic law did not automatically convert that domestic law into international law. For example, an automobile driver in Kosovo might violate a speed limit in an UNMIK traffic regulation, but he surely does not violate international law simply because the entity that promulgated the law against speeding was created by an international body.

34. Mr. President, if there were ever a time when United Nations officials could have acted to set aside the Declaration of Independence, it was soon after that Declaration issued in February 2008. But the responsible organs of the United Nations made a considered decision nearly two years ago *not* to invalidate that Declaration of Independence. They made that decision with full awareness of that Declaration's specific acceptance of resolution 1244 and the international presences established by it, and fully aware of Kosovo's pledge to act consistently with all Security Council resolutions and requirements of international law.

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[69] UNMIK's grant of authority was to exercise "legislative and executive powers"—that is what it was doing when it promulgated Regulation 2001/9—and its responsibility was to "change, repeal or suspend existing laws to the extent necessary for the carrying out of [its] functions", Report of the Secretary-General on the United Nations Interim Administration in Kosovo, S/1999/779, 12 July 1999, Dossier No. 37. A contemporaneous 2001 commentary noted that Regulation 2001/9, the Constitutional Framework, assigns to the Special Representative of the Secretary-General and KFOR "the powers that are typically associated with a federal government", A. Zimmerman and C. Stahn, "Yugoslav Territory, United Nations Trusteeship or Sovereign State", 70 *Nordic Journal of International Law* 423, 428 (2001).

III. The Court Should Only Answer the Narrow Question Posed

35. Finally, Mr. President, the Court should answer only the narrow question posed. What all this has demonstrated is just how anomalous and narrow is the question presented in this case. It is not a question about whether Kosovo is an independent State today, nor whether it has been properly recognized. Nor is this case about whether UNMIK and the United Nations should be doing anything differently. It is not about whether United Nations institutions empowered to do so acted properly in declining to invalidate the Declaration of Independence nearly two years ago. Finally, it is not about whether Kosovo's future status talks—which were properly ended as "exhausted" years ago—could or should now be resumed.

36. The usual premise upon which the Court's advisory jurisdiction rests is that the requesting organ—here, the *General Assembly*—needs the Court's legal advice to carry out its functions effectively. But here the question has been asked not to give the Assembly legal advice, so much as to give advice to Member States.[75] Resolution 63/3, which referred the advisory question to the Court, nowhere indicates how the Court's opinion would relate to any planned activity of the General Assembly nor does it identify any constructive use to which the General Assembly might put a Court opinion. And *unlike every prior occasion* on which the General Assembly has requested an advisory opinion, resolution 63/3 was adopted not in connection with a substantive agenda item for the General Assembly's work, but rather, only under an

[75] As this Court has emphasized in the past, advisory opinions serve to advise the organs of the *United Nations*, not individual Member States. In seeking support for its resolution, Serbia continually emphasized not the need of the General Assembly for an answer to the question, but the purported right of *Member States* to refer a question to the Court. Serbia frankly described this case as being "about the right of any member State of the United Nations to pose a simple, elementary question", asserting before the General Assembly that "[n]o country should be denied the right to refer such a matter to the ICJ"; and that a vote against the resolution "would in effect be a vote to deny the right of any country to seek—now or in the future—-judicial recourse through the United Nations system." See US Statement, p. 44.

ad hoc agenda item created for the sole purpose of requesting an advisory opinion from this Court.

37. Ironically, the Member State who supported the referral of this narrow question has avowed that the Court's answer will not change even its conduct. Serbia has repeatedly said that it will not recognize Kosovo "at any cost, even in the event that the [Court's] decision is in favor of Pristina." But, Mr. President, this Court has no obligation to issue advisory opinions that the moving State has already suggested it might ignore, that seek to reopen long ended political negotiations that responsible United Nations officials have concluded are futile, or that seek to enlist the Court to unravel delicate political arrangements that have brought stability to a troubled region.

38. We therefore urge this Court to leave Kosovo's Declaration undisturbed—either by refusing to issue an opinion or by simply answering in the affirmative the question presented: whether Kosovo's Declaration of Independence accords with international law. As our written pleadings make clear, the Court may answer the question posed to it and opine that international law did not prohibit Kosovo's Declaration of Independence, without addressing other political situations or complex issues of self-determination raised by a number of States in these proceedings.

39. But if the Court should find it necessary to examine Kosovo's Declaration through the lens of self-determination, it should consider the unique legal and factual circumstances of this case, which include the extensive Security Council attention given to Kosovo; the large-scale atrocities against the people of Kosovo that led to Rambouillet and the 1244 process; the United Nations concern for the will of the people of Kosovo, their undivided territory and the unique historical, legal, cultural and linguistic attributes; the lengthy history of Kosovo's autonomy; the participation of Kosovo's representatives in the internationally led political process; the commitment of the people of Kosovo in their Declaration to respect prior Security Council resolutions and international law; and the decision by United Nations organs to leave undisturbed Kosovo's move to independence.

40. Mr. President, in its presentation yesterday, Cyprus pointedly sought to analogize the 1244 process to the heart-wrenching,

but misleading, case where a parent sends a small child off to State supervision, only to lose her forever. But upon reflection, the far better analogy would be to acknowledge the futility of the State forcing an adult child to return to an abusive home against her will, particularly where the parent and child have already long lived apart, and where repeated efforts at reconciliation have reached impasse. There, as here, declaring independence would be the only viable option, and would certainly be in accordance with law.

IV. Conclusion

41. In conclusion, Mr. President, Kosovo's Declaration of Independence has proven to be necessary and politically stabilizing. The 2008 Declaration of Independence, and the ensuing recognition of Kosovo by many nations, brought much needed stability to the Balkans and closed the books on the protracted break-up of what once was Yugoslavia. Kosovo's Declaration of Independence emanated from a process supervised by the United Nations, which through resolution 1244 and the institutions it established, was deeply involved in Kosovo's past and present. And the Declaration of Independence has now made possible a future in which Kosovo is not merely independent politically, but also self-sufficient economically, administratively, and civilly.

42. Although Serbia, acting through the General Assembly, has urged the Court to issue an advisory opinion it hopes will reopen status negotiations to redetermine Kosovo's future, it has given this Court no reason to upend what has become a stable equilibrium. For Kosovo is now independent. Both Kosovo and Serbia are part of Europe's future. As the principal judicial organ of the United Nations, this Court should not be conscripted into a Member State's effort to roll back the clock nearly a decade, undoing a careful process accomplished under resolution 1244 and overseen by so many other United Nations bodies: the Security Council; the Special Representative of the Secretary-General; two Special Envoys, UNMIK and the Troika. And when Kosovo's independence has finally closed one of the most painful chapters in modern European history, this Court should not use its advisory jurisdiction to reopen that chapter. Instead, we should all look to

a common future in which Serbia and an independent Kosovo have vitally important roles to play.

43. Mr. President, honorable Members of the Court, on behalf of my country, I thank you for your thoughtful attention.

B. U.S. RELATIONS WITH TAIWAN

On April 7, 2009, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the dismissal of a suit brought by individuals residing on Taiwan and the Taiwan Nation Party, on behalf of its members. The plaintiffs claimed that the American Institute on Taiwan "denied individual [p]laintiffs' rights and privileges as United States [non-citizen] nationals" by refusing to accept and process their applications for U.S. passports. The plaintiffs requested a declaratory judgment that, as residents on Taiwan, they are nationals of the United States, with all related rights and privileges, including those flowing from the First, Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. *Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009). The court concluded that the case presented a nonjusticiable political question because determinations of sovereignty are reserved to the executive branch and affirmed the dismissal of the case for lack of subject matter jurisdiction. Excerpts below provide the court's analysis of the applicability of the political question doctrine. For prior developments in the case, see *Digest 2007* at 1–3 and 433–37 and *Digest 2008* at 443–47. On October 5, 2009, the Supreme Court denied certiorari. *Lin v. United States*, 130 S. Ct. 202 (2009).

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II

. . . Under the political question doctrine, a court must decline jurisdiction if there exists "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). "[D]ecision-making in

the fields of foreign policy and national security is textually committed to the political branches of government." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). Because deciding sovereignty is a political task, Appellants' case is nonjusticiable. *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political[] question . . . ."); *Baker*, 369 U.S. at 212 ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing . . . .").

Appellants argue this is a straightforward question of treaty and statutory interpretation and well within the Article III powers of the court. It is and it isn't. The political question doctrine deprives federal courts of jurisdiction, based on prudential concerns, over cases which would normally fall within their purview. *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996). We do not disagree with Appellants' assertion that we *could* resolve this case through treaty analysis and statutory construction, *see Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) . . . ; we merely decline to do so as this case presents a political question which strips us of jurisdiction to undertake that otherwise familiar task. . . .

Once the Executive determines Taiwan's sovereign, we can decide Appellants' resulting status and concomitant rights expeditiously. *Baker*, 369 U.S. at 212 . . . . But for many years—indeed, as Appellants admit, since the signing of the SFPT [San Francisco Peace Treaty of September 8, 1951, under which Japan renounced "all right, title and claim to Formosa and the Pescadores"] itself—the Executive has gone out of its way to avoid making that determination, creating an information deficit for determining the status of the people on Taiwan. . . .

Identifying Taiwan's sovereign is an antecedent question to Appellants' claims. This leaves the Court with few options. We could jettison the United States' long-standing foreign policy regarding Taiwan—that of strategic ambiguity—in favor of declaring a sovereign. But that seems imprudent. Since no war powers have been delegated to the judiciary, judicial modesty as well as doctrine cautions us to abjure so provocative a course.

Appellants attempt to side-step this fatal hurdle by asserting that, for the limited purpose of determining their status and rights under U.S. law, the issue of sovereignty is already decided under the SFPT. According to them, as the "principal occupying power" under the treaty, the United States retains temporary *de jure* sovereignty over Taiwan. Consequently, Appellants urge us to remember recognizing that the determination of sovereignty over an area is a political question "does not debar courts from examining the status resulting from prior action." *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948). True enough. However, under the interpretation of the political departments to whom we must defer in such matters, *Pearcy v. Stranahan*, 205 U.S. 257, 265 (1907) (deferring to "the interpretation which the political departments have put upon [a] treaty" when resolving a question of sovereignty), it remains unknown whether, by failing to designate a sovereign but listing the United States as the "principal occupying power," the SFPT created any kind of sovereignty in the first place. Therefore, the "prior action" on which Appellants rely is not only an open question, but is in fact the same question Appellants insist they do not require this Court to answer: who is Taiwan's sovereign? Appellants may even be correct; careful analysis of the SFPT might lead us to conclude the United States has temporary sovereignty. But we will never know, because the political question doctrine forbids us from commencing that analysis. We do not dictate to the Executive what governments serve as the supreme political authorities of foreign lands, *Jones*, 137 U.S. at 212; this rule applies *a fortiori* to determinations of U.S. sovereignty.

* * * *

Finally, Appellants attempt to analogize the United States' former relationship with the Philippines, after Spain ceded the Philippine Islands to the United States in 1898, to its current relationship with Taiwan. The comparison is inapposite. Congress, not a court, declared the Filipino population was "entitled to the protection of the United States" based on the United States' sovereignty over the Philippines. *See Rabang v. Boyd*, 353 U.S. 427, 429 (1957). Later, Congress acknowledged "the final and complete

withdrawal of American sovereignty over the Philippine Islands" and stripped the Filipino people of their non-citizen national status. *Id.* at 429–30. Therefore, unlike here, courts confronting claims involving the rights enjoyed by Filipinos had no need to determine sovereignty over the Philippine Islands.

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C. EXECUTIVE BRANCH AUTHORITY OVER FOREIGN STATE RECOGNITION AND PASSPORT ISSUANCE

Status of Jerusalem

On July 6, 2009, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the dismissal of a suit seeking to compel the State Department to list "Israel" as the place of birth in the passport (and consular report of birth) for a U.S. citizen child born in Jerusalem. *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009). The State Department instructs passport officials to list only "Jerusalem" as the place of birth of such citizens because of the United States' longstanding policy of leaving the status of Jerusalem to be determined by the parties to the Arab-Israeli dispute.

The case was filed on behalf of a child born in Jerusalem whose parents sought to compel the Department to comply with § 214(d) of the FY 2003 Foreign Relations Authorization Act, Pub. L. No. 107-228, 116 Stat. 1350, which directs the Secretary of State to list "Israel" as the place of birth of a citizen born in Jerusalem, when the citizen so requests. In the majority's decision, the court concluded that, because the executive branch has sole constitutional authority to recognize foreign governments and the President's decision not to recognize any government as sovereign over Jerusalem represents an exercise of his recognition power, the judiciary could not order the executive branch to change the nation's foreign policy in this matter. Therefore, the court concluded that the case was nonjusticiable under the political question doctrine. In a concurring opinion, the third judge on the panel

found the political question doctrine inapplicable, as he saw the court's role as determining the constitutionality of § 214(d). The concurrence identified two dispositive questions: (1) whether the Jerusalem policy falls within the President's exclusive power to recognize foreign sovereigns and (2) whether § 214(d) impermissibly intrudes on that power. The concurrence answered both affirmatively and concluded that § 214(d) is unconstitutional.

On August 21, 2009, the plaintiff-appellants filed a petition for rehearing en banc. In response to the court of appeals' order, on September 15, 2009, the United States submitted a brief opposing rehearing. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*. As of the end of 2009, the court of appeals had not acted on the petition for rehearing en banc.*

Excerpts follow from the panel majority's analysis of the applicability of the political question doctrine and the concurrence's analysis in concluding that the Jerusalem policy falls within the President's exclusive power to recognize foreign sovereigns and that § 214(d) is unconstitutional (footnotes and citations to the Joint Appendix and other submissions in the case omitted). For prior developments in the case, see *Digest 2006* at 530–47, *Digest 2007* at 437–43, and *Digest 2008* at 447–54; the government's 2008 brief in the court of appeals is available as document 3 for *Digest 2008* at *www.state.gov/s/l/c8183.htm*.

* * * *

Majority Opinion

II.

In *Baker v. Carr* [369 U.S. 186 (1962)], the Supreme Court held that courts may not consider claims that raise issues whose resolution

* Editor's note: On June 29, 2010, the D.C. Circuit denied the petition for rehearing en banc. *Zivotofsky v. Secretary of State*, 610 F.3d 84 (D.C. Cir. 2010).

has been committed to the political branches by the text of the Constitution. 369 U.S. at 217 . . . .

It is well established that the Constitution's grant of authority to the President to "receive Ambassadors and other public Ministers," U.S. CONST. art. II, § 3, includes the power to recognize foreign governments. . . . That this power belongs solely to the President has been clear from the earliest days of the Republic. . . . The Supreme Court has recognized this constitutional commitment of authority to the President repeatedly and consistently over many years. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign sovereign] is exclusively a function of the Executive."); *Goldwater v. Carter*, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting) ("Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes." (citing *Sabbatino*, 376 U.S. at 410; *Baker*, 369 U.S. at 212; *United States v. Pink*, 315 U.S. 203, 228–30 (1942))).

The President's exercise of the recognition power granted solely to him by the Constitution cannot be reviewed by the courts. . . . A decision made by the President regarding which government is sovereign over a particular place is an exercise of that power. . . . As a result, we have declined invitations to question the President's use of the recognition power. . . .

Thus the President has exclusive and unreviewable constitutional power to keep the United States out of the debate over the status of Jerusalem. Nevertheless, Zivotofsky asks us to review a policy of the State Department implementing the President's decision. But as the Supreme Court has explained, policy decisions made pursuant to the President's recognition power are nonjusticiable political questions. *See Pink*, 315 U.S. at 229 . . . . And every president since 1948 has, as a matter of official policy, purposefully avoided taking a position on the issue whether Israel's sovereignty extends to the city of Jerusalem. The State Department's refusal to record "Israel" in passports and Consular Reports of Birth of U.S. citizens born in Jerusalem implements this longstanding policy of the Executive. *See Haig v. Agee*, 453 U.S. 280, 292 (1981) (recognizing that a U.S. passport is an official government document used to communicate with foreign governments).

By asking the judiciary to order the State Department to mark official government documents in a manner that would directly contravene the President's policy, Zivotofsky invites the courts to call into question the President's exercise of the recognition power. This we cannot do. We therefore hold that Zivotofsky's claim presents a nonjusticiable political question because it trenches upon the President's constitutionally committed recognition power.

Zivotofsky argues that the political question doctrine cannot foreclose a court from enforcing a duly enacted law. . . . Enforcement of the rights Congress created presents no political question. The government responds that even if we find jurisdiction to consider Zivotofsky's claim, we must nevertheless strike section 214(d) as an unconstitutional infringement on the President's recognition power. We agree that resolving Zivotofsky's claim either at the jurisdictional stage under the political question doctrine or on the merits by striking section 214(d) implicates the recognition power. Only the Executive—not Congress and not the courts—has the power to define U.S. policy regarding Israel's sovereignty over Jerusalem and decide how best to implement that policy. The question for us is whether Zivotofsky loses on jurisdictional grounds, or on the merits because Congress lacks the power to give him an enforceable right to have "Israel" noted as his birthplace on his government documents.

Under the Supreme Court's precedent and our own, the answer must be the former. We are aware of no court that has held we cannot or need not conduct the jurisdictional analysis called for by the political question doctrine simply because the claim asserted involves a statutory right. We must always begin by interpreting the constitutional text in question and determining "whether and to what extent the issue is textually committed." *Nixon*, 506 U.S. [224,] 228 [(1993)]. The question is not whether the courts are competent to interpret a statute. Certainly we are. But as our recent decision makes clear, we will decline to "resolve [a] case through . . . statutory construction" when it "presents a political question which strips us of jurisdiction to undertake that otherwise familiar task." *Lin* [*v. United States*], 561 F.3d at 506. [Editor's note: For further discussion of *Lin v. United States*, see B., *supra*.] In a case such as this, to borrow the words of Professor Wechsler,

"abstention of decision" is required because deciding whether the Secretary of State must mark a passport and Consular Report of Birth as Zivotofsky requests would necessarily draw us into an area of decisionmaking the Constitution leaves to the Executive alone. *See* HERBERT WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 11–14 (1961). That Congress took a position on the status of Jerusalem and gave Zivotofsky a statutory cause of action . . . is of no moment to whether the judiciary has authority to resolve this dispute between the political branches. . . . We decline to be the first court to hold that a statutory challenge to executive action trumps the analysis in *Baker* and *Nixon* and renders the political question doctrine inapplicable.

* * * *

Concurring Opinion

* * * *

[II.]B. The President's Passport Policy Regarding the Designation of Jerusalem Is an Exercise of the Recognition Power

The Executive and Congress historically have shared authority over the regulation of passports. However, "[f]rom the outset, Congress [has] endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports. Early Congresses enacted statutes expressly recognizing the Executive authority with respect to passports." *Haig v. Agee*, 453 U.S. 280, 294 (1981); *see also id.* at 292–300 (discussing history of congressional legislation and Executive control over passports); *Kent v. Dulles*, 357 U.S. 116, 122–24 (1958) (same). Congress passed the first Passport Act in 1856, endorsing the Executive's power to control passports, *Kent*, 357 U.S. at 123. The current Passport Act maintains this recognition of Executive authority. 22 U.S.C. § 211a ("The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic and consular officers of the United States and by such other employees of the Department of State[] . . . .").

Although Congress often has recognized the authority of the Executive to regulate the issuance of passports, this obviously does not confirm that the Executive retains exclusive control over all matters relating to passports. Indeed, the history of congressional legislation in this area suggests otherwise. *See, e.g.*, 22 U.S.C. § 211a (restricting the Executive department from designating a passport as restricted for travel "[u]nless authorized by law"). It is clear, however, that Congress lacks the power to interfere with a passport policy adopted by the Executive in furtherance of the recognition power. . . . The record in this case supports the Secretary's claim that the policy relating to the designation of Jerusalem on passports lawfully "govern[s] the question of recognition." *Pink*, 315 U.S. at 229.

. . . The United States has long refrained from recognizing Jerusalem as a city located within the sovereign state of Israel. . . .

The Secretary's rules regarding the designation of Jerusalem on passports obviously aim[] to further the United States' policy regarding the recognition of Israel. . . .

* * * *

. . . The Executive's policy is not to prejudge the status of Jerusalem, and any official statement to the contrary impinges upon the Executive's prerogative. The Executive has the *exclusive* authority to implement policies in furtherance of the recognition power and this court has no authority to second-guess the Executive's judgment when, as here, it is clear that the disputed policy is in furtherance of the recognition power.

* * * *

D. Section 214(d) Unconstitutionally Infringes the President's Exclusive Power to Recognize Foreign Sovereigns

The final question in this case is whether § 214(d) of the Foreign Relations Authorizations Act, which affords Zivotofsky a statutory right to have "Israel" listed as the place of birth on his passport, is a constitutionally valid enactment. Given the mandatory terms of the statute, it can hardly be doubted that § 214(d) intrudes on the President's recognition power. In commanding that the Secretary *shall* record Israel as the place of birth upon the request

of a citizen who is born in Jerusalem and entitled to a United States passport, the statute plainly defies the Executive's determination to the contrary. . . .

Zivotofsky argues that § 214(d) cannot be seen to interfere with the Executive's recognition power, because the statute here is no different from another uncontested legislative action taken by Congress with respect to Taiwan. In 1994, Congress enacted a provision requiring that, "[f]or purposes of the registration of birth or certificate of nationality of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan." Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382 (1994) (as amended by State Department: Technical Amendments, Pub. L. No. 103-415, § 1(r), 108 Stat. 4299, 4302 (1994)). This example is inapposite. Following the enactment of the statute covering Taiwan, the State Department determined that the congressional provision was consistent with the United States' policy that the People's Republic of China is the "sole legal government of China" and "Taiwan is a part of China." U.S. Department of State Passport Bulletin 94-12 (Nov. 7, 1994). Because listing "Taiwan" did not contravene the President's position regarding China's sovereignty, the State Department allowed American citizens born in Taiwan to record "Taiwan" as their place of birth. *See id*. The present case is different from the Taiwan example. The State Department here has determined that recording Israel as the place of birth for United States citizens born in Jerusalem misstates the terms of this country's recognition of Israel.

The more important point here is that the President has the exclusive power to establish the policies governing the recognition of foreign sovereigns. The Executive may treat different situations differently, depending upon how the President assesses each situation. These are matters within the exclusive power of the Executive under Art. II, § 3, and neither Congress nor the Judiciary has the authority to second-guess the Executive's policies governing the terms of recognition.

"[I]t remains a basic principle of our constitutional scheme that one branch of the government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748,

757 (1996). In my view, the bottom line of the court's judgment in this case is inescapable: "Section 214(d) is unconstitutional. Article II assigns to the President the exclusive power to recognize foreign sovereigns, and Congress has no authority to override or intrude on that power." Section 214(d) impermissibly intrudes on the President's exclusive power to recognize foreign sovereigns. . . .

Cross References

UN Interim Administration Mission in Kosovo following Kosovo's independence, **Chapter 17.B.4.**
Russia/Georgia, **Chapter 18.A.1.b.(2)**

Chapter 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITY

1. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602–1611, provides that, subject to international agreements to which the United States was a party at the time of enactment in 1976, a foreign state is immune from the jurisdiction of courts in the United States unless one of the specified exceptions in the statute applies. A foreign state is defined to include its agencies and instrumentalities but not the individual actors. The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). Before the enactment of the FSIA, courts abided by "suggestions of immunity" from the State Department. When no suggestion was filed, however, the courts would make the determination by applying principles derived from State Department practice.

In the FSIA Congress codified the "restrictive" theory of sovereign immunity, under which a state is entitled to immunity with respect to its sovereign or public acts, but not those that are private or commercial in character. The United States had previously adopted the restrictive theory in the "Tate Letter" of 1952, reproduced at 26 Dep't State Bull. 678 at 984–85 (1952). *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711–15 (1976).

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From the outset, the FSIA has recognized exceptions to immunity, notably commercial activity. Over time, amendments to the FSIA incorporated additional exceptions, including one enacted in 1996 for acts of terrorism in certain circumstances, which was repealed in 2008 and replaced with a more expansive provision. The FSIA's various statutory exceptions, set forth at 28 U.S.C. §§ 1605(a)(1)–(6) and § 1605A, have been subject to significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and in which it participates, if at all, as *amicus curiae*.

The following items describe a selection of the significant proceedings that occurred during 2009.

a. Scope of application of the FSIA

On February 10, 2009, the U.S. Court of Appeals for the Sixth Circuit withdrew a 2008 opinion and issued an amended opinion affirming a district court order dismissing some claims and allowing others to proceed in a putative class action against the Holy See. *O'Bryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009). Although the United States recognizes the Holy See as a foreign government, the plaintiffs, who alleged sexual abuse by Catholic priests in the United States, argued that they could invoke federal jurisdiction over the Holy See without relying on the FSIA by virtue of the Holy See's status as the head of the Roman Catholic Church. On appeal, the plaintiffs also alleged that the FSIA was unconstitutional as applied to the Holy See.

The United States participated in the appeal as *amicus curiae* to defend the executive branch's recognition of the Holy See as a foreign government and to argue that the Holy See can be sued only as authorized by the FSIA. The United States also intervened in the litigation to defend the constitutionality of the FSIA, as applied to the Holy See. *See* 28 U.S.C.

§ 2403(a). The U.S. brief, filed on September 17, 2007, is available at *www.state.gov/s/l/c8183.htm*.

In affirming the district court, the Sixth Circuit rejected the plaintiffs' argument that they could sue the Holy See outside the FSIA and also determined that the plaintiffs had waived their constitutional challenge by failing to present it to the district court. Excerpts from the court's opinion follow, providing factual background and analyzing the applicability of the FSIA generally. (Footnotes and citations to other submissions in the case are omitted.) For the court's analysis in holding that, while the commercial activity exception of the FSIA did not apply to the case, certain portions of the plaintiffs' claims fell within the non-commercial tort exception of the FSIA, see A.1.b.(1)(i) and A.1.b.(2)(i) below, respectively. The Supreme Court denied certiorari on October 5, 2009. *O'Bryan v. Holy See*, 130 S. Ct. 361 (2009).

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On June 4, 2004, plaintiffs, who claim to have been victims of sexual abuse by Roman Catholic clergy, filed a class action suit against the Holy See. The Holy See is both a foreign state and an unincorporated association and the central government of an international religious organization, the Roman Catholic Church. . . .

* * * *

Plaintiffs' claims regarding the liability of the Holy See stem, in large part, from their allegations regarding the purported policy of the Holy See towards accusations of sexual abuse leveled against clergy:

> [T]he Holy See has mandated that all allegations of childhood sexual abuse be kept under a cloak of complete secrecy, even if that secrecy violated state, federal, or international law. In March, 1962, the Holy See privately circulated a document containing a set of procedural norms for

> dealing with the solicitation of sex in confession, clergy sex with minors, homosexual relations, and bestiality. This document [the "1962 Policy"]—an official legislative text issued by the Congregation of the Holy Office and specifically approved by Pope John XXIII—imposes the highest level of secrecy on the handling of clergy sexual abuse matters. . . . This secret document was first discovered and made public in July, 2003 by news media in the United States and throughout the world. The policies of the Holy See expressed in this and other documents require bishops in the United States to, among other things, refuse to report childhood sexual abuse committed by priests to criminal or civil authorities, even where such failure to report would itself be a criminal offense.

* * * *

In this case, there is no dispute that the United States recognized the Vatican in 1984, and there is no dispute between the parties that the *State of the Vatican* is a foreign state within the meaning of [the] FSIA. . . .

Plaintiffs, however, contend that the "Holy See . . . . *as the head of the Roman Catholic Church*, . . . has no defined territory and no permanent population, and thus does not" satisfy the definition of "foreign state" under the Restatement's standard.

Plaintiffs' argument remains somewhat obscure. . . . The first possible interpretation of plaintiffs' argument is that they ask this court to conceive of the Holy See as two separate entities—first, a foreign sovereign, recognized by the United States government, and second, an unincorporated head of an international religious organization. Alternatively, they ask this court not to consider the Holy See, a single entity, a foreign sovereign in this case because the Holy See was acting in a non-sovereign capacity when it engaged in the conduct alleged in plaintiffs' complaint.

Plaintiffs' argument fails under either construction. With respect to the first alternative—the two-entity alternative—the district court correctly noted that "[p]laintiffs cite no authority for the proposition that the Holy See may be sued in a separate,

non-sovereign function as an unincorporated association and as head of an international religious organization." *O'Bryan* [*v. Holy See*], 490 F. Supp 2d [826,] 830 [(W.D. Ky. 2005)]. To the contrary, courts have generally treated the Holy See as a foreign state for purposes of the FSIA. . . . Consequently, we reject plaintiffs' contention that they are not suing the Holy See that has been recognized by the United States government, but a parallel non-sovereign entity conjured up by the plaintiffs.

The structure and intent of the FSIA also counsel us to reject the plaintiffs' alternative capacity approach. As the Supreme Court has explained, by enacting [the] FSIA, Congress intended to adopt the "restrictive theory" of sovereign immunity, "under which 'the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).'" *Permanent Mission of India to the U.N. v. City of New York*, 127 S. Ct. 2352, 2357 (2007) (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976)).

In order to implement the "restrictive theory" of sovereign immunity and limit immunity to sovereign acts but not private acts, Congress crafted exceptions to [the] FSIA. *See* 28 U.S.C. 1605(a). . . . In this way, Congress constructed the FSIA to immunize foreign sovereigns acting in a public capacity, while ensuring that essentially private activities would be actionable under the FSIA exceptions.

* * * *

. . . [I]f plaintiffs believe that the Holy See acted in a private capacity, then the plaintiffs are limited to arguing that an exception to the FSIA applies; such claims cannot serve as reasons to avoid the FSIA altogether. The exceptions to FSIA capture all instances where Congress has deemed conduct, if pursued by a foreign sovereign, sufficiently private so as to eliminate foreign sovereign immunity. In turn, the alternative-capacity argument can only succeed to the extent that it identifies conduct that fits within one of the exceptions outlined under FSIA. *See* 28 U.S.C. § 1605(a).

* * * *

b. Exceptions to immunity

(1) Commercial activity

Section 1605(a)(2) of the FSIA provides that a foreign state is not immune from suit in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

(i) O'Bryan v. Holy See

In *O'Bryan v. Holy See*, discussed in A.1.a. *supra*, the U.S. Court of Appeals for the Sixth Circuit held that the commercial activity exception to state immunity did not provide jurisdiction in a suit brought against the Holy See in connection with alleged sexual abuse by Catholic priests in the United States. Excerpts follow from the court's analysis in finding the commercial activity exception inapplicable (footnote omitted).

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* * * *

. . . "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). In addition, "the commercial activity relied upon by plaintiff for jurisdictional purposes must be also the activity upon which the lawsuit is based; that is, there must be a connection between that activity and the act complained of in the lawsuit." *Gould*[, *Inc. v. Pechiney Ugine Kuhlmann*], 853 F.2d[, 445,] 452

[(6th Cir. 1988)] (citing *Riedel v. Bancam, S.A.*, 792 F.2d 587, 591 (6th Cir. 1986)).

* * * *

The analysis in [*Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607 (1992)] and [*Saudi Arabia v. Nelson*, 507 U.S. 349 (1993)] points to two distinct limitations on the application of the commercial activity exception. First, the activity must be of the type in which private individuals engage; if the activities in question are not private, but sovereign in nature, then the commercial activity exception will not apply. . . .

Second, the *Weltover* and *Nelson* cases also instruct courts to avoid the artful pleading of plaintiffs and look to the core of the activities alleged to be commercial in nature. . . .

* * * *

Both limiting principles apply to plaintiffs' attempt to invoke the commercial activity exception . . . . On one front, all of the claims advanced by plaintiffs stem from the promulgation of the purported 1962 Policy by the Holy See. Indeed, . . . plaintiffs themselves emphasize the force of the purported policy and the potential for sanction if Holy See employees chose not to comply.

In addition, the gravaman of plaintiffs' claims is the tortious conduct of priests which was allegedly facilitated by the tortious conduct of Holy See employees. Thus to allow plaintiffs to obtain jurisdiction under the commercial activity exception through a semantic ploy would allow them to "obtain jurisdiction over a claim that Congress did not intend to be brought against a foreign sovereign." *See Leutwyler* [*v. Office of Her Majesty Queen Rania Al Abdullah*], 184 F. Supp. 2d [277,] 299 [(S.D.N.Y. 2001)]. We therefore conclude that the commercial activity exception does not apply.

* * * *

(ii) Swarna v. Al-Awadi

See discussion below in B.2.b.(1).

(iii) Cause of action under customary international law

On November 20, 2009, the U.S. District Court for the District of Columbia issued its decision in long-running litigation arising from a claim that Iran expropriated property belonging to an American company during the 1979 Revolution. *McKesson Corp. v. Islamic Republic of Iran,* 2009 U.S. Dist. LEXIS 109368 (D.D.C. 2009). McKesson originally brought suit in 1982 alleging that Iran had unlawfully expropriated its dividends and interests in Pak Dairy, an Iranian dairy company. In 2008 the U.S. Court of Appeals for the District of Columbia Circuit held that McKesson did not have a cause of action under the U.S.–Iran Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, 8 U.S.T. 899, 903 ("Treaty of Amity") and remanded the case to the district court to address three issues: (1) whether McKesson had a cause of action under Iranian law; (2) whether, in light of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), McKesson had a cause of action under customary international law; and (3) whether the act of state doctrine applied. *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485 (D.C. Cir. 2008). The D.C. Circuit also held that the district court properly found jurisdiction under the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2). *Id*. For additional background on the litigation, see *Digest 2002* at 219–26 and 519–22; *Digest 2003* at 258–67; and *Digest 2008* at 155–58.

On September 28, 2009, at the request of the court, the United States filed a Statement of Interest in the case. Noting the FSIA's legislative history and the text of the commercial activities exception, the United States recommended that the court find that "a plaintiff may not maintain a federal common law cause of action based on customary international law in a suit where jurisdiction is premised on the commercial activities exception within the FSIA." The U.S. Statement of Interest is available at *www.state.gov/s/l/c8183.htm*.

In its November 2009 decision, the D.C. District Court disagreed with the United States and held that McKesson

had "an implied cause of action under customary international law for expropriation." *McKesson Corp. v. Islamic Republic of Iran*, 2009 U.S. Dist. LEXIS 109368, at *19. In reaching that conclusion the court stated, "Congress enacted the commercial activities exception [of the FSIA] on an understanding that courts would apply causes of action based on customary international law." *Id*. at *13. The court also held that McKesson had a cause of action under Iranian law and that the act of state doctrine did not apply. *Id*. at *19. As of the end of 2009, further proceedings remained ongoing before the district court.

(2) Non-commercial tort exception

Section 1605(a)(5) of the FSIA provides that a foreign state is not immune from suit in any case:

> not otherwise encompassed in [the exception for commercial activity], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) O'Bryan v. Holy See

In *O'Bryan v. Holy See*, discussed in A.1.a. and A.1.b.(1)(i) *supra*, the U.S. Court of Appeals for the Sixth Circuit held that the non-commercial tort exception of the FSIA provided jurisdiction over certain claims in a suit brought against the

Holy See in connection with alleged sexual abuse by Catholic priests in the United States. Excerpts follow from the court's analysis of the elements of the non-commercial tort exception to immunity (footnotes omitted). *See also* the discussion of *Swarna v. Al-Awadi* in B.2.b.(1).

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* * * *

i. Elements of the Tortious Act Exception

(a) "Occurring in the United States"

"Section 1605(a)(5) is limited by its terms . . . to those cases in which the damage to or loss of property occurs in the United States." *Amerada Hess Shipping Corp.*, 488 U.S. at 439 (emphasis omitted). Thus, in contrast to the commercial activity exception, a tortious act having "direct effects" in the United States will not satisfy the requirements of the tortious activity exception. *Id.* at 441. . . .

We join the Second and D.C. Circuits in concluding that in order to apply the tortious act exception, the "entire tort" must occur in the United States. This position finds support in the Supreme Court's decision in *Amerada Hess Shipping*: "the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States." 488 U.S. at 441. Moreover, the purpose of the tortious activity exception is limited: "Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law." *Id.* at 439–40 (citing H.R. Rep., at 14). Thus, it seems most in keeping with both Supreme Court precedent and the purposes of the FSIA to grant subject matter jurisdiction under the tortious activity exception only to torts which were entirely committed within the United States.

(b) Caused by an Act or Omission

In Kentucky, "[l]iability for a negligent act follows a finding of proximate or legal cause," which is defined as "a finding of causation in fact, i.e., substantial cause, and the absence of a public

policy rule of law which prohibits the imposition of liability." *Deutsch v. Shein*, 597 S.W.2d 141, 143–44 (Ky. 1980). . . .

(c) Official or Employee of a Foreign State

Kentucky law appears to have adopted the Restatement (Third) of Agency § 7.07 definition of employee when addressing claims of vicarious liability: "an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work . . . ." *Papa John's Int'l, Inc. v. McCoy*, 2008 Ky. LEXIS 16, at *16 (Ky. 2008) (quoting Restatement (Third) of Agency § 7.07). . . .

(d) Scope of Employment

"State law, not federal common law, governs whether an officer's or employee's action is within the scope of employment in determining the applicability of the FSIA." *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 173 (5th Cir. 1994). . . . Because the conduct alleged by the named plaintiffs occurred in Kentucky, Kentucky law applies to the instant case.

Under Kentucky law, for alleged conduct to be considered within the scope of employment "the conduct must be of the same general nature as that authorized or incidental to the conduct authorized." *Osborne v. Payne*, 31 S.W.3d 911, 915 (Ky. 2000). Thus, "[u]nder the doctrine of respondeat superior, an employer can be held vicariously liable for an employee's tortious actions if committed in the scope of his or her employment." *Papa John's Int'l*, 2008 Ky. LEXIS 16, at *28–*29. "In the area of intentional torts, the focus is consistently on the purpose or motive of the employee in determining whether he or she was acting within the scope of employment." *Id.* at *29. However, "[a] principal is not liable under the doctrine of respondeat superior unless the intentional wrongs of the agent were calculated to advance the cause of the principal or were appropriate to the normal scope of the operator's employment." *Osborne*, 31 S.W.3d at 915. Applying these principles, the Kentucky Supreme Court ruled that a priest's adulterous conduct could not be considered within the scope of his employment, even though the underlying conduct was intentional. *Osborne*, 31 S.W.3d at 915.

ii. Exceptions to the Tortious Act Exception

(a) Discretionary Function Exception to the Tortious Act Exception

The FSIA does not define "discretionary functions." To interpret the FSIA's discretionary function exception, courts typically apply the interpretation of the discretionary function exception of the Federal Tort Claims Act (the "FTCA"), because "[n]ot only does the language of the FSIA discretionary function exception replicate that of the [FTCA], 28 U.S.C. § 2680(a), but the legislative history of the FSIA, in explaining section 1605(a)(5)(A), directs us to the FTCA." *Olsen* [*v. Gov't of Mexico*], 729 F.2d [641,] 646 [9th Cir. 1984) (abrogated on other grounds by *Joseph v. Consulate General of Nig.*, 830 F.2d 1018, 1026 (1987)] (citing H.R. Rep. at 21); *see also Rodriguez v. Republic of Costa Rica*, 297 F.3d 1, 8 (1st Cir. 2002); *Office of Consulate Gen. of Nig.*, 830 F.2d at 1026 (9th Cir. 1987).

In determining whether particular conduct falls under the FTCA's, and in turn under the FSIA's, discretionary function exception, courts apply the . . . *Berkovitz* test:

> The first inquiry is whether the challenged action involved an element of choice or judgment, for it is clear that the exception "will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." If choice or judgment is exercised, the second inquiry is whether that choice or judgment is of the type Congress intended to exclude from liability—that is, whether the choice or judgment was one involving social, economic or political policy.

Vickers v. United States, 228 F.3d 944, 949 (9th Cir. 2000) (internal citations omitted) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)); *Rodriguez*, 297 F.3d at 9 (applying the two-part *Berkovitz* test to the FSIA's discretionary function exception). . . .

* * * *

(b) Arising Out of Misrepresentation or Deceit Exceptions to the Tortious Act Exception

The scope of the misrepresentation or deceit exception to the tortious act exception is an unsettled matter. Courts generally have

looked to the definition of misrepresentation in the FTCA as a guide for defining the term under the FSIA, relying on the legislative history of the FSIA for such comparison. *See, e.g.*, *Cabiri v. Gov't of the Republic of Ghana*, 165 F.3d 193, 200 n.4 (2d Cir. 1999) ("The FSIA House Report provides that 'the exceptions provided in subparagraph[] . . . (B) of section 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the [FTCA], 28 U.S.C. 2680(a) and (h).") (quoting H.R. Rep. at 21); *see also De Sanchez v. Banco Central de Nicar.*, 770 F.2d 1385, 1398 (5th Cir. 1985).

In addition, both the Second and Ninth Circuits have dismissed claims against foreign sovereigns where the foreign sovereign allegedly provided false or misleading information regarding the whereabouts of the plaintiffs' relatives. *See Cabiri*, 165 F.3d 193, 200 (dismissing claim "for emotional injury caused by the refusal of a foreign state, however nefarious, to give its citizens in the United States full or truthful information concerning its operations"); *Kozorowski v. Russian Fed'n*, No. 93-16388, 1997 U.S. App. LEXIS 26266 (9th Cir. Sept. 19, 1997) (dismissing claims of intentional infliction of emotional distress, fraud and deceit, conspiracy and other claims because they were premised on the Soviet Union's failure to disclose its role in the 1940 massacre of Polish soldiers and therefore arose out of misrepresentation and deceit).

iii. Application of the Tortious Act Exception to the Instant Case

The difficulty in applying the elements of the tortious act exception to plaintiffs' complaint is the manner in which plaintiffs have pled their claims. In their complaint, plaintiffs advance the following claims: violation of customary international law of human rights, negligence, breach of fiduciary duty, tort of outrage/infliction of emotional distress, deceit and misrepresentation. In each of their claims, plaintiffs base their theories of liability not only on the actions of the Holy See itself, but also on the acts of the Holy See's agents and employees. As a result, we must analyze each claim to see not only which claims survive, but which *parts* of each claim survive.

Looking first to the fourth requirement for the application of the tortious act exception, the Kentucky Supreme Court's holding

in *Osborne*, 31 S.W.3d at 915, leads to the inescapable conclusion that the alleged acts of sexual abuse were not done while the alleged tortfeasors were acting within the scope of their employment. Thus, the tortious act exception to the FSIA's grant of immunity cannot apply to permit suit against the Holy See for sexual abuse by its clergy, even if the other requirements for its application are met.

Furthermore, as per the FSIA's explicit terms, in order for the tortious act exception to apply, the tortious acts in question must have occurred in the United States. Therefore, any portion of plaintiffs' claims that relies upon acts committed by the Holy See abroad cannot survive. . . .

* * * *

. . . [T]he portions of plaintiffs' claims that are based upon the conduct of bishops, archbishops and Holy See personnel while supervising allegedly abusive clergy satisfy all four requirements of the tortious act exception: this conduct served as a substantial cause of the alleged abuse; the conduct occurred in the United States; the conduct was within the scope of employment; and these individuals were, according to the pleadings, Holy See employees.

However, although the four requirements are met for these claims, we must still consider whether either of the two exceptions to the tortious act exception applies and prevents its application: the discretionary-function exception and the arising-out-of-misrepresentation-or-deceit exception.

* * * *

1) **Violation of Customary International Law of Human Rights . . . :** Plaintiffs plead this claim against the Holy See itself, stating that

> [t]he instructions, mandates and dictates of the Defendant, Holy See in the United States prohibiting the disclosure of the identity and existence of pedophiles and sexual predators under its control, thereby placing children in a position of peril, is a gross violation of well-established, universally recognized norms of international law of human rights.

This claim does not survive against the Holy See as it pertains to the actual promulgation of the 1962 Policy because the promulgation itself occurred abroad. However, this claim does survive against the Holy See as it pertains to the conduct of its employees who, pursuant to the 1962 Policy, violated the terms of the relevant international laws through their tortious supervisory conduct over the allegedly abusive clergy.

2) **Negligence** . . . : Plaintiffs present three grounds for negligence in their complaint: failure to provide "safe care"; failure to "warn"; and failure to report. The failure to warn and failure to report prongs of the negligence claim survive because they are premised on the conduct of Holy See employees who were allegedly negligent in their supervision of abusive clergy. However, the claims of negligence against the Holy See for its own conduct cannot survive because such negligence would not have occurred in the United States. Furthermore, the claim of failure to provide safe care does not survive. As the district court noted, the failure to provide safe care amounts to a claim for negligent hiring. *O'Bryan II*, 471 F. Supp. 2d at 793. And, as outlined above, claims of negligent hiring fall within the discretionary function exception. . . .

* * * *

3) **Breach of Fiduciary Duty** . . . : Plaintiffs plead this claim against the Holy See itself, stating that "a special legal relationship existed between the Plaintiffs and the Defendant Holy See, in the nature of a fiduciary relationship, which was carried out by and through priests, clerics, and administrators under the absolute control of the Defendant . . . ." In turn, plaintiffs contend that the "Defendant breached fiduciary duties owed to the Plaintiffs," premised upon the "duty to warn parents" and the "duty to report known or suspected perpetrators.["] This claim survives against the Holy See for the actions of its supervising employees occurring in the United States. As has already been emphasized, the claim cannot survive against the Holy See itself for its own failures to warn or report because such tortious conduct would have occurred abroad.

4) **Tort of Outrage/Infliction of Emotional Distress** . . . . This claim cannot survive against the Holy See as it pertains to the actual promulgation of the 1962 Policy because the

promulgation itself occurred abroad. In addition, it cannot survive against the Holy See for the conduct of its allegedly abusive priests because the acts of alleged abuse did not occur within the scope of employment. In contrast, this claim does survive against the Holy See as it pertains to the conduct of its employees who, pursuant to the 1962 Policy, violated the terms of the relevant international laws through their tortious supervisory conduct over the allegedly abusive clergy.

We next turn to considering whether the surviving theories of liability, as outlined above, are precluded by the other exception to the tortious act exception: whether they arise out of misrepresentation or deceit.

In contrast to *Cabiri* and *Kozorowski*, plaintiffs' claims are not best characterized as stemming directly from the misinformation disseminated by the Holy See. Instead, plaintiffs' claims are more akin to claims of negligent supervision as employees of the Holy See are alleged to have provided inadequate supervision over those under its care. In this way, these claims resemble other negligent supervision claims more than they resemble claims brought by the plaintiffs in *Cabiri* and *Kozorowski*. . . . We therefore conclude that, at this stage of the litigation, the plaintiffs' claims of violation of customary international law of human rights, negligence, and breach of fiduciary duty should not be dismissed for "arising out of . . . misrepresentation [or] deceit." *See* 28 U.S.C. § 1605(a)(5)(B). We do however dismiss the last two claims advanced by plaintiffs in their complaint . . . as they do arise out of misrepresentation or deceit.

* * * *

(ii) Federal Insurance Co. v. Kingdom of Saudi Arabia

In May 2009, at the invitation of the Court, the United States filed a brief in the Supreme Court opposing a petition for writ of certiorari by persons injured in the September 11, 2001 attacks, the families and representatives of decedents, and insurers, who alleged, among other things, that Saudi Arabia and several high-ranking Saudi officials bore responsibility

for the attacks because they had funded ostensible charities they knew were diverting funds to al Qaeda. *Federal Insurance Co. v. Kingdom of Saudi Arabia*, Case No. 08-640. The United States argued that the Supreme Court should not grant review of the case because "[t]he lower courts correctly concluded that Saudi Arabia and its officials are immune from suit for governmental acts outside the United States." As to the claims against Saudi Arabia itself, while agreeing with the lower courts that the petitioners' claims did not fall within the non-commercial tort exception of the FSIA, the United States disagreed with the courts' analysis in reaching that conclusion. The United States argued that plaintiffs can bring terrorism-related claims against foreign states under either the terrorism or the tort exception rather than the terrorism exception only, as the court of appeals held. Nonetheless, the United States stated that the court of appeals' holding on this issue did not warrant the Court's review. The government's arguments on another issue the case presented, concerning the source of foreign officials' immunity for acts within their official capacity, are discussed below in A.3. On June 29, 2009, the Supreme Court denied certiorari. *Federal Insurance Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009).

Additional excerpts below from the U.S. brief elaborate on the government's arguments. (One footnote and citations to other submissions in the case are omitted.) The full text of the U.S. brief is available at *www.justice.gov/osg/briefs/2008/2pet/6invit/2008-0640.pet.ami.inv.html*.

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* * * *

2. The court of appeals held that "claims based on terrorism must be brought under the Terrorism Exception, and not under any other FSIA exception." In fact, contrary to the court's analysis, the tort and terrorism exceptions are not mutually exclusive. But the court was correct that the tort exception's territorial limitation cannot be avoided by pleading the kind of "material support" claim that falls within the terrorism exception when brought

against a country designated by the Secretary of State. To satisfy the domestic tort exception, petitioners must allege that Saudi Arabia, its officials, or employees, committed tortious acts within the United States. Petitioners' complaints do not satisfy that requirement. The court of appeals' decision is the first to consider the interplay of the domestic tort and terrorism exceptions in circumstances such as these, and its holding on this question does not warrant this Court's review.

a. The domestic tort exception is not categorically unavailable for claims that might be brought under the terrorism exception if the foreign state were designated by the Secretary of State. The court of appeals' reliance on language that the terrorism exception applies only in a "case not otherwise covered by this chapter," 28 U.S.C. 1605A(a)(1), was misplaced. The court reasoned from this language that "there would be no need for plaintiffs ever to rely on the Terrorism Exception" unless that provision were exclusive. But that conclusion is mistaken, because the tort exception is more limited than the terrorism exception in a critical respect. The tort exception "covers only torts occurring within the territorial jurisdiction of the United States," *Amerada Hess*, 488 U.S. at 441. By contrast, the terrorism exception contains no geographic limitation. This difference provides the key to understanding Congress's passage of the terrorism exception. As reflected in the legislative history of earlier versions of the legislation, Congress's concern was not to impose new limits on the domestic tort exception, but instead to expand jurisdiction to cover a narrow class of claims based on conduct abroad. See, *e.g.*, H.R. Rep. No. 702, 103d Cong., 2d Sess. 3, 5 (1994) (explaining that the bill would "expand" jurisdiction to include claims by "an American who is grievously mistreated abroad by a foreign government"). The court erred in concluding that Congress intended in 1996 to narrow the tort exception so as to exclude from its scope acts of terrorism committed within the United States.

b. The United States agrees with the court of appeals, however, that the FSIA should not be construed to allow circumvention of the important limitations Congress imposed on both the domestic tort and the terrorism exceptions to immunity. Petitioners do not allege that officials or employees of the Kingdom of Saudi Arabia

personally committed tortious acts in the United States or directed others to do so. The act of Saudi Arabia that forms the central basis of petitioners' claims is that, outside the United States, it donated funds to ostensible charities. Such acts taken by a foreign government outside the United States, without more, would fall outside the scope of the domestic tort exception. Petitioners seek to overcome the territorial limit on the tort exception by alleging that Saudi Arabia funneled money through those charities to al Qaeda, thereby providing "material support to [the] terrorists" who committed the September 11 attacks in the United States. Such allegations of "material support" could establish jurisdiction under the terrorism exception over a state designated as a state sponsor of terrorism by the Secretary of State. But as the court of appeals recognized, if all allegations of extraterritorial "material support" by a state to a terrorist organization were permitted to satisfy the domestic tort exception, "[a]n important procedural safeguard [of the terrorism exception]—that the foreign state be designated a state sponsor of terrorism—would in effect be vitiated."

The domestic tort exception, moreover, requires not merely that the foreign state's extraterritorial conduct have some causal connection to tortious injury in the United States, but that "the tortious act or omission of that foreign state or of any official or employee" be committed within the United States. 28 U.S.C. 1605(a)(5). . . . The tort exception's territorial limitation protects against conflict that would arise from asserting jurisdiction over a foreign government's actions taken in its own territory, and also serves to deter foreign courts from exercising jurisdiction over the United States for actions taken in the United States.

Accordingly, the courts of appeals have recognized that jurisdiction under the tort exception must be based entirely on acts of the foreign state within the United States. . . .

Petitioners do not argue that jurisdiction under the tort exception could be premised entirely on acts by Saudi Arabia and its officers or employees in the United States . . . . Rather, petitioners contend that the domestic acts of the September 11 hijackers should be ascribed to Saudi Arabia under a concerted-action theory. Jurisdiction under the tort exception, however, cannot be

based on the tortious acts of third parties, even if the applicable substantive law would permit holding the foreign state liable for those acts under a theory of secondary liability. The jurisdictional inquiry is one of federal law, and the FSIA tort exception strips foreign states of immunity only for injuries "caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5). It is the foreign state's act or omission—not that of any third party—that must occur in the United States.

. . . Although the court of appeals' analysis has certain flaws, the court correctly identified the danger that a complaint making this kind of allegation would evade the limitations of the domestic tort and terrorism exceptions. Most important, the court's conclusion that petitioners had not overcome Saudi Arabia's immunity was correct. Further review by this Court is therefore unwarranted.

* * * *

(3) Acts of terrorism

Section 1083(b) of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, 122 Stat. 343, repealed 28 U.S.C. § 1605(a)(7), and § 1083(a) of the NDAA replaced it with a new exception to immunity under the FSIA relating to support of terrorism, 28 U.S.C. § 1605A. For background on the legislation and related developments, see *Digest 2008* at 457–63. During 2009, as the examples below discuss, federal courts interpreted the scope of the new terrorism exception and other issues arising from U.S. nationals' claims against states for allegedly supporting terrorism.

(i) Effect of executive and legislative action: Republic of Iraq v. Beaty

On June 8, 2009, the Supreme Court reversed two federal appellate courts' decisions and held that the President's 2003 exercise of his statutory authority to make inapplicable with respect to Iraq provisions of law that applied to countries that

have supported terrorism included § 1605(a)(7), the former exception to immunity under the FSIA for state sponsors of terrorism, making that exception inoperative against Iraq. *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2195 (2009). The President acted in 2003 pursuant to authority provided in § 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 579. Excerpts follow from the Court's analysis in reaching the conclusion that "[w]hen the President exercised his authority [in 2003] to make inapplicable with respect to Iraq all provisions of law that apply to countries that have supported terrorism, the exception to foreign sovereign immunity for state sponsors of terrorism became inoperative as against Iraq. As a result, the courts below lacked jurisdiction; we therefore need not reach Iraq's alternative argument that the NDAA subsequently stripped jurisdiction over the cases." (Footnotes are omitted.) The Court's opinion was consistent with views the United States expressed in an *amicus curiae* brief filed in December 2008, which *Digest 2008* discusses at 464–71 and is available at *www.usdoj.gov/osg/briefs/2008/2pet/6invit/toc3index.html*.

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* * * *

III

A

Section 1503 of the EWSAA consists of a principal clause, followed by eight separate proviso clauses. The dispute in these cases concerns the second of the provisos. The principal clause and that proviso read:

> "The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: . . . *Provided further*, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism . . . ." 117 Stat. 579.

Iraq and the United States both read the quoted proviso's residual clause as sweeping in the terrorism exception to foreign sovereign immunity. Certainly that reading is, as even the *Acree* Court acknowledged, "straightforward." [*Acree v. Republic of Iraq*, 370 F.3d 41, 52 (D.C. Cir. 2004).]

Title 28 U.S.C. § 1605(a)(7)'s exception to sovereign immunity for state sponsors of terrorism stripped jurisdictional immunity from a country unless "the foreign state was not designated as a state sponsor of terrorism." . . . Because the President exercised his authority with respect to "all" provisions of law encompassed by the second proviso, his actions made § 1605(a)(7) "inapplicable" to Iraq.

To a layperson, the notion of the President's suspending the operation of a valid law might seem strange. But the practice is well established, at least in the sphere of foreign affairs. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322–324 (1936) (canvassing precedents from as early as the "inception of the national government"). The granting of Presidential waiver authority is particularly apt with respect to congressional elimination of foreign sovereign immunity, since the granting or denial of that immunity was historically the case-by-case prerogative of the Executive Branch. See, *e.g.*, *Ex parte Peru*, 318 U.S. 578, 586–590 (1943). It is entirely unremarkable that Congress, having taken upon itself in the FSIA to "free the Government" from the diplomatic pressures engendered by the case-by-case approach, *Verlinden* [*B.V. v. Central Bank of Nigeria*], 461 U.S. [480,] 488 [(1983)], would nonetheless think it prudent to afford the President some flexibility in unique circumstances such as these.

B

The Court of Appeals in *Acree* resisted the above construction, primarily on the ground that the relevant text is found in a proviso. . . .

* * * *

. . . . [A] proviso is sometimes used "to introduce independent legislation." [*United States v. Morrow*,] 266 U.S. [531,] 535 [(1935)]. We think that was its office here. The principal clause

granted the President a power; the second proviso purported to grant him an *additional* power. It was not, on any fair reading, an exception to, qualification of, or restraint on the principal power.

* * * *

Even if the best reading of the EWSAA proviso were that it encompassed only statutes that impose sanctions or prohibit assistance to state sponsors of terrorism, see *Acree*, 370 F.3d, at 54, we would disagree with the Court of Appeals' conclusion that the FSIA exception is not such a law. Allowing lawsuits to proceed certainly has the extra benefit of facilitating the compensation of injured victims, but the fact that § 1605(a)(7) targeted only foreign states designated as sponsors of terrorism suggests that the law was intended as a sanction, to punish and deter undesirable conduct. Stripping the immunity that foreign sovereigns ordinarily enjoy is as much a sanction as eliminating bilateral assistance or prohibiting export of munitions (both of which are explicitly mandated by § 586F(c) of the Iraq Sanctions Act). The application of this sanction affects the jurisdiction of the federal courts, but that fact alone does not deprive it of its character as a sanction.

It may well be that when Congress enacted the EWSAA it did not have specifically in mind the terrorism exception to sovereign immunity. The Court of Appeals evidently found that to be of some importance. *Id.*, at 56 (noting there is "no reference in the legislative history to the FSIA"). But the whole value of a generally phrased residual clause, like the one used in the second proviso, is that it serves as a catchall for matters not specifically contemplated . . . . If Congress wanted to limit the waiver authority to particular statutes that it had in mind, it could have enumerated them individually.

We cannot say with any certainty (for those who think this matters) whether the Congress that passed the EWSAA *would have wanted* the President to be permitted to waive § 1605(a)(7). Certainly the exposure of Iraq to billions of dollars in damages could be thought to jeopardize the statute's goal of speedy reconstruction of that country. At least the President thought so. And in the "vast external realm, with its important, complicated, delicate and manifold problems," *Curtiss-Wright Export Corp.*, 299 U.S., at 319, courts ought to be especially wary of overriding apparent

statutory text supported by executive interpretation in favor of speculation about a law's true purpose.

* * * *

We must consider whether anything in the subsequent NDAA legislation changes the above analysis. In particular, § 1083(c)(4) of that statute specifically says that "[n]othing in section 1503 of the [EWSAA] has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States." 122 Stat. 343. . . .

* * * *

In § 1083(d)(1) of the NDAA, the President was given authority to "waive any provision of this section with respect to Iraq." 122 Stat. 343. The President proceeded to waive "all" provisions of that section as to Iraq, including (presumably) § 1083(c)(4). 73 Fed. Reg. 6571. The Act can therefore add nothing to our analysis of the EWSAA. . . . Section 1083(c)(4) could change our interpretation of the disputed EWSAA language only if it has some *substantive* effect, changing what would otherwise be the law. And if the President's waiver does anything, it eliminates any substantive effect that the NDAA would otherwise have on cases to which Iraq is a party.

IV

Having concluded that the President did render 28 U.S.C. § 1605(a)(7) "inapplicable with respect to Iraq," and that such action was within his assigned powers, we consider respondents' argument that the inapplicability of the provision does not bar their claims, since they arise from Iraq's conduct *prior* to the President's waiver. . . .

* * * *

As a textual matter, the proffered definition of "inapplicable" is unpersuasive. If a provision of law is "inapplicable" then it cannot be applied; to "apply" a statute is "[t]o put [it] to use." Webster's New International Dictionary 131 (2d ed. 1954). When the District Court exercised jurisdiction over these cases against Iraq, it surely was putting § 1605(a)(7) to use with respect to that country. Without the

application of that provision, there was no basis for subject-matter jurisdiction. 28 U.S.C. §§ 1604, 1330(a). If Congress had wanted to authorize the President merely to cancel Iraq's designation as a state sponsor of terrorism, then Congress could have done so.

* * * *

As for the judicial presumption against retroactivity, that does not induce us to read the EWSAA proviso more narrowly. Laws that merely alter the rules of foreign sovereign immunity, rather than modify substantive rights, are not operating retroactively when applied to pending cases. Foreign sovereign immunity "reflects current political realities and relationships," and its availability (or lack thereof) generally is not something on which parties can rely "in shaping their primary conduct." *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004); see also *id.*, at 703 (Scalia, J., concurring).

In any event, the primary conduct by Iraq that forms the basis for these suits actually occurred prior to the enactment of the FSIA terrorism exception in 1996. See *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993). That is, Iraq was immune from suit at the time it is alleged to have harmed respondents. The President's elimination of Iraq's *later* subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts.

V

Accordingly, the District Court lost jurisdiction over both suits in May 2003, when the President exercised his authority to make § 1605(a)(7) inapplicable with respect to Iraq. At that point, immunity kicked back in and the cases ought to have been dismissed . . . .

In respondents' view, that is not fatal to their claims. They point to the eighth proviso in § 1503 of the EWSAA:

> "*Provided further*, That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first." 117 Stat. 579.

The effect of this provision, they contend, is that the EWSAA waiver expired in 2005, and that when it did so § 1605(a)(7) was revived, immunity was again stripped, and jurisdiction was restored. . . .

The premise, however, is flawed. . . .

We think the better reading of the eighth EWSAA proviso (the sunset clause) is that the powers granted by the section could be exercised only for a limited time, but that actions taken by the President pursuant to those powers (*e.g.*, suspension of the Iraq Sanctions Act) would not lapse on the sunset date. If it were otherwise, then the Iraq Sanctions Act—which has never been repealed, and which imposes a whole host of restrictions on relations with Iraq—would have returned to force in September 2005. Nobody believes that is so.

* * * *

(ii) Private right of action: Roeder v. Islamic Republic of Iran

On April 21, 2009, the United States, as an intervenor, filed a motion in the U.S. District Court for the District of Columbia to dismiss a suit that former hostages held at the U.S. Embassy in Tehran from 1979 to 1981 and their family members brought against Iran. *Roeder v. Islamic Republic of Iran*, No. 08-0487 (EGS) (D.D.C. 2009). In 2000 the plaintiffs brought a previous suit against Iran, which was dismissed for lack of a private right of action against Iran. *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 146 (D.D.C. 2002), *aff'd*, *Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003) (collectively "*Roeder I*"). For additional background on *Roeder I*, see *Digest 2002* at 523–27; *Digest 2003* at 537 and 547; and *Digest 2004* at 504 and 554.

In their second suit, the plaintiffs relied on § 1083 of the NDAA, which, as the United States explained, "in specified circumstances creates a private right of action against foreign governments that engage in terrorism." The U.S. motion to dismiss, excerpted below, argued that § 1083 did not create a cause of action for the plaintiffs or expressly abrogate the Algiers Accords, which barred their suits. (Some footnotes and citations to other filings are omitted.) The full texts of the

U.S. motion, the U.S. reply, and the U.S. response to plaintiffs' memorandum regarding supplemental authority are available at *www.state.gov/s/l/c8183.htm*.

. . . The gratitude of the United States for the service and dedication of [the plaintiff hostages] cannot be overstated, nor can the suffering and abuse they endured on behalf of this country be exaggerated; these matters are beyond dispute.

To obtain the release of the plaintiff hostages, the United States, through an international agreement known as the Algiers Accords, agreed to preclude the prosecution of any claims against Iran arising out of the hostage taking. That binding international commitment must be honored by the United States unless and until Congress (1) abrogates the Algiers Accords expressly in conjunction with relevant legislation, or (2) unambiguously creates a cause of action for the embassy hostage plaintiffs against Iran. Congress has done neither. Accordingly, plaintiffs have failed to state a claim upon which relief can be granted. The United States has sought intervention in this case, and now moves to dismiss, in order to carry out its obligations under the Algiers Accords.

* * * *

I. Section 1083 Does Not Expressly Abrogate the Accords

Section 1083 does not explicitly abrogate the Algiers Accords. Indeed, it says nothing at all about them, by name or by description. The courts have made clear that Congress must act with clarity and specificity if it intends to supersede United States' treaty obligations. *See*, *e.g.*, *U.S. v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1469 (S.D.N.Y. 1988) (noting that where potential conflict between treaty and subsequent statute was foreseeable, it was "especially important . . . for Congress to give clear, indeed unequivocal guidance" as to any intention to supersede treaty obligations). . . .

Congress was well aware of this requirement generally, therefore, before it enacted Section 1083, and this Court's confirmation of this requirement as regards these very plaintiffs and these very claims in *Roeder I* left no doubt that anything short of a clear expression of intent to revoke the Algiers Accords would have that effect. *See Roeder I*, 195 F. Supp. 2d at 175–84. No such clarity of

purpose to revoke the Algiers Accords can be derived from the provisions of Section 1083, which is completely silent about the Accords. *Roeder I*, 195 F. Supp. 2d at 175 ("'[L]egislative silence is not sufficient to abrogate a treaty,' *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 . . . (1984), or a bi-lateral executive international agreement.' *See Weinberger v. Rossi*, 456 U.S. 25, 32 . . . (1982).").

Although the requisite clear statement must be found, if at all, in the statutory text, there is no support for the plaintiffs' position even in the legislative history of Section 1083, which fails to mention the Algiers Accords. . . .

. . . [T]he scant legislative history on Section 1083 fails to acknowledge the Accords or express Congress' collective will to terminate them. *See Roeder I*, 195 F. Supp. 2d at 182.

Because the legislative history is sparse, the Court must be "even more vigilant in its refusal to draw inferences . . . that would fill in the gaps in congressional logic." *Roeder I*, 195 F. Supp. 2d at 183. . . .

In light of the lack of a clear Congressional intent to abrogate the Algiers Accords, Section 1083 should not be interpreted to create a cause of action for plaintiffs against Iran. *See Roeder I*, 195 F. Supp. 2d at 175 (citing *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. at 252 ("When a later statute conflicts with an earlier agreement, and Congress has neither mentioned the agreement in the text of the statute nor in the legislative history of the statute, the Supreme Court has conclusively held that it can not find the requisite Congressional intent to abrogate.")). As the Court concluded in *Roeder I*, "[u]nless and until Congress expresses its clear intent to overturn the provisions of a binding agreement between two nations that has been in effect for over twenty years, this Court can not interpret these statutes to abrogate that agreement." *Roeder I*, 195 F. Supp. 2d at 177.

II. Section 1083 Creates No Clear Cause of Action for Plaintiffs Against Iran for the Hostage Taking

Section 1083 also cannot be said to unambiguously create a cause of action for plaintiffs against Iran. While it purports to create a cause of action against foreign states, it does not indisputably create a private right of action against Iran for claims arising

from the 1979 hostage taking. The statute is anything but a model of clarity. Section 1083(a)(1) incorporates a new section to be codified at 28 U.S.C. § 1605A. The only source of any potential cause of action for this case is within that new section. Specifically, whether a cause of action exists depends on whether the foreign state is "a state sponsor of terrorism as described in [28 U.S.C. § 1605A(a)(2)(A)(i)]." 28 U.S.C. § 1605A(c). Thus, in the present case, plaintiffs have a cause of action only if Iran is "a state sponsor of terrorism as described in [28 U.S.C. § 1605A(a)(2)(A)(i)(II)]."[7]

The description of a state sponsor of terrorism in 28 U.S.C. § 1605A(a)(2)(A)(i)(II) involves a two-pronged inquiry. Section 1605A(a)(2)(A)(i)(II) refers to a foreign state that, [1] "in the case of an action that . . . is filed under this section by reason of section 1083(c)(3) of [the National Defense Authorization Act for Fiscal Year 2008]," [2] "was designated as a state sponsor of terrorism when . . . the related action under section 1605(a)(7) . . . was filed . . . ." 28 U.S.C. § 1605A(a)(2)(A)(i)(II). The first inquiry under this standard is whether this case was filed "by reason of" Section 1083(c)(3). The term "by reason of" is not defined. However, Section 1083(c)(3) authorizes the filing of an action (such as this case) which arises out of the "same act or incident" that is the basis for another ("related") action which has been timely commenced under 28 U.S.C. § 1605(a)(7).[8] Because *Roeder I* was timely filed under 28 U.S.C. § 1605(a)(7), and both *Roeder I* and this case arise out of the 1979 Iranian hostage taking, it can be assumed, at least for the sake of argument, that this case was, strictly

[7] . . . 28 U.S.C. § 1605A(a)(2)(A)(i)(I) does not create a cause of action for purposes of this case because Iran was not designated as a state sponsor of terrorism at the time the act of hostage taking occurred or as a result of that act. Therefore, the question is whether 28 U.S.C. § 1605A(a)(2)(A)(i)(II) creates a cause of action for plaintiffs.

[8] Section 1083(c)(3) ("Related Action") states in relevant part as follows:

> If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code . . . any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—(A) the date of entry of judgment in the original action; or (B) the date of the enactment of this Act.

in a procedural sense, filed "by reason of" Section 1083(c)(3), as plaintiffs allege.

The second inquiry is whether Iran was "a state sponsor of terrorism when . . . the related action under section 1605(a)(7) . . . was filed . . . ." 28 U.S.C. § 1605A(a)(2)(A)(i)(II). . . .

The phrase "related action" refers back to its usage in Section 1083(c)(3), which is entitled "Related Cases" and is cited earlier in the same sentence (*i.e.*, a state sponsor of terrorism as described in 28 U.S.C. § 1605A(a)(2)(A)(i) is a foreign state that, "in the case of an action that . . . is filed under this section by reason of *section 1083(c)(3)* of [the National Defense Authorization Act for Fiscal Year 2008]," "was designated as a state sponsor of terrorism when . . . *the related action* under section 1605(a)(7) . . . was filed . . . ." 28 U.S.C. § 1605A(a)(2)(A)(i)(II) (emphasis added)). Section 1083(c)(3) is a subsection of Section 1083(c), which is entitled "Application to *Pending* Cases" (emphasis added). These both fall under Section 1083, which bears the general heading "Terrorism Exception to Immunity." This structure of the statute therefore indicates that the terrorism sovereign immunity exception for foreign states created by Section 1083 applies to a subset of "pending cases," namely the "related cases" described in Section 1083(c)(3). Thus, to be considered "related" to this case (which "arises out of" it, as described in section 1083(c)(3)), *Roeder I* must have been pending at the time of enactment of Section 1083. *Roeder I*, however, was dismissed in 2003, and therefore it was not pending in January 2008 when Section 1083 was passed.[10]

The use of the present perfect tense in section 1083(c)(3), to the effect that "[i]f an action arising out of an act or incident *has been* timely commenced," also indicates that a new action cannot be deemed "related" unless the original action (*Roeder I*) was pending at the time of enactment of Section 1083. (Emphasis added). This meaning is reinforced by the more recent decision in *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), in which the

[10] Section 1083 was relevant to numerous other cases still pending against Iran, Cuba, and Libya as of January 2008, when it was passed. There is thus no reason to believe that Congress intended *sub silentio* to create a cause of action for plaintiffs in this case.

Court construed Section 1083, 28 U.S.C. § 1605A(a)(2)(A)(i)(II), as signifying that a new action could be considered "'filed . . . by reason of section 1083(c)(3)' if a *pending* 'related action' had been timely commenced." *Simon*, 529 F.3d at 1193 (emphasis added); *see also id*. at 1191 ("Plaintiffs with 'pending cases' may invoke new § 1605A in certain circumstances."). Because *Roeder I* was dismissed in 2003 and was not pending when Section 1083 was enacted in January 2008, the present case is not "related" to *Roeder I* within the meaning of 28 U.S.C. § 1605A(2)(a)(i)(II). Given that no "related action" exists as defined in the statute, it is impossible for Iran to have been designated as a state sponsor of terrorism when "the related action" was filed. Therefore, Iran is not a "state sponsor of terrorism as described in [28 U.S.C. § 1605A(a)(2)(A)(i)]," 28 U.S.C. § 1605A(c), and plaintiffs have no private right of action against Iran.

* * * *

c. Execution of judgments and other post-judgment actions

(1) Terrorism Risk Insurance Act

(i) Blocked assets and waiver of right of attachment: Ministry of Defense v. Elahi

On April 21, 2009, the Supreme Court reversed the U.S. Court of Appeals for the Ninth Circuit's 2007 judgment in a suit by a U.S. victim of terrorism who had sought to attach Iranian property in the United States to enforce a wrongful death default judgment he held against Iran. *Ministry of Def. & Support v. Elahi*, 120 S. Ct. 1732 (2009). *See Digest 2007* at 477–85; *see also Digest 2006* at 612–21; *Digest 2005* at 549–55; and *Digest 2004* at 516–17 for prior developments in the litigation. The Iranian property at issue was a $2.8 million arbitral award Iran had obtained in a contract dispute against a U.S. company, concerning military equipment Iran ordered in 1977 ("Cubic judgment"). The plaintiff sought to attach the Cubic award under § 201(a) of the Terrorism Risk Insurance

Act ("TRIA"), which permits persons with terrorism-related judgments against a designated state sponsor of terrorism to attach "blocked assets" of that state, including its agencies and instrumentalities. Pub. L. No. 107-297, codified at 28 U.S.C. § 1610 note.

In its decision, excerpted below, the Court agreed with two arguments the United States had presented in an *amicus curiae* brief submitted in September 2008 at the Court's invitation (citations to other submissions omitted). *See Digest 2008* at 484–89; the brief is available at *www.usdoj.gov/osg/briefs/2008/3mer/1ami/2007-0615.mer.ami.html*. First, the Court accepted the U.S. argument that the Ninth Circuit had erred in holding that the Cubic judgment was a "blocked" asset because the executive branch, following the Algiers Accords that resolved the 1979–1981 Tehran hostage crisis, had failed to "unblock" export-controlled Iranian military assets the United States had frozen. The Ninth Circuit's holding was contrary to a key U.S. position in a claim pending before the Iran–U.S. Claims Tribunal (Case B/61). (The tribunal's partial award in Case B/61, issued after the Court's decision in this case, is discussed in Chapter 8.A.) The Court declined to decide whether or not the assets in question were now blocked by the State Department's October 25, 2007 designation, pursuant to Executive Order 13382, of the Iranian Ministry of Defense as a proliferator of weapons of mass destruction. Because of the timing of the designation, this particular issue had not been before the Ninth Circuit. While the Court noted that in such a situation it would usually remand the issue to permit the lower court to decide it, in this case, because of its finding on the second argument presented by the United States (on the question of relinquishment), it was unnecessary to remand the 2007 blocking issue for further consideration.

Second, the Court reversed the appeals court and held that the plaintiff had relinquished his right to attach the property when he elected to receive a payment from the U.S. Treasury under the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA" or "VPA"), Pub. L. No. 106-386,

114 Stat. 1541. The VTVPA provides that, in electing to receive payment from the Treasury, a claimant gives up his or her right to attach Iranian property that is at issue in a claim against the United States before an international tribunal. As the Court noted, this holding made it "unnecessary to remand the [2007] blocking question for further consideration."

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* * * *

Since Iran is a sovereign nation, Elahi cannot attach the Cubic Judgment unless he finds an exception to the principle of sovereign immunity that would allow him to do so. See *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 546 U.S. 450 (2006) *(per curiam)*. As the case reaches us, the Terrorism Risk Insurance Act of 2002 (TRIA), § 201(a), 116 Stat. 2337, note following 28 U.S.C. §1610, provides the sole possible exception. That Act authorizes holders of terrorism-related judgments against Iran, such as Elahi, to attach Iranian assets that the United States has "*blocked*." *Ibid.* (emphasis added). . . .

Even if the Cubic Judgment is a blocked asset, however, Elahi still cannot attach it if he waived his right to do so. . . .

* * * *

II

A

We turn first to the question whether the Cubic Judgment was a "blocked asset." . . .

* * * *

In 1981, the Treasury Department issued an order that authorized "[t]ransactions involving property in which Iran . . . has an interest" where "*[t]he interest in the property . . . arises after January 19, 1981*." 31 CFR § 535.579(a)(1) (emphasis added). As the Court of Appeals itself pointed out, Iran's interest in the Cubic Judgment arose "on December 7, 1998, when the district court confirmed the [arbitration] award." 385 F.3d, at 1224. Since it arose more than 17 years "after January 19, 1981," the Cubic

Judgment falls within the terms of Treasury's order. And that fact, in our view, is sufficient to treat the Judgment as unblocked.

Iran's interest in the property that underlies the Cubic Judgment also arose after January 19, 1981. As the International Court of Arbitration held, Cubic and Iran entered into their initial contract before 1981. But they later agreed to discontinue (but not to terminate) the contract. They agreed that Cubic would try to sell the system elsewhere. And they further agreed that they would take "final decisions" about who owed what to whom "only . . . once the result of Cubic's attempt to resell the System" was "known."

Cubic completed its sale of the system (to Canada) in October 1982. And the arbitrators referred to October 1982 as "the date the Parties had in mind when they agreed to await the outcome of Cubic's resale attempts." Only then was Cubic "in a position to reasonably, comprehensively and precisely account for the reuse of components originally manufactured for Iran and for any modification costs." For those reasons, and in light of the arbitrators' findings, we must conclude that October 1982 is the time when Iran's claim to proceeds arose.

The upshot is that, whether we consider Iran's "interest in property" as its interest in the Cubic Judgment itself or its underlying interest in the proceeds of the Canadian sale, the interest falls within the terms of the Treasury Department's general license authorizing "[t]ransactions involving property in which Iran . . . has an interest" where "[t]he interest in the property . . . arises after January 19, 1981." 31 CFR § 535.579(a). And, as we said, that fact is sufficient for present purposes to treat the asset as having been unblocked at the time the Ninth Circuit issued the decision below.

Finally, even if we were to assume (as the Ninth Circuit held) that the relevant asset were Iran's pre-1981 interest in the air combat training system itself, we should still conclude that that asset was not "blocked" at the time of the decision below. As the Government points out, such an interest falls directly within the scope of Executive Order No. 12281, an unblocking order that required property owned by Iran to be transferred "as directed . . . by the Government of Iran." See also 31 CFR § 535.215(a). . . .

* * * *

III

. . . [T]he second question concerns Elahi's waiver of his right to attach the Cubic Judgment. In 2000, Congress enacted a statute that offers some compensation to certain individuals, including Elahi, who hold terrorism-related judgments against Iran. VPA § 2002, as amended by TRIA § 201(c). The Act requires those who receive that compensation to relinquish "*all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal,* [or] that is the subject of awards rendered by such tribunal." § 2002(a)(2)(D), 114 Stat. 1542; see also § 2002(d)(5)(B), as added by TRIA § 201(c)(4) (cross referencing § 2002(a)(2)(D)). In 2003 the Government paid Elahi $2.3 million under the Act as partial compensation for his judgment against Iran. And at that time, Elahi signed a waiver form that mirrors the statutory language.

The question is whether the Cubic Judgment "is at issue in claims" against the United States before an "international tribunal," namely the Iran–U.S. Claims Tribunal. If so, the Cubic Judgment falls within the terms of Elahi's waiver. . . .

A review of the record in Iran–U.S. Claims Tribunal Case No. B61 leads us to conclude that the Cubic Judgment is "at issue" before that Tribunal. In Case No. B61 Iran argued that, between 1979 and 1981, the United States had wrongly prevented the transfer of Cubic's air combat training system to Iran. Iran asked the Tribunal, among other things, to order the United States to pay damages. In its briefing before the Tribunal, Iran acknowledged that any amount it recovered from Cubic would "be recuperated from the remedy sought" against the United States. And Iran sent a letter to the United States in which it said that any amounts it actually received from Cubic would be "recouped from the remedy sought against the United States in Case B61." *But* Iran added that the Cubic Judgment could *not* be used as a setoff *insofar as it had been attached by creditors*.

Meanwhile, in a rebuttal brief before the Tribunal, the United States, while arguing that in fact it owed Iran nothing, added that at the very least Iran must set off the amount "already . . . awarded" by the International Court of Arbitration (namely, the $2.8 million awarded to Iran from Cubic) against any money awarded by the

Tribunal. And the United States' demand for a setoff applies even if third parties have attached the Cubic Judgment.

The upshot is a dispute about the Cubic Judgment. . . .

To put the matter in terms of the language of Elahi's waiver, one can say for certain that the Cubic Judgment is "property." And Case No. B61 itself is a "clai[m] against the United States before an international tribunal." We can also be reasonably certain that how the Tribunal should use that property is also under dispute or in question in that claim. Moreover, since several parties other than Elahi have already attached the Cubic Judgment, the question whether an attached claim can be used as a setoff is potentially significant, irrespective of Elahi's own efforts to attach the judgment.

Are these circumstances sufficient to place the Cubic Judgment "at issue" in Case No. B61? . . . Iran and the United States do not dispute the Cubic Judgment's validity; they do not dispute the Cubic Judgment's ownership; and they do not dispute the fact that the United States' asset freeze had no adverse effect on the Cubic Judgment or on Iran's entitlement to the Cubic Judgment. As the dissent correctly points out, the Judgment is not "at issue" in any of these senses. The Judgment will neither be suspended nor modified by the Tribunal in Case No. B61, nor is the Judgment property claimed by Iran from the United States in that case.

But that does not end the matter. The question is whether, for purposes of the VPA, a judgment can nevertheless be "at issue" before the Tribunal *even* when it will not be suspended or modified by the Tribunal and when it is not claimed by Iran from the United States. Here, a significant dispute about the Cubic Judgment still remains, namely a dispute about whether it can be used by the Tribunal as a setoff. And in our view, that dispute is sufficient to put the Judgment "at issue" in the case.

For one thing, we do not doubt that the setoff matter is "under dispute" or "in question" in Case No. B61, and those words typically define the term "at issue." Black's Law Dictionary 136 (8th ed. 2004). In the event that the Tribunal finds the United States liable in Case No. B61, the total sum awarded to Iran by the Tribunal will depend on whether the Judgment is used as a setoff. And whether the Judgment can be so used depends, in turn, on whether the United States is right that an attached judgment should be set off or whether Iran is right that it should not be—a matter

in question before the Tribunal. In that sense, the Judgment is "under dispute." We recognize that the dispute is over the *use* of the Judgment, not the validity of the Judgment. But we do not see how that fact matters.

For another thing, ordinary legal disputes can easily encompass questions of setoff. . . .

Further, the language of the statute suggests that Congress meant the words "at issue" to carry the ordinary meaning just described. . . . [T]he statute says that judgment creditors such as Elahi must

> "relinquis[h] all rights to execute against or attach property [1] that is *at issue in claims* against the United States before an international tribunal *[or]* [2] that *is the subject of awards* rendered by such tribunal." VPA § 2002(a)(2)(D), 114 Stat. 1542 (emphasis added); see also § 2002(d)(5)(B), as added by TRIA § 201(c)(4) (cross-referencing § 2002(a)(2)(D)).

Had Congress wanted to limit the property to which it first refers (namely, property that is "*at issue*" in a claim) to property that is *the subject* of a claim, it seems likely that Congress straightforwardly would have used the words "subject of"—words that appear later (in respect to awards rendered) in the very same sentence.

Finally, the statute's purpose leans in the direction of a broader interpretation of the words "at issue" than that proposed by Elahi. . . . The statute authorizes the attachment of blocked assets, and it provides partial compensation to victims to be paid (in part) from general Treasury funds. But it does so in exchange for a right of subrogation, VPA § 2002(c), and for the victim's promise not to pursue the balance of the judgment by attaching property "at issue" in a claim against the United States before the Tribunal. VPA §§ 2002(a)(2)(D), (d)(5)(B), as added by TRIA § 201(c)(4). The statute thereby protects property that the United States might use to satisfy its potential liability to Iran.

The Cubic Judgment falls into this category. It is property that the United States could use to satisfy its potential liability to Iran, but which may be unavailable for that purpose if successfully attached. With respect to the statute's revenue-saving purpose, it is difficult to distinguish between property that is the subject of

a claim before a tribunal and property that is in dispute before the tribunal in respect to its use as an offset.

* * * *

(ii) Attachment of diplomatic properties: Bennett v. Islamic Republic of Iran

On March 31, 2009, the U.S. District Court for the District of Columbia granted a U.S. government motion and quashed writs of attachment served against certain Iranian diplomatic properties to enforce a 2007 judgment against Iran and the Iranian Ministry of Information and Security ("MOIS"). *Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152 (D.D.C. 2009). The court concluded that the properties at issue were immune from attachment because the United States had used them exclusively for diplomatic purposes since 1980, when President Jimmy Carter severed diplomatic relations with Iran and the State Department took custody of Iran's diplomatic and consular property. In reaching that conclusion, the court analyzed various applicable legal authorities, including § 201 of the TRIA, which specifically excludes diplomatic and consular properties from its definition of "blocked assets." The court also stated that the commercial activity exception to a foreign state property's immunity from attachment and execution was inapplicable. In addition, the court stated that the plaintiffs could not invoke 28 U.S.C. § 1610(g), which § 1083 of the NDAA added to the FSIA and allows holders of judgments in suits under new § 1605A to attach properties of the foreign state defendants or their agencies or instrumentalities, because the plaintiffs' judgment was rendered under former FSIA § 1605(a)(7). The court also stated that even if the plaintiffs could invoke § 1083 as a general matter, § 1610(g) does not permit the attachment of diplomatic property. "[N]othing in 1610(g) indicates that Congress intended to strip away the immunity long afforded to diplomatic properties," the court stated, adding that

> in other enactments under the FSIA, such as the TRIA and the VTVPA [Victims of Trafficking and Violence Protection

> Act of 2000, Pub. L. No. 106-386, 114 Stat. 1541], Congress has clearly and directly addressed the issue of whether and to what extent diplomatic properties of terrorist states should be afforded immunity from attachment and execution. Congress' complete silence on the matter in this most recent enactment indicates that they did not intend to pare back the immunity that they have long afforded to diplomatic properties.

Bennett, 604 F. Supp. 2d at 170. On May 4, 2009, the plaintiffs appealed to the U.S. Court of Appeals for the District of Columbia Circuit.

On November 30, 2009, the United States filed a brief in the D.C. Circuit, addressing the question presented: "whether the district court properly concluded that the properties at issue are excluded from TRIA's definition of 'blocked assets,' and thus unavailable for attachment." Excerpts below from the U.S. brief summarize the government's arguments in support of affirmance of the district court's judgment (citations to other submissions in the case omitted). The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

. . . The United States emphatically condemns the acts of terrorism that gave rise to this judgment, and has deep sympathy for plaintiffs' suffering. The United States remains committed to disrupting terrorist financing and to pursuing those responsible for terrorist acts against U.S. nationals.

Attachment of the properties targeted by plaintiffs' writs is not permitted under the laws of the United States, however, and would be inconsistent with obligations set out in the Vienna Convention on Diplomatic Relations. Because the relations among nations are by nature reciprocal, the position urged by plaintiffs could have significant implications for U.S. foreign policy and international relations. In the past, similarly situated plaintiffs have sought to attach many of the same properties at issue here, and courts have repeatedly determined that these properties are not subject to attachment. The district

court here reached the same conclusion, and quashed appellants' writs of attachment. That judgment was proper, and should be affirmed.

Plaintiffs do not press the various arguments they advanced in the district court. They now argue that the properties qualify as attachable "blocked assets" within the meaning of the TRIA. Their argument on appeal is sufficiently distinct from anything articulated in the district court that it may be considered waived. In any event, the argument fails on its merits because TRIA specifically excludes from its definition of "blocked assets" any "property subject to the Vienna Convention on Diplomatic Relations . . . [that] is being used exclusively for diplomatic or consular purposes." TRIA § 201(d)(2)(B)(ii), 116 Stat. at 2340.

As the State Department has determined and as prior cases reflect, the properties at issue in this case all fall within the statutory definition of "propert[ies] subject to the Vienna Convention on Diplomatic Relations." *Id.* § 201(d)(3), 116 Stat. at 2340. Plaintiffs readily concede that this is true of four of the five properties at issue, but argue that the fifth—3410 Garfield Street, N.W.—is not subject to the Vienna Convention. This is a new development on appeal: plaintiffs did not previously so argue. The argument is thus waived. And, in any event, it is without merit. The district court found, based on undisputed evidence, that the Garfield Street property was, prior to 1979, a diplomatic residence. By its terms, the Vienna Convention makes clear that, whether or not it is part of the premises of the mission, the residence of diplomatic staff enjoys the same protections as the premises of the mission. VCDR, arts. 1(e), 30(1). Moreover, courts have concluded that deference is owed the State Department on questions of whether a particular property is protected by the Vienna Convention, and the Garfield Street property has consistently been recognized as such.

Further, all five subject properties are in the protective custody of the Department of State. Acting pursuant to a broad delegation of authority and discretion, the Department protects and preserves the properties in satisfaction of international obligations and to advance long-term U.S. foreign policy objectives. Plaintiffs nonetheless argue that the properties are not "'being used exclusively for diplomatic and consular purposes.'" They neither suggest that the United States, as custodian of the properties, seeks to achieve

any non-diplomatic objective, nor otherwise dispute that the United States' sole purpose in maintaining the properties is diplomatic. Rather, they maintain that TRIA requires a separate and independent assessment of the "the properties' use," and suggest that the leasing of property is necessarily not diplomatic.

Plaintiffs made no argument of this sort in district court. Even if this Court elects to consider it, plaintiffs' position does not find support in TRIA's "plain language," as they now contend. In fact, their view rests on a misreading of the statute—one that treats Section 201(d)(2)(B)(ii) as if it establishes distinct requirements of "diplomatic uses" and "diplomatic purposes." Plaintiffs' approach is fundamentally problematic. Contrary to accepted canons of statutory construction, plaintiffs read TRIA to require, rather than avoid, violations of international treaty obligations. Moreover, plaintiffs seek to replace the State Department's lawful exercise of authority (which reflects powers constitutionally vested in the Executive branch and discretion expressly afforded by Congress) with judicial determinations on matters of foreign policy.

Finally, even plaintiffs' erroneous reading of the statute does not establish any basis for relief in this case. They have not identified any manner in which the property is "being used" that renders it attachable. Plaintiffs cannot overcome the presumption of immunity to which property of a foreign state is entitled where they identify no basis for an exception.

* * * *

f. Plaintiffs ultimately suggest that, by enacting TRIA § 201(d)(2)(B)(ii), Congress intended to abrogate the obligations of the United States under the Vienna Convention on Diplomatic Relations. They insist that any other reading would undermine Congressional intent.

The plain terms of TRIA refute that proposition, however. Pursuant to Section 201(d)(2)(B)(ii), property cannot be attached if attachment "would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations," § 201(d)(3), 116 Stat. at 2339 (defining "property subject to the Vienna Convention on Diplomatic Relations"), unless the United States has elected to abandon its treaty obligations. *Id.* § 201(d)(2)(B)(ii), 116 Stat. at 2340. Congress thus chose to

structure the statute so as to *avoid* treaty violations, not to require them (as plaintiffs urge). *See also, e.g.*, *Weinberger v. Rossi*, 465 U.S. 25, 32 (1982) (It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, [6 U.S.] 2 Cranch 64, 118 (1804), that 'an act of congress ought never be construed to violate the laws of nations, if any other possible construction remains.'").[12]

The necessary consequence of a successful attachment of the properties sought by plaintiffs is that the United States would be unable to fulfill its obligation to "respect and protect" the premises of Iran's mission. *See, e.g.*, *Weinstein v. Islamic Republic of Iran*, 274 F. Supp. 2d 53, 60–61 (D.D.C. 2003). Indeed, it would require the United States to renege on its assurance to Algeria that it would "retain custody of these properties until Iran releases to the custody of the Government of Switzerland Protecting Power the diplomatic and consular properties owned by the United States in Iran." Because the plaintiffs' interpretation of Section 201(d)(2)(B)(ii) would lead to a violation of the United States' treaty obligations under the Vienna Convention, the district court correctly rejected it. *Cf. Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 237–38 (D.C. Cir. 2003) (noting that "neither a treaty nor an executive agreement will be considered 'abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed,'" and on this basis concluding that an amendment to the FSIA did not abrogate the Algiers Accords) (citations omitted).

* * * *

(2) Presumption of immunity for foreign state property

On June 25 and 26, 2009, the United States filed briefs in the U.S. Courts of Appeals for the Seventh and Ninth Circuits as *amicus curiae* in cases arising from the efforts of U.S. victims of terrorism to satisfy their judgments against Iran. *Rubin v.*

[12] While TRIA does not require the violation of longstanding treaty obligations, it nonetheless facilitates recovery by various judgment creditors. For example, under TRIA § 201, certain judgment creditors may attach a foreign state's nondiplomatic property even if the state did not use that property for commercial activities; such property was not attachable before TRIA's enactment.

Islamic Republic of Iran, No. 08-2805 (7th Cir.) and *Peterson v. Islamic Republic of Iran*, No. 08-17756 (9th Cir.). In the Ninth Circuit litigation, the family members of the 241 U.S. servicemen who died in the 1983 bombing of the U.S. Marine barracks in Beirut, Lebanon, sought to satisfy a $2.6 billion default judgment against Iran and Iranian government agencies in connection with the bombing. In its brief, the United States supported affirmance of a district court's dismissal, on sovereign immunity grounds, of the plaintiffs' effort to compel Iran to assign its right to receive payments from foreign shipping companies for their use of Iran's harbor facilities. *See Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 48 (D.D.C. 2003); *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007).

In the Seventh Circuit litigation, the plaintiffs sought to satisfy a default judgment against Iran awarding them $71.5 million in compensatory damages for injuries they sustained in a Hamas-orchestrated terrorist attack in Jerusalem in 1997. In its brief, the United States supported reversal of a district court's 2006 judgment holding that the immunity of a foreign state's property is an "affirmative defense," subject to "forfeiture" unless the foreign state appears to assert its immunity. *Rubin v. Islamic Republic of Iran*, 436 F. Supp. 2d 938, 941 (N.D. Ill. 2006). *See also Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 261–68 (D.D.C. 2003).

Both U.S. briefs set forth the view that because foreign sovereign assets are presumptively immune, a court must consider a foreign state's immunity on its own initiative even if the foreign state does not appear in the litigation to assert its immunity and find applicable one of the FSIA's exceptions to immunity before issuing an order of attachment or execution against that state's property. Excerpts follow from the U.S. brief in *Peterson* (footnotes omitted). U.S. views on other legal issues raised in these cases are discussed below in A.1.c.(3)–(5) and A.2. The full texts of the government's briefs in both cases are available at *www.state.gov/s/l/c8183.htm*.

* * * *

A. . . . [T]he FSIA's text and structure make clear that a district court must consider *sua sponte* whether foreign state property is immune before permitting enforcement measures against that property.

First, and as noted, the statute creates a presumption of immunity from execution for foreign state property, and also requires judicial review, before permitting an order of attachment or execution. *See* 28 U.S.C. §§ 1609, 1610(a), (c). This approach evinces Congress' intent to protect foreign state property absent a judicial finding that an exception to immunity applies.

Furthermore, one of the exceptions to immunity for foreign state property applies where a foreign state waives immunity, § 1610(a)(1). There would seem to be no need for this provision if, as the plaintiffs argue, a foreign state waives immunity from execution unless it appears to raise the claim. Section § 1610(a)'s waiver provision "is governed by the same principles that apply to waivers of immunity from jurisdiction," H.R. Rep. 94-1487, at 28, and Congress "anticipated, at a minimum," that waiver from jurisdictional immunity "would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so." *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 378 (7th Cir. 1985).

Similarly, under the jurisdictional provisions of the FSIA, §§ 1604–1605, a court must consider *sua sponte* whether an exception to foreign state immunity from suit applies. *See Verlinden* [*B.V. v. Central Bank of Nigeria*], 461 U.S. [480,] 494 n.20 [(1983)]. The FSIA's execution provisions are modeled on the jurisdictional provisions, *see* H.R. Rep. 94-1487, at 8, 27, and the practice of *sua sponte* consideration of immunity from suit also supports *sua sponte* consideration of immunity from execution.

Taken together, these provisions strongly support the conclusion that, as the Fifth Circuit recognized in *Walker v. Republic of Congo*, 395 F.3d 229, 233 (5th Cir. 2004), arguments about who has standing to raise a claim that foreign state property is immune from attachment are "irrelevant" under the FSIA.

* * * *

B. As the Supreme Court recently recognized in *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008), judicial seizure of the property of a foreign state "may be regarded as an affront to its dignity and may affect our relations with it." *Sua sponte* review of the statutory exceptions to immunity from execution protects against unjustified exercises of judicial power that could harm our foreign relations, potentially place the United States in violation of its international obligations, and lead to disadvantageous treatment of the United States in foreign courts.

The Department of State and the Department of Justice explained in a joint section-by-section analysis of the proposed legislation ultimately enacted as the FSIA that "[i]t would be inappropriate, and probably in violation of international law, to allow the successful litigant to levy on any assets of a foreign state because these may be used for strictly governmental and sovereign purposes." Hearing on H.R. 3493 before Subcomm. on Claims and Government Relations of House Judiciary Committee, 93d Cong., 1st Sess. 45 (Jun. 7, 1973). The concern about inappropriate enforcement measures is not merely hypothetical. In *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835 (D.C. Cir. 2006), for example, the district court entered a default judgment on a motion seeking execution against the diplomatic property of a foreign state, which was entitled to immunity under the Vienna Convention on Diplomatic Relations. An assignment order by a U.S. court also could lead to friction in our foreign relations by purporting to impose obligations on foreign corporations with possession of foreign state assets, which might have inconsistent obligations with regard to those assets as a matter of domestic law or by contract.

An order by a U.S. Court authorizing execution against foreign state property also could have consequences for the treatment of the United States abroad under principles of reciprocity. As the D.C. Circuit recognized in *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), because "some foreign states base their sovereign immunity decisions on reciprocity," a U.S. court's decision to exercise jurisdiction over a foreign state can "subject the United States to suits abroad" in like circumstances.

Similarly, a U.S. court's order permitting execution or attachment of foreign state property used for a public, governmental purposes could encourage foreign courts to issue like orders against United States property abroad. These considerations all militate heavily in favor of a court's *sua sponte* consideration of immunity prior to ordering execution or attachment.

* * * *

(3) Assignment of a foreign state's assets outside the United States

The U.S. brief in *Peterson*, discussed in A.1.c.(2) *supra*, also argued that if a foreign state's assets are not subject to execution under the FSIA, a court cannot order the state to assign them to a judgment creditor. Excerpts below from the brief elaborate upon the government's views (footnotes omitted).

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* * * *

The district court correctly refused to order the foreign state defendant to assign to the plaintiffs in satisfaction of their judgment certain rights to payment from CMA CGM. [Editor's note: CMA CGM is a French shipping company.] The plaintiffs have conceded that the property held by CMA CGM is located outside the United States, and thus is immune from execution under the FSIA. The district court's authority to execute against foreign state property is restricted to the circumstances set forth in 28 U.S.C. §§ 1609–1611. There is no indication in the statutory text or history that Congress intended for litigants to be able to sidestep these restrictions simply by seeking an order of assignment purporting to transfer ownership of immune assets, rather than by seeking an order of execution against those same assets.

The plaintiffs argue that the assignment order they seek is appropriate notwithstanding the limitations on execution under the FSIA because the order would not itself effectuate transfer of possession of foreign state property, but would require enforcement by a foreign court. Of course, a third party obligor may choose to comply with a U.S. court's assignment order and transfer

possession of foreign state property that is immune from direct execution, rather than seek to challenge that order in court, making foreign enforcement unnecessary (and making the practical effect of the assignment order identical to execution). Furthermore, it is entirely likely that judgment creditors would seek enforcement of a U.S. Court's assignment order without regard to any limits that would otherwise apply in a foreign court to efforts to execute against foreign state property. In theory, an assignment order of this type might be used to circumvent the immunity requirements of both the U.S. and the foreign court.

In any event, the plaintiffs' distinction does not demonstrate tha[t] an assignment order directed at foreign state property abroad is appropriate. Such an order would purport to effectuate a change in ownership of foreign state property that is outside the Court's jurisdiction and immune from execution under the FSIA. Such an assignment order, transferring property interests in order to satisfy a judgment against a foreign state, is in every meaningful sense an order of execution. This Court should not permit this blatant end-run around the careful limits in §§ 1610 and 1611.

"The FSIA did not purport to authorize execution against a foreign state's property * * * wherever that property is located around the world." *Autotech Technologies LP v. Integral Research & Devel. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1451 (2008). Such a judicial act would constitute a "breathtaking assertion of extraterritorial jurisdiction," 499 F.3d at 750, and is contrary to normal principles of territorial jurisdiction, which recognize the primacy of a foreign court's authority over property located within its own territory.

* * * *

The United States is aware of no decision by a U.S. court ordering assignment of a foreign state's worldwide assets to satisfy a judgment, and courts in very similar circumstances have refused to order assignment of property that is immune from execution under the FSIA.

* * * *

(4) Notice requirements

The U.S. brief in *Peterson*, discussed in A.1.c.(2) *supra*, also argued that a judgment creditor seeking enforcement against a foreign state must provide "adequate notice" to that state, relying on methods comparable to the ones set out in 28 U.S.C. § 1608(a). Excerpts below provide U.S. views on that issue.

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* * * *

In denying the plaintiffs' motion for an assignment, the district court also relied on the fact that the plaintiffs did not provide service in accordance with 28 U.S.C. § 1608(a) in registering their judgment and moving for an assignment of assets. The United States agrees that a judgment creditor must provide adequate notice to a foreign state of proceedings seeking enforcement of a default judgment. Although § 1608(a) is not directly applicable, it provides a helpful model for what constitutes adequate service. The plaintiffs' failure to provide adequate service provides an independent and sufficient basis for affirmance.

The FSIA "preserve[s] a distinction" between a foreign state's jurisdictional immunity from an action brought in a U.S. court and its "immunity from having its property attached or executed upon." *Ministry of Defense for Armed Forces of Islamic Republic of Iran v. Cubic Defense Sys., Inc.*, 385 F.3d 1206, 1218 (9th Cir. 2004), *vacated on other grounds,* 546 U.S. 450 (2006). Reflecting Congress's recognition of the significant interests at stake in execution, the FSIA requires that attachment or execution must be ordered by "the court," and only after a judicial determination "that a reasonable period of time has elapsed following the entry of judgment" or notice of default judgment. 28 U.S.C. § 1610(c). This is unlike the normal rule for private litigation, where execution can often be initiated by application to a court clerk or sheriff. By preventing execution except by court order, and by requiring the passage of a reasonable time following entry of default judgment, Congress clearly envisioned that there would be a meaningful

opportunity for the foreign sovereign to be heard at the enforcement stage to assert immunity.

Because of the important interests at stake when a judgment creditor seeks to execute against a foreign state's property, and because the foreign state might not have participated in the underlying litigation addressing liability, it is critically important that a foreign state have notice that its property is subject to enforcement efforts and an opportunity to appear and to assert immunity from execution. *See, e.g., Connecticut Bank of Commerce*, 309 F.3d at 251. Courts have "stressed a foreign sovereign's interest—and our interest in protecting that interest—in being able to assert defenses based on its sovereign status." *FG Hemisphere*, 447 F.3d at 838.

Furthermore, the FSIA itself makes clear that Congress intended for foreign states to be notified not only of the initiation of a lawsuit, but also of the entry of a subsequent default judgment that might be the basis for enforcement proceedings. Section 1608(e) provides that a foreign state must receive notice of a default judgment using the same methods of service required for the summons and complaint, and § 1609(c) provides that no attachment or execution shall be permitted until the district court "determine[s] that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e)." Notably, notice of the default judgment in the underlying merits action in this case does not appear to have been made in compliance with these requirements. *See Peterson v. Islamic Republic of Iran*, Civ. 1:01-cv-2094 RCL, Affidavit of Service of Process of Judgment Pursuant to 28 U.S.C. § 1608(e), Dkt. 352 (filed June 23, 2008) (stating that copy of default judgment was mailed by plaintiff's counsel to Iranian Ministry of Foreign Affairs).

Even following a default judgment, any pleading "asserting new or additional claims" against a foreign state must be served in conformance with § 1608(a). *See* Fed. R. Civ. P. 5(a), 4(j)(1). In light of the distinct rights and interests implicated for the first time where a judgment against a foreign state is sought to be enforced, a motion seeking an order of enforcement against foreign state property can be viewed as analogous to a pleading asserting a new claim for relief.

More generally, all of these provisions and rules reflect an intent that a foreign state be provided with meaningful notice of critical developments in the litigation, typically in accordance with the methods for service identified in § 1608(a). Although § 1608(a) is not directly applicable to efforts to execute against foreign sovereign property, it nevertheless serves as a model for what constitutes effective notice to the foreign state. *Cf.* H.R. Rep. No. 94-1487, at 13–14 (explaining that Section 1608 "satisfies the due process requirement of adequate notice").

* * * *

(5) Third-party assertions of immunity

The U.S. brief in *Rubin*, discussed in A.1.c.(2) *supra*, also addressed the significance of third-party assertions of an absent foreign state's immunity, which the United States often relies upon to protect U.S. interests abroad. Specifically, the United States argued that the court should have considered the views that the Chicago museums and the United States presented concerning the artifacts' immunity. The government stated:

> Just as the United States relies on foreign custodians of U.S. property to protect U.S. interests abroad, so may foreign states rely on U.S. custodians to protect their interests here. The University of Chicago's Oriental Institute has housed the Persepolis and Chogha Mish collections for decades pursuant to agreements with Iran. The University thus has a direct interest in plaintiffs' attempt to execute on these collections. Indeed, an order of execution may subject a private party in possession of foreign state assets to competing legal obligations with regard to those assets. *Cf. Credit Suisse v. U.S. Dist. Court*, 130 F.3d 1342, 1348 (9th Cir. 1997). The University's standing to protect foreign state assets in its possession cannot seriously be questioned. The Museum of Natural History claims ownership of the Herzfeld collection, and its standing to contest execution is evident.

> . . . Even apart from the foreign policy concerns that underlie all foreign sovereign immunity determinations, the United States has a particular interest in one of the artifact collections that plaintiffs seek to attach. As our declaration explained, the Chogha Mish collection is the subject of a claim by Iran against the United States in proceedings before the Iran–U.S. Claims Tribunal. [citation omitted] The United States thus has a direct interest in the proper disposition of that property. . . .

(6) Post-judgment litigation and application of NDAA amendments

(i) Availability of new provisions concerning payment of special masters

As discussed in A.1.c.(2) *supra*, the *Peterson* plaintiffs' post-judgment litigation continued in 2009. On January 5, 2009, the U.S. District Court for the District of Columbia denied the plaintiffs' motions for payment of special masters who had assisted the court in the earlier litigation by recommending amounts for the court to award in damages. *Peterson v. Islamic Republic of Iran*, 01-2094 (RCL) (D.D.C. 2009); 01-2684 (RCL) (D.D.C. 2009). The plaintiffs sought the funding under § 1605A(e), which provides:

> (1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.
> (2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c) to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

On July 25, 2008, the United States had filed a response to the plaintiffs' motions at the court's request, expressing the

view that payment was not justified under the circumstances. In its order, the court agreed with the United States, stating:

> As the United States correctly observes, these consolidated cases are maintained under 28 U.S.C. § 1605(a)(7), rather than the new terrorism exception, Section 1605A . . . . Accordingly, the new provisions in 28 U.S.C. § 1605A(e) are not applicable to these particular cases because § 1605A(e)(2) provides for the payment of special masters only in those cases brought or maintained pursuant to the new enactment, 1605A. This conclusion is also compelled by the case of *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. [Cir.] 2008). As the D.C. Circuit observed: "[A] plaintiff in a case pending under § 1605(a)(7) may not maintain that action based upon the jurisdiction conferred by § 1605A; in order to claim the benefits of § 1605A, the plaintiff must file a new action under that new provision." *Id.* at 1192. The plaintiffs in these actions have not filed under that new enactment, and therefore they cannot avail themselves [of] the special masters provisions.

The court's unpublished order and the U.S. response are available at *www.state.gov/s/l/c8183.htm*.

(ii) Exceptions to immunity from attachment or execution

On March 31, 2009, the U.S. District Court for the District of Columbia denied the *Peterson* plaintiffs' motions for appointment of receivers with broad powers to help them satisfy their judgment against Iran. *Peterson v. Islamic Republic of Iran*, 01-2094 (RCL) (D.D.C. 2009); 01-2684 (RCL) (D.D.C. 2009). As the court explained, the plaintiffs argued that new § 1610(g) of the FSIA "completely eliminates Iran's sovereign immunity with respect to its property, and thus that property should . . . be turned over to court-appointed receivers." Section 1610(g)(1) and (2) provide:

> (1) IN GENERAL.—Subject to paragraph (3) [concerning third-party joint property holders], the property of

> a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
>
> (A) the level of economic control over the property by the government of the foreign state;
> (B) whether the profits of the property go to that government;
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs
> (D) whether the government is the sole beneficiary in interest of the property; or
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States Courts while avoiding its obligations.
>
> (2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Powers Act.

The court based its decision on the same grounds as its earlier decision to deny the same plaintiffs' petition for payment of special masters, discussed in A.1.c.(6)(i) *supra*, stating:

> . . . By its express terms, § 1610(g) applies only to "judgments entered under 1605A." Notably, plaintiffs could have converted their judgment under § 1605(a)(7) into a new action under § 1605A. *See* § 1083(c). Plaintiffs failed to do so. Accordingly, plaintiffs are not entitled to reap

the benefits of any subsequent changes in the law relating to the degree of immunity accorded to Iran's property under the FSIA.

The court's unpublished order and the Statement of Interest the United States filed on March 13, 2009, are available at *www.state.gov/s/l/c8183.htm*.

(iii) In re Islamic Republic of Iran Terrorism Litigation

On September 30, 2009, Judge Royce C. Lamberth, Chief Judge of the U.S. District Court for the District of Columbia, issued an omnibus opinion, *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31 (D.D.C. 2009) ("Lamberth Opinion"), purporting to "consider whether and to what extent . . . recent changes in the law should apply retroactively to a number of civil actions against Iran that were filed, and in many instances, litigated to a final judgment prior to the enactment of the 2008 NDAA," which amended the FSIA. The court raised, *sua sponte*, the question of whether § 1083(c) of the NDAA "usurp[s] the prerogative of the judiciary to decide cases under Article III and thereby offend[s] the principle of separation of powers enshrined in our Constitution." Lamberth Opinion at 37. Specifically, the court examined the provisions of § 1083(c) that direct courts to disregard the judicial doctrines of res judicata and collateral estoppel with respect to any matters litigated in a prior FSIA terrorism case and, arguably, to reopen final judgments entered under the previous version of the terrorism exception, 28 U.S.C. § 1605(a)(7), for re-litigation. The court held that the statute "withstands constitutional scrutiny." *Id.*

However, the "Court also reache[d] an even more fundamental conclusion: Civil litigation against Iran under the FSIA state sponsor of terrorism exception represents a failed policy." *Id.* After surveying the history of the litigation under the terrorism exception of the FSIA in the D.C. Circuit, Judge Lamberth offered a 30-page critique of the policy behind victims' litigation entitled "A Call for Meaningful Reform."

Lamberth Opinion at 120–37. In this section, Judge Lamberth criticized the terrorism exception in the FSIA as an "empty promise," *id.* at 122, and opined that "[w]ith virtually no Iranian assets within the jurisdiction of our courts to satisfy judgments . . . the great travesty in all this is that our political branches have essentially told victims of terrorism to continue their long march to justice down a path that leads to nowhere." *Id.* at 125. The court also noted that "these actions frequently run into direct conflict with other sources of law" and that they sometimes negatively impact "the President's powers to manage national security" issues with Iran. *Id.* at 126.

By way of a solution, Judge Lamberth called upon Congress and the President to "pull together to find meaningful, workable solutions, rather than finding new and creative ways to push these tragic claims back onto the Courts." *Id.* at 133. The court suggested a claims commission, administered by the executive branch, which would adjudicate claims under the terrorism exception and make recommendations on how best to structure a large settlement with Iran in the event of normalization of relations between the United States and Iran. *Id.* at 134–35. Finally, the court invited the United States to file a brief in which it might express its views regarding any of the issues raised by the Lamberth Opinion. *Id.* at 137.

On November 30, 2009, the United States filed its response as the court had requested. *In re Islamic Republic of Iran Terrorism Litig.*, 01-cv-02094 (RCL) (D.D.C. 2009). In its response, the United States noted its appreciation to the court for its "efforts to resolve complex issues in this intricate field of law" and for the opportunity to comment on the opinion. Specifically, the United States noted that it "closely examines the need to participate in these cases and does so only when it deems participation necessary to address the interests of the United States." The United States continued:

> That judicious approach derives from an inherent dilemma identified by the Court in its opinion: The United

States in no way seeks to stand as an "adversar[y]" to victims of terrorism in their pursuit of justice, but is compelled to participate when the plaintiffs' specific attempts to recover on their judgments "run into direct conflict with other sources of law" or the national interests of the United States. [citation omitted]

Consistent with this approach, the United States does not have any specific comment at this time regarding the legal issues identified by this Court's opinion. The United States recognizes and appreciates this Court's attention in its opinion to previous filings by the United States on the viability of the drastic remedy of receivership, the limitations on the scope of 28 U.S.C. § 1610(g)(2), as well as the retroactivity problems that would accompany the appointment of Special Masters for work performed to effectuate a judgment pursuant to 28 U.S.C. § 1605(a)(7), [citations omitted]. The United States is also appreciative of this Court's offer to solicit the views of the United States on any future motions on the receivership issue. [citation omitted]

The United States will continue to monitor these, and other, issues as they arise in the context of specific cases and motions filed by the plaintiffs, and will consider participation in litigation on those issues in the appropriate context where the need may arise. At this time, however, the United States hesitates to comment on issues raised by this Court's reasoned opinion out of concern that such views would not be narrowly tailored to particular facts in a given case.

* * * *

Apart from the specific legal issues identified, this Court stated in its opinion that the "more important[]" issue to be addressed is the consideration of whether there is "a more viable system of redress for these tragic and difficult cases" than the judicial system. [citation omitted] The Executive Branch will continue to evaluate its policy with respect to the system of recovery for victims of terrorism with this Court's opinion in mind, endeavoring to provide justice for

> victims while simultaneously preserving the important diplomatic and national interests of the United States.

The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

d. In rem *action*

On December 22, 2009, the U.S. District Court for the Middle District of Florida dismissed claims to the remains of a shipwreck and related artifacts discovered at a site in international waters for lack of subject matter jurisdiction under the FSIA. *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126, 1129 (M.D. Fla. 2009). The court also vacated an arrest warrant the court had issued previously against the "vessel, its apparel, tackle, appurtenances and cargo." *Id*. at 1131. According to the report and recommendation of the magistrate judge, dated June 3, 2009, which the district court adopted and incorporated into its order, Odyssey Marine Exploration Inc. ("Odyssey") initiated the *in rem* action after discovering artifacts from a shipwreck site in international waters. Peru (based on its claim that the coins found at the shipwreck site had their origins in Peru) and 25 descendants of persons who are claimed to have had property on board the ship when it sank also filed claims to the items at the shipwreck site.

In granting Spain's motion to dismiss, the court noted its "emphatic agreement . . . with the Magistrate Judge's conclusion that no genuine, plausible claim persists that the site at issue is anything other than the site of the wreck of the Spanish naval vessel *Nuestra Señora de las Mercedes*." *Id*. at 1128. The court also noted its

> emphatic agreement with both the Magistrate and Spain, which states at page twenty-one of the response . . . that:
>
> > Odyssey's rehash of "commercial activity" arguments conspicuously fails to acknowledge that the exception expressly applies only to "property used for a commercial activity in the United States," if it "is or was used for

> the commercial activity upon which the claim is based." 28 U.S.C. §§ 1610(a), 1610(a)(2). Moreover, the FSIA defines "commercial activity in the United States" as "commercial activity carried on by such state and having substantial contact with the United States." 23 U.S.C. § 1603(e). It is undisputed that the *Mercedes* had nothing to do with the United States: "the *res* lacks any nexus to our nation's sovereign boundaries." [citation omitted]
>
> . . . .
>
> To defeat a showing of sovereign ownership and invocation of the FSIA, the claimant must show its claims are based on commercial activity by the vessel in the United States and/or a waiver of sovereign immunity. Odyssey has done neither.

Id. at 1128–29.

Odyssey, the Republic of Peru, and the individual claimants appealed the dismissal to the U.S. Court of Appeals for the Eleventh Circuit.

Excerpts follow from the magistrate judge's conclusions that the shipwreck, cargo, and related items, as Spanish property, are immune under § 1609 of the FSIA (footnotes and citations to submissions in the case omitted). Chapter 12.A.9.a. addresses other aspects of the magistrate judge's report and recommendation and the U.S. *amicus curiae* brief in support of Spain.

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* * * *

. . . Section 1609 of the FSIA states in pertinent part:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611.

Unquestionably, the *Mercedes* is the property of Spain—constructed in 1788 by Navy Engineers in the shipyard of the Spanish Navy in

Havana, Cuba; commanded by officers and crewed by sailors of the Royal Spanish Navy throughout its service; and designated as a Spanish frigate of war. It remains on the Royal Navy's official registry of ships. As such, [§] 1609's plain reading limits Odyssey to arguing the Court has jurisdiction under "existing international agreements" or as permitted by [§§] 1610 and 1611. None of these exceptions apply here, as Spain urges and Odyssey's silence concedes. Instead, Odyssey sidesteps § 1609's exceptions by claiming: § 1609 does not shield property *outside* the United States; Spain must actually "possess" the *res*; the cargo should be partitioned to satisfy the descendants' claims to the private lots; and other provisions of the FSIA deny Spain sovereign immunity from *in personam* claims. These contentions are without merit as all evade the FSIA's goals, its statutory scheme, and the special status accorded warships per the various treaties and agreements § 1609 necessarily incorporates.

* * * *

2. Discovery Orders: *Rubin v. Islamic Republic of Iran*

The U.S. brief in *Rubin*, discussed in A.1.c.(2) *supra*, also supported reversal of the district court's 2008 ruling finding Iran subject to discovery. The court held that when a foreign state appears in a U.S. court to assert the immunity of specific property, as Iran did in this case, it "voluntarily" subjects itself to the obligations imposed on private litigants, including the obligation to identify all assets in which it has an interest, regardless of the location of those assets in the United States. *Rubin v. Islamic Republic of Iran*, 2008 WL 2502039 (N.D. Ill. June 23, 2008). Excerpts below from the U.S. brief elaborate on the government's argument that the court's order permitting broad discovery to identify Iran's assets in the United States was erroneous. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

The order allowing general assets discovery rested on the flawed "affirmative defense" ruling and may be vacated on that basis. The district court directed a foreign state to choose between forfeiting the immunity of its property or appearing and subjecting itself to discovery. That approach found no support in the FSIA, which makes the property of a foreign state presumptively immune from execution and requires a judgment creditor to establish that specific property falls within an exception to immunity.

The district court compounded its error by treating Iran's limited appearance, which was made in response to the "affirmative defense" ruling for the limited purpose of asserting the immunity of the artifacts collections, as a basis for general discovery of "every conceivable asset of Iran's in the United States." . . . As other courts of appeals have recognized, discovery against a foreign sovereign "should be ordered 'circumspectly and only to verify allegations of specific facts crucial to the immunity determination.'" *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007) (quoting *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002)) (emphasis omitted). That approach is consistent with accepted international practice, which allows the United States to appear in foreign courts for specific, limited purposes—such as to assert the immunity of specific assets from attachment or the immunity of specific officials for specific conduct—without exposing itself to general discovery. By contrast, the district court's discovery order exceeds the bounds of accepted international practice, discourages foreign sovereigns from appearing in U.S. courts, and encourages foreign courts to allow similar discovery against the United States.

* * * *

3. Foreign Officials

In 2009 two federal appellate courts considered whether former foreign officials are immune from jurisdiction under the FSIA or under a longstanding non-statutory immunity that the FSIA did not replace. In *Yousuf v. Samantar*, 552 F.3d 371, 381 (4th Cir. 2009), the U.S. Court of Appeals for the Fourth

Circuit held that the FSIA does not apply to individual foreign government officials and therefore the defendant, a former Somali Prime Minister and Defense Minister, was not immune from suit under the FSIA. The court remanded the case to the district court for an examination of whether Samantar might enjoy immunity on any other basis. In *Matar v. Dichter*, 563 F.3d 9, 13 (2d Cir. 2009), the U.S. Court of Appeals for the Second Circuit held that the defendant, the former head of the Israeli Security Agency, was immune from civil jurisdiction under common law, without deciding whether he might also be immune under the FSIA. The court held that "whether the FSIA applies to former officials or not, they continue to enjoy immunity under common law." For prior developments in the case, see *Digest 2006* at 465–76 and *Digest 2007* at 224–26 and 504–8.

On May 29, 2009, in an *amicus curiae* brief filed at the invitation of the Supreme Court in a third case, the United States expressed its view that foreign officials derive their immunity from "non-statutory principles articulated by the Executive, not the FSIA." *Federal Insurance Co. v. Kingdom of Saudi Arabia*, Case No. 08-640. The United States provided those views in opposing a petition for certiorari in a case seeking to hold several high-ranking Saudi officials and Saudi Arabia liable for the September 11, 2001 terrorist attacks. The United States argued that the lower courts correctly dismissed claims against the officials based on their immunity for governmental acts outside the United States but noted its disagreement with the conclusion of the court of appeals that the FSIA provided the basis for that immunity. Nonetheless, because the court of appeals correctly upheld the defendants' immunity, the U.S. brief stated that the government's disagreement with the court of appeals' analysis "on the proper legal basis for the individual defendants' official immunity . . . does not warrant this Court's review."

The Court denied certiorari on June 29, 2009, in *Federal Insurance Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009), but granted certiorari on September 30, 2009, in *Samantar v. Yousuf*, 130 S. Ct. 1499 (2009). The Court's review

of whether the FSIA applies only to states or both to states and foreign government officials for actions taken in their official capacity remained pending at the end of 2009.*

The excerpts below from the government's brief in *Federal Insurance Co. v. Kingdom of Saudi Arabia* summarize the government's argument in opposing the petition for certiorari. (Citations to other submissions in the case are omitted.) The government's brief is available in full at *www.justice.gov/osg/briefs/2008/2pet/6invit/2008-0640.pet.ami.inv.html.*

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* * * *

a. The text, structure, and history of the FSIA demonstrate that it was not intended to address the immunity of foreign officials. Section 1603(a) provides that the phrase "foreign state" includes an "agency or instrumentality." 28 U.S.C. 1603(a). Congress's use of the terms "agency" and "instrumentality" rather than "agent" suggests they were not intended to encompass natural persons. That conclusion is reinforced by Subsection (b)'s definition of "agency or instrumentality" as an "entity" that "is a separate legal person, corporate or otherwise," which indicates an exclusive concern with non-natural "entit[ies]." 28 U.S.C. 1603(b).

Other features of the FSIA confirm that understanding. For example, the statute makes "the property of an agency or instrumentality of" a designated terrorist state subject to execution to satisfy a terrorism-related judgment against the state itself. See 28 U.S.C. 1610(g)(1). It is difficult to believe that Congress intended, as would follow from the court of appeals' ruling, that the personal property of every official or employee of a state sponsor of terrorism would be available for execution to satisfy a terrorism-related judgment

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* Editor's note: On June 1, 2010, the Supreme Court affirmed the lower court's judgment, holding that the FSIA did not govern Samantar's claim, and remanded the case to the district court to consider whether Samantar might be entitled to immunity under common law or whether he might assert other defenses. *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). *Digest 2010* will discuss relevant aspects of the opinion.

against the state. Similarly, the FSIA's focus on the status of an entity as an agency or instrumentality at the time suit was filed, see *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003), would mean, if applied in the same fashion to the immunity of officials, that a plaintiff could circumvent that immunity by waiting until an official left office. Congress is unlikely to have conferred a time-limited immunity of this nature.

The FSIA's legislative history further demonstrates that Congress did not intend to supplant existing principles regarding the immunity of foreign officials. In clarifying that the FSIA would not affect diplomatic or consular immunity, notwithstanding the tort exception's reference to torts committed by foreign officials acting within the scope of their authority, the House report explained that the statute would "deal[] only with the immunity of foreign states." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 21 (1976) (*House Report*). Further, the report noted that with regard to discovery, "official immunity," of a kind existing separate from and outside of the FSIA, would apply if a litigant sought to depose a "high-ranking official of a foreign government." *Id.* at 23.

b. As petitioners note, the courts of appeals disagree over whether the FSIA governs the immunity of foreign officials. Compare *Belhas v. Ya'alon*, 515 F.3d 1279, 1284–1288 (D.C. Cir. 2008), *Keller v. Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002), *Byrd v. Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380 (5th Cir. 1999), and *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990), with *Yousef v. Samantar*, 552 F.3d 371, 381 (4th Cir. 2009) (holding FSIA inapplicable, remanding for consideration of other sources of immunity), and *Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005), cert. denied, 546 U.S. 1175 (2006). But that disagreement appears to be of little practical consequence, and is of no consequence where, as here, respondents would be immune from suit under both the FSIA and principles articulated by the Executive.

Notably, the Ninth Circuit, the first of the courts of appeals to adopt the FSIA as the framework for analyzing foreign official immunity, did so in order to *protect* foreign officials from suit and to prevent the FSIA from "be[ing] vitiated if litigants could avoid immunity simply by recasting the form of their pleadings" to

name individual foreign officials as defendants. *Chuidian*, 912 F.2d at 1102. Where, as in *Chuidian* and this case, the lower courts apply the FSIA to provide immunity and the Executive also would recognize such immunity, the different approaches produce the same result, and the divergence in rationales becomes irrelevant. . . .

Questions have emerged in two contexts in which the FSIA might provide a less expansive immunity than the principles recognized by the Executive, but whether there is any genuine divergence is still unclear. First, as noted above, application of the FSIA framework raises the problematic prospect that, under *Dole Food*, foreign officials could lose immunity upon leaving office. See *Yousef*, 552 F.3d at 383 (holding that FSIA does not protect former officials, but remanding for consideration of non-FSIA immunity). But that potential anomaly so far has not led to untoward results. . . .

A second situation of possible divergence has arisen when foreign officials are sued individually for official acts falling within the FSIA's commercial activities exception. Two appellate decisions have upheld jurisdiction over foreign government officials in this circumstance, raising the possibility that the FSIA approach to official immunity would have a narrower scope than that based on principles recognized by the Executive Branch. See *Byrd*, 182 F.3d at 382, 384–385, 389–391 (alleged conspiracy by state-owned corporation to take control of sawmill); *Keller*, 277 F.3d at 816–817 (alleged conspiracy of officials at state bank to defraud plaintiff). But, in fact, principles recognized by the Executive also might have allowed those two suits to go forward. In neither case did the Executive recommend immunity, nor did the courts consider non-statutory immunity. Recently, moreover, the Executive has indicated that "it is not clear whether (and if so, to what extent) [non-statutory] immunity applies to corporate officers of a state owned commercial enterprise." *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007) (No. 06-1763). That issue is not, in any event, presented here, where the challenged activity is not commercial in nature.

* * * *

B. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

1. Same-sex Partners

On November 4, 2009, the Department of State circulated a diplomatic note to Chiefs of Mission of diplomatic missions in the United States, which advised that, "in addition to the categories of individuals previously accepted as family members, the Department has determined that the definition of 'family' forming part of the household of a diplomatic agent may include same-sex domestic partners ('domestic partners') for purposes of the application of the Vienna Convention on Diplomatic Relations and Vienna Convention on Consular Relations in the United States." This announced change in policy means that the Department accepts the accreditation of same-sex domestic partners of foreign diplomatic or consular personnel assigned to official duty in the United States, who became eligible for diplomatic visas as a result of a July 22, 2009 change in the Department's visa regulations. *See* 74 Fed. Reg. 36,112 (July 22, 2009) for the final rule. Accredited same-sex domestic partners enjoy the same privileges and immunities of other accredited family members who are recognized by the Department as forming part of a diplomat's household. The diplomatic note, which is provided below, is also available at *www.state.gov/s/l/c8183.htm*.

The Secretary of State presents her compliments to Their Excellencies and Messieurs and Mesdames the Chiefs of Mission and refers to the notes dated November 3, 1988, February 2, 1987, and May 22, 1986, concerning the definition of family members.

As indicated in the referenced May 22, 1986, note, it has long been an accepted principle of international law that the privileges and immunities to which members of the mission are entitled extend, to a certain degree, to the members of their families forming part of their households. The Vienna Convention on Diplomatic

Relations (Article 37(1)) specifies the privileges and immunities which shall be accorded such "members of the family of a diplomatic agent forming part of [the] household" but does not provide a definition of the term "members of the family" for the purposes of the Convention. The drafters of the Convention recognized that the concept of "family" differs among the societies of the world and left the matter to be resolved according to the standards of the respective receiving States.

The Chiefs of Mission are informed that, in addition to the categories of individuals previously accepted as family members, the Department has determined that the definition of "family" forming part of the household of a diplomatic agent may include same-sex domestic partners ("domestic partners") for purposes of the application of the Vienna Convention on Diplomatic Relations and Vienna Convention on Consular Relations in the United States. In accordance with guidance from the White House, the Department is not in a position to accept the accreditation of opposite-sex domestic partners as members of the family.

In order to be eligible for acceptance as a domestic partner of a member of a diplomatic or consular mission, a domestic partner must not be a member of some other household, must reside regularly in the household of the principal, and must be recognized by the sending State as a family member forming part of the household of the principal, as demonstrated by eligibility for rights and benefits from the sending State. Therefore, when notifying the Department of domestic partners of its mission members, the sending State is requested to submit appropriate documentation that it recognizes the domestic partner relationship, which could include evidence that the sending State provided the domestic partner with a diplomatic or an official passport or other documentation based on that status, or with travel or other allowances. Domestic partners of employees of a diplomatic or consular mission (and of miscellaneous foreign government offices) accepted by the Department will be eligible for "A" or "G" visas. The new visa regulation is enclosed.

In addition, the Department intends to pursue the legal measures necessary to enable the United States to offer dependent employment to domestic partners, on a reciprocal basis, in the context of bilateral dependent employment agreements or arrangements. The Chiefs of

Mission will be advised of any such developments as soon as it is possible to do so.

The attention of the Chiefs of Mission is also drawn to applicable provisions of international law in respect of the termination of status. As stated in previous circular notes, whenever any person who has been accorded status as a member of the family in the United States (other than a student attending boarding school or college) ceases to reside with the principal, such person immediately ceases to be a member of the family within the meaning of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. Accordingly, all privileges and immunities, if any, to which such person previously had been entitled in the United States would terminate thirty days thereafter unless in a particular case a shorter time has been specified by the Department of State.

The Chiefs of Mission are advised that until the Department of State publications and circular notes are revised explicitly to incorporate "domestic partners" as members of the family of a diplomatic or consular agent forming part of the household, references to family members in the context of privileges and immunities and related matters other than dependent employment should be understood to include domestic partners as described herein.

It is emphasized that the standard set forth in this note is to define members of the family for the purposes of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations and is without prejudice to other definitions of family for other purposes which have an independent basis in international agreements or U.S. domestic law.

2. Immunity of Diplomats from Civil Jurisdiction

In 2009 federal district courts in New York and Washington, D.C., issued decisions in cases that domestic workers brought against both serving and former foreign diplomats who employed them while on diplomatic assignments in the United States. The plaintiffs' claims alleged human trafficking, involuntary servitude, and slavery, and the defendants asserted

they enjoyed immunity from jurisdiction under international law, including the Vienna Convention on Diplomatic Relations ("Vienna Convention" or "VCDR"). The first case, discussed below in B.2.a., addressed the question of whether a diplomat's employment of a domestic worker is a commercial activity for which, under Article 31(1)(c) of the Vienna Convention, the diplomat enjoys no immunity. Article 31(1)(c) provides an exception to diplomatic immunity for "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official function." The United States understands the Vienna Convention to provide immunity to a diplomat for all matters incidental to daily life, including the employment of a servant, but not for the conduct of a business or for outside employment, for which there is no immunity. In the second two cases, discussed below in B.2.b., the courts considered whether Article 39(2) of the Vienna Convention provides residual immunity to a former diplomat for actions relating to employment of a domestic worker during the diplomatic assignment. Under Article 39(2), former diplomats enjoy ongoing immunity "with respect to acts performed . . . in the exercise of [their] functions as a member of the mission." For discussion of a diplomatic note the Department of State circulated to diplomatic missions in the United States in 2009 concerning domestic workers, see C.4. of this chapter.

a. Immunity of a serving diplomat for acts incidental to daily life

On March 20, 2009, the U.S. District Court for the District of Columbia held that a serving diplomat and his spouse were immune from claims filed by their former domestic servant and granted the defendants' motion to dismiss. The court also quashed service of process against the defendants. *Sabbithi v. Al Saleh,* 605 F. Supp. 2d 122 (D.D.C. 2009). In reaching its conclusion, the court relied on the Department of State's certification of the diplomatic status of the defendants, which provided them broad immunity from civil jurisdiction. Consistent with the Statement of Interest the United States

filed on July 22, 2008, at the court's request, the court concluded that employment of a domestic servant did not fall within the commercial activity exception to immunity contained in Article 31(1)(c) of the Vienna Convention. Instead, the court concluded that "hiring domestic employees is an activity incidental to the daily life of a diplomat and his or her family, and does not constitute commercial activity outside a diplomat's official function." *Id.* at 128–29.

In this case, the diplomat had left his post in Washington, D.C., and returned to Kuwait in 2007. The plaintiff thus argued that the defendants had no residual immunity for their alleged actions. The U.S. Statement of Interest noted that the question about immunity in the case related only to whether the defendants had immunity from suit when they were sued and served with notice of the suit. At that time, the defendants were serving diplomats in Washington. The United States explained that the fact that the defendants had left the United States in 2007

> has no bearing on the central issue now before the Court—namely, whether Defendants were immune from service of process when it was attempted in January 2007. If they were, the attempted service was a nullity, and the Court lacks personal jurisdiction over them. . . . Given that the record does not indicate that service has been effected at a time when Defendants were not immune from service of process, the United States does not at this time address the separate question whether Defendants enjoy "residual immunity" under Article 39(2) of the Vienna Convention. . . .

The U.S. Statement of Interest is available at *www.state.gov/s/l/c8183.htm.*

b. Residual immunity

(1) Swarna v. Al-Awadi

On March 20, 2009, the U.S. District Court for the Southern District of New York held that it had jurisdiction over a

former Kuwaiti diplomat to the United Nations and his wife in a case their former domestic worker brought against them under the Alien Tort Claims Act and New York state law. The court entered a default judgment against the individual defendants. *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509 (S.D.N.Y. 2009). Plaintiff alleged that the individual defendants subjected her to slavery and slavery-like practices, including involuntary servitude, torture, and abuse (including physical assault and rape), and failed to pay her minimum wages required by New York state law. Plaintiff also sought to hold the State of Kuwait vicariously liable for the individual defendants' alleged actions, and the court dismissed those claims on sovereign immunity grounds.

The individual defendants, who were serving in Kuwait's mission in France when they were served at their Parisian residence, did not answer the complaint but filed a Notice of Appearance asserting immunity from civil jurisdiction under the Vienna Convention. Kuwait asserted immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602–1611. The United States declined the court's invitation, dated December 17, 2008, to address the issue of residual immunity and the exceptions to immunity that might apply to the case.

In assessing the plaintiff's claims against the individual defendants, the court considered the question of residual immunity and its scope. The court determined that the Kuwaiti diplomat did not commit the alleged acts in the exercise of his diplomatic functions. While employing an individual to work at a diplomatic mission may be an official act, the court held that the act of hiring and employing a domestic servant is a private act that is peripheral to an official's diplomatic duties. The court observed that the diplomat did not need to employ the servant to represent Kuwait or protect its interests, did not employ her in the course of implementing official policy, and did not supervise her at the Kuwaiti mission. The court also concluded that the diplomat's wife had no residual immunity, noting that it was not clear that

she performed any functions that could be considered official and that she had no greater entitlement to immunity than her husband.

With regard to the claims against the State of Kuwait, the court analyzed the FSIA's commercial activities and tort exceptions to immunity. The court concluded that plaintiff had failed to show that Kuwait had engaged in any commercial activity, given that individuals and not the state had employed the plaintiff. The court also concluded that the tort exception did not apply because the diplomat did not act within the scope of his employment under New York law and the acts alleged to support the claim that Kuwait ratified, aided, or abetted the diplomat's abuse of plaintiff were discretionary acts.

The individual defendants' appeal of the district court's default judgment and the plaintiff's cross appeal of the district court's decision holding that Kuwait was immune from suit were pending before the U.S. Court of Appeals for the Second Circuit at the end of 2009.

(2) Baoanan v. Baja

On June 16, 2009, the U.S. District Court for the Southern District of New York determined that the former Philippine Ambassador to the United Nations and his wife were not immune from its jurisdiction with regard to their former domestic servant's claims of abuse. *Baoanan v. Baja*, 627 F. Supp. 2d 155 (S.D.N.Y. 2009). In this case, the plaintiff brought claims that included forced labor trafficking, involuntary servitude, and violations of the federal and state minimum wage laws and served the defendants with the complaint in the Philippines on July 8, 2008. Ambassador Baja served as the Permanent Representative of the Philippines to the United Nations from May 11, 2003, to February 21, 2007. Following *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509 (S.D.N.Y. 2009) ("*Swarna*"), discussed in B.2.b.(1) *supra*, the court held that the former diplomat and his wife did not have residential diplomatic immunity under Article 39(2) of the Vienna Convention

and denied the defendants' motion to dismiss and to quash the service of process against them.

The court's conclusion also relied in large part on the U.S. Statement of Interest filed on April 28, 2009. *Baonoan v. Baja*, 08 Civ. 5692 (VM) (S.D.N.Y. 2009). The United States endorsed the approach taken in *Swarna*, noting that the court had "correctly approached" the question of the scope of residual immunity by finding that it "pertains to acts taken in the regular course of implementing an official program or policy of the mission, . . . as well as the hiring and employment of an individual to work at a diplomatic mission." The government stated:

> The *Swarna* court also noted that "residual diplomatic immunity does not extend to lawsuits based on actions that were entirely peripheral to the diplomatic agent's official duties". . . . Ultimately, the *Swarna* court determined that the acts alleged by a former domestic servant in her complaint against former Kuwaiti diplomats were not official but private acts and thus that the former diplomats were not shielded by the residual immunity set forth in Article 39(2). [citation omitted] While the Government takes no position in this case as to whether Ambassador Baja enjoys residual immunity, the Government agrees with the analytical approach of the *Swarna* court, which came to its determination by considering, "whether the acts allegedly committed by [defendant] against plaintiff were performed in the exercise of his diplomatic functions." . . .

Excerpts below from the U.S. Statement of Interest set forth the government's views on the scope of residual immunity and on the relationship between the "commercial activity" exception to the immunity of serving diplomats set forth in Article 31(1)(c) and the residual immunity enjoyed by former diplomats, as set forth in Article 39(2). The full text of the U.S. Statement of Interest is available at *www.state.gov/s/l/c8183.htm*.

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I. SCOPE OF RESIDUAL IMMUNITY

A. The Residual Immunity Enjoyed by Former Diplomats Is Limited to Immunity for Acts Performed in the Exercise of Official Functions as a Mission Member

The privileges and immunities accorded diplomatic agents are set forth in the VCDR. Under the VCDR, during the period of their accreditation, diplomatic agents enjoy near absolute immunity from civil jurisdiction. *See* VCDR, Article 31. The purpose of such diplomatic immunity "is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." *Id.*, preamble, cl. 4; *see also Swarna v. Al-Awadi*, 06 Civ. 4880 (PKC), 2009 WL 773446, at *6 (March 20, 2009 S.D.N.Y.); *U.S. v. Cole*, 717 F. Supp. 309 (E.D.Pa. 1989) ("The theoretical basis for diplomatic immunity is generally agreed to be 'functional necessity.'"). The Department of State has further elaborated that, "foreign representatives may carry out their duties effectively only if they are accorded a certain degree of insulation from the application of the laws of the host country. Thus, these representatives need protection *while* they are serving in their positions so that they may fully carry out their functions, without fear of interference or harassment by the receiving state." Declaration of Abraham D. Sofaer, dated July 5, 1988 ("Sofaer Decl."), ¶ 6, submitted in *United States v. Guinand*, 688 F. Supp. 774 (D.D.C. 1988), declaration excerpted in *Cumulative Digest of United States Practice in International Law*, 1981–1988, Book I (1993) at 1010–1013. [fn. omitted]

Once an individual *ceases* to be a diplomatic agent in a receiving state, however, the scope of that individual's immunity is then limited to that set forth in Article 39 (2):

> When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, *with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.*

VCDR, Article 39(2) (emphasis added). In other words, a former diplomat has continuing or residual immunity only for "acts performed . . . in the exercise of his functions as a member of the mission," *i.e.,* for his official acts.[4] VCDR, Article 39(2)*; see also Swarna,* 2009 WL 773446, at *5, *Brzak v. United Nations*, 551 F. Supp.2d 313, 317 (S.D.N.Y. 2008); *De Luca v. United Nations Organization*, 841 F. Supp. 531, 534 (S.D.N.Y. 1994). Residual immunity is limited to official acts performed by a diplomat as part of his job because, as explained by a leading diplomatic law expert, such acts "are in law the acts of the sending State. It has therefore always been the case that the diplomat cannot be sued in respect of such acts since this would be indirectly to implead the sending State." Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 439 (3d ed. 2008). [fn. omitted] The need for the more expansive immunity enjoyed by accredited diplomats "terminates when the individual ceases to be a diplomatic agent." *Swarna*, 2009 WL 773446, at *6; *see also* Sofaer Decl., ¶ 6 (explaining that former diplomats "are no longer exercising important functions which must be protected in order to maintain the orderly conduct of foreign relations between their state and the receiving state"). Thus:

> [t]he United States Government has consistently interpreted Article 39 of the VCDR to permit the exercise of U.S. jurisdiction over persons whose status as members of the diplomatic mission has been terminated for acts they committed during the period in which they enjoyed privileges and immunities, except for acts performed in the exercise of the functions as a member of the mission. (Article 3 of the VCDR lists the permissible functions of a diplomatic mission.) The Department of State has publicly communicated this interpretation to U.S. law enforcement authorities, to Congress, and to members of foreign diplomatic missions in the United States.

[4] In this brief, the Government uses the term "official acts" to refer only to the scope of residual immunity provided by Article 39(2) of the VCDR. The Government takes no position on the scope of the term "official acts" as used elsewhere in the VCDR.

Sofaer Decl., ¶ 5.

The Department of State issued such a communication to the chiefs of all diplomatic missions in the United States in a Circular Note, which stated, "[t]he Department wishes to remind the missions that in any case involving criminal activity no immunity exists against the arrest and prosecution of a person formerly entitled to privileges and immunities who returns to the United States following the termination of his or her official duties, unless it can be proved that the crime *related to the exercise of official functions*." Circular Note, November 15, 1989, published at 2 Foreign Affairs Manual Exhibit 233.4 (emphasis added), *available at http://www.state.gov/documents/organization/84395.pdf*. Although this communication was focused on criminal immunity, the limited immunity of former diplomats described in Article 39(2) applies equally to both criminal and civil liability. *Swarna*, 2009 WL 773446, at *9. Furthermore, "[t]he United States Government's interpretation of the termination of immunity under the VCDR is . . . consistent with the practice of the other sovereign states, including [those] which are party to the Vienna Convention." Sofaer Decl., ¶ 8.

B. The Court Should Consider Whether Ambassador Baja's and/or His Wife's Employment of Plaintiff Was an Official Act to Determine Whether He and/or She Enjoy Residual Immunity From This Suit.

In this case, because Ambassador Baja was served in this action more than a year after he left his position as Permanent Representative to the United Nations, Ambassador Baja enjoys residual immunity only for his official acts carried out as a member of the Philippine Mission to the United Nations under Article 39 (2) of the VCDR.[6] During the period when Mrs. Baja was accredited by the Government of the Philippines to the United Nations as the

[6] The privileges and immunities set forth in the VCDR are enjoyed by Ambassador Baja and his wife by virtue of the Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations ("UN Headquarters Agreement"), which provides that certain resident representatives to the United Nations are entitled to the same privileges and immunities in the United States as the United States accords to diplomatic envoys accredited to it. *See* UN Headquarters Agreement, Article V, § 15, 12 Bevans 956, T.I.A.S. 1676; *Ahmed v. Hoque*, No. 01 Civ. 7224 (DLC), 2002 WL 1964806, at *5 (S.D.N.Y Aug. 23, 2002).

Ambassador's spouse, she enjoyed the same broad privileges and immunities as Ambassador Baja. *See* VCDR, Article 37(1). However, Mrs. Baja was also served in this action long after Ambassador Baja left his post at the United Nations. As she was never a member of the Philippine Mission to the United Nations, she could not have conducted any acts under Article 39(2) "as a member of the mission," and her immunity does not continue to subsist for any acts. Thus, Mrs. Baja enjoys no residual immunity and is subject to the civil jurisdiction of the United States. *See* VCDR, Article 37(1), 39(2). *Cf. Swarna*, 2009 WL 773446, at *10–11.

The question remaining before the Court is thus whether Ambassador Baja's employment of plaintiff was an act carried out in the exercise of his official functions as a member of the Philippine Mission. It is clear that such acts are limited to those, "performed on behalf of or imputable to the sending State." Denza at 441. The more difficult question is what constitutes such an act. A similar question arises in the consular context, as consular officers and employees are not subject to criminal or civil jurisdiction "in respect of acts performed in the exercise of consular functions." Vienna Convention on Consular Relations, Article 43(1), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("VCCR"). *See Ford v. Clement*, 834 F. Supp. 72, 75 (S.D.N.Y. 1993) ("[A] consular officer . . . must . . . plead and prove immunity on the ground that the act or omission underlying the process was in the performance of his official functions," *quoting Koeppel & Koeppel v. Federal Republic of Nigeria*, 704 F. Supp. 521, 522 (S.D.N.Y. 1989)). In evaluating whether a specific act was "performed in the exercise of consular functions," rendering a consular officer or employee immune from jurisdiction, courts have looked to Article 5 of the VCCR, which describes activities that comprise consular functions. *See, e.g., Park v. Shin*, 313 F.3d 1138 (9th Cir. 2002); *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340 (9th Cir. 1993); *Ford,* 834 F. Supp. at 75 (S.D.N.Y. 1993); *Cole*, 717 F. Supp. at 323.

It would be reasonable for courts to look to the analogous article of the VCDR, Article 3, which provides a list of the "functions of a diplomatic mission," to inform an analysis of whether

an act was performed in the exercise of a former diplomat's "functions as a member of the mission." Article 3 defines these as, inter alia,

(a) Representing the sending State in the receiving State;
(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
(c) Negotiating with the Government of the receiving State;
(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations;

In the recent opinion in the *Swarna* case, the court correctly approached this question by conducting a careful analysis of the VCDR, including Article 3, and the existing case law in an attempt to discern the contours of residual diplomatic immunity. The *Swarna* court concluded that residual immunity pertains to acts taken in the regular course of implementing an official program or policy of the mission, *see Swarna*, 2009 WL 773446, at *6 (*citing De Luca*, 841 F. Supp. at 534–35), as well as the hiring and employment of an individual to work at a diplomatic mission, *see id*. at *7 (*citing Brzak,* 551 F. Supp. 2d at 319; *Osman v. Annan*, 07-837-CV-W (NKL), 2008 WL 2477535, at *1–2 (W.D. Mo. June 16, 2008); *D'Cruz v. Annan*, 05 Civ. 8918 (DC), 2005 WL 3527153, at *1 (S.D.N.Y. Dec. 22, 2005)).

The *Swarna* court also noted that "residual diplomatic immunity does not extend to lawsuits based on actions that were entirely peripheral to the diplomatic agent's official duties," such as, for example, the criminal distribution of narcotics, *see Swarna,* 2009 WL 773446, at *7 *(citing U.S. v. Guinard*, 688 F. Supp. 774, 774 (D.D.C. 1988)), and observed that the one case that "arguably holds to the contrary" did not independently analyze whether residual diplomatic immunity applied to defendant's acts because plaintiff had already conceded that defendant had been acting in

his official capacity. *See Swarna*, 2009 WL 773446, at *8 (discussing *Knab v. Republic of Georgia*, 97 Civ. 3118 (TFH), 1998 WL 34067108 (D.D.C. May 29, 1998).) Ultimately, the *Swarna* court determined that the acts alleged by a former domestic servant in her complaint against former Kuwaiti diplomats were not official but private acts and thus that the former diplomats were not shielded by the residual immunity set forth in Article 39(2). *See Swarna*, 2009 WL 773446, at *9, 10. While the Government takes no position in this case as to whether Ambassador Baja enjoys residual immunity, the Government agrees with the analytical approach of the *Swarna* court, which came to its determination by considering, "whether the acts allegedly committed by [defendant] against plaintiff were performed in the exercise of his diplomatic functions." *Id.* at *5.

II. RELATIONSHIP BETWEEN THE "COMMERCIAL ACTIVITY" EXCEPTION AND OFFICIAL ACTS IN THE VCDR

A. Residual Official Acts Immunity Under Article 39(2) of the VCDR Requires a Separate Analysis from the Commercial Activity Exception Under Article 31(1)(c) of the VCDR

In the Government's view, the question currently before the Court is whether the former Ambassador and his wife enjoy residual diplomatic immunity under Article 39(2) for the acts alleged by plaintiff. Accordingly, there is no need for the Court to address whether the plaintiff's claims fall within the "commercial activity" exception of Article 31(1)(c) of the VCDR, which is applicable only to diplomatic agents during the period of their assignment and accreditation.

As noted above, the VCDR provides accredited diplomatic agents, as well as members of their families forming part of their households, near absolute immunity from civil jurisdiction. *See* VCDR, Articles 31, 37. Article 31 provides three limited exceptions to this immunity, including an exception for "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official function." VCDR, Article 31(1)(c). The scope of this exception has been ruled on in three cases outside this district, all of which were brought against diplomats by their former domestic servants; in all

of these cases the courts agreed with the United States' position that the "commercial activities exception" to Article 31(1)(c) does not apply to the employment of a domestic worker. *See Sabbithi v. Al Saleh*, No. 07-CV-00115-EGS, 2009 WL 737006, at *4–5 (D.D.C. Mar. 20, 2009); *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 193 (D.D.C. 2007); *Tabion v. Mufti*, 877 F. Supp. 285, 291–292 (E.D.Va. 1995), *aff'd*, 73 F.3d 535 (4th Cir. 1996). An analysis of the application of Article 31(1)(c)'s commercial exception with respect to accredited diplomatic agents, however, is independent from the analysis applicable here, regarding the residual immunity of Ambassador Baja under Article 39(2). While Article 31(1)(c) provides an exception to diplomatic immunity for commercial activity conducted "outside [a diplomat's] official function," it does not follow that those acts of an accredited diplomat that do not fall within the commercial activity exception are "official acts" for the purposes of residual immunity under Article 39(2). In fact, there is a broad scope of conduct that is neither commercial nor official, for which former diplomats do not enjoy immunity.

* * * *

. . . [T]he immunity of current diplomatic agents is extensive, consistent with the purpose of such immunity "to ensure the efficient performance of the functions of diplomatic missions." VCDR, preamble, cl. 4. The exception to such immunity for commercial or professional activities set forth in Article 31(1), when examined in this context, should be interpreted narrowly. *See* VCDR, Article 31(1); *see also Sabbithi,* 2009 WL 737006, at *4, *Gonzalez Paredes,* 479 F. Supp. 2d at 193, *Tabion,* 877 F. Supp. at 291. Residual immunity, however, is limited to acts "performed on behalf of or imputable to the sending State," Denza at 441. It is not the case that all acts of a diplomatic agent, other than those for which there is an exception to immunity under Article 31, are "performed on behalf of or imputable to the sending State." The types of conduct that clearly fall outside the scope of the commercial activities exception are "[o]rdinary contracts incidental to life in the receiving State, such as purchase of goods, medical, legal or educational services, or agreements to rent accommodation." Denza at 305. But it is precisely this type of unofficial conduct,

which is incidental to the life of a diplomat and therefore protected by the broad immunity provided under Article 31, that would appear to fall outside the scope of the official acts "imputable to the sending State" for which Article 39(2) provides residual immunity.

Indeed, to conflate conduct that is not commercial, and thus outside the scope of Article 31(1)(c), with acts performed in the exercise of a diplomat's function as a member of the mission for which there is ongoing immunity under Article 39(2), would provide former diplomats with essentially the same broad immunity enjoyed by accredited diplomats. As noted by the *Swarna* court, such conflation,

> would eliminate any difference between the scope of immunity provided by Art. 31 and that provided by Art. 39, despite the use of more restrictive language in Art. 39. . . . Art. 39 first provides that a diplomatic agent's immunity "shall normally cease" when his duties "come to an end" and he departs the country or after a reasonable time to depart has expired. VCDR [A]rt. 39(2). The next sentence qualifies the prior one: "However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist." *Id.* This qualifier makes clear that diplomatic agents were only intended to receive residual immunity with respect to official acts, and that not *all* acts of a diplomatic agent were understood to be official.

Swarna, 2009 WL 773446, at *10. . . .

* * * *

3. Protection of Diplomatic Property and Diplomats

On September 21, 2009, Honduran President Manuel Zelaya, who was removed from office in a coup d'etat on June 28 and forced to leave Honduras, returned to Honduras and took refuge at the Brazilian Embassy. On September 22, 2009, State Department Spokesman Ian Kelly issued a statement

concerning President Zelaya's return, stressing "the importance of respecting the inviolability of the Embassy of Brazil in Tegucigalpa and the individuals on its premises." The statement also noted "with appreciation the de facto authority's statement last night promising to respect the Vienna Convention on Diplomatic Relations of 1961, to which Honduras is a party." The full text of the statement is available at *www.state.gov/r/pa/prs/ps/2009/sept/129479.htm.*

On September 25, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, speaking in the U.S. capacity as President of the Security Council, made a statement to the press after the Brazilian Ambassador briefed the Council. On behalf of the Council, Ambassador Rice stated:

> Council members stressed the importance of respecting International Law through preserving the inviolability of the Embassy of Brazil in Tegucigalpa, and other protections afforded it by the Vienna Convention on diplomatic relations, and ensuring the safety of individuals on its premises. They condemned acts of intimidation against the Brazilian Embassy and called upon the de facto government of Honduras to cease harassing the Brazilian Embassy and to provide all necessary utilities and services including water, electricity, food and continuity of communications. Respect and protection of the inviolability of diplomatic premises is a universally accepted principle of international relations.

See http://usun.state.gov/briefing/statements/2009/september/129633.htm; *see also* the remarks of Legal Adviser Harold Hongju Koh at a press briefing in Geneva, available at *http://geneva.usmission.gov/news/2009/09/28/koh-posner/*, and the October 28 remarks of Ambassador Alejandro D. Wolff, Deputy Permanent Representative to the United Nations, to the General Assembly, available at *http://usun.state.gov/briefing/statements/2009/131038.htm*. Chapters 6.I.2., 7.C.1.b., and 16.A.4.c. provide additional discussion of the U.S. response to the coup in Honduras.

C. OTHER ISSUES OF STATE REPRESENTATION

1. Designation of a Benefit Under the Foreign Missions Act

a. Exemption of foreign diplomatic and consular staff from tobacco excise taxes

On January 14, 2009, Ambassador Eric J. Boswell, Director of the State Department's Office of Foreign Missions and Assistant Secretary for Diplomatic Security, designated as a benefit under the Foreign Missions Act, 22 U.S.C. §§ 4301–4316, an exemption for foreign missions and their personnel from excise taxes on tobacco and tobacco products. The designation, which was published in the Federal Register, as set forth below, was intended to clarify that the exemption from taxation provided under the Vienna Conventions and other international agreements included an exemption from these excise taxes. 74 Fed. Reg. 5019 (Jan. 28, 2009). The Department had similarly designated an exemption for diplomatic and consular missions and their personnel from federal manufacturers' and retailers' excise taxes under the Foreign Missions Act in 1998 for purchases from the manufacturer or retailer liable for the tax.

After due consideration of the benefits, privileges and immunities provided to missions of the United States under the Vienna Diplomatic and Consular Conventions and other governing treaties, and in order to facilitate relations between the United States and foreign governments, to improve or maintain the availability of tax exemption privileges for the United States, and by virtue of the authority vested in me under the Foreign Missions Act, 22 U.S.C. 4301 *et seq.*, and Delegation of Authority No. 214, § 14, dated September 20, 1994, I hereby designate as a benefit under the Act, to be granted to foreign diplomatic and consular missions and personnel in the United States on the basis of reciprocity and as otherwise determined by the Department, to include personnel of international organizations and missions to such organizations

who are otherwise entitled to exemption from direct taxes, exemption from Federal and State or local excise taxes imposed with respect to tobacco products (as defined in 26 U.S.C. 5702) manufactured, packaged or sold in the United States. Procedures governing implementation of this benefit will be established by the Department of the Treasury.

b. Exemption from real property taxes on certain consular and diplomatic property

> On June 23, 2009, Deputy Secretary of State for Management and Resources Jacob J. Lew designated an "exemption from real property taxes on property owned by foreign governments and used to house staff of permanent missions to the United Nations or the Organization of American States or of consular posts as a benefit for purposes of the Foreign Missions Act." Deputy Secretary Lew further determined that "any state or local laws to the contrary are hereby preempted." 74 Fed. Reg. 31,788 (July 2, 2009). As the Federal Register notice, set forth below, explained, in so doing, Deputy Secretary Lew extended to diplomatic missions to the United Nations and the Organization of American States and to consular posts nationwide the same tax treatment the United States had provided to bilateral diplomatic missions in Washington, D.C. since 1986. The Deputy Secretary acted, among other things, "to assist in resolving a dispute affecting U.S. interests and involving foreign governments which assert that international law requires the exemption from taxation of such diplomatic and consular properties."

Pursuant to the authority vested in the Secretary of State by the laws of the United States, including the Foreign Missions Act, 22 U.S.C. 4301 *et seq*., and delegated by the Secretary to me as one of the President's principal officers for foreign affairs by Delegation

of Authority No. 245-1 of February 13, 2009, and at the direction of the Secretary of State, and after due consideration of the benefits, privileges, and immunities provided to missions of the United States abroad, as well as matters related to the protection of the interests of the United States, and at the request of foreign missions, I hereby designate exemption from real property taxes on property owned by foreign governments and used to house staff of permanent missions to the United Nations or the Organization of American States or of consular posts as a benefit for purposes of the Foreign Missions Act. I further determine that such exemption shall be provided to such foreign missions on such terms and conditions as may be approved by the Office of Foreign Missions and that any state or local laws to the contrary are hereby preempted. Prior inconsistent guidance is hereby rescinded. This action is in accord with the tax treatment of foreign government-owned property in the United States used as residences for staff of bilateral diplomatic missions, see Department of State, Notice: Property Owned by Diplomatic Missions and Used to House the Staff of Those Missions is Exempt from General Property Taxes, 51 FR 27303 (July 30, 1986), and conforms to the general practice abroad of exempting government-owned property used for bilateral or multilateral diplomatic and consular mission housing.

This action is necessary to facilitate relations between the United States and foreign states, to protect the interests of the United States, to allow for a more cost effective approach to obtaining benefits for U.S. missions abroad, and to assist in resolving a dispute affecting U.S. interests and involving foreign governments which assert that international law requires the exemption from taxation of such diplomatic and consular properties. The dispute has become a major irritant in the United States' bilateral relations and threatens to cost the United States hundreds of millions of dollars in reciprocal taxation. As the largest foreign-government property owner overseas, the United States benefits financially much more than other countries from an international practice exempting staff residences from real property taxes, and it stands to lose the most if the practice is undermined. Responsive measures taken against the United States because of the dispute also have impeded significantly the State Department's ability to

implement urgent and congressionally mandated security improvements to our Nation's diplomatic and consular facilities abroad, imposing unacceptable risks to the personnel working in those facilities. This action will allow the United States to press forward with improvements that will protect those who represent the Nation's interests abroad.

The exemption from real property taxes provided by this designation and determination shall apply to taxes that have been or will be assessed against any foreign government with respect to property subject to this determination, and shall operate to nullify any existing tax liens with respect to such property, but shall not operate to require refund of any taxes previously paid by any foreign government regarding such property. These actions are not exclusive and are independent of alternative legal grounds that support the tax exemption afforded herein.

c. Litigation concerning tax liens and property taxes imposed on consular and diplomatic property

On June 29, 2009, the United States filed a brief as *amicus curiae*, urging the U.S. Court of Appeals for the Second Circuit to vacate a lower court's judgment that upheld New York City's imposition of tax liens and assessment of local property taxes on residences owned by the Governments of India and Mongolia and used to house staff of their missions to the United Nations, and in the case of India, of its consular post as well. *City of New York v. Permanent Mission of India to the United Nations*, No. 08-1805-cv (2d Cir.). *See Digest 2006* at 592–603; *Digest 2007* at 455–62; and *Digest 2008* at 456–57 and 495–98 for prior developments in the litigation. The U.S. brief argued that the court should vacate the lower court's judgment that India and Mongolia owed approximately $42 million and $4 million, respectively, because the State Department's June 23, 2009 determination, discussed in C.1.b. *supra*, exempted "taxes that have been or will be assessed" and nullified "any existing tax liens." Excerpts below from the U.S. brief discuss the State Department's

authority under the Foreign Missions Act to designate and determine a tax exemption as a benefit accorded to foreign missions. The initial U.S. brief and the supplemental brief the United States filed on October 19, 2009, are available at *www.state.gov/s/l/c8183.htm*. The litigation remained pending at the end of 2009.*

* * * *

1. The State Department's Notice falls within the broad authority granted in the FMA. That statute specifies that the State Department shall determine "[t]he treatment to be accorded to a foreign mission in the United States." 22 U.S.C. § 4301(c). Among the functions specified in the FMA, the State Department shall "[p]rovide or assist in the provision of benefits for or on behalf of a foreign mission in accordance with section 4304 of this title." 22 U.S.C. § 4303(2).

In turn, section 4304 delineates the "[p]rovision of benefits" by the State Department to foreign missions. The State Department can provide benefits, subject to any "terms and conditions" the Department specifies, either "[u]pon the request of a foreign mission," or whenever the State Department "determines that such action is reasonably necessary on the basis of reciprocity or otherwise" in

* Editor's note: On August 17, 2010, the U.S. Court of Appeals for the Second Circuit vacated and reversed the district court's opinion and remanded. *City of New York v. Permanent Mission of India to the United Nations*, 2010 U.S. App. LEXIS 17127 (2d Cir. 2010). The Second Circuit concluded that the State Department had acted within its statutory authority. The court held first "that the Foreign Missions Act ("FMA") permits the State Department to designate affirmative benefits such as tax exemptions and that the Act allows the State Department to make such tax exemptions preemptive of State and municipal tax laws." *Id.* at *4. Second, the court held "that, under the circumstances of this case, the State Department acted within its power in designating this benefit as effective retroactively." *Id.* The court also "conclude[d] that the Notice issued by the State Department was procedurally proper because it [fell] within the 'foreign affairs function' exception to notice and comment under the Administrative Procedure Act, 5 U.S.C § 553(a)(1)." *Id.* at *4–5.

order to advance certain foreign relations goals. 22 U.S.C. § 4304(a)–(b). The statute lists those goals, which include:

- "to facilitate relations between the United States and a sending State,"
- "to protect the interests of the United States,"
- "to adjust for costs and procedures of obtaining benefits for missions of the United States abroad," and
- "to assist in resolving a dispute affecting United States interests and involving a foreign mission or sending State."

22 U.S.C. § 4304(b)(1)–(4).

"Benefit" is a broad, inclusive term in the FMA. The statute specifies one category of benefits—the acquisition of property, goods, or services—but the statute also delegates to the State Department the authority to specify "such other benefits as the Secretary may designate." 22 U.S.C. § 4302(a)(1). The definition of "benefit" thus gives the State Department authority to determine all aspects of the "treatment to be accorded to a foreign mission in the United States." 22 U.S.C. § 4301(c).[4] The expansive

[4] In determining the "treatment" to be accorded to foreign missions, the FMA directs the State Department to consider (among other factors) the reciprocal "benefits, privileges, and immunities" accorded to missions of the United States by other countries. 22 U.S.C. § 4301(c). The statute also directs the State Department to "[a]ssist" federal, state, and local governments in "according benefits, privileges and immunities" to foreign missions. 22 U.S.C. § 4303(1). Although the FMA refers to privileges and immunities along with benefits, the statute does not expressly grant the State Department any specific authority to establish privileges and immunities of missions. Instead, the statutory phrase refers to the international law obligations the United States owes to foreign missions. See 28 U.S.C. § 4310 (entitled "Privileges and immunities") ("Nothing in this chapter shall be construed to limit the authority of the United States to carry out its international law obligations."). The FMA gives the State Department authority to confer benefits that go beyond the privileges and immunities established by international law. Indeed, the legislative history reflects Congress' view that privileges and immunities under international law are a subset of the benefits that the State Department is authorized to provided to foreign missions. See, *e.g.*, 127 Cong. Rec. H26074 (Oct. 29, 1981) (section-by-section analysis of House bill substantially identical to FMA as enacted: FMA's broad authority "is intended * * * to enable the United States to exercise more effective control over the

scope of the State Department's authority to confer benefits is confirmed by Congress' direction that "[d]eterminations with respect to the meaning and applicability of the term[] * * * shall be committed to the discretion of the Secretary." 22 U.S.C. § 4301(b). Thus, the State Department not only has the statutory power to "designate" any "other benefits," but may also "[d]etermin[e]" the "meaning" of the term "benefit."

The FMA repeatedly emphasizes the broad authority Congress granted to the State Department to specify the treatment of foreign missions by designating benefits. See, *e.g.*, 22 U.S.C. §§ 4301(c), 4302(b), 4303(1)–(2), (5), 4304(a)–(b). The statute also expressly commits to the State Department's discretion all determinations under the FMA, including the designation and determination of benefits. See 22 U.S.C. § 4308(g) ("Except as otherwise provided, any determination required under this chapter shall be committed to the discretion of the Secretary."). That language reflects Congress' judgment that the State Department shall bear primary responsibility for determining the treatment of foreign missions. . . .

* * * *

3. The State Department's Notice here is a proper exercise of the powers granted under the FMA. In 1986, the State Department issued a public notice recognizing an exemption from real property taxes for the residences of staff of bilateral foreign diplomatic missions. See 51 Fed. Reg. 27303 (July 30, 1986). The Fourth Circuit upheld that policy and (relying on the Supremacy Clause) prohibited efforts by a local government to impose real estate taxes on such diplomatic-residence properties. See *United States v. Arlington County*, 669 F.2d 925 (4th Cir. 1982) (*Arlington*

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granting of privileges, immunities, and other benefits to foreign missions"). Although appellants argue that U.N. mission-staff housing is entitled to tax exemption under international law, the State Department acted under its domestic statutory authority pursuant to the FMA. The Notice thus does not require the Court to answer the question whether international law would provide an independent basis for affording appellants an exemption from real estate taxes.

County I) (upholding application of the State Department tax-exemption policy prospectively); *United States v. Arlington County*, 702 F.2d 485 (4th Cir. 1983) (*Arlington County II*) (retroactive application upheld).

At the time of that announcement, the State Department's policy concerning tax exemption for staff-residence property extended only to the housing for staff of bilateral diplomatic missions, not to other foreign mission staff residences, such as foreign government property used to house staff of consulates or permanent missions to international organizations. Under the State Department's policy at the time, those other mission properties remained subject to real property taxes by state and local governments. See United States Mission to the United Nations Circular Note HC-12-01 (April 5, 2001).

In the intervening years, the efforts of local governments in the United States to tax foreign mission property used to house staff of consulates and permanent missions to international organizations—including efforts by New York City to impose real estate taxes on the properties at issue in this case—have proved to be a persistent irritant in the foreign relations of the United States. The governments of India and Mongolia, among others, have repeatedly objected to those tax assessments, and have sought protection from the State Department.

Even more significantly, foreign governments have recently imposed or threatened to impose barriers, restrictions, and limitations on the operation of United States missions abroad. For example, the government of India has refused to issue permits for a new consular compound in Mumbai, resulting in substantial monetary costs to the United States and frustrating efforts to improve security for consular staff. . . .

Foreign governments have also threatened to impose taxes on staff-residence property owned by the United States abroad, justifying their policies by reference to the taxable status in the United States of property used for foreign mission staff housing. . . .

The Notice expressly refers to those concerns, and explains the disproportionate harm to the United States that flows from local taxation of foreign mission properties in this country. . . .

* * * *

2. London Congestion Tax

On August 12, 2009, the Department of State Office of the Spokesman responded to a question taken at the daily press briefing, asking "What is U.S. Government policy regarding the United Kingdom's Congestion Tax?" The City of London assesses a daily tax of eight pounds (£8.00) on all motorists entering an area of central London where the U.S. Embassy is located. "U.S. Government policy regarding the Congestion Tax has not changed," the Department's response explained. "This is longstanding U.S. Government policy and is not affected by a change in Ambassadors." The Department also stated, "The Congestion Tax is prohibited by various treaties, including the Vienna Convention on Diplomatic Relations; the Vienna Convention on Consular Relations; our 1951 bilateral Consular Agreement with the United Kingdom; and the NATO Status of Forces Agreement." The Department's response is also available at *www.state.gov/r/pa/prs/ps/2009/aug/127997.htm*. Additional discussion of the U.S. position concerning the congestion tax is available in *Digest 2005* at 570–74.

3. Agreement for Construction and Renovation of Embassies, Consulates, and the Permanent Mission of the People's Republic of China to the United Nations

On August 20, 2009, the United States and the People's Republic of China ("PRC") signed an international agreement governing the terms under which embassies, consulates, and the PRC's Permanent Mission to the United Nations may be constructed, expanded, renovated, or demolished. Agreement Between the Government of the United States of America and the Government of the People's Republic of China on the Conditions of Construction of Diplomatic and Consular Complexes in the People's Republic of China and the United States of America. Provisions excerpted below relate to the diplomatic and consular status of sites and archives; treatment of personnel, including privileges and immunities;

and shipments of project-related materials and equipment, including a special bilateral arrangement for processing such shipments through upon arrival in both countries' ports. The agreement entered into force upon signature and will remain in effect for ten years from that date. The full text of the agreement is available at *www.state.gov/documents/organization/130493.pdf*.

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8. Diplomatic and Consular Status of Sites and Archives

8.1 Any site acquired by either Party for future diplomatic and consular construction projects, whether acquired prior or subsequent to this Agreement, shall be considered part of the premises of the Construction Party's diplomatic or consular mission under the VCDR or the China–U.S. Consular Treaty, respectively, from the date of delivery of right to use.

8.2 All of the Construction Party's temporary sites shall be considered part of the premises of the Construction Party's diplomatic or consular mission under the VCDR or the China–U.S. Consular Treaty, respectively, within the duration of use approved by the Host Country.

8.3 All sites referred to in Articles 8.1 and 8.2 of this Agreement shall be inviolable and under the total control of the Construction Party.

8.4 The records and papers of an organization from the same country as the Construction Party relating to design or construction work performed in connection with such construction (including but not limited to tender and contract documents, architectural and engineering plans and specifications) shall be considered a constituent part of the archives of the diplomatic or consular mission of the Construction Party and shall be inviolable under the VCDR and the China–U.S. Consular Treaty, respectively.

* * * *

9.6 Construction Party personnel who are of Construction Party nationality, and whose stay in the Host Country is more than

30 calendar days, shall be attached, as appropriate, to the Construction Party diplomatic mission as administrative and technical staff or to a consular mission as employees of the consulate for the duration of their work on a project. These personnel shall enjoy the privileges and immunities accorded administrative and technical staff of the diplomatic mission under the VCDR, or those accorded employees of a consulate under the China–U.S. Consular Treaty, respectively.

* * * *

[Shipments] 10.4 As a special bilateral arrangement, the Host Country customs shall, after the landing of construction materials and equipment shipped as special dedicated project materials for the Construction Party's embassy or consulate and within 48 hours of the submission of Construction Party's written declaration to the customs authorities, finish procedures for release and release the articles pursuant to Host Country customs procedures. The Construction Party shall submit advance written notice in accordance with Host Country requirements no later than 24 hours before the arrival of the shipments. The Construction Party shall comply with related Host Country laws and regulations and shall attach visible marks to the shipments and make customs declarations in writing to Host Country customs authorities.

10.5 The Parties pledge that construction materials and equipment shipped as special dedicated project materials for the embassy or consulate, as well as equipment installed and used, shall all respect relevant provisions of the VCDR or the China–U.S. Consular Treaty related to articles for official use of the mission and at the same time shall be in keeping with Host Country laws and regulations, and shall be limited to official and communications use of the embassy or consulate. No equipment and instruments that endanger Host Country security shall be imported. As a necessary means to determine whether construction materials and equipment shipped by the Construction Party include equipment and instruments that endanger Host Country security and whether construction materials and equipment shipped conform to the declaration, the Host Country shall have the right to subject shipments to passive inspection, without opening the containers;

or, on the premise that prior notice is served to the Construction Party, shall have the right to subject shipments to active inspection, without opening the containers. Such inspections shall be conducted in the presence of the Construction Party's diplomatic or consular agents or its authorized personnel. In the event the Construction Party objects to an active inspection, it shall have the right to return such shipments unopened and without inspection. In the event the Host Country determines that the Construction Party is importing equipment and instruments that endanger its national security, or that the materials and equipment shipped do not conform to the declaration, the Host Country, on the premise that prior notice is served to the Construction Party, shall have the right to inspect by opening the containers. Such inspections shall be conducted in the presence of the Construction Party's diplomatic or consular agents or its authorized personnel. In the event the Construction Party objects to an inspection, it shall have the right to return such shipments unopened and without inspection.

* * * *

4. Labor Issues

On September 16, 2009, the Department of State circulated a diplomatic note to Chiefs of Mission of diplomatic missions in the United States, discussing the standards applicable to the employment of domestic workers of mission personnel who are in the United States on nonimmigrant A-3 or G-5 visas. The note superseded previous notes on the same subject and "emphasize[d] the importance the United States Government attaches to providing fair treatment to domestic workers who come to the United States to work for members of the diplomatic community." It also "remind[ed] the Chiefs of Mission to take any and all measures necessary to ensure that members of their missions employing such workers respect the laws relating to the treatment to be accorded to domestic workers."

The first section of the note addressed the Department of State's two new requirements concerning prospective

domestic workers' eligibility for visas. As it explained, "Effective October 15, 2009, the Department of State will also require that foreign missions notify the Department of any prospective domestic worker before the worker applies for a visa." Second, the note advised that the Department would presume that foreign mission personnel below the rank of Minister would not be able to provide the legally required wages and working conditions; to overcome this presumption, the prospective mission member would have to demonstrate the financial ability to pay the salary and related travel expenses of a domestic worker. The note explained further that

> [t]o overcome this presumption, a prospective mission member not having the rank of Minister or above would have to demonstrate to the consular officer reviewing the A-3 or G-5 visa application that he or she has the financial ability to pay the salary of the domestic worker as specified in the contract, as well as the related travel expenses. The consular officer will also take into consideration the number of domestic workers that a particular mission member may reasonably have the ability to employ. If a mission member seeks to replace a domestic worker or add to his/her existing domestic staff, the A-3 or G-5 visa may be denied if the Department has credible evidence that the mission member failed to fulfill his/her obligations to a former or current employee, such as to abide by the contract terms generally, and specifically, to pay a fair wage.

The Department's note also announced a new requirement that wage payments to domestic workers be made either by check or electronic fund transfer to a bank account in the domestic worker's name only, prohibiting cash payments to such workers. In addition, the note reminded the Chiefs of Mission that passports of domestic workers must be in the sole possession of the worker and advised them of a new statute requiring the Secretary of State to suspend A-3 or G-5 visas for missions in certain circumstances.

Finally, the note advised the Chiefs of Missions of new statutory authority that requires the Secretary of State to

"suspend for such period as the Secretary determines necessary, the issuance of A-3 visas or G-5 visas to applicants seeking to work for officials of a diplomatic mission or international organization, if the Secretary determines that there is credible evidence that one or more employees of such mission or international organization have abused or exploited one or more nonimmigrants holding an A-3 or G-5 visa, and that the diplomatic mission or international organization tolerated such actions." William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (*see Digest 2008* at 119–20). The note also stated that the Department of State "forwards to the Department of Justice all credible allegations of abuse of domestic workers by mission members which may constitute criminal conduct. In that context, the Department of State may take other appropriate action, including a request for a waiver of any applicable immunity, based on a determination by an appropriate prosecuting authority."

The full text of the note is available at *www.state.gov/s/l/c8183.htm*.

D. INTERNATIONAL ORGANIZATIONS

1. INTERPOL

On December 16, 2009, President Barack H. Obama issued Executive Order 13524, expanding INTERPOL's privileges and immunities in the United States. 74 Fed. Reg. 67,803 (Dec. 21, 2009). The order amends Executive Order 12425 of June 15, 1983, which designated INTERPOL as a public international organization pursuant to the International Organizations Immunities Act ("IOIA"), 22 U.S.C. § 288. The 1983 order provided INTERPOL with certain privileges and immunities, including certain immunities from suit and legal process in the United States but withheld some of the benefits normally given to international organizations under the IOIA because, at the time, INTERPOL did not have an office in the United States.

Because INTERPOL opened a liaison office to the United Nations in New York in 2004, the new order extends to INTERPOL the remaining privileges and immunities that IOIA-designated international organizations with offices in the United States normally enjoy. The privileges and immunities the new order accords to INTERPOL include: immunity from search and confiscation of its property and archives or files; freedom from customs duties and taxes related to the importation of baggage and effects; and immunity from federal income, Social Security, and property taxes. The new order does not enable or authorize INTERPOL or its officials to conduct searches or seizures, make arrests, or take any other law enforcement actions in the United States.

2. Constitutionality of the International Organizations Immunities Act

On May 1, 2009, the United States filed a brief as intervenor in the U.S. Court of Appeals for the Second Circuit in a case brought by a Portuguese and Italian national against her former employer, the World Meteorological Organization ("WMO"), a specialized agency of the United Nations, and four current or former WMO officials for acts that allegedly occurred in Switzerland. *Veiga v. World Meteorological Org.*, No. 08-3999-cv (2d Cir.). The plaintiff brought employment-related and other claims arising from her alleged discovery of an embezzlement scheme and efforts to expose it. In 2008 a district court dismissed the plaintiff's claims for lack of subject matter jurisdiction, rejecting the plaintiff's argument that the Constitution was violated by dismissal of her claims under the International Organizations Immunities Act ("IOIA"), 22 U.S.C. § 288 et seq. On appeal, the plaintiff reiterated her argument that the application of the IOIA to dismiss her claims was unconstitutional. The United States took no position on the merits of the plaintiff's claim but defended the constitutionality of the IOIA. As an initial matter, the United States explained that, "[a]s a foreign citizen who at all relevant

times resided and worked in Switzerland, and who has sued her former employer, an international organization based in Switzerland, as well as its employees, for acts that occurred entirely abroad, the plaintiff has no constitutional rights to invoke." The United States then argued that "there is simply no constitutional right to bring suit free from the application of immunity doctrines." Excerpts follow from the brief's discussion of the constitutionality of the IOIA. The full text of the brief is available at *www.state.gov/s/l/c8183.htm*. The litigation remained pending as of the end of 2009.*

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The authority of the political branches to define and confer immunities includes the authority to grant immunities to designated public international organizations, such as the WMO. Although international organizations are not themselves foreign states, the statutory extension of immunities historically enjoyed by foreign states to international organizations reflects the international community's "growing efforts to achieve coordinated international action through multinational organizations with specific missions." *Mendaro v. World Bank,* 717 F.2d 610, 615 (D.C. Cir. 1983). In passing the IOIA, Congress noted the "increased activities of the United States in relation to international organizations," and specifically recognized the need to "extend privileges of a governmental character" in cases where "this Government associates itself with one or more foreign governments in an international organization." S. Rep. No. 79-861, at 2 (1945). Indeed, Congress limited the reach of the IOIA to public international organizations, described in the House Report as "those which are composed of governments as members," H.R. Rep. No. 79-1203, at 1 (1945), in which "the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such

* On March 3, 2010, the U.S. Court of Appeals for the Second Circuit affirmed the district court's judgment. *Veiga v. World Meteorological Org.*, 368 Fed. Appx. 189 (2d Cir. 2010); 2010 U.S. App. LEXIS 4440 (2d Cir. 2010).

participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter." 22 U.S.C. § 288; *see also* Exec. Order 10,676, 21 Fed. Reg. 6625 (1956) (designating WMO). The extension of such privileges is a logical one given the function of international organizations to serve as the instrumentalities of many nations, and given the modern reality that international organizations are critical fora for the conduct of foreign affairs.

The immunities of international organizations have been repeatedly recognized and respected by district courts within this Circuit over many years without their constitutionality ever having been called into question. *See, e.g., Van Aggelen v. United Nations,* 06 Civ. 8240 (LBS), 2007 WL 1121744, at * 1 (S.D.N.Y. Apr. 12, 2007), *aff'd,* 2009 WL 424175 (2d Cir. 2009); *D'Cruz v. Annan*, 05 Civ. 8918 (DC), 2005 WL 3527153, at *1–2 (S.D.N.Y. Dec. 22, 2005), *aff'd,* 223 Fed. Appx. 42 (2d Cir. 2007); *McGehee v. Albright,* 210 F. Supp. 2d 210, 218 (S.D.N.Y. 1999), *aff'd,* 208 F.3d 203 (2d Cir. 2000); *Askir v. Boutros-Ghali,* 933 F. Supp. 368, 373 (S.D.N.Y. 1996); *De Luca v. United Nations Org.,* 841 F. Supp. 531, 533 (S.D.N.Y.), *aff 'd,* 41 F.3d 1502 (2d Cir. 1994); *Klyumel v. United Nations,* 92 Civ. 4231 (PKL), 1993 WL 42708, at *1 (S.D.N.Y. Feb. 17, 1993); *Boimah v. United Nations Gen. Assembly,* 664 F. Supp. 69, 71 (E.D.N.Y. 1987).

Furthermore, the few courts to have specifically considered constitutional challenges to the immunities of international organizations or their officials have rejected those challenges out of hand. *See Weinstock v. Asian Development Bank,* No. Civ.A 105 CV00174RMC, 2005 WL 1902858, at *3–*4 (D.D.C. Jul. 13, 2005) (rejecting constitutional challenge to immunity afforded to international organizations under the IOIA); *Ahmed v. Hogue,* 01 Civ. 7224 (DLC), 2002 WL 1964806, at *7 (S.D.N.Y. Aug. 23, 2002) (rejecting plaintiff's constitutional challenge to diplomatic immunity invoked by Bangladeshi representative to the United Nations); *Tuck v. Pan Am. Health Org.,* 668 F.2d 547, 549–550 (D.C. Cir. 1981) (upholding defendant's immunity under IOIA

without addressing plaintiff's First and Fourteenth Amendment claims).

As the district court recognized in *Weinstock,* in rejecting the plaintiff's assertion that the dismissal of claims [against] the Asian Development Bank deprived the plaintiff of his "fundamental right of access to the court,"

> [i]t is axiomatic that Congress can limit the jurisdiction of the lower federal courts. *E.g., Keene Corp. v. United States,* 508 U.S. 200, 207 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts. . . ."). One method by which it can do so, and which it employs quite frequently, is to provide by statute that the United States, foreign sovereigns, or certain entities are immune from suit in the district courts. The codification of these immunities is not a constitutional violation.

Weinstock, 2005 WL 1902858, at *3 (some citations omitted). The same rationale applies here, and bars the plaintiff's constitutional challenge.

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Cross References

Immigration and visas and U.S. visa-related restrictions, **Chapters 1.C. and 16.A.4.c.(2), 4.d., and 4.e.**
Trafficking in persons, **Chapters 3.B.3. and 16.A.7.**
Security Council travel bans, **Chapter 16.A.1.a.(1), 2.a., 3.a., and 3.b.**
References to privileges and immunities and other benefits provided under earlier bilateral defense agreements in U.S.–Colombia Defense Cooperation Agreement, **Chapter 18.A.1.c.(1)**

Chapter 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Bilateral Open Skies Agreements and Air Transport Agreements

Information on recent U.S. Open Skies and other air transport agreements, by country, is available at *www.state.gov/e/eeb/tra/c661.htm*. During 2009 the United States engaged in negotiations with a number of countries, including the following:

By an exchange of diplomatic notes in March 2009, the United States and Israel agreed to extend the Protocol relating to and amending the Air Transport Agreement between the Government of the United States of America and the Government of the State of Israel of June 13, 1950, as amended, signed at Jerusalem July 11, 2001, as extended, until March 31, 2010. The diplomatic notes are available at *www.state.gov/documents/organization/130177.pdf*.

By an exchange of diplomatic notes dated October 15 and November 5, 2009, the United States and Ecuador agreed that Annex I to the 1986 Air Transport Agreement between the two countries, as modified in 1995 and 2002, and Annex II to the 1986 Agreement, would continue to govern air services between the two countries through June 30, 2010, with effect from July 1, 2009. The U.S. diplomatic note, dated October 15, 2009, is available at *www.state.gov/documents/organization/140373.pdf*.

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The United States and Uganda concluded an Air Transport Agreement on October 27, 2009, and the agreement entered into force on that date. The agreement is available at *www.state.gov/e/eeb/rls/othr/ata/u/uy2/131429.htm*.

By an exchange of diplomatic notes in December 2009, the United States and Colombia agreed that paragraphs 1 and 3 of the 2000 understanding and amendments relating to the 1956 Air Transport Agreement between the two countries would continue to apply through December 31, 2010. The U.S. diplomatic note, dated December 29, 2009, is available at *www.state.gov/documents/organization/140372.pdf*.

2. Air Transport Preclearance Agreements

In 2009 the United States concluded a bilateral agreement with Bermuda to expand preclearance operations at Bermuda's international airport. Department of Homeland Security Secretary Janet Napolitano, on behalf of the United States, signed an agreement with Bermuda Premier and Minister of Tourism and Transport Dr. Ewart Brown on April 23, 2009, which, upon entry into force, will supersede the Agreement on Preclearance for Entry into the United States, with Annexes, which entered into force on January 15, 1974, 25 U.S.T. 288, T.I.A.S. 7801. In general, bilateral preclearance agreements enable U.S. authorities to screen individuals, goods, and aircraft for entry or admission to the United States at airports outside the United States. Among other things, the new agreement with Bermuda will expand the scope of the 1974 agreement to cover preclearance of private aircraft destined for the United States. The agreement enters into force upon the later notification through an exchange of notes that mutually acceptable protocols have been established. A press release issued by the Department of Homeland Security on April 23, 2009, available at *www.dhs.gov/ynews/releases/pr_1240515431927.shtm*, provided additional details on the agreement.

3. Other Aviation Agreements

On April 27, 2009, the United States and Japan concluded an agreement concerning promotion of aviation safety. The agreement entered into force on that date. Article II(1) of the agreement obligates both countries "to accept the airworthiness approvals that have been made by the other Party's authorities in accordance with the other Party's laws and regulations as well as the terms and conditions of the Implementation Procedures referred to in Article III." Article II(2) provides further that, "[i]n negotiating the Implementation Procedures under this Agreement, the authorities of each Party shall endeavor to formulate terms and conditions for the reciprocal acceptance of airworthiness approvals for civil aeronautical products to ensure that each Party's civil aeronautical products meet a level of safety and environmental quality equivalent to that provided by the applicable laws, regulations and requirements of the other Party." The full text of the agreement is available at *www.state.gov/documents/organization/130473.pdf*.

B. NORTH AMERICAN FREE TRADE AGREEMENT

1. Investment Dispute Settlement Under Chapter 11

a. Expropriation and minimum standard of treatment: Glamis Gold, Ltd. v. United States

On May 7, 2009, an arbitral panel constituted under Chapter 11 of the North American Free Trade Agreement ("NAFTA") dismissed a Canadian mining company's claim for injuries relating to a proposed gold mine in California. *Glamis Gold, Ltd. v. United States of America*. The claimant alleged that certain federal and California state regulatory measures expropriated its investment in the proposed gold mine in violation of NAFTA Article 1110 and denied its investment the minimum standard of treatment under international law in

violation of Article 1105. A media note issued by the Department of State on June 9, 2009, excerpted below, provided details on the tribunal's decision and the claim. The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2009/06a/124527.htm*. The arbitration panel's award (with confidential information redacted) and submissions, transcripts, and other orders in the proceedings are available at *www.state.gov/s/l/c10986.htm*. For prior developments in the arbitration, including discussion of U.S. submissions, see *Digest 2006* at 709–26 and *Digest 2007* at 535–48.

A three-member NAFTA arbitration tribunal rejected a $50 million claim filed by the Canadian mining company, Glamis Gold Ltd., challenging certain actions taken by the Department of the Interior (DOI) and certain measures adopted by the State of California relating to land reclamation in connection with proposed open-pit mining operations. The Office of the Legal Adviser of the Department of State represented the United States in the case.

The claimant, Glamis, submitted its claim to arbitration in 2003, alleging that certain DOI actions and California measures relating to its proposed open-pit gold mine on federal lands in California made development of that project economically infeasible, and deprived it of the value of its investment in that project, in violation of NAFTA investment protections. The tribunal unanimously rejected Glamis' claim and ordered Glamis to pay two-thirds of the arbitration costs.

Background

The Glamis case concerns the claimant's proposed development of the "Imperial Project," a gold mining operation that was proposed to be located on federal lands in the environmentally sensitive California Desert Conservation Area. Glamis claimed that certain actions taken by the DOI during the permitting process, combined with reclamation requirements adopted by the State of California, made development of the project economically infeasible.

Concurrent with the DOI's review of Glamis' proposed Imperial Project, and in order to address concerns about the potential impact of open-pit metallic mines on the environment and Native American cultural resources, the State of California adopted measures requiring all future open-pit metallic mines to backfill and re-grade the large open pits left on mined lands. Glamis claimed that the actions taken by California, together with alleged delay by the DOI in its review of Glamis' application, violated the provisions of NAFTA Chapter Eleven, which, consistent with international law, ensure a minimum level of treatment and prohibit uncompensated takings of property. Glamis alleged that the California measures were politically motivated and lacked any legitimate public policy basis.

The United States maintained that there was no undue delay in the DOI's review of Glamis' application and that the California reclamation requirements were supported by legitimate public policy goals of protecting the environment and Native American cultural resources.

The tribunal agreed with the United States and rejected Glamis' claim in its entirety. It held that the actions and measures in question were supported by legitimate public policy goals and did not violate the minimum standard of treatment provision of the NAFTA or constitute an expropriation of Glamis' investment.

* * * *

b. Lack of investment in the territory of the host state and other issues: Grand River Enterprises Six Nations v. United States

On May 13, 2009, the United States filed its rejoinder in *Grand River Enterprises Six Nations v. United States of America*, an arbitration proceeding under Chapter 11 of the NAFTA. In this case, Grand River Enterprises Six Nations, Ltd., a Canadian tobacco manufacturer that exports cigarettes to the United States, and certain members of Canadian First Nations contended that certain U.S. state laws relating to the 1998 Master Settlement Agreement ("MSA"), which settled litigation brought by U.S. states against major tobacco companies,

violated Chapter 11. The claimants' allegations specifically concerned amendments to escrow statutes that altered the formula for obtaining releases of escrow deposits made by tobacco manufacturers under the statutes. For additional background, see *Digest 2006* at 688–93 and *Digest 2008* at 351–57 and 528–42.

In its rejoinder, the United States elaborated on positions set forth in its Counter-Memorial filed on December 22, 2008, and addressed claimants' new arguments. In particular, the United States argued that to qualify as an "investor" under NAFTA Article 1101(1), a claimant must be seeking to invest or have made an investment in the territory of the host state. On the merits, the United States elaborated on its earlier arguments that the claimants failed to establish a basis for their claim that the amended escrow statutes resulted in the expropriation of their investments in violation of NAFTA Article 1110 and discriminated against them in violation of Article 1102 (national treatment) and Article 1103 (most-favored-nation treatment). The United States also addressed the claimants' new arguments under Article 1105 (minimum standard of treatment) in support of their position that UN human rights and treaty law generally required the United States to consult with them before the U.S. states adopted the challenged measures. The United States argued that (1) a consultation obligation cannot be imported into Article 1105(1) through the Universal Declaration of Human Rights ("UDHR") and the UN Charter; and (2) a prohibition on racial discrimination cannot be imported into Article 1105(1) through Article 53 of the Vienna Convention on the Law of Treaties. The rejoinder (with confidential information redacted) is available at *www.state.gov/s/l/c11935.htm*. The arbitral panel's award remained pending at the end of 2009.

c. Venue transfer under Article 2005(4) of the NAFTA: Dolphin-safe tuna dispute

On November 5, 2009, the United States initiated state-to-state dispute resolution proceedings under the NAFTA

concerning Mexico's failure to transfer its dispute about the U.S. "dolphin-safe" tuna labeling requirement for consideration under the NAFTA's dispute settlement procedures rather than the WTO's. Before doing so, the United States had attempted to change the venue under Article 2005 of the NAFTA, in the first such action since the NAFTA's adoption. Article 2005 provides in relevant part:

> 4. In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):
>
> (a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and
> (b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters,
>
> where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

Excerpts below from a press statement the U.S. Office of the Trade Representative ("USTR") issued November 5 provide background on the dispute and its significance. The full text of the press statement is available at *www.ustr.gov/about-us/press-office/press-releases/2009/november/united-states-initiates-nafta-dispute-mexico-over*.

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"In requesting NAFTA consultations, we are enforcing the right that the United States, Canada and Mexico negotiated in the NAFTA," said [a USTR spokesperson]. "This is an important right that has not previously been invoked by a NAFTA party, and defending our right under this clause preserves and strengthens the NAFTA dispute settlement regime."

The U.S. dolphin safe labeling provisions at issue in the WTO dispute prohibit tuna sellers from labeling their products as "dolphin safe" if the tuna is caught by intentionally encircling ("setting on") dolphins with purse seine nets. Mexican fishing vessels use this technique to fish for tuna.

Mexico's challenge to the U.S. dolphin safe labeling provisions meets the criteria in NAFTA Article 2005(4) choice of forum provision. . . .

NAFTA rules provide that once a responding party invokes the choice of forum provision, the complaining party may pursue the dispute solely under the NAFTA and must withdraw from the WTO proceedings.

BACKGROUND

On March 9, 2009 Mexico requested that a WTO panel be established to review Mexico's claims that U.S. law limiting the use of the "dolphin safe" label on tuna and tuna products is inconsistent with U.S. obligations under the WTO Agreement. In response, the United States invoked the NAFTA choice of forum provision (Article 2005(4) of the NAFTA) on March 24, 2009.

However, Mexico pursued its request for a WTO panel and on April 20, 2009, the WTO Dispute Settlement Body established a WTO panel to review Mexico's claims that U.S. dolphin safe labeling provisions are inconsistent with U.S. obligations under the WTO Agreement. Although Mexico agreed to postpone selecting panelists as it explored other settlement options with the United States, those efforts have not yet led to a resolution of the dispute and Mexico has resumed the WTO proceedings.

Consultations are the first step in a NAFTA dispute. Under NAFTA rules, if the parties do not resolve an issue through consultations, either party may request a meeting of the NAFTA Free Trade Commission to address the matter.

2. Trucking

Section 136 of the Department of Transportation Appropriations Act, 2009, which President Barack H. Obama signed

into law on March 11, 2009, eliminated funding for a Department of Transportation ("DOT") demonstration program that had allowed a limited number of Mexican carriers to operate trucks throughout the United States. Div. I, Title I, Pub. L. No. 111-8, 123 Stat. 932; *see also Digest 2007* at 556–62 for a discussion of the pilot demonstration program. In response, Mexico increased tariffs on certain imports from the United States.

C. WORLD TRADE ORGANIZATION

1. Dispute Settlement

U.S. submissions in WTO dispute settlement cases are available at *www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement*.

The following discussion of a selection of WTO disputes involving the United States is drawn largely from Chapter II, "World Trade Organization," of the 2009 Annual Report of the President of the United States on the Trade Agreements Program ("2009 Annual Report"), available at *www.ustr.gov/2010-trade-policy-agenda*. WTO legal texts referred to below are available at *www.wto.org/english/docs_e/legal_e/legal_e.htm*.

a. Disputes brought by the United States

(1) Disputes brought by the United States against China

(i) China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights (WT/DS362)

On January 26, 2009, as discussed below, a WTO panel issued a report in favor of U.S. claims against China concerning deficiencies in its intellectual property rights laws. *See* 2009 Annual Report at 73. In 2007 the United States had

requested the WTO to establish a dispute settlement panel to consider China's measures; see *Digest 2007* at 563–64.*

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The panel circulated its report on January 26, 2009. The panel found that China's denial of copyright protection to works that do not meet China's content review standards is inconsistent with the TRIPS Agreement [Agreement on Trade-Related Aspects of Intellectual Property Rights]. The panel also found it inconsistent with the TRIPS Agreement for China to provide for simple removal of an infringing trademark as the only precondition for the sale at public auction of counterfeit goods seized by Chinese customs authorities.

With respect to the U.S. claim regarding thresholds in China's law that must be met in order for certain acts of trademark counterfeiting and copyright piracy to be subject to criminal procedures and penalties, the panel clarified that China must provide for criminal procedures and penalties to be applied to willful trademark counterfeiting and copyright piracy on a commercial scale. The panel agreed with the United States that Article 61 of the TRIPS Agreement requires China not to set its thresholds for prosecution of piracy and counterfeiting so high as to ignore the realities of the commercial marketplace. The Panel did find, however, that it needed more evidence in order to decide whether the actual thresholds for prosecution in China's criminal law are so high as to allow commercial-scale counterfeiting and piracy to occur without the possibility of criminal prosecution.

The DSB adopted the panel report on March 20, 2009. On April 15, 2009, China notified the DSB that China intends to implement the recommendations and rulings of the DSB in this dispute, and stated it would need a reasonable period of time for implementation. On June 29, 2009, the United States and China

* Editor's note: When this volume went to press in 2010, the United States was working with China on its implementation of the DSB recommendations and rulings in this dispute.

notified the DSB that they had agreed on a one-year period of time for implementation, to end on March 20, 2010.

(ii) China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (WT/DS363)

In 2009, as described below, a WTO panel and the WTO Appellate Body issued reports in a dispute concerning China's restrictions on the importation and distribution of imported publications, films for theatrical release, sound recordings, and audiovisual entertainment products. *See* 2009 Annual Report at 73–74; *see also Digest 2007* at 564–65.

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The report of the panel was circulated to WTO Members and made public on August 12, 2009. In the final report, the panel made three critical sets of findings. First, the panel found that China's restrictions on foreign-invested enterprises (and in some cases foreign individuals) from importing films for theatrical release, audiovisual home entertainment products, sound recordings, and publications are inconsistent with China's trading rights commitments as set forth in China's protocol of accession to the WTO. The panel also found that China's restrictions on the right to import these products are not justified by Article XX(a) of the GATT 1994. Second, the panel found that China's prohibitions and discriminatory restrictions on foreign-owned or -controlled enterprises seeking to distribute publications and sound recordings over the Internet are inconsistent with China's obligations under the GATS. Third, the panel also found that China's treatment of imported publications is inconsistent with the national treatment obligation in Article III:4 of the GATT 1994.

In September 2009, China filed a notice of appeal to the WTO Appellate Body, appealing certain of the panel's findings. First, China contended that its restrictions on importation of the products at issue are justified by an exception related to the protection of public morals. Second, China claimed that while it had made

commitments to allow foreign enterprises to partner in joint ventures with Chinese enterprises to distribute music, those commitments did not cover the electronic distribution of music. Third, and finally, China claimed that its import restrictions on films for theatrical release and certain types of sound recordings and DVDs were not inconsistent with China's commitments related to the right to import because those products were not goods and therefore were not subject to those commitments. The United States filed a cross-appeal on one aspect of the panel's analysis of China's defense under GATT Article XX(a). On December 21, 2009, the Appellate Body issued its report. The Appellate Body rejected each of China's claims on appeal. The Appellate Body also found that the Panel had erred in the aspect of the analysis that the United States had appealed.

(iii) China–Grants, loans and other incentives (WT/DS387)

On December 18, 2009, the United States and China reached an agreement to settle a dispute concerning more than 90 Chinese government subsidies provided at the national and subnational levels to promote sales of Chinese products outside China. The subsidies largely supported exports of Chinese products the government designated as "famous brands" and covered products such as textiles, household appliances, medicines, and food. A summary of the dispute and its resolution is provided below and in the 2009 Annual Report at 75–76. *See also* USTR's press statement, issued on December 18, 2009, available at *www.ustr.gov/about-us/press-office/press-releases/2009/december/united-states-wins-end-china's-"famous-brand"-sub*.

On December 19, 2008, the United States requested consultations with China regarding government support tied to China's industrial policy to promote the sale of Chinese brand name and other products abroad. This support is provided in the form of cash grant rewards, preferential loans, research and development funding, and payments to lower the cost of export credit

insurance. Because these subsidies are offered on the condition that enterprises meet certain export performance criteria, they appear to be inconsistent with several provisions of the WTO Agreement, including Article 3 of the *Agreement on Subsidies and Countervailing Measures* and Articles 3, 9, and 10 of the *Agreement on Agriculture*, as well as specific commitments made by China in its WTO accession agreement. In addition, to the extent that the grants, loans, and other incentives also benefit Chinese-origin products, but not imported products, the measures appear to be inconsistent with Article III:4 of the *General Agreement on Tariffs and Trade 1994*. Mexico and Guatemala also initiated disputes regarding the same subsidies.

Joint consultations were held in February 2009. On December 18, 2009, the parties concluded a settlement agreement in which China confirmed that it had eliminated all of the export-contingent benefits in the challenged measures.

(iv) China–Measures Relating to the Exportation of Various Raw Materials (WT/DS394)

On June 23, 2009, the United States requested consultations with China concerning China's export restraints on various industrial raw materials used to produce steel, aluminum, and chemicals. The United States requested the establishment of a WTO dispute settlement panel to examine this matter on November 4, 2009. The WTO established a panel on December 21, 2009. A summary of the dispute is set forth below.

On June 23, 2009, the United States requested consultations with China regarding China's export restraints on a number of important industrial raw materials. The materials at issue are: bauxite, coke, fluorspar, magnesium, manganese, silicon metal, silicon carbide, yellow phosphorus, and zinc. These materials are inputs for steel, aluminum, and chemical products.

Specifically, the United States is concerned that certain Chinese measures restrain the exportation of these raw materials

by imposing on their exportation: (1) quantitative restrictions in the form of quotas; (2) export duties; and (3) additional requirements such as licensing, minimum export prices, and excessive fees and formalities. The United States is also concerned that China administers its export procedures unfairly in other respects, including, for example, by not publishing relevant measures in a manner that allows them to be readily available to governments and traders, by restricting the right of Chinese as well as foreign enterprises to export, and by requiring foreign-invested enterprises to satisfy certain criteria that Chinese enterprises need not satisfy in order to export. The measures at issue appear to be inconsistent with several WTO provisions, including provisions in the General Agreement on Tariffs and Trade 1994, as well as specific commitments made by China in its WTO Accession Protocol. The United States and China held consultations on July 31 and September 1–2, 2009, but they did not resolve the dispute. The European Union and Mexico have also requested and held consultations with China on these measures.

On November 19, 2009, the European Union and Mexico joined the United States in requesting the establishment of a panel, and on December 21, 2009, the WTO Dispute Settlement Body established a single panel to examine all three complaints.

(2) European Union–Measures Concerning Meat and Meat Products (Hormones) (WT/DS26, 48)

On May 13, 2009, as described below, the United States and the European Union concluded a Memorandum of Understanding ("MOU") relating to the dispute concerning the EU ban on imports of meat from animals that had been administered certain growth hormones. The MOU provides U.S. beef exports with additional access to EU markets and provides that the two parties will not pursue WTO litigation relating to the dispute before February 11, 2011. *See* 2009 Annual Report at 76–77; for additional background on the MOU, see USTR's May 13, 2009 press release, available at *www.ustr.gov/about- www.ustr.gov/about-us/press-office/*

press-releases/2009/may/ustr-announces-agreement-european-union-beef-hormones-. For additional background on the WTO dispute, see *Digest 2008* at 562–67.

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On December 22, 2008, the EU requested consultations with the United States and Canada pursuant to Articles 4 and 21.5 of the DSU, regarding the EU's implementation of the DSB's recommendations and rulings in the EU–Hormones dispute. In its consultations request, the EU stated that it considered that it has brought into compliance the measures found inconsistent in EU–Hormones by, among other things, adopting its revised ban in 2003. Consultations took place in February 2009.

Discussions between the United States and the EU resulted in the conclusion of a Memorandum of Understanding ("Beef MOU") on May 13, 2009. The Beef MOU provides for increased, duty-free access to the EU market for beef produced without certain growth promoting hormones and maintains increased duties on a reduced list of EU products. Under the terms of the Beef MOU, after three years, duty-free access to the EU market for beef produced without certain growth promoting hormones may increase and the application of all remaining increased duties imposed on EU products may be suspended. The Beef MOU also suspends further litigation in the *EU–Hormones* compliance proceeding until at least February 3, 2011.

(3) European Communities–Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States (WT/DS389)

On January 16, 2009, the United States requested consultations with the European Union concerning EU prohibitions on imports of certain poultry meat and poultry meat products. The U.S. initiative exemplified its broader effort, announced later in 2009 and discussed below in D.1., to address sanitary and phytosanitary measures that restrict

U.S. agricultural exports. A summary of the dispute is set forth below; *see* 2009 Annual Report at 81.

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On January 16, 2009, the United States requested consultations regarding certain EU measures that prohibit the import of poultry meat and poultry meat products that have been processed with chemical treatments designed to reduce the amount of microbes on poultry meat, unless such pathogen reduction treatments ("PRTs") have been approved. The EU further prohibits the marketing of poultry meat and poultry meat products if they have been processed with PRTs. In December 2008, the EU formally rejected the approval of four PRTs whose approval had been requested by the United States, despite the fact that EU scientists have repeatedly concluded that poultry meat and poultry meat products treated with any of these four PRTs does not present a health risk to European consumers. The EU's maintenance of its import ban and marketing regulation against PRT poultry appears to be inconsistent with its obligations under the SPS [Sanitary and Phytosanitary Measures] Agreement, the Agreement on Agriculture, the GATT 1994, and the TBT [Technical Barriers to Trade] Agreement. Consultations were held on February 11, 2009, but those consultations failed to resolve the dispute. The United States requested the establishment of a panel on October 8, 2009, and the DSB established a panel on November 19, 2009.

b. Disputes brought against the United States

(1) United States–Subsidies on Upland Cotton (WT/DS267)

On August 31, 2009, arbitrators issued awards against the United States in arbitration arising from Brazil's requests to impose countermeasures against the United States in a long-standing dispute involving Brazil's claims that certain subsidies to upland cotton and export credit guarantees under the

GSM 102 program were inconsistent with U.S. obligations under the WTO ("Cotton dispute").* The arbitral awards and related developments at the WTO are discussed below; *see* 2009 Annual Report at 87–88. For previous developments in the dispute, see *Digest 2005* at 633 and *Digest 2008* at 557–62.**

* * * *

The Arbitrators issued their awards on August 31, 2009. They issued one award concerning U.S. subsidies found to cause serious prejudice to Brazil's interests (marketing loan and countercyclical payments for cotton), and another award concerning U.S. subsidies found to be prohibited export subsidies (export credit guarantees under the GSM 102 program for a range of agricultural products, plus the repealed "Step 2" program for cotton).

* Editor's note: Information on GSM 102, the U.S. Department of Agriculture's Export Guarantee Credit Program, is available at *www.fas.usda.gov/excredits/exp-cred-guar-new.asp*.

** Editor's note: On March 8, 2010, Brazil announced countermeasures on goods that would take effect on April 7, 2010. On April 6, 2010, the United States and Brazil reached agreement on certain steps to help make progress for a negotiated outcome in the dispute. As a result, Brazil did not impose countermeasures on April 7. Pursuant to the agreement, on April 20, 2010, the United States and Brazil signed a Memorandum of Understanding ("MOU") providing for a fund of approximately $147.3 million per year on a pro rata basis to provide technical assistance and capacity building for the cotton sector in Brazil and certain other countries. The fund is scheduled to continue until the next U.S. statute authorizing the continuation of U.S. agricultural programs is enacted or a mutually agreed solution to the Cotton dispute is reached. After negotiating the MOU, the United States and Brazil negotiated a framework regarding the Cotton dispute. On June 17, 2010, Brazil approved the framework that the governments had negotiated, and on June 21 it announced that it would not impose countermeasures as long as the framework remained in effect. The framework includes elements addressing cotton support, the GSM 102 program, and further discussion between the United States and Brazil.

The Arbitrators found that Brazil may impose countermeasures against U.S. trade:

(1) for marketing loan and countercyclical payments for cotton, in an annual fixed amount of $147.3 million; and
(2) for export credit guarantees under the GSM 102 program, in an annual amount that may change each year based on a formula.

The Arbitrators rejected Brazil's request for countermeasures for the Step 2 program.

The Arbitrators also found that, in the event that the total level of countermeasures that Brazil would be entitled to in a given year should increase to a level that would exceed a threshold based on a subset of Brazil's consumer goods imports from the United States, then Brazil would also be entitled to suspend certain obligations under the TRIPS Agreement and/or the GATS with respect to any amount of permissible countermeasures applied in excess of that figure.

On September 25, 2009, Brazil requested data from the United States for 2008 and 2009 to calculate countermeasures according to the formula in the Arbitrator's award. On November 19, the United States provided Brazil the data requested for 2008 and stated that it would provide 2009 data when they are complete.

On November 19, 2009, the WTO DSB granted Brazil authorization to suspend the application to the United States of concessions or other obligations consistent with the Arbitrators' awards.

(2) United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (WT/DS381)

On April 20, 2009, the WTO established a panel at Mexico's request in a dispute concerning the United States' requirements for "dolphin-safe" labeling for tuna and tuna products. Background on the WTO dispute is provided below; *see* 2009 Annual Report at 98. The United States' attempt to transfer

the venue of the dispute for consideration under the NAFTA's dispute resolution procedures is discussed in B.1.c. *supra*.

On October 24, 2008, Mexico requested consultations regarding U.S. dolphin-safe labeling provisions for tuna and tuna products. . . . Mexico challenges three U.S. measures: (1) the Dolphin Protection Consumer Information Act (19 U.S.C. § 1385); (2) certain dolphin-safe labeling regulations (50 C.F.R. §§ 216.91–92); and (3) the Ninth Circuit decision in *Earth Island v. Hogarth*, 494 F.3d. 757 (9th Cir. 2007). [Editor's note: *Digest 2007* discusses *Earth Island v. Hogarth* at 718–20.] On April 20, 2009, at Mexico's request, the DSB established a WTO panel to examine these measures. Mexico alleges that these measures accord imports of tuna and tuna products from Mexico less favorable treatment than like products of national origin and like products originating in other countries, and fail to immediately and unconditionally accord imports of tuna and tuna products from Mexico any advantage, favor, privilege, or immunity granted to like products in other countries. Mexico further alleges that the U.S. measures create unnecessary obstacles to trade, and are not based on relevant international standards. Mexico alleges that the U.S. measures are inconsistent with Articles I and III of the *General Agreement on Tariffs and Trade 1994* and Article 2 of the *Agreement on Technical Barriers to Trade*.

On December 14, 2009, the Director General composed the panel . . . .

(3) United States–Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China (DS399)

See D.5. below.

D. OTHER TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Enforcement of Trade Agreements: Overview

On July 16, 2009, U.S. Trade Representative Ronald Kirk announced a new U.S. commitment to trade enforcement,

including through new U.S. initiatives for enforcing trade agreements, in an address at the Mon Valley Works–Edgar Thomson Plant in Pittsburgh, Pennsylvania. Ambassador Kirk's remarks, excerpted below, are available at *www.ustr.gov/about-us/press-office/speeches/transcripts/2009/july/ambassador-kirk-announces-new-initiatives-trade.*

Today, on behalf of President Obama, I am here to affirm this administration's commitment to trade enforcement.

* * * *

We will take new steps to protect the rights of American farmers and small business owners. We will hold our trading partners to their word on labor standards. And we will use work we're already doing to fight even harder for the men and women who fuel our economy and support their families.

* * * *

Americans have believed that our government hasn't done enough to protect our trade rights. And, while our trading partners largely respect our agreements, sometimes those rules are violated. That's why enforcement cannot be an afterthought. It needs to be a centerpiece of trade policy.

* * * *

President Obama and I believe that on a level playing field, Americans can compete in any sector—from manufacturing to services to agriculture. Just enforcing the rules on the books can win our workers and companies the benefits of trading as fully, fairly, and freely as our agreements allow.

Our new approach to enforcement is simple. We will deploy our resources more effectively to identify and solve problems at the source. But make no mistake: we will pursue legal remedies when other options are closed.

* * * *

Legal remedies are never our first choice. Not because they are not effective, but because right now, many American companies,

and the people who work for them, can't afford to wait years for an international legal case. So we will emphasize vigorous oversight, frank dialogue, and negotiation as faster means of getting trade back on track.

* * * *

President Obama has committed to a new approach to trade—one that rejects protectionism and creates opportunities at home and abroad. He recognizes that trade is essential to America's prosperity and has the potential to lift up workers in America and around the world. The President will share more about our approach, but we already know that for trade to reach its full potential, we need to do a better job of enforcing our trade agreements.

So, in this administration, we will break down trade barriers that confront American workers and businesses.

First, we will build on what works. One of the best ways we guarantee America's trade rights is by consistently monitoring our partners' trade practices. If they know we are holding a magnifying glass up to their actions, they'll be less likely to break the rules. So, we will use that magnifying glass on behalf of more American businesses.

Some of our best results have come from two targeted enforcement tools: one to stop violations in telecommunications trade, and one called Special 301, that does the same for American intellectual property rights.

* * * *

We're going to apply the lessons of those successful programs to address other, equally important trade barriers. Two new, innovative tools will provide strong support for U.S. farmers, ranchers, and industry.

The first new tool will confront barriers that other countries raise to prevent our farmers and ranchers from marketing their products abroad. We must more strongly address sanitary and phytosanitary barriers, like the restrictive regulations some countries slapped on American pork because of the H1N1 flu scare. And we must address them across the board, as well as on a case

by case basis. This will ensure our agricultural producers see their rights restored abroad, and their businesses saved here at home.

The second new tool will take on one of the biggest obstacles our manufacturers face: technical barriers to trade, such as technical regulations and standards that restrict U.S. exports of safe, high quality products. Now, we will seek out these barriers and tackle them head-on.

* * * *

We will also continue to use trade remedies, like anti-dumping and anti-subsidy laws that the U.S. has on the books, and that are vitally important tools. We use them to correct distortions of trade—situations where the playing field is artificially tilted against us—and to ensure that the field stays level everywhere else.

* * * *

2. Free Trade Agreements

During 2009 the United States' free trade agreements with Oman and Peru entered into force on January 1 and February 1, respectively. Chapter III, "Bilateral and Regional Negotiations and Agreements," of the 2009 Annual Report of the President of the United States on the Trade Agreements Program ("2009 Annual Report") described the Peru agreement as follows:

> The PTPA eliminates tariffs and removes barriers to U.S. services, provides a secure, predictable legal framework for investors, and strengthens protection for intellectual property, workers, and the environment. The PTPA is the first agreement in force that incorporates groundbreaking provisions concerning the protection of the environment and labor rights that were included as part of the Bipartisan Agreement on Trade Policy developed by Congressional leaders on May 10, 2007.

See 2009 Annual Report at 133, available at *www.ustr.gov/webfm_send/1675*. Section D.6. of this chapter discusses the labor rights standards incorporated into U.S. free trade

agreements; *see also Digest 2007* at 579–84. *See Digest 2008* at 572 for discussion of the U.S.–Oman agreement.

The Dominican Republic–Central America–United States Free Trade Agreement ("CAFTA–DR") entered into force for Costa Rica on January 1, 2009, bringing the CAFTA–DR into force for all seven states parties.

The texts of U.S. free trade agreements are available at *www.ustr.gov/trade-agreements/free-trade-agreements*.

3. Other Trade and Investment Instruments

Information on trade and investment instruments, including texts of agreements, is available at *www.ustr.gov/trade-agreements/trade-investment-framework-agreements*.

a. Trade and Investment Framework Agreements

During 2009 the United States concluded trade and investment framework agreements with Angola on May 19, and with the Maldives on October 27. Each agreement establishes a Trade and Investment Council to provide a forum for senior representatives of the United States and its respective partner to discuss a range of issues relating to trade and investment, including the environment, labor, capacity building, and intellectual property. The texts of these and other trade and investment framework agreements are available at *www.ustr.gov/trade-agreements/trade-investment-framework-agreements. See also* USTR's press releases, available at *www.ustr.gov/about-us/press-office/press-releases/2009/may/united-states-and-angola-sign-trade-and-investment-fra* and *www.ustr.gov/about-us/press-office/press-releases/2009/october/united-states-signs-trade-and-investment-agreement*.

b. Trade and Investment Cooperation Forum Agreement

On January 15, 2009, USTR announced that Assistant U.S. Trade Representative for Europe and the Middle East Chris

Wilson and Icelandic Minister of Industry and Energy Össur Skarphéðinsson had signed a Trade and Investment Cooperation Forum Agreement ("TICFA") as a "part of a comprehensive U.S. effort to support the Icelandic Government." The TICFA "will provide a vehicle for deepening and broadening already strong U.S.-Icelandic economic relations," USTR explained. The full text of the press release is available at *www.ustr.gov/about-us/press-office/press-releases/2009/january/united-states-and-iceland-sign-trade-and-investmen*. Despite its different title, the agreement performs the same function as the trade and investment framework agreements discussed in D.3.a. *supra*.

4. Trade Legislation and Trade Preferences

This section highlights selected 2009 developments relating to U.S. trade preference programs. For a broader overview of U.S. trade preference programs, see Chapter V, "Trade Enforcement Activities," of the 2009 Annual Report of the President of the United States on the Trade Agreements Program, at 180–87, available at *www.ustr.gov/webfm_send/1677*.

a. Andean Trade Preference Act and Andean Trade Promotion and Drug Eradication Act

The Andean Trade Preference Act ("ATPA") was enacted in 1991 to combat drug production and trafficking in Bolivia, Ecuador, Colombia, and Peru. The ATPA authorized the President, upon a determination that the statutory eligibility criteria had been met, to grant trade benefits to any of those four Andean countries. The eligibility criteria included a provision concerning counternarcotics cooperation with the United States. The ATPA expired in 2001, and in 2002 the Andean Trade Promotion and Drug Eradication Act, Title XXXI of the Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 ("ATPDEA"), reinstated the ATPA's benefits with certain amendments that made more items eligible for trade benefits. The ATPDEA

also provided additional criteria for the President to consider in designating ATPDEA beneficiaries. Congress extended the ATPA benefits, as amended, in 2006, 2007, and 2008. On October 16, 2008, Congress extended the preferences for Colombia and Peru through December 31, 2009. The legislation made Ecuador eligible for benefits through December 31, 2009, unless the President determined on or before June 30 that Ecuador did not satisfy the statutory eligibility requirements. The legislation extended preferences for Bolivia through June 30, 2009, but only if the President determined on or before then that Bolivia satisfied the statutory eligibility requirements.

On June 30, 2009, President Obama transmitted a report to Congress containing his determinations concerning Bolivia and Ecuador "based on a review of the performance of Bolivia and Ecuador with respect to the ATPA's eligibility criteria and a summary of the developments and concerns that exist in four key areas reflecting the criteria set forth in the ATPA." The President's letter transmitting his report is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00525, p. 1. In the report, President Obama stated with respect to Bolivia:

> Having reviewed the criteria set forth in section 203 of the Andean Trade Preference Act, as amended (19 U.S.C. 32020) (ATPA or Act) and taken into account each of the factors set forth in section 203(d) of the Act (19 U.S.C. 3202(d)), I have not determined pursuant to section 208(a)(3)(A) of the Act (19 U.S.C. 3206(a)(c)(A)) that Bolivia satisfies the requirements set forth in section 203(c) of the Act (19 U.S.C. 32020(c)) for being designated as [a] beneficiary country under the ATPA. Therefore, as provided for in section 208(a)(3) of the Act (19 U.S.C. 3206(a)(3)), no duty free treatment or other preferential treatment extended under the ATPA, as amended (19 U.S.C. 3201 *et seq.*) shall remain in effect with respect to Bolivia after June 30, 2009.

President Obama stated with respect to Ecuador:

> Having reviewed the criteria set forth in section 203 of the Act, and taken into account each of the factors set forth

> in section 203(d) of the Act, I have not determined pursuant to section 208(a)(c)(A) of the Act (19 U.S.C. 3206(a)(c)(A)) that Ecuador does not satisfy the requirements set out in section 203(c) of the ATPA for being designated as a beneficiary country under the ATPA. Therefore, as provided for in section 208(a)(c) of the Act (19 U.S.C. 3206(a)(c)), duty-fee treatment or other preferential treatment extended under the ATPA shall remain in effect with respect to Ecuador after June 30, 2009.

The full text of the report is available at *www.ustr.gov/webfm_send/1184*.

On December 28, 2009, President Obama signed into law legislation extending the preferences available under the ATPA, as amended, for Colombia, Ecuador, and Peru through December 31, 2009. Pub. L. No. 111-124, 123 Stat. 3484.

b. Haitian Hemispheric Opportunity through Partnership Encouragement Act

On October 16, 2009, President Obama determined and certified to Congress that Haiti had met the statutory criteria for eligibility for continuing trade benefits under the Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2008 ("HOPE II Act"), Pub. L. No. 110-246, 122 Stat. 1651, 2289. President Obama's certification, excerpted below, is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00816, p. 1. For background on the HOPE II Act, see *Digest 2008* at 582; *see also* USTR's press release of October 17, 2009, available at *www.ustr.gov/about-us/press-office/press-releases/2009/october/ustr-kirk-statement-haiti-certification-hope-ii-be*.

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Since enactment of HOPE II, Haiti has issued a decree establishing an independent labor ombudsman's office, and the President of

Haiti has selected a labor ombudsman following consultation with unions and industry representatives. In addition, Haiti, in cooperation with the International Labor Organization, has established a Technical Assistance Improvement and Compliance Needs Assessment and Remediation (TAICNAR) Program. Haiti has also implemented an electronic visa system that acts as a registry of Haitian producers of articles eligible for duty-free treatment and has made participation in the TAICNAR Program a condition of using this visa system.

In light of these actions and in accordance with section 213A of CBERA [the Caribbean Basin Economic Recovery Act], as amended [by the HOPE II Act], I have determined and hereby certify that Haiti: (i) has implemented the requirements set forth in sections 213A(e)(2) and (e)(3); and (ii) is requiring producers of articles for which duty-free treatment may be requested under section 213A(b) to participate in the TAICNAR Program and has developed a system to ensure participation in such program by such producers, including by developing and maintaining a registry of producers.

* * * *

5. Trade Enforcement Action: Imposition of Additional Duties on Tires from China

On September 11, 2009, President Obama issued Proclamation 8414, "To Address Market Disruption From Imports of Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China." Daily Comp. Pres. Docs., 2009 DCPD No. 00701, pp. 1–2. The White House Office of the Press Secretary explained the President's action as follows:

> After reviewing recommendations from the United States Trade Representative (USTR), the President today signed a determination to apply an increased duty to all imports of passenger vehicle and light truck tires from China for a period of three years in order to remedy a market disruption caused by a surge in tire imports. As part of its accession to

> the World Trade Organization (WTO), China agreed to a special safeguard mechanism that would allow its trading partners to implement remedies in response to import surges and under other circumstances. The President decided to remedy the clear disruption to the U.S. tire industry based on the facts and the law in this case.

The White House statement is available at *www.whitehouse.gov/the_press_office/Statement-from-the-Press-Secretary-on-the-Remedy-to-Address-Market-Disruption-from-Imports-of-Certain-Passenger-Vehicle-and-Light-Truck-Tires. See also* the statement of U.S. Trade Representative Ronald Kirk, available at *www.ustr.gov/about-us/press-office/press-releases/2009/september/kirk-white-house-fulfilling-trade-enforcement-pl.*

In making his determination to apply the additional duty, the President acted pursuant to § 421(a) of the Trade Act of 1974, 19 U.S.C. § 2451(a), which provides:

> If a product of the People's Republic of China is being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of a like or directly competitive product, the President shall, in accordance with the provisions of this section, proclaim increased duties or other import restrictions with respect to such product, to the extent and for such period as the President considers necessary to prevent or remedy the market disruption.

Excerpts follow from the President's proclamation. *See also* Presidential Determination No. 2009-28, "Imports of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China," issued on September 11, 2009, and available at Daily Comp. Pres. Docs., 2009 DCPD No. 00702, pp. 1–2.

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1. On July 9, 2009, the United States International Trade Commission (USITC) transmitted to me a report on its investigation under section 421 of the Trade Act of 1974, as amended (the

"Trade Act") (19 U.S.C. 2451), with respect to imports of certain passenger vehicle and light truck tires from the People's Republic of China (China). In its report, the USITC stated that it had reached an affirmative determination under section 421(b)(1) of the Trade Act that certain passenger vehicle and light truck tires from China are being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products.

2. For purposes of its investigation, the USITC defined certain passenger vehicle and light truck tires from China as new pneumatic tires, of rubber, from China, of a kind used on motor cars (except racing cars) and on-the-highway light trucks, vans, and sport utility vehicles, provided for in subheadings 4011.10.10, 4011.10.50, 4011.20.10, and 4011.20.50 of the Harmonized Tariff Schedule of the United States (HTS).

3. The USITC commissioners voting in the affirmative under section 421(b) of the Trade Act also transmitted to me their recommendations made pursuant to section 421(f) of the Trade Act (19 U.S.C. 2451(f)) on proposed remedies that, in their view, would be necessary to remedy the market disruption and the basis for each recommendation.

4. Pursuant to section 421(a) of the Trade Act (19 U.S.C. 2451(a)), I have determined to provide import relief with respect to new pneumatic tires, of rubber, from China, of a kind used on motor cars (except racing cars) and on-the-highway light trucks, vans, and sport utility vehicles, provided for in subheadings 4011.10.10, 4011.10.50, 4011.20.10, and 4011.20.50 of the HTS.

5. Such import relief shall take the form of an additional duty on imports of the products described in paragraph 4, imposed for a period of 3 years. For the first year, the additional duty shall be in the amount of 35 percent *ad valorem* above the column 1 general rate of duty. For the second year, the additional duty shall be in the amount of 30 percent *ad valorem* above the column 1 general rate of duty, and in the third year, the additional duty shall be in the amount of 25 percent *ad valorem* above the column 1 general rate of duty.

* * * *

On September 14, 2009, China responded to the imposition of the additional U.S. duties by requesting consultations through the WTO's dispute settlement procedures. The 2009 Annual Report of the President of the United States on the Trade Agreements Program explained:

> China alleges that the additional tariffs are inconsistent with the GATT 1994, the Agreement on Safeguards, and the Protocol of Accession. China alleges that various elements of USITC's determination regarding market disruption are inconsistent with the Protocol of Accession. In addition, China alleges that the level and duration of the additional tariffs are inconsistent with the Protocol of Accession. Finally, China alleges that the Section 421 definition of "significant cause" is in and of itself inconsistent with the Protocol of Accession.
>
> The United States held consultations with China on November 9, 2009. On December 9, 2009, China filed a request for establishment of a panel. As of December 31, 2009, the panel had not been established.*

See 2009 Annual Report at 100. Other 2009 developments relating to WTO disputes are discussed in C.1. *supra*.

6. Labor

On July 16, 2009, as discussed in D.1. *supra*, U.S. Trade Representative Ronald Kirk outlined the United States' new commitment to trade enforcement, including through an increased focus on enforcing labor rights in U.S. trade relationships. Excerpts follow from Ambassador Kirk's remarks concerning labor standards. The full text of Ambassador Kirk's speech is available at *www.ustr.gov/about-us/press-office/*

* Editor's note: On January 19, 2010, the WTO's Dispute Settlement Body established a panel at China's request.

speeches/transcripts/2009/july/ambassador-kirk-announces-new-initiatives-trade.

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. . . [W]e will hold our trading partners to their commitments on workers' rights.

Since 2001, the United States has entered into free trade agreements with 14 countries.

Every one of those agreements contains an obligation to enforce domestic labor laws, and to strive for labor standards that adhere to international norms. Now, we will insist that our trading partners hold up their end of the bargain. American workers should not be expected to compete against substandard labor practices.

To date, we have enforced our trading partners' labor obligations only on a complaint-driven basis. Well, no longer.

In close partnership with Labor Secretary Hilda Solis, Secretary of State Hillary Clinton, and their staffs, we will immediately identify and investigate labor violations . . . before they can disadvantage American workers.

Together, we will engage governments of countries that violate the rules, to restore workers' rights quickly. If those governments can't seem to fix their labor problems, we will help them find a way. And if they won't fix their labor problems, we will exercise our legal options.

* * * *

7. Arbitration and Related Actions Arising from the Softwood Lumber Agreement

On September 12, 2006, the United States and Canada concluded the Softwood Lumber Agreement ("SLA"), which was intended to settle issues concerning trade between the two countries in softwood lumber that had given rise to arbitration under the North American Free Trade Agreement.

See Digest 2006 at 762–63 for an overview of the SLA, which entered into force on October 12, 2006. The text of the SLA is available at *www.state.gov/documents/organization/107266.pdf*. Amendments to Articles II–IV and X, as well as associated annexes, are available at *www.state.gov/documents/organization/107267.pdf*.

a. Arbitration on export measures requested in 2007 and new proceedings on remedies: Case No. 7941 and Case No. 91312

On February 23, 2009, a tribunal of the London Court of International Arbitration ("Tribunal") issued an award in favor of the United States, in the amount of CDN $68.26 million, as a remedy for Canada's six-month failure to apply correctly to its eastern lumber producing provinces ("Option B provinces" in the SLA) a calculation of export measures required by the SLA. *United States of America v. Canada*, LCIA, Case No. 7941. For prior developments in the arbitration, see *Digest 2007* at 593–97 and *Digest 2008* at 583–89. The Tribunal determined that Canada was required to collect an additional 10 percent *ad valorem* export charge on the relevant softwood lumber shipments until it had collected a total of CDN $68.26 million and thus remedied its failure to make the proper export adjustment as of January 1, 2007. The Tribunal further defined the remedy amount as the first of the four proposed damages the United States provided in its 2008 Statement of the Case on Remedy (available at *www.ustr.gov/sites/default/files/us_statement_case_on_remedy.pdf*): CDN $63.9 million, plus CDN $4.36 million in interest. For the text of the award, see *www.ustr.gov/sites/default/files/award_on_remedy.pdf*.

Acting U.S. Trade Representative Peter Allgeier welcomed the LCIA's decision on February 26, 2009, saying that it "confirms the view of the United States that the SLA is an enforceable agreement." *See www.ustr.gov/about-us/press-office/*

press-releases/2009/february/tribunal-orders-canada-cure-breach-softwood-lumbe for the full text of the press release USTR issued on February 26.

Canada responded by maintaining its original interpretation of the SLA, arguing that it does not call for retrospective compensation to remedy a breach. Instead, Canada argued that the SLA only requires a state to end its breach and, if it fails to do so within the "reasonable period" established by the Tribunal, to adjust its export measures prospectively, as Canada had done. On March 27, 2009, Canada offered to pay the United States U.S. $34 million to cure the breach, provided the United States accepted four conditions that included ending its claims that Canada had failed to cure its breach and committing not to pursue additional arbitration against Canada in the matter. On April 2, 2009, the United States rejected Canada's offer. The United States also advised Canada that if it did not make the compensatory adjustments to its export measures required by the Tribunal's award, the United States would impose countermeasures against Canada, consistent with the SLA.

On April 3, 2009, Canada initiated new proceedings at the LCIA, requesting a ruling that its offer constituted a cure. *Canada v. United States of America*, LCIA, Case No. 91312. On April 7, USTR announced the imposition of an additional 10 percent *ad valorem* customs duty on softwood lumber imports from four provinces in eastern Canada (Ontario, Québec, Manitoba, and Saskatchewan) under § 301 of the Trade Act of 1974, 19 U.S.C. § 2411. *See www.ustr.gov/about-us/press-office/press-releases/2009/april/united-states-imposes-tariffs-softwood-lumber-four-c*. In the arbitral proceedings, the United States filed its Response on April 17 (available at *www.ustr.gov/webfm_send/870*) and its Statement of Defense on June 1, 2009 (available at *www.ustr.gov/webfm_send/1034*).

On September 21, 2009, the Tribunal issued its award in favor of the United States, rejecting Canada's contentions that its proffer of $34 million, as a government-to-government payment, could constitute a "cure" under the SLA. The Tribunal

accepted the U.S. argument that a "cure" for purposes of the SLA must impact directly those producers who were the cause of the breach (in this case, the softwood lumber producers of Canada's eastern provinces). The Tribunal also encouraged the parties to try to reach a settlement, bearing in mind the *ad valorem* tax the United States had imposed since April. The full text of the Tribunal's award is available at *www.ustr.gov/webfm_send/1379*. Ambassador Kirk welcomed the award and stated, "final resolution of this arbitration is an important enforcement action on behalf of the United States." *See www.ustr.gov/about-us/press-office/press-releases/2009/september/tribunal-finds-canada-failed-cure-breach-softwoo*.

b. Arbitration on provincial subsidies: Case No. 81010

On April 3, 2009, the United States filed its corrected Reply Memorial in *United States of America v. Canada*, LCIA, Case No. 81010. In this case, the United States alleged that six programs implemented by Québec and Ontario provided financial incentives that benefited Canadian softwood lumber producers in violation of the anti-circumvention provision of the SLA. The United States sought a remedy valued between CDN $123.7 million and CDN $288 million to reflect the financial benefits the provincial subsidies provided to softwood lumber producers. In its Reply, the United States addressed Canada's arguments concerning liability and remedy and elaborated upon the arguments set out in the U.S. Statement of the Case. *See Digest 2008* at 589–93 for discussion of the U.S. Statement of the Case filed on December 23, 2008. The LCIA held hearings in Ottawa on July 20–24, 2009, and the United States filed its Post-Hearing Brief on October 15, 2009, and its Post-Hearing Reply Brief on November 20, 2009. The texts of the U.S. submissions in the arbitral proceedings are available at *www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/2006-softwood-lumber-agreement*. The panel's decision remained pending at the end of 2009.

E. TELECOMMUNICATIONS

1. U.S.–Mexico Telecommunications Agreement

On August 31 and September 1, 2009, the United States and Mexico signed an agreement concerning a cross border public security communications network to enhance the two countries' border security efforts. Protocol 18, Protocol Between the Department of State of the United States of America and the Secretariat of Communications and Transportation of the United Mexican States Concerning the Use of Radio Frequencies By Certain Fixed Terrestrial Links Constituting a Cross Border Public Security Communications Network Along the Common Border. The two countries entered into the protocol pursuant to the Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Allocation and Use of Frequency Bands by Terrestrial Non-Broadcasting Radiocommunication Services Along the Common Border, signed at Williamsburg, Virginia, June 16, 1994.

The Department of State Office of the Spokesman issued a statement that day, excerpted below, which provided details on the protocol. The full text of the statement is available at *www.state.gov/r/pa/prs/ps/2009/sept/128577.htm*. The protocol is available at *www.state.gov/e/eeb/rls/othr/telecom/128506.htm*, and the underlying 1994 agreement is available at *www.fcc.gov/ib/sand/agree/files/mex-nb/framewrk.pdf*.

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The Department of State and the Department of Homeland Security announced today that senior officials on the United States-Mexico High-Level Consultative Commission on Telecommunications (HLCC) have signed a bilateral telecommunications agreement to support a new cross border communications network for public

safety and law enforcement organizations focused on strengthening border security.

The agreement establishes a bilateral working group through which the Department of Homeland Security of the United States and the Secretariat of Public Security (SSP) of Mexico will coordinate the installation and operation of the network. The new network will allow participating public safety organizations to coordinate incident response and cooperate on a broad array of law enforcement activities through the establishment of new cross border voice, data and video channels.

The agreement also provides radio interference protection for the network's infrastructure and a process under which the bilateral working group can establish interoperable communications for qualifying federal, state, local and tribal public safety and law enforcement organizations that are invited to participate in the network.

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Negotiation of the agreement stemmed from a recommendation by HLCC working level officials in May 2008 to formulate a long-term plan to advance critical cross border communications networks for improving border security and combating border violence.

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2. International Telecommunication Union Treaties

On January 16, 2009, the United States deposited its instruments of ratification of five treaties concluded under the auspices of the International Telecommunication Union ("ITU"): the 1992 Partial Revision of the Radio Regulations (S. Treaty Doc. No. 107-17 (2002)); the 1995 Revision of the Radio Regulations (S. Treaty Doc. No. 108-28 (2004)); 1998 Amendments to the Constitution and Convention of the ITU (S. Treaty Doc. No. 108-5 (2003)); the 2002 Amendments to the Constitution and Convention of the ITU (S. Treaty Doc. No. 109-11 (2006)); and the 2006 Amendments to

the Constitution and Convention of the ITU (S. Treaty Doc. No. 110-16 (2008)). The treaties entered into force for the United States on January 16, 2009. For background, see *Digest 2004* at 634–39; *Digest 2006* at 682–84 and 770–74; and *Digest 2008* at 158–60 and 388–93.

F. OTHER ISSUES

1. Intellectual Property

On April 30, 2009, the Office of the U.S. Trade Representative ("USTR") announced the issuance of the 2009 Special 301 Report to identify those foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons that rely upon intellectual property protection, and those foreign countries determined to be priority foreign countries. USTR submits the report annually pursuant to § 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994). The 2009 report included countries on the Priority Watch List and the Watch List and one country under § 306 monitoring; placement of a trading partner in one of these categories indicates that particular problems exist in that country with respect to protection of intellectual property rights, enforcement, or market access for persons relying on intellectual property protection. *See Digest 2007* at 605–7 for additional background.

The 2009 report summarized continuing concerns about China and Russia, while also discussing steps both countries took in 2009 to improve their protection of intellectual property rights. *See* C.1.a. *supra* for discussion of the WTO's 2009 decisions in two disputes concerning intellectual property rights the United States brought against China. The report added Algeria, Canada, and Indonesia to the Priority Watch List and added Brunei and Finland to the Watch List. The report also removed Korea and Taiwan from the Watch List

and retained Paraguay under § 306 monitoring. As excerpted below, the report contained a discussion of the United States' bilateral agreements or memoranda of understanding with the Russian Federation, Peru, and Paraguay relating to intellectual property rights. The full text of the report is available at *www.ustr.gov/about-us/press-office/reports-and-publications/2009/2009-special-301-report*. For a summary of countries identified in the 2009 report, see USTR press release of April 30, 2009, available at *www.ustr.gov/about-us/press-office/press-releases/2009/april/ustr-releases-2009-special-301-report*.

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Russia will remain on the Priority Watch List in 2009. While Russia has made some progress in improving IPR protection and enacting necessary legislation, concerns remain, particularly with respect to Russia's slow implementation of some of its commitments in the November 2006 bilateral agreement on IPR ("IPR Bilateral Agreement").

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In the IPR Bilateral Agreement, Russia committed to fight optical disc and Internet piracy, protect against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products, deter piracy and counterfeiting through criminal penalties, strengthen border enforcement, and bring its laws into compliance with WTO and international IPR norms. Russia's implementation of these IPR commitments will be essential to completing the final WTO accession process. While Russia has made some progress in implementation, additional work remains for Russia to fully implement its commitments under the IPR Bilateral Agreement. Specifically, the United States looks to Russia to make further progress by ensuring that the Russian Customs Code, Civil Code and Law on Medicines comply with the IPR Bilateral Agreement and the relevant TRIPS Agreement obligations that will take effect upon Russia's accession to the WTO.

On the positive side, Russia recently acceded to the WIPO Internet Treaties, and has made progress combating software piracy. In addition, the Moscow City Government has recently banned DVD/CD kiosks in the public transport system and pedestrian spaces, thus eliminating one major nexus of retail trade in pirated videos and music. Amendments to the Civil Code and Customs Code have been introduced into the Duma and are under active consideration. The United States-Russia Bilateral Working Group on IPR met in March 2009. The United States Government looks forward to future collaborative meetings to discuss how both governments can work to strengthen the protection and enforcement of IPR.

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Peru will remain on the Watch List in 2009. As a result of the U.S.–Peru Trade Promotion Agreement (PTPA), Peru enhanced its IPR legal framework significantly to strengthen IPR protection and enforcement. [Editor's note: *See* D.2. *supra* for additional discussion of the PTPA.] Nevertheless, there is inadequate enforcement carried out by enforcement agencies, due in part to the lack of resources provided to agencies. As a result, piracy rates are high and counterfeit clothing and toys continue to be easily found throughout the country at markets, street corners, and beach areas.

As part of the PTPA implementation process, Peru amended its laws and regulations to provide procedures and remedies for improved enforcement of IPR. For example, the Government reorganized the Intellectual Property Office, INDECOPI, to help expedite the hearing and granting of precautionary measures; revised its customs law and regulations to strengthen the procedures for suspending IPR infringing goods and ensuring that infringing goods are seized and destroyed absent the allowable exceptions; and put in place deterrent-level penalties for copyright and trademark infringement both in civil and criminal violations. The United States will work closely with Peru [to] ensure the effective enforcement of its obligations under the PTPA.

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In 2009, the United States will continue to monitor Paraguay under Section 306, specifically with respect to Paraguay's implementation of [a] bilateral agreement regarding IPR protection and enforcement. In 2008, the United States and Paraguay signed an extension and revision of a previous Memorandum of Understanding, which will remain in effect through 2009. There have been continued strong efforts by Paraguay to improve IPR enforcement, particularly by increasing the number of raids and seizures of pirated and counterfeit goods (by the IPR investigative unit in particular). However, Paraguay continues to have problems providing effective IPR protection due to porous borders, ineffective prosecutions of IPR infringers, and the lack of deterrent-level sentences in court cases being issued. A new penal code, approved in 2008, provides minimum sentences for counterfeiting and piracy. The United States urges effective prosecutions under this new law, which goes into effect in July 2009. The United States has concerns about the inadequate protection against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products as well as shortcomings in Paraguay's patent regime. The United States will continue to work with Paraguay to address these IPR concerns during the coming year, including through the Joint Commission on Trade and Investment.

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2. Tax-related Issues

a. Bilateral tax treaties

In 2009 the United States continued to negotiate, conclude, and bring into force bilateral income tax treaties to eliminate double taxation and prevent tax evasion. For example, a new tax treaty with Italy (which replaced an existing treaty that was signed in 1984) and a protocol amending the U.S. tax treaty with France entered into force on December 16 and 23, 2009, respectively. The protocol to the tax treaty with France includes a provision for mandatory binding arbitration of

certain disputes that is similar to arbitration rules that have been recently concluded with Belgium, Germany, and Canada. *See Digest 2008* at 610–16 for discussion. On November 10, 2009, Manal Corwin, International Tax Counsel, U.S. Treasury Department, explained the arbitration provision in testimony before the Senate Committee on Foreign Relations in support of the protocol and two other tax treaties:

> . . . [T]he proposed Protocol provides for mandatory arbitration of certain cases that have not been resolved by the competent authority within a specified period, generally two years from the commencement of the case. A Memorandum of Understanding accompanying the Protocol sets forth rules and procedures for arbitration. The arbitration board must deliver a determination within six months of the appointment of the chair of the arbitration board, and the determination must either be the proposed resolution submitted by the United States or the proposed resolution submitted by France. The board's determination has no precedential value and . . . the board shall not provide a rationale for its determination. . . . [I]n response to concerns expressed by the Senate in the approval of prior agreements, the arbitration rule in the proposed Protocol differs from earlier arbitration provisions in some key respects. First, the proposed Protocol permits the concerned taxpayers to summit written Position Papers to the arbitration board. Second, under the proposed Protocol, the competent authority of a Contracting State may not appoint an employee of its tax administration to be a member of the arbitration board. Finally, the proposed protocol does not prescribe a hierarchy of legal authorities to which the arbitration board must adhere.

The full text of Ms. Corwin's testimony is available at *www.treas.gov* [search "tg402"].

Ms. Corwin also addressed the importance of information exchange provisions in preventing tax evasion. These provisions enable the United States to request information from a treaty partner that can be used in enforcing U.S.

tax laws. "Concluding agreements that provide for the full exchange of information, including information held by banks and other financial institutions, is [a] key priority of the Treasury Department," Ms. Corwin said, explaining that "access to information from other countries is critically important to the full and fair enforcement of U.S. tax laws." She continued:

> 2009 has been a year of fundamental change in transparency, as many secrecy jurisdictions announced their intentions to comply with the international standard of full information exchange. In this changing environment, the Treasury has made many key achievements, including the conclusion of protocols of amendment to the U.S. tax treaties with Switzerland [September 23] and Luxembourg [May 29] that provide for full exchange of information, including bank account information.

Protocols of amendments to the U.S. tax treaties with Luxembourg and Switzerland, signed on May 20 and September 23, respectively, which have not yet been ratified, would both permit exchanges of information for income tax purposes "to the full extent permitted by Article 26 of the Organization for Economic Co-operation and Development (OECD) Model Income Tax Convention." *See* *www.treas.gov* [search "tg143"] and *www.treas.gov* [search "tg297"] for additional background on the two protocols.

b. Agreement with Switzerland on sharing banking information

In 2009, as part of a broad effort to hold U.S. taxpayers with undisclosed foreign accounts liable for evading U.S. tax laws, the U.S. Department of Justice and the Internal Revenue Service ("IRS") settled criminal and civil actions against UBS AG, a Swiss bank. *See* Department of Justice press statement of November 17, 2009, available at *www.justice.gov/opa/pr/2009/November/09-tax-1241.html.* On February 18, 2009,

the Department of Justice announced that it had entered into an agreement with UBS AG, under which the United States would defer its prosecution of the bank "on charges of conspiring to defraud the United States by impeding the Internal Revenue Service (IRS)." The Department of Justice's press statement explained that

> [a]s part of the deferred prosecution agreement and in an unprecedented move, UBS, based on an order by the Swiss Financial Markets Supervisory Authority (FINMA), has agreed to immediately provide the United States government with the identities of, and account information for, certain United States customers of UBS's cross-border business. . . . UBS has further agreed to pay $780 million in fines, penalties, interest and restitution.

The full text of the press statement is available at *www.justice.gov/opa/pr/2009/February/09-tax-136.html*.

On August 19, 2009, the United States and Switzerland concluded an agreement to enable the IRS to obtain information on certain U.S. account holders at UBS AG. The agreement provided a mechanism under the existing bilateral tax treaty for the IRS to access information it originally sought through civil proceedings in U.S. federal court in Miami, Florida. The IRS had issued a "John Doe Summons" to UBS AG, seeking information about its U.S. clients' accounts in Switzerland.* Citing Swiss bank secrecy laws, UBS had declined to provide the information.

In remarks to the press on August 19, IRS Commissioner Doug Shulman called the agreement "unprecedented" and said it "[would] result in our receiving what we wanted all along from the beginning of our investigation into UBS." Commissioner Shulman's remarks are available in full at *www.irs.gov/newsroom/article/0,id=212203,00.html*. An additional IRS press statement issued on August 19, excerpted below, provided details on the agreement and explained its relationship to

* Editor's note: Information about John Doe Summonses is available at *www.irs.gov/irm/part25/irm_25-005-007.html*.

the civil litigation. The full text of the IRS statement is available at *www.irs.gov/newsroom/article/0,id=212124,00.html*. The agreement, the accompanying declarations of the United States and Switzerland, and a related settlement agreement between the United States and UBS AG concerning the civil litigation are available at *www.irs.gov/pub/irs-drop/us-swiss_government_agreement.pdf*, *www.irs.gov/pub/irs-drop/declarations__us.pdf*, and *www.irs.gov/pub/irs-drop/bank_agreement.pdf*, respectively.**

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Under the agreement, the IRS will submit a treaty request to the Swiss government describing the accounts for which it is requesting information. The Swiss government will then direct UBS to initiate procedures to turn over information on thousands of accounts to the IRS. The IRS will receive information on accounts of various amounts and types, including bank-only accounts, custody accounts in which securities or other investment assets were held and offshore company nominee accounts through which an individual indirectly held beneficial ownership in the accounts.

Also, the agreement retains the U.S. Government's right, if the results are significantly lower than expected and other measures fail, to seek appropriate judicial remedies, including resuming actions to enforce the John Doe summons.

The agreement involves a number of simultaneous legal actions:

- The judicial enforcement of the John Doe summons will be dismissed. While this enforcement motion will be withdrawn, the underlying summons remains in effect.

** Editor's note: Subsequent to the agreement's conclusion, a Swiss court found that some of the requested account information could not be provided. The United States and Switzerland then concluded a revised agreement in 2010, resolving the court's concerns, which the Swiss parliament ratified on June 17, 2010. *Digest 2010* will provide relevant details on these developments.

- Upon receiving the treaty request, the Swiss government will direct UBS to notify account holders that their information is included in the IRS treaty request. It is expected that these notices will be sent on a rolling basis with some being sent over the coming weeks and others over the coming months. Receipt of this notice will not by itself preclude the account holder from coming into the IRS under the Voluntary Disclosure Program.

In addition, the Swiss Government has agreed to review and process additional requests for information for other banks regarding their account holders to the extent that such a request is based on a pattern of facts and circumstances equivalent to those of the UBS case.

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Cross References

Counternarcotics certification process, **Chapter 3.B.2.a.**
U.S. report on goods produced with child labor, **Chapter 6.C.2.**
Commercial private international law, **Chapter 15.A.**
International civil litigation in U.S. courts, **Chapter 15.C.**
Forum non conveniens considerations in litigation arising from the Montreal Convention, **Chapter 15.C.4.a.**
Sanctions, **Chapter 16.**
Telecommunications service between the United States and Cuba, **Chapter 16.B.1.**

Chapter 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

1. UN Convention on the Law of the Sea

a. Department of State views

On October 16, 2009, Secretary of State Hillary Rodham Clinton offered strong support for U.S. accession to the 1982 United Nations Convention on the Law of the Sea ("LOS Convention" or "Convention") in letters to Senator John F. Kerry (D-Massachusetts), Chairman of the Senate Committee on Foreign Relations ("Committee"), and Senator Richard G. Lugar (R-Indiana), the Ranking Member of the Committee. Both letters, which are excerpted below, are available at *www.state.gov/s/l/c8183.htm*.

Recognizing the Senate Foreign Relations Committee's intention to consider the Convention on the Law of the Sea, I offer my strong support for U.S. accession to the convention.

As you are aware, the convention protects and advances the national security, economic, and environmental interests of the United States. In particular, the convention codifies navigational rights and freedoms critical to U.S. military and commercial vessels and secures U.S. economic rights to natural resources offshore. In addition, as a party, the United States would have access to procedures that would maximize international recognition and

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legal certainty for U.S. sovereign rights over offshore resources (including minerals) beyond 200 miles of our coastline.

The United States, as a major maritime power, the country with the largest exclusive economic zone, and one of the largest continental shelves, stands to gain more from this treaty in terms of economic and resource rights than any other country. Having a seat at the table as a party would allow the United States to participate more effectively in the interpretation and development of the convention and the ability to participate formally in its institutions.

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b. Interagency Ocean Policy Task Force views

During 2009 the Interagency Ocean Policy Task Force ("Task Force"), which President Barack H. Obama established on June 12, 2009, also stressed the need for the United States to become a party to the LOS Convention. The Task Force's interim report, issued on September 10, stated:

> . . . Our Nation, as a major maritime power and coastal State, has a large stake in the development and interpretation of international law and policy applicable to the ocean, our coasts, and the Great Lakes. Our national security interests are tightly linked to navigational rights and freedoms, as well as to operational flexibility. Our national security and economic interests are also linked to our ability to secure U.S. sovereign rights over resources in extensive marine areas off our coasts, to promote and protect U.S. interests in the marine environment, and to ensure that our maritime interests are respected and considered internationally. The Administration's support for accession to the Law of the Sea Convention reflects several important objectives, including strengthening our Nation's ability to participate in and influence international law and policy related to the ocean.

See www.whitehouse.gov/assets/documents/09_17_09_Interim_Report_of_Task_Force_FINAL2.pdf. The President's

memorandum establishing the Task Force and accompanying background are available at *www.whitehouse.gov/administration/eop/ceq/initiatives/oceans.*

2. Outer Limits of the Continental Shelf

a. Commission on the Limits of the Continental Shelf and Article 121 of the Law of the Sea Convention

The United States participated as an observer in the Nineteenth Meeting of the States Parties to the Law of the Sea Convention ("SPLOS"), June 22–26, 2009. Among other things, participants discussed how the Commission on the Limits of the Continental Shelf ("CLCS" or "Commission") should consider a state's submission to establish the outer limits of its continental shelf if it reflects an interpretation of Article 121 of the LOS Convention with which another party to the Convention disagrees. Article 121 provides in part that islands are entitled to continental shelf in accordance with the provisions of the Convention applicable to other land territory but that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no . . . continental shelf."

Under the CLCS Rules of Procedure, the CLCS cannot consider a submission in a case where a land or maritime dispute exists without the consent of all of the parties to the dispute. U.N. Doc. CLCS/40/Rev. 1. The United States expressed the following view:

> While this is an important issue, we do not believe it is an instance of an unresolved land or maritime dispute. We note that the Commission has stated that it has no role on matters relating to the legal interpretation of Article 121 of the Convention. Given that, our view is that the Commission should proceed with its work on such a submission, while acknowledging in its recommendations that there is an unresolved question regarding the interpretation of Article 121. We do not take this position because we have an opinion on the substantive issue;

> we have not expressed an opinion on that matter. Rather, we believe it would be most efficient and cost-effective for the Commission to consider all the technical and scientific aspects of all parts of the submission, so that it does not have to revisit the submission at a later date.

b. Statement of Understanding concerning a method for establishing the outer edge of the continental shelf

During the Nineteenth Meeting of the States Parties to the Law of the Sea Convention ("SPLOS"), the United States participated in a side event concerning the application of the Statement of Understanding concerning a specific method to be used in establishing the outer edge of the continental margin, adopted in 1980 as Annex II of the Final Act of the Third United Nations Conference on the Law of the Sea. The U.S. representative expressed the view that the Statement of Understanding can apply to any state with a continental shelf that meets the characteristics specified in the Statement of Understanding, stating:

> The Statement of Understanding in Annex II of the Final Act of the Third United Nations Conference on the Law of the Sea was adopted to address the inequity that would result from the application of the formulas in Article 76 to a State whose continental margin has special characteristics. It is our view that the formula contained in the Statement of Understanding can apply to a State whose continental margins meet the special characteristics elaborated in the Statement of Understanding.

3. Other Boundary or Territorial Issues

a. South China Sea

On July 15, 2009, Scot Marciel, Deputy Assistant Secretary, Department of State Bureau of East Asian and Pacific Affairs,

testified before the Subcommittee on East Asian and Pacific Affairs of the Senate Committee on Foreign Relations concerning "Maritime Issues and Sovereignty Disputes in East Asia." In his testimony, excerpted below, Mr. Marciel discussed U.S. efforts to support respect for international maritime law in East Asia's waterways, U.S. views on sovereignty disputes in the South China Sea, and U.S. concerns about China's interpretation of international maritime law. Mr. Marciel's comments concerning freedom of navigation incidents involving China and U.S. naval vessels are discussed below in A.5. The full text of the testimony is available at *www.state.gov/p/eap/rls/rm/2009/07/126076.htm*.

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The United States has long had a vital interest in maintaining stability, freedom of navigation, and the right to lawful commercial activity in East Asia's waterways. For decades, active U.S. engagement in East Asia, including the forward-deployed presence of U.S. forces, has been a central factor in keeping the peace and preserving those interests. That continues to be true today. . . .

Our presence and our policy have also aimed to support respect for international maritime law, including the UN Convention on the Law of the Sea. Although the United States has yet to ratify the Convention, . . . this Administration and its predecessors support doing so, and in practice, our vessels comply with its provisions governing traditional uses of the oceans.

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China, Vietnam, Taiwan, the Philippines, Malaysia, Indonesia, and Brunei each claim sovereignty over parts of the South China Sea, including its land features. . . . The claims center on sovereignty over the 200 small islands, rocks and reefs that make up the Paracel and Spratly Islands chains.

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U.S. policy continues to be that we do not take sides on the competing legal claims over territorial sovereignty in the South China Sea. In other words, we do not take sides on the claims to sovereignty over the islands and other land features in the South China Sea, or the maritime zones (such as territorial seas) that derive from those land features. We do, however, have concerns about claims to "territorial waters" or any maritime zone that does not derive from a land territory. Such maritime claims are not consistent with international law, as reflected in the Law of the Sea Convention.

We remain concerned about tension between China and Vietnam, as both countries seek to tap potential oil and gas deposits that lie beneath the South China Sea. Starting in the summer of 2007, China told a number of U.S. and foreign oil and gas firms to stop exploration work with Vietnamese partners in the South China Sea or face unspecified consequences in their business dealings with China.

We object to any effort to intimidate U.S. companies. During a visit to Vietnam in September 2008, then-Deputy Secretary of State John Negroponte asserted the rights of U.S. companies operating in the South China Sea, and stated that we believe that disputed claims should be dealt with peacefully and without resort to any type of coercion. We have raised our concerns with China directly. Sovereignty disputes between nations should not be addressed by attempting to pressure companies that are not party to the dispute.

We have also urged that all claimants exercise restraint and avoid aggressive actions to resolve competing claims. We have stated clearly that we oppose the threat or use of force to resolve the disputes, as well as any action that hinders freedom of navigation. We would like to see a resolution in accordance with international law, including the UN Convention on the Law of the Sea.

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The assertions of a number of claimants to South China Sea territory raise important and sometimes troubling questions for the international community regarding access to sea-lanes and

marine resources. There is considerable ambiguity in China's claim to the South China Sea, both in terms of the exact boundaries of its claim and whether it is an assertion of territorial waters over the entire body of water, or only over its land features. In the past, this ambiguity has had little impact on U.S. interests. It has become a concern, however, with regard to the pressure on our energy firms, as some of the offshore blocks that have been subject to Chinese complaint do not appear to lie within China's claim. It might be helpful to all parties if China provided greater clarity on the substance of its claims.

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b. Status of Wrangel and other Arctic islands

In the context of inquiries from the general public, the State Department Bureau of European and Eurasian Affairs issued a fact sheet on the status of Wrangel and other Arctic islands on September 9, 2009. The fact sheet, which is provided below, is also available at *www.state.gov/p/eur/rls/fs/128740.htm*.

The U.S.–USSR Maritime Boundary Agreement was signed in 1990. The negotiations that led to that agreement did not address the status of Wrangel Island, Herald Island, Bennett Island, Jeannette Island, or Henrietta Island, all of which lie off Russia's Arctic coast, or Mednyy (Copper) Island or rocks off the coast of Mednyy Island in the Bering Sea. None of the islands or rocks above were included in the U.S. purchase of Alaska from Russia in 1867, and they have never been claimed by the United States, although Americans were involved in the discovery and exploration of some of them.

The U.S.–USSR Maritime Boundary Agreement, signed by the United States and the Soviet Union on June 1, 1990, defines our maritime boundary in the Arctic Ocean, Bering Sea, and northern Pacific Ocean. The U.S.–USSR Maritime Boundary Agreement is a treaty that requires ratification by both parties before it formally

enters into force. The treaty was made public at the time of its signing. In a separate exchange of diplomatic notes, the two countries agreed to apply the agreement provisionally. The United States Senate gave its advice and consent to ratification of the U.S.–USSR Maritime Boundary Agreement on September 16, 1991. [Editor's note: *See II Cumulative Digest 1991–99* at 1744–45 for additional background on the agreement.]

The Russian Federation informed the United States Government by diplomatic note dated January 13, 1992, that it "continues to perform the rights and fulfill the obligations flowing from the international agreements" signed by the Soviet Union. The United States and the Russian Federation, which is considered to be the sole successor state to the treaty rights and obligations of the former Soviet Union for the purposes of the U.S.–USSR Maritime Boundary Agreement, are applying the treaty on a provisional basis, pending its ratification by the Russian Federation.

The United States regularly holds discussions with Russia on Bering Sea issues, particularly issues related to fisheries management, but these discussions do not affect the placement of the U.S.-Russia boundary or the jurisdiction over any territory or the sovereignty of any territory. The United States has no intention of reopening discussion of the 1990 Maritime Boundary Agreement.

4. Piracy

a. Contact Group on Piracy off the Coast of Somalia

On January 14, 2009, pursuant to UN Security Council Resolution 1851 (2008) (U.N. Doc. S/RES/1851), the United States hosted the first meeting of the Contact Group on Piracy off the Coast of Somalia ("CGPCS") at UN Headquarters in New York. Among other things Resolution 1851 encouraged states to establish an international cooperation mechanism to serve as a point of contact for states and organizations conducting counter-piracy efforts near Somalia. *See Digest 2008* at 929–32. Participants adopted a statement, excerpted

below, which described the objectives, participation, activities, and structure of the organization. The full text of the statement is available at *www.state.gov/t/pm/rls/fs/130610.htm*. During the remainder of 2009, the United States participated actively in meetings of the CGPCS and its four working groups. The United States chairs the CGPCS's working group on strengthening the shipping industries' self-awareness and other capabilities to counter piracy.

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Pursuant to United Nations Security Council Resolution 1851, the Contact Group on Piracy off the Coast of Somalia (CGPCS) was established on January 14, 2009 to facilitate discussion and coordination of actions among states and organizations to suppress piracy off the coast of Somalia. The CGPCS will report its progress periodically to the UN Security Council. Participating in the meeting were representatives from: Australia, China, Denmark, Djibouti, Egypt, France, Germany, Greece, India, Italy, Japan, Kenya, Republic of Korea, The Netherlands, Oman, Russia, Saudi Arabia, Somalia TFG, Spain, Turkey, United Arab Emirates, United Kingdom, United States, and Yemen, as well as the African Union, the European Union, the North Atlantic Treaty Organization (NATO), the UN Secretariat, and the International Maritime Organization.

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As an international cooperation mechanism created pursuant to Security Council resolution 1851 to act as a point of contact between and among states, regional and international organizations on aspects of combating piracy and armed robbery at sea off Somalia's coast, the CGPCS will inform the UN Security Council on a regular basis of the progress of its activities, including through providing relevant information to the UN Secretary General for possible incorporation into his periodic reports to the Council.

The CGPCS emphasizes the primary role of Somalia itself in rooting out piracy and armed robbery at sea and the importance

of assisting Somalia in strengthening its own operational capacity to fight piracy and bring to justice those involved in piracy.

The Contact Group on Piracy off the Coast of Somalia applauds the efforts countries, industry, and regional and international organizations have taken to address the piracy problem pursuant to Security Council resolutions. Of particular note, the CGPCS applauds the counter-piracy operations that individual nations, Combined Maritime Forces (CMF), NATO and the EU have undertaken during the last six months.

Pursuant to UNSCR 1851, States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia will consider creating a center in the region to coordinate information relevant to piracy and armed robbery at sea off the coast of Somalia (the Counter-Piracy Coordination Center) as soon as possible in 2009. Pending the establishment of such a center, the Contact Group will look to put interim arrangements in place. The CGPCS asks participating states, international and regional organizations to support both the interim and follow-on facilities.

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The Contact Group on Piracy off the Coast of Somalia recognizes the importance of apprehending and prosecuting suspected pirates. The CGPCS calls on state parties to implement their obligations under relevant treaties and applicable international law, including in particular the UN Convention on the Law of the Sea, with respect to suppressing piracy, establishing jurisdiction, and accepting delivery of suspected pirates, and to discuss, as appropriate, the applicability of other international instruments including the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention"), and the UN Convention Against Transnational Organized Crime.

The CGPCS will examine practical options for strengthening the ability of countries willing to detain and prosecute suspected pirates. It will also examine options for developing other mechanisms to address piracy, including international judicial mechanisms. . . .

The Contact Group on Piracy off the Coast of Somalia reaffirms its respect for Somalia's sovereignty, territorial integrity, and

sovereign rights over natural resources, and its participants ensure that their flagged vessels respect these rights.

The CGPCS offers participation to any nation or international organization making a tangible contribution to the counter-piracy effort, or any country significantly affected by piracy off the coast of Somalia. As such, the Contact Group extends invitations to Belgium, Norway, Portugal, Sweden, and the Arab League.

The CGPCS identified six related focus areas: improving operational and information support to counter-piracy operations, establishing a counter-piracy coordination mechanism, strengthening judicial frameworks for arrest, prosecution and detention of pirates, strengthening commercial shipping self-awareness and other capabilities, pursuing improved diplomatic and public information efforts, and tracking financial flows related to piracy.

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Additionally, participating states affirmed the importance of attention to financial flows to pirates and their activities and decided to remain seized of the issue. . . .

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b. New York Declaration

On September 9, 2009, the United States signed the New York Declaration, committing to "promulgate internationally recognized best management practices" for protecting U.S. ships against piracy. The declaration, which is not legally binding, was signed earlier in 2009 by Panama, the Bahamas, Liberia, and the Marshall Islands. Cyprus, Japan, Singapore, and the United Kingdom also signed the declaration on September 9, and South Korea signed it on September 10. *See www.state.gov/r/pa/prs/ps/2009/sept/128747.htm; see also www.state.gov/r/pa/prs/ps/2009/sept/128768.htm.* The New York Declaration is available at *www.state.gov/r/pa/prs/ps/2009/sept/128767.htm.*

5. Freedom of Navigation

In his testimony concerning "Maritime Issues and Sovereign Disputes in East Asia," discussed in A.3.a. *supra*, Scot Marciel, Deputy Assistant Secretary, Department of State Bureau of East Asian and Pacific Affairs, discussed incidents involving China and U.S. vessels in international waters within China's exclusive economic zone. Excerpts follow from Mr. Marciel's discussion of that issue. The full text of his written statement is available at *www.state.gov/p/eap/rls/rm/2009/07/126076.htm*.

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. . . In March 2009, the survey ship *USNS Impeccable* was conducting routine operations, consistent with international law, in international waters in the South China Sea. Actions taken by Chinese fishing vessels to harass the *Impeccable* put ships of both sides at risk, interfered with freedom of navigation, and were inconsistent with the obligation for ships at sea to show due regard for the safety of other ships. We immediately protested those actions to the Chinese government, and urged that our differences be resolved through established mechanisms for dialogue—not through ship-to-ship confrontations that put sailors and vessels at risk.

Our concern over that incident centered on China's conception of its legal authority over other countries' vessels operating in its Exclusive Economic Zone (EEZ) and the unsafe way China sought to assert what it considers its maritime rights.

China's view of its rights on this specific point is not supported by international law. We have made that point clearly in discussions with the Chinese and underscored that U.S. vessels will continue to operate lawfully in international waters as they have done in the past.

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. . . With respect to freedom of navigation in the EEZ by U.S. naval vessels, we have urged China to address our differences

through dialogue. Last month at the Defense Consultative Talks in Beijing, Under Secretary of Defense for Policy Michele Flournoy raised this issue, and the Chinese agreed to hold a special session of our Military Maritime Consultative Agreement (signed in 1998) to take up this issue and seek to resolve differences.

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6. Maritime Security and Law Enforcement

a. Shiprider agreement with Canada

On May 26, 2009, Secretary for Homeland Security Janet Napolitano and Canadian Minister of Public Safety Peter Van Loan signed the Framework Agreement on Integrated Cross-Border Maritime Law Enforcement Operations between the Government of the United States of America and the Government of Canada. The agreement establishes a permanent shiprider arrangement, enabling joint U.S.-Canadian law enforcement teams to conduct operations along the two countries' maritime border "to prevent, detect, suppress, investigate, and prosecute criminal offences or violations of law including, but not limited to, illicit drug trade, migrant smuggling, trafficking of firearms, the smuggling of counterfeit goods and money, and terrorism." Article I.

"Shiprider is a critical security partnership between the United States and Canada, improving our cross-border operations," said Secretary Napolitano in concluding the agreement. "Through coordinated enforcement along our shared waterways, we can better interdict offenders trying to flee across our maritime border." *See* Department of Homeland Security press release, dated May 26, 2009, available at *www.dhs.gov/ynews/releases/pr_1243354565323.shtm*. The DHS press release continued:

> Shiprider enables the [Royal Canadian Mounted Police] RCMP and the U.S. Coast Guard to cross-train, share resources and personnel and utilize each others' vessels

> in the waters of both countries, such as the Great Lakes and St. Lawrence Seaway. Working together, Canadian and U.S. law enforcement will help ensure that criminal organizations no longer exploit the shared border and waterways because of the inherent jurisdictional challenges associated with cross-border policing.

For example, Article 7 of the agreement requires the central authorities for the two parties (the Royal Canadian Mounted Police and the U.S. Coast Guard) to

> coordinate the development of and approve a joint training program for designated cross-border maritime law enforcement officers that includes training on the applicable laws, regulations, constitutional considerations and policies of both Parties, and in particular, depending on the anticipated role of the integrated cross-border maritime law enforcement officer, those pertaining to:
>
> (a) the use of force, marine safety, operational procedures and protection of informants and other sensitive information; and
> (b) aviation regulations and flight safety procedures.

The agreement also includes an article concerning custody of persons, vessels or things detained or seized in the course of joint operations. That article provides in part that "[i]n all cases where a person, vessel, or thing is detained or seized, during the course of an integrated cross-border maritime law enforcement operation, such person, vessel, or thing shall be dealt with in accordance with the laws of the host country." Article 10(1).

Pursuant to Article 19, the agreement will enter into force upon an exchange of diplomatic notes confirming that each party has completed its necessary internal procedures. The United States has completed the procedures necessary to bring the agreement into force for the United States as an executive agreement. As of the end of 2009, Canada was taking the steps necessary to allow it to enter into force for Canada. The agreement is available at *www.state.gov/s/l/c8183.htm*.

b. Agreement with Sierra Leone

On June 26, 2009, the United States and Sierra Leone concluded an agreement concerning cooperation to suppress illicit transnational maritime activity. Article 1.1 of the agreement defines "[i]llicit transnational maritime activity" to mean "illegal activities prohibited by international law, including international conventions to which both the Government of the Republic of Sierra Leone and the Government of the United States of America are party, but only to the extent enforcement is authorized by the laws of both Parties; and including without limitation 'illicit traffic' as defined in Article 1(m) of the 1988 Convention [against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances]." The agreement contains shiprider provisions to permit members of the U.S. Coast Guard and the Sierra Leone Armed Forces to embark on the other state's ships or aircraft to conduct joint maritime law enforcement operations. The agreement also authorizes the Coast Guard, under certain conditions, to investigate, board, and search suspect vessels in Sierra Leone's territorial sea or internal waters if no Sierra Leone official is embarked on the Coast Guard ship. In such circumstances, the agreement also authorizes the Coast Guard, if evidence of illicit transnational maritime activity is found, to detain the vessel, cargo, and persons on board pending instructions from the Sierra Leone Armed Forces.

The agreement is also a shipboarding agreement. It authorizes the Coast Guard and the Sierra Leone Armed Forces, under certain circumstances, to board, search, and detain suspect ships in international waters that claim the nationality of the other state without the presence of officials from that state. The agreement also authorizes the Coast Guard or the Sierra Leone Armed Forces to detain the suspect ships, cargo, and persons on board pending disposition instructions from the other state's authorities. The agreement is available at *www.state.gov/s/l/c8183.htm*.

c. Shiprider agreement with Tonga

On August 24, 2009, the United States and the Kingdom of Tonga concluded an agreement concerning cooperation in joint maritime surveillance operations. The agreement contains "shiprider" provisions, permitting officers of Tonga's Tonga Defense Services, Ministry of Fisheries, and Ministry of Transport to ride aboard U.S. Coast Guard vessels and aircraft to conduct joint operations. For example, Tonga's embarked officers are empowered to grant Coast Guard vessels entry into Tonga's territorial sea to assist Tonga's authorities in stopping, boarding, and searching vessels suspected of violating Tonga's laws and assist in arresting suspects and seizing contraband and vessels. The agreement also permits Coast Guard vessels and aircraft, with Tonga's officers on board, to assist in fisheries surveillance and law enforcement activities in Tonga's exclusive economic zone. The agreement further empowers Tonga's embarked officers to permit the Coast Guard to stop, board, and search vessels located seaward of any state's territorial sea and claiming Tonga's nationality.

The agreement was the sixth shiprider agreement the United States has concluded with Pacific Island States. Under the 1988 Multilateral Treaty on Fisheries between the United States and the nations of the Pacific Forum Fisheries Agency ("FFA"), the United States and the Pacific Island States cooperate closely on fisheries issues, and the shiprider agreements have grown out of that cooperation. *See* testimony of William Gibbons-Fly, Director, Office of Marine Conservation, Bureau of Oceans, Environment and Science, Department of State, before the Subcommittee on Insular Affairs, Oceans and Wildlife of the U.S. House of Representatives Committee on Natural Resources on March 19, 2009, available at *http://resourcescommittee.house.gov/images/Documents/20090319iaow/testimony_gibbons-fly.pdf*. The agreement is available at *www.state.gov/s/l/c8183.htm*. For discussion of the agreements concluded in 2008 with Kiribati, the Cook Islands, the Marshall Islands, the Federated States of Micronesia, and Palau, see *Digest 2008* at 649–50.

7. Marine Scientific Research

The United States participated in the ninth meeting of the Intergovernmental Oceanographic Commission's ("IOC") Advisory Body of Experts on the Law of the Sea ("ABE-LOS"), held at UNESCO Headquarters in Paris, France, March 30–April 3, 2009. ABE-LOS provides advice, upon request of the IOC, on the IOC's role in relation to the UN Convention on the Law of the Sea ("LOS Convention" or "Convention"). At its forty-first session, June 24–July 1, 2008, the IOC Executive Council had requested ABE-LOS to continue its work concerning the legal framework applicable to the collection of oceanographic data. *See Digest 2008* at 653–56 for background on ABE-LOS's work on this issue and U.S. views on it.

At ABE-LOS IX, participants decided that ABE-LOS does not have a mandate to draft implementing procedures for the Guidelines for the deployment of Argo floats on the high seas,* which the IOC adopted in 2008. Participants decided instead that the IOC Executive Secretary should draft such procedures with relevant bodies that oversee the Argo Programme. The meeting also decided that no Guidelines are needed for deployment of floats or drifting buoys into exclusive economic zones ("EEZs") or for deployment of expendable bathythermographs ("XBTs")** by ships of opportunity into EEZs. During the discussions that led to the ABE-LOS experts' decisions, the United States reiterated its position that the routine collection of ocean observations, such as temperature, pressure, current, salinity, and wind, in an EEZ is not marine scientific research ("MSR") governed by

* Editor's note: *See www.argo.ucsd.edu/FrFAQ.html* for background on Argo floats.

** Editor's note: According to the National Oceanic and Atmospheric Administration, the Expendable Bathythermograph ("XBT") is a probe oceanographers use "to obtain information on the temperature structure of the ocean to depths of up to 1,500 meters. [It] is dropped from a ship and measures the temperature as it falls through the water." *See www.aoml.noaa.gov/goos/uot/xbt-what-is.php*.

Part XIII of the LOS Convention, requiring the consent of the coastal state. The U.S. delegate stated:

> The routine collection of ocean observations in near-real time that are distributed freely and openly and are used for monitoring and forecasting of ocean state, for weather forecasts and warnings, and for climate prediction is analogous to the collection of marine meteorological data and therefore is not scientific research regulated by Part XIII of the Law of the Sea Convention.

8. Marine Casualty Code

On June 29, 2009, the U.S. Embassy in London transmitted a diplomatic note to the International Maritime Organization ("IMO"), conveying the U.S. objection to the amendments to Chapter XI-1 to the International Convention on the Safety of Life at Sea ("SOLAS"), which the IMO's Maritime Safety Committee adopted on May 16, 2008. Absent objection, these amendments make mandatory for SOLAS Contracting Governments Parts I and II of the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident ("Casualty Code"). The amendments also provide that Part III of the Casualty Code "should be taken into account to the greatest extent possible." SOLAS, to which the United States is a party, establishes requirements for the safe and secure operation of ships. The Casualty Code establishes minimum standards and, for the most part, a uniform approach for investigating maritime casualties.

The United States participated actively in negotiating the Casualty Code, including by chairing the working group assigned to develop it. In most respects, the Casualty Code incorporates practices the U.S. Coast Guard and the U.S. National Transportation Safety Board already employ, but, as explained in the U.S. diplomatic note, other aspects of the Casualty Code would make mandatory practices that would conflict with important aspects of U.S. domestic law and

practice without directly promoting maritime safety. For example, the Casualty Code would mandate certain legal and procedural rights for seafarers that exceed the protections granted under U.S. law. *See Digest 2007* at 660 for additional background.

The U.S. objection prevented the amendments from entering into force automatically with respect to the United States. Under SOLAS's tacit amendment procedure, an IMO-approved amendment enters into force automatically for a party unless that party objects to the amendment before the date on which the amendment is deemed "accepted" (SOLAS, Articles VIII(b)(vi)(2) and VIII(b)(vii)(2)). In adopting the Casualty Code, the IMO established July 1, 2009, as the "acceptance" date and January 1, 2010, as the date for the amendments to enter into force. The substantive portions of the U.S. diplomatic note are set forth below, and the full text of the note is available at *www.state.gov/s/l/c8183.htm*.

The Embassy of the United States has the honor to refer to the Amendments to Chapter XI-1 to the International Convention on the Safety of Life at Sea (the Convention), adopted by Resolution 257(84) of the Maritime Safety Committee on May 16, 2008. Specifically, Resolution 257(84) made parts I and II of the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident mandatory under the Convention.

On behalf of the Government of the United States of America, the Embassy has the further honor to inform your Excellency, in your capacity as depositary for the Convention, that the Government of the United States of America objects to the above-described amendments to Chapter XI-1 of the Convention because certain provisions of the Code do not directly promote maritime safety and conflict with important aspects of U.S. domestic law and practice.

We have the honor to request that your Excellency therefore notify the Contracting Governments to the Convention that these amendments will not enter into force for the United States on January 1, 2010.

9. Salvage at Sea

a. Naval shipwrecks

As discussed in Chapter 10.A.1.d., on December 22, 2009, the U.S. District Court for the Middle District of Florida dismissed claims to artifacts from a shipwreck site discovered in international waters for lack of subject matter jurisdiction and vacated a related arrest warrant. *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126 (M.D. Fla. 2009). According to the report and recommendation of the magistrate judge, dated June 3, 2009, which the district court adopted and incorporated into its order, Odyssey Marine Exploration Inc. ("Odyssey") initiated the *in rem* action after discovering the shipwreck in international waters off the Strait of Gibraltar in March 2007. Odyssey sought possessory rights and ownership over the items it had retrieved, along with all of the artifacts remaining at the site of the wreck. Alternatively, Odyssey sought a salvage award under the law of salvage. Peru (based on its claim that the coins found at the shipwreck site had their origins in Peru) and 25 descendants of persons, who are alleged to have had their property on board the ship when it sank, also filed claims to the items at the shipwreck site.

In granting Spain's motion to dismiss, the court accepted the magistrate judge's conclusion that the shipwrecked vessel was the *Nuestra Señora de las Mercedes*, a Spanish naval vessel that exploded and sank in 1804 after the British Navy intercepted and fired on it while the ship was sailing from the Spanish colonies in South America. The court stated:

> . . . [T]he *Mercedes* is a naval vessel of Spain and . . . the wreck of this naval vessel, the vessel's cargo, and any human remains are the natural and legal patrimony of Spain and are entitled in good conscience and in law to lay undisturbed in perpetuity absent the consent of Spain and despite any man's aspiration to the contrary. That the *Mercedes* is now irreparably disturbed and her cargo brought to the United States, without the consent of Spain and

> athwart venerable principles of law, neither bestows jurisdiction on the United States to litigate conflicting claims of ownership (to all or part of the cargo) nor empowers the United States to compel the sovereign nation of Spain to appear and defend in a court of the United States.

Id. at 1129.

As discussed in Chapter 10.A.1.d., the basis for the magistrate judge's report and recommendation to dismiss the case was an analysis of the Foreign Sovereign Immunities Act ("FSIA"). As the magistrate judge noted, however, § 1609 of the FSIA requires claims of immunity to be evaluated "subject to existing international agreements to which the United States is a party." The magistrate judge then described two such agreements and their relevance to Odyssey's claims:

> . . . As Spain emphasizes, and as the Fourth Circuit has specifically held, Spain's sovereign vessels are covered by the 1902 Treaty of Friendship and General Relations between the United States and Spain. *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 638, 642–643 (4th Cir. 2000). Per its provisions, "[i]n cases of shipwreck . . . each party shall afford to the vessels of the other, whether belonging to the State or to individuals the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases." Treaty of Friendship and General Relations, U.S.–Spain, Art. X, July 3, 1902, 33 Stat. 2105; [fn. omitted] *see also Sea Hunt, Inc.*, 221 F.3d at 642. In short, this treaty is "unique" and requires that imperiled Spanish vessels shall receive the same immunities conferred upon similarly situated vessels of the United States." *Sea Hunt*, 221 F.3d at 642. [fn. omitted]
>
> The United States protects its sunken warships. *See* Geneva Convention on the High Seas, Art. 8, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 ("Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State"); Sunken Military Craft Act, Pub. L. No. 108-375, § 1406, 118 Stat. 2094

(codified at 10 U.S.C. § 113 note) (October 28, 2004) ("The law of finds shall not apply to . . . any foreign sunken military craft located in United States waters"; and "[n]o salvage rights or awards shall be granted with respect to . . . any foreign sunken military craft located in United States waters without the express permission of the relevant foreign state."); [fn. omitted] Protection of Sunken Warships, Military Aircraft and Other Sunken Government Property, 69 F.R. 5647–01, 5648 (Feb. 5, 2004) (President Clinton's January 19, 2001, statement expressing concern that recent technological advances made the unauthorized disturbance of sunken State craft possible and stating the United States "recognizes that title to a United States or foreign sunken State craft, wherever located, is not extinguished by passage of time, regardless of when such sunken State craft was lost at sea;" sunken warships "may contain objects of a sensitive . . . archaeological or historical nature."); [fn. omitted] *see also International Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255, 1258–60 (11th Cir. 2000) (determining law of salvage and not law of finds applied to navy bomber that crashed in international waters where the United States had not abandoned its interests in ships sunk over a century ago); *Sea Hunt*, 221 F.3d at 647 (noting the United States' interest is "rooted in customary international law;" the "[p]rotection of the sacred sites of other nations thus assists in preventing the disturbance and exploitation of our own."); *United States v. Steinmetz*, 763 F. Supp. 1293, 1299 (D.N.J. 1991) (reciting the State Department's position that warships and their remains are "clothed with sovereign immunity and therefore entitled to a presumption against abandonment of title"), *aff'd*, 973 F.2d 212 (3d Cir. 1992).

Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel, 675 F. Supp. 2d at 1143–44.

In a Statement of Interest and brief as *amicus curiae* supporting Spain filed on September 29, 2009, after the magistrate

judge issued his report and recommendation, the United States also addressed the 1902 Treaty of Friendship and General Relations between the United States and Spain ("1902 Treaty"). The United States did not take a position on the factual disputes between the parties; instead, in addressing the protections and immunities the *Mercedes* and its cargo would be entitled to under the 1902 Treaty, it assumed, as the magistrate judge had found, that the shipwrecked vessel was the *Mercedes* and that the *res* recovered by Odyssey came from the *Mercedes*, a warship of the Spanish Royal Navy that Spain has not abandoned. As the government stated:

> Article X of the Treaty provides, "In cases of shipwreck, damages at sea . . . each party shall afford to the vessels of the other . . . the same assistance and protection and the same immunities, which would have been granted to its own vessels in similar cases." Spain, the United States, and a U.S. Court of Appeals all interpret this language to require the United States to extend to Spain the same protection and immunities the United States customarily affords to its own sunken vessels. *Sea Hunt v. Unidentified Shipwrecked Vessel*, 221 F.3d 634, 643 (4th Cir. 2000) . . . . [T]hose protections and immunities include the rules that (1) sunken state vessels are not deemed abandoned absent a clear and affirmative sovereign act, and (2) sunken state vessels shall not be disturbed or subject to salvage without express sovereign consent.

The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*. Odyssey, the Republic of Peru, and the individual claimants appealed the dismissal to the U.S. Court of Appeals for the Eleventh Circuit.

b. UNESCO Convention on the Protection of Underwater Cultural Heritage

On March 26–27, 2009, the United States participated as an observer in the first meeting of the states parties to the

UNESCO Convention on the Protection of Underwater Cultural Heritage ("UNESCO Convention"). Excerpts follow from the U.S. statement, reaffirming U.S. support for the goal to protect underwater cultural heritage and the protective Rules established in the Annex to the UNESCO Convention, discussing U.S. efforts to protect underwater cultural heritage, and noting U.S. concerns with other aspects of the UNESCO Convention. For discussion of U.S. concerns expressed at the time of conclusion of the UNESCO Convention, see *Digest 2001* at 693–95. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*.

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The United States uses this occasion to re-affirm its support of the overall goal of this UNESCO Convention to protect underwater cultural heritage. The United States fully supports the Annex of Rules concerning activities directed at underwater cultural heritage.

Since the conclusion of the negotiations on this Convention in 2001, the United States has taken several steps to protect underwater cultural heritage, in a manner consistent with customary international law, as reflected in the United Nations Convention on the Law of the Sea. For example, the United States enacted a new law, the Sunken Military Craft Act of 2004, to ensure protection of both sunken U.S. military craft, wherever located, and sunken foreign military craft located in U.S. waters (landward of the 24nm limit of the contiguous zone). The Sunken Military Craft Act provides that the law of finds does not apply to any U.S. sunken military craft, wherever located, or to any sunken foreign military craft located in U.S. waters, in a manner consistent with customary international law and the interests of Flag States. The law also extensively protects all U.S. sunken military craft and sunken foreign military craft in U.S. waters from the application of the law of salvage by prohibiting the issuance of any salvage rights or awards under salvage law, unless expressly authorized by the flag State of the sunken military craft. The Sunken Military Craft Act clarifies that sunken military craft of the United States remain U.S. property

and that right, title, and interest of the United States are not extinguished except by express divestiture of title by the United States. Further, this U.S. law encourages the United States to negotiate bilateral and multilateral agreements to protect sunken military craft. To date, the United States has cooperated with several foreign nations on the protection of their sunken State craft in U.S. waters and has provided technical assistance for underwater cultural heritage research projects outside of U.S. waters.

Another example of measures the United States has taken to protect underwater cultural heritage is the negotiation, with Canada, France, and the United Kingdom, resulting in the International Agreement Concerning the Shipwrecked Vessel R.M.S. *Titanic*. The United States signed this Agreement in 2004 and has made considerable efforts toward promoting the protection of the sunken vessel, its wreck site, and its artifacts. This includes developing proposed implementing legislation for the Agreement consistent with the historic preservation principles in the UNESCO UCH Convention and its Annexed Rules. In addition, in 2001, the U.S. Department of Commerce's National Oceanic and Atmospheric Administration published Guidelines for Research, Exploration and Salvage of R.M.S. *Titanic* that are similar to the Annexed Rules of the UNESCO UCH Convention.

The Annexed Rules of the UNESCO UCH Convention are a valuable contribution to the protection of underwater cultural heritage. A number of United States federal and state agencies currently use the Annexed Rules as a guide in the protection and management of underwater cultural heritage located in national marine sanctuaries, national parks, and national monuments, including in the national marine monument in the Northwestern Hawaiian Islands, the Papahanaumokuakea National Monument. [Editor's note: *See Digest 2007* at 705–6 and *Digest 2008* at 702–3 for discussion of the Papahanaumokuakea National Monument.]

These actions illustrate that the United States cares about and is actively taking steps to protect underwater cultural heritage. The United States believes that a broadly ratified Convention is a useful means through which to achieve the protection of underwater cultural heritage. The United States supported and actively participated in the negotiations here at UNESCO to develop

a multilateral instrument to protect underwater cultural heritage. The resulting Convention, especially in the Annexed Rules, preamble, and general principles, reflects substantial progress by the global community in developing means to protect submerged cultural heritage. However, the United States continues to have serious concerns with certain provisions in the Convention. These concerns have prevented our country from becoming a State Party. For example, the United States cannot join a convention that is not consistent with the jurisdictional regime set forth in the United Nations Convention on the Law of the Sea. The United States hopes that there will be future opportunities to discuss the concerns that have prevented our country, and others, from joining this Convention. We also look forward to opportunities to discuss some of the means by which States may cooperate, including through scientific and technical exchanges, to protect underwater cultural heritage.

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B. OUTER SPACE

On October 19, 2009, Garold N. Larson, Alternate Representative to the First Committee, addressed the General Assembly's First Committee about disarmament concerns and outer space. Excerpts follow from Mr. Larson's comments concerning the Obama administration's commitment to upholding international law applicable to outer space. The full text of the U.S. statement is available at *http://usun.state.gov/briefing/statements/2009/130701.htm*.

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In consultation with allies, the Obama Administration is currently in the process of assessing U.S. space policy, programs, and options for international cooperation in space as a part of a comprehensive review of space policy. This review of space cooperation options

includes a "blank slate" analysis of the feasibility and desirability of options for effectively verifiable arms control measures that enhance the national security interests of the United States and its allies. The United States looks forward to discussing insights gained from this Presidential review next year at the Conference on Disarmament during substantive discussions on the Prevention of an Arms Race in Outer Space agenda item as a part of a consensus program of work.

Mr. Chairman, although it is premature to predict the specific decisions on arms control that will result from this U.S. policy review, this Committee can rest assured that the United States will continue to uphold the principles of the 1967 Outer Space Treaty, which provides the fundamental guidelines required for the free access to, and use of, outer space by all nations for peaceful purposes. The United States will continue to support the inherent right of individual or collective self-defense, as reflected in the UN Charter. The United States also will continue to:

- Reject any limitations on the fundamental right of the United States to operate in, and acquire data from, space.
- Conduct United States space activities in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.
- Highlight the responsibility of states to avoid harmful interference to other nations' peaceful exploration and use of outer space.
- Take a leadership role in international fora to promote policies and practices aimed at debris minimization and preservation of the space environment.

To further these goals, the United States will seek opportunities to work with other like-minded nations here in the United Nations and in other fora in the furtherance of international norms and standards that can help advance the common good and enhance stability and security in outer space. . . .

Cross References

MARPOL Annex VI (Regulations for the Prevention of Air Pollution from Ships), **Chapter 13.A.2.a.**
Fisheries issues, **Chapter 13.A.2.b.**
Maritime boundary issues discussed in U.S. response to ILC questionnaire on transboundary oil and gas, **Chapter 13.A.3.a.(1)**
Conservation efforts in Antarctica, **Chapter 13.A.3.c.**
U.S. initiatives to protect cultural heritage, **Chapter 14.**

Chapter 13

Environment and Other Transnational Scientific Issues

A. ENVIRONMENT AND CONSERVATION

1. Land and Air Pollution and Related Issues

a. Climate change

(1) Overview

During 2009, as discussed in greater detail in this section, the United States played a lead role in efforts to address the threat of global climate change. In his address to the General Assembly on September 23, 2009, for example, President Barack H. Obama announced that "the days when America dragged its feet on this issue are over" and called for collective action to address the threat of climate change. The full text of President Obama's speech is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00742, pp. 1–9. *See also* President Obama's September 22 address to the UN Climate Change Summit, available at Daily Comp. Pres. Docs., 2009 DCPD No. 00736, pp. 1–3.

(2) Meetings of major economies

On March 28, 2009, President Obama announced the inception of the Major Economies Forum on Energy and

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Climate ("MEF"). As a White House press release issued March 28 explained:

> The Major Economies Forum will facilitate a candid dialogue among key developed and developing countries, help generate the political leadership necessary to achieve a successful outcome at the UN climate change negotiations that will convene this December in Copenhagen, and advance the exploration of concrete initiatives and joint ventures that increase the supply of clean energy while cutting greenhouse gas emissions.
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> The 17 major economies are: Australia, Brazil, Canada, China, the European Union, France, Germany, India, Indonesia, Italy, Japan, Korea, Mexico, Russia, South Africa, the United Kingdom, and the United States. Denmark, in its capacity as the President of the December 2009 Conference of the Parties to the UN Framework Convention on Climate Change, and the United Nations have also been invited to participate in this dialogue.

See www.whitehouse.gov/the_press_office/president-obama-announces-launch-of-the-major-economies-forum-on-energy-and-climate. On July 9, 2009, the leaders of the MEF met in L'Aquila, Italy, and issued a declaration setting out the steps they would take to address climate change. The declaration, excerpted below, is available at *www.whitehouse.gov/the_press_office/Declaration-of-the-Leaders-the-Major-Economies-Forum-on-Energy-and-Climate.*

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We reaffirm the objective, provisions and principles of the UN Framework Convention on Climate Change. Recalling the Major Economies Declaration adopted in Toyako, Japan, in July 2008, and taking full account of decisions taken in Bali, Indonesia, in December 2007, we resolve to spare no effort to reach agreement

in Copenhagen, with each other and with the other Parties, to further implementation of the Convention.

Our vision for future cooperation on climate change, consistent with equity and our common but differentiated responsibilities and respective capabilities, includes the following:

1. Consistent with the Convention's objective and science:

Our countries will undertake transparent nationally appropriate mitigation actions, subject to applicable measurement, reporting, and verification, and prepare low-carbon growth plans. Developed countries among us will take the lead by promptly undertaking robust aggregate and individual reductions in the midterm consistent with our respective ambitious long-term objectives and will work together before Copenhagen to achieve a strong result in this regard. Developing countries among us will promptly undertake actions whose projected effects on emissions represent a meaningful deviation from business as usual in the midterm, in the context of sustainable development, supported by financing, technology, and capacity-building. The peaking of global and national emissions should take place as soon as possible, recognizing that the timeframe for peaking will be longer in developing countries, bearing in mind that social and economic development and poverty eradication are the first and overriding priorities in developing countries and that low-carbon development is indispensible to sustainable development. We recognize the scientific view that the increase in global average temperature above pre-industrial levels ought not to exceed 2 degrees C. . . .

We will take steps nationally and internationally, including under the Convention, to reduce emissions from deforestation and forest degradation and to enhance removals of greenhouse gas emissions by forests, including providing enhanced support to developing countries for such purposes.

2. Adaptation to the adverse effects of climate change is essential. Such effects are already taking place. . . . There is a particular and immediate need to assist the poorest and most vulnerable to adapt to such effects. . . . Further support will need to be mobilized, should be based on need, and will include resources additional to existing financial assistance. We will work together to develop, disseminate, and transfer, as appropriate, technologies that advance adaptation efforts.

3. We are establishing a Global Partnership to drive transformational low-carbon, climate-friendly technologies. We will dramatically increase and coordinate public sector investments in research, development, and demonstration of these technologies, with a view to doubling such investments by 2015, while recognizing the importance of private investment, public-private partnerships and international cooperation, including regional innovation centers. . . .

4. Financial resources for mitigation and adaptation will need to be scaled up urgently and substantially and should involve mobilizing resources to support developing countries. . . . The governance of mechanisms disbursing funds should be transparent, fair, effective, efficient, and reflect balanced representation. Accountability in the use of resources should be ensured. An arrangement to match diverse funding needs and resources should be created, and utilize where appropriate, public and private expertise. . . .

* * * *

(3) UN Framework Convention on Climate Change: Conference of the Parties

The United States participated in the Fifteenth Session of the Conference of the Parties to the UN Framework Convention on Climate Change ("UNFCCC") in Copenhagen, Denmark, December 7–19, 2009. President Obama, Secretary of State Hillary Rodham Clinton, and five other cabinet members participated in the U.S. delegation, signaling the importance the United States attached to achieving a successful outcome. During the conference, President Obama and Secretary Clinton emphasized the need for an outcome containing three elements: (1) commitments by the major economies to take decisive national actions to reduce their emissions; (2) a transparency mechanism to enable states to review whether other states fulfill their commitments; and (3) financing and support to help developing countries reduce emissions and adapt to climate change. Secretary Clinton's December 17 remarks to the press are available at *www.state.gov/secretary/*

rm/2009a/12/133734.htm; President Obama's December 18 address to the conference's morning plenary session is available at Daily Comp. Pres. Docs., 2009 DCPD No. 01002, pp. 1–3. *See also* the U.S. website for the conference, available at *www.cop15.state.gov*.

On December 18, 2009, President Obama announced that the major economies had achieved a breakthrough in the negotiations, producing a document called the Copenhagen Accord. Among other things, as discussed in the excerpts below from President Obama's December 18 press briefing, the Copenhagen Accord establishes that states need to reduce their emissions in order to achieve the goal of limiting the increase in the global temperature to two degrees Centigrade. Although not legally binding, the Copenhagen Accord provides for the implementation of targets and actions to reduce countries' emissions by 2020 and the submission of information about those steps to the UNFCCC Secretariat by 2010. It also addresses transparency and contains provisions concerning financing and technology to help developing countries reduce their emissions. The full text of President Obama's press briefing is available at Daily Comp. Pres. Docs., 2009 DCPD No. 01005, pp. 1–7.

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Today we've made . . . a meaningful and unprecedented breakthrough here in Copenhagen. For the first time in history all major economies have come together to accept their responsibility to take action to confront the threat of climate change.

* * * *

. . . [T]hree components, transparency, mitigation, and finance, form the basis of the common approach that the United States and our partners embraced here in Copenhagen. Throughout the day we worked with many countries to establish a new consensus around these three points, a consensus that will serve as a foundation for

global action to confront the threat of climate change for years to come.

* * * *

Earlier this evening I had a meeting with the . . . four leaders . . . from China, India, Brazil, and South Africa, and that's where we agreed to list our national actions and commitments, to provide information on the implementation of these actions through national communications, with international consultations and analysis under clearly defined guidelines. We agreed to set a mitigation target to limit warming to no more than 2 degrees Celsius and, importantly, to take action to meet this objective consistent with science. . . .

Now, this progress did not come easily, and we know that this progress alone is not enough. Going forward, we're going to have to build on the momentum that we've established here in Copenhagen to ensure that international action to significantly reduce emissions is sustained and sufficient over time. We've come a long way, but we have much further to go.

* * * *

Q . . . Can you give a little bit more detail about . . . the transparency issue . . . ? And can you speak also more specifically about cutting emissions? . . .

The President. Well, on the second question first, the way this agreement is structured, each nation will be putting concrete commitments into an appendix to the document, and so will lay out very specifically what each country's intentions are.

Those commitments will then be subject to a international consultation and analysis, similar to, for example, what takes place when the WTO is examining progress or lack of progress that countries are making on various commitments. It will not be legally binding, but what it will do is allow for each country to show to the world what they're doing, and there will be a sense on the part of each country that we're in this together, and we'll know who is meeting and who's not meeting the mutual obligations that have been set forth.

* * * *

From the perspective of the United States, I've set forth goals that are reflected in legislation that came out of the House, that are being discussed on a bipartisan basis in the Senate. And although we will not be legally bound by anything that took place here today, we will, I think, have reaffirmed our commitment to meet those targets. . . .

* * * *

Q . . . Can you talk about what you gave up and where you might have shifted the U.S. position to get to this point? And also, if this was so hard to get to, just what you have today, how do you feel confident about getting to a legally binding agreement in a year?

The President. I think it is going to be very hard and it's going to take some time. . . .

* * * *

Essentially you have a situation where the Kyoto Protocol and some of the subsequent accords called on the developed countries who were signatories to engage in some significant mitigation actions and also to help developing countries. And there were very few, if any, obligations on the part of the developing countries.

. . . But what's happened, obviously, since 1992 is that you've got emerging countries like China and India and Brazil that have seen enormous economic growth and industrialization. So we know that moving forward it's going to be necessary if we're going to meet those targets for some changes to take place among those countries. . . . Those countries are going to have to make some changes as well, not of the same pace, not in the same way, but they're going to have to do something to assure that whatever carbon we're taking out of the environment is not just simply dumped in by other parties.

On the other hand, from the perspective of the developing countries like China and India, they're saying to themselves, per capita our carbon footprint remains very small, and we have hundreds of millions of people who don't even have electricity yet, so for us to get bound by a set of legal obligations could potentially curtail our ability to develop, and that's not fair.

So I think that you have a fundamental deadlock in perspectives that were brought to the discussions during the course of this week. And both sides have legitimate points.

My view was that if we could begin to acknowledge that the emerging countries are going to have some responsibilities, but that those responsibilities are not exactly the same as the developed countries, and if we could set up a financing mechanism to help those countries that are most vulnerable, like Bangladesh, then we would be at least starting to reorient ourselves in a way that allows us to be effective in the future.

But it is still going to require more work and more confidence building and greater trust between emerging countries, the least developed countries, and the developed countries before I think you are going to see another legally binding treaty signed.

I actually think that it's necessary for us, ultimately, to get to such a treaty, and I am supportive of such efforts. But this is a classic example of a situation where if we just waited for that, then we would not make any progress. And in fact, I think there might be such frustration and cynicism that rather than taking one step forward, we ended up taking two steps back.

* * * *

The Conference of Parties to the UNFCCC adopted a decision taking note of and attaching the Copenhagen Accord. The chapeau to the Copenhagen Accord also listed the countries that had agreed to it. Parties wishing to associate themselves with the Accord had the opportunity to add themselves to its chapeau by informing the UNFCCC Secretariat accordingly. *See* COP Decision 2/CP.15, available at *http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf#page=4.**

* Editor's note: The United States submitted its emissions targets to the UNFCCC Secretariat on January 28, 2010. *Digest 2010* will discuss relevant aspects of the U.S. submission.

b. Ozone depletion

On November 4, 2009, Daniel A. Reifsnyder, Deputy Assistant Secretary for the Environment and Sustainable Development, Department of State, made a statement at the 21st Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer ("Montreal Protocol"), held November 4–8, 2009, in Sharm el Sheikh, Egypt. In his statement, excerpted below, Mr. Reifsnyder described the joint proposal of the United States, Canada, and Mexico to take action under the Montreal Protocol to phase down the use of hydrofluorocarbons ("HFCs"). The three countries proposed to amend the Montreal Protocol by adding a new Annex F, which would address efforts to phase down the consumption and production of HFCs. The full text of Mr. Reifsnyder's statement is available at *www.state.gov/g/oes/rls/remarks/2009/131348.htm*. The full text of the U.S.-Canadian-Mexican proposal, UNEP Document UNEP/OzL.Pro.21/3/Add.1, is available at *http://ozone.unep.org/Meeting_Documents/mop/21mop/MOP-21-3-Add-1E.pdf*.

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The United States of America is pleased to join our neighbors to the North and South—the Governments of Canada and Mexico—in support of the North American proposal to phase down the use of HFCs. This is an historic proposal—never in my experience have the three governments of our North American continent joined together to propose global action to address a common threat to our environment. It is also historic in that we are seeking to address a threat that has not yet fully materialized. Global use of HFCs today is still relatively small. Our concern is that, unless we begin to act, use will increase significantly in the coming years—and it is this increased use that will pose a problem for the environment.

We believe that our proposal will provide significant climate protection benefits, partly by preventing projected increases in the

use of HFCs in many countries that result from both a transition away from ozone depleting substances (ODS), but also significantly as a result of the projected growth in air conditioning and refrigeration globally. . . .

* * * *

. . . [S]ome have asked why we are proposing to take action under an ozone treaty on a climate issue. The answer is very simple. The climate issue is very broad and very complex. In our view, not all of the solutions to the climate problem will arise in the climate arena. We must take advantage of the tools at our disposal—wherever they may be found—to address the climate problem. This notion is found already within the Kyoto Protocol, I might note, in entrusting the International Civil Aviation Organization and the World Maritime Organization with responsibility for addressing greenhouse gas emissions from aircraft and shipping.

The Montreal Protocol does not set out explicit provisions related to the scope of the agreement, so we look to the language of the Vienna Convention to determine whether the Montreal Protocol can be used to phase down HFCs, in particular Article 2, paragraph 2(b).

This paragraph sets out general obligations for Parties to "co-operate in harmonizing appropriate policies to control, limit, reduce or prevent human activities that have or are likely to have adverse effects resulting from modification of the ozone layer."

HFCs are used primarily because they are alternatives to covered ozone depleting substances being phased out under the Protocol, and used in the very same sectors of CFC and HCFC use: foam blowing, air conditioning and refrigeration applications in particular.

In addressing HFCs, we are "harmonizing" our policies with regard to the phase-out of CFCs and HCFCs by agreeing to move away from them in a specific fashion.

We believe this concept was also reflected in Decision XIX/6, which gives priority to alternatives to HCFCs that minimize their impacts on the environment, including specifically their climate impacts.

It is therefore clear that we, as Parties, can choose to address HFCs in the Montreal Protocol consistent with Article 2, paragraph 2(b),

to "co-operate in harmonizing appropriate policies" as is clearly set out in that text.

* * * *

. . . [S]ome have asked whether we mean to remove HFCs from the purview of the U.N. Framework Convention on Climate Change (Framework Convention) and the Kyoto Protocol—nothing could be more contrary to our intention. It is vital that we here and our colleagues in the climate arena work in tandem. We are proposing to change nothing under the Framework Convention and the Kyoto Protocol—only to complement them. We are proposing here to address the consumption and production of HFCs—not emissions. In our view, countries will continue to report on their emissions of HFCs under the Framework Convention and the Kyoto Protocol. Similarly, any accounting for reduced emissions of HFCs would accrue under the Framework Convention. Ultimately, to spell out this relationship more precisely we see the need for a decision under the Framework Convention, but we need not await such a decision to act now—at this meeting.

* * * *

The participants in the meeting did not reach consensus on the U.S.-Canadian-Mexican proposal. Instead, the United States, Canada, and Mexico joined 36 other states in issuing a declaration concerning alternatives to ozone depleting substances ("ODSs") that have high global warming potentials ("GWPs"). The report of the meeting noted the declaration and included it as an annex. *See* UNEP/OzL.Pro.21/8, available at *http://ozone.unep.org/Meeting_Documents/mop/21mop/MOP-21-8E.pdf.*

c. Mercury

On February 16, 2009, Daniel A. Reifsnyder, Deputy Assistant Secretary for the Environment and Sustainable Development, Department of State, made a statement to the Committee of the Whole at the twenty-fifth meeting of the Governing Council of the United Nations Environment Programme ("UNEP"),

lending U.S. support for the development of a global legally binding instrument on mercury. Mr. Reifsnyder's statement, excerpted below, is available at *www.state.gov/g/oes/rls/remarks/2009/117504.htm*. On February 20, 2009, the United States joined consensus on the UNEP Governing Council in adopting Decision 25/5, which, among other things, requested UNEP's Executive Director to convene an intergovernmental committee to negotiate a global legal binding instrument on mercury.

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We are prepared, Mr. Chairman, to help lead in developing a global legally binding instrument for mercury. We believe that:

- Now is the time for governments to launch an Intergovernmental Negotiating Committee (INC);
- The first negotiating session should begin this year with the goal of completing negotiations prior to the 2012 Governing Council (GC)/Global Ministerial Environment Forum (GMEF);
- The mandate of the INC should be devoted exclusively to mercury;
- It should be comprehensive, addressing all significant sources of mercury emissions, with particular attention to sectors that have the greatest global impact such as coal-fired power plants and other sources of unintentional air emissions;
- Financial resources for implementation should focus on priority issues of greatest global concern;
- It should include approaches tailored to specific emissions sectors, and contain a level of flexibility to achieve our global goals while allowing countries discretion in terms of their path to implementation.
- Governments should support the UNEP Mercury Program and Global Mercury Partnership to continue their work concurrent with the negotiations.

* * * *

It is clear that mercury is *the* most important global chemical issue facing us today that calls for immediate action. Mercury is a chemical of global concern specifically due to its long range environmental transport, its persistence in the environment once introduced, its ability to bioaccumulate in ecosystems, and its significant negative effects on human health and the environment. The United States does not support adding additional substances to an agreement on mercury, or diverting valuable time and attention to other issues by debating criteria and parameters for an adding mechanism. We urge delegates to focus on those issues where we can find agreement.

* * * *

2. Protection of Marine Environment and Marine Conservation

a. Air pollution from ships

On January 8, 2009, Annex VI to the International Convention for the Prevention of Pollution by Ships, 1973, as modified by subsequent Protocols ("MARPOL Convention"), entered into force for the United States. S. Treaty Doc. No. 108-7 (2003). *See Digest 2008* at 691–95 for background on Annex VI, "Regulations for the Prevention of Air Pollution from Ships."

b. Fish and marine mammals

(1) Illegal, unreported, and unregulated fishing

(i) Overview

On March 19, 2009, in testimony before the House of Representatives Committee on Natural Resources, Subcommittee on Insular Affairs, Oceans and Wildlife, William Gibbons-Fly, Director, Office of Marine Conservation, Bureau of Oceans, Environment and Science, Department of State, discussed U.S. efforts to strengthen efforts to combat illegal, unreported, and unregulated ("IUU") fishing. Among other

things, Mr. Gibbons-Fly noted U.S. efforts within Regional Fisheries Management Organizations ("RMFOs") to develop boarding and inspection regimes. Mr. Gibbons-Fly cited in particular the Western Central Pacific Fisheries Commission's ("WCPFC") boarding and inspection regime, which became operational in 2008. Calling the new regime "groundbreaking," Mr. Gibbons-Fly stated:

> . . . This regime is the first, and to date the only, such arrangement adopted to implement the boarding and inspection provisions of the UN Fish Stocks Agreement through a regional fisheries management organization. In negotiating these procedures under the WCPFC, we successfully established unprecedented authority for the U.S. Coast Guard to board and inspect fishing vessels on the high seas flying the flag of WCPFC members (and cooperating non-members) throughout millions of square miles of the Pacific Ocean, without the need to request and receive prior approval and authorization from the flag State. In effect, adherence to the procedures themselves constitutes advance authorization from the flag State, in a manner fully consistent with the sovereignty exercised by flag States over their vessels operating on the high seas.
>
> Since the arrangement became operational early in 2008, [the] Coast Guard has conducted a number of inspections throughout the Convention Area on vessels of various flags. I am pleased to note that the reports received from the flag State authorities of the vessels in question have been uniformly positive; reaffirming that, in each case, these inspections have been conducted in an efficient and respectful manner, in full accordance with the established procedures and relevant provisions of international law.

The full text of Mr. Gibbons-Fly's written testimony is available at *http://resourcescommittee.house.gov/images/Documents/20090319iaow/testimony_gibbons-fly.pdf*. The boarding and inspection procedures, which the WCPFC adopted in December 2006 pursuant to Article 26 of the Convention on the Conservation and Management of Highly Migratory

Fish Stocks in the Western and Central Pacific Ocean, are available at *www.wcpfc.int/doc/cmm-2006-08/western-and-central-pacific-fisheries-commission-boarding-and-inspection-procedures*. *See also* the related testimony of Rear Admiral Sally Brice-O'Hara, Deputy Commandant for Operations, U.S. Coast Guard, available at *http://resourcescommittee.house.gov/images/Documents/20090319iaow/testimony_brice-ohara.pdf*.

(ii) Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

On November 22, 2009, with strong U.S. support, the Food and Agriculture Organization ("FAO") Conference approved the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. The United States signed the agreement on the same day and as of the end of 2009 was working actively to become a party to it. The agreement reflects the U.S. commitment to establish legally binding international instruments to combat IUU fishing. According to a State Department press statement issued on August 28, 2009:

> The agreement represents a step forward in the fight against illegal, unreported and unregulated fishing. It is the hope of the United States that the treaty will receive widespread adherence and full implementation. The guiding premise of the treaty is to make illegal, unreported and unregulated fishing more costly and more risky for those who continue to undermine fisheries rules.

See www.state.gov/r/pa/prs/ps/2009/aug/128418.htm.

The agreement sets minimum standards that parties must follow to deny port access to ships carrying fish caught in an illegal, unreported, or unregulated way and to prevent vessels known to be involved in IUU fishing from accessing port services. The agreement adopts the definition of IUU fishing used in the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported or Unregulated

Fishing, but notes also in Article III, paragraph 3 that fishing activity is IUU if it is illegal, or unreported, or unregulated, such that only one of these criteria need be met. Article III(3) thereby addresses criticism that the definition of IUU fishing in the FAO International Plan of Action does not make clear whether barred fishing could be any one of the three categories or must be all three. For additional details on the agreement, see *ftp://ftp.fao.org/docrep/fao/meeting/018/k6339e.pdf*. The FAO International Plan of Action is available at *www.fao.org/fishery/ipoa-iuu/legal-text/en*.

(iii) Report to Congress on Implementation of Title VI of the Magnuson-Stevens Fishery and Conservation Reauthorization Act of 2006

In January 2009 the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration ("NMFS") submitted its first biennial report to Congress pursuant to § 406 of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2007 ("MSRA"), Pub. L. No. 109-479, 120 Stat. 3575, 3633. For background on the MSRA, see *Digest 2007* at 706–9. The report, as the MSRA requires, identified France, Italy, Libya, Panama, the People's Republic of China, and Tunisia as states having vessels engaged in IUU fishing or bycatch of protected living marine resources ("PLMRs").

In testimony before the Subcommittee on Insular Affairs, Oceans and Wildlife of the U.S. House of Representatives Committee on Natural Resources on March 19, 2009, Dr. Rebecca Lent, Director, Office of International Affairs, NMFS, discussed the steps the United States had taken to encourage the countries identified in the report to address the IUU fishing described in the report. As Dr. Lent explained in her written statement:

> Working through the Department of State, NOAA has contacted relevant officials in each of the identified nations to initiate formal consultations. The U.S. government is committed to working cooperatively to address

> IUU fishing with these nations, including bilaterally and through relevant multilateral fora. Progress made bilaterally and multilaterally in addressing the IUU activity will inform the last step of our domestic process, which is to certify to Congress whether appropriate corrective action has been taken by the identified nations, or whether the relevant international fishery management organization has implemented measures that are effective in ending IUU fishing activity. The failure of an identified nation to take sufficient corrective action, as determined by the Secretary of Commerce, may lead to denial of port privileges for fishing vessels of that nation, prohibitions on the importation of certain fisheries products from that nation into the United States, and other measures.
>
> In response to the outreach conducted by the U.S. government, several identified nations have provided information indicating that positive steps have been taken to address the IUU fishing activity described in the biennial report to Congress. NOAA is hopeful that outreach and cooperative engagement with these nations will lead to further progress.

The full text of Dr. Lent's written testimony is available at *http://resourcescommittee.house.gov/images/Documents/20090319iaow/testimony_lent.pdf*. Excerpts follow from the report, summarizing its contents and discussing the statutory requirement for its list of states. The full text of the report is available at *www.nmfs.noaa.gov/msa2007/docs/msra_biennial_report_011309.pdf*.

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. . . Title IV of the MSRA amends the High Seas Driftnet Fishing Moratorium Protection Act (Moratorium Protection Act) to require the Secretary of Commerce to produce a biennial report to Congress that includes: the state of knowledge on the status of international living marine resources shared by the United States or subject to treaties or agreements to which the United States is

a party; a list of nations the United States has identified as having vessels engaged in IUU fishing and/or bycatch of PLMRs; a description of efforts taken by nations on those lists to take appropriate corrective action consistent with the Act; progress at the international level to strengthen the efforts of international fishery management organizations to end IUU fishing; and the steps taken by the Secretary at the international level to adopt measures comparable to those of the United States to reduce the impacts of fishing and other practices on PLMRs.

* * * *

[IX.A.] IUU. As amended by the MSRA, Section 607 of the Moratorium Protection Act requires the Secretary of Commerce to submit a report to Congress, by not later than two years after the date of enactment of the MSRA and every two years thereafter, a report that, *inter alia*, lists nations whose vessels have been identified as having fishing vessels engaged in IUU fishing pursuant to Section 609(a) of the Moratorium Protection Act. Section 609(a), in turn, provides that the Secretary shall identify a nation with regard to IUU fishing if:

> "fishing vessels of that nation are engaged or have been engaged at any point during the preceding two years in IUU fishing—
>
> (1) the relevant international fishery management organization has failed to implement effective measures to end the illegal, unreported, or unregulated fishing activity by vessels of that nation or the nation is not a party to, or does not maintain cooperating status with, such organization; or
> (2) where no international fishery management organization exists with a mandate to regulate the fishing activity in question."

The Act also defines IUU fishing, a definition that has been adopted by NMFS for purposes of implementation (72 Fed. Reg. 18404, April 12, 2007):

> (A) "fishing activities that violate conservation and management measures required under an international

fishery management agreement to which the United States is a party, including catch limits or quotas, capacity restrictions, and bycatch reduction requirements;

(B) overfishing of fish stocks shared by the United States, for which there are no applicable international conservation or management measures or in areas with no applicable international fishery management organization or agreement, that has adverse impacts on such stocks; and

(C) fishing activity that has an adverse impact on seamounts, hydrothermal vents, and cold water corals located beyond national jurisdiction, for which there are no applicable conservation or management measures or in areas with no applicable international fishery management organization or agreement."

As Section 609(a) refers to activities of "vessels," for purposes of identification for IUU fishing activities, a nation must have more than one vessel engaged in IUU fishing activities during the relevant time period for consideration, which is the "preceding two years" from submission of the biennial report to Congress. Information concerning activities outside that time period cannot form the basis for an identification decision. In this first identification report, NMFS is relying upon information related to vessels engaged in IUU fishing activities as the basis for identification of a nation. NMFS has concerns about other non-compliant activities, such as non-compliance with RFMO reporting and other requirements. However, it is not clear whether these actions (or failures to take required actions) appropriately can be the bases of identification because they may not reflect actions by specific vessels, as contemplated by the existing statutory language as a potential requirement for identification. We are, however, also including information about other non-compliant activities within this Report to demonstrate NMFS's concerns about the extent of such violations. Current statutory provisions do not appear to allow for identification in the absence of some linkage to the activity of vessels.

It is also worth noting that any entity other than a "nation" cannot be identified for having vessels engaged in IUU fishing activity for purposes of the Moratorium Protection Act. Thus, fishing

entities and other governance arrangements and institutions cannot be identified under this statute. Moreover, as noted above, IUU fishing is limited to fishing activities that violate conservation and management measures required under an international fishery management agreement to which the United States is party; overfishing of stocks shared by the United States (which precludes stocks found solely within the EEZ of another nation) to which no international conservation or management measures apply, where the overfishing has adverse impacts on the stocks; or fishing activity with adverse impact on seamounts, hydrothermal vents, or cold water corals, to which no conservation and management measures apply. Activities that fall outside this definition, likewise, cannot form the basis of an identification decision.

PLMR Bycatch. As amended by the MSRA, Section 607 of the Moratorium Protection Act also requires that the biennial report to Congress list those nations whose vessels have been identified pursuant to Section 610(a) of the Moratorium Protection Act as having vessels engaged in fishing activities or practices that result in bycatch of PLMRs. Section 610(a) requires that the Secretary identify a nation for bycatch activities if:

(1) "fishing vessels of that nation are engaged, or have been engaged during the preceding calendar year in fishing activities or practices;
   (A) in waters beyond any national jurisdiction that result in bycatch of a protected living marine resource, or
   (B) beyond the exclusive economic zone of the United States that result in bycatch of a protected living marine resource shared by the United States;
(2) the relevant international organization for the conservation and protection of such resources or the relevant or regional fishery organization has failed to implement effective measures to end or reduce such bycatch, or the nation is not a party to, or does not maintain cooperating status with, such organization; and
(3) the nation has not adopted a regulatory program governing such fishing practices designed to end or reduce such bycatch that is comparable to that of the United States, taking into account different conditions."

"Protected living marine resource" is defined by Section 610 (e) of the Moratorium Protection Act as:

(1) "non-target fish, sea turtles, or marine mammals that are protected under United States law or international agreement, including the Marine Mammal Protection Act, the Endangered Species Act, the Shark Finning Prohibition Act, and the Convention on International Trade in Endangered Species of Wild Flora and Fauna; but
(2) does not include species, except sharks, managed under the Magnuson-Stevens Fishery Conservation and Management Act, the Atlantic Tunas Convention Act, or any international fishery management agreement."

Thus, identification of nations for bycatch activities can be based only on current activities of fishing vessels of that nation, or activities in which those vessels have been engaged during the preceding calendar year from submission of the biennial report to Congress. Activities outside that timeframe cannot form the basis for identification. Likewise, the statute restricts action to activities that result in the bycatch of PLMRs, as defined under the Moratorium Protection Act, where the relevant international conservation organization has failed to implement effective measures to end or reduce such bycatch or the nation is not a party to or a cooperating partner with such organization; and the nation has not adopted a regulatory program governing such fishing practices that is comparable to that of the United States, taking into account different conditions. Bycatch activities that fail to meet these standards cannot form the basis for identification.

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(2) Commission for the Conservation of Antarctic Marine Living Resources

(i) U.S. adoption of CCAMLR conservation measures

On February 12, 2009, the Department of State's Office of Ocean Affairs and the Department of Commerce, National

Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NMFS") published the conservation and management measures adopted by the Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR") at its twenty-seventh meeting in 2008. 74 Fed. Reg. 7110 (Feb. 12, 2009); *see also Digest 2008* at 712–13. The Federal Register notice explained that:

> . . . All the measures were agreed upon in accordance with Article IX of the Convention for the Conservation of Antarctic Marine Living Resources (the Convention). Measures adopted restrict overall catches of certain species of finfish, squid, krill, and crabs, restrict fishing in certain areas, restrict use of certain fishing gear, specify implementation and inspection obligations supporting the Catch Documentation Scheme of Contracting Parties, promote compliance with CCAMLR measures by non-Contracting Party vessels, and require vessels engaged in bottom fishing to report data on benthic organisms recovered by their gear. . . .

The notice sought public comments on the proposed measures, noting that "[u]nder Article IX(6)(c) of the Convention, the United States has 90 days after the November 12, 2008, notification by the Commission to consider the Conservation Measures agreed to at the Twenty-Seventh Meeting of CCAMLR and respond to the Secretariat of CCAMLR that we are unable to accept a Conservation Measure(s)."

On June 17, 2009, NMFS published a Federal Register notice stating that the United States had accepted the measures and that the measures would take effect on that day. The notice also included summaries of the 22 new measures and two resolutions CCAMLR adopted in 2008. 74 Fed. Reg. 28,668 (June 17, 2009).

(ii) Protection of vulnerable marine ecosystems: Bottom fishing

The United States participated in the twenty-eighth meeting of the Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR"), October 26–November 6,

2009, in Hobart, Australia. During the meeting, the United States expressed concern that CCAMLR's Scientific Committee had not been able to analyze the anticipated impact on vulnerable marine ecosystems ("VMEs") of two states' proposed fishing activities for the 2009/10 season. The Committee could not conduct its review, as CCAMLR Conservation Measure 22-06 requires, because the two states did not submit their preliminary impact assessments in a timely manner. The U.S. delegation noted that CCAMLR adopted the Conservation Measure in response to the 2006 UN General Assembly Resolution on Sustainable Fisheries, which called on regional fisheries management organizations ("RFMOs") to assess the potential impact of individual bottom fishing activities on VMEs and to ensure that any activities assessed as having significant adverse impacts are managed to prevent those impacts or are not authorized to proceed. U.N. Doc. A/RES/61/105. The U.S. delegation stated that CCAMLR's ability to prevent significant adverse impacts to VMEs is severely weakened when its Scientific Committee cannot evaluate the preliminary impact assessments states submit concerning their proposed fishing activities.

(3) South Pacific Regional Fisheries Management Organization treaty negotiations

On November 14, 2009, negotiations to establish a regional fisheries management organization ("RFMO") in the South Pacific Ocean concluded with the adoption of the Convention on the Conservation and Management of High Seas Resources of the South Pacific Ocean. Once the treaty enters into force, the new RFMO will manage non-highly migratory species and address the impact of fisheries on vulnerable marine ecosystems. The convention is a best-practices fisheries management treaty that draws on the agreements establishing RFMOs in the Pacific, Indian, and Atlantic oceans (the Western and Central Pacific Fisheries Convention ("WCPFC"), the Southern Indian Ocean Fisheries Agreement ("SIOFA"), and the South East Atlantic Fisheries Organization ("SEAFO")). It also

contains a new feature, concerning decision-making procedures for the commission the treaty establishes. Articles 16 and 17, as well as Annex II, establish an objection procedure that applies when states parties cannot reach consensus within the commission, with limited bases for objections and the opportunity for a panel review.

(4) North Pacific Regional Fisheries Management Organization treaty negotiations

During 2009 negotiations continued to establish an RFMO for the North Pacific. Russia, Korea, Japan, and the United States began the negotiating process in 2006, with the aim of addressing bottom fishing activities in the Emperor Sea Mounts in the Northwest Pacific. At the urging of the United States, the negotiations have expanded to develop a treaty to cover the entire North Pacific (the southern boundary of which remains to be determined) and to cover all fisheries resources not already managed by another treaty body.

d. Sea turtle conservation and shrimp imports

On May 1, 2009, the Department of State made its annual certifications related to conservation of sea turtles. The Supplementary Information section of the Federal Register notice, excerpted below, explained the Department's action and the applicable legal framework. 74 Fed. Reg. 21,048 (May 6, 2009).

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Section 609 of Public Law 101-162 prohibits imports of certain categories of shrimp unless the President certifies to the Congress not later than May 1 of each year either: (1) That the harvesting nation has adopted a program governing the incidental capture of sea turtles in its commercial shrimp fishery comparable to the program in effect in the United States and has an incidental take rate comparable to that of the United States; or (2) that the fishing

environment in the harvesting nation does not pose a threat of the incidental taking of sea turtles. The President has delegated the authority to make this certification to the Department of State. Revised State Department guidelines for making the required certifications were published in the *Federal Register* on July 2, 1999 (Vol. 64, No. 130, Public Notice 3086).

On May 1, 2009, the Department certified 15 nations on the basis that their sea turtle protection programs are comparable to that of the United States: Belize, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Madagascar, Mexico, Nicaragua, Nigeria, Pakistan, Panama, Suriname, and Venezuela.

The Department also certified 24 shrimp harvesting nations and one economy as having fishing environments that do not pose a danger to sea turtles. Sixteen nations have shrimping grounds only in cold waters where the risk of taking sea turtles is negligible. They are: Argentina, Belgium, Canada, Chile, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Russia, Sweden, the United Kingdom, and Uruguay. Eight nations and one economy only harvest shrimp using small boats with crews of less than five that use manual rather than mechanical means to retrieve nets, or catch shrimp using other methods that do not threaten sea turtles. Use of such small-scale technology does not adversely affect sea turtles. The eight nations and one economy are: the Bahamas, China, the Dominican Republic, Fiji, Hong Kong, Jamaica, Oman, Peru and Sri Lanka.

The 2009 recommendation for certification changes Costa Rica's status by de-certifying that country. For several years, OES/OMC [the State Department's Bureau of Oceans and International Environmental and Scientific Affairs Office of Marine Conservation] has been accumulating data, both through certification visits and from credible third-party sources suggesting that Costa Rica's program did not provide sanctions for TED violations that served as an effective deterrent against the failure to use TEDs. In meetings with senior Costa Rican fisheries officials during the December 2008 certification visit, the State Department representative stressed that without rapid remedial action Costa Rica's certification might be compromised. Costa Rican officials were aware of the issue and promised to resolve it early in 2009. However, the

United States Embassy in San Jose reports that since that December visit Costa Rican authorities have not taken all the action they promised. Additionally, third parties, including Costa Rican Non-Governmental Organizations (NGOs), have written OES/OMC saying that TED violations in Costa Rica still go unpunished. Because of Costa Rica's ineffective enforcement mechanism for TEDs violations, the State Department has concluded that Costa Rica's regulatory program governing the incidental take of sea turtles is not currently comparable to that of the United States.

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e. Land-based sources and activities, Wider Caribbean Region

On February 13, 2009, the United States deposited its instrument of ratification of the Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, with Annexes ("LBS Protocol"), done at Oranjestad, Aruba, on October 6, 1999. S. Treaty Doc. No. 110-1 (2007). For background, see *Digest 2007* at 724–28 and *Digest 2008* at 715–16. As of the end of 2009, the LBS Protocol had not yet entered into force.

3. Other Conservation Issues

a. Transboundary oil and gas resources

(1) International Law Commission questionnaire

On May 8, 2009, the United States responded to a questionnaire on transboundary oil and gas resources that the International Law Commission's Working Group on Shared Natural Resources had developed. The U.S. response is set forth below (internal cross references and attachments omitted) and is also available in full at *www.state.gov/s/l/c8183.htm*.

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1. Do you have any agreement(s), arrangement(s) or practice with your neighboring State(s) regarding the exploration and exploitation of transboundary oil and gas resources or for any other cooperation for such oil or gas? Such agreements or arrangement should include, as appropriate, maritime boundary delimitation agreements, as well as unitization and joint development agreements or other arrangements. Please provide a copy of the agreement(s) or arrangement(s) or describe the practice.

Aside from certain provisions in one maritime boundary treaty with Mexico (described below), the United States has not entered into any international agreements or arrangements, nor established any practice with neighboring States, in relation to transboundary oil and gas reservoirs along the U.S. maritime or continental shelf boundaries with Mexico or Canada. We also are not aware that any such transboundary reservoirs have been identified. The United States also has identified no agreements, arrangements or established practice with its neighboring States specific to the exploration and exploitation of transboundary oil and gas resources along its land boundaries.

The United States has two maritime boundary and delimitation agreements with Mexico. The first is the U.S.–Mexico Treaty on Maritime Boundaries (signed at Mexico City May 4, 1978; entered into force November 13, 1997), which establishes the maritime boundary between the United States and Mexico out to 200 miles in the Gulf of Mexico and the Pacific Ocean, using the principle of equidistance. This agreement does not address the exploration or exploitation of transboundary oil and gas resources. In addition, the agreement left two "gaps," or areas outside the EEZ [Exclusive Economic Zone] jurisdiction of either state: one in the eastern Gulf (which concerned Mexico, Cuba, and the United States), and one in the western Gulf (which concerned the United States and Mexico).

To address the gap in the western Gulf, the United States and Mexico concluded the Treaty on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles, with annexes (signed at Washington June 9, 2000; entered into force January 17, 2001) ("Western Gap Treaty"). Again, applying the principle of equidistance, the agreement allots 62% of the 17,190 km2 area to Mexico and 38% to the United States. The agreement also established a "buffer zone" extending 1.4 nautical

miles on either side of the boundary in the Western Gap, within which neither party may engage in drilling or exploitation of the continental shelf for a period of ten years.

While utilization and joint development arrangements were not part of this agreement, the agreement does address the subject of possible oil and gas transboundary reservoirs. In particular, the agreement requires each Party, in accordance with its national laws and regulations, to facilitate requests from the other Party to authorize geological and geophysical studies to help determine the possible presence and distribution of transboundary reservoirs. In addition, each Party is required to share geological and geophysical information in its possession in order to determine the possible existence and location of transboundary reservoirs. In the event any transboundary reservoir is identified, moreover, the agreement obligates the Parties "to seek to reach agreement for the efficient and equitable exploitation of such transboundary reservoirs." *See* art. V(1)(b).

2. Are there any joint bodies, mechanisms or partnerships (public or private) involving exploration, exploitation or management of the transboundary oil or gas?

We have identified no joint bodies, partnerships or formal mechanisms with Mexico or Canada to address exploration, exploitation and management of transboundary oil or gas. Along its maritime boundary, the United States itself does not engage in these forms of activity, but instead issues Outer Continental Shelf leases within U.S. jurisdiction on a competitive basis to private oil and gas companies. These leases and their operators must adhere to the U.S. laws and regulations, as well as the terms of the lease. Please see the Outer Continental Shelf Lands Act (OCSLA) and its implementing regulations, the most pertinent of which are found at 30 C.F.R. Parts 250, 256, and 260.

3. If the answer to question 1 is yes, please answer the following questions on the content of the agreements or arrangements and regarding the practice:

(a) Are there any specific principles, arrangements, or understandings regarding allocation or appropriation of oil and gas, or other forms of cooperation?

There are no principles, arrangements, or understandings regarding allocation or appropriation of oil and gas production from transboundary reservoirs, as no transboundary reservoirs have been identified along the U.S. maritime boundary. The only forms of cooperation concern data sharing and other limited forms of cooperation described in the Western Gap Treaty with regard to possible transboundary reservoirs.

(b) Are there any arrangements or understandings or is there any practice regarding prevention and control of pollution or regarding other environmental concerns, including mitigation of accidents?

Because the United States has no arrangements or practices regarding the exploration and exploitation of transboundary oil and gas resources, there are no related arrangements or understandings regarding pollution prevention and control or other environmental concerns. As a domestic matter, oil and gas operators operating in areas under U.S. jurisdiction are required to follow all U.S. laws and regulations, many of which relate to pollution and environmental issues. For example, see generally the OCSLA, and specifically its implementing regulations at 30 C.F.R. Part 250. In addition, U.S. Government inspectors visit and inspect offshore facilities regularly to ensure that all equipment and facilities comply with regulatory requirements.

4. Please provide any further comments or information, including legislation, judicial decisions, which you consider relevant or useful to the Commission in the consideration of issues regarding oil and gas.

There is no U.S. legislation or judicial decision specifically addressing transboundary reservoirs at this time and the relevant agency in the federal government currently lacks domestic legislative authority to enter into a cooperative development arrangement (such as a joint plan, allocation, or unitization arrangement) with a neighboring State. Our Outer Continental Shelf operators are subject to a number of laws and regulations, including provisions for domestic unitization arrangements between leaseholders in certain circumstances. In general, operators are allowed to explore, develop, and produce hydrocarbons from their leased acreage pursuant to the "modern rule of capture," which requires

(for example) resource conservation practices and maximizing ultimate recovery from resource reservoirs.

5. Are there any aspects in this area that may benefit from further elaboration in the context of the Committee's work?

The United States believes that state practice in the area of transboundary oil and gas resources is divergent and relatively sparse, and that specific resource conditions likewise vary widely. In addition, development of oil and gas resources, including transboundary resources, entails very sensitive political and economic considerations. Given these factors, the United States does not believe it would be helpful or wise for the Commission to study this area further or attempt to extrapolate rules of customary international law from limited practice.

(2) International Law Commission report to the General Assembly

On October 30, 2009, Mark A. Simonoff, Counselor, U.S. Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee on the report of the International Law Commission ("ILC" or "Commission") on the work of its sixty-first session. As excerpted below, Mr. Simonoff expressed the U.S. view that the ILC should not include oil and gas issues in its consideration of the issue of shared natural resources. The full text of Mr. Simonoff's statement is available at *www.state.gov/s/l/c8183.htm*; the ILC report is available at *http://untreaty.un.org/ilc/reports/2009/2009report.htm*.

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We note that the Commission has endorsed a process for obtaining and reviewing information to help decide whether to address transboundary oil and gas resources. As part of this process, the Commission plans to re-circulate a questionnaire asking States about their practice regarding transboundary oil and gas deposits, and seeking views about whether there are oil and gas issues that can usefully be addressed by the Commission. The United States

has been constructively engaged in this discussion and submitted a response to the questionnaire when it was previously circulated.

As we stated in our response to the questionnaire and elsewhere, we ultimately do not support inclusion of oil and gas issues in the Commission's consideration of shared natural resources. State practice in the area of transboundary oil and gas resources is divergent, essentially bilateral, and relatively sparse. Also, the subject matter is highly technical, and specific resource conditions vary widely. Given the political and economic stakes in oil and gas resources, states are well aware of the issues surrounding oil and gas and therefore are not in as much need of instruction or encouragement by the Commission in dealing with such resources.

Thus, we believe that it would not be a productive exercise for the Commission to try to extrapolate customary international law, common principles, or best practices from the divergent and sparse state practice in this area.

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b. Forest conservation

On June 30, 2009, the United States and Indonesia entered into agreements to protect Indonesia's tropical forests, financed by relief from debt owed to the United States and contributions from two non-governmental organizations, Conservation International and Yayasan Keanekaragaman Hayati Indonesia ("KEHATI"). A Department of State press release describing the agreement is excerpted below and available at *www.state.gov/r/pa/prs/ps/2009/06a/125500.htm*.

The Governments of the United States of America and the Republic of Indonesia, together with two environmental NGOs, Conservation International and Yayasan Keanekaragaman Hayati Indonesia (KEHATI), have signed agreements for the largest debt-for-nature swap under the Tropical Forest Conservation Act (TFCA) since its passage in 1998. The agreements will reduce Indonesia's debt payments to the United States Government by nearly $30 million over

the next eight years. In return, the Government of Indonesia has committed these funds to support grants to protect and restore the country's tropical forests.

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The swap is made possible through contributions of $20 million by the U.S. Government under the TFCA and a combined donation of $2 million from Conservation International and KEHATI. Grants provided under the TFCA program will support activities such as conserving protected areas, improving natural resource management and supporting the development of sustainable livelihoods for communities that rely on forests.

The Indonesia agreement marks the 15th TFCA deal, following agreements with Bangladesh, Belize, Botswana, Colombia, Costa Rica, El Salvador, Guatemala, Jamaica, Panama (two agreements), Paraguay, Peru (two agreements) and the Philippines. Over time, these debt-for-nature programs together will generate more than $218 million to protect tropical forests.

c. Antarctic Treaty

(1) Fiftieth anniversary commemoration

On April 6–17, 2009, the United States hosted the Thirty-Second Antarctic Treaty Consultative Meeting in Baltimore, Maryland, at which participants commemorated the fiftieth anniversary of the signing of the Antarctic Treaty. The Antarctic Treaty was signed in Washington on December 1, 1959, and it entered into force on June 23, 1961. 12 U.S.T. 794; T.I.A.S. 4780; 402 UNTS 71. The United States serves as depositary for the treaty.

To begin the meeting, a ministerial-level gathering at the State Department in Washington, D.C., the United States hosted the first-ever joint session of the Antarctic Treaty Consultative Meeting and the Arctic Council on April 6. Secretary of State Clinton stressed the continuing importance of the Antarctic Treaty in remarks to the joint session on April 6.

Secretary Clinton's statement, excerpted below, is available at *www.state.gov/secretary/rm/2009a/04/121314.htm*.

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In 1959, representatives from 12 countries came together in Washington to sign the Antarctic Treaty, which is sometimes referred to as the first arms control agreement of the Cold War. Today, 47 nations have signed it. And as a result, Antarctica is one of the few places on earth where there has never been war. Other than occasional arguments among scientists and those stationed there over weighty matters having to do with sports, entertainment, and science, there has been very little conflict.

* * * *

The genius of the Antarctic Treaty lies in its relevance today. It was written to meet the challenges of an earlier time, but it and its related instruments remain a key tool in our efforts to address an urgent threat of this time, climate change, which has already destabilized communities on every continent, endangered plant and animal species, and jeopardized critical food and water sources.

Climate change is shaping the future of . . . our planet in ways we are still striving to understand. But the research made possible within the framework of the Antarctic Treaty has shown us that catastrophic consequences await if we don't take action soon. The framers of the treaty may not have foreseen exactly the shape of climate change, but their agreement allowed scientists to model its effects, including glaciologists studying the dynamics of ice, biologists exploring the effects of harsh temperatures on living organisms, geophysicists like those who discovered the hole in the ozone layer above Antarctica that prompted the ban embodied in the 1987 Montreal Protocol. . . .

So the treaty is a blueprint for the kind of international cooperation that will be needed more and more to address the challenges of the 21st century, and it is an example of smart power at its best. . . .

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The United States stands in strong support of both the Antarctic Treaty and its purpose: to maintain . . . Antarctica as a place of peace and to use the science that can only be performed there to benefit the entire planet.

* * * *

In her statement, Secretary Clinton also discussed U.S. proposals for the Consultative Parties of the Antarctic Treaty to consider during their meeting. Secretary Clinton described the proposals as follows:

> The United States has also submitted a proposal to the Consultative Parties of the Antarctic Treaty to extend marine pollution rules in a manner that more accurately reflects the boundaries of the Antarctic ecosystem. Strengthening environmental regulation is especially important as tourism to . . . Antarctica increases. The United States is concerned about the safety of the tourists and the suitability of the ships that make the journey south. We have submitted a resolution that would place limits on landings from ships carrying large numbers of tourists. We have also proposed new requirements for lifeboats on tourist ships to make sure they can keep passengers alive until rescue comes. And we urge greater international cooperation to prevent discharges from these ships that will further degrade the environment around . . . Antarctica.

During their meeting, the Consultative Parties adopted Measure 15, "Landing of persons from passenger vehicles in the Antarctic treaty area," which contained all substantive aspects of the U.S. proposal for limiting landings from ships carrying large numbers of tourists. That proposal and the other U.S. proposals are available in Part IV.2. of the final report on the meeting, available at *www.ats.aq/documents/atcm_fr_images/ATCM32_fr001_e.pdf*.

(2) Ministerial declaration

On April 6, 2009, the Consultative Parties to the Antarctic Treaty adopted the "Antarctic Treaty Consultative Meeting

XXXII Washington Ministerial Declaration on the Fiftieth Anniversary of the Antarctic Treaty." In the declaration, the Consultative Parties "reaffirm[ed] their continued commitment to the objectives and purposes of the Antarctic Treaty and the other elements of the Antarctic Treaty system." Among other things, the Consultative Parties also

> 2. *[r]eaffirm[ed]* the importance of the Treaty's provisions guaranteeing freedom of scientific investigation and reserving Antarctica exclusively for peaceful purposes, free from measures of a military nature;
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> * * * *
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> 4. *[u]nderscore[d]* the importance of the Protocol on Environmental Protection to the Antarctic Treaty;
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> 5. *[r]eaffirm[ed]* their commitment to Article 7 of the Environmental Protocol, which prohibits any activity relating to mineral resources, other than scientific research;
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> 6. *[u]nderline[d]* the importance of cooperation related to the conservation of living marine resources and strengthened implementation under the Convention on the Conservation of Antarctic Marine Living Resources; [and]
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> * * * *
>
> 8. . . . *[e]ncourage[d]* other States that are committed to the objectives of the Antarctic Treaty to accede [to it] in accordance with their terms. . . .

The full text of the declaration is available at *www.state.gov/g/oes/rls/other/2009/121339.htm.*

(3) Annex on Liability Arising from Environmental Emergencies

On April 2, 2009, President Obama transmitted to the Senate for its advice and consent to ratification Annex VI on Liability Arising from Environmental Emergencies to the Protocol on Environmental Protection to the Antarctic Treaty ("Annex VI").

S. Treaty Doc. No. 111-2 (2009). Annex VI, which was adopted at Stockholm on June 14, 2005, has not yet entered into force for any state. The Protocol on Environmental Protection to the Antarctic Treaty ("Protocol") together with its Annexes I–IV, adopted at Madrid on October 4, 1991, and Annex V to the Protocol, adopted at Bonn on October 17, 1991, entered into force for the United States on January 14, 1998, and May 24, 2002, respectively. President Obama's letter transmitting Annex VI to the Senate stated:

> In Article 16 of the Protocol, the Parties undertook to elaborate, in one or more Annexes, rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by the Protocol. Annex VI sets forth rules and procedures relating to liability arising from the failure of operators in the Antarctic to respond to environmental emergencies.
>
> I believe Annex VI to be fully in the U.S. interest. Its provisions advance the U.S. goals of protecting the environment of Antarctica, establishing incentives for Antarctic operators to act responsibly, and providing for the reimbursement of costs incurred by the United States Government when it responds to environmental emergencies caused by others.

As the Department of State report, which Secretary Clinton submitted to the President on March 13, 2009, and is included in S. Treaty Doc. No. 111-2, stated:

> Pursuant to Annex VI . . . , the Parties agree to require their operators to take preventative measures and establish contingency plans for preventing and responding to environmental emergencies in the Antarctic Treaty area and to take prompt and effective response action to such emergencies arising from their activities. . . .
>
> Annex VI is not self-executing. Annex VI will require implementing legislation, which will be submitted shortly to Congress for its consideration. . . .

See Digest 2005 at 755 for additional background.

B. OTHER TRANSNATIONAL SCIENTIFIC ISSUES

Plant Genetic Resources

On November 8, 2009, Dr. Kerri-Ann Jones, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, testified before the Senate Committee on Foreign Relations in support of the International Treaty on Plant Genetic Resources for Food and Agriculture. President George W. Bush transmitted the treaty to the Senate on July 7, 2008, for advice and consent to ratification. *See* S. Treaty Doc. No. 110-19 (2008); *see also Digest 2008* at 725–27. Excerpts below from Dr. Jones's testimony describe the treaty and its significance for the United States. The full text of Dr. Jones's written statement is available at *http://foreign.senate.gov/testimony/2009/JonesTestimony091110a.pdf*.

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. . . By establishing a stable legal framework for international germplasm exchanges, this Treaty benefits both research and commercial interests in the United States. The Treaty also promotes global food security through the conservation and sustainable use of plant genetic resources for food and agriculture.

The centerpiece of the Treaty is the establishment of a "Multilateral System" for access to, and benefit-sharing regarding, certain plant genetic resources to be used for research, breeding and training for food and agriculture. The scope of the Treaty's coverage currently encompasses genetic resources of 64 crops and forages that are maintained by International Agricultural Research Centers or that are under the management and control of national governments and in the public domain. Access to covered germplasm is granted through a Standard Material Transfer Agreement, a contract that defines the terms of access and benefit-sharing. Furthermore, the Treaty provides a mechanism for enabling developing countries to acquire the capacities needed to conserve and sustainably use plant germplasm essential for food

security, including facing the global challenges associated with climate change.

The Treaty entered into force in 2004 and now has 120 Parties. The United States signed the Treaty in 2002. The President forwarded it to the Senate for consideration in July 2008, after negotiations of the Standard Material Transfer Agreement were completed. Throughout the Treaty negotiating process, the United States was firmly committed to creating a system that promotes U.S. and global food security and protects U.S. access to genetic resources held outside our borders. The United States also sought to protect the ability of the International Agricultural Research Centers—the institutions largely responsible for the "Green Revolution" which saved billions of lives—to continue to genetically improve crops that underpin global food security. The Treaty enjoys broad stakeholder support, including support for U.S. ratification from several prominent industry organizations such as the American Seed Trade Association, the National Farmers Union, the American Soybean Association, the National Association of Wheat Growers, the National Corn Growers Association, the Biotechnology Industry Organization and the Intellectual Property Owners of America.

Mr. Chairman, the Treaty is consistent with existing U.S. practice and may be implemented under existing U.S. authorities. No statutory changes are needed. The Agricultural Research Service, in its capacity as manager of the National Plant Germplasm System, would play a major role in domestic Treaty implementation. For more than 50 years, the U.S. National Plant Germplasm System has distributed samples of germplasm to plant breeders and researchers worldwide and free of charge, thereby already contributing significantly to the global effort to safeguard plant germplasm for food security, now and in the future. Consequently, the United States is already in compliance with key provisions of the Treaty, and ratification would not entail major policy or technical changes to current National Plant Germplasm System operations.

* * * *

Ratification of the Treaty would not only underscore our continued leadership but it would also help U.S. farmers and

researchers sustain and improve their crops and promote food security for future generations, not only in the United States but globally. . . .

Cross References

International Convention on Civil Liability for Oil Pollution Damage and applicability in U.S. litigation, **Chapter 4.C.1.**
World Trade Organization, **Chapter 11.C.**

Chapter 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

During 2009 the United States took action to protect cultural property in China and Honduras by placing import restrictions on certain Chinese and Honduran archaeological material, as well as certain Chinese artwork and sculpture. The United States acted pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 U.N.T.S. 231 (1972) ("1970 UNESCO Convention"), which the United States ratified in 1983 and implements through the Convention on Cultural Property Implementation Act. *See* Pub. L. No. 97-446, 96 Stat. 2329, 19 U.S.C. §§ 2601–2613. If the requirements of 19 U.S.C. § 2602 are satisfied, the President has the authority to enter into agreements to apply import restrictions for up to five years on archaeological or ethnological material of a nation that has requested such protections and has ratified, accepted, or acceded to the 1970 UNESCO Convention. The President may also impose import restrictions on cultural property in an emergency situation pursuant to 19 U.S.C. §§ 2603 and 2604.

1. China

On January 14, 2009, the United States and China signed a Memorandum of Understanding ("MOU") concerning the

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imposition of import restrictions on certain archaeological objects, monumental sculpture, and wall art from China. This action was based on determinations by the Department of State's Bureau of Educational and Cultural Affairs, finding among other things that the cultural heritage of China was "in jeopardy from the pillage of irreplaceable archaeological materials representing China's cultural heritage." 74 Fed. Reg. 2838, 2839 (Jan. 16, 2009). Background information provided by the Department of State's Bureau of Educational and Cultural Affairs is excerpted below. Further information and links to related documents, including the text of the agreement, are available at *http://exchanges.state.gov/heritage/culprop/chfact.html.*

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The U.S. action is in response to a request from [the] Government of the People's Republic of China seeking protection of its cultural heritage made under Article 9 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

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Signed on the occasion of the 30th anniversary of diplomatic relations between the two countries, the MOU establishes a means of cooperation to reduce the incentive for archaeological pillage and illicit trafficking in cultural objects that threaten China's ancient heritage. The MOU also aims to further the international interchange of such materials for cultural, educational, and scientific purposes. To that end, China has agreed to promote long-term loans of archaeological objects to museums. . . .

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The categories of archaeological materials covered by the import restriction include objects made of ceramic, stone, metal, bone, ivory, horn, shell, silk, lacquer, wood, paper, and glass. The time period covered extends from the Paleolithic Era (beginning about 75,000 B.C.) through the end of the Tang Dynasty, A.D. 907.

Also subject to import restriction are elements of monumental sculpture and other wall art that are at least 250 years old.

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[Restricted objects] may enter the U.S. only if they are accompanied by an export permit issued by the appropriate authority in the Government of China, or by documentation indicating that they left China prior to the effective date of the restriction: January 16, 2009.

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2. Honduras

Effective March 12, 2009, the United States and Honduras extended their existing Memorandum of Understanding ("MOU") concerning the imposition of import restrictions on certain pre-Columbian archaeological objects from Honduras. The two countries also amended Article II of the MOU, which sets forth additional measures for each government to take to protect Honduras's cultural patrimony. In one new paragraph of Article II, for example, both governments agreed "to encourage Honduran and U.S. museums and academic institutions to collaborate in ways they deem beneficial, such as traveling exhibits and long term loans of objects, to the extent permitted by the laws of both countries, and under circumstances in which such exchange does not jeopardize the cultural patrimony of either country." The United States and Honduras originally agreed to the MOU on March 12, 2004 (69 Fed. Reg. 12,267 (Mar. 16, 2004)), and the 2009 extension remains effective for five years.

A statement issued by the Department of State's Office of the Spokesman on March 11, 2009, explained that the extension of the MOU recognizes that Honduras's pre-Columbian heritage "is in jeopardy from pillage" and "enables the imposition of import restrictions on certain categories of archaeological material ranging in date from approximately 1200 B.C. to approximately 1500 A.D., including objects made of

ceramic, metal, stone, shell, and animal bone." The U.S. statement and the exchange of diplomatic notes between Honduras and the United States concerning the MOU are available at *www.state.gov/r/pa/prs/ps/2009/03/120278.htm* and *www.state.gov/documents/organization/129819.pdf*, respectively. Further information and links to related documents, including the 2004 MOU, are available at *http://exchanges.state.gov/heritage/culprop/hnfact.html*.

B. PRESERVATION OF AMERICA'S HERITAGE ABROAD

The Commission for the Preservation of America's Heritage Abroad is an independent agency of the U.S. government established in 1985 by § 1303 of Public Law 99-83, 99 Stat. 190, 16 U.S.C. § 469j (1985). Among other things, the Commission negotiates bilateral agreements with foreign governments to protect and preserve cultural heritage. For additional background, see *II Cumulative Digest 1991–99* at 1793–94. In 2009 three agreements the Commission had concluded previously entered into force for the United States. An agreement with Italy, signed on December 18, 2008, entered into force on August 21, 2009. An agreement with Albania, signed on July 12, 2004, entered into force on October 26, 2009. An agreement with Bulgaria, signed on December 5, 2002, entered into force on November 30, 2009. The texts of the agreements are available at *www.state.gov/documents/organization/135114.pdf* (Albania), *www.state.gov/documents/organization/135117.pdf* (Bulgaria), and *www.state.gov/documents/organization/129710.pdf* (Italy).

Cross References

Underwater cultural heritage, **Chapter 12.A.9.**

Chapter 15

Private International Law

A. COMMERCIAL LAW

1. Carriage of Goods by Sea Convention

On September 23, 2009, Fay Hartog Levin, U.S. Ambassador to the Netherlands, signed the United Nations Convention on Contracts for the International Carriage of Goods, Wholly or Partly by Sea ("Rotterdam Rules") on behalf of the United States. The UN General Assembly adopted the Rotterdam Rules, which were negotiated under the auspices of the UN Commission on International Trade Law ("UNCITRAL"), on December 11, 2008. U.N. Doc. A/RES/63/122. The signing ceremony took place in Rotterdam, the Netherlands, and Ambassador Levin made a signing statement expressing strong support for the treaty and explaining its significance. Ambassador Levin's statement, excerpted below, is available at *http://thehague.usembassy.gov/news/events/events-2009/ambassador-hartog-levin-formally-signs-rotterdam-rules.html*. For additional background, see *Digest 2003* at 843–87; *Digest 2004* at 815–19; *Digest 2005* at 793–99; *Digest 2006* at 903–18; and *Digest 2008* at 743–45.

. . . The United States strongly supports this treaty. It will bring about a much-needed modernization and harmonization of transport law. Existing national laws and international conventions make up a patchwork of inconsistent and sometimes conflicting rules with significant gaps that hinder the free flow of goods and increase costs.

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The U.S. legal regime goes back to 1936 and for the most part simply enacts the 1924 Hague Rules. Even the most recent international convention on these maritime rules is a generation old. None of these could anticipate the changes that have swept through the industry, triggered by containerization and electronic commerce.

This is an exceptional occasion. Another chance to reform and update international transport law will not come anytime soon.

Before negotiations started six years ago, U.S. shipper and carrier interests established a set of common objectives for a new U.S. policy. They realized, however, that a new global regime would be preferable to a unilateral U.S. initiative.

These stakeholders, along with the U.S. Maritime Law Association, therefore agreed to defer seeking new U.S. legislation and to support U.S. Government participation in the UNCITRAL negotiations. During this negotiation, the United States worked closely with all of our industry stakeholders, including shippers, carriers, intermediaries, insurers, and inland carriers.

In fact, the negotiation saw unprecedented participation by governments, industry representatives and academics from all corners of the world. That was the key to the success of this effort. This convention adopted by the UN General Assembly represents a carefully crafted package that balances a wide span of interests.

The successful conclusion of this Convention required everyone, including the United States, to compromise. We strongly believe that Convention as a whole represents a substantial step forward.

It will govern the entire contractual period of carriage, which often includes inland transportation as well as a sea voyage. It clarifies the burdens of proof for all parties and the defenses of a carrier. It lets the shipper/plaintiff choose the place of litigation.

It lets the commercial partners negotiate a transport contract that best meets their needs while providing safeguards for those who want them. This contractual freedom is of particular importance to the United States. The provisions on contractual freedom reflect the way business is done today and correspond to practice in other areas of commercial law.

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2. UNCITRAL

a. Review of work

On October 12, 2009, Mary McLeod, Legal Adviser, U.S. Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee during its annual debate on the report of the UN Commission on International Trade Law ("UNCITRAL"). Excerpts from Ms. McLeod's statement follow, expressing strong support for UNCITRAL's work. The full text of Ms. McLeod's statement is available at *http://usun.state.gov/briefing/statements/2009/130522.htm*.

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We . . . note the completion of the UNCITRAL practice guide for cross-border "protocols" to coordinate and achieve cooperation between bankruptcy authorities and courts in various countries, on matters involving cross-border business bankruptcy cases. In view of the heightened importance of achieving international cooperation in such matters, given the economic circumstances of the past year, the timing of this achievement is particularly welcome. The guide supports implementation of the 1997 UNCITRAL Model Law on cross-border insolvency cases, which Congress enacted as part of the U.S. Bankruptcy Code effective in 2006.

The United States supports the continuing work of the Commission in its Working Groups on international procurement, commercial arbitration, secured finance and intellectual property law, and business insolvency law and looks forward to conclusion of the work of several working groups at the next Plenary Session of the Commission in 2010. We also support consideration of new work on electronic commerce, including work on "single window" projects (structured channels for electronic facilitation of import-export trade) in conjunction with the World Customs Organization (WCO), the UN Economic Commission for Europe (UNECE), the Association of Southeast Asian Nations (ASEAN), the UN

Conference on Trade and Development (UNCTAD) and others, and work on on-line electronic dispute resolution.

* * * *

At the request of developing country member states, the UN Legal Office's Trade Law Branch is exploring the feasibility of posting Secretariat professional staff, possibly on a part time basis, to collaborate with other UN bodies, and other means to better accomplish requests for technical assistance. As stated at the Plenary session, enhancing Technical Assistance, if done within existing resources, is a positive step that benefits developing countries.

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b. Working methods

In her statement during the Sixth Committee's annual debate on UNCITRAL's report, discussed in A.2.a. *supra*, Ms. McLeod stressed the need to maintain UNCITRAL's existing working methods. Ms. McLeod stated:

> The United States has joined like-minded states at the Commission in rejecting proposals over the last two years to revise rules and procedures for the Commission's work which would have the effect of sharply reducing the effectiveness of the Commission. Key issues have included the role of observer states whose views are considered in all matters except for formal voting, and technical NGOs [nongovernmental organizations], which the United States and like-minded states have supported in their role of providing needed advice and information on transactional practices and economic impacts of proposals, as the basis on which governments have assurance that solutions proposed actually work in current transactional practice. Another key issue has been the method of reaching agreement. Since 1970, the Commission has proceeded on the basis of a substantial prevailing majority, rather than full unanimity, since getting unanimous agreement on detailed commercial law texts is unworkable,

> subject always to the right of any member state to obtain a vote on any matter. Shifting to a unanimity standard (absence of objection) would substantially curtail the Commission's five-decade production of detailed commercial law treaties, model laws and other texts.

The full text of Ms. McLeod's statement is available at *http://usun.state.gov/briefing/statements/2009/130522.htm*.

3. OAS Model Secured Transaction Registry Regulations

In October 2009 the Seventh Inter-American Specialized Conference on Private International Law of the Organization of American States ("CIDIP VII") adopted the OAS Model Secured Transaction Registry Regulations ("Model Registry Regulations"), along with an accompanying commentary. U.S. officials and experts served with counterparts from Argentina, Canada, and Mexico on a special drafting committee that prepared the initial draft regulations. The drafting of the Model Registry Regulations occurred as a follow-up project to the OAS's adoption of the Model Inter-American Law on Secured Transactions ("Model Law") in 2002, and the Model Registry Regulations provide a transparent, accessible, and inexpensive framework for implementing the Model Law.

The Model Registry Regulations provide the legal structure needed for states to create a properly functioning Registry of Movable Property Security Interests, as Title IV of the Model Law provides. The Model Registry Regulations are applicable in states following either the civil or common law traditions. The regulations also provide guidance for using online technology to create an electronic registry that a small staff can operate inexpensively and that can eliminate the access problems associated with a physical registry.

The local enactment of the Model Inter-American Law and Registry Regulations by states within the Americas has the potential to reduce significantly the cost of borrowing and facilitate international trade. If enacted at the local level, the

Model Law and Model Regulations would enable a much broader segment of society, including small and medium-sized businesses, to participate in the secured lending market, since the law and regulations would expand the types of property that can be used as collateral beyond real estate, buildings, and automobiles. Some experts estimate that the Model Law and Model Registry Regulations, if fully implemented, could increase Latin American countries' economies by 8–10 percent within a decade.

4. Geneva Securities Convention

On October 5–9, 2009, the Convention on Substantive Rules for Transfers of Intermediated Securities ("Geneva Securities Convention" or "Convention") was concluded by consensus at a diplomatic conference in Geneva, Switzerland. The United States, together with more than 50 states and 15 international organizations and industry-focused nongovernmental organizations ("NGOs") participated actively in the conference, consistent with practice in international private law bodies. Once it enters into force or is applied broadly, the Convention is expected to establish the first negotiated international baseline for modern domestic and cross-border transfers of and accounts for investment securities, as well as related securities market practices. The United States participated actively in negotiating the treaty, and the final text of the Convention reflected most U.S. objectives. The United States is one of a minority of countries that have modernized their legal frameworks for electronic securities holding, transfer, and collateralization, and the Convention's conclusion is consistent with U.S. efforts to promote development of enhanced international standards concerning securities transactions. This Convention follows the negotiation of the first treaty on investment security law, the 2006 Hague Convention on Law Applicable to Intermediated Securities, which the United States signed in 2006. Together these treaties form the first effort to create a multilateral law for the securities sector.

The new Geneva Securities Convention is designed to create an international legal framework for securities holding, transfer, clearance, settlement, and collateralization. The Convention is the first multilateral effort to address gaps among most states' securities laws governing transactions, which are inadequate for many contemporary securities markets, in which "intermediates" handle securities in electronic form. While a growing number of countries are adopting versions of electronic intermediated systems, the legal framework that underlies this modern system in many countries still relies on traditional legal concepts developed for tangible assets, i.e., paper certificates recorded on company books or held in physical custody. As a result, the legal risk in the area of securities holding and disposition is particularly high. The growing interrelationship of capital markets as more securities are transferred electronically across borders, coupled with the frequent incompatibility of domestic legal frameworks, further heightens legal uncertainty. The Convention seeks to harmonize the international legal framework for intermediated securities by addressing the rights resulting from the credit of securities and other transfers to a securities account; clearance and settlement systems and the effect of systemic rules; the holding of securities by and the obligations of intermediaries; irrevocability and protection of securities transactions; priority ranking among competing interests; investor protection; loss allocation in cases of shortfall; related insolvency issues; and use and disposition of securities in collateral transactions, including basic rules for financial netting.

To help achieve compatible results for cross-border transactions among ratifying states, the Convention also addresses aspects of market systems that do not rely on electronic intermediation. For example, the Convention allows a number of declarations by which ratifying states can adjust the treaty's provisions to reflect the structure of their particular markets. In this manner, the Convention can be applied to intermediated systems like the United States', as well as to countries with more traditional markets.

Participants in the diplomatic conference agreed that the Convention's text would become authentic within 120 days after the conference, following the UNIDROIT Secretariat's technical review of the official English and French versions of the treaty to ensure conformity. Preparation of an Official Commentary to the Convention, a necessary step to ensure that states implement the treaty consistently, remained underway at the end of 2009. Once both steps occur, the United States will determine whether signing the Convention is appropriate. The text of the Convention and additional background are available at *www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm*.

5. Choice of Courts Convention

On January 19, 2009, then State Department Legal Adviser John B. Bellinger, III, signed the 2005 Hague Convention on Choice of Court Agreements ("Choice of Court Convention") on behalf of the United States in The Hague. The United States was the first country to sign the Choice of Court Convention, and Mexico had acceded to it previously. The Choice of Court Convention obligates states parties to enforce exclusive choice of court agreements in civil or commercial matters and to recognize and enforce the resulting judgments. For additional background, see the press statement issued by the Hague Conference on Private International Law on January 19, 2009, available at *www.hcch.net/index_en.php?act=events.details&year=2009&varevent=157*. The full text of the Choice of Court Convention is available at *www.hcch.net/index_en.php?act=conventions.text&cid=98*.

B. FAMILY LAW

Convention on International Recovery of Child Support and Other Forms of Family Maintenance

On October 6, 2009, Keith Loken, Assistant Legal Adviser for Private International Law, Department of State, and one other

executive branch official testified before the Senate Committee on Foreign Relations in support of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. President George W. Bush transmitted the treaty to the Senate for its advice and consent to ratification on September 8, 2008. S. Treaty Doc. No. 110-21 (2008). Mr. Loken's testimony, excerpted below, is available at *http://foreign.senate.gov/imo/media/doc/LokenTestimony091006p1.pdf*. *See also* the testimony of Vicki Turetsky, Commissioner, Office of Child Support Enforcement, Department of Health and Human Services, available at *http://foreign.senate.gov/imo/media/doc/TuretskyTestimony091006p1.pdf*, and *Digest 2008* at 751–58 and other annual volumes beginning in 2001.

. . . The Convention was negotiated over a period of several years in the Hague Conference on Private International Law, the source also of the Hague Child Abduction and Child Adoption Conventions to which the United States is a party. The views of concerned domestic stakeholders were taken into account. . . . As a result, there is broad support for the Convention among public officials and private parties who are involved in the enforcement of child support orders in the United States.

Why is this Convention needed? In an era of globalization and increased international movement of individuals, it is increasingly common to find the custodial parent and child in one country and the non-custodial parent in another. There are currently an estimated 150,000 international child support cases in the United States. We have learned that it is difficult, if not impossible, to enforce legal obligations abroad relating to child support without a treaty basis. There are existing multilateral child support conventions that date back a number of years (the most recent is more than 35 years old), but the United States is not a party to them for various reasons, for example, because the jurisdictional provisions were not consistent with U.S. law, or because we considered them ineffective in that they did not require parties to establish new child support orders or to provide cost-free services. The new Convention remedies these deficiencies.

Why is this Convention good for the United States? A major benefit is reciprocity. Although U.S. courts routinely, on the basis of comity or otherwise, recognize and enforce foreign child support orders, the same is typically not true of foreign courts. Many foreign countries will not process foreign child support requests in the absence of a treaty obligation. The United States has entered into bilateral agreements and arrangements with several countries. These instruments will remain in effect. This Convention expands upon the provisions of such instruments and includes several procedural improvements that should simplify the process of implementing child support decisions across borders. Under this Convention, more U.S. children would be able to obtain the financial support they need from a non-custodial parent located overseas. The United States obtained its key objectives in the negotiation of the Convention:

- Scope of the Convention: The Convention addresses maintenance obligations arising from a parent-child relationship and spousal support in a manner that is consistent with existing mechanisms under federal and state law in the United States.
- Jurisdiction: Jurisdictional rules in the United States differ from those in most other countries. The Convention sets forth various mandatory bases for assertion of jurisdiction over the debtor parent, but permits parties to take a reservation with respect to creditor-based jurisdiction, jurisdiction based on a written agreement, or jurisdiction based on a matter of personal status or parental responsibility. The Executive Branch recommends that, should the United States ratify the Convention, it take such a reservation, as this would be consistent with applicable U.S. jurisprudence.
- Establishment: The Convention not only addresses the recognition and enforcement of foreign child support orders, but also the establishment of a new child support decision in the requested State where that is necessary, for example, where the requested State does not recognize the jurisdictional basis of a child support order issued in the requesting State. This obligation to establish a new

decision includes an obligation to establish paternity, where necessary.

– Costs: While the Convention provides a mechanism available to foreign applicants who want to approach directly the relevant court or other authority, we anticipate that a majority of the requests will occur via the Central Authorities. Because applicants who rely on government child support enforcement mechanisms generally have limited financial resources, it was vital to U.S. negotiators that the Convention require that assistance in cases processed through Central Authorities generally be provided free of charge.

How will this Convention be implemented in the United States? The Convention would be implemented through a combination of amendments to part D of title IV of the Social Security Act and adoption by the states of amendments, already approved by the Uniform Law Commission, to the relevant uniform state law, the Uniform Interstate Family Support Act (UIFSA). It is proposed that HHS would be the Central Authority under the Convention. Since 1975, HHS has operated a Federal Parent Locator Service that will facilitate locating non-custodial parents and referring foreign cases to the appropriate state agency to provide services. Also, since 1996, HHS has acted as the Central Authority under bilateral agreements and arrangements with other countries on child support enforcement. It has the expertise, established administrative processes, and close relations with child support enforcement officials in all of the states. The State Department and HHS have cooperated effectively for many years on international child support matters.

Will other countries join the Convention? We expect so. The member states of the European Community (EC) strongly support the Convention. The European Commission has tabled with the European Council a draft proposal to ratify the Convention. . . . Canada also is a strong supporter of the Convention and we understand that the federal government there is working with the provinces and territories on implementation under Canada's federal system. We understand that other countries such as Norway and Australia are actively considering joining. The international

community is waiting to see what the United States does; U.S. ratification would send a strong signal to others. . . .

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C. INTERNATIONAL CIVIL LITIGATION

1. Concurrent and Related Proceedings in Foreign Courts

On November 17, 2009, the U.S. Court of Appeals for the Ninth Circuit issued an amended opinion, reversing and remanding a district court's decision to deny an application for an antisuit injunction. *Applied Med. Distrib. Corp. v. Surgical Co. BV*, 587 F.3d 909 (9th Cir. 2009). According to the Ninth Circuit, the litigation arose after a California corporation, Applied Medical Distribution Corp. ("Applied"), decided not to renew its distribution agreement with a Netherlands limited liability company, Surgical Company BV ("Surgical"). The agreement contained clauses providing for dispute resolution exclusively in California courts under California law, as well as a provision limiting the parties' liability in case of termination. After Surgical claimed an entitlement to compensation under Belgian law, Applied filed a summary judgment motion in federal court in California requesting that the court issue an antisuit injunction applicable outside California, including in Belgium. Applied also sought a declaration that the distribution agreement had terminated under its terms, that the agreement did not permit "goodwill indemnities," and that Surgical would receive nothing as a result of the agreement's termination. Finally, Applied sought attorneys' fees, expenses, and costs. Surgical then filed suit against Applied in Belgium.

The Ninth Circuit based its conclusion that the district court had abused its discretion in denying the antisuit injunction on two grounds. The court stated:

> First, the district court applied the wrong legal standard by requiring that the claims in the domestic and foreign

> action be "identical" instead of engaging in the more functional inquiry concerning dispositiveness required by [*E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006)]. Second, the district court relied on the clearly erroneous factual determination that Surgical's Belgian claims, other than goodwill indemnities, were available apart from termination. Because all of Surgical's claims, like goodwill indemnities, as a practical matter depend on termination of the Agreement, they all "aris[e] out of th[e] Agreement" and are subject to the forum selection clause.

Applied Med. Distrib. Corp., 587 F.3d at 914. Applying the test set out in *Gallo* for granting an antisuit injunction, the court concluded that "the claims in the two actions are functionally the same and the first action is dispositive of the action to be enjoined in the sense that all of the Belgian claims fall under the contract's forum selection clause and can be litigated and resolved in the California action." *Id.* The court also "recognize[d] California's strong policy in favor of enforcing forum selection clauses and note[d] the comity concerns that would arise if a party to a contract containing a forum selection clause were permitted to proceed with duplicative litigation challenging the rightful authority of the contractually-designated forum court." *Id.*

2. Recognition and Enforcement of Foreign Judgments and Arbitral Awards

a. Foreign arbitral award: Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic

On September 28, 2009, the U.S. Court of Appeals for the Second Circuit vacated and remanded to the district court a case in which a company based in the Cayman Islands, Frontera Azerbaijan Oil Corporation ("Frontera"), sought to confirm a Swedish arbitral award against the State Oil Company of the Azerbaijan Republic ("SOCAR"), which is

based in Azerbaijan and owned by the Azerbaijan government. *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009). Frontera based its action on Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 21 U.S.T. 2517, 330 U.N.T.S. 38, which the United States implements through 9 U.S.C. § 207. On the main issue presented, the court held that the district court correctly held that it needed personal or quasi in rem jurisdiction over SOCAR or its property to confirm the Swedish arbitral award, but incorrectly held that foreign states and their agents have due process rights under the U.S. Constitution. "SOCAR is not entitled to the Due Process Clause's jurisdictional protections if it is an agent of the Azerbaijani state," the court stated. *Id.* at 394–95. The court also overruled its contrary holding in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981). In remanding the case, the court instructed the district court to determine "(1) whether SOCAR is an agent of Azerbaijan, and if not, (2) whether SOCAR is entitled to the protections of the Due Process Clause." *Frontera Resources Azerbaijan Corp.*, 582 F.3d at 401. Excerpts follow from the court's analysis of the jurisdictional questions the case raised (footnotes omitted).

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We have previously avoided deciding whether personal or quasi in rem jurisdiction is required to confirm foreign arbitral awards pursuant to the New York Convention. *See Dardana Ltd. v. A.O. Yuganskneftegaz*, 317 F.3d 202, 207 (2d Cir. 2003). However, the numerous other courts to have addressed the issue have each required personal or quasi in rem jurisdiction. *See, e.g.*, *Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 178–79 (3d Cir. 2006); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1120–22 (9th Cir. 2002); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208,

212–13 (4th Cir. 2002); *see also Transatl. Bulk Shipping Ltd. v. Saudi Chartering S.A.*, 622 F. Supp. 25, 27 (S.D.N.Y. 1985).

Frontera contends that none of these courts addressed the precise argument it advances here: that there is no "positive statutory or treaty basis" for such a jurisdictional requirement. The federal statute that implements the New York Convention requires a court to confirm an award "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207. Article V of the New York Convention "provides the exclusive grounds for refusing confirmation," *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997), and specifies seven grounds for refusing to enforce an arbitral award, none of which include a lack of jurisdiction over the respondent or the respondent's property, see New York Convention at art. 5, 21 U.S.T. at 2517. Frontera accordingly argues that we cannot impose a jurisdictional requirement if the Convention does not already have one. We disagree.

Unlike "state courts[,] [which] are courts of general jurisdiction[,] . . . federal courts are courts of limited jurisdiction which thus require a specific grant of jurisdiction." *Foxhall Realty Law Offices, Inc. v. Telecomm. Premium Servs., Ltd.*, 156 F.3d 432, 435 (2d Cir. 1998) (citing *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850)). "The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). While the requirement of subject matter jurisdiction "functions as a restriction on federal power," *id.* at 702, the need for personal jurisdiction is fundamental to "the court's power to exercise control over the parties," *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979). "Some basis must be shown, whether arising from the respondent's residence, his conduct, his consent, the location of his property or otherwise, to justify his being subject to the court's power." *Glencore Grain*, 284 F.3d at 1122 (quoting *Transatl. Bulk Shipping*, 622 F. Supp. at 27).

Because of the primacy of jurisdiction, "jurisdictional questions ordinarily must precede merits determinations in dispositional

order." *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). "[T]he items listed in Article V as the exclusive defenses . . . pertain to substantive matters rather than to procedure." *Monegasue de Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 496 (2d Cir. 2002) (emphasis added). Article V's exclusivity limits the ways in which one can challenge a request for confirmation, but it does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought. . . .

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B. SOCAR's Rights Under the Due Process Clause

The district court recognized that our precedent *Texas Trading* compelled it to hold that SOCAR possessed rights under the Due Process Clause, thus requiring that jurisdiction over SOCAR meet the minimum contacts requirements of *International Shoe* [*v. Washington*, 326 U.S. 310 (1945)]. The district court, however, questioned *Texas Trading*'s soundness. These doubts were well-founded.

The Due Process Clause famously states that "no *person* shall be . . . deprived of life, liberty or property without due process of law." U.S. Const. amend. V (emphasis added). In *Texas Trading*, we held that a foreign state was a "person" within the meaning of the Due Process Clause, and that a court asserting personal jurisdiction over a foreign state must—in addition to complying with the FSIA [Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611]—therefore engage in "a due process scrutiny of the court's power to exercise its authority" over the state. 647 F.2d at 308, 313 ("[T]he [FSIA] cannot create personal jurisdiction where the Constitution forbids it."). *Texas Trading* reached this conclusion without much analysis, while also noting that cases on point were "rare." *Id.* at 313.

* * * *

Since *Texas Trading*, however, the case law has marched in a different direction. In *Republic of Argentina v. Weltover, Inc.*, the Supreme Court "assum[ed], without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause," 504 U.S. 607,

619 (1992), but then cited *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966), which held that "States of the Union are not 'persons' for purposes of the Due Process Clause," 504 U.S. at 619. *Weltover* did not require deciding the issue because Argentina's contacts satisfied the due process requirements, *see id.* at 619 & n.2, but the Court's implication was plain: If the "States of the Union" have no rights under the Due Process Clause, why should foreign states?

After *Weltover*, we noted that "we are uncertain whether [*Texas Trading*] remains good law." *Hanil Bank v. PT Bank Negara Indon.*, 148 F.3d 127, 134 (2d Cir. 1998). But we went no further in *Hanil Bank* because the due process requirements were satisfied in that case. *See id.* The instant case is different, however, as only the Due Process Clause prevented the district court from asserting personal jurisdiction over SOCAR.

In *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), the D.C. Circuit reasoned that because "the word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union," *Katzenbach*, 383 U.S. at 323, "absent some compelling reason to treat foreign sovereigns more favorably than 'States of the Union,' it would make no sense to view foreign states as 'persons' under the Due Process Clause," 294 F.3d at 96. The *Price* court found no such reason, *see id.* at 95–100, and we find that case's analysis persuasive. . . .

* * * *

For the reasons discussed by the *Price* court in its thorough opinion, we "are unwilling to interpret the Due Process Clause as conferring rights on foreign nations that States of the Union do not possess." *Id.* at 99. Thus, we hold that the district court erred, albeit understandably in light of *Texas Trading*, by holding that foreign states and their instrumentalities are entitled to the jurisdictional protections of the Due Process Clause.

* * * *

Simply overruling *Texas Trading*, however, and holding that a sovereign state does not enjoy due process protections does not

decide the precise question in this case, because SOCAR is not a sovereign state, but rather an instrumentality or agency of one. . . .

. . . [I]f the Azerbaijani government "exerted sufficient control over" SOCAR "to make it an agent of the State, then there is no reason to extend to [SOCAR] a constitutional right that is denied to the sovereign itself." *TMR Energy Ltd. v. State Prop. Fund of Ukr.,* 411 F.3d 296, 301 (D.C. Cir. 2005). Although "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such," this presumption can be overcome if the state so "extensively control[s]" the instrumentality "that a relationship of principal and agent is created," or if "adher[ing] blindly to the corporate form . . . would cause . . . injustice." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 626–27, 629, 632 (1983) . . . . Although *Bancec* asked when a state instrumentality can be treated like its state for "the attribution of liability," *id.* at 622 n.11, we think, as the D.C. Circuit did in *TMR Energy*, that *Bancec*'s analytic framework is also applicable when the question is whether the instrumentality should have due process rights to which the state is not entitled. *See TMR Energy*, 411 F.3d at 301 . . . . Accordingly, if SOCAR is an agent of the Azerbaijani state, as recognized in *Bancec* and subsequent cases, then, like Azerbaijan, SOCAR lacks due process rights.

* * * *

b. Comity in litigation under the Hague Abduction Convention: Asvesta v. Petroutsas

On August 29, 2009, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded a district court decision granting a mother's petition under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention"). *Asvesta v. Petroutsas*, 580 F.3d 1000 (9th Cir. 2009). The Ninth Circuit held that the district court erred in granting comity to a previous Greek court order denying a Hague Convention petition the father brought against the mother. The Ninth Circuit concluded that the Greek court's analysis "misapplie[d] the provisions of the Convention,

relie[d] on unreasonable factual findings, and contradict[ed] the principles and objectives of the Hague Convention" and directed the district court to carry out its own analysis under the Hague Convention.

According to the Ninth Circuit, the factual background to the case involved two separate incidents of alleged abduction. The first, which was the subject of the Greek proceeding, arose after the mother, a Greek national, traveled to Greece with the couple's child and informed the father, a U.S.-Greek national, that she would not return to the United States with the child. After petitioning for divorce and receiving temporary custody from a California court, the father filed a petition seeking the child's return under the Hague Convention. A Greek court dismissed the father's petition and later a different Greek court awarded custody to the mother and supervised visitation for the father. Subsequently, the California court modified its earlier custody order, granted the father temporary sole custody, and ordered the parties to mediate the dispute in Greece.

Excerpts follow from the Ninth Circuit's discussion in concluding that a court may examine a foreign court's analysis of a Hague Convention petition before deciding to rely on the foreign judgment based on comity.* For discussion of the brief the United States filed in 2009 in another case, concerning whether a *ne exeat* clause confers a right of custody under the Hague Convention, see Chapter 2.B.2.a.

* * * *

A. International Comity and the Hague Convention

The district court granted Asvesta's Hague petition and ordered the child returned to Greece after extending "comity" to the Greek court's 2006 Hague Convention decision. "The extent to which

* Editor's note: On April 16, 2010, the U.S. District Court for the Northern District of California decided that the child's habitual residence was the United States and therefore ordered the mother to return the child from Greece. *Asvesta v. Petroutsas*, 2010 U.S. Dist. LEXIS 47872 (N.D. Cal. 2010).

the United States, or any state, honors the judicial decrees of foreign nations is a matter of choice, governed by 'the comity of nations.'" *Wilson v. Marchington*, 127 F.3d 805, 808 (9th Cir. 1997) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163 (1895)). "Comity is 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.'" *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1067 (9th Cir. 2007) (quoting *Hilton*, 159 U.S. at 164). Extension of comity to a foreign judgment is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Id.* (internal quotation omitted).

As this court recognized in *Marchington*, "*Hilton* [*v. Guyot*] provides the guiding principles of comity[:]"

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

Hilton, 159 U.S. at 202–03; *see also Marchington*, 127 F.3d at 810 & n.4.

The few United States courts that have addressed the extension of comity to Hague Convention orders of foreign courts "have observed that comity 'is at the heart of the Hague Convention.'" *Diorinou* [*v. Mezitis*], 237 F.3d [133,] 142 [2d Cir. (2001)] (quoting *Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 1999)).

The Second Circuit has noted that, where comity is at issue, a court properly begins its analysis "with an inclination to accord deference to" a foreign court's adjudication of a related Hague petition. *Diorinou*, 237 F.3d at 145. We agree.

Such an approach is consistent with the Convention drafters' primary concern "with securing international cooperation regarding the return of children wrongfully taken by a parent from one country to another." *Gonzalez* [*v. Gutierrez*], 311 F.3d [942,] 944 [(9th Cir. 2002). *Diorinou*'s approach is also consistent with the relatively narrow grounds, set forth in *Hilton*, upon which courts may rely in withholding comity.

We recognize that *Hilton* cautions that "[t]he merits of [a foreign judgment] should not, in an action brought in this country upon the judgment, be tried afresh." 159 U.S. at 202–03. However, the two federal courts of appeal that have considered whether to extend comity to foreign Hague Convention judgments—the Second Circuit in *Diorinou* and the Third Circuit in *Carrascosa v. McGuire*, 520 F.3d 249 (3d Cir. 2008)—both looked closely at the merits of the foreign court's decision in determining whether comity could properly be extended to its judgment.

* * * *

We agree that, in the context of the Hague Convention, a court's decision to extend comity to a foreign judgment may be guided by a more searching inquiry into the propriety of the foreign court's application of the Convention, in addition to the considerations of due process and fairness outlined specifically in *Hilton*. Generally, the issue of comity arises when a foreign court has entered a judgment after applying its own substantive and procedural laws, *see, e.g.*, *Hilton*, 159 U.S. at 114–20; in these cases, *Hilton*'s admonition to avoid a reexamination of the merits of a foreign court's judgment seems most relevant. Here, however, we consider whether the district court properly extended comity to a foreign court that applied the Hague Convention—a legal framework agreed upon and implemented by all contracting nations. In this context, we are in a better position to examine the merits of a foreign court's Hague decision in deciding whether that decision

warrants deference. Although we recognize that our careful examination of the merits of another contracting nation's Hague adjudication could, in some circumstances, undermine the mutual trust necessary for the Convention's continued success, we also recognize that its success relies upon the faithful application of its provisions by American courts and the courts of other contracting nations. For this reason, we follow the path charted by *Diorinou*, *Carrascosa*, and *Pitts* [*v. De Silva*, 2008 ON.C. LEXIS 34 (Jan. 10, 2008)], and conclude that we may properly decline to extend comity to the Greek court's determination if it clearly misinterprets the Hague Convention, contravenes the Convention's fundamental premises or objectives, or fails to meet a minimum standard of reasonableness.

* * * *

3. Enforceability of Arbitration Clauses

a. Safety Nat'l Casualty Corp. v. Certain Underwriters at Lloyd's London

On November 9, 2009, the U.S. Court of Appeals for the Fifth Circuit, sitting en banc, vacated on interlocutory appeal a lower court's denial of a motion to compel arbitration in a contractual dispute among three insurers. *Safety Nat'l Casualty Corp. v. Certain Underwriters at Lloyd's London*, 587 F.3d 714 (5th Cir. 2009). On February 11, 2009, the Fifth Circuit granted rehearing en banc and vacated the 2008 decision of a panel of the Fifth Circuit. For prior developments in the case, see *Digest 2008* at 777–82.

The en banc panel concluded that the McCarran–Ferguson Act, 15 U.S.C. §§ 1011–1015, does not permit Louisiana state law to preempt the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention"). The court referred to preemption by Louisiana state law as "reverse preemption." Under the McCarran–Ferguson Act, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law

enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Excerpts below from the Fifth Circuit's opinion provide its analysis in concluding that "[b]ecause here the Convention, an implemented treaty, rather than the Convention Act [9 U.S.C. §§ 201–208], supersedes state law, the McCarran–Ferguson Act's provision that 'no Act of Congress' shall be construed to supersede state law regulating the business of insurance is inapplicable." *Id.* at 725. (Footnotes, including case citations, are omitted.)*

* * * *

. . . [T]he texts of the Convention, the Convention Act, and the McCarran–Ferguson Act support the conclusion that the McCarran–Ferguson Act does not authorize Louisiana to reverse-preempt the Convention by means of contrary legislation prohibiting arbitration of disputes regarding contracts of insurance.

. . . Although it is not clear from [the Louisiana statute's] text that arbitration agreements are voided, Louisiana courts have held that [arbitration] agreements are unenforceable because of this statute.

The Louisiana statute, as so interpreted, conflicts with the United States's commitments under the Convention. The Convention states that each signatory nation "shall recognize an agreement in writing under which the parties undertake to submit to arbitration" their dispute "concerning a subject matter capable of settlement by arbitration." The Convention contemplates enforcement in a signatory nation's courts, directing that courts "shall" compel arbitration when requested by a party to an international

* Editor's note: On February 5, 2010, Louisiana Safety Association of Self Insurers' Fund ("LSAT") filed a petition for certiorari in the U.S. Supreme Court, arguing that the Fifth Circuit's opinion conflicted with the decisions of the U.S. Court of Appeals for the Second Circuit in *Stephens v. American Int'l Insurance Co.*, 66 F.3d 41 (2d Cir. 1994), which remained pending as of June 2010. On August 26, 2010, in response to the invitation of the Court, the United States filed an *amicus curiae* brief with the Court, which is available at *www.justice.gov/osg/briefs/2010/2pet/6invit/2009-0945.pet.ami.inv.pdf*. The U.S. brief also made clear it views relevant provisions of the New York Convention as self-executing.

arbitration agreement, subject to certain exceptions not at issue in the present case:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

This treaty is the subject of the Convention Act. That Act states that the Convention "shall be enforced in United States courts in accordance with this chapter." The Act additionally provides relevant definitions and establishes federal court jurisdiction and venue. The parties agree that requiring arbitration of the present dispute in compliance with the Convention would contravene the Louisiana statute.

. . . The McCarran–Ferguson Act . . . allows state law to reverse-preempt an otherwise applicable federal statute because the McCarran–Ferguson Act does not permit an "Act of Congress" to be "construed to invalidate, impair, or supersede" state law unless the Act of Congress "specifically relates to the business of insurance."

For the purposes of the McCarran–Ferguson Act, neither the Convention nor the Convention Act specifically relates to the business of insurance. . . [W]e will assume, without deciding, that the Louisiana statute regulates the business of insurance, although the matter is not entirely free from doubt. We, therefore, limit our analysis to whether Louisiana law overrides the Convention's requirement that the present dispute be submitted to arbitration because we construe an act of Congress to invalidate, impair, or supersede state law.

III

LSAT contends that the Convention was not self-executing and could only have effect in the courts of this country when Congress passed enabling legislation. Accordingly, LSAT argues that the Convention's enabling legislation is an "Act of Congress"

within the meaning of the McCarran–Ferguson Act's provision that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . ." LSAT reasons that the Convention has no effect independent of legislation enabling it and that the McCarran–Ferguson Act requires us to construe the Convention's enabling legislation as reverse preempted by the Louisiana statute. . . .

* * * *

It is unclear to us whether the Convention is self-executing. . . .

* * * *

Even if the Convention required legislation to implement some or all of its provisions in United States courts, that does not mean that Congress intended an "Act of Congress," as that phrase is used in the McCarran–Ferguson Act, to encompass a non-self-executing treaty that has been implemented by congressional legislation. Implementing legislation that does not conflict with or override a treaty does not replace or displace that treaty. A treaty remains an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not by Congress.* The fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an "Act of Congress."

To accept LSAT's argument, we must conclude that when Congress used "Act of Congress" in the McCarran–Ferguson Act, it intended that phrase to exclude self-executing treaty provisions but to include treaty provisions that are implemented by federal legislation. This is untenable. The commonly understood meaning of an "Act of Congress" does not include a "treaty," even if the treaty required implementing legislation. . . . LSAT concedes that if the provisions in the Convention directing courts to enforce international arbitration agreements were self-executing, then the

* Editor's note: Pursuant to Article II, § 2 of the U.S. Constitution, the New York Convention was ratified by the President with the advice and consent of the Senate, not by the Senate. Article II § 2 provides: "[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 . . . ."

McCarran–Ferguson Act would have no preemptive effect because self-executing treaties are not an "Act of Congress." Yet, there is no apparent reason—and LSAT has provided no rationale—why Congress would have chosen to distinguish in the McCarran–Ferguson Act between treaty provisions that are self-executing and those that are not self-executing but have been implemented. We do not consider it reasonable to construe the term "Act of Congress" in the McCarran–Ferguson Act as an indication of congressional intent to permit state law to preempt implemented, non-self-executing treaty provisions but not to preempt self-executing treaty provisions.

Our conclusion that Congress did not intend the term "Act of Congress," as used in the McCarran–Ferguson Act, to reach a treaty such as the Convention is buttressed by the terms of the Convention Act. When Congress amended the FAA [Editor's note: Federal Arbitration Act, 9 U.S.C. et seq.] in 1970 to include provisions that dealt with the Convention, it provided in 9 U.S.C. § 203, that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." This is a direct indication that Congress thought that for jurisdictional purposes, an action falling under the Convention arose not only under the laws of the United States but also under *treaties* of the United States. Accordingly, even in the very act of Congress that was arguably necessary to implement the Convention in domestic courts, Congress recognized that jurisdiction over actions to enforce rights under the Convention did not arise solely under an "Act of Congress."

Equally important in the present case, it is a treaty (the Convention), not an act of Congress (the Convention Act), that we construe to supersede Louisiana law. The Convention Act states that the Convention "shall be enforced in United States courts in accordance with this chapter." The Convention Act defines when an arbitration agreement "falls under the Convention"—principally when it is "commercial" and does not "aris[e] out of . . . a [legal] relationship which is entirely between citizens of the United States . . . unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has

some other reasonable relation with one or more foreign states." The Convention Act provides United States courts with jurisdiction over "[a]n action or proceeding falling under the Convention . . . regardless of the amount in controversy." But the Convention Act does not in this case operate without reference to the contents of the Convention. It is *the Convention* under which legal agreements "fall"; it is an action or proceeding under *the Convention* that provides the court with jurisdiction; such an action or proceeding is "deemed to arise under the laws *and treaties*" of the United States, the treaty in this case being the Convention; and when chapter 1 of title 9 (the FAA) conflicts with the Convention, *the Convention* applies.

The Convention Act directs us to the treaty it implemented, and when we "construe" the Convention, we are faced with the possibility of "superseding" the Louisiana law. The Convention requires that each signatory nation "shall recognize an agreement in writing under which the parties undertake to submit to arbitration" their dispute "concerning a subject matter capable of settlement by arbitration," and provides for direct enforcement in a signatory nation's courts, which "when seized of [a covered] action . . . shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null or void, inoperative or incapable of being performed." The Convention itself contains defenses to the enforceability of an arbitration agreement by requiring that it is "in writing," regulates a "subject matter capable of settlement by arbitration," and is not "null and void, inoperative or incapable of being performed." Accordingly, it is by reference to the Convention that we have a command—a judicially enforceable remedy—that we "supersede" Louisiana law unless there are defenses set forth in the Convention that counteract that command. Because here the Convention, an implemented treaty, rather than the Convention Act, supersedes state law, the McCarran–Ferguson Act's provision that "no Act of Congress" shall be construed to supersede state law regulating the business of insurance is inapplicable.

* * * *

V

There is precedent that at the time of the McCarran–Ferguson Act's enactment, courts analyzed treaties, even when implemented by an Act of Congress, as treaties. The Supreme Court's decision in *Missouri v. Holland* reflects that a treaty followed by implementing legislation remains a treaty that, where relevant, is viewed as distinct from an Act of Congress. . . . The Supreme Court decided *Holland* in 1920, so when Congress passed the McCarran–Ferguson Act two decades later (and the Convention Act half a century later), it was well aware that a treaty, even if requiring implementation, was distinct from an Act of Congress and could serve as the source of authority to "override [a state's] power."

We think it unlikely that when Congress crafted the McCarran–Ferguson Act, it intended any future treaty implemented by an Act of Congress to be abrogated to the extent that the treaty conflicted in some way with a state law regulating the business of insurance if Congress's implementing legislation did not expressly save the treaty from reverse-preemption by state law. If this had been Congress's intent, it seems probable that Congress would have included a term such as "or any treaty requiring congressional implementation" following "Act of Congress" and "such Act" in the McCarran–Ferguson Act. There is no indication in the McCarran–Ferguson Act that Congress intended, through the preemption provision and the use of the term "Act of Congress," to restrict the United States' ability to negotiate and implement fully a treaty that, through its application to a broad range of international agreements, affects some aspect of international insurance agreements.

b. Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int'l, Ltd.

On February 13, 2009, the U.S. Court of Appeals for the Sixth Circuit affirmed a district court's order compelling arbitration and refusing to issue a foreign antisuit injunction. *Answers in Genesis of Kentucky v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459 (6th Cir. 2009). As the Sixth Circuit explained, the case

arose from a dispute between Answers in Genesis of Kentucky ("AiG"), a Kentucky-based nonprofit, and Creation Ministries International ("CMI"), an Australian nonprofit. On October 13, 2005, the two organizations concluded a Memorandum of Agreement ("MOA"), which included an arbitration clause, and a Deed of Copyright License. After AiG rejected CMI's subsequent attempt to nullify the two agreements, CMI filed suit against AiG and its leader in Australian court. AiG subsequently filed a motion in federal court in Kentucky to compel arbitration and to enjoin the Australian suit. AiG and CMI then agreed to stay the Australian litigation until the U.S. suit was resolved.

The Sixth Circuit upheld all aspects of the district court's judgment. First, as to CMI's claim that Australia was the only permissible forum for the parties to resolve disputes arising from the agreements, the Sixth Circuit held that "the plain language of the contractual provisions at issue provides that Australia is only one possible forum for any potential litigation" and thus "[t]he district court did not err in refusing to dismiss AiG's motion to compel arbitration based upon the contract's forum selection clause." *Id.* at 465, 466. Second, as to CMI's claim that the district court should have abstained out of deference to the Australian litigation, the court held that "neither international comity nor the traditional abstention factors applicable to parallel proceedings require abstention." *Id.* at 469. In its analysis of the issue of international comity, the court looked to international law, stating:

> International law, as incorporated by congressional action, supports our conclusion that abstention is inappropriate in this case. A similar concern for enforcing private agreements led to the adoption of the international treaty under which AiG seeks to vindicate its right to arbitrate. AiG filed this action under § 206 of the FAA [Federal Arbitration Act]. 9 U.S.C. § 206. Section 206 provides that district courts may compel arbitration upon motion of a party to an agreement covered by the 1958 Convention on the Recognition and Enforcement of Arbitral Awards ("Convention"). Chapter Two of the FAA incorporates the

provisions of the Convention into American domestic law. *See* 9 U.S.C. §§ 201–208. Both Australia and the United States are signatories to the Convention, and thus its terms govern the resolution of this dispute. . . . Article II of the Convention, as incorporated by the FAA, establishes the requirements necessary for an arbitration agreement to come within the Convention's terms. The agreement must be in writing, concern a "legal relationship . . . which is considered as commercial," and either at least one party to the contract must not be an American citizen or the commercial relationship must have a "reasonable relation with one or more foreign states." 9 U.S.C. § 202. *Cf.* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. [hereinafter Convention] . . . All of the Convention's requirements are therefore met. Consequently, "when one of the parties" to the arbitration agreement requests a court refer the dispute to arbitration, that court "shall" do so. Convention art. II(3). *Cf.* 9 U.S.C. § 208.

As other courts construing the Convention's language have observed, "there is nothing discretionary about Article II(3) of the Convention." *Tennessee Imports, Inc. v. Filippi*, 745 F. Supp. 1314, 1322 (M.D. Tenn. 1990) (quoting *McCreary Tire & Rubber Co. v. CEAT S.P.A.*, 501 F.2d 1032, 1037 (3d Cir. 1974)). The language of the treaty and its statutory incorporation provide for no exceptions. When any party seeks arbitration, if the agreement falls within the Convention, we must compel the arbitration unless the agreement is "null and void, inoperative, or incapable of being performed." Convention art. II(3). . . . Further, it is difficult to see how comity concerns could come into play where both Australia and the United States, as signatories to the Convention, apply the same law. . . . To assume that the district court's order infringes on comity concerns is to assume that Australian courts would not follow their obligation under the Convention, as CMI's argument must rest upon an assumption that an Australian court would be less likely to order arbitration.

> Such an argument both demeans the foreign tribunal and hardly advances the comity interests that CMI claims to seek to vindicate. . . .

Id. at 468–69.

Third, based on its analysis of the plain language of the arbitration clause in the MOA, the court upheld the district court's decision to refer all aspects of the parties' dispute to arbitration. *Id.* at 470. Last, the court held that the district court's decision not to issue a foreign antisuit injunction concerning the Australian litigation was not an abuse of its discretion since the Australian proceedings remained suspended. *Id.* at 471–72.

4. *Forum Non Conveniens*

a. Montreal Convention: Pierre-Louis v. Newvac Corp.

On October 8, 2009, the U.S. Court of Appeals for the Eleventh Circuit affirmed a district court's dismissal of litigation brought by the family members of 160 passengers and crew members who were killed when West Caribbean Airways flight 708 crashed in Venezuela en route from Panama. *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009). In so holding, the court concluded that *forum non conveniens* applies in cases involving claims brought under the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal, May 28, 1999 ("Montreal Convention"). The court also concluded that the district court had not abused its discretion in dismissing the case on *forum non conveniens* grounds. The court considered, among other things, the plaintiffs' argument that their choice of forum "is entitled to heightened deference because their access to U.S. courts is granted by an international treaty with a specific venue provision," concluding that, "[r]egardless of the merits of Plaintiffs' argument on this point . . . , the analysis cannot end with a presumption of convenience, but must address the actual convenience of the various available fora." *Id.* at 1059.

See Digest 2008 at 513–19 for discussion of the *amicus curiae* brief the United States filed on May 14, 2008, expressing the view that U.S. courts may apply the *forum non conveniens* doctrine to claims brought under Article 33 of the Montreal Convention. The U.S. brief is available as document 53 for *Digest 2008* at *www.state.gov/s/l/c8183.htm*. Excerpts follow from the court's analysis of the applicability of *forum non conveniens* in cases brought under the Montreal Convention (footnotes omitted).*

* * * *

I.

The doctrine of forum non conveniens permits a court with venue to decline to exercise its jurisdiction when the parties' and court's own convenience, as well as the relevant public and private interests, indicate that the action should be tried in a different forum. A defendant seeking dismissal for forum non conveniens bears the burden of demonstrating:

> (i) that an adequate alternative forum is available, (ii) that relevant public and private interests weigh in favor of dismissal, and (iii) that the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice. Pertinent private interests of the litigants include relative ease of access to evidence in the competing fora, availability of witnesses and compulsory process over them, the cost of obtaining evidence, and the enforceability of a judgment. Relevant public interests include the familiarity of the court(s) with the governing law, the interest of any foreign nation in having the dispute litigated in its own courts, and the value of having local controversies litigated locally.

Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta, 530 F.3d 1339, 1356–57 (11th Cir. 2008) (quotations and citations omitted).

* Editor's note: On June 7, 2010, the U.S. Supreme Court denied certiorari. *Bapte v. West Caribbean Airways*, 130 S. Ct. 3387 (2010).

. . . Chapter III of the Convention is entitled "Liability of the Carrier and Extent of Compensation for Damage." Article 33, located in Chapter III, is the jurisdictional provision which specifies in which fora such suits can be brought:

> 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.
> 2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air. . . .

Thus, under Article 33 of the Convention, suits for damages by passengers on international flights can be filed in a limited number of fora, including, *inter alia*, the domicile of the "carrier" or the principal place of business of the "carrier." In the case of damage resulting from the injury or death of a passenger, suit may be brought in the passenger's permanent residence if the "carrier" operates air carriage services to or from that location.

The term "carrier" is undefined in the Convention. However, Chapter V of the Convention, entitled "Carriage by Air Performed by a Person other than the Contracting Carrier," addresses situations in which there is both a "contracting carrier" and an "actual carrier." Article 39, located in Chapter V of the Convention, provides the definitions for "contracting carrier" and "actual carrier":

> The provisions of [Chapter V] apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person

> (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

These definitions are significant because Article 40, in Chapter V, provides that "[i]f an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in [Chapter V], be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs."

In turn, Article 45 provides that a plaintiff may bring an action for damages under the Convention against the actual carrier or the contracting carrier, or against both together or separately, and Article 46 specifies the fora in which a plaintiff may bring such a suit. Article 46 provides that "[a]ny action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business." . . .

* * * *

When interpreting a treaty, we begin with the words of the treaty in the context in which the words are used. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988). Plaintiffs concede that the starting point of treaty interpretation is the relevant text and recognize that the treaty expressly provides that "[q]uestions of procedure" are governed by the law of the forum in which the case is validly brought. They argue, however, that because the Convention does not specifically affirm the availability of forum non conveniens, it should not be permitted in cases arising under it. We find this argument untenable for two reasons.

First, there is no dispute that forum non conveniens is a "question[] of procedure" under U.S. law and thus it clearly falls within the ambit of Article 33(4). Second, under Plaintiffs' theory, all state procedural rules would have to be specifically enumerated in order to be applicable under the Convention, and we do not believe the Convention's drafters intended such an absurd result.

Plaintiffs further argue that to permit the application of forum non conveniens would undermine the purpose and implementation of the Convention's jurisdictional provisions, which have already enumerated the five "convenient" jurisdictions for purposes of adjudicating international carrier liability. Although we acknowledge Plaintiffs' concerns, we think the purpose of the Convention is adequately safeguarded under traditional forum non conveniens analysis. As the district court pointed out, forum non conveniens would permit dismissal under the Convention only if the alternative forum was authorized to hear the case under Article 33(1) or (2) and was "demonstrably the more appropriate venue."

We therefore find no ambiguity or limitation in the express language of Article 33(4), which states in no uncertain terms that questions of procedure—which can only reasonably be read to include *all* questions of procedure—are governed by the rules of the forum state. As the district court correctly noted, the doctrine of forum non convenience is "firmly entrenched in the procedural law of the United States." In addition, we are satisfied that a district court may—where appropriate—exercise its discretion to apply forum non conveniens, without interfering with the implementation of the Convention, so long as another Convention jurisdiction is available and can more conveniently adjudicate the claim.

* * * *

b. Vivendi SA v. T-Mobile USA, Inc.

On November 2, 2009, the U.S. Court of Appeals for the Ninth Circuit affirmed a lower court's decision dismissing a complaint on the basis of *forum non conveniens. Vivendi SA v.*

T-Mobile USA, Inc., 586 F.3d 689 (9th Cir. 2009). In this case, a French company, Vivendi S.A., and a Delaware company, Vivendi Holding I Corp. (collectively "Vivendi"), brought claims against Deutsche Telekom AG, T-Mobile International AG, and T-Mobile Deutschland GmbH, all German corporations; T-Mobile USA, Inc., a Delaware corporation with its main operations in Washington State; and a Polish national. The litigation arose from Vivendi's efforts to recoup its investment in a Polish telecommunications company in which T-Mobile Deutschland GmbH also invested. In affirming the district court's decision, the Ninth Circuit concluded that the court had not abused its discretion, noting that "[t]he decision as to whether a forum is 'convenient' for litigation and, perhaps, trial is fundamentally a factual determination by the district court. In this case, all of the conduct underlying Vivendi's claims occurred overseas, and all of the witnesses but three reside in Europe." *Id.* at 696.

5. Judicial Assistance

a. Discovery in the United States for use in a foreign arbitration

In an unpublished opinion issued on August 6, 2009, the U.S. Court of Appeals for the Fifth Circuit upheld a lower court's denial of a request for discovery in the United States that an El Salvadoran company, CEL, sought for use in an international arbitration in Switzerland. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed. Appx. 31 (5th Cir. 2009); 2009 U.S. App. LEXIS 17596 (5th Cir. 2009). CEL brought its request based on 28 U.S.C. § 1782, which provides federal court assistance in gathering evidence for use in foreign tribunals. Paragraph (a) of the statute, in particular, provides that a district court "may order" a person residing or found in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal . . . upon application of any interested person."

At the same time CEL filed its request in the U.S. District Court for the Southern District of Texas and another one in

the District of Delaware, the Swiss arbitral tribunal issued a limited discovery order. While CEL's appeal was pending, the arbitral tribunal closed its hearing of the evidence in the arbitration, and the U.S. corporation from which CEL was seeking discovery sought dismissal of the appeal on the ground that it was moot. The court concluded that the appeal was not moot because, under the UNCITRAL arbitration rules, "an 'arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.' If CEL discovers new evidence from its § 1782 application, it may ask the arbitral tribunal to reopen the evidentiary hearing to consider the evidence." *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed. Appx. at 33; 2009 U.S. App. LEXIS 17596, at *5–6 (footnote omitted).

On the merits, the court concluded that the Supreme Court's 2004 decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248 (2004), did not overrule the applicable Fifth Circuit precedent, *Republic of Kazakhstan v. Biedermann Int'l*, which held that "a 'tribunal' within the meaning of § 1782 did not include a private international arbitral tribunal, and thus § 1782 did not apply to discovery sought for use in such a tribunal." *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed. Appx. at 33; 2009 U.S. App. LEXIS 17596, at *7 (citing *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999). Therefore, the Ninth Circuit concluded that the district court did not abuse its discretion in relying on *Biedermann* to deny discovery. For additional discussion of the Supreme Court's decision in *Intel Corp.*, see *Digest 2004* at 851–56.

b. Service of process in a foreign country: Hague Service Convention

On March 23, 2009, the Federal Trade Commission ("FTC") filed a brief addressing the requirements for service of process in Belize. *Federal Trade Comm'n v. Innovative Mktg., Inc.*,

No. RDB-08-CV-3233 (D. Md. 2009). The defendants had filed a motion to dismiss an FTC complaint against them on the grounds that the FTC's use of a private law firm in Belize to serve their co-defendant was invalid. As the FTC explained in its motion for leave to file its brief, "[t]he FTC . . . consulted with the State Department, which . . . searched its records and provided the FTC with guidance on service of process in Belize. This guidance directly contradicts the defendants' argument."

Excerpts below from the brief provide additional background on the facts of the litigation and set forth the requirements for service of process in Belize under the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters ("Hague Service Convention") (footnotes omitted). The full text of the FTC brief, the accompanying declarations of Avril Haines, Assistant Legal Adviser for Treaty Affairs, Department of State, and Edward A. Betancourt, Director, Office of Policy Review and Inter-Agency Liaison, Directorate of Overseas Citizens Services, Department of State Bureau of Consular Affairs, and other accompanying submissions, are available at *www.state.gov/s/l/c8183.htm*. On June 10, 2009, the U.S. District Court for Maryland issued an order denying the defendants' motion to dismiss.

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* * * *

A. The Commission Has Properly Served IMI [Innovative Marketing, Inc.]

Defendants contend that the FTC's use of a private law firm in Belize to personally serve IMI's registered agent in that country is not valid because Belize and the United States are parties to an agreement that requires all service of process in Belize to be sent exclusively to Belize's central authority. The sole authority cited by the defendants for the existence of this purported agreement is a single sentence from a now defunct State Department webpage. This sentence indicated that "authorities" from the government of Belize have advised the "US Embassy" that the Hague Convention

on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (the "Hague Service Convention") applies in Belize and that "requests for service should be sent to the following central authority." From this sentence, the defendants leap to the conclusion that service via the central authority in Belize is the *only* acceptable means of service in Belize.

The defendants' decision to base their argument entirely on a single sentence on a now defunct State Department webpage is curious given that, even when the page was active, it contained an explicit disclaimer cautioning readers that the information provided "may not be totally accurate" and should be used for "general information only." *See* http://web.archive.org/web/20080212013227/http://travel.state.gov/law/info/judicial/judicial_686.html (an archived version of the now defunct webpage cited by defendants). Had the defendants taken the next step, and actually consulted the State Department, they would have learned that their conclusions about the laws of service in Belize are mistaken, and that the FTC's use of a private process server constitutes valid service on IMI.

1. The Hague Service Convention Applies Between the United States and Belize As It Did in 1981

. . . [T]he FTC consulted the State Department's Office of Treaty Affairs for its official position on Belize's status under the Hague Service Convention. In response to the FTC's request, the State Department reviewed its treaty file for Belize and determined that on September 29, 1982, newly independent Belize contacted the Secretary General of the United Nations and informed the U.N. that "the Government of Belize has decided to apply provisionally and on the basis of reciprocity, all treaties to which the Government of the United Kingdom of Great Britain and Northern Ireland was a party, the application of which was extended either expressly or by necessary implication to the then dependent territory of Belize." . . . [Ms. Haines's declaration confirms that] it is the view of the State Department that the Hague Service Convention applies between the United States and Belize "as it applied between British Honduras and the United States prior to Belize's independence in 1981." *See* Haines Decl. at ¶ 5.

2. Under the Applicable Provisions of the Hague Service Convention, the FTC's Service Upon IMI Was Proper

In light of the State Department's conclusion, the sole question for this Court is whether service by private process server was a valid means of service under the Hague Service Convention as the Convention applied in British Honduras (now Belize) prior to Belize's independence. . . . [T]he answer to this question is unambiguously yes.

In order to reach this conclusion, the FTC first confirmed that the Hague Service Convention applied in Belize before its independence. This fact is confirmed by the Hague Conference on Private International Law—the inter-governmental organization responsible for implementation and operation of the Hague Service Convention—which notes that the Convention entered into force in the United Kingdom in 1969 and was extended to its dependency British Honduras (now Belize) in 1970. *See* "Entry Into Force", available online at http://www.hch.net/index_en.php?act+status.comment@csid=902&disp+eif.

Next, the FTC confirmed that service of process by private process server is permissible in the United Kingdom, and by extension Belize, under the Hague Service Convention as the Convention was adopted by the United Kingdom. Under Article 10 of the Convention, service of process is permitted using a variety of means, including private process server, provided that the country adopting the Convention does not object to such alternative means. In its initial declaration concerning methods of service under Article 10, the United Kingdom stated that documents would be accepted "only by the central or additional authorities and only from judicial consular or diplomatic officers of other Contracting States." *See* "Declarations," available online at http://www.hcch.net/index_en.php?act=status.comment&csid=427&disp+resdn. The U.K. later clarified this position in a 1980 letter to the Permanent Bureau of the Hague Conference on Private International Law, noting that "our declaration does not preclude any person in another Contracting State who is interested in a judicial proceeding (including his lawyer) from effecting service in the United Kingdom 'directly' through a competent person other than a judicial officer or official, e.g., a solicitor (. . .)." *Id.* As a result of the

1980 clarification, "direct" service of process via private process server has long been recognized as a valid means of service in the United Kingdom, and by extension, in Belize. *Cf. Koehler v. Dodwell*, 152 F.3d 304, 307–08 (4th Cir. 1998) (holding that service by private process server is valid in the Bahamas, based on the United Kingdom's adoption of the Hague Convention on behalf of the Bahamas). *See also* "Special Consular Services," available online at http://london.usembassy.gov/cons_new/acs/scs?serving_legal_papers_and_process.html (confirming, on the official website of the U.S. Embassy for the United Kingdom, that service of process in the U.S. may be effected through private process server and providing a list of process servers available for hire).

Thus, under the Hague Service Convention as it applies between the United States and Belize, service of process via private process server is a valid means of service in Belize. As a result, the Commission's use of a private process server to serve IMI constitutes valid service, and the defendants' motion to dismiss must fail.

* * * *

c. Assistance to foreign tribunals: Letters rogatory

On December 3, 2009, the United States filed a response in the U.S. Court of Appeals for the Tenth Circuit, opposing a motion for an injunction pending appeal in a case arising out of a letter rogatory the Republic of Chile issued pursuant to the Inter-American Convention on Letters Rogatory. *Malone v. Holder*, No. 09-1442 (10th Cir.). The plaintiff-appellant sought to enjoin the U.S. Department of Justice from executing the letter rogatory, by which Chile sought U.S. assistance in serving a Chilean antitrust complaint and other legal documents against the plaintiff-appellant in Colorado. The U.S. District Court for the District of Colorado denied the plaintiff's motion for an injunction on the merits in an unpublished order issued on September 28, 2009, and it denied the plaintiff's motion for an injunction pending appeal on November 19, 2009. *Malone v. Holder*, 2009 U.S. Dist. LEXIS 116771 (D. Colo. 2009).

The United States argued that the court should not grant the plaintiff-appellant an injunction because he had failed to establish "that the probability of success on the merits, balance of harms, and public interest warrant an injunction." [fn. omitted] The government argued first that the plaintiff had no cause of action and thus "cannot demonstrate a substantial probability of success on the merits." As to the balance of harms and public interest, the government argued that both factors "weigh decidedly against an injunction pending appeal." The government stated:

> The only "harm" that will befall Malone if service is perfected during the pendency of this appeal is that he will be subject to the jurisdiction of the Chilean antitrust tribunal and compelled to defend himself there. Such litigation expense is not cognizable harm in the first instance. *FTC v. Standard Oil of California*, 449 U.S. 232, 244 (1980). And though Malone asserts that an injunction is necessary to prevent the case from becoming moot, such extraordinary relief is not warranted where the challenged agency action is not subject to judicial review in the first instance and where, as the district court found, the appeal would not in fact be mooted if service is perfected.
>
> Finally, an injunction would impair the United States' substantial interest in obtaining reciprocal cooperation from other countries in promptly serving process issued by United States courts. The public interest therefore weighs heavily against an injunction. Malone's request for an injunction pending appeal should therefore be denied.

Further excerpts from the U.S. brief follow, discussing the Inter-American Convention on Letters Rogatory ("IAC") and the government's argument that, because the "determination of whether to assist a foreign government in serving process on individuals within the United States is committed by law to the discretion of the Department of Justice," the plaintiff lacked a cause of action and "cannot demonstrate a substantial probability of success on the merits." (Footnotes and citations to the Administrative Record are omitted.) The full text of the U.S. brief and the district court's unpublished

order and judgment of September 28 are available at *www.state.gov/s/l/c8183.htm*.

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* * * *

The Inter-American Convention on Letters Rogatory ("IAC"), *reprinted at* 28 U.S.C. 1781, is a treaty that establishes a mechanism for State parties to obtain the cooperation of another State party in serving legal process, summonses, or subpoenas. It applies to process issued "in conjunction with civil or commercial matters held before the appropriate judicial or other adjudicatory authority." IAC, art. 2. State parties may, at their option, declare that the IAC also applies to process issued in criminal, labor, arbitration, and "contentious-administrative" cases. *Id.*, art. 16.

To request service of process in matters covered by the IAC, the requesting or "sending" State must issue a duly-authorized letter rogatory requesting the destination State's assistance in serving process on a person within the destination state. *Id.*, arts. 5–7. The letter rogatory must be accompanied by an authenticated copy of the complaint or other pertinent legal process, along with written information on the judicial or other adjudicatory body presiding over the proceeding, the time limits on a response, and a warning of the consequences of failing to respond. *Id.*, art. 8.

Each State party to the IAC designates a "Central Authority" to receive and distribute letters rogatory. *Id*, art. 4 & Additional Protocol, art.4. In the United States, the designated Central Authority is the Department of Justice. Exec. Order No. 12,638, 53 Fed. Reg. 15,649 (Apr. 28, 1988).

Under the IAC, a letter rogatory is to be executed in accordance with the laws and procedural rules of the destination State. *Id.*, art. 10. The IAC further provides that the treaty does not limit other means of executing a letter rogatory, thus stating that the treaty "shall not limit any provisions regarding letters rogatory" in bilateral or multilateral agreements, nor "preclude the continuation of more favorable practices in this regard that may be followed by" State parties. *Id.*, art. 15.

* * * *

I. Plaintiff Has No Cause of Action Under The APA And Thus Cannot Demonstrate A Substantial Probability of Success On The Merits.

Plaintiff's principal contention is that Chile's invocation of the IAC treaty imposes affirmative limitations on the Executive Branch's authority to assist a signatory foreign state in serving process within the United States, and that these putative limitations are enforceable by private individuals through an action commenced under the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq*. The decision as to whether to assist the Chilean government in the service of its process, however, is committed to agency discretion by law. Plaintiff therefore has no cause of action under the APA or any other source of law.

The APA is a limited waiver of the government's sovereign immunity from suit. It provides that "[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA withdraws that waiver of sovereign immunity, however, when the relevant statute "precludes judicial review," 5 U.S.C. § 701(a)(1), or when the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). *See generally High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006).

The latter exception to APA review provides that, even where Congress has not affirmatively precluded review, review is not to be had if the law in question is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. The pertinent law is deemed to have "committed" the decisionmaking to the agency's judgment absolutely, and to thus bar judicial review under the APA. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

The Department of Justice's determination to assist Chile in the service of process on plaintiff Malone falls squarely within this exception to APA review. The Supreme Court has long held that "the very nature of executive decisions as to foreign policy is political, not judicial," because "[s]uch decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative." *Chicago & S. Air Lines, Inc. v.*

Waterman S.S. Corp., 333 U.S. 103, 111 (1948). Thus, as a general matter, the conduct of foreign relations involves the kind of judgment that is typically committed to the discretion of the Executive Branch. *See*, *e.g.*, *Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999) (consular visa decisions committed to State Department discretion by law and not subject to APA review). Though it is "'error to suppose that every case or controversy which touches foreign relations is beyond judicial cognizance,'" judicial review of such matters is not permitted unless there is a treaty, statute, or other binding legal authority that establishes judicially manageable and privately enforceable standards constraining the Executive Branch's discretion. *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 229–30 (1986), quoting *Baker v. Carr*, 369 U.S. 186, 211 (1969).

No such provisions constrain the Executive Branch's authority here. As an initial matter, the IAC treaty does not purport to set forth the sole and exclusive circumstances in which a participating state may assist another state in the service of process and thus does not, without more, impose judicially enforceable limitations on the government's discretion. The treaty instead explicitly provides that it "shall not limit any provisions regarding letters rogatory" in bilateral or multilateral agreements, nor "preclude the continuation of more favorable practices in this regard that may be followed by" State parties. IAC, art. 15. The Fifth Circuit has accordingly held that the IAC does not supplant other means of serving process but rather permits signatories to continue, at their option, any other, otherwise lawful means of service. *Kreimerman v. Casa Veerkamp, S.A. de C.V.,* 22 F.3d 634 (5th Cir. 1994); *accord Pizzabiochhe v. Vinelli*, 772 F. Supp. 1245, 1249 (M.D. Fla. 1991).

Malone has conceded that the IAC does not, of its own force, bar service of process issued by a Chilean antitrust tribunal pursuant to other legal authority. . . . He asserts, however, that Chile's request for assistance limits the Department of Justice's discretion by authorizing only such service as is expressly provided for in the treaty itself. Malone notes in particular that the letter from the Embassy of Chile requesting service of process requests that the letter rogatory be processed pursuant to the IAC.

The document on which Malone chiefly relies is a one-page letter addressed, not to the United States government, but to the Department of Justice's private, process serving agent, Process Forwarding International. Malone's assertion that the Embassy of Chile can unilaterally impose binding legal constraints on the Executive Branch's discretionary authority by transmitting a letter to a private process serving agent strains credulity. Article 15 of the IAC expressly reserves to the United States authority to serve process in circumstances not otherwise covered by the treaty itself. A foreign government cannot limit that reservation of authority by a unilateral decree of any sort, let alone by means of a brief transmittal letter addressed to a private process server.

In any event, the record does not indicate any intent on the part of the Chilean government to limit service [of] process to those means or circumstances authorized by the IAC. The embassy letter on which Malone chiefly relies states only that "[t]he Embassy of Chile would appreciate if PFI would process the attached Letter Rogatory according to the Inter[-]American Convention on Letter[s] Rogatory * * * ." This is nothing more than a request for the assistance contemplated by the IAC. That the Embassy of Chile would "appreciate" processing under the IAC in no way suggests that it is disinclined to accept—and intends to prohibit—service of process pursuant to other legal authority.

Moreover, the Chilean judicial determinations resulting in the issuance of an international letter rogatory reflect a clear intent to authorize service of process in the United States pursuant to any lawful authority, not merely the authority conferred by the IAC. The Chilean antitrust court thus called for the issuance of a letter rogatory empowering the pertinent United States authority to "have broad powers to take all such steps as are necessary for the processing of the letter rogatory and service upon the defendant according to the laws prevailing within the defendant's place of residence." Similarly, the Chilean Supreme Court approved a letter rogatory authorizing service to be made on Malone, not merely in accordance with the IAC, but rather "in accordance with the law of the State of destination." These Chilean judicial determinations thus make clear that Chile intended that the United States use *any*

lawful means of perfecting service, regardless of whether service was authorized by the IAC or some other legal authority.

Finally, even if authority to serve process were limited to that set forth in the IAC—a point we vigorously dispute—the Chilean antitrust proceeding is a "civil or commercial" matter covered by the IAC. *Cf. Restatement (Third) of Foreign Relations,* 471, cmt. f (noting that United States treats most non-criminal proceedings as "civil or commercial" matters covered by the Hague Service Convention). Plaintiff thus errs in asserting that the IAC does not authorize service of process here.

In sum, neither the IAC nor any other law constrains the Department of Justice's discretion to assist Chile in the service of process on Malone. The matter is committed to the Department's discretion by law and therefore is not subject to judicial review under the APA. Malone has no cause of action to challenge the service of process upon him, and he consequently cannot demonstrate the substantial probability of success on the merits necessary to obtain an injunction.

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Cross References

International adoption and child abduction, **Chapter 2.B.**
Consideration of treaty provisions in assessing applicability of forum non conveniens and international comity in litigation, **Chapter 4.C.1.**
Foreign Sovereign Immunities Act, **Chapter 10.A.1.**
Aviation law, **Chapter 11.A.1.**

Chapter 16

Sanctions

A. IMPOSITION AND IMPLEMENTATION OF SANCTIONS

1. Nonproliferation

a. Democratic People's Republic of Korea

(1) Security Council action

On April 5, 2009, North Korea launched a Taepo-Dong 2. In response, President Barack H. Obama called North Korea's action "a clear violation of United Nations Security Council Resolution 1718 (2006), which expressly prohibits North Korea from conducting ballistic missile-related activities of any kind." The full text of President Obama's statement is available at *www.whitehouse.gov/the_press_office/Statement-by-the-President-North-Korea-launch*. *See also* the Joint Statement issued with the European Council on April 5, condemning North Korea's action, available at *www.whitehouse.gov/the_press_office/United-States-European-Council-Joint-Statement-on-the-North-Korean-Launch*. In remarks to the press, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, stated: "[I]t is our view that this action merits a clear and strong response from the United Nations Security Council. We will be embarked on additional consultations with partners in the Security Council as well as allies and concerned parties outside of the Security Council towards obtaining that kind of outcome."

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On April 13, 2009, the Security Council issued a Presidential Statement on the DPRK, which, among other things, condemned the April 5 launch, reiterated the need for North Korea to comply fully with Resolution 1718, and agreed that the Security Council would adjust the measures set forth in paragraph 8 of Resolution 1718 through the designation of entities and additional goods. U.N. Doc. S/PRST/2009/7. On April 14, 2009, Ambassador Rice transmitted a letter and accompanying list of items, materials, equipment, goods, and technology related to ballistic missile-related programs for the Security Council Committee established pursuant to Resolution 1718 ("1718 Committee") to consider adding to its list of items subject to the prohibitions set forth in paragraph 8 of Resolution 1718. U.N. Docs. S/2009/205 and S/RES/1718 (2006). On April 24, 2009, the 1718 Committee approved the list proposed by the United States. As a result, transfers of the items, materials, equipment, goods, and technology on the list to and from the DPRK were prohibited.

In May 2009 North Korea announced that it had conducted its second nuclear test. In remarks to the press on June 10, 2009, Ambassador Rice announced that "on behalf of the United States, Russia, China, France, the UK, Japan, and South Korea we tabled a draft resolution . . . which we think provides a very strong, very credible, very appropriate response to the provocative nuclear tests that North Korea launched and its subsequent activities." Ambassador Rice explained:

> . . . [T]his draft would impose a complete embargo on the export of arms from North Korea. These arms exports have been a significant source of revenue over the years for North Korea and we think it important that that source of revenue be entirely curtailed. It substantially broadens the ban on the import of weapons to North Korea and requires that any remaining light weapons or small arms and related material [to] be imported be notified in advance, fully transparently, to the Sanctions Committee.
>
> Secondly, this regime creates an unprecedented, detailed set of expectations and obligations regarding the

inspection of suspect cargo believed to be carrying goods prohibited under Resolution 1718 and this draft current resolution. It would make it very clear that states are expected to inspect suspected contraband cargo on their territory, in their land, air, or sea.

. . . [I]t [makes] very clear that states are expected to consent to inspection on the high seas if a flagged vessel of their own is believed to be carrying contraband. It calls on all states to inspect suspect vessels with the consent of the [flag state] and it makes it very clear that states that refuse to [consent to inspection of their flagged vessels] on the high seas are obliged under international law to [direct their flagged vessels to] proceed to an appropriate convenient port for mandatory inspection. It also makes it clear that any contraband that is indeed found must be seized and disposed of by the state that finds that material.

It also has a provision, which I believe is brand new and substantially enhances this regime, that would prohibit the provision of bunkering services to DPRK vessels on the high seas believed to be carrying contraband—bunkering services are things like the provision of fuel and other necessary materials for the operation of ships.

The third area of additional sanctions is in the financial realm where we have a very broad set of new authorities to prevent the flow of funds internationally that could in any way, shape, or form benefit North Korea's missile, nuclear or proliferation activities.

The fourth area of the new sanctions is a decision by the Council to engage in a process . . . where we will in the 1718 Committee designate additional goods, entities and individuals within a set timeframe and thus add to those whose assets would be frozen.

And, finally, there is a provision for the enhanced monitoring and implementation of this sanctions regime through a strengthened mandate for the 1718 Committee and the augmentation of its efforts by a panel of experts. Taken together, we think this is a very strong, important resolution.

Ambassador Rice's remarks are available in full at *http://usun.state.gov/briefing/statements/2009/125980.htm*.

On June 12, 2009, the UN Security Council adopted the draft as Resolution 1874. U.N. Doc. S/RES/1874. In adopting the new resolution, the Council acted under Chapter VII of the UN Charter and took the measures Ambassador Rice previewed on June 10 under Article 41 of Chapter VII. In a statement to the Security Council after the resolution's adoption, Ambassador Rosemary A. DiCarlo, U.S. Alternate Representative to the United Nations for Special Political Affairs, summarized its provisions and provided U.S. views on the resolution. Ambassador DiCarlo's remarks, excerpted below, are available at *http://usun.state.gov/briefing/statements/2009/125979.htm*.

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The message of this resolution is clear: North Korea's behavior is unacceptable to the international community, and the international community is determined to respond. North Korea should return without conditions to a process of peaceful dialogue. It should honor its previous commitments to denuclearize the Korean Peninsula. It should shun provocation and proliferation. But for now, its choices have led it to face markedly stronger sanctions from the international community.

This resolution condemns North Korea's nuclear test in the strongest terms. It strengthens and enhances sanctions on North Korea in five critically important areas: by imposing a total embargo on arms exports from North Korea and significantly expanding the ban on arms imports; by creating a wholly new framework for states to cooperate in the inspection of ships and aircraft suspected to be carrying weapons of mass destruction or other banned goods; by calling on states and international financial institutions to disrupt the flow of funds that could support North Korea's missile, nuclear, or proliferation activities; by committing to designate for targeted sanctions additional goods, entities, and individuals involved in North Korea's illicit behavior;

and, finally, by strengthening the mechanisms to monitor and tighten the implementation of this toughened new sanctions regime. These measures are innovative, they are robust, and they are unprecedented.

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On July 16, 2009, the UN Security Council's 1718 Sanctions Committee designated five individuals, five entities, and two categories of goods relating to North Korea's nuclear, ballistic missile, and other WMD-related programs of proliferation concern. The Committee's designations made the sanctions in Security Council Resolutions 1718 and 1874 applicable to the individuals, entities, and goods. On the same day, Robert Wood, Acting Spokesman, Department of State Bureau of Public Affairs, issued a statement supporting the Committee's action. Excerpts follow from Mr. Wood's statement, which is available at *www.state.gov/r/pa/prs/ps/2009/july/126147.htm*. The decision document approved by the Committee is available at *www.state.gov/r/pa/prs/ps/2009/july/126148.htm*.

The United States is pleased that the UN's 1718 Sanctions Committee today designated a number of individuals, entities and goods related to North Korea's nuclear, ballistic missile, and other WMD-related programs of proliferation concern, thereby making them subject to the sanctions measures adopted by the Security Council in resolutions 1718 and 1874. The entities and individuals will now be subject to an asset freeze, and the individuals will also be subject to a travel ban. Further, this decision expands the list of goods related to the DPRK's missile related programs banned for export or import.

These designations—along with the other measures in resolution 1874—constitute a serious and credible response to the May 25 nuclear test and put in place stronger and more credible sanctions than ever before in regards to North Korea. We look forward to continuing to work with the Committee to designate additional items that could contribute to the DPRK's nuclear, ballistic missile,

other WMD-related, and conventional arms programs to prohibit their transfer to or from North Korea and to designate additional individuals and entities engaged in or providing support for these programs.

* * * *

The United States again reiterates its call on North Korea to fulfill its commitments under the September 19, 2005 Joint Statement of the Six-Party talks, to eliminate its nuclear weapons program, and return to the Treaty on the Non-Proliferation of Nuclear Weapons and to IAEA safeguards.

On July 30, 2009, Ambassador Philip S. Goldberg, U.S. Coordinator for the implementation of Resolution 1874, briefed the 1718 Sanctions Committee on U.S. actions to implement Resolutions 1718 and 1874. Ambassador Goldberg's remarks to the press after the meeting, excerpted below, are available in full at *http://usun.state.gov/briefing/statements/2009/july/126837.htm*.

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Reporter: What are the measures that you've taken . . . to strengthen the sanctions?

Ambassador Goldberg: . . . In the financial area, we have advised our banks about activities related to North Korean entities—those that are mentioned in the sanctions committee and have been designated, but also activities with other North Korean individuals/entities, and to have a heightened sense of caution in those kinds of dealings. I think other governments have taken similar positions. And part of our task at the moment is in information sharing when we identify such transactions taking place.

The same would be true in the area of the inspections; . . . we need to exchange information. . . .

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(2) U.S. sanctions

(i) Sanctions under Executive Order 13382

During 2009 the United States imposed sanctions on North Korean entities, entities linked to previously designated North Korean entities, and several individuals under Executive Order 13382, "Blocking Property of Weapons of Mass Destruction Proliferators and their Supporters." Issued in 2005, E.O. 13382 cuts off financial and other resources for proliferation networks, effectively denying designated parties access to the U.S. financial and commercial systems. *See* 70 Fed. Reg. 38,567 (July 1, 2005); *see also Digest 2005* at 1125–31.

Effective June 30, 2009, the Department of State designated a North Korean entity, Namchongang Trading Corporation (a.k.a. NCG, a.k.a. Namchongang Trading, a.k.a. Nam Chon Gang Corporation, a.k.a. Nomchongang Trading Co.). 74 Fed. Reg. 35,226 (July 20, 2009). The Department of State designated two additional DPRK entities, General Bureau of Atomic Energy (a.k.a. gBae, a.k.a. General Department of Atomic Energy) and Korea Tangun Trading Corporation, on August 31, 2009. 74 Fed. Reg. 47,636 (Sept. 16, 2009).

On July 30, 2009, the Treasury Department designated a North Korean entity, the Korea Hyoksin Trading Corporation (a.k.a. Korea Hyoksin Export and Import Corporation) ("Hyoksin"). 74 Fed. Reg. 41,783 (Aug. 18, 2009). Treasury's action implemented the UN Security Council 1718 Committee's July 16 decision, discussed in A.1.a.(1) *supra*, to designate Hyoksin as an entity subject to the asset-freezing measures in paragraph 8 of Resolution 1718. A Treasury Department press release, issued on July 30, explained that Hyoksin was designated "for being owned or controlled by a North Korean entity, the Korea Ryonbong General Corporation (Ryonbong), which was identified in the Annex to E.O. 13382." The release also noted that "Ryonbong, which was also sanctioned pursuant to Resolution 1718, specializes in acquisition for North Korean defense industries and support to Pyongyang's military-related sales." *See www.treas.gov* [search "tg247"].

On August 11, 2009, the Treasury Department designated one North Korean entity, the Korea Kwangson Banking Corp. (a.k.a. KKBC) "for providing financial services" to support Hyoksin and Tanchon Commercial Bank ("Tanchon"). 74 Fed. Reg. 41,782 (Aug. 18, 2009); *www.treas.gov* [search "tg260"]. Tanchon is listed in the Annex to E.O. 13382, and the Security Council's 1718 Committee designated Tanchon in April 2009. A Treasury Department press release, issued on August 11, explained that

> [s]ince 2008, Tanchon has been utilizing KKBC to facilitate funds transfers likely amounting to millions of dollars, including transfers involving Korea Mining Development Trading Corporation (KOMID)-related funds from Burma to China in 2009. KOMID, which has been identified by the President in the Annex to E.O.13382 and designated by the UN pursuant to UNSCR 1718, is North Korea's premier arms dealer and main exporter of goods and equipment related to ballistic missiles and conventional weapons. Tanchon, the financial arm of KOMID, plays a key role in financing KOMID's sales of ballistic missiles. Additionally, Hyoksin, which the UN described as being involved in the development of weapons of mass destruction, sought to use KKBC in connection with a purchase of dual-use equipment in 2008.
>
> Due to KKBC's relationship to Tanchon, Hyoksin, and Ryonbong, today's action is consistent with UNSCR 1718's requirement to freeze the funds of and deny financial services to UN-designated entities. It is also consistent with UNSCR 1874's call to prevent the provision of financial services or any financial assets that could contribute to North Korea's nuclear, ballistic missile, or other WMD-related programs.

See www.treas.gov [search "tg260"]. Other Treasury Department designations under E.O. 13382 during 2009 included two individuals and two entities on January 16, 2009 (74 Fed. Reg. 6085 (Feb. 4, 2009)), and one Iran-based entity on June 30, 2009 (74 Fed. Reg. 32,222 (July 7, 2009)).

(ii) Missile and other nonproliferation sanctions

Effective February 2, 2009, the Department of State's Bureau of International Security and Nonproliferation imposed missile proliferation sanctions on three North Korean entities, Korea Mining and Development Corporation ("KOMID"), Moksong Trading Corporation, and Sino-Ki, as well as their subunits and successors, for engaging in missile technology proliferation activities. The State Department acted pursuant to § 73(a)(1) of the Arms Export Control Act; § 11B(b)(1) of the Export Administration Act of 1979 (50 U.S.C. app. § 2410b(b)(1)), as carried out under Executive Order 13222 of August 17, 2001; and Executive Order 12851 of June 11, 1993. 74 Fed. Reg. 5881 (Feb. 2, 2009), as corrected by 74 Fed. Reg. 6943 (Feb. 11, 2009). The sanctions, which are discussed in the Supplementary Information section of the Federal Register notice, include a two-year denial "of all new individual export licenses for the transfer of MTCR [Missile Technology Control Regime] Annex items to the sanctioned entities."

Also effective February 2, 2009, the Department of State's Bureau of International Security and Nonproliferation imposed sanctions on the same three entities, their subunits, and successors, for engaging in proliferation activity. The State Department acted pursuant to Executive Order 12938 of November 14, 1994, as amended, "Proliferation of Weapons of Mass Destruction." 74 Fed. Reg. 5882 (Feb. 2, 2009), as corrected 74 Fed. Reg. 6943 (Feb. 11, 2009). The sanctions, which are discussed in the Supplementary Information section of the Federal Register notice, include a ban on U.S. government procurement from the entities for two years.

b. Iran

(1) Overview

As discussed in Chapter 18.B.1.f.(1)(ii), in 2009 the United States pursued a two-track approach to preventing Iran from gaining a nuclear weapons capability, which combined

greater diplomatic engagement with Iran with the continued application of sanctions. On October 6, 2009, Stuart A. Levey, Under Secretary for Terrorism and Financial Intelligence, U.S. Department of the Treasury, testified before the Senate Committee on Banking, Housing and Urban Affairs at a hearing concerning "Minimizing Potential Threats from Iran: Administration Perspectives on Economic Sanctions and Other Policy Options." In his testimony, excerpted below, Mr. Levey discussed the targeted financial sanctions the United States has imposed against Iran, as well as U.S. preparations to impose additional sanctions should Iran fail to comply with its nonproliferation obligations and respond to U.S. diplomatic overtures. The full text of Mr. Levey's testimony is available at *www.treas.gov* [search "tg314"].*

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Less than a week ago, the five permanent members of the UN Security Council and Germany—the P5+1—met with Iran in Geneva. As the President said, that meeting was a constructive beginning to our dialogue, but much work remains to be done. He was clear that, "[i]f Iran does not take steps in the near future to live up to its obligations, then the United States will not continue to negotiate indefinitely, and we are prepared to move towards increased pressure." . . .

Even as the Administration focuses on diplomacy, we have also been working with our colleagues across the U.S. government to develop a strategy for imposing substantial costs on the government

* Editor's note: On June 9, 2010, the Security Council adopted Resolution 1929, imposing extensive additional nonproliferation sanctions against Iran. U.N. Doc. S/RES/1929. For additional background, see the White House fact sheet issued on June 9, 2010, available at *www.whitehouse.gov/the-press-office/fact-sheet-new-un-security-council-sanctions-iran*; *see also* the statement of Ambassador Rice to the Security Council, explaining the U.S. vote in support of the resolution, available at *http://usun.state.gov/briefing/statements/2010/142887.htm*. *Digest 2010* will discuss relevant aspects of the new resolution and U.S. views on it.

of Iran if the President determines that is what is needed to affect Iranian policies.

The plan we are developing is comprehensive. It takes into account that no single sanction is a "silver bullet"—we will need to impose measures simultaneously in many different forms in order to be effective. It also takes into account Iran's potential vulnerabilities and those activities that have the greatest influence on Iran's decisionmakers. As we consider various measures, we are particularly mindful of potential unintended consequences on the people of Iran, and the internal dynamic now playing out in that country.

Because financial measures are most effective when imposed as part of a broad-based effort with the support of the largest possible international coalition, we are working closely with our allies as we put together this strategy. We believe that by consulting with them closely and pursuing engagement genuinely we have a better chance to generate the coalition we will need if dialogue does not lead to demonstrated progress.

We should be realistic about the ability of sanctions to achieve our political and security objectives with Iran. If, however, we accurately target the key vulnerabilities and fissures in Iran and then implement our plan with a broad coalition of governments and key private sector actors, we can at least demonstrate to the Iranian government that there are serious costs to any continued refusal to cooperate with the international community. . . .

Financial Measures

Beginning in 2006, we developed and implemented a strategy to target Iran's illicit conduct. We took formal action against many of the specific banks, government entities, companies, and people involved in Iran's support for terrorism and its proliferation activities. We did so using two powerful Executive Orders, E.O. 13382 and E.O. 13224, that allow us to designate proliferators of weapons of mass destruction, terrorists, and their supporters, freezing any assets they have under U.S. jurisdiction and preventing U.S. persons, wherever located, from doing business with them. We have designated more than 100 entities and individuals supporting Iran's nuclear and missile enterprises, including the key organizations

within Iran, scores of their front companies, Iran's major banks that finance their conduct, and Iran's major shipping line, the Islamic Republic of Iran Shipping Lines, that handles illicit shipments for these dangerous enterprises. We have also acted against the Islamic Revolutionary Guard Corps, or the IRGC, and several of its companies for proliferation, as well as the IRGC's Qods Force for its role in supporting terrorist organizations.

As a result of the State Department's intensive diplomatic efforts, the UN Security Council resolutions on Iran contain many of the same designations we have implemented here in the United States. The European Union and Australia have gone beyond implementing the Security Council's list, joining us in other designations, such as that of Iran's Bank Melli. These actions are particularly powerful in that they give us an opportunity to explain publicly our reasons for acting, thereby exposing the illicit conduct of those we have designated.

Importantly, we combined these government actions with unprecedented, high-level outreach to scores of banks, banking associations, and other private sector leaders around the world. We discussed the risks of doing business with Iran and shared information about Iran's illicit and deceptive practices. As a result, the international private sector has amplified the impact of government actions, as banks and companies around the world have come to understand that, if they are dealing with Iran, it is nearly impossible to protect themselves against becoming entangled in that country's illicit conduct.

We have seen firsthand that the financial measures applied by the United States and the international community on Iran since 2006 have had an impact. At this point, most of the world's major banks have cut off or significantly scaled back their business with Iran because of the reputational risks involved. Iran is increasingly dependent on an ever-shrinking number of trade and finance facilitators. Many foreign companies have pulled back from business deals with Iran, including investment in Iran's energy sector. Iranian businessmen face greater inefficiencies, higher operating costs, and increased difficulty finding business partners and banks to provide them with financing.

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There is broad acknowledgment that the Iranian government engages in a range of deceptive financial and commercial conduct in order to obscure its development of nuclear and missile programs and facilitate its support for terrorism. International understanding of these practices—underscored by the UN Security Council resolutions on Iran and six warnings issued by the Financial Action Task Force about the risks Iran poses to the financial system—has been brought about in part by our efforts to share information about Iran's deception with governments and the private sector around the world.

These deceptive practices taint all Iranian business because they make it difficult to determine whether any Iranian transaction is licit. Iranian banks request that their names be removed from transactions so that their involvement cannot be detected; the government uses front companies and intermediaries to engage in ostensibly innocent commercial business to obtain prohibited dual-use goods; and Iran's shipping line, the Islamic Republic of Iran Shipping Lines, or IRISL, repeatedly manipulates bills of lading to shield prohibited cargo from scrutiny.

To a greater extent than ever, private companies across industries are now alert to these kinds of risks. Banks worldwide have been repeatedly warned by regulatory and standard-setting bodies to regard Iranian transactions with caution. Traders and shippers know that transactions with innocent-sounding Iranian counterparts can expose them to risk—both reputational and legal. Energy companies have put Iranian investments on indefinite hold, cautious of the political risk of investing too heavily in Iran. And exporters of sensitive and dual-use technologies know that supplying Iran can lead to severe sanctions and even prosecution. Across the board, then, transactions with Iran are already handled differently than transactions with any other country—except perhaps for North Korea—engendering either heightened suspicion or outright refusal to engage in them.

* * * *

United Coalition Necessary to Exploit Iran's Economic Vulnerabilities

This Administration has demonstrated that it is committed to a diplomatic resolution of the international community's issues

with Iran. The world is now united in looking to Iran for a response. If Iran does not live up to its obligations in this process, it alone will bear the responsibility for that outcome.

Under these circumstances, the United States would be obliged to turn to strengthened sanctions. We are intensifying work with our allies and other partners to ensure that, if we must go down this path, we will do so with as much international support as possible. For the less united we are in applying pressure, the greater the risk our measures will not have the impact we seek. . . . Over the past three years, the U.N. Security Council has adopted three unanimous Chapter VII resolutions against Iran. Those resolutions now represent the baseline. If Iran chooses to defy the international community yet again, and not live up to its obligations, these resolutions as well as other steps taken to date have laid the groundwork for a concerted and meaningful international response.

* * * *

(2) Security Council

During 2009 the Security Council Committee established pursuant to Resolution 1737 ("1737 Committee" or "Iran Sanctions Committee") submitted four reports to the Security Council concerning implementation of Security Council Resolutions 1737, 1747, and 1803. The transcripts of the Committee Chairman's briefings for the Security Council on those reports are available at *www.un.org/sc/committees/1737/selecdocs.shtml*; *see also* the Committee's annual report, U.N. Doc. S/2009/688. The resolutions impose sanctions measures to address Iran's nuclear program and are discussed in *Digest 2006* at 1280–84, *Digest 2007* at 1031–36, and *Digest 2008* at 969–74. In the Security Council's discussions of the Iran Sanctions Committee's reports, the United States expressed concern about Iran's failure to comply with its obligations and called for the Iran Sanctions Committee to redouble its efforts to ensure full and robust implementation of Security Council Resolutions 1737, 1747, and 1803.

During the Council's March 10 and June 15 meetings, the United States expressed concern about a violation of Resolution 1747 involving the *M/V Monchegorsk*. On February 3, 2009, Cyprus informed the Committee that it had found arms-related material during an inspection of the Cypriot-flagged ship, which Islamic Republic of Iran Shipping Lines ("IRISL") had chartered and was traveling from Iran to Syria. Cyprus inspected the ship consistent with paragraph 11 of Resolution 1803, which among other things called upon states, consistent with their national laws and authorities and international law and if they have reasonable grounds to suspect that a ship is carrying items prohibited under Resolutions 1737, 1747, or 1803, to inspect cargoes of ships operated by IRISL in their ports.

At the Security Council's March 10 meeting, Ambassador Rice stated:

> We've carefully studied the report of the inspection of the "M/V Monchegorsk," which was transporting arms-related materiel from Iran to Syria. The Iran Sanctions Committee concluded that this transfer violated Security Council Resolution 1747. The United States supports the steps that the Committee has already taken to address this violation, and we hope that the Committee will take appropriate action under its mandate.

See http://usun.state.gov/briefing/statements/2009/march/127965.htm for the full text of Ambassador Rice's statement. Addressing the Security Council on June 15, Ambassador Rosemary DiCarlo, U.S. Alternative Representative to the United Nations for Special Political Affairs, stated:

> . . . [T]he United States welcomes the Committee's continued efforts to obtain additional information from Iran and Syria about the recent violation of Security Council Resolution 1747 involving the *M/V Monchegorsk*. We remain concerned that the Committee's requests continue to go unanswered. The United States thanks the Republic of Cyprus for its recent letter informing the

> Committee that it has completed inspecting the ship's cargo and placed it in safe storage. We also appreciate Cyprus' providing the Committee with the additional details of the cargo that the Committee requested. We would pay particular note to the information suggesting that some of the ship's cargo belonged to Iran's Defense Industries Organization—a designated entity under Resolution 1737. We support the Committee's critically important efforts to examine these additional details and take appropriate action.

See http://usun.state.gov/briefing/statements/2009/125978.htm.

Ambassador Rice's statement to the Council on December 10, excerpted below, is available at *http://usun.state.gov/briefing/statements/2009/133386.htm.* For discussion of other nonproliferation efforts concerning Iran in 2009, see Chapter 18.B.1.f.(1)(ii)–(iii).

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. . . [T]he United States condemns the serious and repeated sanctions violations reported to the 1737 Committee. In the last year, there have been three reported incidents. All three involved the transfer of arms or ammunition from Iran to Syria. All three involved the Islamic Republic of Iran Shipping Lines, IRISL. And all three are clear violations of paragraph five of Security Council Resolution 1747.

Iran has now been caught breaking the rules—repeatedly. In today's report, the Committee expressed its "grave concern" about the "apparent pattern of sanctions violations involving prohibited arms transfers from Iran." The 1737 Committee has documented in great detail Iran's habit of violating this Council's resolutions. Such violations are unacceptable. The illicit smuggling of weapons from Iran to Syria is not just a sanctions violation; it is also an important factor in the destabilization of an already fragile Middle East.

We applaud the responsible actions that states have taken to detect and disrupt sanctions violations. In the two cases during this 90-day period—involving two vessels, the Hansa India and the Francop—the two member states took action in the face of suspicious cargo originating from Iran. In both cases, the member states off-loaded the arms-related materiel to ensure that it would not reach its intended destination or be returned to its origin. The Committee also has already called attention to its July 2009 Implementation Assistance Notice, which urged member states to "exercise extra vigilance with respect to [the Islamic Republic of Iran Shipping Lines's] role in violations of these resolutions."

The scope of these violations is alarming. On board the Francop were found 36 containers of arms and related materiel, including 690 122mm rockets, around 12,000 anti-tank and mortar shells, more than 20,000 fragmentation grenades, and more than half a million rounds of ammunition. Tons of bullet casings were found on board the Hansa India.

Mr. President, we commend the Committee for the diligence it has shown in carrying out its mandate. The effectiveness of Security Council sanctions depends on the follow-up of the Council, the Committee, and, ultimately, all member states. We must ensure that these sanctions are rigorously enforced to ensure that destabilizing weapons are not allowed to flow from Iran to other parts of the Middle East and elsewhere.

As the cases we have discussed here today amply demonstrate, all states should give extra scrutiny to all shipping between Iran and Syria, especially if the Islamic Republic of Iran Shipping Lines is involved. States should also report any information about sanctions violations to the 1737 Committee. We look to the Committee to consider options for effective action to prevent new incidents, and we look forward to its ideas on ways that member states can better implement these measures.

My third point, Mr. President, is to note that these recent events—the discovery of the Qom facility, Iran's announced intention to build new enrichment plants, and Iran's prohibited arms transfers—underscore the renewed urgency of full and robust implementation of Resolutions 1737, 1747, and 1803. Member states need to redouble their own enforcement efforts, and the

1737 Committee should be more vigilant, engaged, and active. More rigorous implementation of these sanctions will make it harder for Iran to acquire the technology and assistance to support its prohibited proliferation activities. It will make it harder for Iran to smuggle weapons to extremists and nonstate actors. It will make it harder for Iran to abuse the international financial system to fund its proliferation activities. And full implementation will make it harder for Iran to build any more covert nuclear-related facilities—such as the site near Qom—beyond the gaze of international inspectors.

* * * *

Mr. President, the United States remains firmly committed to a peaceful resolution to international concerns with Iran's nuclear program. We also remain willing to engage Iran to work toward a diplomatic solution to the nuclear dilemma it has created for itself—if Iran will only choose such a course. But engagement cannot be a one-way street. Iran must conclusively demonstrate a similar willingness to engage constructively and address the serious issues associated with its nuclear program. The international community stands firm in its conviction that Iran must comply with its international obligations. Should Iran continue to fail to meet its obligations, the international community will have to consider further actions.

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(3) U.S. controls and sanctions

(i) Sanctions under Executive Order 13382

During 2009 the United States imposed sanctions on Iranian entities, entities linked to previously designated Iranian entities, and several individuals under Executive Order 13382, "Blocking Property of Weapons of Mass Destruction Proliferators and their Supporters." Issued in 2005, E.O. 13382 cuts off financial and other resources for proliferation networks, effectively denying designated parties

access to the U.S. financial and commercial systems. *See* 70 Fed. Reg. 38,567 (July 1, 2005); *see also Digest 2005* at 1125–31.

Effective March 3, 2009, the Department of the Treasury designated 11 entities for their ties to Bank Melli, an Iranian bank that the United States designated under E.O. 13382 in 2007. 74 Fed. Reg. 18,281 (Apr. 21, 2009); *see also* 72 Fed. Reg. 62,520 (Nov. 5, 2007). *See also Digest 2007* at 1042, 1045, and 1047–49. Eight of the companies are based in Iran, two in Dubai, and one in the Cayman Islands. As a Treasury Department press release issued on March 3 noted, the U.S. action was consistent with the call in UN Security Council Resolution 1803 "on all Member States to exercise vigilance with respect to activities between financial institutions in their territories and all Iranian banks, particularly Bank Melli." *See www.treas.gov* [search "tg46"].

Effective April 7, 2009, the Department of the Treasury designated Khorasan Metallurgy Industries, Niru Battery Manufacturing Company, four additional Iranian entities, and one Chinese national. 74 Fed. Reg. 19,635 (Apr. 29, 2009). In announcing the designations, Under Secretary for Terrorism and Financial Intelligence Stuart Levey said, "Today we are acting under our Security Council and other international obligations to prevent these entities from abusing the financial system to pursue centrifuge and missile technology for Iran." As the Treasury Department's press release explained,

> . . . [T]he United Nations Security Council designated Khorasan Metallurgy Industries for sanctions in UN Security Council Resolution 1803 (2008) as a subsidiary of Iran's Ammunition Industries Group, which is owned by [Iran's Defense Industries Organization (DIO)], and identified Khorasan as involved in the production of centrifuge components. . . . Niru Battery Manufacturing Company was designated for sanctions by the United Nations Security Council in UN Security Council Resolution 1803 (2008) and identified as a manufacturer of power units for the Iranian military, to include missile systems.

On November 5, 2009, the Treasury Department designated First East Export Bank ("FEEB"), a Malaysian subsidiary of the Iranian government-owned Bank Mellat, and Ali Divandari, the Chairman of Bank Mellat, for acting on behalf of Bank Mellat. *See www.treas.gov* [search "tg355"]. The Treasury Department designated Bank Mellat under E.O. 13382 in 2007. 72 Fed. Reg. 65,837 (Nov. 23, 2007); *see also Digest 2007* at 1042, 1045, and 1047–49. As a Treasury press release, issued on November 5, explained:

> . . . FEEB is the first overseas subsidiary of an Iranian bank to open for business since the Financial Action Task Force (FATF), the world's premier standard-setting body for combating money laundering and terrorist financing, called in February 2009 for all jurisdictions to impose countermeasures to protect against the risks posed by Iran to the international financial system. FATF also advised jurisdictions at that time to take these risks into account when considering requests by Iranian financial institutions to open branches and subsidiaries.
>
> Today's designations are consistent with United Nations Security Council Resolutions on Iran, including UNSCR 1803, which calls on Member States to exercise vigilance over activities between their financial institutions and all banks domiciled in Iran, and their branches and subsidiaries abroad, in order to avoid such activities contributing to the proliferation of sensitive nuclear activities, or to the development of nuclear weapon delivery systems.

See www.treas.gov [search "tg355"] for the full text of the press release.

(ii) Sanctions under Executive Order 12938

Effective February 2, 2009, the Department of State's Bureau of International Security and Nonproliferation imposed sanctions on two Iranian entities, Shahid Bakeri Industrial Group ("SBIG") and Shahid Hemmat Industrial Group ("SHIG"), pursuant to Executive Order 12938 of November 14, 1994, as

amended, "Proliferation of Weapons of Mass Destruction." 74 Fed. Reg. 5883 (Feb. 2, 2009). The sanctions, which are discussed in the Supplementary Information section of the Federal Register notice, include a ban on U.S. government procurement from the entities for two years.

(iii) Iranian Transactions Regulations

Effective July 23, 2009, the Treasury Department's Office of Foreign Assets Control ("OFAC") amended the Iranian Transactions Regulations, 31 C.F.R. part 560, to revise the definition of the term "Iranian accounts" in § 560.320 and make conforming changes elsewhere in the regulations. 74 Fed. Reg. 36,397 (July 23, 2009). The Background section of the notice explained:

> Existing § 560.320 of the ITR defines the term *Iranian accounts* to mean accounts of persons located in Iran or of the Government of Iran maintained on the books of either a United States depository institution or a United States registered broker or dealer in securities. OFAC is revising § 560.320 to clarify the definition by substituting the new phrase "persons who are ordinarily resident in Iran, except when such persons are not located in Iran" for the phrase "persons located in Iran." This change will improve OFAC's overall administration of the ITR and facilitate compliance by U.S. financial institutions. As revised, § 560.320 defines *Iranian accounts* to mean accounts of persons who are ordinarily resident in Iran, except when such persons are not located in Iran, or of the Government of Iran maintained on the books of either a United States depository institution or a United States registered broker or dealer in securities.

On November 23, 2009, OFAC issued an interim final rule making technical changes to certain sections of the Iranian Transactions Regulations relating to the Trade Sanctions Reform and Export Enhancement Act of 2000, as amended ("TSRA"), 22 U.S.C. §§ 7201–7211. The preamble to

the interim final rule also clarified OFAC's policy concerning the process for issuing one-year licenses to export agricultural commodities, medicine, and medical devices to Iran pursuant to TSRA. 74 Fed. Reg. 61,030 (Nov. 23, 2009).

(iv) Dual-use export controls against Iran

On October 6, 2009, Daniel O. Hill, Acting Under Secretary for Industry and Security, U.S. Department of Commerce, testified before the Senate Committee on Banking, Housing and Urban Affairs at a hearing concerning "Minimizing Potential Threats from Iran: Administration Perspectives on Economic Sanctions and Other Policy Options." In his written statement, excerpted below, Mr. Hill discussed the Department of Commerce's role in administering and enforcing U.S. dual-use export control policies toward Iran. The full text of Mr. Hill's testimony is available at *http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=23f97300-5b76-483b-9225-aa14a2a82e79&Witness_ID=d4cea8b9-9656-4846-9ca3-a01f87fb6924.*

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All exports to Iran are subject to both the Export Administration Regulations (EAR) and the Department of the Treasury's Iranian transaction regulations. Treasury is the lead agency for administering the embargo, which features not only a prohibition on exports and reexports of items under the Commerce Department's jurisdiction, but also comprehensive restrictions on financial transactions and investments under the jurisdiction of the Treasury Department.

Commerce, however, is responsible for several aspects of the embargo of Iran. First, Commerce provides critical technical assistance to Treasury on the proper classification of items proposed for export or reexport to Iran under a Treasury license. The Iran Iraq Arms Non-Proliferation Act of 1992 (Note to 50 U.S.C. 1701)

generally requires BIS to deny licenses, absent a Presidential waiver, for the export or reexport of items on the Commerce Control List (CCL) to Iran. In considering an application to export an item to Iran, Treasury must know whether the item is on the CCL and thus prohibited for export to Iran without a waiver. Commerce determines whether the item is on the CCL and informs Treasury.

Second, Commerce plays a vital role in enforcing the embargo by investigating transactions that may constitute exports or reexports to Iran in violation of the EAR. An export or re-export of an item subject to the EAR without Treasury authorization will generally constitute a violation of the EAR. . . .

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The Commerce Department coordinates closely with the Department of State and other agencies to work with other countries, including states that may be involved in transshipments to Iran, to establish and strengthen those states' export and transshipment control systems. This enables those countries to cooperate with us, build their export control system based on our best practices and to cooperate with us on specific transactions as well as take actions against parties in their own territory who are illegally exporting items to countries such as Iran.

Commerce also can bring to bear unique tools to enforce U.S. export controls on Iran. These tools include Temporary Denial Orders (TDO) and the Entity List. A TDO is a legal order that can be issued quickly, for 180 days at a time, to prevent imminent violations of the EAR. . . .

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On February 6, 2009, for example, the Department of Commerce Bureau of Industry and Security issued a temporary denial order against three entities: Islamic Republic of Iran Shipping Lines; Tadbir Sanaat Sharif Technology Development Center; and Icarus Marine (Pty) Ltd. 74 Fed. Reg. 6265 (Feb. 6, 2009). Among other things, the order prohibited Islamic Republic of Iran Shipping Lines from "directly or indirectly, participat[ing] in any way in any transaction involving any commodity, software or technology . . . exported

or to be exported from the United States that is subject to the Export Administration Regulations ('EAR'), or in any other activity subject to the EAR." The order also prohibited the "export or reexport to or on behalf of any [entity subject to the temporary denial order] any item subject to the EAR," among other restrictions. Excerpts below from the Federal Register publication describe the standard for the Commerce Department to issue a temporary denial order.

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Pursuant to Section 766.24(b) of the EAR, the Assistant Secretary may issue a TDO upon a showing by BIS that the order is necessary in the public interest to prevent an "imminent violation" of the EAR. 15 CFR 766.24(b)(1). "A violation may be 'imminent' either in time or in degree of likelihood." 15 CFR 766.24(b)(3). BIS may show "either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations." *Id.* As to the likelihood of future violations, BIS may show that "the violation under investigation or charges is significant, deliberate, covert and/or likely to occur again, rather than technical and negligent[.]" *Id.* A "lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation." *Id.*

* * * *

(v) Commerce Department Iran licensing requirements

Effective January 15, 2009, the Department of Commerce Bureau of Industry and Security issued an interim final rule revising the Export Administration Regulations ("EAR") to impose a new licensing requirement for reexports of certain items for Iran. The rule also imposed licensing requirements on individuals and entities designated pursuant to Executive Order 13382. For discussion of designations of individuals

and entities pursuant to E.O. 13382 in 2009, see A.1.a.(2)(i) and A.1.b.(3)(i) *supra*. As the Background section of the preamble to the final rule explained,

> The EAR imposes license requirements on certain exports and reexports to Iran. These license requirements apply in addition to any requirements for authorization to export or reexport to Iran that are imposed by the Department of the Treasury, Office of Foreign Assets Control (OFAC), which maintains a comprehensive embargo against Iran, as described in the Iranian Transactions Regulations (31 CFR part 560). The EAR license requirements and licensing policy that apply specifically and expressly to Iran are in parts 742 and 746 of the EAR. This rule makes changes to those parts to promote consistency, reduce redundancy and to clarify the role of the Bureau of Industry and Security (BIS) in connection with the enforcement of United States export control policy towards Iran. It establishes a license requirement for reexports of items classified under ten Export Control Classification Numbers (ECCNs) that previously did not require a license for reexport to Iran under the EAR. This rule also adds a new § 744.8 to the EAR that imposes a license requirement on exports and reexports to parties listed by OFAC in Appendix A to 31 CFR Chapter V with the bracketed suffix [NPWMD].

74 Fed. Reg. 2355 (Jan. 15, 2009).

c. Nonproliferation sanctions against Chinese entities

Effective February 2, 2009, the Department of State's Bureau of International Security and Nonproliferation imposed missile proliferation sanctions on the following Chinese entities: Dalian Sunny Industries, also known as LIMMT Economic and Trade Company Ltd., LIMMT ("Dalian") Metallurgy and Minerals Co., and LIMMT ("Dalian FTZ") Economic and Trade Organization, and its sub-units and successors; and

Bellamax and its subunits and successors, for engaging in missile technology proliferation activities. 74 Fed. Reg. 5882 (Feb. 2, 2009). The State Department acted pursuant to § 73(a)(1) of the Arms Export Control Act; § 11B(b)(1) of the Export Administration Act of 1979 (50 U.S.C. App. § 2410b(b)(1)), as carried out under Executive Order 13222 of August 17, 2001 ("Export Administration Act of 1979"); and Executive Order 12851 of June 11, 1993. The sanctions, which are discussed in the Supplementary Information section of the Federal Register notice, included a two-year denial "of all new individual export licenses for the transfer of MTCR [Missile Technology Control Regime] Annex items to the sanctioned entities." The Federal Register notice also stated that "a determination was made pursuant to section 73(e) of the Arms Export Control Act (22 U.S.C. 2797b(e)) that it was essential to the national security of the United States to waive the sanctions described above with respect to the activities of the Chinese government described in section 74(a)(8)(B) of the Arms Export Control Act (22 U.S.C. 2797c(a)(8)(B))—that is, activities of the Chinese government relating to the development or production of any missile equipment or technology and activities of the Chinese government affecting the development or production of electronics, space systems or equipment, and military aircraft." Effective February 2, 2009, the Department also imposed sanctions on the same entities pursuant to Executive Order 12938 of November 14, 1994, as amended by Executive Order 13094 of July 28, 1998 and Executive Order 13382 of June 28, 2005. 74 Fed. Reg. 5883 (Feb. 2, 2009).

d. A.Q. Khan Network sanctions

Effective January 7, 2009, the Department of State announced the imposition of U.S. sanctions on 13 individuals, including Abdul Qadeer Khan, and three entities for their involvement in the A.Q. Khan nuclear proliferation network. The United States imposed the sanctions under the Nuclear Proliferation Prevention Act, 22 U.S.C. § 6301; the Export-Import Bank Act

of 1945, 12 U.S.C. § 635(b)(4); Executive Order 12938 (1994); and Executive Order 13382 (2005). *See* 74 Fed. Reg. 3126 (Jan. 16, 2009) for details on the legal framework and consequences of the U.S. action. A media note issued by the Department of State, excerpted below and available at *http://2001-2009.state.gov/r/pa/prs/ps/2009/01/113774.htm*, provided additional background.

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We believe these sanctions will help prevent future proliferation-related activities by these private entities, provide a warning to other would-be proliferators, and demonstrate our ongoing commitment to using all available tools to address proliferation-related activities.

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The network's actions have irrevocably changed the proliferation landscape and have had lasting implications for international security. Governments around the world, including Pakistan, South Africa, Turkey, the United Kingdom, Germany, the United Arab Emirates, Switzerland, and Malaysia, worked closely with the United States to investigate and shut down the network. Governments have also joined together to put in place United Nations Security Council Resolution 1540 to criminalize proliferation and have worked cooperatively to establish the Proliferation Security Initiative (PSI) to enhance international tools to interdict and prevent trade in sensitive technologies.

Many of Dr. Khan's associates are either in custody, being prosecuted, or have been convicted of crimes. Dr. Khan publicly acknowledged his involvement in the network in 2004, although he later retracted those statements. While we believe the A.Q. Khan network is no longer operating, countries should remain vigilant to ensure that Khan network associates, or others seeking to pursue similar proliferation activities, will not become a future source for sensitive nuclear information or equipment.

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e. Weapons of Mass Destruction Proliferators Sanctions Regulations

On April 13, 2009, OFAC issued its "Weapons of Mass Destruction Proliferators Sanctions Regulations," 31 C.F.R. part 544, to carry out Executive Order 13382 (discussed in A.1.a.(2)(i) and A.1.b.(3)(i) *supra*). 74 Fed. Reg. 16,771 (Apr. 13, 2009).

f. Export controls

(1) Entity List

In his testimony before the Senate Committee on Banking, Housing and Urban Affairs, discussed in A.1.b.(3)(iv) *supra*, Daniel O. Hill, Acting Under Secretary of Commerce for Industry and Security, cited the Commerce Department's Entity List as a valuable nonproliferation tool. Mr. Hill explained that the Entity List

> is a regulatory tool that can be used to prohibit the export, or reexport, of any item subject to the EAR, including items not on the CCL, to any listed entity. In 2008, for example, the Bureau of Industry and Security added 75 foreign parties to the Entity List because of their involvement in a global procurement network that sought to illegally acquire U.S.-origin electronic components and devices capable of being used to construct Improvised Explosive Devices (IEDs). These commodities had been used in IEDs and other explosive devices against Coalition Forces in Iraq and Afghanistan. This network acquired U.S. origin commodities and illegally exported them to Iran. As a consequence of the addition of these entities to the Entity List, no U.S. or foreign party may export or reexport items subject to the EAR to them without a license. Exporting or reexporting any items to any of these entities without the required license would constitute a violation of the EAR.

The full text of Mr. Hill's written testimony is available at *http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=23f97300-5b76-483b-9225-aa14a2a82e79&Witness_ID=d4cea8b9-9656-4846-9ca3-a01f87fb6924*.

During 2009 the Department of Commerce, Bureau of Industry and Security ("BIS"), amended the EAR to add 13 entities located in Germany, Hong Kong, and Ireland to the Entity List. 74 Fed. Reg. 35,797 (July 21, 2009). As explained in the Federal Register, "[t]he persons that are added to the Entity List have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States. . . . A BIS license is required for the export or reexport of any item subject to the EAR to any of the persons [added to the Entity List], including any transaction in which any of the listed persons will act as purchaser, intermediate consignee, ultimate consignee, or end-user of the items. The listing of these persons also prohibits the use of License Exceptions . . . for exports and reexports of items subject to the EAR involving such persons."

(2) Australia Group

On July 6, 2009, the Department of Commerce, Bureau of Industry and Security, issued a final rule revising the EAR to implement changes the Australia Group ("AG") adopted in December 2008 to its "Control List of Dual-Use Chemical Manufacturing Facilities and Equipment and Related Technology and Software" and "Control List of Dual-Use Biological Equipment and Related Technology and Software." As the preamble to the new rule explained:

> The AG is a multilateral forum, consisting of 40 participating countries, that maintains export controls on a list of chemicals, biological agents, and related equipment and technology that could be used in a chemical or biological weapons program. The AG periodically reviews items on its control list to enhance the effectiveness of participating

governments' national controls and to achieve greater harmonization among these controls.

74 Fed. Reg. 31,850 (July 6, 2009). Excerpts below from the Summary section of the Federal Register publication provide details on the amendments.

. . . This final rule amends the EAR to reflect changes to the AG "Control List of Dual-Use Chemical Manufacturing Facilities and Equipment and Related Technology and Software" affecting valves and toxic gas monitoring systems. Consistent with these changes, this rule expands the EAR controls on valves to include those having contact surfaces lined with certain ceramic materials. In addition, this rule clarifies the types of dedicated detecting components that are subject to the EAR controls on toxic gas monitoring systems and expands these controls to include dedicated software for such systems.

This rule also amends the EAR to reflect changes to the AG "Control List of Dual-Use Biological Equipment and Related Technology and Software" affecting cross (tangential) flow filtration equipment. Consistent with these changes, the rule clarifies the EAR controls on such equipment to specifically identify equipment using disposable or single-use filtration components. In addition, this rule amends the EAR to reflect changes to the AG "Guidelines for Transfers of Sensitive Chemical or Biological Items." Consistent with these changes, the rule amends the AG-related software entries in the EAR to include references to several definitions that were recently added to the AG "Guidelines."

Finally, this rule amends the list of countries that currently are States Parties to the CWC by adding "Bahamas," "Dominican Republic," "Iraq," and "Lebanon," which recently became States Parties. As a result of this change, the CW (Chemical Weapons) license requirements and policies in the EAR that apply to these countries now conform with those applicable to other CWC States Parties. However, because of the special EAR controls that apply to Iraq, items controlled under the EAR for CW reasons continue

to require a license for export or reexport to Iraq, or for transfer within Iraq.

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2. Terrorism

a. Security Council 1267 (al-Qaeda/Taliban) sanctions

During 2009 the United States continued its efforts to strengthen the Security Council's sanctions regime against al-Qaeda, Usama bin Laden, the Taliban, and their associates. These sanctions, which the Security Council established in Resolutions 1267, 1333, and 1390 and are referred to collectively as the "1267 sanctions," are an asset freeze and a related ban on the provision of funds, assets or resources to benefit al-Qaeda, Usama bin Laden, the Taliban, and their associates; a travel ban; and an arms embargo. In addition to the sanctions on the Taliban itself pursuant to Resolution 1267, the Security Council's 1267 Sanctions Committee maintains a Consolidated List of individuals and entities it designates as being subject to the sanctions. For additional background, see *Digest 2002* at 885–88.

On November 13, 2009, Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, addressed a Security Council meeting at which the Chairmen of the 1267 Committee, the Counter-Terrorism Committee, and the 1540 Committee briefed the Council. Excerpts follow from his remarks concerning the 1267 sanctions regime and how to strengthen it. The full text of the U.S. statement is available at *http://usun.state.gov/briefing/statements/2009/131935.htm*.

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Countering threats posed by al-Qaeda and the Taliban remains one of the most important challenges facing this Council. Without the

efforts of Member States to work collectively, the world would be much more vulnerable to terrorist attacks. What can we do to ensure the 1267 regime remains a vital and effective multilateral tool to respond to this threat?

First, we can reaffirm the international community's commitment to full implementation of the 1267 measures. The 1267 regime can only function well if states actively participate in the regime, such as by proposing new names for listing.

Second, we should continue our efforts to ensure that the Consolidated List is as accurate and up-to-date as possible, ensuring that our procedures for imposing sanctions are fair and clear. Resolution 1735 and 1822 introduced new measures to help the Committee confirm the accuracy of the list. [Editor's Note: *See Digest 2005* at 1003–6 and *Digest 2008* at 87–88 for background on the two resolutions.] The Committee's work to implement what is perhaps the most significant measure in 1822—the review of every name on the Consolidated List by June 2010—will continue in the coming months. The United States is committed to ensuring that this review is meaningful and is working with Member States to finish this review on time.

And, third, we should continue our efforts to ensure that the sanctions are applied in a fair and transparent manner. Resolution 1822 and its predecessors introduced significant enhancements to ensure fairness. The Council will negotiate, in the coming weeks, a new resolution to renew the mandate of the 1267 Monitoring Team and will take the opportunity to enhance the regime and improve our ability to counter the al-Qaeda and Taliban threats. The United States believes this resolution should take additional steps to ensure that the process for listing and delisting individuals is as fair and transparent as possible. We believe there is room to improve the way in which the 1267 Committee decides to list individuals and how it considers requests from those seeking to be removed from the list.

* * * *

On December 17, 2009, the UN Security Council adopted Resolution 1904, "Threats to international peace and security caused by terrorist acts," strengthening the 1267 sanctions

regime and renewing the mandate of the 1267 Monitoring Team. U.N. Doc. S/RES/1904. The United States took the lead on the resolution, which eight other Security Council members cosponsored. Consistent with the objectives Ambassador Wolff outlined on November 13, the new resolution prescribed measures to promote states' implementation of the 1267 sanctions and to ensure that the 1267 Committee's procedures for placing and removing individuals and entities to and from its Consolidated List are fair and clear. In Resolution 1904, the Security Council decided that states must continue to implement the 1267 sanctions against persons and entities on the Consolidated List. The Council also confirmed for the first time that the 1267 financial sanctions prohibit payment of ransom to any individual or entity on the Consolidated List.

The resolution also established new procedures for removing individuals and entities from the Consolidated List. Most notably, paragraph 20 of the resolution established an Office of the Ombudsperson, initially for 18 months, to assist the 1267 Committee in its consideration of de-listing requests. Paragraph 20 directed the Secretary-General to appoint an Ombudsperson with expertise in areas such as law, human rights, counterterrorism, and sanctions, and Annex 2 to the resolution set forth the Ombudsperson's mandate. Among other things, the resolution mandated the Ombudsperson to receive de-listing requests, gather information about those requests, produce a comprehensive report on each request for the 1267 Committee, communicate the Committee's decision on each request to the petitioner, and report biannually to the Security Council.

The resolution also included new provisions to make the Committee's listing process fairer and more transparent and to enhance the accuracy of the Consolidated List. For example, paragraph 8 of the resolution encouraged states to name a national point of contact for entries on the Consolidated List. In paragraph 11 the Council decided that the statements of cases that states are required to provide when they propose names for the Committee to add to the Consolidated

List would be publicly releasable, apart from any sections that a member state advises the 1267 Committee are confidential. The resolution also directed the Committee to complete its review of all names on the Consolidated List, as required by paragraph 25 of Resolution 1822, by June 30, 2010, and then to review annually all names on the list that had not been reviewed in three years or more.

b. U.S. targeted sanctions implementing Resolution 1267 and other Security Council resolutions on terrorism

The United States implements its counterterrorism obligations under UN Security Council Resolution 1267 (1999), subsequent UN Security Council resolutions concerning al-Qaeda/Taliban sanctions, and Resolution 1373 (2001) through Executive Order 13224 of September 24, 2001. U.N. Docs. S/RES/1373 and S/RES/1267. *See* A.2.a. *supra*.

Executive Order 13224 imposes economic sanctions on persons who have been designated in the annex to the executive order; persons designated by the Secretary of State for having committed or for posing a significant risk of committing acts of terrorism; and persons designated by the Secretary of the Treasury for working for or on behalf of, providing support to, or having other links to, persons designated under the executive order. For additional background, see 66 Fed. Reg. 49,079 (Sept. 25, 2001); *see also Digest 2001* at 881–93 or *Digest 2007* at 155–58.

(1) Department of State

In 2009 the Secretary of State or the Deputy Secretary of State designated two entities and two individuals pursuant to E.O. 13224, as follows: (1) one entity on June 24, 2009 (74 Fed. Reg. 31,788 (July 2, 2009) (Kata'ib Hizballah, a.k.a. KH)); (2) one entity on July 31, 2009 (74 Fed. Reg. 41,482 (Aug. 17, 2009) (Revolutionary Struggle, a.k.a. Epanastatikos Aghonas)); (3) one entity on December 14, 2009 (75 Fed. Reg. 2920 (Jan. 19, 2010)

(al-Qa'ida in the Arabian Peninsula ("AQAP") and its associated aliases)); and (4) two individuals on December 14, 2009 (75 Fed. Reg. 2920 (Jan. 19, 2010) (Nasir al-Wahishi); 75 Fed. Reg. 2921 (Jan. 19, 2010) (Said Ali al-Shihri)).

(2) Office of Foreign Assets Control

(i) 2009 designations

OFAC designated 14 individuals and three entities pursuant to Executive Order 13224 during 2009. The designated individuals and entities are associated with or provide support for Hizballah, al-Qaeda, the Kurdistan Workers Party ("PKK"), Lashkar-e-Tayyiba ("LT"), the Liberation Tigers of Tamil Eelam ("LTTE"), or the Eastern Turkistan Islamic Party ("ETIP"), organizations the United States has designated as terrorist organizations. 74 Fed. Reg. 4299 (Jan. 23, 2009); 74 Fed. Reg. 4504 (Jan. 26, 2009); 74 Fed. Reg. 6946 (Feb. 11, 2009); 74 Fed. Reg. 7741 (Feb. 19, 2009); 74 Fed. Reg. 19,123 (Apr. 27, 2009); 74 Fed. Reg. 26,475 (June 2, 2009); 74 Fed. Reg. 35,907 (July 21, 2009); 74 Fed. Reg. 54,625 (Oct. 22, 2009).

During 2009 the Security Council's 1267 Committee added five of these individuals, Abdul Haq, Bekkay Harrach, Ameen Al-Peshawari, Mohammed Yahya Mujahid, and Arif Qasmani, to its Consolidated List. *See www.un.org/sc/committees/1267/index.shtml.*

(ii) Global Terrorism Sanctions Regulations

On November 23, 2009, OFAC issued a final rule amending the Global Terrorism Sanctions Regulations by including a definition of "financial, material, or technological support." 74 Fed. Reg. 61,036 (Nov. 23, 2009). Excerpts from the preamble to the final rule explain the regulatory change.

* * * *

. . . [P]aragraph (a)(4)(i) of section 594.201 of the [Global Terrorism Sanctions Regulations] GTSR implements section 1(d)(i) of E.O. 13224 by blocking the U.S. property and interests in property of persons determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Secretary of Homeland Security, and the Attorney General:

To assist in, sponsor, or provide *financial, material, or technological support* for, or financial or other services to or in support of:

(A) Acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States, or

(B) Any person whose property or interests in property are blocked pursuant to paragraph (a) of this section. * * * GTSR, section 594.201(a)(4)(i) (emphasis added).

Acting under authority delegated by the Secretary of the Treasury, OFAC today is amending the GTSR to add a new definition of the term "financial, material, or technological support," as used in section 594.201(a)(4)(i) of the GTSR. New section 594.317, in subpart C of the GTSR, defines the term "financial, material, or technological support" to mean any property, tangible or intangible, and includes a list of specific examples.

The definition of the term "financial, material, or technological support" in new section 594.317 may include concepts that overlap with existing provisions in the GTSR, such as interpretive section 594.406 on the "provision of services." However, in light of the threat posed by acts of terrorism to the national security, foreign policy, and economy of the United States, OFAC has determined that the benefit of greater specificity in the new definition outweighs any concerns with regard to redundancy.

Please note that, in promulgating this regulation, OFAC does not imply any limitation on the scope of paragraphs (a)(1), (a)(2), (a)(3), or (a)(4)(ii) of section 594.201. Furthermore, the designation criteria in these paragraphs as well as in paragraph (a)(4)(i) of section 594.201 will be applied in a manner consistent with pertinent Federal law, including, where applicable, the First Amendment to the United States Constitution.

c. Countries not cooperating fully with antiterrorism efforts

On May 8, 2009, James B. Steinberg, Deputy Secretary of State, acting on delegated authority, determined and certified to Congress pursuant to § 40A of the Arms Export Control Act, 22 U.S.C. § 2781, and Executive Order 11958, as amended, that Cuba, Eritrea, Iran, North Korea, Syria, and Venezuela were not cooperating fully with U.S. counterterrorism efforts. 74 Fed. Reg. 23,226 (May 18, 2009). Information concerning the U.S. sanctions that correspond to these designations is available at *Cumulative Digest 1991–99* at 508 or *Digest 2003* at 167.

3. Armed Conflict: Restoration of Peace and Security

a. Eritrea

On December 23, 2009, the Security Council adopted Resolution 1907, which established a new targeted sanctions regime relating to Eritrea. U.N. Doc. S/RES/1907. The Council acted under Chapter VII of the UN Charter, and determined that Eritrea's border dispute with Djibouti and its actions to destabilize Somalia represented a threat to international peace and security. Among other things, the resolution imposed an arms embargo covering imports to and exports from Eritrea. It also imposed a travel ban on individuals and an arms embargo and asset freeze on individuals and entities designated by the Security Council sanctions committee established by Resolution 751 of 1992, including members of Eritrea's military and political leadership that meet the criteria for designation. Paragraph 15 of the resolution set forth the bases for the committee to designate individuals and entities for sanctions, including violations of the arms embargo and the provision of financing or other support for terrorism in the region. Other grounds for designation included impeding implementation of Resolution 1862 (2009) (U.N. Doc. S/RES/1862), which demanded that Eritrea

withdraw its troops and take steps to resolve its border dispute with Djibouti. In a statement to the press after the Council adopted the new resolution, excerpted below, Ambassador Rice provided U.S. views on the Council's action. Ambassador Rice's remarks are available at *http://usun.state.gov/briefing/statements/2009/133975.htm*.

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. . . This was an African initiative. It was the consequence of a decision taken by the African Union. It was consistent with a prior resolution [1862] passed by this Council, that demanded prompt action by Eritrea with respect to Djibouti. Nearly a year later, that action has not been forthcoming. The Council acted today, not hastily, not aggressively, but with the aim quite sincerely of encouraging Eritrea to do as this Council and so many of its members have repeatedly called upon it to do, which is not to continue actions which destabilize Somalia, to halt assistance to those violent elements in Somalia that are working to overthrow the government and attacking AMISOM peacekeepers and to resolve peacefully and in accordance with Resolution 1862, the border skirmish and dispute with Djibouti.

From the United States' point of view, let me say that we have for many, many months sought a constructive dialogue with the government of Eritrea. We have sought to encourage quietly the government of Eritrea to take the steps that it claims it intends to take, but it will not take, and has not taken. And we still hope frankly that they will. We do not see this as the door closing on Eritrea, but on the contrary, we view this as another opportunity for Eritrea to play a more responsible and constructive role in the region. We did not come to this decision with any joy—or with anything other than a desire to support the stability of peace in the region.

* * * *

Question: . . . What does it mean that the political and military leadership of Eritrea will be subject to sanctions?

Ambassador Rice: Well obviously that will be something for the committee to decide. There has been a lot of work done by Somalia Monitoring Group and that sanctions committee . . . has shared with the Council its recommendations as to who ought to be considered for designation under the Somalia regime, and now we will look in addition at who ought to be considered based on the criteria in the resolution we just passed.

b. Democratic Republic of the Congo

On March 4, 2009, the United States designated five leaders of the Democratic Forces for the Liberation of Rwanda ("FDLR") pursuant to Executive Order 13413 of October 27, 2006, "Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of the Congo." 71 Fed. Reg. 64,105 (Oct. 31, 2006); *see also Digest 2006* at 996–98. As a Treasury Department press release issued on the date of the designations explained, the order

> targets, among others, political or military leaders of foreign armed groups operating in the Democratic Republic of the Congo (DRC).
>
> The five individuals are political and military leaders of the Forces Démocratiques de Libération du Rwanda (FDLR). The FDLR is an armed group operating in the DRC made up of ex-Rwandese Armed Forces, Interahamwe, and other Hutu extremists, including those responsible for the Rwandan genocide of 1994. The FDLR has been blamed as the root cause of instability in the eastern DRC, and its activities pose a grave threat to the entire Great Lakes region.

See www.treas.gov [search "tg49"].

In designating the five individuals, the United States acted to implement Security Council Resolution 1857 (2008) concerning the DRC. U.N. Doc. S/RES/1857. The resolution renewed the travel ban and asset freeze on individuals and, as appropriate, entities designated by the Security Council's

DRC Sanctions Committee, which the Security Council adopted initially in Resolution 1596 (2005) (U.N. Doc. S/RES/1596) and modified in subsequent resolutions. Among other things the resolution also renewed the arms embargo, which the Security Council imposed initially in Resolution 1493 (2003) (U.N. Doc. S/RES/1493) and modified in subsequent resolutions. The Security Council's DRC Sanctions Committee designated four of the individuals on March 3, 2009, and had designated the fifth previously. In connection with the U.S. designations, the Department of State issued a statement encouraging "all UN Member States to continue to identify and bring to the attention of the DRC Sanctions Committee individuals and entities who meet the designation criteria in paragraph 4 of UN Security Council resolution 1857 (2008)." U.N. Doc. S/RES/1857.

On November 30, 2009, the Security Council adopted Resolution 1896, which renewed the arms embargo, asset freeze, and travel ban through November 30, 2010. U.N. Doc. S/RES/1896. Among other things, the resolution also expanded the DRC Sanctions Committee's mandate to require it to issue guidelines for its procedures for listing individuals and entities subject to sanctions. The resolution also requested the Secretary-General to renew the Group of Experts established pursuant to Resolution 1533 (2004) (U.N. Doc. S/RES/1533) and included provisions emphasizing the need to prevent illegal exploitation of minerals from the DRC. For example, the resolution tasked the Group of Experts to provide the Committee with recommendations for guidelines on the due diligence that importers, consumers, and industrial processers could perform with respect to mineral-related products from the DRC.

After the Council adopted Resolution 1896, Ambassador Rice discussed its significance with the press. Ambassador Rice's remarks, excerpted below, are available at *http://usun.state.gov/briefing/statements/2009/132756.htm*.

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. . . The new resolution puts important and needed emphasis on the need to prevent the continued illegal exploitation of Congo's minerals, including its gold, which is funding the rebels and the fighting in Congo. This is an important step, and one on an issue that we are greatly concerned about. . . .

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. . . [V]iolations of the DRC regime seem to be evident based on the report of the group of experts. . . . [T]he resolution that was just passed I think takes some important steps in the direction of restraining the illicit trade in gold and other minerals from the DRC. It is a more complicated task than, for example, the Kimberly Process with diamonds, where diamonds are obviously very readily identifiable by their source of origin, but the urgency and importance of it is no less great and we will continue . . . from the context of the panel of experts and in our review of MONUC and our policy toward the region to look for opportunities to constrain that trade.

* * * *

c. Darfur

On December 15, 2009, Ambassador Rice stressed the importance of sanctions as a tool for promoting peace and security in Darfur and expressed support for the Security Council Sudan Sanctions Committee's Panel of Experts. The Secretary-General appointed the panel initially pursuant to Resolution 1591 (2005) to assist the Sudan Sanctions Committee in monitoring the sanctions regime, and subsequent resolutions continued the panel's mandate. U.N. Doc. S/RES/1591. Ambassador Rice's statement, set forth below, is also available at *http://usun.state.gov/briefing/statements/2009/133608.htm.*

In light of the dire situation in Sudan, the United Nations Security Council must use all the tools at its disposal in pursuit of our common goal of ending the suffering in Darfur.

* * * *

. . . The use of targeted sanctions can give peace mediators a tool to marginalize spoilers. UN sanctions can and should be an important element of the international community's efforts to support peace and security.

The United States supports the Panel and will continue to safeguard its independence. While we recognize that the Sanctions Committee must operate on the basis of consensus and that there are times when Governments may not fully agree with its findings, we must preserve the valuable role that expert groups have played for a decade in helping the Council monitor and implement its decisions.

* * * *

On May 28, 2009, OFAC issued its Darfur regulations to implement Executive Order 13400 of April 26, 2006. 74 FR 25,430 (May 28, 2009). For background on Executive Order 13400, see 71 Fed. Reg. 25,483 (May 1, 2006); *see also Digest 2006* at 975–78.

d. Stabilization efforts in Iraq

On July 2, 2009, the Secretary of the Treasury, in consultation with the Secretaries of State and Defense, designated one individual, Abu Mahdi al-Muhandis, and one entity, Kata'ib Hizballah, pursuant to Executive Order 13438, which targets certain persons who threaten stabilization efforts in Iraq. 74 Fed. Reg. 34,639 (July 16, 2009). As a Treasury Department press release issued on July 2 explained,

> Al-Muhandis and Kata'ib Hizballah have committed, directed, supported, or posed a significant risk of committing acts of violence against Coalition and Iraqi Security Forces and as a result are designated today under Executive Order (E.O.) 13438, which targets insurgent and militia groups and their supporters.

* * * *

Abu Mahdi al-Muhandis is an advisor to Qasem Soleimani, the commander of Iran's Qods Force, the arm

> of the Islamic Revolutionary Guard Corps (IRGC) responsible for providing material support to Lebanon-based Hizballah, Hamas, Palestinian Islamic Jihad, and the Popular Front for the Liberation of Palestine–General Command. Further, the IRGC-Qods Force provides lethal support to Kata'ib Hizballah and other Iraqi Shia militia groups who target and kill Coalition and Iraqi Security Forces. The IRGC-Qods Force was named a Specially Designated Global Terrorist by the Treasury Department on October 25, 2007.

See www.treas.gov [search "tg195"]. On June 24, 2009, the Deputy Secretary of State also designated Kata'ib Hizballah as a foreign terrorist organization under § 219 of the Immigration and Nationality Act (*see* Chapter 3.B.1.c.(2)(i)) and as a Specially Designated Global Terrorist under § 1(b) of Executive Order 13224 (*see* A.2.b.(1) *supra*). 74 Fed. Reg. 31,788 (July 2, 2009).

On December 22, 2009, the Treasury Department designated Jaysh Rijal al-Tariq al-Naqshabandi ("JRTN"), an Iraq-based insurgent group. A December 22 Treasury press release explained that Treasury was designating JRTN because it had "conducted attacks against Coalition Forces in Iraq since April 2009, including the August RKG-3 (armor-penetrating grenade) attack against a Coalition Forces convoy in Hawijah, Iraq." *See www.treas.gov* [search "tg500"].

4. Restoration of Democracy

a. Burma

(1) Designations pursuant to E.O. 13448 or 13464

Effective January 15, 2009, OFAC designated two individuals and 23 entities pursuant to Executive Order 13448 of October 18, 2007, "Blocking Property and Prohibiting Certain Transactions Related to Burma," or Executive Order 13464 of April 30, 2008, "Blocking Property and Prohibiting Certain

Transactions Related to Burma." 74 Fed. Reg. 4299 (Jan. 23, 2009). For background on Executive Order 13448, see 72 Fed. Reg. 60,223 (Oct. 23, 2007); *see also Digest 2007* at 808; for Executive Order 13464, see 73 Fed. Reg. 24,491 (May 2, 2008); *see also Digest 2008* at 791–93.

(2) JADE Act

Also on January 15, 2009, OFAC identified the two individuals and 20 of the 23 entities designated under Executive Orders 13448 or 13464 as subject to the blocking provisions of the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008 ("JADE Act"), Pub. L. No. 110-286, 122 Stat. 2632. 74 Fed. Reg. 4299 (Jan. 23, 2009). As the Federal Register publication explained, "Section 5(b)(1) of the JADE Act blocks, with certain exceptions, all property and interests in property that are in, or hereafter come within, the United States, or within the possession or control of a United States person, of those persons described in Section 5(a)(1)." *Id.* at 4301. *See Digest 2008* at 793–95 for additional discussion of the JADE Act's financial sanctions.

(3) Export Administration Regulations

Effective January 8, 2009, the Department of Commerce, Bureau of Industry and Security ("BIS"), issued a final rule amending the Export Administration Regulations ("EAR") at 15 C.F.R. part 744.22, consistent with Executive Order 13464 of April 30, 2008. 74 Fed. Reg. 770 (Jan. 8, 2009). As the Background section of the preamble to the final rule explained:

> In this final rule, BIS further amends the EAR to expand the existing licensing requirements in section 744.22 of the EAR to include persons whose property and interests in property are blocked pursuant to Executive Order 13464 of April 30, 2008 . . . . As set forth in section 744.22 of the EAR, exports, reexports or transfers of items subject to

the EAR, except agricultural commodities, medicine, or medical devices classified as EAR99,* to any person whose property and interests in property are blocked pursuant to Executive Orders 13310, 13448 or 13464, require a license under the EAR.

To avoid duplication, it is unnecessary to obtain a license from both OFAC and BIS for exports under part 744.22. For discussion of Executive Order 13464, see 73 Fed. Reg. 24,491 (May 2, 2008); *see also Digest 2008* at 791–93. For background on Executive Orders 13310 (2003) and 13348 (2007), see 68 Fed. Reg. 44,853 (July 30, 2003); *Digest 2003* at 923–28; 72 Fed. Reg. 60,248 (Oct. 24, 2007); and *Digest 2007* at 808–11.

(4) Customs and Border Protection regulations

Effective January 16, 2009, the U.S. Departments of Homeland Security, Customs and Border Protection ("CBP"), and the Treasury jointly issued an interim final rule amending CBP's regulations at 19 C.F.R. parts 12 and 163 to implement the JADE Act and Presidential Proclamation No. 08-8294 of September 26, 2008. The proclamation included a new Additional U.S. Note 4 to Chapter 71 of the Harmonized Tariff Schedule of the United States. As the preamble to the interim final rule explained: "These amendments are made to implement certain provisions of the JADE Act and the Presidential Proclamation by prohibiting the importation of 'Burmese covered articles' (jadeite, rubies, and articles of jewelry containing jadeite or rubies, mined or extracted from Burma), and by setting forth conditions for the importation of 'non-Burmese covered articles' (jadeite, rubies, and articles of

* Editor's note: "If [an] item falls under U.S. Department of Commerce jurisdiction and is not listed on the CCL [Commerce Control List], it is designated as EAR99. EAR99 items generally consist of low-technology or consumer goods and do not require a license in many situations. If [a] proposed export of an EAR99 item is to an embargoed country, to an end-user of concern or in support of a prohibited end-use, [the exporter] may be required to obtain a license." *See www.export.gov/regulation/eg_main_018229.asp*.

jewelry containing jadeite or rubies, mined or extracted from a country other than Burma)." 74 Fed. Reg. 2844 (Jan. 26, 2009).**

(5) New U.S. policy approach

On September 28, 2009, the United States announced a new policy designed to improve political and humanitarian conditions in Burma. Under the new policy, which Kurt M. Campbell, Assistant Secretary, Bureau of East Asian and Pacific Affairs, outlined on September 28, the United States would pursue new diplomatic engagement with Burma while retaining existing sanctions against Burma and pressing Burma to comply with its nonproliferation obligations under Security Council Resolutions 1874 (2009) and 1718 (2006). Mr. Campbell's statement, excerpted below, is available at *www.state.gov/p/eap/rls/rm/2009/09/129698.htm*. Resolution 1874 is discussed in A.1.a.(1) *supra*.

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For the first time in memory, the Burmese leadership has shown an interest in engaging with the United States, and we intend to explore that interest. In addition, concerns have emerged in recent days about Burma and North Korea's relationship that require greater focus and dialogue.

What are the strategic goals and interests of this approach? We have reaffirmed our fundamental goals in Burma. We support a unified, peaceful, prosperous, and democratic Burma that respects the human rights of its citizens. . . .

We will also press Burma to comply with its international obligations, including on nonproliferation, ending any prohibited military or proliferation-related cooperation with North Korea, and full compliance with United Nations 1874 and 1718.

** Editor's note: The final rule was issued on March 23, 2010, effective April 22, 2010. 75 Fed. Reg. 13,676 (Mar. 23, 2010).

If Burma makes meaningful progress towards these goals, it will be possible to improve the relationship with the United States in a step-by-step process. We recognize that this will likely be a long and difficult process, and we are prepared to sustain our efforts on this front.

Burma's continued estrangement from the international community harms the country and has direct negative consequences beyond Burma's borders. Burma's engagement with the outside world has the potential to encourage new thinking, reform, and participation in the work of the international community.

In terms of engagement, we intend to begin a direct dialogue with Burmese authorities to lay out a path towards better relations. The dialogue will include specific discussion of democracy and human rights inside Burma, cooperation on international security issues such as nonproliferation and compliance with 1874 and 1718, and areas that could be of mutual benefit such as counternarcotics and recovery of World War II era remains.

In terms of sanctions, we will maintain existing sanctions until we see concrete progress towards reform. Lifting sanctions now would send the wrong signal. We will tell the Burmese that we will discuss easing sanctions only if they take actions on our core concerns. We will reserve the option to apply additional targeted sanctions, if warranted, by events inside Burma.

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b. Madagascar

On March 20, 2009, Acting Department of State Spokesman Robert Wood issued a statement announcing that the United States was taking steps to suspend non-humanitarian assistance to Madagascar. As noted in the press statement, excerpted below, the United States acted after President Marc Ravalomanana was forced to resign in an undemocratic transfer of power. The full text of the statement is available at *www.state.gov/r/pa/prs/ps/2009/03/120714.htm*.

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The United States condemns the process through which Marc Ravalomanana was forced to resign as President of the Republic of Madagascar and Andry Rajoelina subsequently was installed as the de facto head of state as undemocratic and contrary to the rule of law.

This series of events is tantamount to a coup d'etat and the United States will not maintain our current assistance partnership with Madagascar.

In view of these developments, the United States is moving to suspend all non-humanitarian assistance to Madagascar.

The United States has enjoyed a long-standing relationship with the people of Madagascar, and we call on them to immediately undertake a democratic, consensual process to restore constitutional governance, culminating in free, fair and peaceful elections.

c. Honduras

(1) Suspension of development and military assistance

On July 2, 2009, in response to the June 28 coup d'etat that resulted in the removal of Jose Manuel Zelaya, the democratically elected president of Honduras, the United States suspended various forms of assistance to the Government of Honduras. On September 3, 2009, the Department of State announced the termination of various forms of assistance to the Honduran government. The Department's September 3 statement, excerpted below, is available at *www.state.gov/r/pa/prs/ps/2009/sept/128608.htm*. For additional discussion of the U.S. response to the coup in Honduras, see Chapters 6.I.2., 7.C.1.b., and 10.B.3.

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The Department of State announces the termination of a broad range of assistance to the government of Honduras as a result of the coup d'etat that took place on June 28. The Secretary already had suspended assistance shortly after the coup.

The Secretary of State has made the decision, consistent with U.S. legislation, recognizing the need for strong measures in light of the continued resistance to the adoption of the San Jose Accord by the de facto regime and continuing failure to restore democratic, constitutional rule to Honduras.

The Department of State recognizes the complicated nature of the actions which led to [the] June 28 coup d'etat in which Honduras' democratically elected leader, President Zelaya, was removed from office. These events involve complex factual and legal questions and the participation of both the legislative and judicial branches of government as well as the military.

Restoration of the terminated assistance will be predicated upon a return to democratic, constitutional governance in Honduras.

The Department of State further announces that we have identified individual members and supporters of the de facto regime whose visas are in the process of being revoked.

* * * *

On September 3, Philip J. Crowley, Assistant Secretary of State, Bureau of Public Affairs, briefed the press on the U.S. termination of assistance. Excerpts follow from Mr. Crowley's responses to questions from the press about whether the Secretary of State, in terminating assistance, had to make a legal determination respecting whether the events of June 28 in Honduras represented a military coup or decree. Section 7008 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2009, Div. H, Pub. L. No. 111-8, 123 Stat. 842, provides in part that "[n]one of the funds appropriated or otherwise made available pursuant to titles III through VI of this Act [bilateral economic assistance, international security assistance, multilateral assistance, and export and investment assistance] shall be obligated or expended to finance directly any assistance to the government of any country whose duly elected head of government is deposed by military coup or decree." As Mr. Crowley noted, "[t]he Secretary did not have to make that determination to take the action that she [took]." The full text of Mr. Crowley's

briefing is available at *www.state.gov/r/pa/prs/dpb/2009/sept/128656.htm* and *www.state.gov/r/pa/prs/dpb/2009/sept/128655.htm.*

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QUESTION: . . . [W]hy not . . . make the determination that this is a coup, a legal determination?

MR. CROWLEY: Well—

QUESTION: A military coup.

MR. CROWLEY: . . . [T]he Secretary, in terminating the aid, did not have to reach that conclusion.

QUESTION: But why didn't she reach that conclusion? . . .

MR. CROWLEY: Well, let's focus on what we are trying to do here. We are trying to see democratic, constitutional rule restored in Honduras. That is our purpose. We are acting based on the democratic principles that we embrace and that the OAS embraces. What the Secretary has tried to do throughout this process is we take steps that we believe . . . send the right message, apply the right pressures, trying to yield the proper outcome. That is why we have taken the various actions that we've taken since June 28th.

. . . We suspended the aid, and now we've terminated the aid. The OAS has suspended Honduras from the organization. We're now applying additional pressure. We believe that . . . there's a sense that the de facto regime was thinking, if we can just get to an election, that this would absolve them of all their sins. And we're saying, clearly, that is not the case, that . . . there will have to be definitive steps taken. We'll have to see the restoration of a democratically elected government through a fair, free, and transparent process in the future.

* * * *

QUESTION: But why isn't it a military coup?

MR. CROWLEY: . . . The Secretary did not have to make that determination to take the action that she has taken.

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MR. CROWLEY: It is within the powers of the Secretary of State to stop the aid, as she did today. . . .

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(2) Visa-related suspensions or restrictions

On July 28, 2009, in response to the coup in Honduras, the Department of State announced that it was revoking the diplomatic visas of four individuals involved in the crisis and that it was reviewing the diplomatic visas of other regime members and their family members' derivative visas. In response to a question as to why the revocations did not take place sooner, the Department explained:

> The decision to revoke visas is not one taken lightly or without due diligence. We arrived at this decision after careful consideration. We have said repeatedly since the crisis began that we do not acknowledge the de facto regime in Honduras as the legitimate government there.

See www.state.gov/r/pa/prs/ps/2009/july/126672.htm. As reflected in the Department's announcement of September 3, 2009, quoted above, additional members and supporters of the de facto regime were identified subsequently for visa revocation.

On August 25, 2009, the Department of State announced the suspension of non-emergency, non-immigrant visa services at the U.S. Embassy in Honduras. The State Department's press release explained:

> The OAS Foreign Ministers mission is in Honduras seeking support for the San Jose Accord, which would restore the democratic and constitutional order and resolve the political crisis in Honduras. In support of this mission and as a consequence of the de facto regime's reluctance to sign the San Jose Accord, the U.S. Department of State is conducting a full review of our visa policy in Honduras. As part of that review, we are suspending non-emergency, non-immigrant visa services in the consular section of

> our embassy in Honduras, effective August 26. We firmly believe a negotiated solution is the appropriate way forward and the San Jose Accord is the best solution.

See www.state.gov/r/pa/prs/ps/2009/aug/128349.htm.

d. Guinea

On October 23, 2009, the Secretary of State imposed travel restrictions to the United States on certain members of the military junta and the Government of Guinea, as well as certain of its other supporters. The State Department issued a press statement, set forth below, describing the new restrictions. The statement is also available at *www.state.gov/r/pa/prs/ps/2009/oct/131047.htm.*

On October 23, 2009, the United States imposed restrictions on travel to the United States by certain members of the military junta and the government, as well as other individuals who support policies or actions that undermine the restoration of democracy and the rule of law in Guinea.

The citizens of Guinea deserve the right to choose their own leaders after decades of authoritarian rule. The military junta in power has shown itself disrespectful of human rights and incapable of shepherding Guinea through a peaceful transition to democracy.

e. Niger

On December 23, 2009, Department of State Spokesman Ian Kelly announced that the United States was suspending non-humanitarian assistance to the Government of Niger and that the Secretary of State had imposed travel restrictions on "certain members of the Government of Niger, as well as other individuals who support policies or actions that undermine Niger's return to constitutional rule." As Mr. Kelly explained,

the U.S. actions followed President Tandja's refusal to relinquish his position. *See www.state.gov/r/pa/prs/ps/2009/dec/134045.htm.**

5. Mass Atrocities

On June 15, 2009, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, addressed the International Peace Institute Vienna Seminar on the UN Security Council and the Responsibility to Protect. Among other things, Ambassador Rice stressed the importance of sanctions in responding to mass atrocities and her hope to work with other members of the Security Council to strengthen sanctions as a tool. Ambassador Rice stated:

> . . . [W]e must put the bite back in sanctions. We have increasingly sophisticated tools to compel states and leaders to abide by international laws and norms. Through the UN, we can freeze individuals' assets, ban international travel, restrict the flow of luxury goods and arms, and do much more to limit abusers' abilities to threaten others. But the Security Council often finds it difficult to overcome member states' reluctance to wield and fully implement sanctions on behalf of the victims of mass atrocities. I hope to be able to work with my Security Council colleagues to make better, smarter use of sanctions—not only to maintain global order or to halt proliferation but also to save innocent lives at immediate risk. Sanctions can be an effective, if not always a flexible, targeted instrument, and we must seek to strengthen them.

The full text of Ambassador Rice's speech is available at *http://usun.state.gov/briefing/statements/2009/125977.htm.*

* Editor's note: In February 2010, Tandja was deposed by military action.

6. Narcotrafficking Sanctions

In 2009 President Obama identified seven foreign persons (three entities on April 15, 2009, and three individuals and one entity on May 28, 2009) under the Foreign Narcotics Kingpin Designation Act ("Kingpin Act"), 21 U.S.C. §§ 1901–1908, 8 U.S.C. § 1182, and directed the imposition of sanctions against them, as the Kingpin Act requires. *See* White House Fact Sheet of April 15, 2009, available at *www.whitehouse.gov/the_press_office/Fact-Sheet-Overview-of-the-Foreign-Narcotics-Kingpin-Designation-Act*; Daily Comp. Pres. Docs., 2009 DCPD No. 00413, p. 1; Statement by Press Secretary Robert Gibbs of May 29, 2009, available at *www.whitehouse.gov/the_press_office/Statement-by-Press-Secretary-Robert-Gibbs-on-the-designation-of-significant-foreign-narcotics-traffickers*.

OFAC also designated 62 individuals and 47 entities under the Kingpin Act during 2009. 74 Fed. Reg. 3671 (Jan. 21, 2009) (three individuals); 74 Fed. Reg. 7544 (Feb. 17, 2009) (14 individuals, 26 entities); 74 Fed. Reg. 36,825 (July 24, 2009) (four individuals); 74 Fed. Reg. 43,226 (Aug. 26, 2009) (one individual, four entities); 74 Fed. Reg. 47,041 (Sept. 14, 2009) (six individuals, two entities); 74 Fed. Reg. 54,119 (Oct. 21, 2009) (three individuals); 74 Fed. Reg. 55,624 (Oct. 28, 2009) (six individuals, one entity); 74 Fed. Reg. 65,593 (Dec. 10, 2009) (22 individuals, ten entities); 74 Fed. Reg. 67,964 (Dec. 21, 2009) (three individuals, four entities).

OFAC also designated 56 individuals and 62 entities pursuant to Executive Order 12978 of October 21, 1995, "Blocking Assets and Prohibiting Transactions with Significant Foreign Narcotics Traffickers." 74 Fed. Reg. 5970 (Feb. 3, 2009) (two entities); 74 Fed. Reg. 26,473 (June 2, 2009) (14 individuals, 14 entities); 74 Fed. Reg. 29,272 (June 19, 2009) (nine individuals, 15 entities); 74 Fed. Reg. 34,396 (July 15, 2009) (19 individuals, six entities); 74 Fed. Reg. 59,344 (Nov. 17, 2009) (14 individuals, 25 entities). OFAC also changed its identifying information for 14 previously designated individuals and

one previously designated entity. 74 Fed. Reg. 5970 (Feb. 3, 2009); 74 Fed. Reg. 29,272 (June 19, 2009). For background on Executive Order 12978, see 60 Fed. Reg. 54,582 (Oct. 24, 1995); *see also Cumulative Digest 1991–99* at 547–50.

Chapter 3.B.2. discusses other U.S. initiatives in 2009 to counter narcotics trafficking.

7. Trafficking in Persons

a. Suspension of entry

On January 16, 2009, President George W. Bush issued Proclamation 8342 "To Suspend Entry As Immigrants And Nonimmigrants of Foreign Government Officials Responsible for Failing to Combat Trafficking In Persons." 74 Fed. Reg. 4093 (Jan. 22, 2009). Section 212(f) of the INA, 8 U.S.C. § 1182(f), authorizes the President to suspend entry of any aliens or class of aliens if that entry "would be detrimental to the interests of the United States." Excerpts follow from the proclamation.

In order to foster greater resolve to address trafficking in persons (TIP), specifically in punishing acts of trafficking and providing protections to the victims of these crimes, consistent with the Trafficking Victims Protection Act of 2000, as amended (the "Act") (22 U.S.C. 7101 *et seq.*), it is in the interests of the United States to restrict the international travel and to suspend entry into the United States, as immigrants or nonimmigrants, of certain senior government officials responsible for domestic law enforcement, justice, or labor affairs who have impeded their governments' antitrafficking efforts, have failed to implement their governments' antitrafficking laws and policies, or who otherwise bear responsibility for their governments' failures to take steps recognized internationally as appropriate to combat trafficking in persons, and whose governments have been ranked more than once as Tier 3 countries, which represent the worst anti-TIP performers, in the Department of State's annual Trafficking in Persons Report, and for which I have

made a determination pursuant to section 110(d)(1)–(2) or (4) of the Act. The Act reflects international antitrafficking standards that guide efforts to eradicate this modern-day form of slavery around the world.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, including section 212(f) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(f), and section 301 of title 3, United States Code, hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of persons described in section 1 of this proclamation would, except as provided for in sections 2 and 3 of this proclamation, be detrimental to the interests of the United States.

I therefore hereby proclaim that:

Section 1. The entry into the United States, as immigrants or nonimmigrants, of the following aliens is hereby suspended:

(a) Senior government officials—defined as the heads of ministries or agencies and officials occupying positions within the two bureaucratic levels below those top positions—responsible for domestic law enforcement, justice, or labor affairs who have impeded their governments' antitrafficking efforts, have failed to implement their governments' antitrafficking laws and policies, or who otherwise bear responsibility for their governments' failures to take steps recognized internationally as appropriate to combat trafficking in persons, and who are members of governments for which I have made a determination pursuant to section 110(d)(1)–(2) or (4) of the Act, in the current year and at least once in the preceding 3 years;

(b) The spouses of persons described in subsection (a) of this section.

Sec. 2. Section 1 of this proclamation shall not apply with respect to any person otherwise covered by section 1 where entry of such person would not be contrary to the interest of the United States.

Sec. 3. Persons covered by sections 1 or 2 of this proclamation shall be identified by the Secretary of State or the Secretary's designee, in his or her sole discretion, pursuant to such procedures as the Secretary may establish under section 5 of this proclamation.

Sec. 4. Nothing in this proclamation shall be construed to derogate from United States Government obligations under applicable international agreements.

Sec. 5. The Secretary of State shall implement this proclamation pursuant to such procedures as the Secretary, in consultation with the Secretary of Homeland Security, may establish.

* * * *

b. Trafficking Victims Protection Act sanctions

Consistent with § 110(c) of the Trafficking Victims Protection Act, as amended, 22 U.S.C. § 7107, the President annually submits to Congress notification of one of four specified determinations with respect to "each foreign country whose government, according to [the annual Trafficking in Persons report]—(A) does not comply with the minimum standards for the elimination of trafficking; and (B) is not making significant efforts to bring itself into compliance." The four determination options are set forth in § 110(d)(1)–(4). On September 14, 2009, President Obama issued Presidential Determination No. 2009-29, imposing certain sanctions on, and providing partial or full waivers for, 16 of the 17 countries that the 2009 Trafficking in Persons Report listed as Tier 3 countries. Daily Comp. Pres. Docs., 2009 DCPD No. 00714, pp. 1–3; 74 Fed. Reg. 48,365 (Sept. 23, 2009). *See* Chapter 3.B.3. for discussion of the 2009 report. The Memorandum of Justification Consistent with the Trafficking Victims Protection Act of 2000, Regarding Determinations with Respect to "Tier 3" Countries summarized the determinations the President made and their effect, as excerpted below; the memorandum also included a separate discussion of each of the named countries. The full text of the memorandum of justification is available at *www.state.gov/g/tip/rls/other/2009/129593.htm*.

Pursuant to Section 110(d) of the Trafficking Victims Protection Act (the "TVPA" or the "Act"), the President has made determinations regarding the 17 countries placed on Tier 3 in the State

Department's 2009 Trafficking in Persons Report. The President has determined to sanction Burma, Cuba, the Democratic People's Republic of Korea (DPRK), Eritrea, Fiji, Iran, and Syria, and Zimbabwe. The United States will not provide certain non-humanitarian, non-trade-related assistance to the Governments of Burma, Cuba, the DPRK, Eritrea, Fiji, Iran, Syria, and Zimbabwe until such governments comply with the Act's minimum standards to combat trafficking or make significant efforts to do so. The United States will not provide funding for participation by officials or employees of the Government of Cuba in educational and cultural exchange programs until that government complies with the Act's minimum standards to combat trafficking or makes significant efforts to do so. Furthermore, the President determined, consistent with the Act's waiver authority, that provision of certain assistance to the Governments of Burma, Eritrea, Fiji, Iran, Syria, and Zimbabwe would promote the purposes of the Act or is otherwise in the national interest of the United States. The President also determined, consistent with the Act's waiver authority, that provision of all bilateral and multilateral assistance to Chad, Kuwait, Malaysia, Mauritania, Niger, Papua New Guinea, Saudi Arabia, and Sudan that otherwise would have been cut off would promote the purposes of the Act or is otherwise in the national interest of the United States.

The determinations also indicate the Secretary of State's subsequent compliance determination regarding Swaziland. It is significant that one of the 17 Tier 3 countries took actions that averted the need for the President to make a determination regarding sanctions and waivers. Information highlighted in the Trafficking in Persons Report and the possibility of sanctions, in conjunction with our diplomatic efforts, encouraged this country's government to take important measures against trafficking.

Section 110(d)(1)(B) of the Act interferes with the President's authority to direct foreign affairs. We, therefore, interpret it as precatory. Nonetheless, it is the policy of the United States that, consistent with the provisions of the Act, the U.S. Executive Director of each multilateral development bank, as defined in the Act, and of the International Monetary Fund will vote against, and use the Executive Director's best efforts to deny any loan or other utilization of the funds of the respective institution to the

Governments of Burma, Cuba, the DPRK, Eritrea, Fiji, Iran, Syria, and Zimbabwe (with specific exceptions for Eritrea, Fiji, and Zimbabwe) for Fiscal Year 2010, until such governments comply with the minimum standards or makes significant efforts to come into compliance, as may be determined by the Secretary of State in a report to the Congress pursuant to section 110(b) of the Act.

B. MODIFICATION OF SANCTIONS AND RELATED ACTIONS

1. Cuba

On April 13, 2009, President Obama announced a new policy to promote democracy and human rights in Cuba and directed the Secretaries of State, Treasury, and Commerce to take certain actions to achieve that objective. In his memorandum to the three secretaries, the President stated:

> The promotion of democracy and human rights in Cuba is in the national interest of the United States and is a key component of this Nation's foreign policy in the Americas. Measures that decrease dependency of the Cuban people on the Castro regime and that promote contacts between Cuban-Americans and their relatives in Cuba are means to encourage positive change in Cuba. The United States can pursue these goals by facilitating greater contact between separated family members in the United States and Cuba and increasing the flow of remittances and information to the Cuban people.

Further excerpts below from the President's memorandum set forth the steps the President directed the secretaries to take. The President's memorandum is available at 2009 Daily Comp. Pres. Docs., DCPD No. 00257, pp. 1–2; *see also* the White House fact sheet describing the President's initiative, available at *www.whitehouse.gov/the-press-office/fact-sheet-reaching-out-cuban-people*.

* * * *

(a) Lift restrictions on travel-related transactions for visits to a person's family member who is a national of Cuba by authorizing such transactions by a general license that shall:

- Define family members who may be visited to be persons within three degrees of family relationship (e.g., second cousins) and to allow individuals who share a common dwelling as a family with an authorized traveler to accompany them;
- Remove limitations on the frequency of visits;
- Remove limitations on the duration of a visit;
- Authorize expenditure amounts that are the same as non-family travel; and
- Remove the 44-pound limitation on accompanied baggage.

(b) Remove restrictions on remittances to a person's family member in Cuba by:

- Authorizing remittances to individuals within three degrees of family relationship (e.g., second cousins) provided that no remittances shall be authorized to currently prohibited members of the Government of Cuba or currently prohibited members of the Cuban Communist Party;
- Removing limits on frequency of remittances;
- Removing limits on the amount of remittances;
- Authorizing travelers to carry up to $3,000 in remittances; and
- Establishing general license for banks and other depository institutions to forward remittances.

(c) Authorize U.S. telecommunications network providers to enter into agreements to establish fiber-optic cable and satellite telecommunications facilities linking the United States and Cuba.

(d) License U.S. telecommunications service providers to enter into and operate under roaming service agreements with Cuba's telecommunications service providers.

(e) License U.S. satellite radio and satellite television service providers to engage in transactions necessary to provide services to customers in Cuba.

(f) License persons subject to U.S. jurisdiction to activate and pay U.S. and third-country service providers for telecommunications, satellite radio, and satellite television services provided to individuals in Cuba, except certain senior Communist Party and Cuban government officials.

(g) Authorize, consistent with national security concerns, the export or reexport to Cuba of donated personal communications devices such as mobile phone systems, computers and software, and satellite receivers through a license exception.

(h) Expand the scope of humanitarian donations eligible for export through license exceptions by:

- Restoring clothing, personal hygiene items, seeds, veterinary medicines and supplies, fishing equipment and supplies, and soap-making equipment to the list of items eligible to be included in gift parcel donations;
- Restoring items normally exchanged as gifts by individuals in "usual and reasonable" quantities to the list of items eligible to be included in gift parcel donations;
- Expanding the scope of eligible gift parcel donors to include any individual;
- Expanding the scope of eligible gift parcel donees to include individuals other than Cuban Communist Party officials or Cuban government officials already prohibited from receiving gift parcels, or charitable, educational, or religious organizations not administered or controlled by the Cuban government; and
- Increasing the value limit on non-food items to $800.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

On September 3, 2009, the Department of Commerce's Bureau of Industry and Security issued a final rule, revising its restrictions on exports and reexports of gift parcels to Cuba

and of personal baggage of individuals traveling from the United States to Cuba. The new rule also created a new license exception for certain donated consumer communication devices and expanded the licensing policy concerning certain telecommunications links, including satellite radio and satellite television services. 74 Fed. Reg. 45,985 (Sept. 8, 2009); *see also* the Department of Commerce's press release of September 3, available at *www.bis.doc.gov/news/2009/bis_press093032009.htm.*

Also effective September 3, the Department of the Treasury's Office of Foreign Assets Control ("OFAC") issued a final rule amending the Cuban Assets Control Regulations ("CACR"), 31 C.F.R. part 515, to implement the President's April 13 directive, to implement certain provisions of the Omnibus Appropriations Act, 2009 (Pub. L. No. 111-8, 123 Stat. 524), and to make certain technical and conforming changes. A Treasury Department fact sheet, dated September 3 and available at *www.treas.gov* [search "tg273"], provided details on the rule changes implementing the President's April 13 initiative.*

* Editor's note: On January 21, 2010, the Federal Communications Commission ("Commission") issued a public notice announcing its receipt of a letter from the Department of State, dated January 12, 2010, providing new guidance consistent with President Obama's April 13 directive concerning licensing of the provision of telecommunications service between the United States and Cuba. The public notice advised that "[t]he Commission will act upon applications to provide facilities-based telecommunications services between the United States and Cuba consistent with the guidance set out in the 2010 State Department letter . . . and Commission's policies and rules." The Commission's public notice, which attached the State Department's letter, is available at *www.fcc.gov/ftp/Daily_Releases/Daily_Business/2010/db0121/DA-10-112A1.pdf. Digest 2010* will discuss relevant aspects of the updated policy guidance the State Department provided and the Commission's notice.

2. Terrorism Unblockings

On November 3, 2009, OFAC determined that Barakaat International, Barakaat International Foundation, and Patricia Rosa Vinck, who had been designated pursuant to E.O. 13224, should be removed from the Treasury Department's list of Specially Designated Nationals and Blocked Persons. 74 Fed. Reg. 58,373 (Nov. 12, 2009); *see also* A.2.b. *supra*. The 1267 Committee previously removed all three from its Consolidated List. A Treasury Department press release, dated November 3 and excerpted below, provided additional detail on the action. The full text of the press release is available at *www.treas.gov* [search "tg345"].

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Vinck, Barakaat International, and Barakaat International Foundation were all designated by the Treasury Department under Executive Order 13224 and by the U.N. 1267 Committee. The Treasury Department and the United Nations designated Vinck in January 2003 and the two Barakaat entities in November 2001.

Vinck is the wife of Nabil Abdul Salam Sayadi, who headed the Belgium office of the Global Relief Foundation (GRF), an organization designated in October 2002 by the United States and the United Nations for its support to al Qaida. Vinck served as the secretary of GRF's Belgium office and facilitated GRF's activities. Following U.S. and U.N. sanctions against her, Vinck ceased her activities on behalf of GRF.

The Barakaat organizations were part of a financial conglomerate operating in 40 countries around the world that facilitated the financing and operations of al Qaida and other terrorist organizations. The U.S. and U.N. sanctions against these entities assisted the global effort to prevent them from routing funds to al Qaida and other terrorist groups, and the two organizations are no longer operating. Other designated entities and individuals related to the Barakaat conglomerate remain on the U.S. and U.N. sanctions lists.

* * * *

3. Sudan

a. Goods and services for diplomatic missions and personnel; regional Government of Southern Sudan

Effective June 10, 2009, OFAC issued a rule amending the Sudanese Sanctions Regulations, 31 C.F.R. part 538, to authorize the provision of goods or services in the United States to Sudan's diplomatic missions to the United States and the United Nations as well as their employees, subject to certain conditions. The amendments also authorize the regional Government of Southern Sudan and its employees to import certain goods or services into the United States, subject to certain conditions. 74 Fed. Reg. 27,433 (June 10, 2009). Excerpts below from the preamble to the final rule provide additional background on the amendments.

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* * * *

Today, OFAC is amending section 538.515 of the [Sudanese Sanctions Regulations, 31 C.F.R. part 538]. Before its amendment, section 538.515 authorized all transactions ordinarily incident to the importation of any goods or services into the United States destined for official or personal use by the diplomatic missions of the Government of Sudan to the United States and to international organizations located in the United States, subject to certain conditions. OFAC is amending this section to expand the scope of the authorization to include the provision of goods or services in the United States to the diplomatic missions of the Government of Sudan to the United States and the United Nations, and to the employees of the diplomatic missions of the Government of Sudan to the United States and the United Nations, subject to certain conditions.

Paragraph (a) of the revised section 538.515 authorizes the importation of goods or services into the United States by, and the provision of goods or services in the United States to, the diplomatic missions of the Government of Sudan to the United States and the United Nations, subject to four conditions: (1) The goods

or services must be for the conduct of the official business of the missions, or for personal use of the employees of the missions, and not for resale; (2) such transactions must not involve the purchase, sale, financing, or refinancing of real property; (3) such transactions are not otherwise prohibited by law; and (4) all such transactions must be conducted through an account at a U.S. financial institution specifically licensed by OFAC. A note to paragraph (a)(4) of the revised section 538.515 states that U.S. financial institutions are required to obtain specific licenses to operate accounts for, or extend credit to, the diplomatic missions of the Government of Sudan to the United States and the United Nations.

Paragraph (b) of the revised section 538.515 authorizes the importation of goods or services into the United States by, and the provision of goods or services in the United States to, the employees of the diplomatic missions of the Government of Sudan to the United States and the United Nations, subject to two conditions: (1) The goods or services must be for personal use of the employees of the missions, and not for resale; and (2) such transactions are not otherwise prohibited by law.

Paragraph (c) of the revised section 538.515 authorizes the importation of goods or services into the United States by the regional Government of Southern Sudan and its employees that involve the transit or transshipment of goods from the Specified Areas of Sudan through areas of Sudan other than the Specified Areas of Sudan, subject to two conditions: (1) The goods or services must be for the conduct of the business of the regional Government, or for personal use of the employees of the regional Government, and not for resale; and (2) such transactions are not otherwise prohibited by law. A note to paragraph (c) of revised section 538.515 explains that the authorization contained in this paragraph permits the regional Government of Southern Sudan and its employees to import into the United States goods or services that have transited or transshipped through areas of Sudan other than the Specified Areas of Sudan without the need to obtain a specific license under § 538.417. The importation of goods and services into the United States by the regional Government of Southern Sudan not involving the transit or transshipment through areas of Sudan other than the Specified Areas of Sudan is already

exempt under §§ 538.212(g) and 538.305(b) and, therefore, requires no authorization. Similarly, the provision of goods and services in the United States to the regional Government of Southern Sudan and its employees already is exempt pursuant to §§ 538.212(g) and 538.305(b) and also requires no authorization.

* * * *

b. Agricultural commodities, medicine, and medical devices

Effective September 9, 2009, OFAC issued a final rule amending the Sudanese Sanctions Regulations by issuing a general license authorizing exports and reexports of agricultural commodities, medicine, and medical devices to certain areas of Sudan, as well as related transactions. 74 Fed. Reg. 46,361 (Sept. 9, 2009). Excerpts below from the Background section of the rule explain the action taken. *See also* 74 Fed. Reg. 61,030 (Nov. 23, 2009) (interim final rule making technical changes to the Sudanese Sanctions Regulations and the Iranian Transactions Regulations with respect to exports of agricultural commodities, medicine, and medical devices).

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* * * *

OFAC today is further amending the SSR [Sudanese Sanctions Regulations] to resolve a tension between E.O. 13412 [71 Fed. Reg. 61,369 (Oct. 17, 2006)] and the DPAA [Darfur Peace and Accountability Act, Pub. L. No. 109-344, 120 Stat. 1869] on the one hand, and the Trade Sanctions Reform and Export Enhancement Act of 2000 (22 U.S.C. 7201–7211) ("TSRA") on the other. Pursuant to E.O. 13412 and the DPAA, most trade and related activities—other than trade with the Government of Sudan or relating to Sudan's petroleum or petrochemical industries—are allowed with the Specified Areas of Sudan. These Specified Areas, however, remained subject to regulations promulgated pursuant to section 906(a)(1) of TSRA, which provides that the export of agricultural commodities, medicine, and medical devices to the government of a country that has been determined by the Secretary

of State, under section 6(j) of the Export Administration Act of 1979, 50 U.S.C. App. 2405(j) (the "EAA"), to have repeatedly provided support for acts of international terrorism, or to any entity in such a country, shall be made pursuant to one-year licenses issued by the United States government.

Because Sudan has been determined by the Secretary of State to be a country that has repeatedly provided support for acts of international terrorism pursuant to section 6(j) of the EAA, the entire country remained subject to TSRA's licensing requirements under the SSR.

The overlap of TSRA with E.O. 13412 and the DPAA—as previously implemented in the SSR—resulted in the requirement that OFAC authorize the export of agricultural and medical items to the Specified Areas of Sudan, even though no OFAC authorization was required to export most other items to those areas.

Therefore, in view of the underlying policy objectives and findings concerning the Specified Areas of Sudan that resulted in the elimination of most of the previous economic sanctions against these areas within Sudan, including export sanctions analogous to those covered by TSRA, OFAC has determined that specific licenses for TSRA-related transactions with respect to the Specified Areas of Sudan should no longer be required.

Instead, OFAC is authorizing such transactions through a general license, set forth at SSR § 538.523(a)(2), provided that such transactions do not involve any property or interests in property of the Government of Sudan or relate to the petroleum or petrochemical industries in Sudan. In accordance with the requirements set forth in section 906(a)(1) of TSRA, this general license covers exports shipped within the twelve-month period beginning on the date of the signing of the export contract. In addition, each year by the anniversary of its effective date on September 9, 2009, OFAC will determine whether to revoke the general license. Unless revoked, the general license will remain in effect. However, specific licenses for TSRA-related transactions with respect to the Government of Sudan, to any individual or entity in an area of Sudan other than the Specified Areas of Sudan, or to persons in third countries purchasing specifically for resale to the foregoing are still required.

Existing prohibitions and safeguards satisfy TSRA's requirement that procedures be in place to deny the general license for exports to entities within Sudan promoting international terrorism. For instance, the requirement that no U.S. person engage in any transaction with anyone on OFAC's List of Specially Designated Nationals and Blocked Persons, including persons designated under the terrorism programs administered by OFAC, provides a mechanism for denying TSRA-related exports to certain entities within the Specified Areas of Sudan. In addition, if it deems necessary, OFAC may amend, modify, or revoke the new general license pursuant to § 501.803 of the Reporting, Procedures and Penalties Regulations, 31 CFR part 501 (the "RPPR") . . . . Section 538.502 of the SSR similarly provides OFAC with the authority to exclude any person, property, or transaction from the operation of the general license or to restrict the applicability of the general license with respect to any persons, property, or transactions. Finally, the requirement that all U.S. persons maintain records of any transaction subject to OFAC-administered sanctions for a period of not less than five years pursuant to RPPR § 501.601, and OFAC's authority to obtain these records pursuant to RPPR § 501.602, allow OFAC to monitor activities under the general license in order to determine whether it should exercise these authorities.

Those transactions now authorized by the general license set forth at § 538.523(a)(2) of the SSR include the sale, exportation, and reexportation of agricultural commodities, medicine, and medical devices, the financing of and payment for such sales, and the brokering of TSRA sales. However, the transshipment or transit of TSRA-related exports through areas of Sudan other than the Specified Areas of Sudan, and any related financial transactions that are routed through depository institutions located in an area of Sudan other than the Specified Areas, remain prohibited under §§ 538.417 and 538.418 of the SSR.

4. Tom Lantos Block Burmese JADE Act

On January 15, 2009, President Bush waived the financial sanctions under § 5(b) of the Tom Lantos Block Burmese

JADE (Junta's Anti-Democratic Efforts) Act of 2008 ("JADE Act"), Pub. L. No. 110-286, 122 Stat. 2632, with respect to those individuals and entities described in § 5(a)(1) of the JADE Act who are not included on the Department of the Treasury's List of Specially Designated Nationals and Blocked Persons. 74 Fed. Reg. 3957 (Jan. 21, 2009). Section 5(b) of the JADE Act provides:

> (1) BLOCKED PROPERTY.—No property or interest in property belonging to a person described in subsection (a)(1) may be transferred, paid, exported, withdrawn, or otherwise dealt with if—
>
> (A) the property is located in the United States or within the possession or control of a United States person, including the overseas branch of a United States person; or
>
> (B) the property comes into the possession or control of a United States person after the date of the enactment of this Act.
>
> (2) FINANCIAL TRANSACTIONS.—Except with respect to transactions authorized under Executive Orders 13047 (May 20, 1997) and 13310 (July 28, 2003), no United States person may engage in a financial transaction with the SPDC or with a person described in subsection (a)(1).

Excerpts follow from the Presidential determination.

By the authority vested in me as President by the Constitution and laws of the United States, including the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008 (Public Law 110-286) (JADE Act) and section 301 of title 3, United States Code, in order to ensure that the United States Government's sanctions against the Burmese leadership and its supporters continue to be implemented effectively, to allow the reconciliation of measures applicable to persons sanctioned under the JADE Act with measures applicable to the same persons sanctioned under the International Emergency Economic Powers Act (50 U.S.C.

1701 *et seq.*), and to allow for the implementation of additional appropriate sanctions:

(1) I hereby waive, pursuant to section 5(i) of the JADE Act, the provisions of section 5(b) of the JADE Act with respect to those persons described in section 5(a)(1) of the JADE Act who are not included on the Department of the Treasury's List of Specially Designated Nationals and Blocked Persons. Because the imposition of effective and meaningful blocking sanctions requires the identification of those individuals and entities targeted for sanction and the authorization of certain limited exceptions to the prohibitions and restrictions that would otherwise apply, I hereby determine and certify that such a limited waiver is in the national interest of the United States.

* * * *

5. Nonproliferation

During 2009 the Treasury Department clarified several existing designations it had made pursuant to Executive Order 13382, discussed *supra*. For example, OFAC identified eight additional aliases for a previously designated Chinese entity, LIMMT Economic and Trade Company, Ltd. ("LIMMT"), effective April 7, 2009.* Later in the year OFAC announced changes to its identifying information for three previously designated entities: First Persia Equity Fund, Mehr Cayman Ltd, and IRISL Benelux NV. 74 Fed. Reg. 40,003 (Aug. 10, 2009) (two entities); 74 Fed. Reg. 41,784 (Aug. 18, 2009) (one entity).

Also in 2009 the Commerce Department's Bureau of Industry and Security removed seven entities from its Entity List and corrected the addresses listed for information for four entities on the Entity List. 74 Fed. Reg. 8182 (Feb. 24, 2009); 74 Fed. Reg. 11,472 (March 18, 2009); 74 Fed. Reg. 68,146 (Dec. 23, 2009).

* Editor's note: Also on April 7, 2009, the New York County District Attorney's Office unsealed a criminal indictment against LIMMT, which was designated under E.O. 13382 in 2006. 74 Fed. Reg. 19,635 (Apr. 29, 2009); *see also www.treas.gov* [search "tg84"].

6. Narcotics Unblockings

On April 8, 2009, OFAC unblocked the property and interests in property of one individual, who had been placed on its list of Specially Designated Nationals and Blocked Persons pursuant to the Foreign Narcotics Kingpin Designation Act (21 U.S.C. §§ 1901–1908, 8 U.S.C. § 1182). 74 Fed. Reg. 17,283 (Apr. 14, 2009).

During 2009 OFAC also unblocked the property and interests in property of 102 other individuals and 17 entities, which had been designated as Specially Designated Narcotics Traffickers pursuant to Executive Order 12978 (1995). 74 Fed. Reg. 7546 (Feb. 17, 2009) (one individual); 74 Fed. Reg. 10,994 (March 13, 2009) (one individual); 74 Fed. Reg. 16,259 (Apr. 9, 2009) (four individuals); 74 Fed. Reg. 18,609 (Apr. 23, 2009) (two individuals); 74 Fed. Reg. 22,807 (May 14, 2009) (four individuals); 74 Fed. Reg. 30,205 (June 24, 2009) (four individuals); 74 Fed. Reg. 33,022 (July 9, 2009) (49 individuals); 74 Fed. Reg. 34,397 (July 15, 2009) (four individuals, three entities); 74 Fed. Reg. 39,734 (Aug. 7, 2009) (one individual); 74 Fed. Reg. 34,397 (Aug. 26, 2009) (one individual); 74 Fed. Reg. 47,993 (Sept. 18, 2009) (seven individuals, one entity); 74 Fed. Reg. 52,296 (Oct. 9, 2009) (three individuals); 74 Fed. Reg. 57,399 (Nov. 5, 2009) (ten individuals, 13 entities); and 74 Fed. Reg. 62,886 (Dec. 1, 2009) (eight individuals).

7. Belarus Sanctions

On May 21 and again on November 13, 2009, OFAC renewed a general license authorizing transactions between U.S. persons and two Belarusian entities, Lakokraska OAO and Politsk Steklovolokno OAO. On May 15, 2008, OFAC identified the two entities as being owned by the Belarusian petrochemical conglomerate Belneftekhim and thus subject to the sanctions imposed by Executive Order 13405 (2006). The general license extends until May 15, 2010, and was first issued on September 4, 2008. *See www.treas.gov/resource-center/*

sanctions/Documents/belarus_gl_1b.pdf; *www.treas.gov/resource-center/sanctions/Documents/belarus_gl_1c.pdf*. *See also Digest 2008* at 807.*

C. OTHER ISSUES

1. Litigation

a. Licensing requirement for Cuban company's application to renew trademark

On March 30, 2009, the U.S. District Court for the District of Columbia granted summary judgment for the Treasury Department's Office of Foreign Assets Control ("OFAC"), in a case challenging OFAC's denial of a Cuban company's request for a license it needed to renew the trademark HAVANA CLUB. *Empresa Cubana Exportadora de Alimentos y Productos Varios d/b/a Cubaexport v. U.S. Dep't of the Treasury, Office of Foreign Assets Control*, 606 F. Supp. 2d 59 (D.D.C. 2009). For previous developments in the case, see *Digest 2006* at 1006–15 and *Digest 2007* at 828–30.

The court held that OFAC correctly interpreted § 211(a)(1) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. at 2681–88, and its implementing regulations, 31 C.F.R. § 515.527, in determining that Cubaexport needed a specific license to renew the trademark. The court also held that OFAC's procedures for making its determination did not violate the Administrative Procedure Act. Taking into account a supplementary declaration submitted by OFAC Director Adam J. Szubin on November 27, 2007, the court held further that OFAC's determination was reasonable. The court also concluded that OFAC had not violated Cubaexport's constitutional rights "if any—to procedural due process, substantive due

* Editor's note: On May 17, 2010, OFAC renewed the license until November 30, 2010. *See www.treasury.gov/resource-center/sanctions/Programs/Documents/belarus_gl_1d.pdf*.

process, or under the Takings Clause." For the supplementary declaration of OFAC Director Szubin, see *www.state.gov/s/l/c8183.htm*.

As of the end of 2009, Cubaexport's appeal was pending before the U.S. Court of Appeals for the District of Columbia Circuit.

b. Challenge to Executive Order 13224 sanctions

On August 19, 2009, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court judgment in a case bringing challenges under the U.S. Constitution to various aspects of the terrorism-related sanctions the United States imposes pursuant to Executive Order 13224 and its implementing regulations. *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1145–48 (9th Cir. 2009). The plaintiffs, humanitarian organizations and U.S. citizens, sought to support what they characterized as certain lawful and non-violent activities of the Kurdistan Worker's Party ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"), both of which are designated as Specially Designated Global Terrorists under E.O. 13224, and challenged restrictions on the provision of services to designated individuals and entities.

The appeals court affirmed the district court's judgment that the Humanitarian Law Project ("HLP") lacked standing to challenge the President's designation authority under the International Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701–1707, and the United Nations Participation Act ("UNPA"), 22 U.S.C. § 287c. In reaching that conclusion, the Ninth Circuit noted that "HLP has never been designated, or threatened with designation, on account of" the President's designation authority. Similarly, the Ninth Circuit affirmed the district court's judgment that HLP lacked standing to challenge the Treasury Department's regulations for licensing activities that IEEPA otherwise prohibits. As the Ninth Circuit stated, HLP "cannot show injury-in-fact with respect to the licensing regulations as it has never applied for, or been denied, a license."

On the merits of HLP's challenge to the Secretary of the Treasury's authority to designate individuals and organizations pursuant to E.O. 13224, the Ninth Circuit "agree[d] with the district court that the Secretary's authority to designate terrorist groups is adequately constrained by criteria in the Executive Order." The court also rejected HLP's challenge to E.O. 13224's prohibition on "the making or receiving of any . . . services to or for the benefit of those persons listed in the Annex to this order or determined to be subject to this order." As the Ninth Circuit stated:

> [T]he ban on "services" to designated organizations is not unconstitutionally vague; 'services' are clearly enough delineated by examples in the regulations for a person of ordinary intelligence to understand what kind of activities are not permitted. HLP worries that protected speech such as independent advocacy may be caught in the net, but the Secretary [of the Treasury] does not interpret the ban this way, nor do we.

The Ninth Circuit also rejected HLP's challenges to the civil and criminal penalties under IEEPA, holding that "IEEPA's civil penalties may be imposed without *mens rea* requirements because they are indeed civil; its criminal penalties require a culpable state of mind and the Constitution does not additionally require specific intent to further terrorist activities." In holding that "neither the civil penalty nor designation offends the First and Fifth Amendments for lack of sufficient *mens rea*," as HLP claimed, the court stated in part:

> On balance, we conclude that HLP has not shown by "clearest proof" that either the civil penalty or designation is so punitive as to be criminal. [citation omitted] Although designation presents a closer call than the civil penalty, at the end of the day we are influenced by the fact that designation, at the core, is a function of national security and foreign policy and thus serves an alternative function other than punishment. As such, we accord deference to the executive branch's decision that designation

is necessary for the national interest. As a penalty, designation is not excessive in relation to that purpose.

On October 22, 2009, the Ninth Circuit granted HLP's motion to hold the case in abeyance and for an extension for the time to file a petition for rehearing pending the Supreme Court's decision in a related case, *Humanitarian Law Project v. Holder*, discussed in Chapter 3.B.1.c.(2)(iii)(B).*

2. Examples of Sanctions Enforcement Under U.S. Criminal Law

The U.S. Department of Justice takes criminal enforcement measures against knowing and intentional violations of U.S. sanctions laws. On December 16, 2009, for example, the Department of Justice announced that Credit Suisse had agreed to forfeit $536 million to the United States and the New York County District Attorney's Office to settle claims arising from its violations, over a period of ten years, of U.S. sanctions law and New York state law. A Department of Justice press release, excerpted below, provided details on the forfeiture—the largest of its kind—and Credit Suisse's violations. The full text of the press release is available at *www.justice.gov/opa/pr/2009/December/09-ag-1358.html*; *see also* the Department of Justice's press release dated January 9, discussing Lloyds TSB Bank plc's agreement to

* Editor's note: On June 21, 2010, the Supreme Court issued a decision upholding the constitutionality of 18 U.S.C. § 2339B, affirming in part and reversing in part the Ninth Circuit's judgment and remanding the case. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). As to the plaintiffs' due process claims under the Fifth Amendment, the Court limited its decision to the specific activities at issue in the case and held that the statute was not vague as applied. With respect to the First Amendment claim, the Court likewise sustained the statute with respect to the support at issue as striking an appropriate balance between national security imperatives and free speech. *Digest 2010* will discuss relevant aspects of the Court's decision. Following the Court's decision in that case, the plaintiffs chose not to seek rehearing of the Ninth Circuit's August 2009 decision in *Humanitarian Law Project v. U.S. Treasury Dep't*.

forfeit $350 million to the United States and the New York County District Attorney's Office for violations of the International Emergency Economic Powers Act, available at *www.justice.gov/opa/pr/2009/January/09-crm-023.html.*

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The violations relate to transactions Credit Suisse illegally conducted on behalf of customers from Iran, Sudan and other countries sanctioned in programs administered by the Department of the Treasury's Office of Foreign Assets Control (OFAC).

A criminal information was filed today in the U.S. District Court for the District of Columbia charging Credit Suisse with one count of violating the IEEPA. Credit Suisse waived indictment, agreed to the filing of the information, and has accepted and acknowledged responsibility for its criminal conduct. Today, Credit Suisse also entered into an agreement with OFAC to settle the apparent civil violations of IEEPA and other authorities arising from this conduct. Credit Suisse agreed to forfeit the funds as part of the deferred prosecution agreements reached with the Department of Justice and the New York County District Attorney's Office and in settlement of the civil claims with OFAC.

* * * *

Under IEEPA, it is a crime to willfully violate, or attempt to violate, any regulation issued under the act, including the regulations related to Iran, Sudan, Burma, [and] Cuba . . . .

According to court documents, beginning as early as 1995 and continuing through 2006, Credit Suisse, in Switzerland and the United Kingdom, altered wire transfers involving U.S. sanctioned countries or persons. Specifically, according to court documents, Credit Suisse deliberately removed material information, such as customer names, bank names and addresses, from payment messages so that the wire transfers would pass undetected through filters at U.S. financial institutions. Credit Suisse also trained its Iranian clients to falsify wire transfers so that such messages would pass undetected through the U.S. financial system. This scheme allowed

U.S. sanctioned countries and entities to move hundreds of millions of dollars through the U.S. financial system.

For its Iranian clients, Credit Suisse promised that no message would leave the bank without being hand-checked by a Credit Suisse employee to ensure that the message had been formatted to avoid U.S. filters. If an Iranian client provided payment messages that contained identifying information, Credit Suisse employees would remove the detectable information so that the message could pass undetected through OFAC filters at U.S. financial institutions. According to court documents, Credit Suisse's international communications showed a continuous dialogue about the scheme, assessing how to better process Iranian transactions to ensure increased business from existing and future Iranian clients. For example, in 1998, Credit Suisse provided its Iranian clients with a pamphlet entitled, "How to transfer USD payments", which provided detailed payment instructions on how to avoid triggering U.S. OFAC filters or sanctions. Additionally, Credit Suisse processed 88 payments for those listed as "Specially Designated Nationals" by OFAC. Specially Designated Nationals are individuals and entities specifically named by OFAC to be subject to U.S. sanctions. Their assets are blocked and U.S. persons are generally prohibited from dealing with them.

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The bank's forfeiture of $268 million to the United States and $268 million to the New York County District Attorney's Office will settle forfeiture claims by the Department of Justice and the state of New York and civil claims by OFAC related to the misconduct. In light of the bank's remedial actions to date and its willingness to acknowledge responsibility for its actions, the Department will recommend the dismissal of the information in two years, provided Credit Suisse fully cooperates with, and abides by, the terms of the agreement.

Throughout the investigation, Credit Suisse has provided prompt and substantial cooperation, including working with regulators to find a method consistent with Swiss law to disclose a significant portion of the data, communications and documentation underlying the misconduct. . . .

3. Annual Report on Economic Sanctions Imposed Against Sudan

In January 2009 OFAC issued its annual report on the effectiveness of U.S. economic sanctions imposed against Sudan, as required by § 10(b) of the Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516. *See Digest 2007* for background on the legislation. The report is available at *www.treas.gov/resource-center/sanctions/Documents/sudan_report_030509.pdf*.

Cross References

Elimination of U.S. travel ban on individuals with HIV, **Chapter 1.C.2.**
Exemption of certain individuals associated with Iraqi and Kurdish organizations from terrorism-related provisions of the Immigration and Nationality Act, **Chapter 1.C.3.**
Designations of Foreign Terrorist Organizations, **Chapter 3.B.1.c.(2)**
Sudan peace process, **Chapter 17.A.2.**
Security Council arms embargoes, **Chapter 18.B.7.b. and c.**

Chapter 17

International Conflict Resolution and Avoidance

A. PEACE PROCESS AND RELATED ISSUES

1. Israeli-Palestinian Conflict

During his first year in office, President Barack H. Obama pledged U.S. support for achieving a comprehensive peace between Israelis, Palestinians, and the Arab world. Among other initiatives, the President appointed George J. Mitchell as his Special Envoy to the Middle East and affirmed U.S. support for a two-state solution. In a speech at Cairo University on June 4, 2009, for example, President Obama pledged to work to resolve the Israeli-Palestinian conflict and stressed the parties' need to fulfill their commitments under the Roadmap for Peace. Excerpts follow from President Obama's speech, which is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00436, pp. 1–11. *Digest 2003* at 943–47 provides background on the Roadmap.

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For decades . . . there has been a stalemate: two peoples with legitimate aspirations, each with a painful history that makes compromise elusive. It's easy to point fingers, for Palestinians to point to the displacement brought about by Israel's founding and for Israelis to point to the constant hostility and attacks throughout its history from within its borders as well as beyond. But if we see this conflict only from one side or the other, then we will be blind to

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the truth. The only resolution is for the aspirations of both sides to be met through two states, where Israelis and Palestinians each live in peace and security.

That is in Israel's interest, Palestine's interest, America's interest, and the world's interest. And that is why I intend to personally pursue this outcome with all the patience and dedication that the task requires. The obligations that the parties have agreed to under the road map are clear. For peace to come, it is time for them, and all of us, to live up to our responsibilities.

Palestinians must abandon violence. Resistance through violence and killing is wrong and it does not succeed. . . .

Now is the time for Palestinians to focus on what they can build. The Palestinian Authority must develop its capacity to govern, with institutions that serve the needs of its people. Hamas does have support among some Palestinians, but they also have to recognize they have responsibilities. To play a role in fulfilling Palestinian aspirations, to unify the Palestinian people, Hamas must put an end to violence, recognize past agreements, recognize Israel's right to exist.

At the same time, Israelis must acknowledge that just as Israel's right to exist cannot be denied, neither can Palestine's. The United States does not accept the legitimacy of continued Israeli settlements. This construction violates previous agreements and undermines efforts to achieve peace. It is time for these settlements to stop.

And Israel must also live up to its obligation to ensure that Palestinians can live and work and develop their society. . . .

And finally, the Arab States must recognize that the Arab Peace Initiative was an important beginning, but not the end of their responsibilities. . . . [Editor's note: *See Digest 2007* at 846–47 for discussion of the Arab Peace Initiative.]

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In his speech to the General Assembly on September 23, 2009, President Obama stressed the need "to achieve a just and lasting peace between Israel, Palestine, and the Arab world." President Obama continued:

> The time has come to re-launch negotiations—without preconditions—that address the permanent-status

> issues: security for Israelis and Palestinians; borders; refugees; and Jerusalem. And the goal is clear: Two states living side by side in peace and security; a Jewish State of Israel, with true security for all Israelis; and a viable, independent Palestinian state, with contiguous territory that ends the occupation that began in 1967 and realizes the potential of the Palestinian people.

President Obama's speech is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00742, pp. 1–9.

On September 24, 2009, representatives of the United Nations, the European Union, the Russian Federation, and the United States, referred to as the Quartet, affirmed their support for efforts to re-launch negotiations to resolve the Israeli-Palestinian conflict. Excerpts follow from the statement the Quartet issued after its meeting on September 24. The full text is available at *www.state.gov/r/pa/prs/ps/2009/sept/129602.htm*. The statement issued by the Quartet following its June 26 meeting is available at *www.state.gov/r/pa/prs/ps/2009/06a/125433.htm*.

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. . . [T]he Quartet welcomes the recent meetings between U.S. President Barack Obama, Israeli Prime Minister Benjamin Netanyahu, and Palestinian President Mahmoud Abbas as significant steps toward the re-launching of direct, bilateral negotiations as part of a comprehensive resolution of the Arab-Israeli conflict, on the basis of UN Security Council Resolutions 242, 338, 1397, 1515, 1850, and the Madrid principles. The Quartet reiterates that the only viable solution to the Israeli-Palestinian conflict is an agreement that ends the occupation that began in 1967; resolves all permanent status issues as previously defined by the parties; and fulfils the aspirations of both parties for independent homelands through two states for two peoples, Israel and an independent, contiguous and viable state of Palestine, living side by side in peace and security. The Quartet re-affirms that Arab-Israeli peace and the establishment of a peaceful state of Palestine in the West Bank

and Gaza, on this basis, is in the fundamental interests of the parties, of all states in the region, and of the international community.

The Quartet shares the sense of urgency expressed by President Obama and fully supports the steps ahead as outlined in his statement to the UN General Assembly on September 22. The Quartet calls on Israel and the Palestinians to act on their previous agreements and obligations—in particular adherence to the Roadmap, irrespective of reciprocity—to create the conditions for the resumption of negotiations in the near term. The Quartet urges the government of Israel to freeze all settlement activity, including natural growth; and to refrain from provocative actions in East Jerusalem and calls on the Palestinian Authority to continue to make every effort to improve law and order, to fight violent extremism, and to end incitement.

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The Quartet stresses the urgency of a durable resolution to the Gaza crisis and calls for a solution that addresses Israel's legitimate security concerns, including an end to weapons smuggling into Gaza; promotes the re-unification of Gaza and the West Bank under the legitimate Palestinian Authority; and facilitates the opening of the crossings to allow for the unimpeded flow of humanitarian aid, commercial goods, and persons to and from Gaza, consistent with UN Security Council Resolution 1860. . . .

Recognizing the significance of the Arab Peace Initiative, the Quartet urges regional governments to support the resumption of bilateral negotiations, enter into a structured regional dialogue on issues of common concern, and take steps toward normalization of relations across the region in the context of progress towards peace. . . .

In November and December 2009, White House Press Secretary Robert Gibbs issued two statements reiterating the U.S. position on the status of Jerusalem. On November 17, 2009, Mr. Gibbs stated:

> We are dismayed at the Jerusalem Planning Committee's decision to move forward on the approval process for the expansion of Gilo in Jerusalem. At a time when we are working to re-launch negotiations, these actions make it

> more difficult for our efforts to succeed. Neither party should engage in efforts or take actions that could unilaterally pre-empt, or appear to pre-empt, negotiations. The U.S. also objects to other Israeli practices in Jerusalem related to housing, including the continuing pattern of evictions and demolitions of Palestinian homes. Our position is clear: the status of Jerusalem is a permanent status issue that must be resolved through negotiations between the parties.

See www.whitehouse.gov/the-press-office/statement-white-house-press-secretary-robert-gibbs-on-jerusalem. In a second statement, dated December 28, Mr. Gibbs reiterated U.S. opposition to new Israeli construction in East Jerusalem. *See www.whitehouse.gov/the-press-office/statement-white-house-press-secretary-robert-gibbs-construction-east-jerusalem*. Peace talks had not resumed as of the end of 2009.

2. Sudan

a. Overview

During 2009 the Obama administration pursued a variety of initiatives to support implementation of the Comprehensive Peace Agreement ("CPA"), signed on January 9, 2005 to resolve the North-South conflict in Sudan, and to end the conflict in Darfur. *See Digest 2005* at 920–28 for background on the CPA. On April 30, 2009, the State Department issued a press statement calling on the parties to the conflict in Darfur

> to join the Doha peace talks immediately and to cease all provocations and violent actions in Darfur. An interim ceasefire is within reach, one which will allow the armed movements and the Government of Sudan to achieve a comprehensive solution that includes security, individual compensation, wealth-sharing, respect for land rights and political participation by all the people of Darfur. The United States continues to support the work of United Nations-African Union Joint Chief Mediator Bassolé. The United States further welcomes the Libya-mediated and

> Qatari-sponsored bilateral talks in Doha between Sudan and Chad as a positive step forward and calls on the two countries to end all support for cross-border violence. The United States stands ready to support peace efforts aimed at ending the conflict in Darfur and promoting regional stability.

See www.state.gov/r/pa/prs/ps/2009/04/122500.htm. U.S. views concerning 2009 developments in Sudan are discussed in greater detail in this section.

b. Abyei boundary dispute arbitration

On July 22, 2009, a five-member arbitral panel established under the auspices of the Permanent Court of Arbitration ("PCA") issued a final award in a dispute concerning the boundaries of the Abyei Area of Sudan. The PCA addressed a dispute between the Government of Sudan and the Sudan People's Liberation Movement/Party over whether the Abyei Boundaries Commission ("ABC"), established pursuant to the CPA, had exceeded its mandate in the recommendations it made in the report it submitted to the Sudanese Presidency on July 14, 2005. As the panel explained in paragraph 480 of its award, "the ultimate political objective of delimiting the boundaries of the Abyei Area [is] to determine the residents of the Abyei Area who would be entitled to vote in the 2011 plebiscite on whether the Abyei Area should retain its special administrative status in the north, or whether it should instead be part of the province of Bahr el Ghazal in the south." [fn. omitted]

In a July 22 press release, the PCA announced the panel's finding that the ABC experts did not exceed their mandate in the way they interpreted the task of determining the boundaries of the nine Ngok Dinka chiefdoms transferred in 1905 to be considered as the Abyei Area under the CPA. However, the panel also found that in implementing their mandate, the experts had exceeded their mandate in part because they failed to state sufficient reasons for their conclusions concerning some of the boundaries of the Abyei Area. The panel

then defined the boundaries of the Abyei Area. The press release is available at *www.pca-cpa.org/showpage.asp?pag_id=1306*, along with the text of the award, the parties' written pleadings, and other written materials. The United States and the European Union issued a joint declaration on July 22, describing the panel's findings as "an important step in the implementation of the Comprehensive Peace Agreement (CPA)" and calling on the parties to the CPA to implement the decision. The declaration, excerpted below, is available at *www.state.gov/r/pa/prs/ps/2009/july/126300.htm*.

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Both parties to the CPA have committed themselves to accept the decision of the Court as final and binding. The United States and the European Union jointly call on both parties to the Comprehensive Peace Agreement (CPA)—the National Congress Party and the Sudan People's Liberation Movement—to immediately implement the decision of the Permanent Court of Arbitration panel in The Hague. Both parties must use their authority and influence to ensure that the Court's decision is respected and peacefully implemented. The US and EU stress the importance of the parties' working together to inform the population of the decision of the Court and to ensure that the rights of persons and communities concerned are fully respected.

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The U.S. and EU stand ready to continue working with all relevant stakeholders to bring peace, stability, and prosperity to Sudan.

c. Agreement between Sudan People's Liberation Movement and National Congress Party

On August 19, 2009, representatives of the Sudan People's Liberation Movement ("SPLM") and the ruling National Congress Party ("NCP") initialed an agreement on advancing

the Comprehensive Peace Agreement ("CPA"). Scott Gration, U.S. Special Envoy to Sudan, facilitated the negotiations and witnessed the action. A State Department press release, dated August 19 and available at *www.state.gov/r/pa/prs/ps/2009/aug/128068.htm*, provided additional background.

d. New U.S. policy toward Sudan

On October 19, 2009, representatives of the Obama administration outlined a new U.S. strategy toward Sudan. Secretary of State Hillary Rodham Clinton made opening remarks, excerpted below, followed by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, and Scott Gration, U.S. Special Envoy to Sudan. The full text of the press conference is available at *www.state.gov/secretary/rm/2009a/10/130686.htm*.

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Our strategy has three principal objectives: First, an end to conflict, gross human rights abuses, war crimes, and genocide in Darfur; second, implementation of the Comprehensive Peace Agreement that results in a united and peaceful Sudan after 2011, or an orderly path toward two separate and viable states at peace with each other; and third, a Sudan that does not provide a safe haven for terrorists.

In the past, the United States's approach too often has focused narrowly on emerging crises. This is no longer the case. Our effort sets forth a comprehensive U.S. policy toward Sudan.

First, we view the crisis in Sudan as two-fold: The situation in Darfur remains unresolved after six years. And the Comprehensive Peace Agreement between North and South will be a flashpoint for renewed conflict if not fully implemented through viable national elections, a referendum of self-determination for the South, resolution of border disputes, and the willingness of the respective parties to live up to their agreements. So we are approaching two

key issues—Darfur and the Comprehensive Peace Agreement—simultaneously and in tandem.

Second, we are looking to achieve results through broad engagement and frank dialogue. But words alone are not enough. Assessment of progress and decisions regarding incentives and disincentives will be based on verifiable changes in conditions on the ground. Backsliding by any party will be met with credible pressure in the form of disincentives leveraged by our government and our international partners.

Third, we will use our leadership globally to reconstitute, broaden, and strengthen the multilateral coalition that helped achieve the signing of the Comprehensive Peace Agreement, and we will work equally hard to translate international concern about Darfur into genuine international commitments.

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In a background briefing on Sudan on October 19, two senior administration officials responded to a question from the press about the new aspects of the U.S. policy. One official stressed the new policy's "clear elevation of full implementation of the CPA" and the need to achieve progress before the 2011 referendum in Southern Sudan. The officials also elaborated on the types of benchmarks that the United States would examine to assess developments on the ground and determine whether to take additional measures. The official stated:

> The kinds of things we're looking for are reduced tensions between Chad and Sudan, for example, improved security on the ground in Darfur, [the] end of aerial bombardment and security operations. A ceasefire, ultimately, is what we're looking for in Darfur, and full engagement of the government with the rebels in Doha and a proposal that the rebels can respond to.
>
> For North-South, we're looking at the referendum law, which we need to see . . . very soon, very urgently. We're looking for final preparations for the elections so it can be free, fair, and credible. And we're looking for other milestones that are critical to full implementation of the CPA,

> including the boundary—finalizing the boundary area, demarcation and delimitation, so it can be finalized.

The other official stated:

> . . . We want to see the resolution of issues related to the census. We want to see national elections occur. And we want the referenda to move forward in accordance with the CPA, which allows the people of the South to determine whether they want to remain a part of Sudan or whether they want their independence. . . .
>
> . . . [I]n the case of Darfur, broadly speaking, we want to see an end to the humanitarian suffering, and we want an end to the political crisis there, which has divided the groups inside of Darfur amongst themselves, as well as with the government in Khartoum. . . .

The full text of the briefing is available at *www.state.gov/p/af/rls/spbr/2009/130696.htm*.

B. PEACEKEEPING AND RELATED ISSUES

1. Overview

During the Security Council's thematic debate on peacekeeping on June 29, 2009, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, outlined five U.S. objectives for UN peacekeeping operations. Ambassador Rice's statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/2009/125798.htm*.

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First, we will seek mandates for UN peacekeeping operations that are credible and achievable. We will urge the Council to continue to weigh the full range of responses to a given challenge. Poorly armed and disorganized gangs, rebel groups, and others outside a peace process should not be allowed to thwart a peacekeeping mandate or block a UN deployment. Peacekeepers are often authorized

to use appropriate force to defend themselves and fulfill their mandate, including protecting civilians under imminent threat of violence. They must be willing and able to do so.

At the same time, we recognize that UN peacekeepers cannot do everything and go everywhere. There are limits to what they can accomplish, especially in the midst of a full-blown war or in the face of opposition from the host government. Peacekeeping missions are not always the right answer; some situations require other types of UN-authorized military deployments, such as regional efforts or multinational forces operating under the framework of a lead nation. And effective mediation must precede as well as accompany peacekeeping efforts if they are to succeed. . . .

Second, the United States will intensify diplomatic efforts to give new momentum to some of the stalled or faltering peace processes in areas where UN peacekeeping operations are deployed, starting with Darfur and Sudan's North-South peace process. . . . Successful diplomatic and political efforts are crucial to enabling UNAMID, UNMIS, and MINURCAT to better implement their mandates.

Third, the United States will strengthen its efforts with the UN and other partners to expand the pool of troop and police contributors, for both current and future UN peacekeeping operations. . . .

The United States, for its part, is willing to consider directly contributing more military observers, military staff officers, civilian police, and other civilian personnel—including more women—to UN peacekeeping operations. We will also explore ways to provide enabling assistance to peacekeeping missions, either by ourselves or together with partners. Let me single out one immediate priority: we will assist with generating the missing forces and enabling units required for UNAMID, MINURCAT, and MONUC to better protect civilians under imminent threat of physical, including sexual, violence.

We will be open-minded about practical suggestions to deepen consultations among troop and police contributors, the Security Council, and the Secretariat, including redoubling efforts to implement undertakings in Resolutions 1327 and 1353. In these

consultations, we should also be clear about what we are asking of troop contributors and what we are willing to do to assist them.

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Fourth, the United States will dedicate greater attention to Security Council discussions on the renewal of existing peacekeeping mandates. We will seek more comprehensive assessments of the progress that has been made and the obstacles that remain. This includes carefully considering the early recovery and peacebuilding activities that enable peacekeeping operations to depart successfully, such as demobilizing and reintegrating former combatants, reforming the security sector, and strengthening the rule of law. . . . But let me be clear: we will not support arbitrary or abrupt efforts to downsize or terminate missions, before their downsizing or termination is warranted.

And finally, the United States will give a careful review of and keep an open mind about reform proposals from the Secretariat, and others . . . .

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At a meeting on peacekeeping on August 5, 2009, the Security Council issued a Presidential Statement, summarizing the Council's efforts during 2009 to improve oversight of peacekeeping operations and identifying issues for additional consideration. U.N. Doc. S/PRST/2009/24. Excerpts follow from Ambassador Rice's statement to the Council, welcoming the Presidential Statement and announcing that the United States would be able to clear its accumulated peacekeeping arrears for 2005 through 2008 and meet in full U.S. obligations for 2009. The full text of the statement is available at *http://usun.state.gov/briefing/statements/2009/august/126908.htm*.

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Adopting today's Presidential Statement will improve peacekeeping operations' chances of success, both now and in the future. In this statement, we have committed ourselves to providing

missions with clear, credible, and achievable mandates. We have pledged to think carefully before establishing new missions that may lack the resources needed to get the job done or may have to operate in conditions ill-suited to success. We have resolved to resist the temptation to simply roll over mandates when they expire.

These are important steps. We have agreed to reflect seriously on the progress that has been made and the obstacles that remain to ensure that we can make any necessary adjustments. But as we have noted before, the United States will not support the arbitrary or abrupt downsizing or termination of missions.

Second, this Presidential Statement acknowledges that both the Security Council and the Secretariat must do a better job of consulting with troop- and police-contributing countries, especially when adopting new mandates or renewing old ones. The troop and police contributors bring a wealth of experience to these discussions, and they deserve to have their concerns heard and heeded. This is one of the most important messages we have taken away from discussions in the Council's previous thematic debates, the Council's Working Group on Peacekeeping Operations, and the General Assembly's Special Committee on Peacekeeping Operations.

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. . . [T]he United States is ready to act on both the spirit and the letter of this Presidential Statement and the New Horizon non-paper [prepared by the Departments of Peacekeeping Operations and Field Support in the UN Secretariat]. . . . We also welcome early recommendations from the Secretariat on actions that the Security Council and member states can take to increase the chances that mandates will be successfully implemented and that missions can be drawn down responsibly at the appropriate time.

And finally, while the United States will be appealing to all member states to do more for UN peacekeeping, we're also asking more of ourselves. That includes, importantly, meeting our financial obligations. . . . The United States is now in a position to clear all peacekeeping arrears accumulated from 2005 to 2008 and to

meet our obligations in full for 2009—currently estimated at approximately $2.2 billion.

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2. Sexual Exploitation and Abuse by UN Peacekeepers

On July 29, 2009, Ambassador Rice testified before the House Foreign Affairs Committee on "Confronting New Challenges in United Nations Peacekeeping Efforts." In her testimony and in response to questions from committee members, Ambassador Rice discussed the issue of sexual exploitation and abuse by UN peacekeepers. The transcript of Ambassador Rice's testimony, excerpted below, is available at *http://usun.state.gov/briefing/statements/2009/july/126840.htm*; Ambassador Rice's written statement is available at *http://usun.state.gov/briefing/statements/2009/july/126844.htm*. Chapter 6.B.2.b.(2)(i) discusses the U.S.-led resolution concerning women and conflict, Resolution 1888, which the Security Council adopted unanimously on September 30, 2009 (U.N. Doc. S/RES/1888).

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The Administration is also encouraging reform efforts that elevate performance standards and prevent fraud and abuse, including sexual exploitation. The UN has taken several critical steps in recent years to establish and implement a zero-tolerance policy for sexual exploitation and abuse by UN peacekeeping personnel—including establishing a well-publicized code of conduct and creating Conduct and Discipline Units in the field to perform training, carry out initial investigations, and support victims. The Administration strongly supports these measures, and we will remain vigilant to ensure that they are implemented effectively.

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REP. BERMAN: . . . .

. . . Have you any thoughts on . . . whether . . . the UN charter could be amended to hold member states responsible for prosecuting their nationals who commit criminal acts [such as rape], while serving in an international peacekeeping operation? . . . [I]n the alternative: Should there be an international mechanism—a military tribunal established for these kinds of cases?

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AMB. RICE: . . . [W]e are all deeply concerned about the prevalence of rape as a crime of war. It is not a new phenomenon unfortunately. It is as old as time, but it is particularly egregious and strikingly prevalent in places like the Democratic Republic of Congo . . . . It's prevalent in Congo and Liberia, Sudan and elsewhere. And these need to be addressed in a very serious way when they're committed by combatants, as well as by peacekeepers.

Now, I think it's important to note that while there have been some very unacceptable egregious instances of abuse by UN personnel, that is a very small fraction of the problem. The vast majority of peacekeepers . . . are responsible, principled and are contributing to the protection of civilians rather than the alternative. But where abuses occur by peacekeepers there does need to be accountability, which is why we have been so supportive of the UN's zero-tolerance policy, its placement in the field of code of conduct teams that can investigate, that can train and that can enable mission leaders to hold accountable personnel and remove them.

The present circumstance, however, as you know is that every national government, every troop-contributing country is responsible ultimately for the prosecution and the disposition of their own troops in cases of crimes. That is, as you know, a privilege we jealously guard ourselves. And so while I think it is certainly worth considering and exploring what additional . . . international legal mechanisms might be available to ensure that when perpetrators are identified and convicted that they are in fact held accountable, we need to be realistic about what member states are prepared to allow their own personnel to be subjected to in the form of

international justice. It's analogous to the debate that we're all familiar with that we've had in this country and elsewhere with respect to the international criminal court . . . . And so when you talk about an amendment to the [UN] charter, you're talking about two-thirds of the member states of the General Assembly, ratification by our own Senate and I think it's a high bar, because if we were to sponsor that we would have to be willing to subject ourselves to it.

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AMB. RICE: . . . [W]ith respect to zero tolerance, the UN has taken important steps to implement that on the ground in critical places like Congo and Sudan. We continue to be dismayed by the fact that cases of abuse occasionally still do arise. But the steps that they have taken to investigate, prevent and then hold accountable those who have committed crimes are directionally correct.

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3. Georgia

On June 15, 2009, the Russian Federation vetoed a Security Council resolution to extend the mandate of the UN Mission in Georgia ("UNOMIG"). Following the vote, Ambassador Rosemary A. DiCarlo, U.S. Alternative Representative to the United Nations for Special Political Affairs, made a statement to the Security Council expressing regret at the outcome. Ambassador DiCarlo's statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/2009/125975.htm*. *See also* the Joint Statement issued by the Group of Friends of the UN Secretary-General, available at *www.state.gov/r/pa/prs/ps/2009/06a/125002.htm*.

. . . The United States deeply regrets the outcome of today's vote on the draft resolution to extend the United Nations Mission in Georgia. The draft resolution would have given the Council time to reach agreement on a new mandate for the UN presence on the basis of the Secretary General's recommendations—recommendations

that most Council members have supported. Extending the mandate would have allowed the UN to continue to carry out its role in monitoring the ceasefire, addressing security and humanitarian concerns on the ground, and helping create the conditions for the return of refugees and displaced persons.

Mr. President, we believe that a UN presence in Georgia is important. For this reason, the United States, along with other members of the Friends of the Secretary General for Georgia, have tried over the past two weeks to engage in good faith negotiations.

Regrettably, the Russian Federation could not agree to language in this technical rollover—language that reflects a well-balanced compromise that the Council had reached in its two previous resolutions on this issue. This language served to bridge the differing views among us on the situation in Georgia.

. . . We will now consider measures to address a Georgia without a UN presence. We will continue to work closely with the leadership of the EU Monitoring Mission and with the co-chairs of the Geneva talks. In the meantime, it is the civilian population that suffers by facing a tenuous security environment without an international presence in Abkhazia, Georgia.

The United States, Mr. President, would like today to reaffirm once again in this chamber its commitment to the territorial integrity and sovereignty of Georgia. The vote today demonstrates that the majority of Council members agree.

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4. Kosovo

The Security Council met in 2009 to consider reports of the Secretary-General on the United Nations Administration in Kosovo ("UNMIK") and to hear briefings by Lamberto Zannier, the Secretary-General's Special Representative and head of UNMIK. Ambassador Rosemary A. DiCarlo, U.S. Alternative Representative to the United Nations for Special Political Affairs, delivered statements at the Security Council's meetings on March 23 and October 15, excerpted below, expressing support for the reconfiguration and downsizing

of UNMIK and stressing the importance of the EU's Rule of Law Mission in Kosovo ("EULEX") and NATO's peacekeeping force in Kosovo. The full texts of the statements are available at *http://usun.state.gov/briefing/statements/2009/march/127981.htm* (March 23), and *http://usun.state.gov/briefing/statements/2009/130609.htm* (Oct. 15). *See also* Ambassador DiCarlo's statement of June 17, available at *http://usun.state.gov/briefing/statements/2009/125971.htm*. *Digest 2008* discusses U.S. participation in EULEX at 439–42.

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March 23

. . . With the rise of a truly self-governing Kosovo, UNMIK's presence has been substantially reduced, and the European Union has stepped forward as Kosovo's primary international adviser. The United States encourages efforts to reduce further UNMIK's presence in Kosovo in light of these changes.

We welcome the important role of the EU's Rule of Law Mission in Kosovo (EULEX), and note the encouraging progress report EULEX has provided. We are particularly pleased that EULEX police and court officials have deployed and been accepted throughout Kosovo, and that the mission is on track to reach full operational capacity.

The Kosovo Government has, of course, primary responsibility for the rule of law. But we welcome EULEX's efforts to assist the government in exercising these functions. We all share a common goal: seeing the rule of law throughout the territory of Kosovo strengthened and upheld in a uniform, transparent, and professional manner.

For Kosovo's multi-ethnic democracy to succeed fully, the cooperation and active participation of the country's Serbs is simply essential. We hope that EULEX will continue to discuss practical issues—police, justice, and customs—with representatives from Kosovo's Serb community, the Government of Serbia and the Government of Kosovo. We welcome the statements of

Belgrade authorities [of their readiness] to cooperate with EULEX and to continue their dialogue with the European Union.

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Security is important and my government commends the continued efforts of NATO in Kosovo—through its peacekeeping force, KFOR, and its assistance in the standing up of the Kosovo Security Force. This new force, with a mandate to handle civil protection, emergency response and removal of explosive ordnances, is open to all of Kosovo's ethnic communities. NATO's supervision of the force will help to ensure that it conducts itself according to the highest standards worthy of a democratic, multiethnic and civilian-controlled security institution.

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. . . [T]he United States welcomes what the Secretary-General has called a "new phase" for UNMIK. The full deployment of the European Union Rule of Law Mission, EULEX, has enabled UNMIK to reconfigure itself and reduce its responsibilities.

We fully support this transition, which makes EULEX the primary international presence for rule-of-law issues in Kosovo. We welcome EULEX's expanding role in Kosovo, especially in the north of the country. As the Secretary-General states, UNMIK has now refocused its efforts on facilitating practical cooperation among all communities in Kosovo. And we note that both Belgrade and Pristina have adopted pragmatic approaches in resolving some of their outstanding issues.

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. . . [T]he Secretary-General notes that the security situation remains relatively calm in Kosovo. For this reason NATO decided to downsize its peacekeepers to a deterrent presence. But recent security incidents in northern Kosovo highlight the sensitivities and tensions inherent in building a multiethnic society. . . .

The United States condemns the recent vandalism of EULEX vehicles and applauds Kosovo's handling of the incident, including

the later arrest and prosecution of the perpetrators. These incidents and others . . . underscore the need for strengthened police cooperation and security for returning displaced persons.

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5. Lebanon

As discussed in B.2. *supra*, Ambassador Rice testified before the House Foreign Affairs Committee concerning peacekeeping on July 29, 2009. During her testimony, Ambassador Rice responded to a question from Representative Ron Klein (D-Florida), concerning ways to strengthen the mandate of the United Nations Interim Force in Lebanon ("UNIFIL"). Ambassador Rice's response is excerpted below; the full text of her oral testimony is available at *http://usun.state.gov/briefing/statements/2009/july/126840.htm*.

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. . . UNIFIL is currently limited to a Chapter 6 mandate. And others can provide the history better than I, because this mandate was passed and updated prior to my tenure. But it was a contentious discussion and debate, and there were those who didn't want to give UNIFIL the enhanced capacity that it has today. And so the strengthening of the mandate is an interest that I understand many good people on the Hill share, and we certainly are sympathetic to it. But I don't think, as a practical matter, that we will be able to muster the support in the Security Council that would be necessary to substantially strengthen the mandate. . . .

And we frankly think . . . that on balance the role that UNIFIL is playing adds value rather than the opposite, even as we wish it would be able to do more. It is, in fact, taking active steps to visibly mark the blue line. Forty points along the blue line have been agreed by the parties. Seventeen markers have been installed or are under construction. It is investigating, where it can, consistent with

its mandate, violations of 1701, including arms flows. It did not succeed as it went to try to investigate the arms cache that exploded on the 14th of July, not because it lacked the will but because it lacked the strength on the ground to frankly repel and didn't have the mandate to repel with force—

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. . . I don't think anybody could say they're satisfied with UNIFIL in its current capacity. But I think we support it because we think its presence contributes, on balance. It's better than the alternative. Were there no UNIFIL there, there would be no ability to demarcate the blue line, to investigate these abuses, and to provide some eyes and ears on what is transpiring in this very, very sensitive zone.

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6. Somalia

During 2009 the Security Council reauthorized the African Union ("AU") peacekeeping operation in Somalia and considered other options, including a UN peacekeeping mission.

On January 16, 2009, the Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1863, in which it decided to reauthorize for six months the African Union Mission to Somalia ("AMISOM"). U.N. Doc. S/RES/1863. The United States took the lead in drafting and introducing the resolution, which the Council adopted unanimously. The Security Council, as it had done in previous resolutions, authorized AMISOM to take "necessary measures" appropriate to carry out its mission, contained in paragraph 6 of Resolution 1772 (2007) (U.N. Doc. S/RES/1772), to contribute to establishing peace and security in Somalia. The resolution also welcomed the AU's decision to retain AMISOM in Somalia until March 16, 2009, and requested the AU to keep AMISOM there for another six months. Notably, the resolution requested the Secretary-General—"in order for

AMISOM's forces to be incorporated into a United Nations Peacekeeping Operation"—to provide a UN logistical support package to AMISOM, including equipment and services but not transferred funds, until June 1, 2009, or a Security Council decision on whether to establish a UN peacekeeping operation in Somalia. The Security Council also expressed its intention to establish a UN peacekeeping mission in Somalia to succeed AMISOM, subject to its further decision on the issue by June 1, 2009.

Ambassador Zalmay Khalilzad, then U.S. Permanent Representative to the United Nations, addressed the Security Council on January 16, following adoption of Resolution 1863. Excerpts below from Ambassador Khalilzad's remarks address the need for a comprehensive approach to address the causes of instability in Somalia, as well as the importance of Somali-led efforts to achieve peace and security in the country. Ambassador Khalilzad's remarks are available in full at *www.archive.usun.state.gov/press_releases/20090116_011.html.*

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Somalia is one of the most complex challenges faced by the international community. . . .

. . . We need a comprehensive approach that addresses the root causes of instability in Somalia which include political, economic, humanitarian and security. The resolution adopted today attempts to address these root causes by making a clear commitment that the Security Council will assume its responsibilities with regard to Somalia. The resolution also provides for the United Nations to back up this commitment with concrete logistical support to the forces of the African Union. We intend this support to AMISOM to allow it to continue to provide security for key humanitarian infrastructure in Mogadishu until June 1st, by which date the Council will make a decision on movement towards a UN peacekeeping force.

As we shoulder our responsibility, this resolution makes clear that ultimate responsibility for national reconciliation and

stabilization lies with the Somalis themselves. The United States strongly supports the political process led by SRSG Ahmedou Ould-Abdallah and calls on all Somali stakeholders to renounce violence and engage constructively in the formation of a Unity Government in the interest of establishing lasting peace, stability, and effective governance in Somalia. We also attach great importance to the establishment, under the terms of the Djibouti Peace Agreement, of joint Somali security forces, who ultimately will take responsibility for ensuring security in the country.

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On May 26, 2009, the Security Council adopted Resolution 1872, which among other things further renewed AMISOM's mandate and the UN logistical support package for AMISOM until January 31, 2010. U.N. Doc. S/RES/1872. The resolution also recalled the Council's statement of intent to establish a UN peacekeeping force in Somalia. During the rest of 2009, the United States continued to express support for AMISOM and concern about instability in Somalia. In a statement to the Security Council on July 9, 2009, for example, Ambassador Rice stated:

> AMISOM is playing an indispensible role in helping to stabilize the security situation on the ground. In particular, we salute the dedication of the Ugandan and Burundian forces. But their bravery alone is not enough. AMISOM needs the support of the UN and its member states to achieve its objectives. This is why the United States continues to support the provision of a UN support package to AMISOM, as approved by this Council in Resolution 1872. My government has also provided more than $135 million in training, equipment, and logistical support to AMISOM since the mission's creation. But more still must be done. We call on the African Union states to consider sending peacekeepers to this vital mission, and we call on UN member states to extend generous support for AMISOM's activities.

The full text of the statement is available at *http://usun.state.gov/briefing/statements/2009/july/125867.htm.*

In her July 29 testimony to the House Foreign Affairs Committee, discussed in B.2. *supra*, Ambassador Rice addressed questions about the situation in Somalia. Excerpts follow from Ambassador Rice's responses, and the full transcript of the hearing is available at *http://usun.state.gov/briefing/statements/2009/july/126840.htm.*

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AMB. RICE: . . . We are very concerned, obviously, about the situation in Somalia. We have an enormous stake in the survival of the transitional federal government and in the defeat of Al Shabab and other extremist groups that are affiliated with Al Qaida and are gravely imperiling that transitional federal government. That is why the United States has provided 80 tons of military equipment, including ammunition, to the TFG to support it. That is why we have been the principal supporter of AMISOM in funding its logistic support package. AMISOM is playing a very important role, even within the bounds of its mandates. It is helping to defend the TFG and we think that's vitally important.

With respect to whether it is a circumstance ripe for UN peacekeeping, we think it is certainly a circumstance where we need a credible security support for the government. AMISOM is—has committed to play that role. We think it is the best approach at present because there is a history in Somalia . . . of the United Nations which wasn't entirely a happy one, to put it mildly. There is a tradition of really violent opposition to outsiders of all sorts, and AMISOM has succeeded to a substantial extent in being accepted by the population, particularly in Mogadishu, because it's engaged in medical outreach and support, provision of services to the population. It is not viewed with the same skepticism and hostility that the UN might. Plus, we have just discussed the problem of giving the UN mandates that they can't fulfill, and this is a case where even [AMISOM] is not staffed at its full complement. So to hand that over to the UN, with the current deficit we have in the gaps between the authorized strength in Darfur and Congo

and the actual troops available, would only be to exacerbate the problem.

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On October 26, 2009, the Security Council met to discuss the report of the Secretary-General on support to African Union peacekeeping operations authorized by the United Nations (U.N. Doc. S/2009/490). In her statement to the Council, Ambassador Rice noted that the United States had supported, "on an exceptional basis, the use of assessed contributions to support the African Union Mission in Somalia. However, we must stress that that decision was only possible in the unique circumstances of Somalia, and the United States is unable to make a broad commitment to support such arrangements in future operations." The full text of Ambassador Rice's statement is available at *http://usun.state.gov/briefing/statements/2009/130928.htm*.

7. Sudan

a. UN/African Mission in Darfur

During 2009 the United States continued to support the UN/African Mission in Darfur. On January 1, 2009, President George W. Bush issued a Presidential waiver to permit the United States to provide nonreimbursable assistance to UNAMID to support the airlift of equipment for the peacekeeping mission. Presidential Determination No. 2009-10 stated:

> By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 10(d)(1) of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287e–2(d)(1)), I hereby determine that provision of assistance to the United Nations/African Union Mission in Darfur to support the airlift of equipment for peacekeeping in Darfur without reimbursement from the United Nations is important to the security interests of the United States.

74 Fed. Reg. 1583 (Jan. 13. 2009).

On November 30, 2009, Ambassador Rice made comments to the press on the Security Council's discussions of UNAMID and the situation in Darfur. Ambassador Rice expressed concern about reports that UNAMID personnel and patrols had been denied freedom of movement and access. Ambassador Rice stated:

> . . . These quite directly and seriously contravene the terms in the status of forces agreement that the government of Sudan has committed to. It impedes UNAMID's ability to protect civilians and do its vital work and it is utterly unacceptable, as are the threats by the government of Sudan against UNAMID and its personnel . . . .

Ambassador Rice's remarks are available at *http://usun.state.gov/briefing/statements/2009/132756.htm*.

b. UN Mission in Sudan

During 2009 the United States also continued to support the activities of the UN Mission in Sudan ("UNMIS"). On April 30, 2009, the Security Council unanimously adopted Resolution 1870, which renewed the UNMIS mandate through April 30, 2010. U.N. Doc. S/RES/1870. Ambassador Rice made a statement after the vote, excerpted below, expressing support for UNMIS. The full statement is available at *http://usun.state.gov/briefing/statements/2009/april/126490.htm*.

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We are very pleased that the Council has unanimously adopted renewal of the UNMIS mandate. The Council's vote reflects its unwavering support for the work [of] the United Nations in southern Sudan. It also reflects the Council's continued belief that full implementation of the Comprehensive Peace Agreement (CPA) is vital to bringing lasting peace to the people of Sudan. After years

of conflict and economic deprivation, the citizens of Sudan deserve a future of peace and promise.

The Sudanese people are faced with many challenges. We are concerned about the deterioration of relations between Chad and Sudan. The relationship between these two countries affects peace throughout Sudan. And for this reason we welcome the Qatar and Libyan sponsored bilateral talks in Doha between Chad and Sudan as a positive step forward.

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We fully support UNMIS as it continues its work by helping to implement the CPA, to protect vulnerable citizens, and assist the people of Sudan to achieve a lasting peace.

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Cross References

International Criminal Tribunals for the Former Yugoslavia and Rwanda, **Chapter 3.C.2.**
U.S. views on UN Fact Finding Mission on the Gaza Conflict, **Chapters 6.A.3.b. and 18.A.1.b.**(1)
Women and situations of armed conflict, **Chapter 6.B.2.b.**
U.S. legislation addressing issues concerning child soldiers, **Chapter 6.G.**
Status of Jerusalem, **Chapter 9.C.**
Sanctions to restore peace and security, **Chapter 16.A.3.**
Russia/Georgia, **Chapter 18.A.1.b.**(2)
Protection of civilians in armed conflict, **Chapter 18.A.1.d.**

Chapter 18

Use of Force, Arms Control and Disarmament, and Nonproliferation

A. USE OF FORCE

1. General

a. Overview

On December 10, 2009, President Barack H. Obama accepted the Nobel Peace Prize. Excerpts follow from President Obama's remarks concerning the wars in Iraq and Afghanistan and the use of force generally. The full text of President Obama's acceptance speech is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00985, pp. 1–8.

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. . . [P]erhaps the most profound issue surrounding my receipt of this prize is the fact that I am the Commander in Chief of the military of a nation in the midst of two wars. One of these wars is winding down. The other is a conflict that America did not seek; one in which we are joined by 42 other countries—including Norway—in an effort to defend ourselves and all nations from further attacks.

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. . . I believe that all nations, strong and weak alike, must adhere to standards that govern the use of force. I, like any head

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of state, reserve the right to act unilaterally if necessary to defend my nation. Nevertheless, I am convinced that adhering to . . . international standards strengthens those who do and isolates and weakens those who don't.

The world rallied around America after the 9/11 attacks, and continues to support our efforts in Afghanistan, because of the horror of those senseless attacks and the recognized principle of self-defense. Likewise, the world recognized the need to confront Saddam Hussein when he invaded Kuwait, a consensus that sent a clear message to all about the cost of aggression.

Furthermore, America—in fact, no nation—can insist that others follow the rules of the road if we refuse to follow them ourselves. For when we don't, our actions appear arbitrary and undercut the legitimacy of future interventions, no matter how justified.

And this becomes particularly important when the purpose of military action extends beyond self-defense or the defense of one nation against an aggressor. More and more, we all confront difficult questions about how to prevent the slaughter of civilians by their own government or to stop a civil war whose violence and suffering can engulf an entire region.

I believe that force can be justified on humanitarian grounds, as it was in the Balkans or in other places that have been scarred by war. Inaction tears at our conscience and can lead to more costly intervention later. That's why all responsible nations must embrace the role that militaries with a clear mandate can play to keep the peace.

America's commitment to global security will never waver. But in a world in which threats are more diffuse, and missions more complex, America cannot act alone. America alone cannot secure the peace. This is true in Afghanistan. This is true in failed states like Somalia, where terrorism and piracy is joined by famine and human suffering. And sadly, it will continue to be true in unstable regions for years to come.

The leaders and soldiers of NATO countries and other friends and allies demonstrate this truth through the capacity and courage they've shown in Afghanistan. But in many countries, there is a disconnect between the efforts of those who serve and

the ambivalence of the broader public. I understand why war is not popular, but I also know this: The belief that peace is desirable is rarely enough to achieve it. Peace requires responsibility; peace entails sacrifice. That's why NATO continues to be indispensable. That's why we must strengthen U.N. and regional peacekeeping and not leave the task to a few countries. That's why we honor those who return home from peacekeeping and training abroad to Oslo and Rome, to Ottawa and Sydney, to Dhaka and Kigali. We honor them not as makers of war, but . . . as wagers of peace.

Let me make one final point about the use of force. Even as we make difficult decisions about going to war, we must also think clearly about how we fight it. The Nobel Committee recognized this truth in awarding its first prize for peace to Henry Dunant, the founder of the Red Cross and a driving force behind the Geneva Conventions.

Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength. That is why I prohibited torture. That is why I ordered the prison at Guantanamo Bay closed. And that is why I have reaffirmed America's commitment to abide by the Geneva Conventions. We lose ourselves when we compromise the very ideals that we fight to defend, and we honor those ideals by upholding them not when it's easy, but when it is hard.

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b. Use of force issues related to specific conflicts

(1) Gaza: UN Fact Finding Mission on the Gaza Conflict

As discussed in Chapter 6.A.3.b., on September 29, 2009, Justice Richard L. Goldstone, head of the United Nations Fact Finding Mission on the Gaza Conflict, addressed the Human Rights Council on the mission's report ("Goldstone Report"). On that day, Assistant Secretary of State for Human Rights,

Democracy and Labor Michael H. Posner provided the U.S. position on the Goldstone Report in a statement to the Council. Excerpts below provide U.S. views on the report's allegations of violations of international humanitarian law. The full text of Mr. Posner's statement is available at *www.state.gov/s/l/c8183.htm*.

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. . . [W]e are guided by our commitment to the universal application of international law, including humanitarian law and human rights law, in assessing the findings and recommendations of this report, but that cannot be understood to imply a moral equivalence between Israel, a democratic state with the right of self-defense, and the terrorist group Hamas, that responded to Israel's pull-out of Gaza by terrorizing civilians in southern Israel. The report includes a number of very serious allegations charging Israel and the Palestinians with violations of human rights and humanitarian law. We take these allegations seriously. We are confident that Israel, as a democracy with a well-established commitment to rule of law, has the institutions and ability to carry out robust investigations into these allegations. We note that Israel has stated publicly it has already investigated at least 100 complaints related to the Gaza conflict, including about some incidents mentioned in the report, and is currently pursuing action in 23 individual cases. The findings from each of its investigations is subject to multiple independent layers of review. We encourage Israel to utilize appropriate domestic review procedures and meaningful accountability mechanisms to investigate and address all credible allegations of misconduct or violations of international law. Hamas, a terrorist group that has seized control of a territory, has neither democratic structures, nor an independent judiciary, nor willingness to examine its own violations of international humanitarian law and human rights law. Nevertheless, this body should certainly demand from Hamas that it do so, as well as demand an end to Hamas' deliberate targeting of civilians and its use of its own population as human shields. This body also should ask the Palestinian Authority

to carry out its own investigation into Hamas' violations of international law.

. . . [A] genuine commitment to the truth should compel this body to discuss the weaknesses of the report. Those weaknesses will appear clearer to those who actually have read the full report and understood its implications. The report makes extraordinarily negative inferences about the intentions of Israeli military commanders, senior political leaders, and the entire Israeli criminal justice system on the basis of a limited factual record and from those inferences draws condemnatory conclusions of law, treating accusations and inferences as fact. One example is the report's call for UNGA to establish an escrow account to which only Palestinians could make compensation claims and which only Israel is required to fund. The report further calls on Israel to undertake a moratorium on the use of certain munitions; it makes no such demand of Hamas with regard to its use of indiscriminate rockets. These unbalanced recommendations taint many of the report's suggestions for international action.

Another significant problem with the report is its failure to deal adequately with the asymmetrical nature of this conflict or assign appropriate responsibility to Hamas for its decision to base itself and its military operations in heavily civilian-populated urban areas. The conflict in Gaza is emblematic of a new kind of conflict in our world, where some of those engaged in combat use civilian spaces—schools, hospitals and religious institutions—to store weapons and as staging grounds for rocket attacks and armed combat. National militaries engaged in asymmetrical warfare must remain bound by humanitarian law, but it is a stark and tragic reality that terrorists systematically ignore these laws. Actions by terrorist groups that have the effect of employing civilians as human shields put enormous pressures on militaries that are trying to protect civilians and their own soldiers, an issue faced by many militaries today. Although the Goldstone report deals briefly with these issues, its findings of fact and law are tentative and equivocating.

We also have very serious concerns about the recommendations spelled out in this report, especially that these allegations be taken up by the UN Security Council and then possibly referred to the International Criminal Court. The role of the Human Rights

Council would be dramatically different if this approach were to be applied in every conflict situation around the world where there are alleged violations of human rights or humanitarian law.

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On October 15–16, 2009, the Human Rights Council held its twelfth special session, focusing on the Goldstone Report. Douglas M. Griffiths, Chargé d'Affaires, a.i., U.S. Mission to the United Nations, Geneva, addressed the Council on October 15. In his statement, Mr. Griffiths addressed the use of force in the conflict, noting in part that "[t]he Report makes clear that the Gaza operation was commenced lawfully after civilians in Israel came under sustained attack by Hamas, in violation of international human rights and humanitarian law." Mr. Griffiths also stated:

> . . . [W]ith respect to the Gaza conflict early this year, a question left unaddressed by the Goldstone Report and other human rights reports on the conflict relates to how Israel can effectively defend itself against Hamas's attacks in a manner consistent with international law. The Report affirms the bedrock principles of proportionality and distinction, which exist to help protect civilians from harm during armed conflict. But the report leaves open crucial questions regarding the complications associated with implementing fundamental law of war principles—including proportionality, distinction, and precautions–in the face of deliberate tactics by Hamas which target civilians, and in view of the physical footprint and population density of Gaza. It is not the job of this body to proffer military strategies, and we recognize states' continuing obligations to comply with these principles even in difficult circumstances. Israel is not the only nation-state facing conflicts in which non-state actors launch attacks against the state and its population from civilian areas. Virtually every region of the world has similar conflict situations. This is one of the complex issues presented by the Report and is an issue that requires more consideration than this body has given it.

The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*. For discussion of related developments in 2009, see Chapter 6.A.3.b.

(2) Russia/Georgia

During 2009 the United States issued several statements expressing support for Georgia's sovereignty and territorial integrity and calling on the Russian Federation to fulfill its commitments under the August 12 and September 8, 2008 ceasefire agreements between the Russian Federation and Georgia. For example, on February 6, 2009, Robert Wood, Acting State Department Spokesman, issued a statement concerning the Russian Federation's intention to establish bases in Georgia. The press statement, excerpted below, is available at *www.state.gov/r/pa/prs/ps/2009/02/116247.htm*. For background on the conflict that broke out in Georgia in August 2008, see *Digest 2008* at 863–70.

The United States regrets the Russian Federation's expressed intention to establish bases in the territory of Georgia as contrary to the spirit and the letter of Russia's existing commitments. These Russian plans include a naval base at the port of Ochamchire, army bases in the Abkhazia and South Ossetia regions of Georgia, and the possible deployment of combat aircraft.

Under the August 12 and September 8 ceasefire agreements between Georgia and Russia, mediated by the French EU Presidency, Russia committed to return its forces to their pre-war numbers and locations in South Ossetia and Abkhazia. This latest announced build-up of the Russian Federation's military presence in the Georgian regions of Abkhazia and South Ossetia without the consent of the Georgian Government would clearly violate that commitment. Implementation of these basing plans would also violate Georgia's sovereignty and territorial integrity, to which Russia repeatedly committed itself in numerous United Nations Security Council resolutions.

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On April 30, 2009, Robert Wood, Acting State Department Spokesman, issued a statement expressing concern about an agreement between Russia and the de facto authorities in the Georgian separatist regions of Abkhazia and South Ossetia to permit Russia, among other things, to station border guards along the two regions' administrative boundaries. "This action contravenes Russia's commitments under the August 12 ceasefire agreement brokered by President Nicolas Sarkozy between Russia and Georgia, and violates Georgia's territorial integrity," Mr. Wood stated. He also called on Russia

> to honor its commitments under the August 12 and September 8 ceasefire agreements. This includes removing its troops to positions held prior to the start of the conflict, allowing unfettered humanitarian access, and allowing human rights organizations to investigate allegations of ethnic cleansing in the two regions. Establishing a "border" under the control of Russian soldiers marks another step in the opposite direction.

The full text of the statement is available at *www.state.gov/r/pa/prs/ps/2009/04/122520.htm*.

On December 17, 2009, Casey Christensen, Acting Deputy Chief of Mission, U.S. Mission to the Organization for Security and Cooperation in Europe ("OSCE"), delivered a statement to the Permanent Council of the OSCE concerning the Abkhazia region of Georgia. The U.S. statement, excerpted below, is available at *http://osce.usmission.gov/media/pdfs/2009-statements/st_121709_abkhazia.pdf*.

The United States regrets the decision to hold "elections" in the Abkhazia region of Georgia on December 12 and recognizes neither their legitimacy nor their results.

We reiterate our support for Georgia's sovereignty and territorial integrity within its internationally recognized borders.

We remain committed to the achievement of a long-term, peaceful resolution to the conflict. . . .

We also renew our call for Russia to fulfill the provisions of the August 12 cease-fire agreement and the September 8 implementing measures . . . . Russia's characterization of these regions [Abkhazia and South Ossetia] as independent does not relieve it of these commitments.

We remain convinced that the continued involvement of the international community is critical. We firmly believe an international presence should be established throughout Georgia, and once more call for access to the South Ossetia and Abkhazia regions for international monitors.

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c. Bilateral agreements and arrangements

(1) Defense Cooperation Agreement with Colombia

On October 30, 2009, the United States and Colombian governments signed a defense cooperation agreement, the Supplemental Agreement for Cooperation and Technical Assistance and Security ("DCA"). The two countries agreed "to deepen their cooperation in areas such as interoperability, joint procedures, logistics and equipment, training and instruction, intelligence exchanges, surveillance and reconnaissance capabilities, combined exercises, and other mutually agreed activities, in order to address common threats to peace, stability, freedom, and democracy." DCA, Article III(1). Article III(2) provides that the activities the agreement covers "shall require authorization by and coordination with the appropriate Colombian authorities . . . shall not exceed the provisions established in bilateral and multilateral cooperation agreements signed by the Parties, and shall respect Colombian regulations." Article III(4) provides that the parties "shall comply with their obligations under this Agreement in a manner consistent with the principles of sovereign equality, territorial integrity of States, and non-intervention in the internal affairs of other States."

The DCA makes reference to earlier bilateral defense agreements regarding the various privileges and immunities and other benefits U.S. personnel, their dependents, and U.S. contractors will receive. For instance, Article VIII of the DCA confirms that U.S. personnel and their dependents are granted "the privileges, exemptions, and immunities accorded to the administrative and technical staff of a diplomatic mission under the Vienna Convention," and Article X exempts the United States and U.S. contractors from "all fees, duties, taxes, and other charges otherwise leviable in Colombia on the importation into, and procurement and use of, goods in Colombia, and on funds utilized in Colombia in connection with activities carried out" under the DCA.

The DCA entered into force upon signature. A State Department fact sheet issued on October 30, 2009, excerpted below, provided additional details on the DCA. The full text of the fact sheet is available at *www.state.gov/r/pa/prs/ps/2009/oct/131134.htm*, and the agreement is available at *www.state.gov/documents/organization/131654.pdf*.

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. . . The DCA will facilitate effective bilateral cooperation on security matters in Colombia, including narcotics production and trafficking, terrorism, illicit smuggling of all types, and humanitarian and natural disasters.

The DCA does not permit the establishment of any U.S. base in Colombia. It ensures continued U.S. access to specific agreed Colombian facilities in order to undertake mutually agreed upon activities within Colombia.

The agreement facilitates U.S. access to three Colombian air force bases, located at Palanquero, Apiay, and Malambo. The agreement also permits access to two naval bases and two army installations, and other Colombian military facilities if mutually agreed. All these military installations are, and will remain, under Colombian control. Command and control, administration, and security will continue to be handled by the Colombian armed forces. All activities conducted at or from these Colombian bases

by the United States will take place only with the express prior approval of the Colombian government. The presence of U.S. personnel at these facilities would be on an as needed, and as mutually agreed upon, basis.

The DCA does not signal, anticipate, or authorize an increase in the presence of U.S. military or civilian personnel in Colombia.

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At a technical level, the DCA harmonizes and updates existing bilateral agreements, practices, and arrangements on security matters, and continues to ensure appropriate protections and status for U.S. personnel. Bilateral U.S.-Colombian engagement in the security sphere is governed by conditions set in a number of bilateral agreements, including the 1952 Mutual Defense Assistance Agreement, the 1962 General Agreement for Economic, Technical and Related Assistance, and related subsequent agreements in 1974, 2000, and 2004.

(2) Supplemental Status of Forces Agreement with Poland

On December 11, 2009, Under Secretary of State for Arms Control and International Security Ellen O. Tauscher and Polish Under Secretary of Defense Stanislaw Komorowski signed the Agreement Between the Government of the United States of America and the Government of the Republic of Poland on the Status of the Armed Forces of the United States of America in the Territory of the Republic of Poland ("SOFA") in Warsaw. The SOFA "supplements the NATO SOFA [signed on June 19, 1951] and further defines the status of, and terms and conditions governing the presence of, United States forces, members of the force and the civilian component, and dependents in the territory of the Republic of Poland. This Agreement, in specific situations indicated herein, also defines the status of, and terms and conditions governing the presence of, United States contractors and United States contractor employees in the territory of the Republic of Poland in connection with the provision of goods and services to United States forces." SOFA, Article 1(1).

In a statement released on December 11, 2009, Department of State Spokesman Ian Kelly explained that the agreement "will facilitate a range of mutually agreed activities, including joint training and exercises, deployments of U.S. military personnel and prospective Ballistic Missile Defense deployments." The full text of Mr. Kelly's statement is available at *www.state.gov/r/pa/prs/ps/2009/dec/133470.htm*. The text of the agreement is available at *www.state.gov/documents/organization/142328.pdf*. For additional background, see *Digest 2008* at 1009–10.

(3) Russia

(i) Strategic framework for military-to-military engagement

On July 6, 2009, Admiral Michael Mullen, Chairman of the Joint Chiefs of Staff, and General Nikolai Makarov, Chief of Defense for the Russian Federation, signed a strategic framework to enable the United States and Russia to resume bilateral military-to-military activities. Those activities had been suspended since August 2008. The White House issued a press statement on that day, excerpted below, providing details on the new framework, which is not binding under international law. The full text of the press statement is available at *www.whitehouse.gov/the_press_office/United-States-Russia-Military-to-Military-Relations.*

. . . This new framework will set conditions that raise military cooperation to a new level and deepen mutual understanding between our respective armed forces.

The Armed Forces of the United States and Russian Federation have agreed in their work plan for 2009 to conduct nearly 20 exchanges and operational events before the end of the year, including a strategic discussion between the U.S. Joint Staff and the Russian General Staff, orientation for Russian military cadets at the U.S. Military Academy at West Point, planning for a joint

exercise to respond to a hijacked aircraft in national and international airspace, visit of the faculty of the Russian Combined Arms Academy to the U.S. Army Combined Arms Center at Ft. Leavenworth, and a naval war game conducted by the Kuznetsov Naval Academy and the U.S. Naval War College. In addition, the U.S. European Command and the Russian Ministry of Defense have agreed to meet to plan a robust and more ambitious work plan for 2010.

. . . Reestablishing our military-to-military bonds will enhance transparency, establish clear paths of communication, and focus our collective efforts on today's global strategic challenges.

(ii) Military air transit agreement

On July 6, 2009, the United States and Russia concluded a military air transit agreement, which "defines the procedure for the transit [by air] by the U.S. . . . of armaments, military equipment, military property, and personnel through the territory of the Russian Federation for purposes of supporting international efforts for ensuring the security, stabilization, and reconstruction of the Islamic Republic of Afghanistan." Article 1.A. In concluding the agreement, the two parties acted to carry out UN Security Council Resolution 1386 (2001), concerning international efforts to ensure Afghanistan's security and stabilization, and also took into account Resolutions 1368 (2001), 1373 (2001), and 1444 (2002). U.N. Docs. S/RES/1386, S/RES/1368, S/RES/1373, and S/RES/1444. Article 5 of the agreement provides for the application of Russian Federation jurisdiction over personnel, except in cases involving U.S. personnel who commit crimes against the United States or other U.S. personnel, or which arise from the performance of official duties. Article 9 of the agreement provides that "[q]uestions regarding payment of air navigation fees shall be addressed separately, based on the principles of reciprocity." A White House fact sheet, excerpted below, provided additional background on the agreement. The full text of the fact sheet is available at

www.whitehouse.gov/the-press-office/fact-sheet-united-states-russia-military-transit-agreement.

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This agreement complements a NATO-Russia arrangement, under which the United States began shipping non-lethal equipment to Afghanistan through Russian territory earlier this year.

This agreement will enable the United States to further diversify the crucial transportation routes and decrease the amount of time needed to move troops and critical equipment to resupply international forces in Afghanistan and to bring needed supplies to the government and people of Afghanistan. This will permit 4,500 flights per year. The new transit routes will save the United States government up to $133 million annually in fuel, maintenance and other transportation costs, and this agreement is free of any air navigation charges. By providing access to these transit routes, the Russian Federation is enabling a substantial increase in the efficiency of our common effort to defeat the forces of violent extremism in Afghanistan and to ensure Afghanistan's and the broader region's security.

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(iii) U.S.–Russia Joint Commission on Prisoners of War and Missing in Action

On July 6, 2009, the United States and the Russian Federation exchanged diplomatic notes establishing a non-binding framework for the U.S.–Russia Joint Commission on Prisoners of War and Missing in Action (POW/MIAs) to resume its activities. As a White House fact sheet explained, "[t]he Commission serves as a forum through which both nations seek to determine the fates of their missing servicemen" from World War II, the Korean War, the Vietnam War, and the Cold War. The exchange of notes "restores in full the important work of the Joint Commission," which the two countries established initially in 1992. The fact sheet is available in full

at *www.whitehouse.gov/the_press_office/FACT-SHEET-US-Russia-Joint-Commission-on-POW-MIAs*. For additional background, see *http://bushlibrary.tamu.edu/research/public_papers.php?id=4089&year=1992&month=3*.

d. International humanitarian law

(1) 60th anniversary of Geneva Conventions

On September 26, 2009, State Department Legal Adviser Harold Hongju Koh spoke at an event to commemorate the sixtieth anniversary of the Geneva Conventions, "Ensuring Respect for International Humanitarian Law in a Changing Environment and the Role of the United Nations." Jeh Charles Johnson, General Counsel, U.S. Department of Defense, and Vice Admiral James W. Houck, Judge Advocate General, U.S. Navy, also made statements. Excerpts follow from Mr. Koh's statement. The full texts of all of the statements are available at *www.state.gov/s/l/c8183.htm*.

. . . On behalf of the United States Government, I thank the Government of Switzerland for organizing this important event, which marks the 60th anniversary of the Geneva Conventions. Today we also pay tribute to the work of the ICRC, which over 60 years has established an astonishing record of professionalism, neutrality, bravery, independence and sacrifice.

The relationship between the United States and the Geneva Conventions has been the subject of much commentary since September 2001. Today, it is clear that individuals taken into custody by the United States must, as a matter of law, be treated humanely. The entire United States Government has worked to achieve this result, which is true to the letter and spirit of the Geneva Conventions.

As President Barack Obama said before this body earlier this week, we live our values. If there is any doubt about our character

as a nation, it is revealed in the concrete actions of the past nine months. . . .

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On December 3, 2009, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, addressed a commemoration of the sixtieth anniversary of the Geneva Conventions, "The Geneva Conventions at 60: Taking Stock," which the Law Library of Congress and the American Red Cross sponsored. Ambassador Rice's remarks, excerpted below, are available at *http://usun.state.gov/briefing/statements/2009/133122.htm.*

. . . I want to begin by saying as simply as possible: The United States will support and advance international humanitarian law—both as a matter of national policy and as a basic precept for the entire international community. We embrace the Geneva Conventions because it is the right thing to do. We embrace them because hard experience has taught us that we are safer and stronger when we do. And we embrace them because we honor the legal obligations we undertake.

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Many wars have indeed been fought since 1949. The Geneva Conventions have obviously not prevented the many tragedies and atrocities those wars have wrought. But the existence of the Geneva Convention rules has often stayed the hand of warring parties and saved innocent lives. The code of conduct they established has brought humane treatment and due care to prisoners of war. It spurred the design of military technologies so as to avoid civilian suffering. And it has helped us to mobilize pressure against those who violate it.

In recent years, some have called the Geneva Conventions outdated as we face an enemy that is loyal to no state, that hides among civilians, and that routinely violates the laws our own forces are obliged to uphold. However, for all the enormity of al-Qaeda's deadly ambitions, the challenge we face today has its

own unfortunate tradition. The framers of the Conventions were perfectly familiar with terrorism, albeit of a different sort.

If anything, the conflict we are waging today in Afghanistan, and the struggle against violent extremists and terrorists more broadly, make the Geneva Conventions even more relevant and important. This conflict is not about winning territory but about winning the confidence and respect of a population. That requires distinguishing civilians from combatants and protecting them from violence. As the commander of our forces in Afghanistan has said, while "civilian protection is a legal and moral issue, it [also] is an overarching operational issue—[a] clear-eyed recognition that loss of popular support will be decisive to either side in this struggle."

Our enemies may reject the values embodied in the Geneva Conventions. But that is just the point. Our insistence on distinguishing civilians from combatants is what distinguishes us from our enemies. So does our rejection of torture and cruelty. These are values from which our men and women in uniform draw strength and pride, and they help define what we stand for as a nation. And we are well served by our military lawyers who ensure that we live up to these rules every day, drawing on fundamental values and fortitude that go all the way back to 1775. As Senator McCain so rightly said when he challenged the Congress to reject torture, this is not about who our enemies are—"it is about who we are."

The rules we embrace create a playing field on which those who take hostages, or send truck bombs into apartment buildings, or rockets into civilian neighborhoods, have no legitimacy. They favor the way we and other democratic countries are already pledged to fight, not the way our enemies fight. They are morally right in and of themselves, but they also give us a great advantage. That's why, in his inaugural address, President Obama rejected the false choice between our security and our values. It's why in his first week in office he signed Executive Orders to close the Guantanamo Bay detention facility, to end without question the use of torture, and to ensure America's compliance with the Geneva Conventions. We also deeply value our continuing, confidential dialogue with the International Committee of the Red Cross on and off the battlefield, and we welcome its advice on how we can do better.

By taking these steps, we are in a stronger position to challenge other nations and groups to uphold international humanitarian law, and to marshal opposition to those who do not. We are also in a better position to support the extraordinarily important work of the Red Cross and Red Crescent Movement around the world, including its support for and protection of civilians in crisis zones like Darfur and Sri Lanka. Finally, we are also able to better support the indispensable work of the American Red Cross, which introduces the concepts of international humanitarian law through its Exploring Humanitarian Law program to schools and universities around the United States and in 40 countries worldwide. Our actions are an example to the youth of America that we are prepared to honor the principles of the Geneva Conventions.

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(2) Protection of civilians in armed conflict

On November 11, 2009, the Security Council adopted Resolution 1894 on the protection of civilians in armed conflict. U.N. Doc. S/RES/1894. Ambassador Rosemary A. DiCarlo, U.S. Alternate Representative to the United Nations for Special Political Affairs, made a statement following the vote, highlighting ways in which the resolution addressed actions to strengthen the protection of civilians in armed conflict. Ambassador DiCarlo's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2009/131799.htm*.

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On occasion the severity of the threat cannot be managed by UN Peacekeepers. What is needed is a much more sophisticated combat capability and enforcement action. It is especially important that military forces undertaking such actions abide by the Geneva Conventions, whose 60th anniversary we celebrate this year. U.S. Forces are committed to compliance with the laws of war, including the Geneva Conventions, even as we face an enemy that

is loyal to no state, that hides amongst civilians, and that routinely violates laws.

Mr. President, the lives of innocent civilians in all the world's conflict zones demand our concern. But the situations in which civilians are imperiled differ radically. As such, the resolution adopted today addresses a wide range of actions to strengthen the protection of civilians. . . .

. . . [W]e must continue to develop the means to ensure that the Security Council has prompt access to accurate and objective information on threats to civilians in armed conflict, impediments to humanitarian access, and alleged violations of international humanitarian, human rights, and refugee law.

. . . [W]e must strengthen the tools to hold accountable those who flout the laws of war. The Security Council must be prepared to impose sanctions on those who violate international humanitarian law, whether by freezing assets, banning international travel, or restricting the flow of goods and arms. Establishing accountability and promoting reconciliation through credible and effective national courts when possible, or through international or hybrid tribunals when necessary are essential to end impunity. Those responsible must be held to account.

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2. Convention on Certain Conventional Weapons

a. Cluster munitions: Negotiation of CCW protocol

During 2009 the United States participated in meetings of the Group of Governmental Experts ("GGE") to negotiate a new protocol to the Convention on Certain Conventional Weapons ("CCW") to address the humanitarian harm that cluster munitions can cause. In his opening statement to the GGE on April 14, 2009, excerpted below, Stephen Mathias, head of the U.S. delegation, reiterated U.S. views on the humanitarian benefit of the draft protocol and concerns about a proposal to exempt certain cluster munitions from the draft text. The full texts of Mr. Mathias's statement and other U.S.

interventions in the negotiations are available at *http://ccwtreaty.state.gov*. *See also Digest 2007* at 899–905 and *Digest 2008* at 885–88.

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As we embark on this process, we once again want to reiterate the need for compromise on all sides if we are to reach agreement. For example, while we have repeatedly stated our strong preference for an article that sets forth key provisions of international humanitarian law that are particularly relevant to the use of cluster munitions, and we continue to believe that including such an article would be strongly preferable, in the spirit of compromise, we are willing to negotiate on the basis of the text you have put forward.

We would, however, note a couple of important issues that we think we should draw to other delegations' attention at the outset of this round of negotiations.

- First, there is the question of what standard we should measure our work here against. We believe that the standard we should strive for in this process is to achieve a significant humanitarian benefit. As we have outlined in more detail in previous statements to the GGE, we believe in particular that weapons possessing the technical requirements set forth in Article 4 would have significant humanitarian benefits over existing stockpiles. Currently, the vast majority of the world's stockpiles of cluster munitions are outside of any international agreement specifically addressing these weapons. It is open to the CCW to remedy this situation. Some have argued that success in the CCW requires that we find a way to eliminate all human suffering caused by cluster munitions. In our view, this overstates what will be achievable here. All weapons cause human suffering, and the only way to eliminate such suffering would be to ban them. As we all realize, that will not be possible in this forum with respect to cluster munitions.

We should rather commit ourselves in this forum to strong measures that will result in a significant humanitarian benefit when compared to the status quo.

- Second, we feel it is important to note once again our serious concern about exempting entirely from this draft protocol the cluster munitions that fall within the exceptions currently found in paragraph 2 of Article 2. Conceptually, as we have stated in previous sessions, we believe that these weapons are in fact cluster munitions. However, because we understand the complication this may cause for countries that have signed the (Oslo) Convention on Cluster Munitions, we have indicated that we have no objection to keeping an exception along these lines in this protocol. Nevertheless, we can see no justification for exempting them from all of the substantive provisions (other than, for example, the technical requirements in Article 4) in the Protocol, such as the ban on transfers to non-state actors.

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Excerpts below from Mr. Mathias's closing statement to the GGE on April 17, 2009, provide U.S. views on the state of the negotiations. *See also Digest 2007* at 899–905.

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- My delegation has a mixed view of the results of this week of negotiations. On the one hand, we are disappointed that more progress has not been made. In addition, there are elements in this new Chairman's text that are of concern to my delegation. It also contains a number of new elements (such as the new reporting requirement, the provisions on anti-ship and anti-runway munitions, and the new treatment of direct fire weapons) that will require careful review by my delegation and presumably other delegations as well. However, in general, we believe that this text remains a

good basis for continued work, it moves us closer to a draft protocol that could achieve consensus, and it contains provisions that will have a significant humanitarian benefit.

- We are well aware of the complaint that a text along the lines of the one in front of us does not go far enough. However, we have to keep in mind that the perfect can become the enemy of the good. This is particularly true in large multilateral negotiations which, by their very nature, involve compromises among many competing interests. We have in front of us a text that, while certainly not perfect from any delegation's perspective, clearly would have a major positive humanitarian impact.

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- This text would have a very significant impact on the world's existing stocks of cluster munitions. Many, if not most, of the cluster munitions that currently exist do not meet the requirements that are set forth in article 4 of this text. The result is that these cluster munitions would have to be removed from the active stocks of any state party to this potential new protocol.
- As we have said with regard to our own stocks, our domestic policy that we would use to implement these obligations would affect almost our entire arsenal of cluster munitions. Over 95% of our cluster munitions will be affected by this new standard. We understand that other countries' arsenals will also be similarly dramatically affected.
- We believe that many of the countries participating in this process who have large stockpiles of cluster munitions could agree to a text along the lines of the one before us, and that these countries will live up to the commitments they make. Therefore, we continue to hope that we will be able to reach agreement and realize the humanitarian gains that are within our grasp here.

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On November 12, 2009, Mr. Mathias addressed the meeting of the CCW High Contracting Parties. Mr. Mathias's statement, excerpted below, reiterated the U.S. preference for states to continue efforts to negotiate a new instrument addressing cluster munitions within the CCW framework. The full text of the statement is available at *www.state.gov/s/l/c8183.htm*.

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We remain committed to negotiating a legally binding Protocol on Cluster Munitions in the CCW to mitigate the threat to civilian populations resulting from the use of cluster munitions. We have acknowledged that many States represented here are parties to the Convention on Cluster Munitions (CCM). However, many other States, including the United States, are not parties. It is for each State here to determine whether its national security interests can be fully ensured consistent with the terms of the CCM. As we have noted on other occasions, a comprehensive international response to the humanitarian concerns associated with cluster munitions must include action by those States that are not in a position to become parties to the CCM, because among those States are the States that produce and stockpile the vast majority of the world's cluster munitions. The United States believes that it should be possible to reach agreement in the CCW on a protocol on cluster munitions that will have significant humanitarian benefits. The U.S. delegation is committed to working cooperatively with delegations across the spectrum of views represented here to achieve this positive result.

. . . A CCW protocol that imposes meaningful requirements on the countries that hold 90 percent of the world's stockpiles of cluster munitions would be an important step forward from a humanitarian standpoint. On behalf of the United States, let me reaffirm that we have come prepared to listen to all reasonable proposals and comments regarding the existing text and believe that this text provides a foundation for our work next year. . . .

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b. CCW-related instruments

On November 9–10, 2009, the United States participated in the Third Conference of the High Contracting Parties to Protocol V on Explosive Remnants of War. The United States had deposited its instruments of ratification for Protocol V, as well as Protocols III and IV and the amendment to Article 1 of the CCW, on January 21, 2009. As a result, the United States participated in the review conference for the first time as a High Contracting Party. *See www.state.gov/r/pa/prs/ps/2009/01/115309.htm; see also Digest 2008* at 885–88. In his opening statement to the conference on November 9, Department of State Legal Adviser Harold Hongju Koh stressed the significance of the U.S. action, stating:

> . . . The United States took a leading role in negotiating these protocols and the amendment, has long complied with the norms contained in them, and is pleased to now finally be a party to each of them. This action reaffirms the U.S. commitment to the development and implementation of international humanitarian law (IHL).

Further excerpts follow from Mr. Koh's statement, which is available at *www.state.gov/s/l/c8183.htm.*

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The United States is concerned by risks created by Explosive Remnants of War (ERW) and continues to be a world leader in Humanitarian Mine Action (HMA). For many years our HMA assistance programs have addressed both ERW and landmines. Since 1993, the United States has provided more than $1.5 billion for HMA in over 46 countries. This amounts to between one-quarter to one-third of the global humanitarian assistance in this area. In 2009, the Department of State provided $113 million in assistance to 35 countries and continues to work bilaterally and multilaterally to reduce the threat to civilians. . . .

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The United States takes seriously Protocol V's guidance on generic preventive measures to limit the creation of ERW. The U.S. Department of Defense carries out a robust Physical Security and Stockpile Management program for all U.S. munitions that include regular surveillance to ensure that weapons are performing effectively. Through the Defense Threat Reduction Agency and the Department of State, we offer technical advice, training, and in some cases technical assistance to help states improve their stockpile management.

With respect to cluster munitions, let me confirm today that the United States remains committed to negotiate a legally binding Protocol on Cluster Munitions in the CCW to mitigate the threat to civilian populations resulting from the use of cluster munitions. We realize many delegations here are parties to the Convention on Cluster Munitions (CCM). However, many States, including the United States, have determined that their national security interests cannot be fully ensured consistent with the terms of the CCM. A comprehensive international response to the humanitarian concerns associated with cluster munitions must include action by those States that are not in a position to become parties to the CCM, because those States produce and stockpile the vast majority of the world's cluster munitions. The United States believes that it should be possible to reach agreement in the CCW on a protocol on cluster munitions that will have significant humanitarian benefits. The U.S. delegation is committed to working cooperatively with delegations across the spectrum of views represented here to achieve this positive result.

On the national level, the United States continues to implement the cluster munitions policy that was signed by Secretary of Defense Robert Gates in June 2008. . . . [Editor's note: *See Digest 2008* at 884–85.]

We know that negotiations on a cluster munitions protocol in the CCW will continue to be difficult, and we realize that strong differences remain among the various delegations. Nevertheless, we believe that it is worth devoting a significant effort to achieve a successful result. A CCW protocol that imposes meaningful requirements on the countries that hold 90 percent of the world's

stockpiles of cluster munitions would be an important step forward from a humanitarian standpoint.

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3. Ottawa Convention

From November 29–December 4, 2009, the United States attended the Second Review Conference of the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on Their Destruction ("Ottawa Convention"), in Cartagena, Colombia, as an observer. The United States is not a party to the Ottawa Convention and participated for the first time in the conference as a result of an ongoing comprehensive review of U.S. landmine policy that President Obama initiated. On December 1, 2009, James Lawrence, Deputy Director, Office of Weapons Removal and Abatement, Department of State Bureau of Political-Military Affairs, delivered a statement stressing the U.S. commitment to eliminating the humanitarian risks posed by landmines. The U.S. statement, excerpted below, is available at *www.state.gov/r/pa/prs/ps/2009/dec/132891.htm*.

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Our acceptance of President Uribe's invitation affirms that the United States shares the humanitarian concerns of parties to the Ottawa Convention. The Administration is strongly committed to continued U.S. global leadership in eliminating the humanitarian risks posed by landmines.

No country does more to support humanitarian mine action in strong support of the Convention's goals, including in landmine clearance, mine risk education, and victim assistance. . . .

Equally significant, the United States has ended use of all non-detectable mines, both anti-personnel and anti-vehicle mines.

The United States will also end all use of persistent mines, both anti-personnel and anti-vehicle, by the end of . . . 2010.

The United States continues to abide by its obligations as a member of the Amended Mines Protocol to the Convention on Certain Conventional Weapons.

The Administration's decision to attend this Review Conference is the result of an on-going comprehensive review of U.S. landmine policy initiated at the direction of President Obama.

This is the first comprehensive review since 2003. As such, it will take some time to complete, given that we must ensure that all factors are considered, including possible alternatives to meet our national defense needs and security commitments to our friends and allies to ensure protection of U.S. troops and the civilians they protect around the world.

The Administration applauds the significant accomplishments to date by the Convention in addressing the harmful effects of indiscriminate landmines and is committed to a continued U.S. leadership role in humanitarian mine action.

4. Cultural Property

On March 13, 2009, the United States deposited its instrument of ratification for the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, concluded on May 14, 1954. S. Treaty Doc. No. 106-1 (1999). For background, see *II Cumulative Digest 1991–99* at 2197–206 and *Digest 2008* at 888–89.

5. Detainees

a. Overview

On May 21, 2009, President Obama made remarks on national security at the National Archives. The President outlined the steps he had taken, including with respect to individuals detained by the Department of Defense, to make U.S. counterterrorism efforts more effective while relying on U.S. legal traditions and institutions. The text of the President's

speech, excerpted below, is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00388, pp. 1–11. Other entries in this section provide additional details on the initiatives President Obama outlined at the National Archives, as well as other developments in 2009 relating to U.S. detention policy.

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After 9/11, we knew that we had entered a new era; that enemies who did not abide by any law of war would present new challenges to our application of the law; that our Government would need new tools to protect the American people, and that these tools would have to allow us to prevent attacks instead of simply prosecuting those who try to carry them out.

Unfortunately, faced with an uncertain threat, our Government made a series of hasty decisions. I believe that many of these decisions were motivated by a sincere desire to protect the American people. But I also believe that all too often, our Government made decisions based on fear rather than foresight; that all too often our Government trimmed facts and evidence to fit ideological predispositions. Instead of strategically applying our power and our principles, too often we set those principles aside as luxuries that we could no longer afford. And during this season of fear, too many of us—Democrats and Republicans, politicians, journalists, and citizens—fell silent.

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Now let me be clear: We are indeed at war with Al Qaida and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process; in checks and balances and accountability. For reasons that I will explain, the decisions that were made over the last 8 years established an ad hoc legal approach for fighting terrorism that was neither effective nor sustainable, a framework that failed to rely on our legal traditions and time-tested institutions, and that failed to use our values as a compass. And that's why I took several steps upon taking office to better protect the American people.

First, I banned the use of so-called enhanced interrogation techniques by the United States of America. Now, I know some have argued that brutal methods like waterboarding were necessary to keep us safe. I could not disagree more. As Commander in Chief, I see the intelligence; I bear the responsibility for keeping this country safe. And I categorically reject the assertion that these are the most effective means of interrogation. What's more, they undermine the rule of law. They alienate us in the world. They serve as a recruitment tool for terrorists, and increase the will of our enemies to fight us, while decreasing the will of others to work with America. They risk the lives of our troops by making it less likely that others will surrender to them in battle, and more likely that Americans will be mistreated if they are captured. In short, they did not advance our war and counterterrorism efforts; they undermined them. And that is why I ended them once and for all.

Now, I should add, the arguments against these techniques did not originate from my administration. As Senator McCain once said, torture "serves as a great propaganda tool for those who recruit people to fight against us." And even under President Bush, there was recognition among members of his own administration—including a Secretary of State, other senior officials, and many in the military and intelligence community—that those who argued for these tactics were on the wrong side of the debate, and the wrong side of history. That's why we must leave these methods where they belong, in the past. They are not who we are, and they are not America.

Now, the second decision that I made was to order the closing of the prison camp at Guantanamo Bay. For over 7 years, we have detained hundreds of people at Guantanamo. During that time, the system of military commissions that were in place at Guantanamo succeeded in convicting a grand total of three suspected terrorists. Let me repeat that: three convictions in over 7 years. Instead of bringing terrorists to justice, efforts at prosecution met setback after setback, cases lingered on, and in 2006 the Supreme Court invalidated the entire system. Meanwhile, over 525 detainees were released from Guantanamo under not my administration, under the previous administration. Let me repeat

that: Two-thirds of the detainees were released before I took office and ordered the closure of Guantanamo.

There is also no question that Guantanamo set back the moral authority that is America's strongest currency in the world. Instead of building a durable framework for the struggle against Al Qaida that drew upon our deeply held values and traditions, our Government was defending positions that undermined the rule of law. In fact, part of the rationale for establishing Guantanamo in the first place was the misplaced notion that a prison there would be beyond the law, a proposition that the Supreme Court soundly rejected. Meanwhile, instead of serving as a tool to counter terrorism, Guantanamo became a symbol that helped Al Qaida recruit terrorists to its cause. Indeed, the existence of Guantanamo likely created more terrorists around the world than it ever detained.

So the record is clear. Rather than keeping us safer, the prison at Guantanamo has weakened American national security. It is a rallying cry for our enemies. It sets back the willingness of our allies to work with us in fighting an enemy that operates in scores of countries. By any measure, the costs of keeping it open far exceed the complications involved in closing it. That's why I argued that it should be closed throughout my campaign, and that is why I ordered it closed within 1 year.

And the third decision that I made was to order a review of all pending cases at Guantanamo. I knew when I ordered Guantanamo closed that it would be difficult and complex. There are 240 people there who have now spent years in legal limbo. In dealing with this situation, we don't have the luxury of starting from scratch. We're cleaning up something that is, quite simply, a mess, a misguided experiment that has left in its wake a flood of legal challenges that my administration is forced to deal with on a constant, almost daily basis, and it consumes the time of Government officials whose time should be spent on better protecting our country.

Indeed, the legal challenges that have sparked so much debate in recent weeks here in Washington would be taking place whether or not I decided to close Guantanamo. For example, the court order to release . . . 17 Uighur detainees took place last fall, when George Bush was President. The Supreme Court that invalidated

the system of prosecution at Guantanamo in 2006 was overwhelmingly appointed by Republican Presidents, not wild-eyed liberals. In other words, the problem of what to do with Guantanamo detainees was not caused by my decision to close the facility; the problem exists because of the decision to open Guantanamo in the first place.

So—now let me be blunt. There are no neat or easy answers here. I wish there were. But I can tell you that the wrong answer is to pretend like this problem will go away if we maintain an unsustainable status quo. As President, I refuse to allow this problem to fester; I refuse to pass it on to somebody else. It is my responsibility to solve the problem. Our security interests will not permit us to delay. Our courts won't allow it, and neither should our conscience.

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. . . We are not going to release anyone if it would endanger our national security, nor will we release detainees within the United States who endanger the American people. Where demanded by justice and national security, we will seek to transfer some detainees to the same type of facilities in which we hold all manner of dangerous and violent criminals within our borders, namely highly secure prisons that ensure the public safety.

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. . . [W]e are currently in the process of reviewing each of the detainee cases at Guantanamo to determine the appropriate policy for dealing with them. And as we do so, we are acutely aware that under the last administration, detainees were released and, in some cases, returned to the battlefield. That's why we are doing away with the poorly planned, haphazard approach that le[t] those detainees go in the past. Instead, we are treating these cases with the care and attention that the law requires and that our security demands. Now, going forward, these cases will fall into five distinct categories.

First, whenever feasible, we will try those who have violated American criminal laws in Federal courts, courts provided for by the United States Constitution. Some have derided our Federal courts as incapable of handling the trials of terrorists.

They are wrong. Our courts and our juries, our citizens, are tough enough to convict terrorists. The record makes that clear. Ramzi Yousef tried to blow up the World Trade Center. He was convicted in our courts and is serving a life sentence in U.S. prisons. Zacarias Moussaoui has been identified as the 20th 9/11 hijacker. He was convicted in our courts, and he too is serving a life sentence in prison. If we can try those terrorists in our courts and hold them in our prisons, then we can do the same with detainees from Guantanamo.

Now, recently, we prosecuted and received a guilty plea from a detainee, al-Marri, in federal court after years of legal confusion. We're preparing to transfer another detainee to the Southern District Court of New York, where he will face trial on charges related to the 1998 bombings of our Embassies in Kenya and Tanzania, bombings that killed over 200 people. Preventing this detainee from coming to our shores would prevent his trial and conviction. And after over a decade, it is time to finally see that justice is served, and that is what we intend to do.

The second category of cases involves detainees who violate the laws of war and are therefore best tried through military commissions. . . .

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. . . Instead of using the flawed commissions of the last 7 years, my administration is bringing our commissions in line with the rule of law. . . .

The third category of detainees includes those who have been ordered released by the courts. Now let me repeat what I said earlier: This has nothing to do with my decision to close Guantanamo; it has to do with the rule of law. The courts have spoken. They have found that there's no legitimate reason to hold 21 of the people currently held at Guantanamo. Nineteen of these findings took place before I was sworn into office. I cannot ignore these rulings because as President, I too am bound by the law. The United States is a nation of laws and so we must abide by these rulings.

The fourth category of cases involves detainees who we have determined can be transferred safely to another country. So far, our review team has approved 50 detainees for transfer. And my

administration is in ongoing discussions with a number of other countries about the transfer of detainees to their soil for detention and rehabilitation.

Now, finally, there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. And I have to be honest here: This is the toughest single issue that we will face. We're going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country. But even when this process is complete, there may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who, nonetheless, pose a threat to the security of the United States. Examples of that threat include people who've received extensive explosives training at Al Qaida training camps, or commanded Taliban troops in battle, or expressed their allegiance to Usama bin Laden, or otherwise made it clear that they want to kill Americans. These are people who, in effect, remain at war with the United States.

Let me repeat: I am not going to release individuals who endanger the American people. Al Qaida terrorists and their affiliates are at war with the United States, and those that we capture, like other prisoners of war, must be prevented from attacking us again. Now having said that, we must recognize that these detention policies cannot be unbounded; they can't be based simply on what I or the executive branch decide alone. That's why my administration has begun to reshape the standards that apply to ensure that they are in line with the rule of law. We must have clear, defensible, and lawful standards for those who fall into this category. We must have fair procedures so that we don't make mistakes. We must have a thorough process of periodic review so that any prolonged detention is carefully evaluated and justified.

I know that creating such a system poses unique challenges. And other countries have grappled with this question; now, so must we. But I want to be very clear that our goal is to construct a legitimate legal framework for the remaining Guantanamo detainees that cannot be transferred. Our goal is not to avoid a legitimate legal framework. In our constitutional system, prolonged detention should not be the decision of any one man. If and when

we determine that the United States must hold individuals to keep them from carrying out an act of war, we will do so within a system that involves judicial and congressional oversight. And so, going forward, my administration will work with Congress to develop an appropriate legal regime so that our efforts are consistent with our values and our Constitution.

* * * *

b. Ensuring lawful interrogations: Executive Order 13491

On January 22, 2009, President Obama issued Executive Order 13491, "Ensuring Lawful Interrogations." 74 Fed. Reg. 4893 (Jan. 27, 2009). The President acted "in order to improve the effectiveness of human intelligence-gathering, to promote the safe, lawful, and humane treatment of individuals in United States custody and of United States personnel who are detained in armed conflicts, to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions, and to take care that the laws of the United States are faithfully executed." A White House press statement issued on the same day summarized the order as follows:

> [The] Executive Order revokes Executive Order 13440 that interpreted Common Article 3 of the Geneva Conventions. [Editor's note: *See* 72 Fed. Reg. 40,707 (July 24, 2007); *see also Digest 2007* at 922–25.] It requires that all interrogations of detainees in armed conflict, by any government agency, follow the Army Field Manual interrogation guidelines. The Order also prohibits reliance on any Department of Justice or other legal advice concerning interrogation that was issued between September 11, 2001 and January 20, 2009.
>
> The Order requires all departments and agencies to provide the ICRC [International Committee of the Red Cross] access to detainees in a manner consistent with Department of Defense regulations and practice. It also

> orders the CIA to close all existing detention facilities and prohibits it from operating detention facilities in the future.
>
> Finally, the Order creates a Special Task Force with two missions. The Task Force will conduct a review of the Army Field Manual interrogation guidelines to determine whether different or additional guidance is necessary for the CIA. It will also look at rendition and other policies for transferring individuals to third countries to be sure that our policies and practices comply with all obligations and are sufficient to ensure that individuals do not face torture and cruel treatment if transferred. . . .

See www.whitehouse.gov/the-press-office/background-president-obama-signs-executive-orders-detention-and-interrogation-polic. Section 3 of the order, which is set forth below, addresses "Standards and Practices for Interrogation of Individuals in the Custody or Control of the United States in Armed Conflicts."

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* * * *

(a) **Common Article 3 Standards as a Minimum Baseline.** Consistent with the requirements of the Federal torture statute, 18 U.S.C. 2340–2340A, section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd, the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.

(b) **Interrogation Techniques and Interrogation-Related Treatment.** Effective immediately, an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2–22.3 (Manual). Interrogation techniques, approaches, and treatments described in the Manual shall be implemented strictly in accord with the principles, processes, conditions, and limitations the Manual prescribes. Where processes required by the Manual, such as a requirement of approval by specified Department of Defense officials, are inapposite to a department or an agency other than the Department of Defense, such a department or agency shall use processes that are substantially equivalent to the processes the Manual prescribes for the Department of Defense. Nothing in this section shall preclude the Federal Bureau of Investigation, or other Federal law enforcement agencies, from continuing to use authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises.

(c) **Interpretations of Common Article 3 and the Army Field Manual.** From this day forward, unless the Attorney General with appropriate consultation provides further guidance, officers, employees, and other agents of the United States Government may, in conducting interrogations, act in reliance upon Army Field Manual 2–22.3, but may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation—including interpretations of Federal criminal laws, the Convention Against Torture, Common Article 3, Army Field Manual 2–22.3, and its predecessor document, Army Field Manual 34–52—issued by the Department of Justice between September 11, 2001, and January 20, 2009.

* * * *

c. Guantanamo Bay detention facilities

(1) Executive Order 13492

On January 22, 2009, President Obama issued Executive Order 13492, "Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities." 74 Fed. Reg. 4897 (Jan. 27, 2009). A White House press release summarized the new order as follows:

> [The] Executive Order requires closure of the Guantanamo detention center no later than one year from the date of the Order. Closure of the facility is the ultimate goal but not the first step. The Order establishes a review process with the goal of disposing of the detainees before closing the facility.
>
> The Order sets up an immediate review to determine whether it is possible to transfer detainees to third countries, consistent with national security. If transfer is not approved, a second review will determine whether prosecution is possible and in what forum. The preference is for prosecution in Article III courts or under the Uniform Code of Military Justice (UCMJ), but military commissions, perhaps with revised authorities, would remain an option. If there are detainees who cannot be transferred or prosecuted, the review will examine the lawful options for dealing with them. . . .
>
> The Executive Order directs the Secretary of State to seek international cooperation aimed at achieving the transfers of detainees.
>
> The Order directs the Secretary of Defense to halt military commission proceedings pending the results of the review.
>
> Finally, the Executive Order requires that conditions of confinement at Guantanamo, until its closure, comply with Common Article 3 of the Geneva Conventions and all other applicable laws.

See www.whitehouse.gov/the-press-office/background-president-obama-signs-executive-orders-detention-and-interrogation-polic. Excerpts follow from the new order.

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

* * * *

Sec. 3. *Closure of Detention Facilities at Guantánamo.* The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

Sec. 4. *Immediate Review of All Guantánamo Detentions.*

(a) **Scope and Timing of Review.** A review of the status of each individual currently detained at Guantánamo (Review) shall commence immediately.

* * * *

(c) **Operation of Review.** The duties of the Review participants shall include the following:

(1) **Consolidation of Detainee Information.** The Attorney General shall, to the extent reasonably practicable, and in coordination with the other Review participants, assemble all information in the possession of the Federal Government that pertains to any individual currently detained at Guantánamo and that is relevant to determining the proper disposition of any such individual.

All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual. The Attorney General may seek further information relevant to the Review from any source.

(2) **Determination of Transfer.** The Review shall determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release. The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.

(3) **Determination of Prosecution.** In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

(4) **Determination of Other Disposition.** With respect to any individuals currently detained at Guantánamo whose disposition is not achieved under paragraphs (2) or (3) of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals. The appropriate authorities shall promptly implement such dispositions.

(5) **Consideration of Issues Relating to Transfer to the United States.** The Review shall identify and consider legal, logistical, and security issues relating to the potential transfer of individuals currently detained at Guantánamo to facilities within the United States, and the Review participants shall work with the Congress on any legislation that may be appropriate.

Sec. 5. *Diplomatic Efforts.* The Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts

with foreign governments as are necessary and appropriate to implement this order.

Sec. 6. *Humane Standards of Confinement.* No individual currently detained at Guantánamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The Secretary of Defense shall immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance with this directive. Such review shall be completed within 30 days and any necessary corrections shall be implemented immediately thereafter.

Sec. 7. *Military Commissions.* The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.

* * * *

(2) U.S.–EU Joint Statement

On June 15, 2009, the European Union and its member states and the United States issued a Joint Statement on the closure of the detention facility at Guantanamo. The Joint Statement, excerpted below, is available at *www.state.gov/r/pa/prs/ps/2009/06a/124796.htm. See also* the statement of the State Department Office of the Spokesman, welcoming the EU Council of Ministers' adoption of the Joint Statement, available at *www.state.gov/r/pa/prs/ps/2009/06a/124795.htm.*

The European Union and the United States share fundamental values of freedom, democracy, and respect for international law, the rule of law and human rights. We, the leaders of the European Union and the United States of America, refer to the longstanding tradition of humanitarian assistance that is shared by the European Union and its Member States and the United States of America, our commitment to security, and our deep and abiding friendship. Efforts to combat terrorism should be conducted in a manner that comports with the rule of law, respects our common values, and complies with our respective obligations under international law, in particular international human rights law, refugee law, and humanitarian law. We consider that efforts to combat terrorism conducted in this manner make us stronger and more secure.

Closure of Guantanamo:

We note the positive actions taken by the President of the United States of America when he ordered the closure of the Guantanamo Bay detention facility by January 22, 2010.

We welcome the determination of the United States of America to close the facility together with other steps taken, including the intensive review of its detention, transfer, trial and interrogation policies in the fight against terrorism and increased transparency about past practices in regard to these policies, as well as the elimination of secret detention facilities.

We reaffirm that the primary responsibility for closing Guantanamo and finding residence for the former detainees rests with the United States.

However, we also recall the request made by the Government of the United States to assist it in finding residence for some of those persons cleared for release from the Guantanamo Bay detention facility, who the United States has determined it will not prosecute, and who for compelling reasons cannot return to their countries of origin, but have expressed the wish to be received by the one or the other EU Member State or Schengen associated country.

We take note of the commitment of the United States to develop a new and more sustainable approach to security-related issues

and of the thorough review of US policies initiated by President Obama's Executive Orders of January 22, 2009. [Editor's note: *See* discussion in A.5.b. and A.5.c.(1) *supra*; *see also* Executive Order 13493, "Review of Detention Policy Options," 74 Fed. Reg. 4901 (Jan. 27, 2009).] Against this background and in the expectation that underlying policy issues will be addressed, the EU and its Member States wish to help the US turn the page. In this context, certain Member States of the European Union have expressed their readiness to assist with the reception of certain former Guantanamo detainees, on a case-by-case basis.

* * * *

(3) Thomson Correctional Center

On December 15, 2009, President Obama issued a memorandum to the Secretary of Defense and the Attorney General, "Directing Certain Actions With Respect to Acquisition and Use of Thomson Correctional Center to Facilitate Closure of Detention Facilities at Guantanamo Bay Naval Base." Excerpts from the memorandum follow, providing the legal basis for the President's action and discussing the specific actions the President ordered the Secretary of Defense and the Attorney General to take. 74 Fed. Reg. 67,047 (Dec. 17, 2009).

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force (Public Law 107-40, 115 Stat. 224), and in order to facilitate the closure of detention facilities at the Guantanamo Bay Naval Base, I hereby direct that the following actions be taken as expeditiously as possible with respect to the facility known as the Thomson Correctional Center (TCC) in Thomson, Illinois:

1. The Attorney General shall acquire and activate the TCC as a United States Penitentiary . . . . The Attorney General shall also provide to the Department of Defense a sufficient portion of the TCC to serve as a detention facility to be operated by the

Department of Defense in order to accommodate the relocation of detainees by the Secretary of Defense in accordance with paragraph 2 of this memorandum.

2. The Secretary of Defense, working in consultation with the Attorney General, shall prepare the TCC for secure housing of detainees currently held at the Guantanamo Bay Naval Base who have been or will be designated for relocation, and shall relocate such detainees to the TCC, consistent with laws related to Guantanamo detainees and the findings in, and interagency Review established by, Executive Order 13492 of January 22, 2009.

* * * *

(4) Procedures for ensuring humane treatment of detainees transferred from Guantanamo

During 2009 the Department of State engaged in intensive diplomatic efforts to repatriate or resettle individuals detained at Guantanamo, consistent with Executive Order 13492. In a declaration submitted in habeas litigation brought by detainees at Guantanamo, Ambassador Daniel Fried, Special Envoy for the Closure of the Guantanamo Bay Detention Facility, described those efforts in the context of "U.S. policies with respect to post-transfer security and post-transfer humane treatment, including the policy that the U.S. government will not transfer individuals to countries where it has determined that they are more likely than not to be tortured." Excerpts from Ambassador Fried's declaration follow, discussing the procedures the Department of State follows in negotiating the terms of detainees' transfers from Guantanamo with other governments, including the measures the Department takes to ensure that a detainee, once transferred, is treated humanely (footnote omitted). The full text of Ambassador Fried's declaration is available at *www.state.gov/s/l/c8183.htm*. Section A.5.e.(1) below discusses the Guantanamo detainee habeas litigation.

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4. Of particular concern to the Department of State is the question of whether the foreign government concerned will treat the detainee humanely, in a manner consistent with its international obligations, and will not persecute the individual on the basis of his race, religion, nationality, membership in a social group, or political opinion. The Department is particularly mindful of the longstanding policy of the United States not to transfer a person to a country if it determines that it is more likely than not that the person will be tortured or, in appropriate cases, that the person has a well-founded fear of persecution and would not be disqualified from persecution protection on criminal- or security-related grounds. This policy is consistent with the approach taken by the United States in implementing the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Protocol Relating to the Status of Refugees. The Department of State works closely with relevant agencies to advise on the likelihood of persecution or torture in a given country and the adequacy and credibility of assurances obtained from a particular foreign government prior to any transfer.

5. The Department of State generally has responsibility for communications on transfer-related matters between the United States and foreign governments. The Department of State receives requests from foreign governments for the transfer of detainees and forwards such requests to the Guantanamo Review Task Force and the Department of Defense for coordination with appropriate Departments and agencies of the United States Government. The Department of State also conveys requests from the United States to foreign governments to accept the transfer of their nationals. In cases where approved detainees cannot be transferred to their countries of nationality because of humane treatment concerns, the Department of State communicates with foreign governments to explore third-country resettlement possibilities. Numerous countries have been approached to date with respect to various detainees who fall within this category, and the U.S. Government has had success in resettling in third countries detainees with no prior legal ties to that location (including Albania, Belgium, Bermuda, France, Ireland, Palau, and Portugal).

6. Once a detainee has been approved for transfer through the processes on the Guantanamo Review Task Force, my office generally takes the lead in discussions with the foreign government concerned or, where repatriation is not an available option because of humane treatment concerns or for other reasons, with third country governments where resettlement might be appropriate. The primary purpose of these discussions is to learn what measures the receiving government is likely to take to ensure that the detainee will not pose a continuing threat to the United States or its allies, including resettlement arrangements, and to obtain appropriate transfer assurances. My office seeks assurances that the United States Government considers necessary and appropriate for the country in question. Among the assurances sought in every transfer case in which security measures or (in fewer cases, detention) by the government concerned are foreseen or possible is the assurance of humane treatment and treatment in accordance with the international obligations of the foreign government accepting transfer. The Department of State considers whether the State in question is party to the relevant treaties, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and ensures that assurances are tailored accordingly if the State concerned is not a party or other circumstances warrant.

7. Decisions with respect to disposition of Guantanamo detainees are made on a case-by-case basis, taking into account the particular circumstances of the transfer, the receiving country, the individual concerned, and any concerns regarding torture or persecution either extant or that may arise. Recommendations by the Department of State are decided at senior levels through a process involving Department officials most familiar with international legal standards and obligations and the conditions in the countries concerned. Within the Department of State, my office, together with the Office of the Legal Adviser, the Bureau of Democracy, Human Rights, and Labor, and the relevant regional bureau, normally evaluate foreign government assurances in light of the circumstances of the individual concerned and the overall record of the country in question with respect to human rights and other relevant issues. The views of the Bureau of Democracy, Human Rights, and Labor, which drafts the U.S. Government's annual

Human Rights Reports, and of the relevant regional bureaus, country desk, or U.S. Embassy are important in evaluating foreign government assurances and any individual fear of persecution or torture claims, because they are knowledgeable about matters such as human rights, prison conditions, and prisoners' access to counsel both in general and as they may apply to a particular case in the foreign country concerned, and knowledgeable as well as to particular information about the entity or individual that is offering the assurance in any particular case and as to relevant background about any allegations of mistreatment that may have surfaced in connection with past transfers to the country in question. If deemed appropriate, my office and other relevant offices brief the Secretary or other Department Principals before finalizing the position of the Department of State.

8. The essential question in evaluating foreign government assurances relating to humane treatment is whether, taking into account these assurances and the totality of other relevant factors relating to the individual and the government in question, the competent Department of State officials believe it is more likely than not that the individual will be tortured in the country to which he is being transferred. In determining whether it is "more likely than not" that an individual would be tortured, the United States takes into account the treatment the individual is likely to receive upon transfer, including, *inter alia*, the expressed commitments of officials from the foreign government accepting transfer. When evaluating the adequacy of any assurances, Department officials consider the identity, position, or other information concerning the official relaying the assurances, and political or legal developments in the foreign country concerned that would provide context (and credibility) for the assurances provided. Department officials may also consider U.S. diplomatic relations with the country concerned when evaluating assurances. For instance, Department officials may make a judgment regarding [a] foreign government's incentives and capacities to fulfill its assurances to the United States, including the importance to the government concerned of maintaining good relations and cooperation with the United States. In an appropriate case, the Department of State may also consider seeking the foreign government's assurance of access by governmental or non-governmental

entities in the country concerned to monitor the condition of an individual returned to that country, or of U.S. Government access to the individual for such purposes. In instances in which the United States transfers an individual subject to assurances, it would pursue any credible report and take appropriate action if it had reason to believe that those assurances would not be, or had not been, honored. We take seriously past practices by governments. In an instance in which specific concerns about the treatment an individual may receive cannot be resolved satisfactorily, we have in the past and would in the future recommend against transfer, consistent with the United States policy.

9. The Department of State's ability to seek and obtain assurances from a foreign government depends in part on the Department's ability to treat its dealings with the foreign government with discretion. This is especially the case with respect to issues having to do with detainees at the Guantanamo Bay Detention Facility. Consistent with the diplomatic sensitivities that surround the Department's communications with foreign governments concerning allegations relating to torture, the Department of State does not unilaterally make public the specific assurances or other precautionary measures obtained in order to avoid the chilling effects of making such discussions public and the possible damage to our ability to conduct foreign relations. Seeking assurances may be seen as raising questions about the requesting State's institutions or commitment to the rule of law, even in cases where the assurances are sought to highlight the issue for the country concerned and satisfy the Department that the country is aware of the concerns raised and is in a position to undertake a commitment of humane treatment of a particular individual. There also may be circumstances where it may be important to protect sources of information (such as sources within a foreign government) about a government's willingness or capability to abide by assurances concerning humane treatment or relevant international obligations.

* * * *

12. The Executive Branch, and in particular the Department of State, has the tools to obtain and evaluate assurances of humane

treatment, to make recommendations about whether transfers can be made consistent with U.S. government policy on humane treatment, and where appropriate to follow up with receiving governments on compliance with those assurances. The Department of State has used these tools in the past to facilitate transfers in a responsible manner that comports with the policies described herein. . . .

d. Procedures for reviewing status of aliens detained at Bagram Theater Internment Facility

On July 2, 2009, the Deputy Secretary of Defense, William J. Lynn, III, approved policy guidance modifying the Department of Defense's procedures for reviewing the status of aliens it detains at the Bagram Theater Internment Facility ("BTIF") in Afghanistan.* The Deputy Secretary also approved related policy guidance providing criteria for Defense Department officials to use in assessing the threat posed by detainees at the BTIF and concerning DOD's authority to transfer and release detainees from the BTIF. On July 14, 2009, DOD transmitted the new policy guidance to Congress, pursuant to § 1405(c) of the Detainee Treatment Act of 2005, Title XIV, Pub. L. No. 109-163, 119 Stat. 3474. Excerpts below from a letter from Philip Carter, Deputy Assistant Secretary of Defense for Detainee Policy, to Senator Carl Levin (D-Michigan), Chairman, U.S. Senate Armed Services Committee, transmitting the DOD guidance, describe the modified review procedures. The full text of the report is available at *www.state.gov/s/l/c8183.htm.*

. . . The enhanced detainee review procedures significantly improve the Department of Defense's ability to assess whether the facts support the detention of each detainee as an unprivileged enemy

* Editor's note: In late 2009, the BTIF was replaced by a new theater internment facility, called the Detention Facility in Parwan ("DFIP").

belligerent, the level of threat the detainee represents, and the detainee's potential for rehabilitation and reconciliation. The modified procedures also enhance the detainee's ability to challenge his or her detention.

The modified procedures adopt the definitional framework of detention authority that the Administration first published in a Guantanamo habeas filing on March 13, 2009. [Editor's note: *See* A.5.e.(1)(i) below.] Under this framework, the Department of Defense has the authority to detain "[p]ersons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks." The Department of Defense also has the authority to detain "[p]ersons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces."

In addition to assessing whether the facts support the detention of each detainee as an unprivileged enemy belligerent under this framework, the modified procedures require detainee review boards to consider each detainee's threat level and potential for rehabilitation and reconciliation. Moreover, these threat assessments will no longer be linked to the criteria for transferring the detainee to Guantanamo.

The modified procedures generally follow the procedures prescribed in Army Regulation (AR) 190–8, such as that the proceedings generally shall be open (with certain exceptions including for matters that would compromise national or operational security), including to representatives of the ICRC and possibly nongovernmental organizations. Detainees will be allowed to attend all open sessions and call reasonably available witnesses.

Key supplemental procedures not found in AR 190–8 that enhance the detainee's ability to challenge his or her detention include appointment of a personal representative who "shall act in the best interests of the detainee"; whose "good faith efforts on behalf of the detainee shall not adversely affect his or her status as

a military officer (e.g., evaluations, promotions, future assignments)"; and who has access to all reasonably available information (including classified information) relevant to the proceedings. The end result is a process that approximates the process used to screen American citizens captured in Iraq.

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e. U.S. court decisions and other proceedings

(1) Detainees at Guantanamo: Habeas litigation

(i) Standard for detention of aliens at Guantanamo

Following the U.S. Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), which held that detainees at Guantanamo have a right under the U.S. Constitution to seek a writ of habeas corpus and stated that "[t]he detainees in these cases are entitled to a prompt habeas corpus hearing," the U.S. District Court for the District of Columbia began to consider more than 200 Guantanamo detainees' habeas petitions. In doing so, the district court considered whether the President had the authority to detain the petitioners, a question the Supreme Court did not address. On March 13, 2009, in a filing in Guantanamo habeas litigation before the U.S. District Court for the District of Columbia, the Department of Justice articulated a revised basis for the President's authority to detain individuals at Guantanamo. *In re Guantanamo Bay Litig.*, Misc. No. 08-442 (TFH) (D.D.C. 2009). A Department of Justice press release, dated March 13, explained the significance of the U.S. filing as follows:

> . . . The definition does not rely on the President's authority as Commander-in-Chief independent of Congress's specific authorization. . . . And it does not employ the phrase "enemy combatant."

* * * *

> . . . [T]he government bases its authority to hold detainees at Guantanamo on the Authorization for the Use of Military Force, which Congress passed in September 2001, and which authorized the use of force against nations, organizations, or persons the president determines planned, authorized, committed, or aided the September 11 attacks, or harbored such organizations or persons. The government's new standard relies on the international laws of war to inform the scope of the president's authority under this statute, and makes clear that the government does not claim authority to hold persons based on insignificant or insubstantial support of al Qaeda or the Taliban.

The full text of the press release is available at *www.justice.gov/opa/pr/2009/March/09-ag-232.html.* Excerpts follow from the U.S. memorandum (footnotes omitted), which is available in full at *www.justice.gov/opa/documents/memo-re-det-auth.pdf.* Attorney General Holder's accompanying declaration is available at *www.justice.gov/opa/documents/ag-declaration.pdf.*

Through this submission, the Government is refining its position with respect to its authority to detain those persons who are now being held at Guantanamo Bay. The United States bases its detention authority as to such persons on the Authorization for the Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001). The detention authority conferred by the AUMF is necessarily informed by principles of the laws of war. *Hamdi v. Rumsfeld,* 542 U.S. 507, 521 (2004) (plurality). The laws of war include a series of prohibitions and obligations, which have developed over time and have periodically been codified in treaties such as the Geneva Conventions or become customary international law. *See, e.g., Hamdan v. Rumsfeld,* 548 U.S. 557, 603–04 (2006).

The laws of war have evolved primarily in the context of international armed conflicts between the armed forces of nation states. This body of law, however, is less well-codified with respect to our current, novel type of armed conflict against armed groups such as

al-Qaida and the Taliban. Principles derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict. Accordingly, under the AUMF, the President has authority to detain persons who he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for the September 11 attacks. The President also has the authority under the AUMF to detain in this armed conflict those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable.

Thus, these habeas petitions should be adjudicated under the following definitional framework:

> The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

There are cases where application of the terms of the AUMF and analogous principles from the law of war will be straightforward. It is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of "substantial support," or the precise characteristics of "associated forces," that are or would be sufficient to bring persons and organizations within the foregoing framework. Although the concept of "substantial support," for example, does not justify the detention at Guantanamo Bay of those who provide unwitting or insignificant support to the organizations identified in the AUMF, and the Government is not asserting that it can detain anyone at

Guantanamo on such grounds, the particular facts and circumstances justifying detention will vary from case to case, and may require the identification and analysis of various analogues from traditional international armed conflicts. Accordingly, the contours of the "substantial support" and "associated forces" bases of detention will need to be further developed in their application to concrete facts in individual cases.

This position is limited to the authority upon which the Government is relying to detain the persons now being held at Guantanamo Bay. It is not, at this point, meant to define the contours of authority for military operations generally, or detention in other contexts. . . .

* * * *

I. THE AUMF GIVES THE EXECUTIVE POWER TO DETAIN CONSISTENT WITH THE LAW OF ARMED CONFLICT.

The United States can lawfully detain persons currently being held at Guantanamo Bay who were "part of," or who provided "substantial support" to, al-Qaida or Taliban forces and "associated forces." This authority is derived from the AUMF, which empowers the President to use all necessary and appropriate force to prosecute the war, in light of law-of-war principles that inform the understanding of what is "necessary and appropriate." Longstanding law-of-war principles recognize that the capture and detention of enemy forces "are 'important incident[s] of war.'" *Hamdi,* 542 U.S. at 518 (quoting *Ex Parte Quirin,* 317 U.S. 1, 28 (1942)).

The AUMF authorizes use of military force against those "nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." AUMF, § 2(a). By explicitly authorizing the use of military force against "*nations, organizations, or persons*" that were involved in any way in the September 11 attacks (or that harbored those who were), the statute indisputably reaches

al-Qaida and the Taliban. Indeed, the statute's principal purpose is to eliminate the threat posed by these entities.

Under international law, nations lawfully can use military force in an armed conflict against irregular terrorist groups such as al-Qaida. The United Nations Charter, for example, recognizes the inherent right of states to use force in self defense in response to any "armed attack," not just attacks that originate with states. United Nations Charter, art. 51. The day after the attacks, the United Nations Security Council adopted Resolution 1368, which affirmed the "inherent right of individual or collective self-defence in accordance with the Charter" and determined "to combat by all means threats to international peace and security caused by terrorist acts." U.N. General Assembly Security Council Resolution of Sept. 12, 2001 (S/RES/1368). . . . The North Atlantic Treaty Organization and the Organization of American States treated the attacks as "armed attacks" for purposes of their collective self-defense provisions. The AUMF invokes the internationally recognized right to self-defense. *See* AUMF, Preamble (it is "both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad"). Other nations joined or cooperated closely with the United States' military campaign against al-Qaida and the Taliban. *See* [Michael N.] Schmitt, 27 Harv. J.L. & Pub. Pol'y [737,] 748–49 [(2004)].

The United States has not historically limited the use of military force to conflicts with nation-states:

> [A] number of prior authorizations of force have been directed at non-state actors, such as slave traders, pirates, and Indian tribes. In addition, during the Mexican-American War, the Civil War, and the Spanish-American War, U.S. military forces engaged military opponents who had no formal connection to the state enemy. Presidents also have used force against non-state actors outside of authorized conflicts.

Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2066–67

(2005) (citing U.S. use of military force in the Chinese Boxer Rebellion, against the Mexican rebel leader Pancho Villa, and in the 1998 cruise missile attacks against al-Qaida targets in Sudan and Afghanistan).

Thus, consistent with U.S. historical practice, and international law, the AUMF authorizes the use of necessary and appropriate military force against members of an opposing armed force, whether that armed force is the force of a state or the irregular forces of an armed group like al-Qaida. Because the use of force includes the power of detention, *Hamdi,* 542 U.S. at 518, the United States has the authority to detain those who were part of al-Qaida and Taliban forces. Indeed, long-standing U.S. jurisprudence, as well as law-of-war principles, recognize that members of enemy forces can be detained even if "they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." *Ex parte Quirin*, 317 U.S. at 38; *Khalid v. Bush*, 355 F. Supp. 2d 311, 320 (D.D.C. 2005), *rev'd on other grounds sub nom.*, *Boumediene v. Bush,* 128 S. Ct. 2229 (2008); *see also* Geneva Convention (III) Relative to the Treatment of Prisoners of War of Aug. 12, 1949, art. 4, 6 U.S.T.S. 3316 (contemplating detention of members of state armed forces and militias without making a distinction as to whether they have engaged in combat). Accordingly, under the AUMF as informed by law-of-war principles, it is enough that an individual was part of al-Qaida or Taliban forces, the principal organizations that fall within the AUMF's authorization of force.

Moreover, because the armed groups that the President is authorized to detain under the AUMF neither abide by the laws of war nor issue membership cards or uniforms, any determination of whether an individual is part of these forces may depend on a formal or functional analysis of the individual's role. Evidence relevant to a determination that an individual joined with or became part of al-Qaida or Taliban forces might range from formal membership, such as through an oath of loyalty, to more functional evidence, such as training with al-Qaida (as reflected in some cases by staying at al-Qaida or Taliban safehouses that are

regularly used to house militant recruits) or taking positions with enemy forces. In each case, given the nature of the irregular forces, and the practice of their participants or members to try to conceal their affiliations, judgments about the detainability of a particular individual will necessarily turn on the totality of the circumstances.

Nor does the AUMF limit the "organizations" it covers to just al-Qaida or the Taliban. In Afghanistan, many different private armed groups trained and fought alongside al-Qaida and the Taliban. In order "to prevent any future acts of international terrorism against the United States," AUMF, § 2(a), the United States has authority to detain individuals who, in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency.

Finally, the AUMF is not limited to persons captured on the battlefields of Afghanistan. Such a limitation "would contradict Congress's clear intention, and unduly hinder both the President's ability to protect our country from future acts of terrorism and his ability to gather vital intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary." *Khalid,* 355 F. Supp. 2d at 320; *see also Ex parte Quirin*, 317 U.S. at 37–38. Under a functional analysis, individuals who provide substantial support to al-Qaida forces in other parts of the world may properly be deemed part of al-Qaida itself. Such activities may also constitute the type of substantial support that, in analogous circumstances in a traditional international armed conflict, is sufficient to justify detention. *Cf. Boumediene v. Bush,* 579 F. Supp. 2d 191, 198 (D.D.C. 2008) (upholding lawfulness of detaining a facilitator who planned to send recruits to fight in Afghanistan, based on "credible and reliable evidence linking Mr. Bensayah to al-Qaida and, more specifically, to a senior al-Qaida facilitator" and "credible and reliable evidence demonstrating Mr. Bensayah's skills and abilities to travel between and among countries using false passports in multiple names").

* * * *

II. READ IN LIGHT OF THE LAWS OF WAR, THE AUMF AUTHORIZES THE NATION TO USE ALL NECESSARY AND APPROPRIATE MILITARY FORCE TO DEFEND ITSELF AGAINST THE IRREGULAR FORCES OF AL-QAIDA AND THE TALIBAN.

Petitioners have sought to restrict the United States' authority to detain armed groups by urging that all such forces must be treated as civilians, and that, as a consequence, the United States can detain only those "directly participating in hostilities." The argument should be rejected. Law-of-war principles do not limit the United States' detention authority to this limited category of individuals. A contrary conclusion would improperly reward an enemy that violates the laws of war by operating as a loose network and camouflaging its forces as civilians.

It is well settled that individuals who are part of private armed groups are not immune from military detention simply because they fall outside the scope of Article 4 of the Third Geneva Convention, which defines categories of persons entitled to prisoner-of-war status and treatment in an international armed conflict. *See* Third Geneva Convention, art. 2, 4. Article 4 does not purport to define all detainable persons in armed conflict. Rather, it defines certain categories of persons entitled to prisoner-of-war treatment. *Id.,* art. 4. As explained below, other principles of the law of war make clear that individuals falling outside Article 4 may be detainable in armed conflict. Otherwise, the United States could not militarily detain enemy forces except in limited circumstances, contrary to the plain language of the AUMF and the law-of-war principle of military necessity.

For example, Common Article 3 of the Geneva Conventions provides standards for the treatment of, among others, those persons who are part of armed forces in non-international armed conflict and have been rendered *hors de combat* by detention. Third Geneva Convention, art. 3. Those provisions pre-suppose that states engaged in such conflicts can detain those who are part of armed groups. Likewise, Additional Protocol II to the Geneva Conventions expressly applies to "dissident armed forces" and "other organized armed groups" participating in certain non-international armed

conflicts, distinguishing those forces from the civilian population. Additional Protocol II, art. 1(1), 13.

Moreover, the Commentary to Additional Protocol II draws a clear distinction between individuals who belong to armed forces or armed groups (who may be attacked and, *a fortiori,* captured at any time) and civilians (who are immune from direct attack except when directly participating in hostilities). That Commentary provides that "[t]hose who belong to armed forces or *armed groups* may be attacked at any time." *See* ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), ¶ 4789, *http://www.icrc.org/ihl.nsf/COM/475-760019?OpenDocument* (emphasis added). Accordingly, neither the Geneva Conventions nor the Additional Protocols suggest that the "necessary and appropriate" force authorized under the AUMF is limited to al-Qaida leadership or individuals captured directly participating in hostilities, as some petitioners have suggested.

Finally, for these reasons, it is of no moment that someone who was part of an enemy armed group when war commenced may have tried to flee the battle or conceal himself as a civilian in places like Pakistan. Attempting to hide amongst civilians endangers the civilians and violates the law of war. *Cf.* ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), ¶ 1944, *http://www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument* ("Further it may be noted that members of armed forces feigning civilian non-combatant status are guilty of perfidy."). Such conduct cannot be used as a weapon to avoid detention. A different rule would ignore the United States' experience in this conflict, in which Taliban and al-Qaida forces have melted into the civilian population and then regrouped to relaunch vicious attacks against U.S. forces, the Afghan government, and the civilian population.

* * * *

On April 22 and May 19, 2009, in memorandum opinions concerning different habeas petitions, two judges on the

D.C. District Court reached slightly different conclusions concerning the new standard the government proposed on March 13. On April 22, Judge Reggie B. Walton agreed with the government that the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001), "functions as an independent basis in domestic law for the President's asserted detention authority," and adopted "the basic framework advanced by the government for determining whether an individual is subject to that authority," subject to certain "non-exclusive" limiting principles he articulated in the memorandum opinion. *Gherebi v. Obama*, 609 F. Supp. 2d 43, 69–70 (D.D.C. 2009). The court held that "the President has the authority to detain persons who were part of, or substantially supported, the Taliban or al-Qaeda forces that are engaged in hostilities against the United States or its coalition partners, provided that the terms 'substantially supported' and 'part of' are interpreted to encompass only individuals who were members of the enemy organization's armed forces, as that term is intended under the laws of war, at the time of their capture." *Id.* at 71. Excerpts below from the April 22 memorandum opinion provide the court's analysis in interpreting the government's detention standard (most footnotes, citations to other submissions and the hearing transcript in the case, and internal cross references omitted).*

* * * *

* Editor's note: On January 10, 2010, the U.S. Court of Appeals for the District of Columbia Circuit adopted a broader standard for the government's authority to detain individuals at Guantanamo. *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010). The D.C. Circuit reasoned that the scope of the President's detention authority is not limited by the international laws of war and held that, under the AUMF and other statutes, the category of persons the President is authorized to detain "includes those who are part of forces associated with Al Qaeda or the Taliban or those who purposefully and materially support such forces in hostilities against U.S. Coalition partners." *Id.* at 871, 872. On August 31, 2010, the D.C. Circuit denied rehearing en banc "to determine the role of international law-of-war principles in interpreting the AUMF, because . . . the panel's discussion of that question is not necessary to the disposition of the merits." *Al-Bihani v. Obama*, 2010 U.S. App. LEXIS 18169, at *2 (D.C. Cir. 2010).

. . . In [the AUMF], Congress conferred upon the President all "necessary and proper" authority to execute military combat against both "nations" *and* "organizations" that carried out the 9/11 attacks. And in *Hamdi*, the Supreme Court found that the "detention of individuals falling into the limited category" before it was "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress ha[d] authorized the President to use." *Hamdi*, 542 U.S. at 518 (plurality opinion). Given that the "detention of individuals" is an "exercise" of military force authorized by Congress in the AUMF with respect to the enemy nations named therein, and given that Congress authorized the same amount of force with respect to enemy "organizations" as it did with respect to enemy nations, it stands to reason that Congress intended to confer upon the President the same authority to detain individuals fighting on behalf of enemy organizations that it conferred upon him with respect to enemy nations. *See al-Marri* [*v. Pucciarelli*], 534 F.3d [213,] 260 [(4th Cir. 2008)] (Traxler, J., concurring) ("[I]t strains reason to believe that Congress, in enacting the AUMF in the wake of [the 9/11] attacks, did *not* intend for it to encompass al[-]Qaeda operatives standing in the exact position as the attackers who brought about its enactment." (emphasis in original)).

* * * *

. . . Khan has no adequate explanation for why the Court *should* not apply the plurality's reasoning [in *Hamdi*] to the conflict between the United States and enemy organizations named in the AUMF. The only reason provided by Khan is that the war against the Taliban is an "international" conflict, whereas the war against al-Qaeda and its ilk are not. . . . [T]hat is no reason to refuse to apply the plurality's logic in *Hamdi* to the situation at hand.

The distinction drawn between "international" and "non-international" conflicts has its roots in the Geneva Conventions, four treaties that comprise a part of "the rules and precepts of the law of nations." *Hamdan*, 548 U.S. at 613. Two articles are identical in the Third and Fourth Conventions, and thus are known as "common articles": Common Article 2, which specifies that the Conventions apply to "all cases of declared war or any other armed

conflict which may arise between two or more of the High Contracting Parties," Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (the "Third Geneva Convention"), and Common Article 3, which governs "armed conflict[s] not of an international character," *id.*, art. 3. Participants in a conflict falling under Common Article 2 are subject to the requirements and protections of the Conventions, whereas participants in a conflict falling under Common Article 3 are subject only to the strictures of that article . . . . International armed conflicts are also governed by a subsequently enacted treaty known as the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, or "Additional Protocol I," whereas yet another treaty, the Protocol Additional to the Geneva Conditions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, or "Additional Protocol II," applies to non-international armed conflicts.[10]

[10] The United States has signed but not ratified Additional Protocol I. It has neither signed nor ratified Additional Protocol II. [Editor's note: The United States signed Additional Protocol II on December 12, 1977, and President Ronald Reagan transmitted it to the Senate for its advice and consent to ratification on January 29,1987, but the United States has not ratified the treaty.] However, the Department of State has explicitly recognized that "certain provisions" of Additional Protocol I reflect customary international law, *see* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. Univ. J. Int'l L. & Pol'y 419, 421 (1987), including "the principle that no order be given that there shall be no survivors . . . contained in [A]rticle 40" of the protocol, "the principle that persons entitled to combatant status be treated as prisoners of war in accordance with the 1949 Geneva Conventions," *id.* at 425, the principle that "immunity not be extended to civilians who are taking part in hostilities," *id.* at 426, and, "in particular[,] the fundamental guarantees contained in [A]rticle 75" of the protocol, "such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the [Geneva] Conventions be treated humanely in all circumstances," *id.* at 427. Similarly, the Department of State has opined that "[t]he basic core of [Additional] Protocol II," as "reflected in [C]ommon [A]rticle 3 of the 1949 [Geneva] Conventions[,] . . . is[] and should be[] a part of generally accepted customary law." *Id.* at 430–31. "This specifically includes its prohibitions on violence toward persons taking no active part in hostilities,

Among the protections afforded in international armed conflicts are the prisoner-of-war provisions set forth in the Third Geneva Convention. . . . In contrast, Common Article 3 is silent with respect to prisoners of war. Thus, in non-international armed conflicts, the Geneva Conventions are "silent, in deference to national law, on questions of detention." Gabor Rona, *An Appraisal of U.S. Practice Relating to "Enemy Combatants"*, 10 Y.B. Int'l Humanitarian L. 232, 241 (2007).

Khan argues that this silence forecloses military detention in non-international armed conflicts under the AUMF. . . .

* * * *

. . . [R]egarding the "authority" to detain individuals in an armed conflict, the laws of war are silent with respect to both international and non-international armed conflicts. Yet, these same laws require the state to detain rather than summarily execute fighters in such conflicts. The obvious implication, consistent with historical practice, is that these provisions, far from "authorizing" detention in one context but not another, act as restraints on the inherent authority of the state to exercise military force in whatever manner it deems appropriate.

The Court is therefore baffled by the assertion, repeated throughout Khan's memorandum of law and at oral argument, that the President could take military action against an organization like al-Qaeda under the AUMF but could not detain anyone fighting on behalf of that organization as part of that military action. . . .

* * * *

. . . The reality is that Congress authorized the same use of military force, and thus conferred upon the President the same degree of detention authority, with respect to "organizations" responsible for the 9/11 attacks as it did with respect to the "nations" responsible for those attacks. Only the extent to which

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hostagetaking, degrading treatment, and punishment without due process." *Id.* at 431. The Court therefore construes Additional Protocol I and Additional Protocol II to constitute customary international law at least with respect to the principles listed above, and also as elucidations of the customary humanitarian protections enshrined in the Geneva Conventions where appropriate.

that authority is restricted by the laws of war varies based on whether the armed conflict falls under the rubric of Common Article 2 or Common Article 3. Khan's arguments to the contrary are without merit and are therefore rejected in their entirety.

* * * *

. . . [W]hereas the Geneva Conventions rigorously protect individuals who participate in hostilities in the international context, they are silent with respect to individuals who engage in intranational (or, in this case, transnational) combat.

The petitioners evidently interpret this lack of protection for "combatants" in non-international armed conflicts to mean that every individual associated with the enemy to any degree in such a conflict must be treated as a civilian. . . . [T]his assumption rests on the notion that the Geneva Conventions must specifically enable its signatories to act in a specific manner for a signatory to have the authority necessary to take such action. . . . [T]his notion gets things exactly backwards. The Geneva Conventions restrict the conduct of the President in armed conflicts; they do not enable it. And the absence of any language in Common Article 3 and Additional Protocol II regarding prisoners of war or combatants means only that no one fighting on behalf of an enemy force in a non-international armed conflict can lay claim to the protections of such status, not that every signatory to the Geneva Conventions must treat the members of an enemy force in a civil war or transnational conflict as civilians regardless of how important the members in question might be to the command and control of the enemy force or how well organized and coordinated that force might be.

* * * *

. . . Common Article 3, Additional Protocol II, and the commentaries of the International Committee of the Red Cross all contemplate a division in the treatment of the members of an enemy's "armed forces" and civilians. Unless they surrender or are incapacitated, members of the enemy's armed forces are always "taking [an] active part in hostilities," Third Geneva Convention, art. 3(1), and therefore "may be attacked" and, incident to that attack, detained "at any time," [Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at

522 (Sandoz et al. eds. 1987) (the "ICRC Additional Protocols Commentary")], at 1453. "[C]ivilians who do not participate in hostilities," on the other hand, "should be spared" those consequences. *Id.* at 1443.

* * * *

This result is also consonant with the intended purpose of Common Article 3. While its scope may encompass the transnational conflict at issue here, the article was drafted "to aid the victims of civil wars and internal conflicts." [International Committee of the Red Cross, 29 Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War, at 178 (Pictet et al. eds. 1960)], at 28. As counsel for the government pointed out at oral argument on this issue, permitting a State to detain members of the armed forces of a non-state entity in a non-international armed conflict only when those members directly participated in hostilities, at least as that term is defined by the petitioners, "would encourage . . . armed groups to try to blend into the civilian population, which then necessarily subjects the civilian population to increased danger." . . .

The Court therefore rejects the petitioners' argument that the laws of war permit a state to detain only individuals who "directly participate" in hostilities in non-international armed conflicts. Common Article 3 is not a suicide pact; it does not provide a free pass for the members of an enemy's armed forces to go to and fro as they please so long as, for example, shots are not fired, bombs are not exploded, and planes are not hijacked. Consistent with Common Article 3 and Additional Protocol II, the President may detain anyone who is a member of the "armed forces" of an organization that "he determines planned, authorized, committed, or aided" the 9/11 attacks, as well as any member of the "armed forces" of an organization harboring the members of such an organization. Pub. L. No. 107-40 § 2(a), 115 Stat. at 224.

As for the criteria used to determine membership in the "armed forces" of the enemy, the Court agrees with the government that the criteria set forth in Article 4 of the Third Geneva Convention and Article 43 of Additional Protocol I should inform the Court's assessment as to whether an individual qualifies as a member of

the "armed forces" of an enemy organization like al-Qaeda. Although these provisions obviously cannot be applied literally to the enemy organizations contemplated in the AUMF—if that were the case, the conflict at hand would not be governed by Common Article 3 in the first place—they may nevertheless serve as templates from which the Court can glean certain characteristics necessary to identify those individuals who comprise an "armed force" for purposes of Common Article 3. This approach is also consistent with Common Article 3's command that the "[p]arties to the conflict . . . endeavor[r] to bring into force . . . all or part of the other provisions of the [Third Geneva Convention]."

Foremost among these basic distinguishing characteristics of an "armed force" is the notion that the group in question be "organized . . . under a command responsible . . . for the conduct of its subordinates," Additional Protocol I, art. 43.1. Although "[t]he term 'organized' is obviously rather flexible, . . . [a]ll armed forces, groups[,] and units are necessarily structured and have a hierarchy." ICRC Additional Protocols Commentary, *supra*, at 512 . . . . Thus, mere sympathy for or association with an enemy organization does not render an individual a member of that enemy organization's armed forces. Instead, the individual must have some sort of "structured" role in the "hierarchy" of the enemy force.

Obviously, "the 'organizations' that the President is authorized to target under the AUMF do not . . . issue membership cards or uniforms." Nevertheless, there is a distinction to be made between members of a terrorist organization involved in combat operations and civilians who may have some tangential connections to such organizations. As Curtis Bradley and Jack Goldsmith note in their lengthy article on the validity of the AUMF and its implications, "terrorist organizations do have leadership and command structures, however diffuse, and persons who receive and execute orders within this command structure are analogous to combatants" in international armed conflicts. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2114–15 (May 2005). Thus, under Additional Protocol I, only "persons who receive and execute orders" from the enemy's "command structure" can be considered members of the enemy's armed forces. Sympathizers, propagandists, and financiers

who have no involvement with this "command structure," while perhaps members of the enemy organization in an abstract sense, cannot be considered part of the enemy's "armed forces" and therefore cannot be detained militarily unless they take a direct part in the hostilities.

At the same time, the armed forces of the enemy consist of more than those individuals who would qualify as "combatants" in an international armed conflict. . . . The key question is whether an individual "receive[s] and execute[s] orders" from the enemy force's combat apparatus, not whether he is an al-Qaeda fighter. Thus, an al-Qaeda member tasked with housing, feeding, or transporting al-Qaeda fighters could be detained as part of the enemy armed forces notwithstanding his lack of involvement in the actual fighting itself, but an al-Qaeda doctor or cleric, or the father of an al-Qaeda fighter who shelters his son out of familial loyalty, could not be detained assuming such individuals had no independent role in al-Qaeda's chain of command. . . .

With these non-exclusive limiting principles in mind, the Court agrees with the government that "[i]t is neither possible nor advisable" to define "the precise nature and degree of 'substantial support,' or the precise characteristics of 'associated forces,' that are or would be sufficient to bring persons and organizations" within the government's proposed standard for detention. As the government aptly suggests, the exact contours of the standard must and will be fleshed out on a case-by-case basis. . . .

But while the precise meaning of the definition for detention now invoked by the government cannot be definitively settled in the abstract, it is not the case that the standard is, as the petitioners' designated lead counsel suggests, "entirely nebulous." For, as counsel for the government conceded at oral argument on this issue, the "substantial support" model advanced by the government is restricted to those individuals that are "effectively part of the [armed] force[s]" of the enemy. And that inquiry must, at a minimum, be made consistent with the limiting principles articulated above. Any attempt by the government to apply its "substantial support" standard in a manner contradictory to these principles would give rise to the constitutional concerns raised by the petitioners regarding the clarity of the scope of Congress's delegation of authority to the President and, as such, would have to be rejected by the Court.

In other words, the Court interprets the government's "substantial support" standard to mean individuals who were members of the "armed forces" of an enemy organization at the time of their initial detention. It is not meant to encompass individuals outside the military command structure of an enemy organization, as that term is understood in view of the limiting principles set forth above. With these caveats in play, the Court adopts the government's "substantial support" standard for detention in favor of the "direct participation" model advanced by the petitioners.

* * * *

On May 19, 2009, Judge John D. Bates concurred with most of the court's analysis and conclusions in *Gherebi*, concluding that the government has the authority to detain individuals who are "'part of' the 'Taliban or al Qaida forces,'" or "members of 'associated forces,'" but did not adopt all aspects of the government's proposed standard. *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69 (D.D.C. 2009). Because he found no basis in U.S. law or the laws of the war "to justify the concept of 'support' as a valid ground for detention," Judge Bates "reject[ed] the concept of 'substantial support' as an independent basis for detention" and held that "'directly support[ing] hostilities' is not a proper basis for detention." *Id.* at 69. In reaching that conclusion, however, Judge Bates noted that "evidence tending to demonstrate that a petitioner provided significant 'support' is relevant in assessing whether he was 'part of' a covered organization (through membership or otherwise) or 'committed a belligerent act' (through direct participation in hostilities)." *Id.* at 70.

(ii) Habeas petitions: Uighurs

On February 18, 2009, the U.S. Court of Appeals for the District of Columbia Circuit reversed a lower court decision granting the writ of habeas corpus to 17 Uighurs held at Guantanamo Bay and ordering their immediate release into the United States. The D.C. Circuit held that the district court had no legal authority to order the executive branch to bring

the petitioners to the United States and release them. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

On April 3, 2009, the plaintiffs petitioned the U.S. Supreme Court for a writ of certiorari, and on May 29, 2009, the United States filed a brief opposing the petitioners' request (available at *www.justice.gov/osg/briefs/2008/0responses/2008-1234.resp.html*). On October 20, 2009, the Supreme Court granted certiorari on the question "whether a federal court exercising its habeas corpus jurisdiction may order the United States government to bring petitioners into the United States for release, outside of the framework of the federal immigration laws." *Kiyemba v. Obama*, 130 S. Ct. 458 (2009). The case was pending at the end of 2009.**

Before the Supreme Court granted certiorari, four of the petitioners were released and resettled in Bermuda, pursuant to an arrangement between the United States and the Government of Bermuda. On October 31, 2009, six of the petitioners were released and resettled in Palau, pursuant to an arrangement between the United States and the Government of Palau.

(2) Thirty-day notice orders

On April 7, 2009, the U.S. Court of Appeals for the District of Columbia Circuit reversed a lower court's decision granting the writ of habeas corpus to nine Uighurs held at Guantanamo Bay and requiring the United States to provide 30 days' notice to

** Editor's note: On March 1, 2010, the Supreme Court vacated the D.C. Circuit's judgment and remanded the case. The Court noted that since it had granted certiorari, each of the petitioners had received an offer of resettlement in a country other than the United States. The Court remanded the case to the court of appeals to "determine, in the first instance, what further proceedings in that court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments." *Kiyemba v. Obama*, 130 S. Ct. 124 (2010). On May 28, 2010, after holding further proceedings, considering the parties' motions, and hearing oral arguments, the D.C. Circuit issued a Per Curiam opinion granting the government's motion to reinstate the court's original judgment and reinstating its original opinion, as modified to take into account recent developments. *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010).

the district court and to the petitioners' counsel before transferring them from Guantanamo. *Kiyemba v. Obama* ("*Kiyemba II*"), 561 F.3d 509 (D.C. Cir. 2009). The petitioners in the case, who were also among those who brought the litigation described in A.5.e.(1)(ii) *supra*, sought to prevent the United States from transferring them to any country where they would be likely to be tortured or further detained. For additional background, see *Digest 2008* at 915–16. The D.C. Circuit determined that it had jurisdiction and reversed the lower court's decision on the merits. The court concluded that

> [t]he Supreme Court's ruling in *Munaf* [*v. Geren*, 553 U.S. 674 (2008)] precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country. The Government has declared its policy not to transfer a detainee to a country that likely will torture him, and the district court may not second-guess the Government's assessment of that likelihood. Nor may the district court bar the Government from releasing a detainee to the custody of another sovereign because that sovereign may prosecute or detain the transferee under its own laws. In sum, the detainees' claims do not state grounds for which habeas relief is available. . . .

Kiyemba II, 561 F.3d at 516. For discussion of the Supreme Court's decision in *Munaf v. Geren*, see *Digest 2008* at 73–78 and 918–20. The petitioners sought certiorari in the Supreme Court on November 10, 2009, and the Court's decision was pending at the end of 2009.***

(3) Former detainees at Guantanamo: Civil suit against U.S. officials

On April 24, 2009, on remand from the U.S. Supreme Court for consideration in view of *Boumediene v. Bush*, 553 U.S. 723 (2008), the U.S. Court of Appeals for the District of Columbia

*** Editor's note: The Supreme Court denied certiorari on March 22, 2010. *Kiyemba v. Obama*, 130 S. Ct. 1880 (2010).

Circuit reinstated its judgment, "on a more limited basis," in *Rasul v. Myers* ("*Rasul I*"), 512 F.3d 644 (D.C. Cir. 2008). *Rasul v. Myers* ("*Rasul II*"), 563 F.3d 527 (D.C. Cir. 2009). For discussion of *Rasul I*, see *Digest 2008* at 914–15.

In its Per Curiam opinion, the D.C. Circuit concluded that *Boumediene* did not change the outcome in *Rasul I*, in which the D.C. Circuit upheld a lower court's dismissal of claims that four former Guantanamo detainees brought against the U.S. Secretary of Defense and certain military officers based on the Alien Tort Claims Act, the Geneva Conventions, and the Fifth and Eighth Amendments to the Constitution. In analyzing the plaintiffs' constitutional claims, the court relied on the Supreme Court's decision in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), to conduct a narrower review than it had in *Rasul I*. The court assessed whether the rights the plaintiffs asserted were "'clearly established' . . . in light of the circumstances in the particular case at hand," *Rasul II*, 563 F.3d at 530 (quoting *Pearson*, 129 S. Ct. at 818), and concluded that "there was no authority for—and ample authority against—plaintiffs' asserted rights at the time of the alleged misconduct. The defendants are therefore entitled to qualified immunity against plaintiffs' *Bivens* claims [for damages based on a constitutional violation]." *Rasul II*, 563 F.3d at 532. The court also reinstated its dismissal of the plaintiffs' claims under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb–2000bb-4. *Id.* at 533.

The Supreme Court denied certiorari on December 14, 2009. *Rasul v. Myers*, 130 S. Ct. 1013 (2009).

(4) Detainees held at Bagram Air Force Base in Afghanistan: Habeas litigation

On April 2, 2009, a judge on the U.S. District Court for the District of Columbia held, based on an application of the factors set out in *Boumediene v. Bush*, that three alien detainees held at the U.S. detention facility at Bagram Air Force Base in Afghanistan had a right under the U.S. Constitution to seek a writ of habeas corpus. *Al Maqaleh v. Gates*, 604 F. Supp. 2d

205 (D.D.C. 2009). The court denied the fourth petition, filed by an Afghan national, because it concluded that "the possibility of friction with Afghanistan . . . precludes his invocation of the Suspension Clause under the *Boumediene* balance of factors." *Id.* at 235.

On July 30, 2009, the U.S. Court of Appeals for the District of Columbia Circuit granted the government's petition for interlocutory appeal, *In re Gates*, 2009 U.S. App. LEXIS 17032 (D.C. Cir. 2009), and the United States filed its Brief for Respondents-Appellants on September 14, 2009. Excerpts below from the U.S. brief summarize the government's argument. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*. The case remained pending at the end of 2009.****

* * * *

Habeas rights under the United States Constitution do not extend to enemy aliens detained in the active war zone at Bagram Airfield in Afghanistan. No court has ever extended the Great Writ so far; the district court's reading of *Boumediene* is wrong. The court therefore erred in declaring Section 7(a) of the Military Commissions Act unconstitutional as applied to these enemy detainees. The court's reading reverses longstanding law, imposes great practical problems, conflicts with the considered judgment of both political branches, and risks opening the federal courts to habeas claims brought by detainees held in other theaters of war during future military actions.

I. The Supreme Court's decisions in [*Johnson v.*] *Eisentrager* [, 339 U.S. 763 (1950)] and *Boumediene* establish three controlling principles. First, the extraterritorial reach of the constitutional

**** Editor's note: On May 21, 2010, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's order and ordered that the petitions be dismissed, holding that the court does not have jurisdiction under the U.S. Constitution to hear habeas claims of aliens detained by the executive branch at the Bagram facility in the Afghan theater of war. *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

right to habeas does not depend solely on formal designations of territorial sovereignty, but rather incorporates a functional analysis of "objective factors and practical concerns" concerning the circumstances of the detention being challenged. Second, in that functional analysis, two considerations are paramount: the nature and duration of the United States presence at the site of detention, and the practical obstacles to permitting the detainee to pursue habeas relief in United States court. Third, the extension of habeas rights to Guantanamo in *Boumediene* rested heavily on the "unique status of Guantanamo" in both of these critical respects. The Supreme Court recognized that it had never before extended constitutional rights to non-citizens captured and held abroad, but it concluded that a different result was warranted because of the unique confluence of circumstances that renders Guantanamo effectively part of the United States for habeas purposes. In different circumstances, however, where a site of detention does not share the defining attributes of Guantanamo, an enemy alien apprehended and detained by the military overseas in an active war zone at the very least bears an extremely heavy burden before he may sue his captors civilly and require the federal courts to second guess the judgment of both political branches with respect to the reach of habeas jurisdiction.

II. Application of *Boumediene* and *Eisentrager* to this case makes clear that constitutional habeas rights do not extend to enemy aliens held at Bagram Airfield.

A. First, the nature of the United States presence at Bagram is fundamentally different from that at Guantanamo. Guantanamo has been under the "complete jurisdiction and control" of the United States for more than 100 years, and United States activities there are not constrained by any other nation or by the host government.

The United States presence at Bagram Airfield, in contrast, is less than a decade old, it exists to serve a highly specific set of purposes—to win the active military conflict against the enemies of the United States and Afghanistan, to support Afghan sovereignty, and to protect Afghan territorial integrity—and the United States is obligated under the terms of its lease to leave when it concludes that the Airfield is no longer necessary for "military uses." At Bagram, moreover, the United States must be mindful of the

sovereignty of Afghanistan, as the host nation, and respectful of the numerous other countries that operate their own military forces out of that facility. United States activity at Bagram Airfield, specifically including detainee affairs, is conducted with a keen eye toward its implications for the sensitive and active diplomatic dialogue between the United States and Afghanistan. Nothing remotely similar could be said about Guantanamo and United States relations with Cuba.

In light of these essential distinctions, the district court erred in holding that detention at Bagram Airfield is not "appreciably different" from Guantanamo with respect to *Boumediene*'s "site of detention" factor. The court gave short shrift to the disparate histories, foundations, and purposes of the two sites. Moreover, the district court's expansion of habeas jurisdiction on the basis of United States military control over the detention facility could potentially extend United States constitutional habeas rights to other locations in the world where the United States might hold detainees in future wars, including locations like Bagram in the midst of the theater of active combat. That highly anomalous result cannot be squared with the great pains taken by the Supreme Court to announce a limited and narrow ruling in *Boumediene*.

B. Second, because Bagram, unlike Guantanamo, is in an active theater of war, and because the United States maintains close cooperation with the Afghan government on whose sovereign territory the United States military actions and related detentions occur, permitting Bagram detainees to seek release through United States courts would encounter grave practical obstacles. The logistical complications created by civil litigation would divert military officials from their proper focus on the mission of winning the ongoing war. And the intrusion of a United States court adjudicating a habeas petition could cause friction with the host government by interfering with the sensitive diplomatic dialogue that is important to the success of that military mission. Those consequences directly implicate the Supreme Court's warning in *Eisentrager* about the dangerous effect of granting wartime detainees the right to subject the United States military to habeas suits.

III. The district court also erred because it relied on factors peripheral to the *Boumediene* and *Eisentrager* analyses. By

distinguishing these detainees from other Bagram detainees based on whether they were Afghan nationals or captured in Afghanistan, the district court essentially deemed dispositive the "citizenship" and "site of apprehension" factors in *Boumediene*. That reasoning finds no support in *Boumediene* or *Eisentrager*, neither of which even focused upon—much less treated as conclusive—the fact that the petitioners in both cases were moved from the site of their capture and, in the circumstances at Guantanamo, detained in a country where they were not citizens. Moreover, this artificial limitation on habeas jurisdiction is unlikely to hold in practice, because detainees may simply allege that they were captured outside of Afghanistan and use that allegation to surmount the district court's manufactured jurisdictional barrier.

In addition, the court weighed heavily against the Government the perceived inadequacy of the procedures used for reviewing the status of detainees at Bagram Airfield. But those review procedures (which have recently been enhanced) are at most loosely related to the threshold question of whether the constitutional right to habeas corpus extends to aliens detained at Bagram Airfield; the procedures are critical to the legal analysis in this case only if it were determined that habeas does extend to the detainees and the question then arose whether, consistent with the Suspension Clause, the procedures are sufficiently robust. The Court in *Boumediene* did not hold that the exact quantum of procedures was a central factor to be weighed in determining whether the detainee possessed the right to invoke the constitutional habeas jurisdiction of the federal courts in the first place.

* * * *

(5) U.S. criminal proceedings

(i) Disposition of detainee held in the United States: Ali Saleh Kahlah al-Marri

On April 30, 2009, Ali Saleh Kahlah al-Marri, a national of Saudi Arabia and Qatar, pleaded guilty to one count of conspiracy to provide material support to al-Qaeda, in violation

of 18 U.S.C. § 2339B. *See www.justice.gov/opa/pr/2009/April/09-nsd-415.html*. Al-Marri's plea was the outcome of a process that began on January 22, 2009, when President Obama directed an immediate review of the Department of Defense's detention of al-Marri as an enemy combatant within the United States for more than five years. Daily Comp. Pres. Docs., 2009 DCPD No. 00011, pp. 1–2.

On February 26, 2009, the Department of Justice filed an indictment against al-Marri in the U.S. District Court for the Central District of Illinois, Peoria Division, charging him with conspiracy to provide material support and resources to a foreign terrorist organization (al-Qaeda) and provision of material support and resources to a foreign terrorist organization, in violation of 18 U.S.C. § 2339B(a)(1). On February 27, 2009, President Obama determined that "it is in the interest of the United States that Ali Saleh Kahlah al-Marri be released from detention by the Secretary of Defense and transferred to the control of the Attorney General for the purpose of criminal proceedings against him." Daily Comp. Pres. Docs., 2009 DCPD No. 00110, p. 1. President Obama also specified that his decision "supersede[d] the Presidential directive of June 23, 2003, to the Secretary of Defense, which ordered the detention of Mr. al-Marri as an enemy combatant. Upon Mr. al-Marri's transfer to the control of the Attorney General, the authority to detain Mr. al-Marri provided to the Secretary of Defense in the June 23, 2003, order shall cease." *Id.*

On February 27, 2009, the Department of Justice's Office of the Solicitor General filed a motion in the U.S. Supreme Court, seeking dismissal of the writ of certiorari the Court granted on December 5, 2008, to resolve the question whether the President has authority to detain al-Marri as an enemy combatant. Alternatively, the motion requested the Supreme Court to vacate the July 15, 2008 judgment of the U.S. Court of Appeals for the Fourth Circuit and remand with directions to dismiss the case as moot. The U.S. motion is available at *www.justice.gov/osg/briefs/2008/3mer/2mer/2008-0368.mot.dismiss.mer.pdf*; *see also* the U.S. reply, available at *www.justice.gov/osg/briefs/2008/3mer/2mer/2008-0368.mer.rep.pdf*.

The Acting Solicitor General filed a separate application with the Chief Justice of the Court on that same day, requesting that the Court acknowledge al-Marri's release from military custody and transfer to civilian custody. On March 6, 2009, the Court granted the Acting Solicitor General's application. The Court also vacated the Fourth Circuit's judgment and remanded the case to the Fourth Circuit "with instructions to dismiss the appeal as moot." *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009). Background on previous developments concerning al-Marri is available at *Digest 2003* at 1029–30, *Digest 2007* at 968–75, and *Digest 2008* at 917–18.

(ii) Prosecution of September 11 conspirators

On November 13, 2009, Attorney General Eric Holder announced that "the Department of Justice will pursue prosecution in federal court of the five individuals accused of conspiring to commit the 9/11 attacks." The full text of Attorney General Holder's statement is available at *www.justice.gov/ag/speeches/2009/ag-speech-091113.html*. The five individuals, Khalid Sheikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi, had been charged in military commissions and were detained at Guantanamo Bay. The charges against the five detainees had been stayed since February 2009 while attorneys from the Departments of Justice and Defense reviewed their cases. Controversy broke out following the Attorney General's announcement but no new decisions concerning the five detainees were made in 2009.

f. Military commissions

On October 28, 2009, President Obama signed into law the Military Commissions Act of 2009, Title XVIII of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2587. Section 1802 amended the

provisions of 10 U.S.C. § 47A, "Military Commissions," which were added by § 3 of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. Among other things, the amendments eliminate the term "unlawful enemy combatant" and use the term "unprivileged enemy belligerent" instead to describe individuals subject to trial by military commissions (§ 948a(7)); exclude statements obtained by cruel, inhuman, or degrading treatment (§ 948r); limit the use of hearsay evidence (§ 949a(b)(3)); change the rules concerning defense counsel, including by allowing defendants greater opportunities to choose their counsel (§ 949c(b)(2)); make clear the requirement for the government to disclose exculpatory evidence to defendants (§ 949j(b)); modify the procedures for using classified information (§ 949p-1 through § 949p-7); and broaden the scope of appellate review (§ 950g(d)).

Enactment of the new law followed President Obama's announcement on May 15 that the Department of Defense had made several changes to the rules governing military commissions and that the administration would work with Congress on additional reforms. President Obama explained:

> Military commissions have a long tradition in the United States. They are appropriate for trying enemies who violate the laws of war, provided that they are properly structured and administered. In the past, I have supported the use of military commissions as one avenue to try detainees, in addition to prosecution in Article III courts. In 2006, I voted in favor of the use of military commissions. But I objected strongly to the Military Commissions Act that was drafted by the Bush Administration and passed by Congress because it failed to establish a legitimate legal framework and undermined our capability to ensure swift and certain justice against those detainees that we were holding at the time. Indeed, the system of Military Commissions at Guantanamo

> Bay had only succeeded in prosecuting three suspected terrorists in more than 7 years.
>
> Today the Department of Defense will be seeking additional continuances in several pending military commission proceedings. We will seek more time to allow us time to reform the military commission process. The Secretary of Defense will notify the Congress of several changes to the rules governing the commissions. The rule changes will ensure that: First, statements that have been obtained from detainees using cruel, inhuman, and degrading interrogation methods will no longer be admitted as evidence at trial; second, the use of hearsay will be limited, so that the burden will no longer be on the party who objects to hearsay to disprove its reliability; third, the accused will have greater latitude in selecting their counsel; fourth, basic protections will be provided for those who refuse to testify; and fifth, military commission judges may establish the jurisdiction of their own courts.
>
> These reforms will begin to restore the Commissions as a legitimate forum for prosecution, while bringing them in line with the rule of law. In addition, we will work with the Congress on additional reforms that will permit commissions to prosecute terrorists effectively and be an avenue, along with Federal prosecutions in Article III courts, for administering justice. This is the best way to protect our country, while upholding our deeply held values.

Daily Comp. Pres. Docs., 2009 DCPD No. 00364, p. 1. For additional background, see the testimony on the proposed legislation by Jeh C. Johnson, General Counsel, Department of Defense, available at *http://armed-services.senate.gov/statemnt/2009/July/Johnson%2007-07-09.pdf*, and David S. Kris, Assistant Attorney General for National Security, available at *http://armed-services.senate.gov/statemnt/2009/July/Kris%2007-07-09.pdf*, before the U.S. Senate Armed Services Committee on July 8, 2009.

B. NONPROLIFERATION, ARMS CONTROL, AND DISARMAMENT

1. Nuclear Nonproliferation

a. Overview

In a speech in Prague on April 5, 2009, President Obama announced "clearly and with conviction America's commitment to seek the peace and security of a world without nuclear weapons" and described steps the United States would take to help realize that goal. President Obama also outlined U.S. initiatives to strengthen the Nuclear Non-Proliferation Treaty and to prevent terrorists from gaining access to nuclear weapons and materials. President Obama's speech, excerpted below, is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00228, pp. 1–6. *See also* President Obama's speech to the General Assembly on September 23, 2009, available at Daily Comp. Pres. Docs., 2009 DCPD No. 00742, pp. 1–9.

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. . . The existence of thousands of nuclear weapons is the most dangerous legacy of the cold war. . . .

Today, the cold war has disappeared but thousands of those weapons have not. In a strange turn of history, the threat of global nuclear war has gone down, but the risk of a nuclear attack has gone up. More nations have acquired these weapons. Testing has continued. Black market trade in nuclear secrets and nuclear materials abound. The technology to build a bomb has spread. Terrorists are determined to buy, build or steal one. Our efforts to contain these dangers are centered on a global non-proliferation regime, but as more people and nations break the rules, we could reach the point where the center cannot hold.

* * * *

Now, just as we stood for freedom in the 20th century, we must stand together for the right of people everywhere to live free from fear in the 21st century. And . . . as a nuclear power, as the only nuclear power to have used a nuclear weapon, the United States has a moral responsibility to act. We cannot succeed in this endeavor alone, but we can lead it; we can start it.

So today I state clearly and with conviction America's commitment to seek the peace and security of a world without nuclear weapons. I'm not naive. This goal will not be reached quickly, perhaps not in my lifetime. It will take patience and persistence. But now we, too, must ignore the voices who tell us that the world cannot change. We have to insist, "Yes, we can."

Now, let me describe to you the trajectory we need to be on. First, the United States will take concrete steps towards a world without nuclear weapons. To put an end to cold war thinking, we will reduce the role of nuclear weapons in our national security strategy and urge others to do the same. Make no mistake, as long as these weapons exist, the United States will maintain a safe, secure, and effective arsenal to deter any adversary, and guarantee that defense to our allies, including the Czech Republic. But we will begin the work of reducing our arsenal.

To reduce our warheads and stockpiles, we will negotiate a new Strategic Arms Reduction Treaty with the Russians this year. President Medvedev and I began this process in London and will seek a new agreement by the end of this year that is legally binding and sufficiently bold. And this will set the stage for further cuts, and we will seek to include all nuclear weapons states in this endeavor.

To achieve a global ban on nuclear testing, my administration will immediately and aggressively pursue U.S. ratification of the Comprehensive Test Ban Treaty. After more than five decades of talks, it is time for the testing of nuclear weapons to finally be banned.

And to cut off the building blocks needed for a bomb, the United States will seek a new treaty that verifiably ends the production of fissile materials intended for use in state nuclear weapons. If we are serious about stopping the spread of these weapons, then we should put an end to the dedicated production of weapons-grade materials that create them. That's the first step.

Second, together we will strengthen the Nuclear Non-Proliferation Treaty as a basis for cooperation. The basic bargain is sound. Countries with nuclear weapons will move towards disarmament, countries without nuclear weapons will not acquire them, and all countries can access peaceful nuclear energy. To strengthen the treaty, we should embrace several principles. We need more resources and authority to strengthen international inspections. We need real and immediate consequences for countries caught breaking the rules or trying to leave the treaty without cause.

And we should build a new framework for civil nuclear cooperation, including an international fuel bank, so that countries can access peaceful power without increasing the risks of proliferation. That must be the right of every nation that renounces nuclear weapons, especially developing countries embarking on peaceful programs. And no approach will succeed if it's based on the denial of rights to nations that play by the rules. We must harness the power of nuclear energy on behalf of our efforts to combat climate change and to advance peace opportunity for all people.

But we go forward with no illusions. Some countries will break the rules. That's why we need a structure in place that ensures when any nation does, they will face consequences. . . .

Rules must be binding. Violations must be punished. Words must mean something. The world must stand together to prevent the spread of these weapons. Now is the time for a strong international response . . . . All nations must come together to build a stronger, global regime. . . .

* * * *

So finally, we must ensure that terrorists never acquire a nuclear weapon. This is the most immediate and extreme threat to global security. One terrorist with one nuclear weapon could unleash massive destruction. Al Qaeda has said it seeks a bomb and that it would have no problem with using it. And we know that there is unsecured nuclear material across the globe. To protect our people, we must act with a sense of purpose without delay. So today I am announcing a new international effort to secure all vulnerable nuclear material around the world within 4 years. We will set new

standards, expand our cooperation with Russia, pursue new partnerships to lock down these sensitive materials.

We must also build on our efforts to break up black markets, detect and intercept materials in transit, and use financial tools to disrupt this dangerous trade. Because this threat will be lasting, we should come together to turn efforts such as the Proliferation Security Initiative and the Global Initiative to Combat Nuclear Terrorism into durable international institutions. And we should start by having a Global Summit on Nuclear Security that the United States will host within the next year.

* * * *

b. Comprehensive Test Ban Treaty

The United States played a leading role in negotiating the Comprehensive Test Ban Treaty ("CTBT"), and President William J. Clinton was the first world leader to sign the treaty in September 1996. President Clinton submitted the CTBT to the Senate for advice and consent to ratification in September 1997 (S. Treaty Doc. No. 105-28 (1997)), but on October 13, 1999, the Senate decided against granting advice and consent. *See* 145 Cong. Rec. S12,505–12,550 (Oct. 13, 1999); *see also II Cumulative Digest 1991–99* at 2271–79. The 44 states listed in Annex 2 to the treaty must ratify the CTBT before it can enter into force, and as of April 2009, the United States was one of nine states listed in Annex 2 that had not yet done so. *See www.ctbto.org/the-treaty/article-xiv-conferences/about-the-article-xiv-conferences*.

In Prague on April 15, 2009 (discussed in B.1.a. *supra*), President Obama announced that the administration would pursue Senate advice and consent to ratification. Consistent with President Obama's announcement, the United States participated for the first time in ten years in the Conference on Facilitating Entry into Force of the Comprehensive Nuclear Test Ban Treaty. The conference, which the UN Secretary-General convenes every two years in the UN's capacity as depositary for the treaty, is generally known as the "CTBT

Article XIV Conference" and focuses on ways to promote ratifications of the treaty. On September 24, 2009, Secretary of State Hillary Rodham Clinton addressed the conference. Her remarks, excerpted below, are available at *www.state.gov/secretary/rm/2009a/09/129703.htm*.

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* * * *

The Comprehensive Nuclear Test Ban Treaty is an integral part of our non-proliferation and arms control agenda, and we will work in the months ahead both to seek the advice and consent of the United States Senate to ratify the treaty, and to secure ratification by others so that the treaty can enter into force.

We believe that the CTBT contributes to our global nonproliferation and disarmament strategy as well as the President's long-range vision. It does so without jeopardizing the safety, security, or credibility of our nuclear arsenal. By pursuing these goals and supporting the CTBT, we are working in the interest of all nations committed to non-proliferation and to reducing the threat of nuclear attack.

The Obama Administration has already begun the work necessary to support U.S. ratification of the Treaty. We know this task will not be quick or easy. But as long as we are confronted with the prospect of nuclear testing by others, we will face the potential threat of newer, more powerful, and more sophisticated weapons that could cause damage beyond our imagination. A test ban treaty that has entered into force will permit the United States and others to challenge states engaged in suspicious testing activities—including the option of calling on-site inspections to be sure that no testing occurs on land, underground, underwater, or in space. CTBT ratification would also encourage the international community to move forward with other essential nonproliferation steps.

* * * *

As we work with the Senate to ratify the CTBT, we will encourage other countries to play their part—including the eight remaining Annex 2 countries. Those who haven't signed should sign.

Those, like us, who haven't ratified, should ratify. And the 149 countries that have already progressed to ratification can use this opportunity to continue preparations for CTBT implementation.

Even in these times of strained budgets, we are prepared to pay our share of the Preparatory Commission budget so that the global verification regime will be fully operational when the CTBT enters into force.

More than eighty percent of the monitoring stations that will constitute the International Monitoring System have already been installed and we urge all host countries to ensure that the data from these installations are reported to the International Data Center. In the coming months, we will look for new ways to support the monitoring system—including upgrades to the system and other verification capabilities of the CTBT—with the help of all nations, including those who have yet to ratify.

* * * *

Mr. Chairman, after a 10-year absence from this conference, America stands ready to renew its leadership role in the non-proliferation regime. As President Obama said yesterday, we have a shared responsibility for a global response to global challenges. We come to this conference with an optimistic spirit that all parties can make a contribution towards a world without nuclear weapons. That is the promise of the CTBT, and it is why we are rededicating ourselves to this effort. . . .

See also the June 8, 2009, statement to the Comprehensive Nuclear Test-Ban Treaty Organization ("CTBTO") Preparatory Commission, delivered by Ambassador Gregory L. Schulte, then U.S. Permanent Representative to International Organizations in Vienna, available at *http://vienna.usmission.gov/090608ctbt.html.*

c. Fissile Material Cut-off Treaty

On May 29, 2009, after ten years of negotiations and deadlock, the Conference on Disarmament agreed upon a program of work for 2009, U.N. Doc. CD/1864. Notably, the Conference

agreed to begin negotiations on a Fissile Material Cut-off Treaty ("FMCT"). On May 29, 2009, President Obama welcomed the Conference on Disarmament's decision, stating:

> There is no greater security challenge in the world today than turning the tide on nuclear-proliferation, and pursuing the goal of a nuclear-free world. I welcome today's important agreement at the Conference on Disarmament to begin negotiations on a fissile material cutoff treaty, which will end production of fissile materials for use in atomic bombs. As I announced in Prague, a verified cut-off treaty is an essential element of my vision for a world free of nuclear weapons. The treaty will help to cap nuclear arsenals, strengthen the consensus underlying the Non-Proliferation Treaty, and deny terrorists access to nuclear materials.
>
> Today's decision ends more than a decade of inactivity in the Conference on Disarmament, and signals a commitment to work together on this fundamental global challenge. It is good to see the Conference at work again. I am committed to consult and cooperate with the governments represented at the Conference on Disarmament to complete this treaty as soon as possible.

President Obama's statement is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00414, p. 1.

On June 4, 2009, Rose E. Gottemoeller, Acting Under Secretary of State for Arms Control and International Security, addressed the Conference on Disarmament in Geneva on the need to begin the FMCT negotiations. Ms. Gottemoeller's statement, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

. . . Your decision last week to begin negotiations on a verifiable fissile material cutoff treaty, as well as to conduct substantive discussions on other core issues, reflects growing recognition of the value of nonproliferation and disarmament agreements to international peace and security. It also demonstrates the importance of

all delegations realistically appraising the present situation and showing the necessary flexibility to allow the Conference to move forward. . . .

* * * *

There should be no misapprehensions or illusions on the difficulty of our task. The United States . . . is committed to doing its part. Until the FMCT is completed, I ask delegations to ensure that the CD not return to deadlock, to pledge themselves to passing in the beginning of each year a Program of Work authorizing the resumption of focused negotiations on an FMCT and discussion of related disarmament issues. . . .

. . . It is time that we stopped talking about having an FMCT, and got to work to complete it. If we succeed on FMCT, we'll have taken a necessary but admittedly not sufficient step towards nuclear disarmament. It must be complemented by deeper respect for nonproliferation rules, consequences for those who violate them, improved verification of compliance, and further progress on arms control.

* * * *

See also the August 20, 2009, statement of Garold N. Larson, Chargé d'Affaires, a.i., U.S. Mission to the Conference on Disarmament, available at *www.state.gov/s/l/c8183.htm*.

d. UNSCR 1887

On September 24, 2009, President Obama chaired a summit of the UN Security Council on nuclear nonproliferation and nuclear disarmament, at which the Council unanimously adopted Resolution 1887. U.N. Doc. S/RES/1887. In the resolution, the Security Council committed to work toward a world without nuclear weapons and endorsed a broad range of actions to reduce the threat of nuclear proliferation and nuclear terrorism. President Obama was the first U.S. President to chair a meeting of the Council, and the summit was the fifth one the Council had ever convened. After the Council adopted the resolution, President Obama delivered

a statement welcoming it and outlining its significance. Excerpts follow from President Obama's statement, which is available at *http://usun.state.gov/briefing/statements/2009/september/129562.htm*.

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* * * *

. . . The historic resolution we just adopted enshrines our shared commitment to the goal of a world without nuclear weapons. And it brings Security Council agreement on a broad framework for action to reduce nuclear dangers as we work toward that goal. It reflects the agenda I outlined in Prague, and builds on a consensus that all nations have the right to peaceful nuclear energy; that nations with nuclear weapons have the responsibility to move toward disarmament; and those without them have the responsibility to forsake them.

Today, the Security Council endorsed a global effort to lock down all vulnerable nuclear materials within four years. . . . This resolution will also help strengthen the institutions and initiatives that combat the smuggling, financing, and theft of proliferation-related materials. It calls on all states to freeze any financial assets that are being used for proliferation. And it calls for stronger safeguards to reduce the likelihood . . . that peaceful nuclear programs can be diverted to a weapons program.

The resolution we passed today will also strengthen the Nuclear Non-Proliferation Treaty. We have made it clear that the Security Council has both the authority and the responsibility to respond to violations to this treaty. We've made it clear that the Security Council has both the authority and responsibility to determine and respond as necessary when violations of this treaty threaten international peace and security.

That includes full compliance with Security Council resolutions on Iran and North Korea. . . .

* * * *

On September 24, 2009, the White House Office of the Press Secretary issued a fact sheet on Resolution 1887. Excerpts follow from the fact sheet, which is available at *http://usun*.

state.gov/briefing/statements/2009/september/129564.htm.

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. . . The new measure, **UNSC Resolution 1887,** expresses the Council's grave concern about the threat of nuclear proliferation and the need for international action to prevent it. It reaffirms that the proliferation of weapons of mass destruction and their means of delivery are threats to international peace and security and shows agreement on a broad range of actions to address nuclear proliferation and disarmament and the threat of nuclear terrorism. . . .

* * * *

UNSC Resolution 1887 includes new provisions **to deter withdrawal from the NPT** and to ensure that nuclear energy is used in a framework that reduces proliferation dangers and adheres to high standards for security. The Council committed to address without delay any state's notification of withdrawal from the NPT and affirmed that states will be held responsible for any violations of the NPT committed prior to their withdrawal from the Treaty.

The Council also endorsed important norms to reduce the likelihood that a peaceful nuclear program can be diverted to a weapons program, including support for **stricter national export controls on sensitive nuclear technologies and** having nuclear supplier states consider **compliance with safeguards agreements when making decisions about nuclear exports** and reserve the right to require that **material and equipment provided prior to termination be returned** if safeguards agreements are abrogated.

The Council also expressed strong support for ensuring **the IAEA has the authority and resources** necessary to carry out its mission to verify both the declared use of nuclear materials and facilities and the absence of undeclared activities and affirmed the Council's resolve to support the IAEA's efforts to verify whether states are in compliance with their safeguards obligations.

The resolution calls upon states to conclude safeguards agreements and an Additional Protocol with the IAEA, so that the IAEA will be in a position to carry out all of the inspections necessary to ensure that materials and technology from peaceful nuclear uses are not used to support a weapons program. The Council also endorsed IAEA work on **multilateral approaches to the fuel cycle,** including assurances of fuel supply to make it easier for countries to choose not to develop enrichment and reprocessing capabilities.

These steps are important in helping address situations where a country uses access to the civilian nuclear benefits of the NPT to cloak a nascent nuclear weapons program and then withdraws from the NPT once it has acquired sufficient technical expertise for its weapons program.

The resolution strengthens implementation for resolution 1540 which requires governments to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery. . . .

* * * *

e. U.S.–IAEA Safeguards Agreement Additional Protocol

On January 6, 2009, Ambassador Gregory L. Schulte, then U.S. Permanent Representative to the International Atomic Energy Agency ("IAEA"), deposited the U.S. instrument of ratification for the U.S. Additional Protocol with the IAEA. Ambassador Schulte issued a statement on January 7, explaining that "[b]y bringing the Additional Protocol into force, the United States has taken another important, tangible step in strong support of the IAEA's efforts to provide international confidence about the absence of undeclared nuclear activities." The full text of Ambassador Schulte's statement, excerpted below, is available at *http://vienna.usmission.gov/090107ap.html*.

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The Additional Protocol is the IAEA's highest standard of verification. It provides IAEA inspectors with additional information and access related to a country's nuclear fuel cycle making it easier for the inspectors to detect a clandestine nuclear weapons program. . . .

* * * *

To date, 118 countries have signed an Additional Protocol with the IAEA and 89, including the United States, have ratified it. We hope that important countries like Brazil and Argentina, which have significant nuclear activities, join us in signing and implementing the Additional Protocol. This would send an important signal to the rest of the world.

We fully support Director General Mohammed El-Baradei in his desire to make the Additional Protocol a universal standard.

f. Country-specific issues

(1) Democratic People's Republic of Korea and Iran

During 2009 the United States pressed the Democratic People's Republic of Korea ("DPRK" or "North Korea") and Iran to fulfill their international obligations concerning nonproliferation of weapons of mass destruction. In his address to the General Assembly on September 23, 2009, for example, President Obama stated:

> . . . Those nations that refuse to live up to their obligations must face consequences. Let me be clear: This is not about singling out individual nations; it is about standing up for the rights of all nations that *do* live up to their responsibilities. Because a world in which IAEA inspections are avoided and the [UN's] demands are ignored will leave all people less safe, and all nations less secure.
>
> In their actions to date, the Governments of North Korea and Iran threaten to take us down this dangerous slope. We respect their rights as members of the community of nations. I have said before, and I will repeat,

> I am committed to diplomacy that opens a path to greater prosperity and more secure peace for both nations if they live up to their obligations.
>
> But if the Governments of Iran and North Korea choose to ignore international standards, if they put the pursuit of nuclear weapons ahead of regional stability and the security and opportunity of their own people, if they are oblivious to the dangers of escalating nuclear arms races in both East Asia and the Middle East, then they must be held accountable. The world must stand together to demonstrate that international law is not an empty promise, and that treaties will be enforced. We must insist that the future does not belong to fear.

The full text of President Obama's speech is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00742, pp. 1–9.

(i) DPRK

For discussion of U.S. and Security Council responses to North Korea's Taepo-Dong launch on April 5, 2009, and the second test of a nuclear explosive device North Korea announced had taken place on May 25, 2009, see Chapter 16.A.1.a. The nonproliferation sanctions the United States imposed in 2009 against North Korean entities and nationals are discussed in Chapter 16.A.1.a.(2). For general discussion of U.S. nonproliferation initiatives relating to North Korea in 2009, see the testimony of Ambassador Stephen W. Bosworth, Special Representative for North Korea Policy, before the Senate Committee on Foreign Relations on June 11, 2009, available at *www.state.gov/p/eap/rls/rm/2009/06/124657.htm*.

(ii) Iran

For discussion of the new two-track U.S. strategy toward Iran, which combines direct U.S. diplomatic engagement with the application of sanctions, see Deputy Secretary of State James B. Steinberg's testimony, dated October 6, 2009, before

the Senate Committee on Banking, Housing and Urban Affairs. Deputy Secretary Steinberg's testimony is available at *http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=23f97300-5b76-483b-9225-aa14a2a82e79&Witness_ID=d34d2781-7cef-42c4-ba93-8dddb6521a34*. Chapter 16.A.1.b. discusses 2009 developments relating to sanctions, export controls, and Iran.

(iii) IAEA resolution on Iran

On November 27, 2009, the IAEA Board of Governors adopted a resolution on Iran by a vote of 25 states in favor and three opposed, with six abstentions. IAEA Doc. GOV/2009/82. The United States, together with the other P5+1 countries (China, France, Germany, Russia, and the United Kingdom) took the lead in preparing the resolution, which was the IAEA's tenth resolution on Iran. The IAEA had not adopted a resolution on Iran since 2006, and it sent a strong signal of serious international concern about Iran's noncompliance with its obligations under its IAEA safeguards agreement and successive Security Council resolutions. The resolution urged Iran to comply fully and without delay with its obligations under Security Council Resolutions 1737 (2006), 1747 (2007), 1803 (2008), and 1835 (2008) and to meet the IAEA Board of Governors' requirements, including by suspending construction immediately at the enrichment facility near Qom. U.N. Docs. S/RES/1737, S/RES/1747, S/RES/1803, and S/RES/1835. For the joint U.S.-French-British statement on September 2, 2009, announcing evidence of the clandestine facility, see *www.whitehouse.gov/the_press_office/Statements-By-President-Obama-French-President-Sarkozy-And-British-Prime-Minister-Brown-On-Iranian-Nuclear-Facility*. The resolution also urged Iran to comply fully with its obligations under its safeguards agreement, particularly by applying Code 3.1, modified, of the Additional Protocol, and to confirm that Iran does not have any other undeclared nuclear facilities. Third, the resolution urged Iran to engage with the IAEA to

resolve all of the outstanding issues concerning Iran's nuclear program and to cooperate fully with the IAEA by providing the IAEA with the information and access to Iranian facilities that it had requested.

As the United States explained in a statement to the Board of Governors following the vote, the resolution reflected "the Board's ongoing and serious concern that Iran continues to defy relevant IAEA Board of Governors and UN Security Council resolutions." The U.S. statement, excerpted below, is available at *http://vienna.usmission.gov/091127iran.html*.

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We believe that the Board's resolution underscores the imperative for Iran to live up to its international obligations and offer transparency in its nuclear program, if it wishes to demonstrate its exclusively peaceful intent, rather than carry out more evasions and unilateral reinterpretations of its obligations. The United States fully supports the IAEA in its efforts. We also fully support the Director General's conclusion that Iran does not have the authority to unilaterally modify its safeguards obligations with respect to the provision of design information.

The United States remains firmly committed to a peaceful resolution to international concerns with Iran's nuclear program. We also remain willing to engage Iran to work toward a diplomatic solution to the nuclear dilemma it has created for itself, if only Iran would choose such a course. But our patience and that of the international community is limited. To date, Iran has refused a follow-on meeting to the October 1 meeting with the P5+1 countries if its nuclear program is included on the agenda. The United States strongly supported—and continues to support—the Director General's positive proposal to provide Iran fuel for its Tehran Research Reactor, a proposal intended to help meet the medical and humanitarian needs of the Iranian people while building confidence in Iran's intentions. We continue to encourage Iran to demonstrate a similar willingness to address the serious issues associated with its nuclear program.

On November 27, 2009, White House Press Secretary Robert Gibbs also welcomed the IAEA resolution. The White House statement explained:

> Today's overwhelming vote at the IAEA's Board of Governors demonstrates the resolve and unity of the international community with regard to Iran's nuclear program. It underscores broad consensus in calling upon Iran to live up to its international obligations and offer transparency in its nuclear program. It also underscores a commitment to strengthen the rules of the international system, and to support the ability of the IAEA and UN Security Council to enforce the rules of the road, and to hold Iran accountable to those rules. Indeed, the fact that 25 countries from all parts of the world cast their votes in favor shows the urgent need for Iran to address the growing international deficit of confidence in its intentions.

The full text of the press statement is available at *www.white-house.gov/the-press-office/statement-white-house-press-secretary-robert-gibbs-todays-iaea-vote*.

(2) Agreement with the UAE for cooperation on peaceful uses of nuclear energy

On May 21, 2009, President Obama transmitted a proposed agreement with the United Arab Emirates for cooperation concerning the peaceful uses of nuclear energy, pursuant to §§ 123 b. and 123 d. of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2153(b), (d)).* On May 19, 2009, President Obama issued Presidential Determination No. 2009-18, as a memorandum for the Secretary of State

* Editor's note: On January 15, 2009, President George W. Bush issued the determination required by § 123 of the Atomic Energy Act with respect to a proposed agreement for peaceful nuclear cooperation with the United Arab Emirates, but that agreement was not transmitted to Congress. *See http://georgewbush-whitehouse.archives.gov/news/releases/2009/01/20090115-4.html*. Instead, after President Obama took office, a modified text was signed on May 21, 2009, and transmitted to Congress on the same day.

and the Secretary of Energy. 74 Fed. Reg. 25,385 (May 28, 2009). The President stated:

> I have considered the proposed Agreement for Cooperation Between the Government of the United States of America and the Government of the United Arab Emirates Concerning Peaceful Uses of Nuclear Energy, along with the views, recommendations, and statements of the interested agencies.
>
> I have determined that the performance of the Agreement will promote, and will not constitute an unreasonable risk to, the common defense and security. Pursuant to section 123 b. of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2153(b)), I hereby approve the proposed Agreement and authorize the Secretary of State to arrange for its execution.

On July 8, 2009, Ellen O. Tauscher, Under Secretary of State for Arms Control and International Security, testified before the House Committee on Foreign Affairs in support of the agreement. In her testimony, Ms. Tauscher stressed the agreement's nonproliferation value and discussed the actions the UAE had taken to demonstrate its commitment to nonproliferation and responsible development of civil nuclear energy.

The United States and the UAE exchanged diplomatic notes on December 17, 2009, to bring the agreement into force. The full text of the agreement is available at *www.state.gov/documents/organization/140162.pdf*.

Excerpts below from Ms. Tauscher's testimony explain the agreement's significance and notable provisions. The full text of the testimony is available at *www.state.gov/t/us/125782.htm*.

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Let me say at the outset that the Administration recognizes the nonproliferation value of this unique Agreement. The UAE has made a principled decision that it will abide by the highest nonproliferation standards. The U.S.-UAE 123 Agreement recognizes

these commitments and achievements of the government of the United Arab Emirates and provides the basis to expand now our cooperation into areas of peaceful nuclear energy.

Consistent with the UAE's commitments to the highest nonproliferation standards, the proposed Agreement contains some unprecedented features for agreements of this type. For the first time in an agreement of this type, the UAE has voluntarily agreed to forgo enrichment and reprocessing. For the first time in a U.S. agreement for peaceful nuclear cooperation, the proposed Agreement provides that prior to U.S. licensing of exports of nuclear material, equipment, components, or technology pursuant to the Agreement, the UAE shall bring into force the Additional Protocol to its safeguards agreement with the IAEA. The Agreement also allows for exceptional circumstances, under which the United States may remove special fissionable material subject to the Agreement from the UAE either to the United States or to a third country if exceptional circumstances of concern from a nonproliferation standpoint so require.

The proposed Agreement has a term of 30 years and permits the transfer of nuclear material, equipment (including reactors), and components for civil nuclear research and civil nuclear power production subject to subsequent individual export licensing. It does not permit transfers of Restricted Data, sensitive nuclear technology, sensitive nuclear facilities, or major critical components of such facilities. It limits the special fissionable material that may be transferred under the Agreement to low enriched uranium except for small amounts of special fissionable material for use as samples, standards, detectors, targets or other purposes agreed by the Parties. If the Agreement is terminated, key nonproliferation conditions and controls will continue with respect to material, equipment, and components subject to the Agreement.

. . . [The UAE is] an example of a country that has concluded that indigenous fuel cycle capabilities are not needed to fully enjoy the benefits of civil nuclear energy.

* * * *

Once the proposed Agreement enters into force, it will establish the necessary legal framework for the United States and the UAE to engage in subsequent, individually-authorized forms of

cooperation in the development of nuclear energy for peaceful purposes to assist the UAE in meeting its growing energy demand. In addition to being indicative of our strong partnership with the UAE, the proposed Agreement is a tangible expression of the United States' desire to cooperate with states in the Middle East, and elsewhere, that want to develop peaceful nuclear power in a manner consistent with the highest nonproliferation, safety and security standards.

* * * *

U.S. Prior Approval for Retransfers

The Agreed Minute to the proposed Agreement provides U.S. prior approval for retransfers by the UAE of irradiated nuclear material . . . to France and the United Kingdom, if consistent with their respective policies, laws, and regulations. Such retransfers would provide the UAE opportunities for management of its spent fuel, subject to specified conditions, including that prior agreement between the United States and the UAE is required for the transfer to the UAE of any special fissionable material recovered from any such reprocessing. Plutonium recovered from reprocessing could not be returned under the Agreement (with the exception of small quantities for the uses described above, but even then only with the further agreement of the Parties). The transferred material would also have to be held within the European Atomic Energy Community subject to the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the United States of America and the European Atomic Energy Community (EURATOM).

In view of the fact that this retransfer consent would constitute a subsequent arrangement under the Act if agreed to separately from the proposed Agreement, the Secretary of State and the Secretary of Energy have ensured that the advance approval provisions meet the applicable requirements of section 131 of the Atomic Energy Act. Specifically, they have concluded that U.S. advance approval for retransfer of nuclear material for reprocessing or storage contained in the Agreed Minute to the proposed Agreement is not inimical to the common defense and security. . . .

* * * *

2. 1540 Committee

On September 30, 2009, the Security Council conducted a comprehensive review of the status of implementation of Resolution 1540 (2004). U.N. Doc. S/RES/1540. The Security Council acted pursuant to paragraph 8 of Resolution 1810 (2008), which requested the 1540 Committee to consider such a review and to report to the Council on its considerations by January 31, 2009. During the Security Council's review, Ambassador Alejandro D. Wolff, Deputy U.S. Permanent Representative to the United Nations, delivered a statement stressing the importance of full implementation of Resolution 1540. Ambassador Wolff's statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/2009/september/130100.htm. See also* Ambassador Wolff's statement to the Security Council on November 13, 2009, available at *http://usun.state.gov/briefing/statements/2009/131935.htm.*

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. . . Resolution 1540 was adopted to address the potential convergence of two serious threats: violent non-state actors and the spread of weapons of mass destruction. . . .

* * * *

The Security Council resolution that was adopted at the Summit level last week affirms the need for full implementation of Resolution 1540, welcomes the work that the 1540 Committee has done to date on funding mechanisms, and reinforces the Security Council's commitment to ensure effective and sustainable support for the Committee's activities, including capacity building. The United States is strongly committed to establishing a voluntary fund to help provide the technical support and expertise to support implementation of Resolution 1540. We will seek to make a meaningful contribution to such a trust fund once it is established, provided it contains effective transparency and

accountability mechanisms. We are prepared to work with the 1540 Committee and others to make that happen.

* * * *

Full implementation is essential for a simple reason: proliferators seek out the weakest links, be they poorly secured materials, unguarded borders, or judicial systems too frail to prosecute perpetrators. In our interconnected world, a single gap in our common defense can threaten us all. So we urge all states to fully shoulder the responsibility of assessing and addressing areas where they might be vulnerable to proliferation-related activity.

UN member states have the sovereign responsibility to regulate their own national commerce; to inspect cargoes transiting their borders and territories; to maintain and oversee their own financial systems; and to monitor and control their own exports. But as states undertake these important functions, they must ensure that they are complying with the obligations established by Resolution 1540 as an operating standard.

* * * *

Mr. Chairman, our goal is to have this Comprehensive Review strengthen the resolution's tools and mechanisms—such as a voluntary trust fund—for building national capacity and international coordination to fighting proliferation, even as we recognize that a "one size fits all" approach to capacity-building will not suffice.

* * * *

We need to consider ways to make this Committee's work more inclusive and allow it to benefit from the input of others, even as we maintain the independence and distinctiveness of the nonproliferation treaties and regimes that mesh with Resolution 1540. . . .

* * * *

Let a better coordinated, better resourced 1540 Committee stand as a demonstration of our shared commitment to a safer and more secure world. . . .

3. Chemical and Biological Weapons

a. Chemical weapons

On October 13, 2009, Robert P. Mikulak, U.S. Representative to the Executive Council of the Organization for the Prohibition of Chemical Weapons ("OPCW"), addressed the OPCW Executive Council at its fifty-eighth session. Mr. Mikulak's statement, excerpted below, is available at *www.state.gov/t/isn/rls/rm/130891.htm*.

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. . . [T]he United States has now destroyed over 65 percent of its chemical weapons—almost two thirds. It is also worth noting that on October 6, the U.S. Army Chemical Materials Agency announced the safe destruction of its two millionth munition since entry-into-force of the Chemical Weapons Convention.

The Obama administration is fully committed to examine all possible options for accelerating Chemical Weapons destruction at the two non-incineration sites consistent with the Chemical Weapons Convention and its applicable safety, technical, and environmental requirements. The United States understands our obligations under the Convention, and we are fully committed to meeting the Convention's objectives, including verified destruction of 100 percent of our stockpile as rapidly and as safely as possible. We are also committed to proactive disclosure of our Chemical Weapons destruction program, so that member states can evaluate our efforts for themselves.

Another of the obligations which we as member states agreed to fulfill when we joined the Convention is contained in Article VII of the Convention, which requires all member states to adopt the necessary measures to implement the Convention and for it to be fully enforced and effective within their territory.

Since the adoption of the Action Plan for Article VII in 2003, there has been a notable increase in the number of member states fully meeting their Article VII obligations, which we applaud. The work of the Technical Secretariat, as well as of member states,

in providing encouragement, assistance and support to other member states has been an important factor in this increase. However, we realize that the work to fully implement Article VII is far from done, as evidenced in the Director-General's annual report on Article VII implementation before us this week. . . .

Rather than repeating decisions from previous years, this Council should provide fresh recommendations to address the current situation. These recommendations should include clear, constructive, and achievable measures to assist and encourage member states wherever they are in the process of implementing Article VII. The United States stands ready to provide support and assistance to any member states requiring it . . . . We call on other member states to do the same. We share a collective interest in seeing each member of this Organization enact and implement comprehensive legislation and regulations. Whenever another member state does so, another gap is closed and our collective security is enhanced.

* * * *

b. Biological weapons

On December 9, 2009, Ellen O. Tauscher, Under Secretary for Arms Control and International Security, addressed the Annual Meeting of the States Parties to the Biological Weapons Convention. In her statement, excerpted below, Ms. Tauscher called on states to join the United States in reinvigorating the Biological Weapons Convention. The full text of the U.S. statement is available at *www.state.gov/t/us/133335.htm*.

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When it comes to the proliferation of bio weapons and the risk of an attack, the world community faces a greater threat based on a new calculus. President Obama fully recognizes that a major biological weapons attack on one of the world's major cities could cause as much death and economic and psychological damage as a nuclear attack.

And while the United States remains concerned about state-sponsored biological warfare and proliferation, we are equally, if not MORE concerned, about an act of bioterrorism, due to the increased access to advances in the life sciences.

* * * *

That is why we in the United States are calling for all of you to join us in bolstering the Biological Weapons Convention, the premier forum for dealing with biological threats.

* * * *

. . . [W]e want to reinvigorate the Biological Weapons Convention as the premier forum for global outreach and coordination. The Biological Weapons Convention embodies the international community's determination to prevent the misuse of biological materials as weapons. But it takes the active efforts of its States Parties—individually, and collectively—to uphold these commitments that continue to bolster the BWC as a key international norm.

* * * *

. . . [L]et me reiterate that the Obama Administration's commitment to the Biological Weapons Convention is steadfast. The United States will continue to meet its Article One commitments not to develop, acquire, produce or possess biological weapons.

But I want to be clear and forthcoming and I hope this will not be a surprise to anyone. The Obama Administration will not seek to revive negotiations on a verification protocol to the Convention. We have carefully reviewed previous efforts to develop a verification protocol and have determined that a legally binding protocol would not achieve meaningful verification or greater security.

It is extraordinarily difficult to verify compliance. The ease with which a biological weapons program could be disguised within legitimate activities and the rapid advances in biological research make it very difficult to detect violations. We believe that a protocol would not be able to keep pace with the rapidly changing nature of the biological weapons threat.

Instead, we believe that confidence in BWC compliance should be promoted by enhanced transparency about activities and pursuing compliance diplomacy to address concerns.

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We want to develop a rigorous, comprehensive program of cooperation, information exchange, and coordination that builds on and modifies as necessary the existing Work Program approach.

As we look toward the 2011 Review Conference, the United States believes that a reinvigorated, comprehensive Work Program is the best way to strengthen the Convention. . . .

To highlight our three areas of emphasis in this area, let me provide a bit more detail about our goals.

First, we seek to promote confidence in effective treaty implementation:

A key consideration related to any treaty is the ongoing need to promote confidence in compliance. We believe that greater emphasis should be placed on voluntary measures to provide increased confidence. We must also increase participation in the existing Confidence-Building Measures. We should work together to review the Confidence Building Measures forms to assess their effectiveness and identify areas for improvement. States Parties, in conjunction with the Implementation Support Unit, should provide appropriate assistance to meet these goals.

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. . . [W]e must seek to make membership in the BWC universal. We will be looking to work with you on outreach efforts to countries that have not yet joined the Convention.

Second, we will seek to enhance cooperation through the BWC on natural and deliberate disease threats to complement the work being done by the World Health Organization and other international bodies. In order to implement our Article Ten commitments, it is critical that we work together to achieve, sustain and improve international capacity to detect, report, and respond to outbreaks of disease, whether deliberate, accidental or natural. This includes

implementation of the World Health Organization's International Health Regulations.

Fundamentally, if we improve a country's ability to respond to natural outbreaks, we have improved their capability to deal with bioterrorism.

In this respect, the United States is dedicated to continuing our substantial assistance and we want to work closely with other BWC States Parties to enhance and coordinate these efforts—including through the G-8 Global Partnership, United Nations Security Council Resolution 1540 and other mechanisms.

The BWC should be fully utilized as a forum to inform States Parties of related bilateral and regional activities, to consult on new avenues of multilateral engagement, and to promote the support of the international community.

* * * *

As the final piece of our strategy to enhance this forum, we want to make the BWC the premier forum for discussion of the full range of biological threats—including bioterrorism and mutually agreeable steps States can take for risk management.

The BWC should provide an international forum for advancing the dialogue on pathogen security and laboratory biosafety practices, and for promoting legislation, guidelines and standards through cooperation and partnership.

We must work here to develop international standards and practices for these important elements that advance our mutual security. . . .

* * * *

4. START

On April 1, 2009, President Obama and Dmitriy A. Medvedev, President of the Russian Federation, issued a Joint Statement on their agreement to begin negotiations on a new agreement to replace the Treaty on the Reduction and Limitation of Strategic Offensive Arms ("START Treaty"). The Joint

Statement, which is provided below, is also available at Daily Comp. Pres. Docs., 2009 DCPD No. 00209, p. 1.

The President of the United States of America, Barack Obama, and the President of the Russian Federation, Dmitriy A. Medvedev, noted that the Treaty on the Reduction and Limitation of Strategic Offensive Arms (START Treaty), which expires in December 2009, has completely fulfilled its intended purpose and that the maximum levels for strategic offensive arms recorded in the Treaty were reached long ago. They have therefore decided to move further along the path of reducing and limiting strategic offensive arms in accordance with U.S. and Russian obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons.

The Presidents decided to begin bilateral intergovernmental negotiations to work out a new, comprehensive, legally binding agreement on reducing and limiting strategic offensive arms to replace the START Treaty. The United States and the Russian Federation intend to conclude this agreement before the Treaty expires in December. In this connection, they instructed their delegations at the negotiations to proceed on basis of the following:

- The subject of the new agreement will be the reduction and limitation of strategic offensive arms;
- In the future agreement the Parties will seek to record levels of reductions in strategic offensive arms that will be lower than those in the 2002 Moscow Treaty on Strategic Offensive Reductions, which is currently in effect;
- The new agreement will mutually enhance the security of the Parties and predictability and stability in strategic offensive forces, and will include effective verification measures drawn from the experience of the Parties in implementing the START Treaty.

They directed their negotiators to report on progress achieved in working out the new agreement by July 2009.

On July 6, 2009, President Obama and President Medvedev signed a Joint Understanding that outlined the

elements for inclusion in the new START treaty. The Joint Understanding, excerpted below, is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00547, pp. 1–2.*

The President of the United States of America and the President of the Russian Federation have . . . directed that the new treaty contain, *inter alia*, the following elements:

1. A provision to the effect that each Party will reduce and limit its strategic offensive arms so that seven years after entry into force of the treaty and thereafter, the limits will be in the range of 500–1100 for strategic delivery vehicles, and in the range of 1500–1675 for their associated warheads. The specific numbers to be recorded in the treaty for these limits will be agreed through further negotiations.
2. Provisions for calculating these limits.
3. Provisions on definitions, data exchanges, notifications, eliminations, inspections and verification procedures, as well as confidence building and transparency measures, as adapted, simplified, and made less costly, as appropriate, in comparison to the START Treaty.
4. A provision to the effect that each Party will determine for itself the composition and structure of its strategic offensive arms.
5. A provision on the interrelationship of strategic offensive and strategic defensive arms.
6. A provision on the impact of intercontinental ballistic missiles and submarine-launched ballistic missiles in a non-nuclear configuration on strategic stability.

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* Editor's note: On April 8, 2010, President Obama and President Medvedev signed the New START Treaty and its Protocol. President Obama transmitted the New START Treaty to the Senate for its advice and consent to ratification on May 13, 2010. S. Treaty Doc. No. 111-5 (2010). *Digest 2010* will discuss relevant aspects of the new treaty and protocol, which are available at *www.state.gov/documents/organization/140035.pdf* and *www.state.gov/documents/organization/140047.pdf*.

7. A provision on basing strategic offensive arms exclusively on the national territory of each Party.
8. Establishment of an implementation body to resolve questions related to treaty implementation.
9. A provision to the effect that the treaty will not apply to existing patterns of cooperation in the area of strategic offensive arms between a Party and a third state.
10. A duration of the treaty of ten years, unless it is superseded before that time by a subsequent treaty on the reduction of strategic offensive arms.

* * * *

The United States and Russia had not concluded their negotiations on the new treaty by December 4, 2009, when the START treaty expired. President Obama and President Medvedev issued a Joint Statement on that date, which provided:

> Recognizing our mutual determination to support strategic stability between the United States of America and the Russian Federation, we express our commitment, as a matter of principle, to continue to work together in the spirit of the START Treaty following its expiration, as well as our firm intention to ensure that a new treaty on strategic arms enter into force at the earliest possible date.

Daily Comp. Pres. Docs., 2009 DCPD No. 00971, p. 1.

Separately, the two countries issued another Joint Statement, which discussed the contributions of Belarus, Kazakhstan, and Ukraine to the START Treaty's successful implementation. Excerpted below, the Joint Statement is available at *www.state.gov/r/pa/prs/ps/2009/dec/133204.htm*.

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The value of the START Treaty was greatly enhanced when the Republic of Belarus, the Republic of Kazakhstan, and Ukraine removed all nuclear weapons from their territories and acceded to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) as

non-nuclear-weapon states. The actions of these states have enhanced the NPT regime, had a beneficial impact on international security and strategic stability, and created favorable conditions for further steps to reduce nuclear arsenals.

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The fulfillment by these states of their obligations under the Protocol to the START Treaty of May 23, 1992, (Lisbon Protocol) and their accession to the NPT as non-nuclear-weapon states, strengthened their security, which was reflected, inter alia, in the Budapest Memoranda of December 5, 1994. In this connection, the United States of America and the Russian Federation confirm that the assurances recorded in the Budapest Memoranda will remain in effect after December 4, 2009.

5. UN Resolution on Arms Trade Treaty

On October 14, 2009, Secretary of State Clinton announced the U.S. commitment to work actively to support efforts to negotiate a multilateral arms trade treaty. Secretary Clinton's statement, which is set forth below, is also available at *www.state.gov/secretary/rm/2009a/10/130573.htm*. *See also* the statement of Ambassador Donald A. Mahley, in the conventional weapons segment of the First Committee's General Debate on October 19, 2009, available at *http://usun.state.gov/briefing/statements/2009/130803.htm*.

Conventional arms transfers are a crucial national security concern for the United States, and we have always supported effective action to control the international transfer of arms.

The United States is prepared to work hard for a strong international standard in this area by seizing the opportunity presented by the Conference on the Arms Trade Treaty at the United Nations. As long as that Conference operates under the rule of consensus decision-making needed to ensure that all countries can be held to standards that will actually improve the global situation by denying arms to those who would abuse them, the United States

will actively support the negotiations. Consensus is needed to ensure the widest possible support for the Treaty and to avoid loopholes in the Treaty that can be exploited by those wishing to export arms irresponsibly.

On a national basis, the United States has in place an extensive and rigorous system of controls that most agree is the "gold standard" of export controls for arms transfers. On a bilateral basis, the United States regularly engages other states to raise their standards and to prohibit the transfer or transshipment of capabilities to rogue states, terrorist groups, and groups seeking to unsettle regions. Multilaterally, we have consistently supported high international standards, and the Arms Trade Treaty initiative presents us with the opportunity to promote the same high standards for the entire international community that the United States and other responsible arms exporters already have in place to ensure that weaponry is transferred for legitimate purposes.

The United States is committed to actively pursuing a strong and robust treaty that contains the highest possible, legally binding standards for the international transfer of conventional weapons. We look forward to this negotiation as the continuation of the process that began in the UN with the 2008 UN Group of Governmental Experts on the ATT and continued with the 2009 UN Open-Ended Working Group on ATT.

6. Defense Trade Cooperation Treaties

On December 10, 2009, Andrew J. Shapiro, Assistant Secretary of State for Political-Military Affairs, and James A. Baker, Associate Deputy Attorney General, testified before the Senate Committee on Foreign Relations in support of advice and consent to ratification of defense trade cooperation treaties with the United Kingdom and Australia. *See http://foreign.senate.gov/testimony/2009/ShapiroTestimony091210a.pdf* and *http://foreign.senate.gov/testimony/2009/BakerTestimony091210a.pdf*. The treaties were transmitted to the Senate in 2007. S. Treaty Doc. Nos. 110-7 and 110-10 (2007); *see Digest 2007* at 996–1000. Action in the Senate remained pending at the end of 2009.

7. Arms Embargoes and Related Issues

a. Program of action to prevent and interdict weapons smuggling

On March 13, 2009, the United States joined Canada, Denmark, France, Germany, Italy, the Netherlands, Norway, and the United Kingdom in agreeing upon a program of action aiming to create a framework for international cooperation to prevent and interdict weapons smuggling into the Gaza Strip. Excerpts follow from the program of action, which is not legally binding under international law and described potential areas for cooperation states might pursue within their existing authorities, such as information and intelligence sharing, diplomatic engagement, and military and law enforcement activities. The full text of the program of action is available at *www.state.gov/s/l/c8183.htm*.

Participating governments seek to enhance efforts to prevent and interdict the illicit trafficking of arms, ammunition and weapons components to Gaza and within their jurisdiction to prevent the facilitation of such transfers. The Governments confirm their commitment to support efforts of regional states through activities farther afield. The Governments reaffirm that the international community has a responsibility to support prevention and interdiction efforts and that such efforts may involve a broad range of tools to include diplomatic, military, intelligence, and law enforcement components. These efforts build upon UNSCR 1860 and the principles and obligations pursuant to transfers of arms or related materials established in relevant UNSCRs including 1747. They recognize that these efforts include measures to prevent, disrupt, delay, stop, or seize illicit transfers of arms, ammunition and weapons components and offer a range of roles for members of the international community, taking into account counter-terrorism and non-proliferation conventions and regimes. Participation in this effort does not obligate states to take any specific action. Cooperative actions may involve only some of the participants.

Participating governments will support, in conformity with international and domestic law, and given national capabilities, a range of actions . . . .

* * * *

b. Lebanon: Implementation of Security Council Resolutions 1559 and 1701

During a Security Council debate on the Middle East on July 27, 2009, Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, stressed the need for full implementation of Security Council Resolutions 1559 (2004) and 1701 (2006). U.N. Docs. S/RES/1559 and S/RES/1701. Ambassador Wolff's statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/2009/july/126549.htm*. *Digest 2005* provides background on Resolution 1559 at 931–33; *Digest 2006* provides background on Resolution 1701 at 1034–41.

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Mr. President, events in Lebanon over the past several weeks have underscored the importance of full implementation of Security Council Resolutions 1559 and 1701. Implementing these resolutions is the only sure path to protect Lebanon's sovereignty, stability, and independence. As the Council heard last week, on July 14, a series of explosions shook a house in the village of Khirbat Salim, well south of the Litani River. Initial findings point to a large quantity of arms and ammunition being stored there, in serious violation of Resolution 1701, with all evidence pointing to Hizballah.

The Khirbat Salim events clearly demonstrate the urgent need to bring arms in Lebanon under legitimate control of the state—and the need for the international community to remain fully committed to supporting UNIFIL and its mission. [Editor's note: *See* Chapter 17.B.5. for discussion of UNIFIL.] We are deeply concerned

about the threat that such weapons pose to the civilian populations in both Israel and Lebanon. By Hizballah's own admission, it is continuing to rearm. This is a dangerous development, which represents a severe violation of a core objective of Resolution 1701, since it was Hizballah that launched the 2006 war that neither Israel nor Lebanon sought.

We join the Secretary-General in calling on Hizballah to disarm and transform itself into a solely political party. We also call for UNIFIL and the Lebanese government to act energetically to follow up on information about Hizballah's weapons stocks, and call for a full and unimpeded investigation into the explosion of the weapons cache at Khirbat Salim.

Resolving this situation would reassure the Government of Israel that its northern border and citizens are secure. Until it has such assurances, Israel has said that it will persist with its reconnaissance over-flights of Lebanon. While we recognize those overflights also as violations of the Blue Line, we understand Israel's justification for them: simply put we have not ensured that Lebanon has secured its borders in order to prevent the entry of illegal arms or related materiel. In short, Hizballah has intentionally perpetuated the threats that lead to these Blue Line violations.

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c. Darfur: Implementation of Security Council Resolution 1591

On December 15, 2009, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, condemned continued violence in Darfur and continued violations of the arms embargo established by Security Council Resolution 1591. U.N. Doc. S/RES/1591. Ambassador Rice stated:

> The United States condemns the blatant disregard for the arms embargo by all parties to the conflict, the continued sexual and gender based violence, and the sustained aerial bombings by the Government of Sudan, as reported by the 1591 Sanctions Committee.

> Political progress, stability in Darfur, and UNAMID's effectiveness are undermined by consistent violations of the arms embargo, increased cross border attacks, recruitment of child soldiers, and the use of militarized civilian vehicles. . . .

See http://usun.state.gov/briefing/statements/2009/133608.htm.

Cross References

Freedom of navigation incidents in international waters, **Chapter 12.A.5.**
Outer space arms control, **Chapter 12.B.**
Nonproliferation-related sanctions and export controls, **Chapter 16.A.1. and B.5.**
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