Digest of United States Practice in International Law

2010

00-Digest-FM.indd i 11/18/2011 5:51:43 PM

Digest of United States Practice in International Law

2010

Elizabeth R. Wilcox
Editor

Office of the Legal Adviser
United States Department of State

OXFORD
UNIVERSITY PRESS

INTERNATIONAL LAW INSTITUTE

The *Digest of United States Practice in International Law* is co-published by Oxford University Press and the International Law Institute under agreement with the United States Department of State, Office of the Legal Adviser. The contents of the *Digest*, including selection of documents and preparation of editorial commentary, are entirely under the auspices of the Office of the Legal Adviser.

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1055 Thomas Jefferson St., NW
Washington, DC 20007

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202-247-6010 (fax)
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ISBN: 978-0-19-985607-7 (2010, Hardback)

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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 2010. This is the thirteenth edition of the *Digest* published by the International Law Institute, and the seventh 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 2010, 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 2010. This edition is fully available not just in print, but also on the State Department's website (*www.state.gov/s/l*) and on the U.S. government's new law-related website, law.data.gov (*http://explore.data.gov/catalog/raw/?Dataset-Summary_Agency=Department+of+State&page=2*); the volumes for 1989-2009 have been posted on both sites as well. The 2010 *Digest* provides a historical record of developments that took place during calendar year 2010, illustrating how the United States put our strategic vision of international law into practice. That concept rests on the principle that obeying international law promotes U.S. foreign policy interests and strengthens our international leadership.

The United States' active participation in international tribunals and other international bodies formed an important part of our practice in 2010. Over the year, the United States continued to engage with the International Criminal Court while maintaining its active support for other international tribunals. I was proud to co-head the U.S. observer delegation at both the resumed Eighth Session of the Assembly of States Parties to the Rome Statute in New York in March 2010 and the first Review Conference of the Assembly of States Parties to the Rome Statute in Kampala in May and June 2010. The United States' active engagement with the Court and the parties to the Rome Statute has enabled us to help shape the direction of the Court to ensure that it fulfills its important mandate to bring to justice the perpetrators of mass atrocities.

In its first full year as a member of the Human Rights Council, the United States engaged in all aspects of the body's work. For example, the United States participated in the Council's first Universal Periodic Review of the United States' human rights record, submitting its written report in August 2010. In November 2010,

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I was privileged to co-lead with Assistant Secretary for Democracy, Human Rights, and Labor Michael Posner and Assistant Secretary for International Organizations Esther Brimmer a high-level interagency delegation in presenting the U.S. report in Geneva and to answer questions about the U.S. human rights record. The United States also took the lead or contributed strongly to the Council's decisions to establish a new Special Rapporteur on the rights to freedom of peaceful assembly and association and a new mechanism to address gender discrimination. Finally, the United States supported the Human Rights Council's Special Session in December 2010 concerning the crisis in Cote d'Ivoire. Convening the Special Session sent a strong signal of the Council's resolve to protest human rights violations and abuses and prevent future violations and abuses in Cote d'Ivoire, and also marked the Council's increasing willingness to focus on country-specific situations, a trend we welcome.

In the area of the law of armed conflict, the United States continued to place priority on ensuring that its detention operations, detainee prosecutions, and operations involving the use of force—including those in the armed conflict with al-Qaeda, the Taliban, and associated forces—are consistent with all applicable law, including international law. In January 2010, an interagency task force established by President Obama completed a comprehensive review of the status of all of the individuals detained at Guantanamo Bay when President Obama assumed office and made consensus determinations about the disposition of each detainee's case consistent with national security, the interests of justice, and the U.S. longstanding policy not to transfer any individual to a country where it is more likely than not he would be tortured. In habeas litigation brought by Guantanamo detainees in U.S. federal court, the United States continued to assert the 2001 statutory Authorization for Use of Military Force ("AUMF") as the basis for the President's detention authority and to make clear that the laws of war would inform the executive branch's interpretation of the AUMF. With respect to detention operations in Afghanistan, the United States continued its rigorous implementation of detainee review procedures established in 2009.

Negotiating, joining, and implementing treaties remained another important aspect of U.S. efforts to promote international law in 2010. The Senate provided its advice and consent to ratification of the New START Treaty, which entered into force earlier this year and represented a landmark contribution to the global arms control and nonproliferation regime. In the family law area, the Senate provided its advice and consent to ratification of the Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance, and the United States signed the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. The Senate also provided its advice and consent to ratification of two treaties concerning defense trade cooperation with Australia and the United Kingdom. The United States also signed many treaties and agreements, including two new treaties relating to aviation security, the 2010 Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation and the 2010 Beijing Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, and air transport agreements with the European Union and its Member States and with Japan. U.S. treaty implementation efforts spanned numerous areas, including human rights and consular relations. For example, the State Department released the updated and expanded third edition of its Consular Notification and Access Manual, an important feature of the executive branch's work to ensure U.S. compliance with the consular notification and access requirements of the Vienna Convention on Consular Relations and related bilateral consular conventions.

The Office of the Legal Adviser worked closely with colleagues in other bureaus and departments on a broad array of resolutions considered and adopted during the year by the Security Council, the General Assembly, and other UN bodies, including for example the adoption and implementation of a range of critically important resolutions related to peacekeeping missions and sanctions programs in various countries around the world, and efforts to stem the proliferation of weapons of mass destruction. In December

2010, the United States played a key role in negotiating UN Security Council Resolution 1966, which established an institution known as the residual mechanism to handle the essential functions remaining when the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda conclude their work, including the prosecution of fugitives indicted by the tribunals who remain at large after the two tribunals cease functioning.

The Supreme Court issued several noteworthy decisions in 2010 on issues arising in our increasingly globalized world. In *Abbott v. Abbott*, the Court held that "rights of custody" under the Hague Convention on International Child Abduction include a *ne exeat* right, which is a parent's right to consent before the other parent removes a child from a country. In the area of foreign sovereign and official immunity, the Court held in *Samantar v. Yousuf* that the Foreign Sovereign Immunity Act does not govern immunity for foreign officials, making clear that the immunity of individual foreign officials should be determined under the common law instead, and the important role of the executive branch in such determinations.

Despite the many accomplishments in international law that this edition documents, 2010 was also marked by loss, with the passing of several distinguished figures in the international legal community. As I wrote on October 15, 2010, in *Opinio Juris*, Professor Louis Henkin "was one of the few truly great men I have ever met" who dramatically "shaped modern international human rights law" over his long and distinguished career.* Sir Ian Brownlie made incalculable contributions to international law, including through his membership in the International Law Commission. The United States is thankful for Ms. Paula Escarameia's invaluable service as a member of the International Law Commission, and we pay our respects to Professor Rex Nettleford, who passed away while he was serving on a Human Rights Council mission to the United States. As a member of the World Trade Organization's

* Harold Hongju Koh, "Louis Henkin (1917–2010)," *Opinio Juris* (Oct. 15, 2010), available at *http://opiniojuris.org/2010/10/15/louis-henkin-1917-2010/*.

panel in the tuna dolphin dispute brought against the United States, Mr. Sivakant Tiwari served with great integrity and professionalism, as he had in his distinguished earlier career in the Singapore Legal Service. Finally, we also owe our gratitude to Mr. Krzysztof Skubiszewski, who brought wisdom and fairness to his duties as President of the Iran-U.S. Claims Tribunal. I would like to acknowledge the achievements and service of these international lawyers and scholars, to honor their memories, and to express our condolences to their families, friends, and colleagues.

As in decades past, the *Digest* continues to reflect the sustained, collaborative effort of many dedicated members of the Office of the Legal Adviser and assistance from our colleagues across the U.S. government. I want especially to thank Stephen Townley, who reviewed and commented on all of the chapters. Among the many volunteers whose significant contributions to the current volume should be acknowledged are Kevin Baumert, Matthew Burton, Michelle Cannon, Maegan Conklin, Daphne Cook, Winnie Fuentes, Kimberly Gahan, Jennifer Gergen, Sandy Kupchan, Frank Holleran, Rebecca Ingber, Jessica Karbowski, Keith Loken, Elizabeth Miller, Holly Moore, Christine Sanford, Mark Simonoff, Scott Vesel (formerly of the office), and Aaron Zelinsky. I am also grateful for the contributions of our colleagues in other U.S. agencies, particularly the Department of Justice, the Department of the Treasury's Office of Foreign Assets Control, and the Office of the U.S. Trade Representative. 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 the indefatigable Elizabeth Wilcox for editing this volume and for her efforts to make the *Digest* more accessible its readers.

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 this practice will 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 2010, both in print and on the State Department's website, brings the new *Digest* series current for the period 1989–2010. 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 2010 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, some 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 June 2011) 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 decisions of federal courts or international dispute settlement bodies and final rules issued before the end of June 2011, as well as several noteworthy developments. Updates on most other 2011 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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This year, the headings for chapters 9 and 16 have been modified slightly to correspond more closely to their contents.

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*. 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 ("GPO") provides electronic access to government publications, 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; and the Daily Compilation of Presidential Documents introduced in January 2009. The Federal Digital System, available at *www.gpo.gov/fdsys*, is GPO's new online site for U.S. government materials and has replaced its previous site, *www.gpoaccess.gov*.

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.gpo.gov/fdsys/browse/collection.action?collectionCode=CDOC*, and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at *www.gpo.gov/fdsys/browse/collection.action?collectionCode=CRPT*. 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.usa.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/?content=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* (nonprecedential 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

On March 22, 2010, the Supreme Court granted certiorari to the U.S. Court of Appeals for the Ninth Circuit in a case challenging provisions of the Immigration and Nationality Act, as amended ("INA"), that prescribe how U.S. citizens can transmit their citizenship to their children if their children are born out of wedlock outside the United States. *Flores-Villar v. United States,* 130 S. Ct. 1878 (2010). The plaintiff claimed that the INA provisions in effect in 1974, when he was born, violated the equal protection component of the due process clause of the Fifth Amendment by requiring fathers to be present in the United States for longer than mothers before their out-of-wedlock children born abroad could be eligible for derivative citizenship. On August 26, 2010, the United States filed its brief in support of affirmance of the Ninth Circuit's 2008 decision, *United States v. Flores-Villar,* 536 F.3d 990 (9th Cir. 2008). Excerpts below from the U.S. brief provide the factual background to the litigation and summarize the government's key arguments. Citations to the joint appendix are omitted. The full text of the U.S. brief is available at *www.justice.gov/osg/briefs/2010/3mer/2mer/toc3index.html.* The Supreme Court heard oral arguments in the case on November 10, 2010, and its decision was pending at the end of 2010.*

* * * *

* Editor's note: On June 23, 2011, the Supreme Court affirmed the Ninth Circuit's decision. *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011).

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STATEMENT

1. . . . At the time of petitioner's birth in 1974, a child born outside the United States to married parents, only one of whom was a U.S. citizen, could acquire citizenship through his or her U.S. citizen parent if, before the child's birth, the citizen parent had been physically present in the United States for a total of ten years, at least five of which were after the parent had turned fourteen years of age. 8 U.S.C. 1401(a)(7) (1970).[1] The same physical-presence requirement applied if the child was born out of wedlock and the father was a U.S. citizen (and if the paternity was established through legitimation while the child was under age 21). 8 U.S.C. 1409(a) (1970); see *Nguyen v. INS*, 533 U.S. 53, 59–73 (2001) (discussing current version of Section 1409(a), requiring, *inter alia*, that paternity be established while the child was under age 18).[2] If, however, the child was born out of wedlock outside the United States and only his mother was a U.S. citizen, Section 1409(c) transmits U.S. citizenship to the child if the mother was a citizen of the United States at the time of the child's birth and had been physically present in the United States before the child's birth for a continuous period of at least one year. *Id.* at 59–60.

2. In 1974, petitioner was born in Tijuana, Mexico, to unmarried parents. His mother is a citizen and national of Mexico, and his father, who was 16 years old at the time of petitioner's birth, is a U.S. citizen who resided in the United States for much of his life.

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[1] Section 1401 has since been amended, with former Section 1401(a)(7) redesignated as Section 1401(g) and the term of the required physical presence in the United States reduced to a total of five years, two of which must be after the parent turned fourteen. Immigration and Nationality Act Amendments of 1986 (1986 Act), Pub. L. No. 99-653, § 12, 100 Stat. 3657. That amendment does not apply unless the child was born on or after November 14, 1986, however, and thus does not govern petitioner's citizenship claim. See Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2618. Unless otherwise specifically stated, references herein to Section 1401 or Section 1401(a)(7) are to the 1970 version.

[2] Section 1409(a) was amended in 1986 to revise the requirements that must be satisfied for a child born abroad out of wedlock to obtain citizenship through a United States citizen father. 1986 Act, Pub. L. No. 99-653, § 13(b), 100 Stat. 3657; *Miller v. Albright*, 523 U.S. 420, 468 (1998) (Ginsburg, J., dissenting).

Although petitioner's father was a U.S. citizen from birth, petitioner's father did not obtain formal documentation of that fact until May 24, 1999 (almost 25 years after petitioner was born), when he was issued a certificate of citizenship upon his own application. Petitioner's father was confirmed as a citizen from birth based on the fact that his mother—petitioner's paternal grandmother—was a U.S. citizen by birth in the United States, and met the requirements of Section 1409(c) to transmit citizenship to her out-of-wedlock child (petitioner's father) at the time of his birth. It is not clear that petitioner's father was aware of his U.S. citizenship prior to adulthood.

When petitioner was two months old, his father and paternal grandmother brought him to the United States to receive medical treatment. After petitioner was released from the hospital, he lived with his father and grandmother in the San Diego area, where he grew up. Although petitioner's father is not listed on his birth certificate, in 1985 the father acknowledged petitioner as his son by filing an acknowledgment of paternity with the Civil Registry in Mexico.

On March 17, 1997, petitioner was convicted of importation of marijuana, in violation of 21 U.S.C. 952 and 960 (1994), and was sentenced to 24 months of imprisonment. After serving his sentence, petitioner was ordered removed from the United States, and he was removed on October 16, 1998. Petitioner repeatedly returned to the United States following removal, resulting in additional removal proceedings in 1999 (when he was twice deported) and again in 2002. In June 2003, following another illegal reentry, petitioner was convicted of two counts of illegal entry into the United States in violation of 8 U.S.C. 1325, and was again removed in October 2003. Petitioner again reentered the United States illegally and was once again removed in March 2005, after which he yet again unlawfully returned to the United States.

3. On February 24, 2006, petitioner was arrested and charged with being a deported alien found in the United States after deportation, in violation of 8 U.S.C. 1326(a) and (b). Petitioner sought to defend against the charge by establishing that he had acquired U.S. citizenship at birth through his father. After his indictment, petitioner filed an application for a certificate of citizenship with

the Department of Homeland Security (DHS), pursuant to 8 U.S.C. 1452(a). DHS denied petitioner's application (and his administrative appeal) because it was physically impossible for petitioner's father, who was 16 years old when petitioner was born, to have been present in the United States for five years after his fourteenth birthday, but prior to petitioner's birth, as required by former Section 1401(a)(7) in order for him to transmit U.S. citizenship to petitioner.

* * * *

SUMMARY OF ARGUMENT

Pursuant to its authority under Article I of the Constitution, Congress has enacted comprehensive rules governing immigration and naturalization. One subset of those rules governs the acquisition of citizenship by children born abroad to U.S. citizen parents. When a U.S. citizen has a child abroad with a non-citizen, Congress requires that the U.S. citizen parent have satisfied a physical-presence requirement prior to the child's birth before the parent may transmit his or her citizenship to the child as of birth. That requirement applies to married fathers and married mothers—and it applies to unmarried fathers such as petitioner's. In an effort to reduce the number of children who may be born stateless, Congress has applied a shorter physical-presence requirement to unmarried U.S. citizen mothers who give birth abroad. Such physical-presence requirements on the U.S. citizen parents of children born abroad ensure that foreign-born children will have sufficient connections to the United States to merit citizenship, and this Court has long upheld Congress's decision to require such a connection.

* * * *

Congress's choice of rules governing naturalization is entitled to deference by this Court and is subject to review under rational basis standards. But even if heightened review is applied to the equal protection challenge asserted here on behalf of petitioner's father, the statutory provisions are constitutional. There is no serious dispute that reducing the number of children born stateless is an important government objective. Congress chose to pursue that objective by applying a shorter physical-presence requirement to

unwed U.S. citizen mothers of foreign-born children than to other U.S. citizen parents. That statutory scheme is constitutionally permissible because it is substantially related to the government's important interest.

As Congress knew, most countries apply *jus sanguinis* citizenship laws, pursuant to which a child's citizenship is determined at birth through his blood relationship to a parent rather than with reference to his place of birth. In most of those countries—as indeed in most *jus soli* countries such as the United States—the only parental relationship that is legally recognized or formalized at birth for a child born out of wedlock is usually that of his mother. Thus, at birth, the child's only means of taking citizenship is through his mother. Although such a child's father may subsequently take actions to establish a legally recognized parental relationship, there is no guarantee that he will ever do so. Because impediments to an unwed mother's ability to transmit her citizenship to a child at birth create a substantially higher risk that a child will be born stateless, Congress eased the requirements for acquisition of U.S. citizenship by the children of those mothers.

The fact that Congress did not eliminate the possibility that any foreign-born child of a U.S. citizen parent would be stateless, either at birth or at some point later in his life, does not render its chosen framework unconstitutional. No foreign-born person has a free-standing constitutional right to U.S. citizenship, and no U.S. citizen has a free-standing right to transmit his or her citizenship to a foreign-born child. Congress balances competing interests in enacting laws governing naturalization. The carefully measured rules Congress enacted serve the important governmental interest in ensuring that children born abroad have sufficient ties to this country to merit citizenship and the interest in reducing statelessness—and consequently do not violate equal protection.

Even if this Court were to determine that the differing physical-presence requirements in Sections 1401 and 1409 violated equal protection, petitioner is not entitled to the relief he seeks, namely a reversal of his criminal conviction based on a determination that he has been a citizen from birth. The fact that Congress chose to apply the more stringent physical-presence requirements in Section 1401 to a substantial majority of U.S. citizen parents of foreign-born

children, the need to preserve necessary flexibility for Congress, as well as adherence to this Court's longstanding treatment of naturalization requirements lead to the conclusion that the proper way to cure any equal protection violation would be to apply the longer physical-presence requirements in Section 1401, on a prospective basis, to unwed citizen mothers. Petitioner's suggestions that the Court either extend the shorter physical-presence requirement in Section 1409(c) to unmarried fathers (but not to married parents of either gender) or retain the unequal treatment but reduce the length of the physical-presence requirement applicable to unmarried men make little sense and could foreclose future revision by Congress. Equalizing the treatment of all citizen parents of foreign-born children as suggested here would eliminate any equal protection problem and most faithfully preserve Congress's policy choices.

B. PASSPORTS

Gender Changes

On June 9, 2010, the Department of State announced a new policy and procedures for reflecting gender changes in U.S. passports and Consular Reports of Birth Abroad. The Office of the Spokesman explained:

> Beginning June 10, when a passport applicant presents a certification from an attending medical physician that the applicant has undergone appropriate clinical treatment for gender transition, the passport will reflect the new gender. The guidelines include detailed information about what information the certification must include. It is also possible to obtain a limited-validity passport if the physician's statement shows the applicant is in the process of gender transition. No additional medical records are required. Sexual reassignment surgery is no longer a prerequisite for passport issuance. A Consular Report of Birth Abroad can also be amended with the new gender.

The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2010/06/142922.htm*.

C. IMMIGRATION AND VISAS

1. Visa Waiver Program

On March 4, 2010, the Department of Homeland Security ("DHS") issued a final rule adding Greece to its list of countries eligible for the Visa Waiver Program ("VWP"). 75 Fed. Reg. 15,991 (Mar. 31, 2010). In general, travelers from VWP member countries may apply for admission to the United States without a visa for up to 90 days for tourism or business. DHS's action continued its efforts, together with the Department of State, to expand the VWP to eligible countries and strengthen the program's security, consistent with § 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"), Pub. L. No. 110-53, 121 Stat. 266. *See Digest 2007* at 32–36 and *Digest 2008* at 20–22; see also the DHS press release, available at *www.dhs.gov/ynews/releases/pr_1268162593062.shtm*. *See* Chapter 3.A.7. for a discussion of the information-sharing agreement the United States concluded with Greece as a condition for its entry to the VWP.

2. INA Exemptions Resolve First Amendment Challenges to Visa Denials

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 limited exemptions for Tariq Ramadan and Adam Habib. Mr. Ramadan and Mr. Habib are Swiss and South African academics who had applied for non-immigrant visas in 2005 and 2007, respectively, to travel to the United States for speaking engagements. In 2006 and 2007, respectively, Mr. Ramadan and Mr. Habib were denied non-immigrant visas, based on the inadmissibility grounds for terrorism-related activities under § 212(a)(3)(B) of the INA. The organizations that had invited Mr. Ramadan and Mr. Habib to speak in the United States then brought separate lawsuits challenging the visa denials

under the First Amendment to the U.S. Constitution. For discussion of the litigation, see *Digest 2006* at 18–29, *Digest 2007* at 19–26, and *Digest 2009* at 12–14.

The Secretary's 2010 actions made INA § 212(a)(3)(B)(iv)(VI)(dd) inapplicable to Mr. Ramadan and INA § 212(a)(3)(B) inapplicable to Mr. Habib, with respect to the specific activities that had rendered them inadmissible, for purposes of any application for non-immigrant visas and for admission to the United States as non-immigrants, thus establishing that neither Mr. Ramadan nor Mr. Habib would be found inadmissible to the United States on the basis of the facts underlying their previous visa denials.

3. Expulsion of Aliens

On March 26, 2010, the United States submitted written comments to the UN Secretariat, which responded to the International Law Commission's request for information and observations from states on issues relating to its work on the topic "Expulsion of Aliens." The ILC included its request for information in chapter III of its report on the work of its sixty-first session, which is available at *http://untreaty.org/ilc/reports/2009/2009report.htm* (at p. 11). The U.S. comments contained information on U.S. law concerning the expulsion of noncitizens and the conditions and duration of custody of persons who are being removed from the United States. It also included information on whether an individual who is removed from the United States unlawfully has a right to return to the United States and the procedures that U.S. officials follow in cases involving a noncitizen of the United States who is removed from the United States through a transit country. The U.S. submission is available at *www.state.gov/s/l/c8183.htm*.

On October 29, 2010, Mark A. Simonoff, Acting Legal Adviser, 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-second session. The text of the U.S. statement, excerpted below, is available

at *http://usun.state.gov/briefing/statements/2010/150315.htm.* The ILC report is available at *http://untreaty.un.org/ilc/reports/2010/2010report.htm.*

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The United States would like to express its appreciation for the continued efforts of Special Rapporteur Kamto on the topic of Expulsion of Aliens, including his efforts to revise and restructure the draft articles. The issues addressed by the Special Rapporteur are complicated ones and we encourage the Special Rapporteur and other members of the Commission, as well as other States, to carefully review the revised draft articles concerning the human rights of aliens subject to expulsion.

As our general and specific comments today illustrate, our concerns 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 remain acute.

First, we would like to underscore a previously-raised issue regarding methodology and the appropriate sources of international law. We continue to believe that, rather than attempting to codify new rights specific to the expulsion context and importing concepts from regional jurisprudence (e.g., from the European Commission and Court), for example in the case of provisions on family unity, the draft articles instead should reflect well-settled principles of law reflected in the texts of broadly ratified global human rights conventions.

Additionally, we continue to believe that extradition should be excluded from the scope of the draft articles; extradition should not be treated in the same manner as expulsion, but as the transfer of an individual—whether it is the transfer of an alien or a national—for a specific law enforcement purpose. We are concerned that many of the proposals would not be consistent with the settled practices and obligations of States under multilateral and bilateral extradition treaty regimes. In this regard, we have particular concerns regarding the new draft articles concerning disguised expulsion and extradition disguised as expulsion.

We also have concerns about the various references to language in the reports regarding the rights of persons who have been expelled. . . .

Regarding Draft Article 10, we of course recognize and appreciate the importance of including a non-discrimination principle in these draft articles. At the same time, we think it would be appropriate to make clear that this principle applies only to the process afforded to aliens in expulsion proceedings, and should not be framed in a manner that would unduly restrain the discretion enjoyed by States to control admission to their territories and to establish grounds for expulsions of aliens under their immigration laws.

Finally, we also have concerns about the 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. These provisions rely 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 Articles 6 and 7 of the International Covenant on Civil and Political Rights or any other United Nations convention. Moreover, we are concerned about the proposed obligation in Draft Article 14 regarding ensuring respect for "personal liberty" as this term is undefined and goes beyond existing obligations regarding non-refoulement assumed by States as parties to global conventions. . . .

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D. ASYLUM AND REFUGEE STATUS AND RELATED ISSUES

On January 21, 2010, following a devastating earthquake off Haiti's coast, the Secretary of Homeland Security designated Haiti under § 244A of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. § 1254a, thereby providing eligible nationals of Haiti with temporary protected status ("TPS") in the United States through July 22, 2011. 75 Fed. Reg. 3476 (Jan. 21, 2010). The Federal Register notice announcing the Secretary's designation explained:

> Given the size of the destruction and humanitarian challenges, there clearly exist extraordinary and temporary conditions preventing Haitian nationals from returning to Haiti in safety. Moreover, allowing eligible Haitian nationals to remain temporarily in the United States, as an important complement to the U.S. government's wider disaster relief and humanitarian aid response underway on the ground in Haiti, would not be contrary to the public interest.

Id. at 3477.

Section 244A authorizes the Secretary of Homeland Security, after consultation with appropriate agencies, to designate a state (or any part of a state) after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. For background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240–47; and *Digest 2004* at 31–33.

Cross References

Protection of migrants, **Chapter 6.F.**
Travel-related restrictions, **Chapter 16.A.6.c.**

Chapter 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. Department of State Guidance on Consular Notification and Access for Federal, State, and Local Law Enforcement and Other Officials

a. Third edition of manual on consular notification and access

On September 13, 2010, the Department of State announced the publication of the third edition of its manual entitled *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officers to Assist Them* ("Consular Notification and Access Manual"). As the foreword to the manual explains, it contains

> instruction and guidance relating to the obligations of federal, state, and local government officials to provide information to foreign consular officers and to permit foreign consular officers to assist their nationals in the United States. It focuses on the obligations of consular notification and access that pertain to the arrest and detention of foreign nationals; the appointment of guardians for minor and adult foreign nationals; deaths and serious injuries of foreign nationals; and wrecks or crashes of foreign ships or aircraft on U.S. territory. . . .

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> This manual is designed to help ensure that foreign governments can extend appropriate consular services to their nationals in the United States and that the United States complies with its legal obligations to such governments.

The new and substantially expanded manual contains seven main parts: Part 1, Basic Instructions; Part 2, Detailed Instructions on the Treatment of Foreign Nationals; Part 3, Frequently Asked Questions; Part 4, Legal Overview; Part 5, Suggested Statements to Detained Foreign Nationals, Notification Fax Sheets, and Consular Identification Cards; Part 6, Model Standard Operating Procedure; and Part 7, Phone and Fax Numbers for Foreign Embassies and Consulates in the United States.

Excerpts below from Parts 1 and 2 of the manual summarize the consular notification and access requirements pertaining to foreign nationals and provide detailed instructions on the treatment of foreign nationals. The links to the manual and related information are available at *http://travel.state.gov/law/consular/consular_753.html*.

PART ONE: BASIC INSTRUCTIONS

* * * *

SUMMARY OF REQUIREMENTS PERTAINING TO FOREIGN NATIONALS

- When foreign nationals from most countries are arrested or detained, they may, upon request, have their consular officers notified without delay of their arrest or detention, and may have their communications to their consular officers forwarded without delay. In addition, foreign nationals must be advised of this information without delay.
- For foreign nationals of some countries, consular officers must be notified of the arrest or detention of a foreign national even if the foreign national does not request or want notification.

- Consular officers are entitled to communicate with and to have access to their nationals in detention, and to provide consular assistance to them, including arranging for legal representation.
- When a law enforcement or other government official becomes aware of the death, serious injury, or serious illness of a foreign national, consular officers must be notified.
- When a guardianship or trusteeship is being considered with respect to a foreign national who is a minor or an incompetent adult, consular officers must be notified.
- When a foreign ship wrecks or a foreign aircraft crashes in U.S. territory, consular officers must be notified.

These are mutual obligations that also apply to foreign authorities when they arrest or detain U.S. citizens abroad. In general, you should treat a foreign national as you would want a U.S. citizen to be treated in a similar situation in a foreign country. This means prompt and courteous compliance with the above requirements.

* * * *

PART TWO: DETAILED INSTRUCTIONS ON THE TREATMENT OF FOREIGN NATIONALS

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The instructions in this manual are based on international legal obligations designed to ensure that governments can assist their nationals who live and travel abroad. While these obligations are in part matters of customary international law, most of them are set forth in the 1963 Vienna Convention on Consular Relations (VCCR), a multilateral treaty to which the United States and more than 170 other countries are party. Other obligations are contained in bilateral agreements (sometimes called "conventions" or "treaties"). These are legally binding agreements between the United States and one other country. Treaties such as the VCCR and other consular conventions are binding on federal, state, and local government officials to the extent they pertain to matters within such officials' competence as a matter of international law and the U.S. Constitution. See U.S. Const., art. VI, cl. 2 ("all Treaties made . . . shall be the supreme law of the land").

These instructions focus primarily on providing consular notification and access with respect to foreign nationals arrested or detained in the United States, so that their governments can assist them. The obligations of consular notification and access apply to U.S. citizens in foreign countries just as they apply to foreign nationals in the United States. When U.S. citizens are arrested or detained abroad, the U.S. Department of State seeks to ensure that they are treated in a manner consistent with these instructions, and that U.S. consular officers can similarly assist them. It is therefore particularly important that federal, state, and local government officials in the United States comply with these obligations with respect to foreign nationals here.

These instructions also discuss obligations relating to the appointment of guardians for foreign nationals who are minors or incompetent adults; to deaths of, serious injuries to, and serious illnesses of foreign nationals; and to accidents involving foreign aircraft or ships. Like the obligations of consular notification and access for arrest and detention cases, these are mutual obligations that also apply abroad.

* * * *

ARRESTS AND DETENTIONS OF FOREIGN NATIONALS

Whenever you arrest or detain a foreign national in the United States, you must inform the foreign national, without delay, that he or she may communicate with his or her consular officers. In most cases, the foreign national then has the option to decide whether to have consular representatives notified of the arrest or detention. If the foreign national requests notification, you must notify the foreign national's consular officers of the arrest or detention. In some cases, a bilateral agreement between the United States and the foreign national's country may require you to notify the foreign national's consular officers of an arrest or detention automatically, regardless of the foreign national's wishes.

Thus, you must notify consular officers that a national of their country has been arrested or detained if: (1) the foreign national requests notification after being informed of his or her option to make such a request; or (2) a bilateral agreement between the United States and the foreign national's country requires notification regardless of the foreign national's request. . . .

NOTIFICATION REQUIRED AT THE FOREIGN NATIONAL'S REQUEST: THE GENERAL RULE

In all cases except those involving nationals from "mandatory notification" ("list") countries . . . , you must inform the foreign national without delay that he or she may have his or her consular officers notified of the arrest or detention, and that he or she may communicate with the consular officers. Once informed of the option to request consular notification, the foreign national then decides whether he or she wants notification to occur. Some foreign nationals will request that their consular representatives be notified of their arrest or detention, while others will not. If the foreign national requests notification, you must ensure that the nearest consulate or embassy of the foreign national's country is notified of the arrest or detention without delay. This rule is set forth in Article 36(1)(b) of the VCCR, which applies to most countries.

Thus, the decision whether consular officers should be notified is for the foreign national to make *unless* the foreign national is from a "mandatory notification" ("list") country.

MANDATORY NOTIFICATION: THE SPECIAL RULE

In cases involving foreign nationals of certain countries, you must notify consular officers if one of their nationals is arrested or detained, regardless of whether the national requests or wants consular notification. . . .

Mandatory notification requirements arise from bilateral agreements between the United States and . . . 57 countries. The terms of the bilateral agreements are not identical to one another, however. Mandatory notification generally must be made to the nearest consulate or embassy "without delay," "immediately," or within a specific period of time established in the agreement.

You should inform the foreign national that notification has been made and advise him or her of the option to communicate with his or her consular officers. . . .

Privacy concerns or the possibility that a foreign national may have a legitimate fear of persecution or other mistreatment by his or her government may exist in some mandatory notification cases. The notification requirement should still be honored, but it is usually possible to take precautions regarding the disclosure

of information. For example, it is not necessary to provide information about why a foreign national is in detention unless the agreement specifically requires that the reasons be given. . . . *Under no circumstances should any information indicating that a foreign national has or may have applied for asylum or withholding of removal in the United States or elsewhere be disclosed to that person's government.* If a consular officer insists on obtaining information about a detainee that the detainee does not want disclosed, the Department of State can provide more specific guidance.

* * * *

Part 4 of the manual includes an overview of the legal authorities relating to consular notification and access, as well as four tables providing a comprehensive overview of the United States' consular treaty relationships. Table A lists all of the countries with which the United States has reciprocal mandatory notification obligations under bilateral agreements, describes the event that triggers the United States' obligations to provide consular notification under each bilateral agreement, and provides the preferred and absolute time limits for the United States to provide consular notification in each case. Table B lists the countries with which the United States has bilateral agreements that require it to provide consular notification upon the request of those countries' nationals, describes the event that triggers the United States' duty to provide such notification for each country, and provides the time limit for the United States to provide such notification in each case. Table C lists all countries in the world and indicates whether or not they are parties to the VCCR or other conventions or agreements concerning consular issues. Table D provides an overview of some of the information provided in the other tables. The "Legal Overview" section of Part 4 of the manual is excerpted below, followed by excerpts discussing U.S. views on the status of the consular notification and access requirement under customary international law.

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LEGAL OVERVIEW

The following pages summarize and provide the basic legal authorities that pertain to consular notification and access. They include the key provisions of the VCCR and bilateral agreements providing for "mandatory notification," as well as bilateral agreements providing for consular notification upon the detained foreign national's request, and information concerning other treaties relevant to the provision of consular services.

* * * *

The performance of consular functions was originally a subject of customary international law but not uniformly addressed in any treaty. Eventually, efforts were made to codify in international treaties the rights of governments to provide consular services to their nationals. Such treaties might be called "treaties," "conventions," or "agreements," but all generally enjoy the status of a treaty in international law, in that they legally bind the countries that become parties to them.

When the United States first began to conclude international agreements on consular relations with other countries, the usual vehicle was a type of bilateral treaty known as a treaty of "friendship, commerce, and navigation."

Later, bilateral conventions dealing exclusively with consular matters—typically referred to as "consular conventions"—became more common. The United States concluded bilateral consular conventions with many countries throughout the twentieth century, though with less frequency after it became a party to the Vienna Convention on Consular Relations (VCCR). As a result of decolonization and the breakup of several countries following the end of the Cold War, a number of new countries succeeded to the bilateral treaty obligations already in force between the relevant predecessor country and the United States. . . .

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CUSTOMARY INTERNATIONAL LAW

While consular relations are now largely governed by the treaties discussed above, the United States still looks to customary international law as a basis for insisting upon adherence to consular

notification and access requirements by a small number of countries not party to the VCCR or any bilateral agreement with a provision on consular notification and access. The Department of State takes the view that consular notification and access upon request as set forth in the VCCR is a universally accepted, basic practice that should be followed even for nationals of countries not party to the VCCR or other applicable bilateral agreements. Following this procedure also is consistent with the practice of U.S. consular officers, who seek similar treatment for U.S. citizens abroad. Thus, in all cases not covered by a mandatory notification agreement, the minimum requirements are to inform an arrested or detained foreign national that his or her consular officers may be notified upon request; to notify these consular officers if the national requests; and to permit the consular officers to provide consular assistance if they wish to do so.

Even these customary international law requirements will not apply to the arrest of a foreign national if the United States and the foreign national's government have not made arrangements for the conduct of consular relations or, in the absence of such relations, for the performance of consular functions through other mechanisms, such as "protecting powers"—that is, third countries that have agreed to perform consular functions on behalf of the United States and the country with which it does not have consular relations. It could nevertheless be appropriate in such situations to inform the foreign national's government of an arrest or detention as a matter of courtesy. Should such a case arise, you should contact the Department of State for guidance.

* * * *

b. Executive branch statements concerning significance of Consular Notification and Access Manual

In correspondence with members of Congress and in a submission to the Inter-American Commission on Human Rights in 2010 concerning U.S. efforts to comply with its obligations concerning consular notification and access under the Vienna

Convention on Consular Relations ("VCCR"), the United States underscored the importance of the Consular Notification and Access Manual. For example, the United States provided details on the manual in a June 23, 2010 submission to the Inter-American Commission on Human Rights concerning U.S. measures relating to consular notification and access. The U.S. submission, excerpted below, is available in full at *www.state.gov/s/l/c8183.htm*. Section A.2.d. below discusses other aspects of the U.S. submission. *See also* the State Department's media note concerning the revised manual, available at *www.state.gov/r/pa/prs/ps/2010/09/147059.htm*.

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. . . The State Department publication *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officers to Assist Them* provides instructions for police and prison officials on what they must do when they detain or arrest a foreign national in order to comply with the VCCR and bilateral consular agreements with 57 countries. It provides a list of those countries for which consular notification must be provided even if not requested by the detainee; sample consular notification statements in English and the 20 languages most commonly spoken by foreign nationals in the United States; a sample "standard operating procedure" on consular notification and access that police departments may adapt and post in their precincts; sample fax sheets to use when notifying a consulate of an arrest or detention; and sample diplomatic and consular identification cards, so that police and prison officials may recognize the consular credentials of foreign officials who visit their facilities to conduct a consular visit. The Manual also contains an extensive "Question and Answer" section detailing what police officers and prison officials should do in different scenarios that arise in practice: what sorts of arrests and detentions trigger the consular notification and access requirement; how quickly notification must be provided; what to do when a dual national is arrested; what to

do when the detainee does not speak English; what to do when the detainee's nationality cannot be conclusively ascertained; how officials from the consulate will provide consular access and assistance; and many others. The Manual lists all the foreign embassies and consulates in the United States, with phone and fax number. Finally, it provides a legal overview geared toward lawyers, courts, and foreign governments on the United States' consular obligations under international law.

The State Department distributes thousands of copies of the Manual per year, free of charge, to federal, state, and local officials, as well as to federal and state agencies, governors' and mayors' offices, bar associations, prison associations, foreign consulates in the United States, and many other entities. The Manual is also posted on the Department's website, *www.travel.state.gov/consularnotification*. Moreover, the Department also distributes other consular notification and access training materials free of charge and posts them on its website, including pocket cards for police officers listing basic consular notification and access procedures, and training videos and PowerPoint presentations on such procedures and scenarios. In 2009, the Department sent over 200,000 consular notification and access training materials—including approximately 84,000 pocket cards—to law enforcement agencies, prisons, and other entities across the United States. The Department also disseminates consular notification and access information on social media websites such as Twitter and Facebook. Over 200 individuals and organizations, including many local police departments, now follow the Twitter feed.

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On April 16, 2010, Richard R. Verma, then Assistant Secretary of State for Legislative Affairs, also provided details on the manual in identical letters he sent to four senators. Mr. Verma's letters are available in full at *www.state.gov/s/l/c8183.htm*. Other issues addressed in the letters are discussed below in A.2.a.

2. *Avena* Implementation and Related Issues

a. Executive branch communications with U.S. Congress

On October 15, 2009, Senators Patrick Leahy (D-VT), John F. Kerry (D-MA), Benjamin L Cardin (D-MD), Russell D. Feingold (D-WI),* and Al Franken (D-MN) wrote Secretary of State Hillary Rodham Clinton and Attorney General Eric H. Holder Jr. to "request the administration's input on what steps may be taken, including by Congress, to respond to the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) and *Medellin v. Texas*, 552 U.S. 491 (2008), and what additional measures may be taken to ensure that state and local officials are aware of the United States' obligations under the Vienna Convention on Consular Relations." On April 1 and 16, 2010, Ronald Weich, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, and Richard R. Verma, then Assistant Secretary of State for Legislative Affairs, respectively sent responses to each senator. Both Mr. Verma and Mr. Weich stated the administration's belief that "legislation would be an optimal way to give domestic legal effect to the *Avena* judgment . . . ." Mr. Verma's April 16 letter to Senator Leahy is excerpted below and available in full at *www.state.gov/s/l/c8183.htm*, along with the identical letters Mr. Verma sent to the other senators and the senators' October 2009 letter. Mr. Weich's responses to the senators are also available at *www.state.gov/s/l/c8183.htm*.

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The Administration shares your desire to ensure that the United States complies with its international obligation to provide consular notification to foreign nationals, including the obligations arising from the ICJ judgment. We also recognize that Vienna

* Editor's note: Senator Feingold left office on January 3, 2011.

Convention protections ensure that consular services can be provided to American citizens who are detained by foreign states. The U.S. Department of State has long worked through a variety of means to increase compliance with the requirements of the VCCR at the federal, state, local, and territorial levels, and welcomes the opportunity to enter into a dialogue with you on ways to better accomplish this goal.

This issue of ensuring consular access has been an ongoing source of tension in our relations with Mexico and other important U.S. allies, who have criticized the United States for failing to comply with its international law obligations, attempted to persuade U.S. state courts to comply with *Avena*, and lobbied Congress to pass legislation requiring states to give effect to that judgment.

In the aftermath of the *Medellín* decision, the Department has continued to consider other means to ensure U.S. compliance with the *Avena* judgment, including legislation. The Administration believes legislation would be an optimal way to give domestic legal effect to the *Avena* judgment, and we would welcome the opportunity to discuss various approaches with you.

The Department also has made efforts to encourage state governors to provide review and reconsideration in the context of the state clemency process. The Department has reached out to several states over the last several years, including Texas and California, but with limited success.

We believe that future VCCR compliance is best advanced through guidance, training, and model policies and practices to ensure consular notification and access in every case. The Department has been engaged for several years in an intensive outreach and training effort directed at federal, state, and local law enforcement officials, as well as counsel and judges. In the past year alone, the Department has distributed over 200,000 sets of briefing materials on consular notification, and has conducted training sessions across the country.

The Department is currently completing a new and expanded version of the widely disseminated Consular Notification and Access Manual . . . . [Editor's note: *See* A.1. *supra*.] The Department also distributes training videos for law enforcement personnel on consular notification and access, maintains comprehensive and

up-to-date information on consular notification at www.travel.state.gov/consularnotification, and even has a consular notification Twitter page, http://twitter.com/ConsularNotify, now followed by 130 organizations.

The United States takes its obligations under the VCCR very seriously. While there is more work to be done, compliance has improved over time. The Department receives only about 50 complaints a year from foreign governments that consular notification has not been provided, and many of these complaints are not meritorious. We believe that in the vast majority of cases, federal, state, local, and territorial law enforcement personnel provide consular notification and access in accordance with VCCR Article 36.

* * * *

b. Collaboration with the Uniform Law Commission

On January 6, 2010, the State Department responded to a request for views from the Uniform Law Commission ("ULC") concerning whether to establish a study committee to consider the feasibility of drafting uniform state legislation to implement the consular notification requirements of Article 36 of the VCCR. The ULC, a non-partisan, non-profit association comprised of commissions from each U.S. state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands, drafts both uniform and model state laws on a variety of topics with the aim of promoting consistency among state laws. *See www.nccusl.org*. The State Department's response, provided below, is also available in full at *www.state.gov/s/l/c8183.htm*. The ULC established a study committee in the spring of 2010, and the Department of State and the Department of Justice are participating as observers. For details on the committee, see *www.nccusl.org/Committee.aspx?title=Article 36 of the Vienna Convention on Consular Relations.*

The State Department welcomes the ULC's interest in establishing a study committee to consider the feasibility of drafting uniform

state legislation to implement the consular notification requirements of Article 36 of the Vienna Convention on Consular Relations (VCCR). The United States takes its obligations under the VCCR very seriously and is mindful of the importance of the convention's protections to ensuring that consular services can be provided to American citizens who are detained abroad. The Department has long worked through a variety of means to increase compliance with the requirements of the VCCR at the federal, state, local, and territorial levels. We believe that future VCCR compliance is best advanced through guidance, training, and model policies and practices.

We believe that, in the vast majority of cases, federal, state and local law enforcement personnel provide consular notification and access in accordance with VCCR Article 36. However, uniform state legislation implementing the consular notification requirements of Article 36 would significantly benefit our efforts to ensure consular notification and access in every case. As the ABA's [American Bar Association's] recent report on the VCCR notes, currently only three states have enacted laws concerning consular notification requirements, and each of these three addresses the requirements quite differently. Model legislation from the ULC would go a long way in furthering our aim of across-the-board and consistent compliance with our obligations under Article 36.

We note that it has been the longstanding position of the Department that consular information should be provided to those who have been arrested or detained as part of the booking process. As the ULC considers the feasibility of drafting model legislation to implement the requirements of Article 36, the Department would welcome an opportunity to consult with you.

c. Proposal to the Advisory Committee on the Criminal Rules

On February 25, 2010, Lanny A. Breuer, Assistant Attorney General, Criminal Division, Department of Justice, transmitted a proposal to amend Rule 5 of the Federal Rules of Criminal Procedure (and the corresponding Rule 58) to the Advisory Committee on the Criminal Rules. Mr. Breuer explained that

the proposed amendments "are important to ensure that foreign defendants arrested pursuant to U.S. charges receive the notifications to which they are entitled pursuant to the obligations of the United States under the multilateral Vienna Convention on Consular Relations ('the Vienna Convention'), or other bilateral agreements." On April 15–16, 2010, the Advisory Committee on the Federal Rules approved the proposal to amend Rules 5 and 58. In its report to the Standing Committee on Rules of Practice and Procedure, the Advisory Committee explained that

> [t]he proposed amendments would require federal courts to inform a non-citizen defendant in custody that an attorney for the government or a federal law enforcement officer will, upon request, notify a consular officer from the defendant's country of nationality of his arrest, and also that the government will make any other consular notification required by its international agreements.

The proposed amendments and an accompanying Committee Note were published for public comment on August 12, 2010. Additional excerpts below from the Advisory Committee's report describe the proposed amendments and provide the text of a Committee Note to accompany the amendment to Rule 5(d)(1)(F), which was identical to the Committee Note to accompany the amendment to Rule 58(b)(2)(H) (footnotes omitted). The full text of the report is available at *www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR05-2010.pdf*; discussion of the proposed amendments to Rules 5 and 58 is set forth on pages 1 and 24–30.

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2. Rules 5(d)(1)(F) and 58(b)(2)(H)

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. . . The Department of Justice proposed these amendments as a further step in fully meeting the United States' international obligation under Article 36 of the Vienna Convention. The Department

supports these amendments notwithstanding the Supreme Court's reservation of important questions surrounding the existence of any individual rights stemming from the Vienna Convention and any possible domestic remedies for a violation of the Convention. The amendments mandate a procedure that is uniformly supported without getting into unresolved questions of the extent of substantive rights or remedies. The Department noted, however, the importance of making it clear that the adoption of these amendments would not create substantive rights, modify in any respect extant Supreme Court case law construing Article 36 of the Vienna Convention, or address the various questions left open by the courts.

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Subdivision 5(d)(1)(F). This amendment is part of the government's effort to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of these amendments, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon,* 548 U.S. 331 (2006). These amendments do not address those questions.

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d. Inter-American Commission on Human Rights proceedings

As discussed in A.1.b. *supra*, on June 23, 2010, the United States provided information to the Inter-American Commission on Human Rights concerning U.S. measures to implement the Commission's recommendations relating to consular notification and access in the cases of four foreign nationals incarcerated in the United States. Cases No. 11.331, 11.753, 12.421, and 12.430. For background on two of the cases, see

Cumulative Digest 1991–1999 at 289–90 (Case No. 11.331, Cesar Fierro; Case No. 11.753, Ramon Martinez Villareal) and *Digest 2002* at 48–52 (Villareal). The U.S. submission discussed the Consular Notification and Access Manual, as well as other training, guidance, and outreach measures the United States had taken to implement its obligations under the VCCR (see A.1.b. *supra*). In view of the measures discussed in the U.S. submission, the United States requested that the Commission consider it "to be in partial compliance with the Commission's Recommendations in the foregoing consular notification and access cases." The full text of the letter is available at *www.state.gov/s/l/c8183.htm*.

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

In an unpublished opinion issued on September 15, 2010, the U.S. Court of Appeals for the Third Circuit affirmed a district court's dismissal of 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 ("ATCA" or "ATS"), 28 U.S.C. § 1350. *McPherson v. United States*, Case No. 08-3757 (3d Cir. 2010); 2010 U.S. App. LEXIS 18618 (3d Cir. 2010). For background on the case, including discussion of the U.S. *amicus curiae* brief filed on August 14, 2009, see *Digest 2009* at 19–27. The court held that the claim was time-barred. Given that holding, the court did not reach the issue of whether the Vienna Convention creates judicially enforceable individual rights to consular notification.**

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* 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.

** Editor's note: On March 2, 2011, the U.S. Supreme Court denied certiorari. *McPherson v. United States*, 131 S. Ct. 1692 (2011).

B. CHILDREN

1. Adoption

On August 6, 2010, the Department of State and the Department of Homeland Security, U.S. Citizenship and Immigration Services, issued a joint statement announcing the suspension of adoptions based on abandonment in Nepal. The joint statement, excerpted below, is available at *www.state.gov/r/pa/prs/ps/2010/08/145767.htm*.

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In order to protect the rights and interests of certain Nepali children and their families, and of U.S. prospective adoptive parents, the Department of State and U.S. Citizenship and Immigration Services (USCIS) have jointly decided to suspend adjudication of new adoption petitions and related visa issuance for children who are described as having been abandoned in Nepal.

The Department of State's recent interactions with the Government of Nepal and its efforts to review and investigate numerous abandonment cases, including field visits to orphanages and police departments, have demonstrated that documents presented to describe and "prove" the abandonment of children in Nepal are unreliable. Civil documents, such as the children's birth certificates often include data that has been changed or fabricated. Investigations of children reported to be found abandoned are routinely hindered by the unavailability of officials named in reports of abandonment. Police and orphanage officials often refuse to cooperate with consular officers' efforts to confirm information by comparing it with official police and orphanage records. In one case, the birth parents were actively searching for a child who had been matched with an American family for adoption. Because the Department of State has concluded that the documentation presented for children reported abandoned in Nepal is unreliable and the general situation of non-cooperation with and even active hindrance of investigations, the U.S. Government can no longer reasonably determine whether a child documented as abandoned

qualifies as an orphan. Without reliable documentation, it is not possible for the United States government to process an orphan petition to completion.

To the best of our knowledge, all other countries that had been processing adoption cases from Nepal have stopped accepting new cases due to a lack of confidence that children presented as orphans are actually eligible for intercountry adoption.

The suspension of adjudication of new adoption petitions on behalf of Nepali children reported as found abandoned is effective as of the date of this statement. Any petition filed for a child who has been presented as found abandoned and who was matched with a prospective adoptive parent prior to the date of this announcement, as evidenced by an official referral letter from the Government of Nepal, will continue to be adjudicated on a case-by-case basis and in light of the totality of the evidence available. The Department of State will reach out to prospective adoptive parents who meet these criteria. . . .

2. Abduction

a. Ne exeat *clause*

On May 17, 2010, the Supreme Court issued a judgment in its first international family law case, *Abbott v. Abbott*, 130 S. Ct. 1983 (2010). The Hague Convention on International Child Abduction ("Hague Convention" or "Convention"), T.I.A.S. No. 11,670, 1343 U.N.T.S. 49, provides, with certain enumerated exceptions, that a child abducted to another country in violation of a parent's "rights of custody" must be returned to the child's country of habitual residence. The question before the Court was whether "rights of custody" encompass a *ne exeat* right—that is, a parent's right to consent before the other parent removes the child from the country. Holding that a *ne exeat* right creates a right of custody, the Court reversed the judgment of the U.S. Court of Appeals for the Fifth Circuit and remanded the case for a determination whether any of the Convention's exceptions to return are applicable.

The case arose after a couple, who had lived in Chile, separated. A Chilean court granted physical custody to the mother and a *ne exeat* right to the father, who also had a *ne exeat* right by Chilean statute. The mother then removed the child to the United States without the father's consent, and the father brought suit in a federal court in Texas, asserting that the Hague Convention required the child's return to Chile. The district court held that a *ne exeat* right is not a right of custody, and thus does not trigger return, and the Fifth Circuit affirmed.

In reversing the Fifth Circuit, the Court agreed with arguments the United States provided in a September 2009 *amicus curiae* brief, available at *www.justice.gov/osg/briefs/2009/3mer/1ami/2008-0645.mer.ami.html*. *See Digest* 2009 at 29–41. The Court's decision also resolved a split among U.S. courts of appeals, three of which had held that *ne exeat* rights are not rights of custody and one of which, the U.S. Court of Appeals for the Eleventh Circuit, had held that *ne exeat* rights are rights of custody. The Court drew upon the text of the Convention, the Department of State's views, decisions of courts in other States Parties to the Convention, and the Convention's object and purposes.

First, the Court determined that the text of the Convention supports a conclusion that rights of custody 'include *ne exeat* rights. The Court noted that "[t]he Convention defines 'rights of custody' to '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.'" *Abbott v. Abbott*, 130 S. Ct. at 1989 (quoting Art. 5(a) of the Convention). The Court then concluded that the father's *ne exeat* right gave him a joint right to determine the child's residence by ensuring that the child could not live outside Chile. In reaching that conclusion, the Court reasoned:

> . . . The phrase "place of residence" encompasses the child's country of residence, especially in light of the Convention's explicit purpose to prevent wrongful removal across international borders. See Convention

> Preamble . . . . And even if "place of residence" refers only to the child's street address within a country, a *ne exeat* right still entitles [the father] to "determine" that place. "[D]etermine" can mean "[t]o fix conclusively or authoritatively," Webster's New International Dictionary 711 (2d ed. 1954) (2d definition), but it can also mean "[t]o set bounds or limits to," *ibid.* (1st definition), which is what [the father's] *ne exeat* right allows by ensuring that [the child] cannot live at any street addresses outside of Chile. It follows that the Convention's protection of a parent's custodial "right to determine the child's place of residence" includes a *ne exeat* right.

Id. at 1990–91. The Court also concluded that the father's *ne exeat* right gave him a joint right relating to the care of the child because, by withholding consent or placing conditions on the child's place of residence, the father could determine the language the child speaks, the identity the child finds, or the culture and traditions the child absorbs. *Id.* at 1991.

Second, the Court cited the State Department's view that rights of custody include *ne exeat* rights, and concluded that the State Department's view was entitled to deference. "It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight,'" the Court stated. *Id.* at 1993 (citing *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)). "There is no reason to doubt that this well-established canon of deference is appropriate here." *Id.*

Third, the Court observed that the conclusion that rights of custody include *ne exeat* rights accords with the views of most other contracting states. High courts in England, Israel, Austria, Germany, and South Africa have so held, the Court noted, as have appellate courts in Australia and Scotland, though a few courts have held otherwise. *Id.* at 1993–94. The Court also cited the views of scholars, stating, "Scholars agree that there is an emerging international consensus that *ne exeat* rights are rights of custody, even if that view was not generally formulated when the Convention was drafted in 1980." *Id.* at 1995. The Court also noted that the official history of the

Convention, while not directly addressing *ne exeat* rights, supports the conclusion that such rights are encompassed in rights of custody. *Id.*

Fourth, the Court stated that "[a]dopting the view that the Convention provides a return remedy for violations of *ne exeat* rights accords with its objects and purposes." *Id.* The Court continued:

> The Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence. See Convention Preamble . . . . Ordering a return remedy does not alter the existing allocation of custody rights, Art. 19 . . . , but does allow the courts of the home country to decide what is in the child's best interests. It is the Convention's premise that courts in contracting states will make this determination in a responsible manner.
>
> Custody decisions are often difficult. Judges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective consideration of all the factors that should be weighed in determining the best interests of the child. This judicial neutrality is presumed from the mandate of the Convention, which affirms that the contracting states are "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody." Convention Preamble . . . . International law serves a high purpose when it underwrites the determination by nations to rely upon their domestic courts to enforce just laws by legitimate and fair proceedings.
>
> To interpret the Convention to permit an abducting parent to avoid a return remedy, even when the other parent holds a *ne exeat* right, would run counter to the Convention's purpose of deterring child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes. . . . The Convention should not be

> interpreted to permit a parent to select which country will adjudicate these questions by bringing the child to a different country, in violation of a *ne exeat* right. Denying a return remedy for the violation of such rights would "legitimize the very action—removal of the child—that the home country, through its custody order [or other provision of law], sought to prevent" and would allow "parents to undermine the very purpose of the Convention." *Croll* [*v. Croll*], 229 F.3d. [133,] 147 [2d Cir. 2000)] (Sotomayor, J., dissenting). This Court should be most reluctant to adopt an interpretation that gives an abducting parent an advantage by coming here to avoid a return remedy that is granted, for instance, in the United Kingdom, Israel, Germany, and South Africa. . . .
>
> Requiring a return remedy in cases like this one helps deter child abductions and respects the Convention's purpose to prevent harms resulting from abductions. . . .

Id. at 1995.

b. 2010 Hague Abduction Convention Compliance Report

On May 21, 2010, 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 ("Convention"). 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 2010 report, covering the period October 1, 2008, through September 30, 2009, identified Brazil, Honduras, and Mexico as "Countries Not Compliant with the Convention" and named Bulgaria as a state "Demonstrating Patterns of Noncompliance." For the first time, the report also discussed the performance of the U.S. Central Authority in implementing the Convention inside the United States. The State Department's

Office of Children's Issues acts as the U.S. Central Authority. For additional details, see the press release the State Department issued on June 1, 2010, available at *www.state.gov/r/pa/prs/ps/2010/06/142445.htm*. The report is available at *http://travel.state.gov/pdf/2010ComplianceReport.pdf*.

Cross References

Alien Tort Claims Act litigation, **Chapter 5.B.**

Chapter 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

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

On February 1, 2010, 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"), entered into force. The agreements were signed in Washington on June 25, 2003, and the United States and the European Union exchanged instruments of ratification for the agreements on October 28, 2009. For background on these agreements, see S. Treaty Doc. Nos. 109-13 and 109-14 (2006); *Digest 2006* at 127–38, 139–47; *Digest 2008* at 56–57 and 78; and *Digest 2009* at 45–46.

On February 1, 2010, the bilateral instruments relating to extradition or mutual legal assistance between the United States and EU member states that had not entered into force in 2009 also entered into force. *See Digest 2009* at 45–49 for a complete list of these agreements, details on their significance, and a list of agreements that entered into force in 2009. For additional background, see *Digest 2006* at 131, 135–38, 139–40, and 146–47.

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2. U.S.–Bermuda Mutual Legal Assistance Treaty

On June 29, 2010, President Barack H. Obama transmitted the Treaty between the Government of the United States of America and the Government of Bermuda relating to Mutual Legal Assistance in Criminal Matters, signed at Hamilton on January 12, 2009, to the Senate for its advice and consent to ratification. S. Treaty Doc. No. 111-6 (2010). In his letter transmitting the treaty to the Senate, President Obama explained that it "is one of a series of modern mutual legal assistance treaties being negotiated by the United States to more effectively counter criminal activities" and "should enhance our ability to investigate and prosecute a wide variety of crimes." President Obama continued:

> The Treaty provides for a broad range of cooperation in criminal matters. Under the Treaty, the Parties agree to assist each other by, among other things: producing evidence (such as testimony, documents, or items) obtained voluntarily or, where necessary, by compulsion; arranging for persons, including persons in custody, to travel to the other country to provide evidence; serving documents; executing searches and seizures; locating and identifying persons or items; and freezing and forfeiting assets or property that may be the proceeds or instrumentalities of crime.

Daily Comp. Pres. Docs., 2010 DCPD No. 00559, p. 1.

The State Department's report on the treaty, which was transmitted to the Senate in S. Treaty Doc. No. 111-6, noted among other things that the treaty included one "relatively uncommon provision in U.S. MLATs, although it is based on similar language in MLATs with Canada and the United Kingdom (including the MLAT with the United Kingdom concerning the Cayman Islands)." The report explained that the provision, Article 18,

> provides that, before a Party seeks to enforce a compulsory measure requiring an action to be performed in the

> other Party (such as production of bank records) relating to a matter for which assistance under the Treaty is available, the Party must first attempt in good faith to obtain the desired assistance under the Treaty. The Requesting Party can fulfill its obligation under this Article by making a formal treaty request or by engaging in consultations for the purpose of assessing the availability of assistance under the Treaty. If the Requested Party does not or cannot commit to provide assistance in a timely fashion, and the delay has the potential to jeopardize the success of the investigation or prosecution, the Requesting Party would be relieved of any further obligation under this provision. In addition, this provision does not require use of the Treaty as a first resort where evidence is located in multiple jurisdictions, including the Requested Party, but the Requesting Party is seeking compulsion of evidence located elsewhere (for example, in its own territory).

The Senate's consideration of the treaty remained pending at the end of 2010.

3. U.S.–Algeria Mutual Legal Assistance Treaty

On April 7, 2010, Attorney General Eric Holder and Algerian Minister of Justice Tayeb Belaiz signed the U.S.–Algeria Treaty on Mutual Legal Assistance in Criminal Matters on behalf of their respective countries. The signing ceremony took place in Algiers, Algeria, and Mr. Holder made a signing statement expressing strong support for the treaty and explaining its significance. Excerpts follow from Mr. Holder's statement, which is available in full at *www.justice.gov/ag/speeches/2010/ag-speech-100407.html*.

. . . This treaty establishes a comprehensive framework for obtaining evidence in criminal cases.

The proliferation of crime across national borders makes it essential that we develop tools for international cooperation in

bringing to justice those criminals—including terrorists—who threaten our safety and security. This treaty will help us to achieve our common goal of ensuring that justice is done and that no criminal benefits by hiding evidence beyond our respective borders.

This new MLAT is emblematic of the good will between Algeria and the United States. It confirms the common goal we share in combating terrorism, organized crime and other serious violations of our laws. The treaty will allow for the efficient exchange of evidence that officials in both the United States and Algeria need to investigate and prosecute criminal activity. It is truly comprehensive in its scope, covering all crimes and a wide range of assistance, including witness statements, physical evidence, bank and business records. I expect the treaty to complement the current and growing cooperation between our investigative agencies.

* * * *

4. Extradition of Fugitives Alleging Fear of Torture

a. Saldana v. United States

On March 25, 2010, a district court in Tennessee dismissed an amended petition for a writ of habeas corpus filed by a Mexican national who challenged the Secretary of State's decision to approve his extradition to Mexico. *Saldana v. United States*, 700 F. Supp. 2d 953 (W.D. Tenn. 2010). The petitioner claimed he would likely be tortured if extradited to Mexico, in violation of U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") and the Foreign Affairs Reform and Restructuring Act ("FARR Act"). He sought a determination that the Secretary of State's December 3, 2009 decision to authorize his extradition to Mexico was judicially reviewable and requested the court to review the merits of the Secretary's decision under the Administrative Procedures Act ("APA"). He also claimed a procedural due process right under the U.S. Constitution to a hearing to address the torture issues he had raised with the Secretary and asserted that

the Secretary's decision to surrender him violated his substantive due process rights under the U.S. Constitution. For additional background on the case, including the U.S. motion to dismiss, see *Digest 2009* at 54–59.

In granting the U.S. motion to dismiss, the court agreed with the United States that, consistent with the rule of non-inquiry, the FARR Act and its implementing regulations prohibit judicial review of the Secretary of State's extradition decisions. The court underscored that "this is not an extreme case in which the Secretary of State has determined that Petitioner is likely to be tortured but decides to extradite him anyway, in violation of the Secretary's obligation under the FARR Act." In support of that conclusion, the court cited a declaration submitted by Clifton M. Johnson, Assistant Legal Adviser, Law Enforcement and Intelligence ("L/LEI"), Department of State, that provided an overview of the process for extraditing a fugitive from the United States and stated in part, "The Secretary will not approve an extradition whenever she determines that it is more likely than not that the particular fugitive will be tortured in the country requesting extradition." (Mr. Johnson's declaration, dated December 30, 2009, is available as document 6.b. for *Digest 2009* at *www.state.gov/s/l/2009/list/index.htm*.) The court also rejected the petitioner's claims of procedural and substantive due process violations under the U.S. Constitution. Excerpts below from the court's opinion highlight key aspects of the court's analysis in concluding that it did not have jurisdiction to review the Secretary's extradition decision.

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* * * *

[II.] a. Extradition and the Rule of Non-Inquiry Prior to the CAT

. . . In the United States, the procedures for extradition are governed by statute. *See* 18 U.S.C. §§ 3184 and 3186. The statutes establish a two-step procedure which divides responsibility for extradition between a judicial officer and the Secretary of State. *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir. 1997). . . .

* * * *

This bifurcated process, which divides responsibility between a judicial officer and the Secretary of State, reflects the fact that extradition proceedings contain legal issues particularly suited for judicial resolution, such as standards of proof, sufficiency of evidence, and treaty construction, yet simultaneously implicate questions of foreign policy, which are better answered by the Executive Branch. *Id.* at 110. Both "institutional competence rationales and our constitutional structure, which places primary responsibility for foreign affairs in the [E]xecutive [B]ranch, support this division of labor." *Id.* (*citing United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–322 (1936)).

The common law rule of non-inquiry, which strictly limits the scope of judicial review in extradition decisions, further reinforces this statutory division. Under the rule of non-inquiry, courts refrain from "investigating the fairness of a requesting nation's justice system," and from inquiring "into the procedures or treatment which await a surrendered fugitive in a requesting country." *See, e.g.*, *id.* (internal citations omitted). The rule, like extradition procedures generally, is rooted in concerns about institutional competency and notions of separation of powers. Since 1852, courts have concluded that the decision to extradite involves foreign policy concerns within the purview of the Executive Branch that should not be addressed by the courts. *See, e.g.*, *In re Thomas Kaine*, 55 U.S. 103, 110 (1852) ("[A]n Executive order of surrender to a foreign government is purely a national act, [it] is not open to controversy; nor can it be doubted that this executive act must be performed through the Secretary of State . . . ."); *Hoxha v. Levi*, 465 F.3d 554, 563 (3d Cir. 2006); *Cornejo-Barreto v. Siefert* ("*Cornejo II")*, 379 F.3d 1075, 1083 (9th Cir. 2004), *vacated as moot*, *Cornejo-Barreto v. Siefert* ("*Cornejo III")*, 389 F.3d 1307 (9th Cir. 2004); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 584 (6th Cir. 1985).

In *Munaf v. Geren*, 128 S. Ct. 2207 (2008), the Supreme Court reaffirmed the principles supporting the rule of noninquiry, noting that the fear of torture in a foreign country "is a matter of serious concern, but . . . that concern is to be addressed by the political branches, not the judiciary." *Id.* at 2225 (*citing* M. Bassiouni, *International Extradition: United States Law and Practice* 921 (2007) ("Habeas corpus has been held not to be a valid means of

inquiry into the treatment the relator is anticipated to receive in the requesting state.").[1]

The *Munaf* Court emphasized that "it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." *Id.* In particular, the Court noted that the "judiciary is not suited to second-guess [Executive] determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Id.* at 2226 (*citing* The Federalist No. 42, p. 279 (J. Cooke ed. 1961) (J. Madison)). In contrast, 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, and what to do about it if there is." *Id.*

The extradition statute and the rule of non-inquiry both establish that the judiciary's role in extradition is limited, leaving the ultimate extradition decision within the discretion of the Secretary of State. The issue before the Court is whether the Secretary's discretion has been constrained by Article 3 of the CAT and section 2242 of the FARR Act, thereby providing the Court with the power to exercise the writ of habeas corpus.

* * * *

c. Foreign Affairs Reform and Restructuring Act ("FARR Act")

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i. *Plain Language of the FARR*

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. . . Nothing in the FARR Act or its implementing regulations indicates that Congress intended to create judicial review and

[1] *Munaf* involved the transfer of American citizens to Iraqi authorities for crimes committed in Iraq. 128 S. Ct. at 2213. The rationale supporting the Court's refusal to exercise the power of the writ of habeas corpus, however, is still applicable to this case. *See id.* at 2222 (noting that "[a]t the end of the day, what petitioners are really after is a court order requiring the United States to shelter them from the sovereign government seeking to have them answer for alleged crimes committed within that sovereign's borders.").

silently alter the existing statutory extradition scheme or the rule of non-inquiry. At the time the FARR Act was passed, Congress was certainly aware that the Secretary of State was responsible for determining whether to surrender a fugitive by means of extradition pursuant to statute, and that the rule of non-inquiry limited the scope of judicial review of this determination. Despite this awareness, the FARR Act and its implementing regulations do not contain any language which suggests that these statutory procedures and judicial restraint principles should be superseded for CAT claims. Even after enacting the FARR Act, Congress made no changes to the statutory extradition provisions for cases involving CAT claims. In light of these factors, the Court finds that the jurisdiction provisions of the FARR Act, *see* § 2242(d), and its implementing regulations, *see* 22 C.F.R. § 95.4, comport with and preserve the statutory division of labor pursuant to 18 U.S.C. §§ 3184 and 3186 and the rationale supporting the rule of non-inquiry, both of which limit the role of the judiciary in the extradition context.

Furthermore, the same concerns regarding institutional competency and notions of separation of powers, "which place[] primary responsibility for foreign affairs in the Executive Branch," *Kin-Hong*, 110 F.3d at 110, remain present for extradition determinations involving CAT claims. Petitioner's claim that the Secretary of State failed to exercise her obligations under the CAT, although framed as a question of law, would require the Court to review the evidence the Secretary relied upon in making her extradition determination. Such evidence may include considerations beyond Petitioner's individual concerns and may involve sensitive matters of foreign policy.[4] Essentially, the Court would be "investigat[ing] the fairness of a requesting nation's justice system," and inquiring about "the procedures or treatment which

[4] In determining whether a fugitive should be extradited, the Secretary may consider factors including but not limited to: whether the extradition request was politically motivated, whether the fugitive is likely to be persecuted or denied a fair trial or humane treatment upon his or her return, the views of relevant regional bureaus such as U.S. Embassies, human rights reports, and information concerning judicial and penal conditions and practices of the requesting State. (*See* Johnson Dec. ¶¶ 4, 6–7).

await a surrendered fugitive in a requesting country." These are precisely the inquiries courts have declined to address. *See Munaf*, 128 S. Ct. at 2225 (the fear of torture in a foreign country "is a matter of serious concern, but . . . that concern is to be addressed by the political branches, not the judiciary."). Finally, this is not an extreme case in which the Secretary of State has determined that Petitioner is likely to be tortured but decides to extradite him anyway, in violation of the Secretary's obligation under the FARR Act. (*See* Johnson Dec. ¶ 8 (stating "The Secretary will not approve an extradition whenever she determines that it is more likely than not that the particular fugitive will be tortured in the country requesting extradition.").)

In accordance with the language of the FARR Act and its implementing regulation, the Court finds that Congress did not intend to make the Secretary of State's extradition decisions involving CAT claims subject to judicial review, and to the contrary, expressly prohibited such review. *See* FARR Act § 2242(d); *see* 22 C.F.R. § 95.4. Even if such review was not expressly prohibited, the Court would still decline to exercise the power of the writ of habeas corpus in this case because doing so requires the Court, to at least some degree, pass judgment on foreign justice systems and may potentially undermine the Government's ability to speak with one voice in this area. As noted in *Munaf*, "we need not assume the political branches are oblivious to these concerns. Indeed, the other branches possess significant diplomatic tools and leverage the judiciary lacks." 128 S. Ct. at 2226 (internal citations and quotation marks omitted).

* * * *

b. Trinidad y Garcia v. Benov

Similar issues were raised in the government's appeal to the U.S. Court of Appeals for the Ninth Circuit of a district court's 2009 grant of habeas corpus relief in *Trinidad y Garcia v. Benov*, 2009 U.S. Dist. LEXIS 115843 (C.D. Cal. 2009). The petitioner in the long-standing litigation, Hedelito Trinidad y Garcia ("Trinidad"), claimed among other things that his extradition

to the Philippines 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 and *Digest 2009* at 50–51. In an unpublished opinion issued August 24, 2010, the Ninth Circuit upheld the district court's decision, *Trinidad y Garcia v. Benov*, 2010 U.S. App. LEXIS 17840 (9th Cir. 2010), and on October 7, 2010, the government filed a petition for rehearing and rehearing en banc. Excerpts below from the U.S. petition provide the government's view that, when appropriate procedures are in place and the Secretary of State has followed them, a court may not inquire into the Secretary's decision to extradite a fugitive after rejecting that individual's torture-related claim against extradition. The full text of the U.S. petition is available at *www.state.gov/s/l/c8183.htm*.*

* * * *

Our argument is a limited one. In particular, the Government is not arguing that the Secretary of State has the discretion to surrender a fugitive who likely will be tortured, even if foreign policy interests at the time would be served. The United States has already stated that it will not transfer a detainee if torture is more likely than not to occur in the receiving state. See Reply Brief for the Federal Parties, at 23, in *Munaf v. Geren*, Nos. 07-394 & 06-1666 (Sup.Ct.); *cf. Munaf*, 553 U.S. at 702 (noting that "this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway").

Rather, our position is that where appropriate procedures are in place, and the Secretary has followed those procedures in making a considered determination that a fugitive is not likely to be tortured, a court may not inquire into that decision, one which

* Editor's note: On February 28, 2011, the Ninth Circuit granted the government's petition for rehearing en banc. *Trinidad y Garcia v. Benov*, 636 F.3d 1174 (9th Cir. 2011).

often depends on complex, delicate, and confidential judgments concerning conditions in foreign countries and multiple foreign relations considerations.

We emphasize that the State Department has just such an established and extensive procedure in place to address allegations of torture; pursuant to State Department regulations and established practice, multiple Department policy and legal offices gather all relevant information so that the torture claim can be fully investigated and considered. Only when that comprehensive process is complete will the Secretary decide whether to issue a surrender warrant, which will in appropriate circumstances be issued only after receiving specific assurances of appropriate treatment by the receiving foreign state, subject to monitoring.

The ruling by the panel in this case that this Court's precedent provides that [the Secretary of State's extradition] determinations are justiciable significantly undermines the ability of the United States to carry out its treaty obligations to extradite fugitives in a timely manner. This result can cause serious friction in our relations with friendly nations, particularly if the relevant statute of limitations runs as the fugitive engages in lengthy litigation battles. This in turn threatens the cooperative relationships essential to the United States' ability to obtain assistance from foreign states in returning fugitives to this country so that they can be tried in the courts here. This Court's precedent thus undermines the United States' ability to obtain the return of fugitives, including terrorists and other criminals whose conduct threatens U.S. national security. Indisputably, a properly functioning extradition process is essential for foreign relations, national security, and effective domestic law enforcement.

* * * *

Additional excerpts below from the U.S. petition detail the government's views on why the panel's decision merited rehearing or rehearing en banc given relevant developments in case law and the enactment of the 2005 REAL ID Act, 8 U.S.C. § 1252(a)(4). Background on *Cornejo-Barreto v. Seifert*, discussed below, is available in *Digest 2001* at 70–87 and *Digest 2004* at 83–90; see also *Digest 2008* at 73–78 for discussion of

Munaf v. Geren and *Digest 2009* at 51–54 for discussion of *Prasoprat v. Benov*.

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* * * *

1. . . . [T]his Court granted rehearing *en banc* in the *Cornejo* litigation in order to resolve the very issue that is now back before the Court: whether a court may inquire into the Secretary's decision to surrender a fugitive after the State Department has rejected his torture claim. Two different panels of this Court had split on that issue, and the Court was therefore poised to set the binding law of the Circuit. However, because the extradition proceedings in *Cornejo* had lasted so long, the applicable Mexican statute of limitations expired and the matter became moot. This case presents a perfect opportunity for this Court to finish the *en banc* proceeding that was interrupted in *Cornejo*.

* * * *

3. Moreover, the reasoning in *Cornejo I* is directly inconsistent with the rationale applied by the Supreme Court in *Munaf*, to the effect that determinations about whether an individual is likely to be tortured after transfer to a foreign government lie exclusively within the realm of the Executive Branch. The Supreme Court ruled that such determinations are non-justiciable because they are beyond the proper competence of the courts. While the panel here recognized (slip op. 6) that *Munaf* did not involve a claim under the FARR Act, the Supreme Court's reasoning nevertheless makes clear that decisions about expected treatment in a foreign country are not appropriate for the Judicial Branch.

In addition, most recently, the D.C. Circuit in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010), relied heavily on *Munaf* and the language of the REAL ID Act in holding that a detainee at Guantanamo could not ask a district court to enjoin his transfer to a third country based on a claim that he would be tortured in the receiving country. The D.C. Circuit recognized United States policy against transfer when torture is more likely than not to occur, and concluded that, under *Munaf*, "the district court may not question the Government's

determination that a potential recipient country is not likely to torture a detainee." 561 F.3d at 514.

4. The panel's decision here also reflects a direct conflict in the Circuits. Like *Cornejo I*, the Fourth Circuit ruled in 2007 in *Mironescu* [*v. Costner*, 480 F.3d 664, 668–73 (4th Cir. 2007)], that the Rule of Non-Inquiry does not bar habeas review of the Secretary's extradition decisions. However, the Fourth Circuit went on to hold that Section 2242(d) of the FARR Act "flatly prohibits" courts from considering CAT and FARR Act claims on habeas review. *Mironescu*, 480 F.3d at 673–77. The court closely analyzed the text of Section 2242(d), and found that it does not permit habeas review of a CAT claim in the extradition context. The Fourth Circuit also noted that this reasoning applies as well to attempts to seek review under the Administrative Procedure Act. *Mironescu*, 480 F.3d at 677 n.15.

5. These factors compel the conclusion that rehearing or rehearing *en banc* is warranted because judicial review of extradition determinations by the Secretary causes serious problems by imposing substantial delays on the process of transferring fugitives to stand trial in foreign states and impeding the ability of the United States to fulfill its international treaty obligations. . . . [T]he extradition process in *Cornejo* lasted so long that the Mexican statute of limitations had run before the *en banc* proceedings could be completed. And in *Mironescu*, the extradition was so delayed that it became moot as Mironescu was in detention in the United States for the entirety of the time he could have been imprisoned in Romania, which had been seeking his extradition. See *Mironescu v. Costner*, 552 U.S. 1135 (2008) (certiorari petition dismissed as moot).

More recently, in *Prasoprat*, despite the existence of a CAT claim, the Government was able to complete an extradition to Thailand only because in Prasoprat's second habeas petition, the district court ruled that he had not made a sufficient showing of likely torture, and this Court denied a request to enjoin the surrender pending appeal. See *Prasoprat v. Benov*, No. 09-56067 (9th Cir. March 10, 2010) (order denying stay of extradition). Even in that circumstance, the extradition took approximately nine years to effectuate.

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c. Prasoprat v. Benov

Also in 2010, a U.S. citizen was extradited after a nine-year effort to challenge his extradition to Thailand on torture-related grounds. For background on the case, *Prasoprat v. Benov*, see *Digest 2009* at 51–54. On March 10, 2010, the U.S. Court of Appeals for the Ninth Circuit denied the petitioner's motion to stay extradition pending his appeal of a district court's order denying his second petition for a writ of habeas corpus. *Prasoprat v. Benov*, No. 09-56067 (9th Cir. Mar. 10, 2010). On March 17, 2010, the petitioner moved for a stay in the U.S. Supreme Court, which Justice Anthony Kennedy denied. The petitioner was extradited to Thailand on May 8, and on August 26 the Ninth Circuit dismissed the petitioner's appeal for lack of jurisdiction *Prasoprat v. Benov*, No. 09-56056 (9th Cir. Aug 26, 2010).

5. Extradite or Prosecute

On November 1, 2010, Todd Buchwald, Assistant Legal Adviser, Department of State, 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-second session. U.N. Doc. A/65/10, available at *http://untreaty.un.org/ilc/reports/2010/2010report.htm*. Excerpts follow from Mr. Buchwald's comments on the ILC's work concerning the issue of the obligation to extradite or prosecute, including the U.S. view that customary international law and state practice provide an insufficient basis for the ILC to prepare draft articles that would impose an obligation on states to extradite or prosecute beyond their existing treaty obligations. The full text of the U.S. statement is available at *http://usun.state.gov/briefing/statements/2010/150375.htm*.

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Madame Chairperson, with respect to the topic Obligation to Extradite or Prosecute, we appreciate the contributions that the

Special Rapporteur, Mr. Zdzislaw Galicki, has made to this topic. We also appreciate the contributions of the Working Group Chairman, Mr. Alain Pellet, and the temporary Chairman of the Working Group during the past ILC session, Mr. Enrique Candioti.

The United States is a party to a number of international conventions that contain an obligation to extradite or submit a matter for prosecution. We consider such provisions to be an integral and vital aspect of collective efforts to deny terrorists and other criminals a safe haven.

In 2007, the Commission reiterated the importance of ascertaining State practice in this area before proceeding to any conclusions. General Assembly resolution 62/66, highlighting a request from the Commission, invited Governments to provide information on legislation and practice regarding the topic. The Special Rapporteur similarly indicated in his third report to the Commission that there was still insufficient information provided in response to these requests. The United States has provided the requested information and appreciates the submissions made thus far by other States.

The United States agrees with the Chairman's observation that certain of the issues identified, such as whether and to what extent the obligation to extradite or prosecute has a basis in customary international law, may be considered only after a careful analysis of the scope and content of the obligation to extradite or prosecute under existing treaty regimes. The Secretariat has prepared a survey of multilateral instruments that proposes a framework for assessing current treaty-based formulations of the obligation.

The United States continues to believe, however, that its practice, as well as the practice of other States, reinforces the view that there is not a sufficient basis in customary international law or State practice to formulate draft articles that would extend an obligation to extradite or prosecute beyond binding international legal instruments that contain such obligations. Instead, States only undertake such obligations by joining binding international legal instruments that contain relevant provisions, and the obligations extend only to other States that are parties to such instruments and only to the extent of the terms of such instruments. Otherwise, States could be required to extradite or prosecute an

individual under circumstances where the States lacked the necessary legal authority to do so, such as the necessary bilateral extradition relationship or jurisdiction over the alleged offense.

Moreover, the United States continues to believe, in accordance with the framework established by the Working Group in 2009, that a comprehensive view of State practice in this area is essential to any consideration of whether there is a basis for inferring a customary international legal norm to extradite or prosecute. This is particularly the case where, as here, the State practice reported to date is largely confined to implementing treaty-based obligations which have been recognized by the Special Rapporteur as varying widely in scope, content, and formulation. While the lack of consistent and sustained State practice to extradite or prosecute in the absence of a treaty-based obligation should suffice to determine that there is not yet such a customary international law norm, any consideration that there might in fact be such a norm would necessitate a broader range of reporting.

As has been noted by the Commission ever since its first report on this topic, if the obligation to extradite or prosecute exists only under international treaties, draft articles on the topic would not appear to be appropriate. In light of the completion of the survey of multilateral instruments by the Secretariat, we urge the Commission, if it continues to believe that consideration of a customary norm in this area might be warranted, to allow sufficient time to receive and evaluate further information provided by States.

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6. Universal Jurisdiction

On May 4, 2010, the United States submitted a paper to the UN Secretariat, providing information and observations on the scope and application of the principle of universal jurisdiction. The U.S. submission, which is excerpted below, responded to the Secretariat's request, consistent with General Assembly Resolution 64/117, for states to submit views and information about the subject of universal jurisdiction.

The full text of the U.S. submission is available at *www.state.gov/s/l/c8183.htm.*

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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 for the offense would be established regardless of the location in which the offense took place, the nationality of either the victim or the perpetrator, or the effect of the crime on the State exercising jurisdiction.

Various federal criminal statutes provide U.S. courts with jurisdiction over certain serious offenses even when there is no direct link between the offense and the United States other than the alleged offender's presence in the United States.[1] Many of these statutes reflect the jurisdictional provisions of international terrorism and other treaties to which the United States is a party, but the statutes also cover a small subset of offenses—crimes like piracy, genocide and torture—for which the authority to exercise such broad jurisdiction derives, at least in part, from recognition of the offense as a universal crime under customary international law.[2] For example, shortly after World War II, genocide came to be viewed as a crime of universal concern with respect to which any state may proscribe the offense and prosecute offenders no matter where the crime occurs and regardless of the nationality of the offender or victim(s). Similarly, maritime piracy is one of the oldest recognized universal crimes. Thus, as part of its efforts to combat piracy off the coast of Somalia, the United States has strongly encouraged all states to ensure that they adequately criminalize piracy under their national laws and empower their courts with

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[1] Although the precise statutory language varies, this is most often expressed in statutory reference to the defendant being "present in" or "found in" the United States.

[2] *See* 18 U.S.C. § 1651 (Piracy); 18 U.S.C. § 1091 (Genocide); 18 U.S.C. § 2340A (Torture).

jurisdiction to prosecute cases even where the specific attack did not have a direct nexus to their state.

More frequently, legislation establishing broad U.S. criminal jurisdiction can be traced to U.S. treaty obligations.[3] For example, U.S. domestic law criminalizes a range of offenses covered by the various international counterterrorism conventions to which the United States is a party, even where the only link between the offense and the United States is the presence of the alleged offender in the United States. These statutes include offenses covered by the Convention of the Suppression of Unlawful Acts against the Safety of Civil Aviation, the International Convention on the Taking of Hostages, the International Convention for the Prevention and Punishment of Crimes against Internationally Protected persons, including Diplomatic Agents, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, the Convention for the Suppression of Unlawful Seizure of Aircraft, the International Convention for the Suppression of Terrorist Bombings, and the International Convention for the Suppression of the Financing of Terrorism, among others. In this context it is useful to note that most of the international counterterrorism conventions exclude from their scope offenses committed exclusively within a single state, where the offender and the victims are nationals of that state, the alleged offender is found in the territory of that state, and no other traditional basis for another state to assert jurisdiction would apply.

[3] Such legislation includes: 18 U.S.C. § 32 (Destruction of aircraft or aircraft facilities); 18 U.S.C. § 37 (Violence at international airports); 18 U.S.C. § 112, 878, 1116 (Protection of foreign officials, official guests, and internationally protected persons); 18 U.S.C. § 831 (Prohibited transactions involving nuclear materials); 18 U.S.C. § 1203 (Hostage taking); 18 U.S.C. § 2280 (Violence against maritime navigation); 18 U.S.C. § 2281 (Violence against maritime fixed platforms); 18 U.S.C. § 2332f (Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities); 49 U.S.C. § 46502 (Aircraft piracy). Broad criminal jurisdiction for some of these crimes may also reflect customary international law based on relevant state practice and opinio juris.

In practice, although we have not conducted a fully comprehensive review of U.S. practice, we are aware of a few examples of U.S. prosecutions based solely on the principle of universal jurisdiction, where there is no other link between the United States and the offense charged except that the alleged offender is present before the court. In 2003, the U.S. district court in Hawaii convicted a Chinese national of stabbing a Chinese captain and first officer of a Taiwanese-owned, Seychelles-flagged, all Chinese-crewed fishing vessel, while in international waters. After the fishing vessel made its way into U.S. waters, the defendant was indicted under the U.S. statute implementing the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.[4] [Editor's note: For discussion of this case, see *Digest 2002* at 133–34 and *Digest 2008* at 125–30.]

In two other well-known cases, although U.S. law would have permitted prosecution based solely on the principle of universality and the offender's presence in the United States, there were alternative bases for jurisdiction. For example, in 2008, a U.S. court convicted Chuckie Taylor, son of former Liberian president Charles Taylor, of torture and related crimes committed in Liberia between 1999 and 2003 under his father's regime. Although the U.S. torture statute[5] provides jurisdiction regardless of the nationality of the offender based on the offender's presence in the United States, Taylor is also a U.S. citizen. [Editor's note: *See Digest 2008* at 123–25 and B.7. below for discussion of the prosecution.] In 1998, Ramzi Yousef was convicted of a number of charges relating to his role in the 1993 bombing of the World Trade Center in New York City and conspiracy to bomb a series of U.S. commercial airliners in Southeast Asia in 1994 and 1995. Among the many charges against him for his role in plotting and executing attacks on the United States, Yousef also was convicted of placing and causing the detonation of a bomb aboard Philippines Airlines Flight 434, while en route from Manila to Japan. [Editor's note: *See Cumulative Digest 1991–1999* at 506.] In the final analysis, the appellate court

[4] 18 U.S.C. § 2280.
[5] 18 U.S.C. § 2340A.

determined that the protective principle provided the basis for U.S. jurisdiction.

In the U.S. justice system, federal criminal prosecutions must be brought by federal prosecutors working within the Department of Justice. Private parties may not file criminal complaints with the courts, and judges may not initiate criminal investigations. In addition, prosecution for a criminal offense must be based on a specific U.S. criminal statute that defines the offense as a crime under U.S. law.

As a general matter, the United States would note that universal jurisdiction is a basis for jurisdiction only and does not itself imply an obligation to submit a case for potential prosecution. In this case, the principle of universal jurisdiction is distinct from the treaty-based principle of *aut dedere aut judicare*.

When considering whether to exercise universal jurisdiction, even if customary international law or a treaty regime recognizes the state's authority to assert jurisdiction over an offense, there are often prudential or other reasons why the United States refrains from exercising such jurisdiction. For example, the United States may appropriately defer asserting jurisdiction in favor of a state on whose territory the crime was committed, as such crimes injure the community where they have been perpetrated in particular, the bulk of the evidence will usually be found in that territory, and prosecution within the territorial state may contribute to the strengthening of rule of law institutions in that state.

In conclusion, a number of U.S. statutes provide for jurisdiction where the only tangible link to the particular crime is the alleged offender's presence in the United States. Although prosecutions under these authorities and circumstances are rare, the United States believes that such jurisdiction, when prudently applied, with appropriate safeguards against inappropriate application, and with due consideration for the jurisdiction of other states, can be an important tool for ensuring that perpetrators of the most serious crimes are brought to justice and that the United States does not provide a safe haven for such individuals. The United States looks forward to learning more about other Member States' practice with respect to this jurisdictional principle and its effective and appropriate implementation.

On October 13, 2010, Gabriel Swiney, Attorney-Adviser, Office of the Legal Adviser, Department of State, 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. Swiney's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/149640.htm*.

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The issue of universal jurisdiction is a complicated one. So long as we are faced with problems such as piracy, genocide, and crimes against humanity, universal jurisdiction remains relevant. Yet despite the importance of this issue and its long history as part of international law, basic questions remain about universal jurisdiction and States' views and practices related to the topic. The submissions made by States to date and the Secretary-General's report are extremely useful in helping us to identify whether there are differences of opinion among States and, if so, where these areas of uncertainty lie.

Beyond the question of definition—what do we mean when we refer to "universal jurisdiction"?—other questions include the appropriate scope of the principle, its relationship to treaty-based obligations, and the need to ensure that decisions to invoke it are undertaken in an appropriate manner, including in cases where there are other States that may exercise jurisdiction. The practical application of universal jurisdiction also differs among countries, such as how often it is invoked, whether alternative bases of jurisdiction are relied upon at the same time, and what safeguards are available to prevent inappropriate prosecutions.

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

During 2010, the United States signed bilateral agreements with Finland, Denmark, Austria, and the Netherlands 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. Also in 2010, similar agreements signed in 2008 entered into force (the Czech Republic, Latvia, Lithuania), along with two others signed in 2009 (Spain and Greece). For background, see *Digest 2008* at 80–83 and *Digest 2009* at 66. The agreements with Spain and the Czech Republic are available at *www.state.gov/documents/organization/147088.pdf* and *www.state.gov/documents/organization/143684.pdf*, respectively. As of the end of 2010, the United States continued to negotiate such data-sharing agreements with other members of the Visa Waiver Program, consistent with a federal statute requiring completion of such agreements with all members of the program.

B. INTERNATIONAL CRIMES

1. Terrorism

a. Country reports on terrorism

On August 5, 2010, the Department of State released the 2009 Country Reports on Terrorism. The annual report is submitted to Congress pursuant to 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/2009*.

b. UN General Assembly

The Ad Hoc Committee of the General Assembly's Sixth (Legal) Committee concerning counterterrorism held its fourteenth session from April 12–16 to continue negotiations on a

draft Comprehensive Convention on International Terrorism. On April 12, 2010, James B. Donovan, then Deputy Legal Adviser, U.S. Mission to the United Nations, delivered opening remarks on behalf of the U.S. delegation. Excerpts below from Mr. Donovan's statement discuss the principles that the United States considers key to any resolution to the outstanding issues in the negotiations. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*.

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. . . [T]he United States continues to support a Comprehensive Convention on International Terrorism that would strengthen the existing international counterterrorism legal regime, and reinforce the critical principle that no cause or grievance justifies terrorism in any form. A convention that underscores this essential principal will be a significant achievement for this global body and in our collective efforts to combat and prevent terrorism.

The United States appreciates the efforts of those who seek to advance new proposals in an attempt to come to agreement on a finalized CCIT text. We firmly believe that any successful resolution to the outstanding issues must be predicated on a shared and clear understanding of certain fundamental principles:

First—A comprehensive convention on terrorism cannot provide a pretext for terrorist groups to claim their criminal acts are excluded from the scope of the convention in the name of national liberation, resistance to foreign occupation, or any other justification or motivation.

Second—As with prior counterterrorism conventions, a comprehensive convention should not reach state military action, which is subject to other international regimes.

The international community has come to consensus on these fundamental principles repeatedly in the past. In the Terrorist Bombings Convention, and more recently in four other counterterrorism instruments, we were able to come to agreement on the very language under consideration in Article 18 that has held up conclusion of this important instrument for too long. We have not been persuaded that there are deficiencies that need to be remedied

in this standard language that the international community has adopted five times before.

Although our preference for this standard language is well known, the United States has throughout been willing to consider all proposals that are consistent with these principles. It was in this spirit of accommodation and compromise, and with the understanding that it would provide a basis for concluding the Convention, that we supported the Coordinator's 2002 proposal.

Unfortunately, those who have objected to the 2002 Coordinator's proposal have not indicated a willingness to accept subsequent attempts at compromise, including the most recent 2007 text.

Concerning the 2007 proposal, we appreciate that the Coordinator offered it in an attempt to reiterate the principles already present in the text. We are concerned that the new language introduces ambiguity into the text and could be misconstrued to suggest that the scope of Article 18 is different from that of the comparable provisions in prior conventions. We are prepared to carefully consider the proposal, but there must be agreement that the 2007 proposal does not modify the fundamental principles we have outlined, and that the 2007 text will be interpreted in the same manner as the text found in the other counter-terrorism conventions. Ambiguity on these points will permit competing interpretations as to the very scope of this convention, thereby undermining its value.

We understand the Coordinator offered the 2007 proposal as a take it or leave it proposition, and we believe it needs to be considered in such a manner. . . .

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On October 5, 2010, Mr. Donovan addressed the Sixth Committee during its annual debate on terrorism. As excerpted below, Mr. Donovan's statement included discussion of U.S. support for the 18 international instruments concerning terrorism and the ongoing negotiations concerning a draft comprehensive counterterrorism convention. The U.S. statement is available at *http://usun.state.gov/briefing/statements/2010/149627.htm*.

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. . . We recognize the successes of the United Nations, thanks to the work of this Committee, and UN specialized agencies in developing 18 universal instruments that establish a thorough legal framework for combating terrorism. These instruments require state parties to criminalize, and cooperate in combating, a wide range of terrorist conduct, including terrorist bombings, terrorist financing, nuclear terrorism, hostage taking, and attacks against ships, fixed platform, airplanes and airports. Where needed, the international community has come together to address gaps and make improvements to this framework, as demonstrated recently with the conclusion last month of the Beijing Convention on the Suppression of Unlawful Acts relating to International Civil Aviation and the Beijing Protocol supplementing the 1971 Hague Hijacking Convention. [Editor's note: *See* B.1.d. below.]

The United States supports efforts to promote ratification of these 18 instruments, as well as efforts to promote their full and effective implementation. In this regard, we recognize the important role that the UN Office of Drugs and Crime's Terrorism Prevention Branch plays in providing much needed training to national criminal justice officials and have recently decided to increase our funding support for its work.

We also support efforts to further develop and enhance the legal framework to combat terrorism. In that respect, we have long supported and continue to support conclusion of a comprehensive convention that would reinforce the critical principle that no cause or grievance justifies terrorism. We have long strived to reach consensus on a text that would draw upon existing language on military activities, which has been widely accepted in the international community, to bring negotiations to conclusion. And while we remain willing to consider solutions consistent with fundamental principles that we have previously outlined, the United States is of the view that a continued impasse on this issue only serves to highlight those issues that divide us in the collective fight against terrorism. Our collective effort in countering the terrorist threat is more effectively focused on the many areas where we are united—and the United States is committed to working with partners around the world, including at and with the United Nations, in a sustained effort to combat terrorism and counter violent extremism.

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c. UN Security Council

On September 27, 2010, Secretary of State Hillary Rodham Clinton addressed the Security Council during its meeting on threats to international peace and security posed by terrorist acts, which the President of the Security Council convened for the Council to review and assess the effectiveness of the Council's counterterrorism efforts in the previous decade. In her statement, as excerpted below, Secretary Clinton underscored the U.S. commitment to working through multilateral institutions to confront the threat of terrorism. The full text of Secretary Clinton's statement is available at *http://usun.state.gov/briefing/statements/2010/148070.htm.*

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. . . [T]oday, let me emphasize that the United States is committed to working through multilateral institutions, including the United Nations, to confront the threats posed. We are also committed to strengthening this multilateral architecture. We believe it can do better. So although we are very supportive, we want to work with all of you to improve it. . . .

Counterterrorism demands a comprehensive approach, as reflected in the presidential statement that will be adopted at the conclusion of today's meeting. Therefore, we need intelligence operations capable of discovering terror plots, military and law enforcement officers trained and ready to stop them, border patrol officials who can spot potential dangers, justice systems that can fairly and effectively prosecute criminals, corrections systems that can then detain those who have been arrested and/or convicted. So we have to do more to develop these institutions and capacities and help each other by mobilizing expertise and resources.

But at the same time, beyond these measures we have to realize that countering terrorism means more than stopping terrorists. It means stopping people from becoming terrorists in the first place. And that requires addressing the political, economic, and social conditions that make people vulnerable to exploitation by extremists.

For people whose lives are characterized by frustration or desperation, for people who believe that their governments are unresponsive or repressive, al-Qaida and other groups may offer an appealing view. But it is a view rooted in destruction, and we have to provide an alternative view that is rooted in hope, opportunity, and possibility.

So that means enacting policies that do create new opportunities for people to build a better future for themselves, strengthening our commitment to core values, particularly human rights and the rule of law. We cannot sacrifice those values in our zeal to stop terrorists. Our values are what makes us different from those who are trying to tear down so much of the progress that has been made over the course of history, and I have to add, especially for women and girls.

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On December 20, 2010, the UN Security Council adopted Resolution 1963, which renewed the mandate of the Counter-Terrorism Committee's Executive Directorate ("CTED") until December 31, 2013. U.N. Doc. S/RES/1963. CTED's experts work under the CTC's policy direction to promote states' implementation of Security Council Resolutions 1373 (2001) and 1674 (2005). Philip J. Crowley, then Assistant Secretary for Public Affairs, Department of State, issued a statement on December 20, welcoming the new resolution and explaining how it reinforced key aspects of U.S. counterterrorism policy. As Mr. Crowley explained:

> The new resolution reinforces four core elements of US counterterrorism policy: First, the importance of building the capacity of partners to be able to tackle terrorist threats emanating from their territory; second, that respect for human rights and the rule of law are an essential part of a successful counterterrorism effort; third the need for comprehensive strategies to address the threat effectively, recognizing that "terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone," and that there is also "the need

> to promote the rule of law, the protection of human rights and fundamental freedoms, good governance, tolerance, inclusiveness to offer a viable alternative to those who could be susceptible to terrorist recruitment and to radicalization leading to violence," and finally, recognition of the invaluable role that civil society and local communities play in our common effort to combat terrorism and counter violent extremism.

The full text of Mr. Crowley's statement is available at *www.state.gov/r/pa/prs/ps/2010/12/153226.htm*.

d. New counterterrorism treaties concerning aviation security

On September 10, 2010, a diplomatic conference of the International Civil Aviation Organization ("ICAO") adopted two new treaties relating to aviation security: the 2010 Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation and the 2010 Beijing Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft. The Beijing Convention superseded the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation done at Montreal on September 23, 1971 ("Montreal Convention"), as amended by the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on February 24, 1988. The Beijing Protocol amended the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on December 16, 1970 ("Hague Convention"). The treaty texts are available at *www2.icao.int/EN/LEB/Pages/TreatyCollection.aspx*, along with related documents.

At the outset of the conference, Peter Gutherie, the alternate head of the U.S. delegation, explained the significance of the amendments and discussed what they would and would not require. Excerpts follow from Mr. Gutherie's statement, which is available in full at *www.state.gov/s/l/c8183.htm*.

. . . In modernizing the provisions of the Montreal and Hague Conventions, the amendments will better protect civil aviation while also enhancing the international legal framework to combat terrorism. ICAO has long been a leader in this area, and these two instruments have for many decades set the standard by which the international community has developed a comprehensive treaty framework to unite states in our common effort to combat terrorism. These updates will ensure that that the ICAO instruments remain at the forefront of that effort.

. . . The Montreal and Hague Conventions are criminal law instruments designed to bring states together in a joint effort to prohibit, prosecute, and prevent criminal activity that would endanger and exploit civil aviation. Building on international experience developed in other recent counterterrorism conventions, these updates will enhance and modernize the tools required for effective international cooperation in this area. Further, they will unite us in condemning and combatting criminal offenses that simply were not contemplated at the time the original instruments were adopted, such as using civil aircraft as a weapon. This includes the threat posed by the transportation of certain extraordinarily dangerous materials by civil aviation. Make no mistake, the intentional transport of biological, chemical and nuclear weapons, as well as transporting materials knowing they will facilitate the manufacture and use of such weapons, constitutes a direct and severe threat to the safety of civil aviation and all of our populations. Terrorists and their groups are seeking such weapons and criminals are actively engaged in making these materials available to terrorists and other criminals. We firmly believe that it is in all of our interests to prevent the exploitation of, and risk to, civil aviation in this area.

It is also important to delineate what these instruments are not designed to do. The instruments are focused on individual criminal liability. They are not designed to target State conduct, which is regulated by other international regimes. The current texts, in particular Article 4*bis* and 4*ter*, reflect this principle. These updates are also not designed to impose additional regulatory burdens on the aviation industry. These criminal law provisions have been carefully designed to impose specific mens rea requirements of knowledge and intentionality that simply do not capture the ordinary

and lawful activity of the aviation industry. The ability of international civil aviation to connect different people and cultures, and thereby promote tolerance and understanding, is itself a vital tool in the effort to combat terrorism. These updates are designed to strengthen and protect, not impede, that ability.

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Clifton Johnson, head of the U.S. delegation, signed the treaties on behalf of the United States on September 10. In a statement he delivered at the conclusion of the diplomatic conference, Mr. Johnson welcomed the adoption of the treaties and explained that "[t]he Beijing Convention and Beijing Protocol will significantly strengthen the existing international counterterrorism legal framework and facilitate the prosecution and extradition of those who seek to commit acts of terror—the kinds of heinous attacks that appalled the international community on September 11, 2001. They will also criminalize efforts by terrorists and other criminals to use civil aviation to transport extraordinarily dangerous materials, such as biological, chemical, and nuclear weapons." The full text of Mr. Johnson's statement is available at *www.state.gov/s/l/c8183.htm*. *See also* the fact sheet the State Department issued September 10, available at *www.state.gov/r/pa/prs/ps/2010/09/147110.htm*.

e. U.S. actions against support for terrorists

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

See Chapter 16.A.4.b.

(2) Foreign Terrorist Organizations

(i) New designations and modifications of existing designations

In 2010, the Department of State announced the Secretary of State's designation of four additional organizations and their associated aliases as Foreign Terrorist Organizations

("FTOs") under § 219 of the Immigration and Nationality Act: al-Qa'ida in the Arabian Peninsula ("AQAP") (75 Fed. Reg. 2920 (Jan. 19, 2010));* Harakat-ul Jihad Islami (75 Fed. Reg. 47,674 (Aug. 6, 2010)), Tehrik-e Taliban Pakistan ("TTP") (75 Fed. Reg. 53,732 (Sept. 1, 2010)), and Jundallah, also known as People's Resistance Movement of Iran ("PMRI") (75 Fed. Reg. 68,017 (Nov. 4, 2010)). Effective November 29, 2010, Secretary Clinton amended the Lashkar-e-Tayyiba ("LT," "LeT") designation to add the following additional aliases: Falah-I-Insaniat Foundation, FiF, Falah-e-Insaniat Foundation, Falah-e-Insaniyat, Falah-i-Insaniyat, Falah Insania, Welfare of Humanity, Humanitarian Welfare Foundation, and Human Welfare Foundation. 75 Fed. Reg. 73,156 (Nov. 29, 2010).

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 applicable sanctions and other legal consequences of designation as an FTO. For discussion of amendments to the Foreign Terrorist Organizations Sanctions Regulations in 2010, see Chapter 16.A.4.e.

(ii) Reviews of FTO designations

During 2010, the Secretary of State continued to review designations of entities as Foreign Terrorist Organizations ("FTOs"), and the Department of State announced the Secretary or the Deputy Secretary's determinations that the designations of the following six organizations as FTOs

* Editor's note: Although the Department of State announced the designation of AQAP as an FTO on January 19, 2010, the Secretary of State's determination was dated December 14, 2009. Accordingly, *Digest 2009* reported the designation of AQAP as one of the three FTO designations the Secretary of State made in 2009. *See Digest 2009* at 70.

"shall remain in place:" Kahane Chai (75 Fed. Reg. 504 (Jan. 5, 2010));** Ansar al-Islam and other designated aliases (75 Fed. Reg. 28,849 (May 24, 2010)); Communist Party of the Philippines/New People's Army and associated aliases (75 Fed. Reg. 40,019 (July 13, 2010)); Jemaah Islamiya ("JI" and other aliases) (75 Fed. Reg. 62,173 (Oct. 7, 2010)); Islamic Movement of Uzbekistan ("IMU" and other aliases) (75 Fed. Reg. 74,127 (Nov. 30, 2010)); and Gama'a al-Islamiyya ("IG" and other aliases) (75 Fed. Reg. 78,336 (Dec. 15, 2010)). The reviews were conducted consistent with the procedures for reviewing and revoking FTO designations in § 219(a) of the Immigration and Nationality Act, 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 and *Digest 2008* at 101–3 for additional details on the IRTPA amendments and review procedures.

On September 28, 2010, the Secretary revoked the designation of the Armed Islamic Group as an FTO, based on her conclusion that "the circumstances that were the basis for the 2003 re-designation of the Armed Islamic Group ("GIA") as foreign terrorist organization have changed in such a manner as to warrant revocation of the designation." 75 Fed. Reg. 63,532 (Oct. 15, 2010). The Secretary's determination also noted that, "[a]lthough the GIA no longer meets the criteria for designation as a foreign terrorist organization, its remnants and some senior leaders have joined al Qa'ida in the Islamic Maghreb (AQIM), a designated Foreign Terrorist Organization." The revocation was the second one made under the review procedures enacted in 2004.

** Editor's note: Although the Department of State announced the completion of the review of Kahane Chai's designation in January 2010, the Deputy Secretary of State's determination was dated December 22, 2009. Accordingly, the reference in *Digest 2009* to the Secretary of State's having determined, following a review, that the designations of 12 FTOs should remain in place should be understood to have included Kahane Chai as one of the 12 FTOs. *See Digest 2009* at 71.

(iii) FTO-related litigation

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

On July 16, 2010, the U.S. Court of Appeals for the D.C. Circuit issued a Per Curiam opinion in a case brought by the People's Mojahedin Organization of Iran ("PMOI"), which challenged the Secretary of State's 2009 decision to retain the designation of the Mujahedin-e Khalq and its associated aliases ("MEK"), including the PMOI. *People's Mojahedin Org. of Iran v. Department of State*, 613 F.3d 220 (D.C. Cir. 2010). The Secretary made her decision after reviewing the administrative record, including the petition for revocation of its FTO designation that the PMOI filed with the Secretary in 2008. *See Digest 2009* at 71–72 for additional background.

The D.C. Circuit held that "the Secretary failed to accord the PMOI the due process protections outlined in our previous decisions" and remanded. The court's earlier decisions addressed challenges the MEK and its aliases brought to the organization's redesignation as an FTO before the IRTPA eliminated the requirement for the Secretary of State to redesignate FTOs every two years and introduced procedures for review and revocation of those designations. In that earlier litigation, the court had held that, before the Secretary of State made a determination to redesignate the MEK and its aliases, due to the group's substantial connections with the United States, the State Department was required as a matter of due process to notify the MEK of the unclassified material the Department proposed to rely upon in making its decision before the Secretary of State made a determination to redesignate the MEK and its aliases. The State Department also was required to allow the MEK the opportunity to present, at least in written form, evidence to rebut the administrative record. For additional discussion of the previous litigation, see *Cumulative Digest 1991–1999* at 483, *Digest 2001* at 109–17, and *Digest 2003* at 176–77.

In its July 16 decision, the D.C. Circuit held that the Secretary still owed the MEK an opportunity to review and rebut the unclassified portions of the administrative record before making a decision on the MEK's petition for revocation. The court reached that conclusion even though the MEK, through its petition for revocation of its FTO designation, had initiated the Secretary of State's review of its designation and submitted volumes of material in support of its position. Given the absence of appropriate due process protection, the court did not rule on the adequacy of the administrative record on which the Secretary relied in reaching her decision. Noting the foreign policy and national security concerns asserted in support of designation, the court left the designation in place and remanded to the State Department for further proceedings consistent with its opinion. As of the end of 2010, the State Department's proceedings remained ongoing.

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

On June 21, 2010, the Supreme Court issued a decision upholding the constitutionality of 18 U.S.C. § 2339B, the criminal statute prohibiting the knowing provision of material support to designated foreign terrorist organizations ("FTOs"), as applied to the particular support that the plaintiffs wished to provide. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). The plaintiffs sought to conduct several activities with two designated FTOs, the Kurdistan Worker's Party ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"), including training members of the PKK on how to use international law to resolve disputes peacefully and training members of the LTTE on how to seek tsunami-related assistance. The plaintiffs alleged that certain elements of the statute were impermissibly vague under the Fifth Amendment of the U.S. Constitution and criminalized activity protected by the First Amendment. The Court affirmed in part and reversed in part the judgment of the U.S. Court of Appeals for the Ninth Circuit and remanded the case. For previous developments in the case, see *Digest*

2004 at 125–26, *Digest 2005* at 124–28, *Digest 2006* at 180–82, *Digest 2007* at 143–50, and *Digest 2009* at 72–82.

Limiting its decision on the Fifth Amendment claim to the specific activities at issue in the case, the Court held that the statute was not vague as applied. Likewise, in addressing the plaintiffs' First Amendment claim, the Court sustained the statute with respect to the support at issue as striking an appropriate balance between national security imperatives and free speech. Although the Court did not address how it would resolve "more difficult cases" that could arise in the future, the decision made clear the Court's view that: 1) under the Constitution, the material support statute can prohibit some forms of nonviolent, non-economic support to a designated FTO; and 2) the government's compelling interest in prohibiting such support may, in certain instances, justify extending the criminal prohibition on material support to speech-based support, such as providing training to members of an FTO on how to petition the United Nations, one of the specific potential actions at issue in the case.

The Court's decision deferred to the executive branch's assessments of the threat terrorism poses. Noting that "[t]his litigation implicates sensitive and weighty interests of national security and foreign affairs," the Court wrote that "Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not." The Court relied heavily on an affidavit the Department of State's Coordinator for Counterterrorism filed in the lower court, stating the executive branch's view that material support to FTOs ultimately will inure to the benefit of the organizations' criminal, terrorist functions whether or not that support ostensibly is intended to support nonviolent, non-terrorist activities.

(3) 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 2010, the Coast Guard determined that Sao Tomé and Principe and Timor-Leste were not maintaining effective counterterrorism measures. As a result, the Coast Guard imposed conditions of entry on vessels that have visited the two states' ports during their last five ports of call. 75 Fed. Reg. 12,250 (Mar. 15, 2010); 75 Fed. Reg. 18,871 (Apr. 13, 2010). The Coast Guard's previous determinations with respect to Cambodia, Cameroon, Cuba, Equatorial Guinea, Guinea-Bissau, Indonesia, Iran, Liberia, Madagascar, Mauritania, the Republic of Congo, Syria, and Venezuela remained in effect throughout 2010. *See Digest 2008* at 111–12 for additional background.

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

On August 1, 2010, the Agreement between the United States of America and the European Union on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program ("TFTP agreement"), signed in Brussels on June 28, 2010, entered into force. The TFTP agreement obligates the European Union to ensure that companies in EU territory that are identified in an annex to the agreement provide the U.S. Treasury Department with certain financial transaction messaging data for the purposes of preventing, investigating, detecting, or prosecuting terrorism and financing of terrorism through the U.S. Terrorist Finance Tracking Program ("TFTP"). To that end, the agreement sets forth procedures and requirements for the U.S. Treasury Department to obtain data from designated providers, and it makes the administrative subpoenas that the U.S. Treasury Department issues to obtain data under the agreement legally

binding in the territory of the European Union once Europol, the EU law enforcement body, confirms that the subpoenas otherwise comply with the agreement's relevant requirements. The agreement also includes requirements for the Treasury Department to follow in protecting the privacy of any transferred data, safeguards relating to transfers of information extracted from transferred data, and provisions concerning retention of data.

The TFTP agreement replaced an interim agreement, signed on November 30, 2009, which the United States and the European Union applied provisionally from February 1, 2010, in accordance with its terms, to February 11, 2010, when the European Parliament declined to consent to it. *See Digest 2009* at 83–84 for background.

Stuart A. Levey, then Under Secretary for Terrorism and Financial Intelligence, Department of the Treasury, issued a statement on July 8, welcoming the European Parliament's decision to adopt the revised agreement. Mr. Levey stated:

> . . . We worked with our European partners over the past several months to preserve the effectiveness of this unique program and, at the same time, ensure that we will enforce the unprecedented data-privacy safeguards that were built into the program from the beginning. This new agreement does that without compromising the operation of the TFTP.

The full text of Mr. Levey's statement is available at *www.treasury.gov/press-center/press-releases/Pages/tg771.aspx*.

On the same day, President Barack Obama issued a statement welcoming the agreement's conclusion and stressing his administration's commitment to protecting privacy and individual civil liberties in fighting terrorism, as the agreement reflected. The White House statement, excerpted below, is available in full at Daily Comp. Pres. Docs., 2010 DCPD No. 00581.

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* * * *

The TFTP has provided critical investigative leads—more than 1,550 to EU Member States—since its creation after the September 11, 2001 terrorist attacks. These leads have aided countries around the world in preventing or investigating many of the past decade's most visible and violent terrorist attacks and attempted attacks, including Bali (2002), Madrid (2004), London (2005), the liquids bomb plot against transatlantic aircraft (2006), New York's John F. Kennedy airport (2007), Germany (2007), Mumbai (2008), and Jakarta (2009).

This new, legally binding agreement reflects significant additional data privacy safeguards but still retains the effectiveness and integrity of this indispensable counterterrorism program.

Protecting privacy and civil liberties is a top priority of the Obama Administration. We are determined to protect citizens of all nations while also upholding fundamental rights, using every legitimate tool available to combat terrorism that is consistent with our laws and principles.

The United States values the European Union's partnership in meeting the complex challenges of this era. Putting the TFTP on this cooperative course is another example of how we can work with our European partners to prevent terrorism and simultaneously respect the rule of law. This cooperation strengthens our transatlantic ties and makes all our people safer.

The full text of the agreement is available at *www.state.gov/documents/organization/148509.pdf*.

g. Libya terrorist case: Abdel Basset Mohamed al-Megrahi

On August 20, 2009, despite strong U.S. objections, the Scottish government released Abdel Basset Mohamed al-Megrahi from custody and allowed him to return to Libya. Al-Megrahi, a Libyan national, was convicted in 2001 of murder and sentenced to life in prison for his role in the bombing of Pan Am flight 103 on December 21, 1988, which killed 270 persons. Citing health reasons, al-Megrahi had petitioned the Scottish government for release on compassionate grounds.

The United States expressed deep concern about the release, both in 2009 and in 2010. *See* Secretary Clinton's statement on August 20, 2009, available at *www.state.gov/secretary/rm/2009a/08/128113.htm*. On September 29, 2010, the Senate Committee on Foreign Relations held hearings entitled, "The al-Megrahi Release: One Year Later." In testimony before the Committee, excerpted below, Ambassador Nancy McEldowney, Principal Deputy Assistant Secretary, Department of State Bureau of European and Eurasian Affairs, explained the administration's continuing concerns about al-Megrahi's release and return to Libya and the United States' consistent position that al-Megrahi should serve his full sentence in Scottish prison. Ambassador McEldowney's written statement is available in full at *http://foreign.senate.gov/imo/media/doc/McEldowney%20Testimony.pdf*. For additional background, see *Cumulative Digest 1991–1999* at 457–58 and 477–80; *Digest 2002* at 111–12.

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It is the view of this Administration that the decision by Scottish authorities to release Megrahi and permit his return to Libya was profoundly wrong: morally wrong because it was an affront to the victims' families and the memories of those killed; politically wrong because it undermined a shared international understanding on Megrahi's imprisonment; and wrong from a security perspective because it signaled a lack of resolve to ensure terrorists are decisively brought to justice. As Secretary Clinton and President Obama have repeatedly stated, our resolute conviction remains that Megrahi should not be a free man and should be serving out the entirety of his sentence in a Scottish prison.

* * * *

. . . [A]t the time Megrahi was transferred from Libya to face trial, there existed a shared understanding between the United States, the United Kingdom, and Libya that he would serve his sentence in Scotland if convicted. On July 3, 2009, the British Foreign Office confirmed in a now-public letter to Scottish authorities that

in the late 1990s "the UK government was committed to ensuring that the Lockerbie accused were tried before a Scottish Court in the Netherlands and, if convicted, they would serve out their sentences in Scotland, in accordance with Scots law." In response to U.S. requests in 1998 for binding assurances that the accused would not later be transferred to Libya, the then British government maintained it could not enter into a legally binding commitment that would constrain the hands of future British governments. They nonetheless assured us of their political commitment that, if convicted, Megrahi would remain in Scotland until the completion of his sentence.

U.S. Reengagement with Libya*

In January 2001, Megrahi was convicted of 270 counts of murder and sentenced to life imprisonment. As Libya accepted responsibility and complied with an agreed settlement on compensation to the victims' families, efforts began to reintegrate the country into the international community and steer it onto a more positive path. The UN Security Council formally lifted international sanctions in September 2003, though the United States maintained its own sanctions because of continuing concerns about Libyan behavior.

Three months later, in December 2003, with encouragement from the United States and United Kingdom, the Libyan government announced its landmark decision to voluntarily dismantle its WMD and missile programs. In recognition of this shift towards Libya becoming a constructive contributor to international peace and security, the United States embarked on a step-by-step process of normalization and removal of sanctions as Libya followed through and implemented its commitments. This process culminated three years later, in 2006, in the reestablishment of full

* Editor's note: After Libyan leader Muammar Qaddafi began a violent crackdown against anti-regime protestors in Libya early in 2011, the United States, together with its allies, took a series of steps to protect civilians in Libya and isolate Qaddafi's regime. On March 28, 2011, President Obama summarized U.S. actions with respect to Libya in an "Address to the Nation," at the National Defense University, available at Daily Comp. Pres. Docs., 2011 DCPD No. 00206. *Digest 2011* will provide detailed discussion of U.S. actions toward Libya in 2011.

diplomatic relations between the U.S. and Libya. At no point during this reengagement did the United States deviate from its long-standing position on Megrahi's continued imprisonment in Scotland.

UK, Libya, and the Prisoner Transfer Agreement

The United Kingdom pursued its own reengagement with the Libyan government during this same period, reestablishing diplomatic relations in 1999 as Libya cooperated with the Lockerbie trial and handed over the accused. In May 2007, then Prime Minister Tony Blair traveled to Libya to sign a series of bilateral agreements, including a memorandum of understanding on negotiations for a Prisoner Transfer Agreement (PTA). . . .

* * * *

U.S. Opposition to Transfer or Release

Weeks after Megrahi's diagnosis [with prostate cancer], in November, the UK and Libya signed the PTA, and it entered into force on April 29, 2009. Six days later, on May 5, the Libyan government submitted its application for Megrahi's transfer to Libya under the auspices of the PTA. Throughout this period, the United States continued to communicate unequivocally to both the UK and Scottish authorities our long-standing policy that Megrahi should serve out his complete sentence in Scotland, regardless of the state of his health, the impact on other countries' interests, or the possible Libyan reaction.

As the UK and Libya moved forward with the PTA, we intensified our efforts to dissuade Scottish authorities from transferring Megrahi to Libya. Secretary Clinton highlighted our longstanding position directly to Scottish First Minister Alex Salmond soon after taking office, during a meeting in Washington in February 2009. Two months later, in April, the United States formally communicated to both the British and Scottish governments that the imminent entry into force of the PTA did not change our longstanding position on Megrahi's incarceration. We also underscored this message in April to senior officials in Tripoli, as did Attorney General Holder in a June phone call to Scottish Justice Minister Kenny MacAskill.

On July 24, Megrahi submitted to Scottish authorities an application for his release on compassionate grounds, as permitted

under Scottish law. Subsequent to this application, during the second week of August, the State Department again communicated to Scottish justice officials and First Minister Salmond our steadfast conviction that Megrahi should remain imprisoned in Scotland for the entirety of his sentence as previously agreed. The text of this diplomatic communication was released by the State Department on July 26 of this year. [Editor's note: *See www.state.gov/r/pa/prs/ps/2010/07/145141.htm*; *www.state.gov/r/pa/prs/ps/2010/07/145142.htm*.] Given that the compassionate release option was under consideration in Edinburgh, we also underscored to Scottish authorities that should they proceed with release despite our objections, under no circumstances should they permit Megrahi to return to Libya. We argued that if they decided they must release Megrahi over our protests, he should be confined to Scotland, remain under the close supervision of authorities, and that an independent and comprehensive medical exam clearly establish that he had less than three months to live. We emphasized that we did not endorse any release in light of the seriousness of Megrahi's crimes, but that such a tightly conditioned scenario would be less objectionable than any outcome that permitted his return to Libya. Secretary Clinton reinforced this message in a phone call to Justice Minister MacAskill on August 13, as did Deputy National Security Advisor John Brennan on August 19.

Megrahi's Release and U.S. Reaction

To our grave disappointment, Mr. MacAskill announced on August 20 his decision to reject Megrahi's application for transfer under the UK-Libya PTA but to grant his application for release on compassionate grounds. In choosing the latter option, the Scottish government not only permitted Megrahi's return to Libya, as would have occurred under prisoner transfer, but allowed him to do so as a free man able to spend the remainder of his life at home with his family and friends—a clear travesty of justice.

In explaining the decision, both at the time and subsequently, Mr. MacAskill and Mr. Salmond have stated that there was no contact between BP and Scottish authorities on this issue and that the decision was based solely on judicial grounds without political or economic consideration. They have also stated that the decision to proceed with so-called "compassionate" release was based on

the medical advice provided by the Director of Health and Care of the Scottish Prison Service that three months was a reasonable prognosis for Megrahi's life expectancy, and that additional medical experts compensated by the Libyan government played "no part in the decision."

The Department of State has no evidentiary basis to dispute or disprove these statements, but the fundamental truth remains that the decision to release Megrahi back to Libya was a grievous mistake. British Prime Minister David Cameron has stated that he shares this view, and the Prime Minister has asked the UK's Cabinet Secretary to conduct a review of British documents to determine if any further relevant materials can be brought to light. We have also called upon the Scottish government to be as transparent as possible in illuminating the circumstances surrounding their decision. In particular, we believe that a decision by the Scottish authorities to release the medical documentation that led to a determination of Megrahi's life expectancy would be appropriate and assist in further understanding the basis of their decision.

As President Obama has stated, all the relevant facts in this case should be made available. The Committee, the victims' families, and the American people deserve nothing less. . . .

2. Narcotrafficking

a. Majors List process

(1) International Narcotics Control Strategy Report

On March 1, 2010, the Department of State released the 2010 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 2009. 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/2010/index.htm*; see also *www.state.gov/p/inl/rls/rm/137531.htm*

(then Assistant Secretary for International Narcotics and Law Enforcement Affairs David Johnson's briefing on the release of the report).

(2) Major drug transit or illicit drug producing countries

On September 15, 2010, President Obama issued Presidential Determination 2010-16, "Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2011." Daily Comp. Pres. Docs., 2010 DCPD No. 00762, pp. 1–4. In this annual determination, the President named Afghanistan, The Bahamas, Bolivia, Burma, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, India, Jamaica, Laos, Mexico, Nicaragua, Pakistan, Panama, Peru, and Venezuela as countries meeting the definition of a major drug transit or major illicit drug producing country. A country's presence on the "Majors List" is not necessarily an adverse reflection of its government's counternarcotics efforts or level of cooperation with the United States. Costa Rica, Nicaragua, and Honduras were added to the list in 2010. 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 "continued support for bilateral programs in Bolivia and limited programs in Venezuela are vital to the national interests of the United States," thus ensuring that such U.S. assistance would not be restricted during fiscal year 2011 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 2011 for most types of U.S. assistance.

b. Interdiction assistance

During 2010, President Obama again certified, with respect to Colombia (75 Fed. Reg. 67,011 (Nov. 1, 2010), corrected

75 Fed. Reg. 68,413 (Nov. 8, 2010)) and Brazil (Daily Comp. Pres. Docs., 2010 DCPD No. 00882), 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. §§ 2291–4, following a thorough interagency review. For background on § 1012, see *Digest 2008* at 114.

3. Trafficking in Persons

a. Trafficking in Persons Report

On June 14, 2010, the Department of State released the 2010 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 2009 through March 2010 and evaluated the anti-trafficking efforts of a greater number of countries (177) than in past years, including, for the first time, those of the United States. In her introduction to the report, Secretary Hillary Rodham Clinton explained that it "highlight[ed] several key trends, including the suffering of women and children in involuntary domestic servitude, the challenges and successes in identifying and protecting victims, and the need to include anti-trafficking policies in our response to natural disasters, as was evident in the aftermath of this year's earthquake in Haiti." For the full text of Secretary Clinton's introduction, see *www.state.gov/g/tip/rls/tiprpt/2010/142744.htm*.

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 13 countries as Tier 3 countries, making them subject to certain restrictions on assistance in the absence of a Presidential national interest waiver. *See* Chapter 16.A.7.b. for discussion of the U.S. restrictions imposed for fiscal year 2011 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 report is available at *www.state.gov/g/tip/rls/tiprpt/2010*, and the remarks of Secretary Clinton, Under Secretary of State for Democracy and Global Affairs Maria Otero, and Ambassador-at-Large Luis CdeBaca, State Department Office To Monitor and Combat Trafficking in Persons, upon the release of the report are available at *www.state.gov/secretary/rm/2010/06/143113.htm*. Chapter 6.C.2.c. discusses the determinations relating to child soldiers that the report included for the first time.

b. Presidential determination

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 10, 2010, President Obama issued a memorandum for the Secretary of State, "Presidential Determination With Respect to Foreign Governments' Efforts Regarding Trafficking in Persons." Presidential Determination No. 2010-15, Daily Comp. Pres. Docs., 2010 DCPD No. 00747, pp. 1–2. The President's memorandum contained determinations concerning the 13 countries that the 2010 Trafficking in Persons Report listed as Tier 3 countries (Burma, Cuba, Democratic

Republic of Congo ("DRC"), Dominican Republic, Eritrea, Iran, Kuwait, North Korea, Mauritania, Papua New Guinea, Saudi Arabia, Sudan, and Zimbabwe). The President's determinations, which are excerpted below, imposed U.S. assistance restrictions under the TVPA for fiscal year 2011 on Eritrea and North Korea, partially waived those restrictions for Burma, Cuba, Iran, and Zimbabwe, and fully waived those restrictions for the DRC, the Dominican Republic, Kuwait, Mauritania, Papua New Guinea, Saudi Arabia, and Sudan. *See* Chapter 3.a. *supra* for discussion of the 2010 report. The Memorandum of Justification Consistent with the Trafficking Victims Protection Act of 2000, Regarding Determinations with Respect to "Tier 3" Countries set forth the determinations the President made and their effect; the memorandum also included a separate discussion of each of the named countries. The memorandum of justification is available at *www.state.gov/g/tip/rls/other/2010/147147.htm*.

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Consistent with section 110 of the Trafficking Victims Protection Act of 2000 (Division A of Public Law 106-386), as amended (the "Act"), I hereby:

Make the determination provided in section 110(d)(1)(A)(i) of the Act, with respect to Burma and Zimbabwe, not to provide certain assistance for those countries' governments for Fiscal Year 2011, until such governments comply with the minimum standards or make significant efforts to bring themselves 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;

Make the determination provided in section 110(d)(1)(A)(ii) of the Act, with respect to Cuba, the Democratic People's Republic of North Korea (DPRK), Eritrea, and Iran, not to provide certain assistance for those countries' governments for Fiscal Year 2011, until such governments

comply with the minimum standards or make significant efforts to bring themselves 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;

Determine, consistent with section 110(d)(4) of the Act, with respect to the Democratic Republic of the Congo, the Dominican Republic, Kuwait, Mauritania, Papua New Guinea, Saudi Arabia, and Sudan, that provision to these countries' governments of all programs, projects, or activities of assistance described in sections 110(d)(1)(A)(i) and 110(d)(1)(B) of the Act would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Burma, that a partial waiver to allow funding for programs described in section 110(d)(1)(A)(i) of the Act to support government labs and offices that work to combat infectious disease would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Cuba and Iran, that a partial waiver to allow funding for educational and cultural exchange programs described in section 110(d)(1)(A)(ii) of the Act would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Zimbabwe, that a partial waiver to allow funding for programs described in section 110(d)(1)(A)(i) of the Act for assistance for victims of trafficking in persons or to combat such trafficking, and for programs to support the promotion of health, good governance, education, agriculture and food security, poverty reduction, livelihoods, family planning, and macroeconomic growth including anti-corruption, and programs that would have a significant adverse effect on vulnerable populations if suspended, would promote the purposes of the Act or is otherwise in the national interest of the United States;

And determine, consistent with section 110(d)(4) of the Act, with respect to Zimbabwe, that assistance described in section 110(d)(1)(B) of the Act, which:

(1) is a regional program, project, or activity under which the total benefit to Zimbabwe does not exceed 10 percent of the total value of such program, project, or activity; or
(2) has as its primary objective the addressing of basic human needs, as defined by the Department of the Treasury with respect to other, existing legislative mandates concerning U.S. participation in the multilateral development banks; or
(3) is complementary to or has similar policy objectives to programs being implemented bilaterally by the United States Government; or
(4) has as its primary objective the improvement of Zimbabwe's legal system, including in areas that impact Zimbabwe's ability to investigate and prosecute trafficking cases or otherwise improve implementation of its anti-trafficking policy, regulations, or legislation; or
(5) is engaging a government, international organization, or civil society organization, and seeks as its primary objective(s) to: (a) increase efforts to investigate and prosecute trafficking in persons crimes; (b) increase protection for victims of trafficking through better screening, identification, rescue/removal, aftercare (shelter, counseling) training, and reintegration; or (c) expand prevention efforts through education and awareness campaigns highlighting the dangers of trafficking or training and economic empowerment of populations clearly at risk of falling victim to trafficking, would promote the purposes of the Act or is otherwise in the national interest of the United States.

* * * *

c. Human Rights Council resolution

On June 17, 2010, the Human Rights Council adopted a resolution on trafficking in persons and regional and subregional

cooperation in combating it through human rights-based approaches. U.N. Doc. A/HRC/RES/14/2. The United States cosponsored the resolution, which Germany and the Philippines introduced. Ambassador Eileen Chamberlain Donahoe, U.S. Permanent Representative to the Human Rights Council, addressed the Council in support of the resolution before its adoption. Ambassador Donahoe's statement, excerpted below, is available in full at *http://geneva.usmission.gov/2010/06/17/trafficking-in-persons/*.

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Article 4 of the Universal Declaration of Human Rights states that "No one shall be held in slavery or servitude; and slavery and the slave trade shall be prohibited in all their forms." The United States deplores the subjection of human beings to modern forms of slavery in the 21st Century.

Human trafficking is both a human rights and a law enforcement issue. Trafficking in persons covers acts that violate human rights and acts that impair the enjoyment of them. Slavery is a gross violation of human rights. Those who subject others to slavery violate human rights. Governments and government officials violate human rights when they engage in or are complicit in trafficking. Governments and their officials also violate human rights when they condone or acquiesce in trafficking or fail to live up to their due diligence responsibilities to prevent or investigate trafficking or punish traffickers. Business owners, middle persons, and others who traffic in human beings commit slavery or impair the enjoyment of human rights and fundamental freedoms by their victims: they are enemies of human dignity and worth.

The United States is committed to addressing the demand for commercial sex, cheap goods, and exploitable labor that traffickers meet through coercion. Businesses, consumers, and governments can help to eliminate involuntary servitude in the 21st Century by insisting on supply chains and procurement processes that are free of modern forms of slavery.

* * * *

d. Global Plan of Action

On July 30, 2010, the United States joined consensus when the General Assembly adopted the United Nations Global Plan of Action to Combat Trafficking in Persons ("Plan of Action"). U.N. Doc. A/RES/64/293. The Plan of Action, contained in the Annex to the General Assembly resolution that adopted it, included provisions relating to prevention of trafficking, protection of and assistance to victims, prosecution of criminal trafficking offenses, and strengthening of partnerships to combat the problem. After the resolution's adoption, Ambassador Frederick Barton, then U.S. Representative to the Economic and Social Council ("ECOSOC") delivered a statement explaining the U.S. perspective on the Plan of Action. Excerpts below from Ambassador Barton's statement highlight the U.S. view that international efforts to combat trafficking in persons should focus on universal ratification and implementation of the UN Convention against Transnational Organized Crime and its supplementary Protocol on Trafficking in Persons. The full text of Ambassador Barton's statement is available at *http://usun.state.gov/briefing/statements/2010/145468.htm*.

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The United States maintains its position that the focus of international anti-trafficking in persons efforts should be on universal ratification and implementation of the United Nations Convention against Transnational Organized Crime and its supplementary Protocol on Trafficking in Persons—not on the establishment of a new mechanism in New York. The TIP Protocol serves as the cornerstone for effective action in ending human trafficking. Ultimately, the political will of governments is vitally important in the fight against trafficking in persons.

Despite our concerns on the necessity of a global plan of action, we have collaborated in good faith to ensure that this document is as strong as possible while not creating any parallel New York process and not overriding the Palermo treaties or the mandate of the UNTOC Conference of the Parties in Vienna. We think the

final text of the document reflects this for the most part. We appreciate the efforts of the Co-Facilitators and the main supporters of the Global Plan of Action in addressing our concerns.

With regard to paragraph six of the General Assembly resolution, it is the view of the United States that this should be limited to an agenda item in the UN General Assembly where member states would self report on their efforts to implement the Global Plan of Action.* The United States will not object to the current language of paragraph six; however, we will not support efforts in the future to turn the Global Plan of Action, or any mechanism that may be established to review implementation of this action plan, into a formal ongoing mechanism in New York that will divert resources from technical assistance and other activities related to the Palermo Protocol.

Human [t]rafficking is a threat to national security, public health, and democracy. Real action is needed on the ground to combat trafficking, and it is our hope that the General Assembly resolution and the annexed Global Plan of Action will lead to universal ratification and implementation of the Protocol.

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On August 31, 2010, consistent with General Assembly Resolution 64/293, the General Assembly held a high-level, one-day meeting to launch the Global Plan of Action ("GPOA"). Ambassador Barton made a statement to the Assembly that reiterated U.S. views on the Plan of Action and its potential to reinforce states' efforts to implement the Protocol on Trafficking in Persons, as excerpted below. The full text of Ambassador Barton's statement is available at *http://usun.state.gov/briefing/statements/2010/146655.htm*.

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. . . We hope that the GPOA will emerge as a useful tool in enabling States to set strategic priorities and outline concrete actions, and to allocate resources and set benchmarks to ensure visible results for their efforts. We view this effort one more step bringing us

* Editor's note: Paragraph 6 decided that the General Assembly would review implementation of the Plan of Action in 2013.

closer to eradicating modern slavery once and for all throughout the world.

At the same time, the United States strongly believes that the focus of international anti-trafficking in persons efforts should be on universal ratification and implementation of the United Nations Convention against Transnational Organized Crime and its supplementary Protocol on Trafficking in Person. . . . While the political will to combat trafficking in persons has been increasing over the last 10 years, concrete actions are not always consistent with declarations, especially in terms of implementation, resource allocation, and capacity development.

Despite our efforts, the rate of victim identification is extremely low compared to the estimated massive scale of trafficking, especially with regard to trafficking for labor exploitation. Speaking about the annual Trafficking in Persons Report, Ambassador Luis CdeBaca recently stated: "a trend that we see in this year's report is the feminization of labor trafficking, which was once thought of as the male counterpoint to sex trafficking of women. But like their brothers, husbands, and sons, women are trapped in fields, factories, mines, and homes, often suffering the dual demons of forced labor and sexual exploitation. Today, more than 56 percent of trafficking is of women and girls, and we see more women than ever before as victims of labor trafficking, specifically involuntary domestic servitude." In this regard, the United States is pleased to support the on-going efforts of the international community to develop an international instrument to protect domestic workers, under the leadership of the International Labor Organization.

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. . . It is our hope that the General Assembly resolution and the annexed Global Plan of Action against Trafficking in Persons will help reinforce the Palermo Convention and its Protocol and the mandate of the UNTOC Conference of the Parties in Vienna.

4. Money Laundering

On February 10, 2010, the U.S. Department of the Treasury's Financial Crimes Enforcement Network issued a final rule

amending its information-sharing rules under the Bank Secrecy Act to improve efforts to counter terrorism financing and money laundering. 75 Fed. Reg. 6560 (Feb. 10, 2010). The final rule adopted the proposed amendments described in the notice of proposed rulemaking FinCEN published on November 16, 2009. 74 Fed. Reg. 58,926 (Nov. 16, 2009); see also *Digest 2009* at 88–91. Among other things, the new rule implements U.S. obligations under the Agreement on Mutual Legal Assistance between the United States of America and the European Union and the 27 related bilateral instruments the United States entered into with the EU member states. *See* A.1. *supra*.

5. Organized Crime

On October 18, 2010, Elizabeth Verville, then Deputy Assistant Secretary, Bureau of International Narcotics and Law Enforcement Affairs, Department of State, made the opening statement on behalf of the U.S. delegation to the Fifth Conference of the Parties to the UN Convention on Transnational Organized Crime. Excerpts below from Ms. Verville's statement discuss how international efforts to counter organized crime have progressed since the signing of the UN Convention on Transnational Organized Crime and its Protocols in 2000 and how the United States believes implementation of the convention can be improved. The full text of Ms. Verville's statement is available at *www.state.gov/p/inl/rls/rm/149557.htm*. *See also* the statement of David T. Johnson, then Assistant Secretary, Department of State Bureau of International Narcotics and Law Enforcement Affairs, to the UN General Assembly's Third Committee, on October 6, 2010, available at *http://usun.state.gov/briefing/statements/2010/149103.htm*.

* * * *

First, a look at the past. As some speakers have already touched upon, and as was evident in the discussions during the high level segment in New York in June, this Convention and its Protocols have unquestionably made their mark on our international efforts to address transnational organized crime. With 157 parties to date, we have created a near global framework for legal and policy cooperation that is actually being used. The United States alone has utilized the Convention 32 times as the basis for many types of legal assistance requests, and, under the Convention, has made 27 extradition requests to 14 different countries, resulting in the successful return of 17 fugitives, in situations where otherwise no legal basis would have existed. The Convention has also created a general framework for criminalizing and prosecuting a wide range of activities of organized crime groups, and has led many countries to ensure that their criminal legislation is sufficient and flexible enough to cover a wide range of such criminal activities. The Protocols alone identified some of the most troubling crimes committed by organized groups—trafficking in persons, migrant smuggling and trafficking in firearms—and have been a catalyst for action. The example of trafficking in persons is the most notable. Prior to Palermo, trafficking in persons was a crime in very few countries. Today, over 116 countries have enacted legislation prohibiting all forms of trafficking in persons.

Now, a look to the future. While there is indeed a sense of accomplishment in the past ten years, we recognize the full potential for this Convention is still ahead. For example, we can definitely do better in utilizing the criminalization and international cooperation frameworks found in UNTOC.

The criminalization framework offered by the Convention was designed to apply to a wide range of organized crime activities. The U.S. has several laws that make up our criminalization framework pursuant to the Convention, and we have used these laws to prosecute everything from extortion to migrant smuggling to environmental crimes to trafficking in stolen art. When we hear proposals to spend time and effort to create new protocols to cover additional criminal activities, we feel that the original idea behind the UNTOC is being a bit misunderstood. Under the Convention,

all of us should have the laws and rules in place to pursue a broad range of organized crimes, including many of the crimes discussed in UNODC's paper on emerging crimes. The Convention contemplates different avenues for reaching all types of organized crime, whether it be through the lens of conspiracy; through laws targeted generally to organized crime groups; through the lens of aiding and abetting; or by following the trail of laundered proceeds. In addition, many countries, like the United States, no doubt have additional laws that target specific emerging crimes. The international cooperation provisions are meant to facilitate cooperation relating to all these types of crime and more. Instead of exerting resources to develop new provisions or protocols, our first priority should be to ensure that we utilize the full potential of the Convention and the framework that it offers.

With regard to international cooperation, we can do better in taking advantage of the Convention as a legal basis for mutual legal assistance and, where appropriate, extradition. The challenge is to identify what, if any, impediments might exist that prevent the Convention from being utilized in this way. The answer may be as simple as educating our law enforcement officers, judges and prosecutors on the potential of the Convention. We should work this week with the goal that many more countries are in a position to use these international cooperation provisions.

One thing that is clear about the future. We believe that a more organized effort to assess our implementation of the Convention and its Protocols will help produce a greater and better use of the Convention and its Protocols. A formal review mechanism will help us identify common and individual challenges and to offer solutions. It will be an opportunity to identify needs for assistance, and to promote a better response to such needs. We, of course, need to be sensitive to the burdens of our experts in designing such a review mechanism, particularly given the demands of other multilateral review processes. We also need to ensure that the benefits from our review efforts will be worth the undoubtedly considerable expert and resource investment that will go into it. But, hopefully, we will be gathering at our next milestone anniversary and expounding on the accomplishments of such a mechanism in helping promote implementation and use of the Convention

and its Protocols. We believe that it is urgent after ten years that we move quickly to establish such a review mechanism and hope that this Conference of Parties will achieve agreement to do this.

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6. Corruption

In 2010, the Working Group on Bribery of the Organization for Economic Co-operation and Development ("OECD") reviewed U.S. efforts to combat transnational bribery. The review praised U.S. efforts, as discussed below in a joint statement the Departments of Justice, Commerce, and State issued with the Securities and Exchange Commission on October 20, 2010. The statement is available at *www.state.gov/r/pa/prs/ps/2010/10/149736.htm*. The full text of the report is available at *www.sec.gov/news/press/2010/2010-200.htm*, along with additional background.

. . . In releasing its review, the OECD's 38-country Working Group on Bribery applauded U.S. enforcement efforts and high-level support for the fight against the bribery of foreign officials.

In finding the United States fully compliant with the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation for Further Combating Bribery, the Working Group highlighted a number of best practices developed by the United States in its efforts to combat foreign bribery, while also noting areas for potential enhancement.

For example, the report noted that the creation of dedicated, specialized units within the Department of Justice Criminal Division's Fraud Section and the FBI to focus on potential violations of the Foreign Corrupt Practices Act (FCPA) significantly increased the rate of enforcement, and that the creation of a new unit at the SEC should further strengthen enforcement efforts. The report also welcomed U.S. efforts toward close cooperation with foreign authorities and the regular interaction between U.S.

and foreign law enforcement, noting that this cooperation is essential to ensuring an effective global fight against corruption.

The Working Group recommended that the United States ensure the statute of limitations period for the foreign bribery offense, which is currently five years, is sufficient to allow adequate investigations and prosecutions. It also recommended that the United States raise awareness of its diligent pursuit of books and records violations under the FCPA, including violations for misreported facilitation payments, and that it pursue additional opportunities to raise awareness generally among small- and medium-sized enterprises on the prevention and detection of foreign bribery. In future periodic reviews of policies and approaches to facilitation payments, the Working Group recommended the United States consider the views of the private sector and civil society.

* * * *

United States: Phase 3, Report on the Implementation and Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation for Further Combating Bribery was published after an approximately six-month review by teams of examiners from Argentina and the United Kingdom, assisted by the OECD's Secretariat, during which examiners reviewed approximately 1,000 pages of documentation and conducted a series of interviews with government, private sector, academic and civil society experts to determine U.S. compliance with the Anti-Bribery Convention.

An inter-agency team of individuals from the Departments of Justice, Commerce and State, and the SEC represented the United States. Along with Finland, the United States was the first country to undergo this Phase 3 review. The Phase 2 review of the United States was completed in October 2002.

Since the Phase 2 review in 2002, 71 individuals and 88 enterprises have been held accountable in the United States, criminally and civilly, for transnational bribery and related offenses. During this same time period, the United States has secured more than $3 billion in criminal and civil penalties and fines, criminal forfeiture, and civil disgorgement in FCPA related cases.

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On December 8, 2010, Secretary of State Clinton issued a statement on behalf of President Obama and the people of the United States to mark December 9 as International Anti-Corruption Day. In her statement, Secretary Clinton welcomed the International Anti-Corruption Plan the G20 leaders adopted in November 2010, stressed the importance of cooperation among the G20 states, the private sector, and civil society organizations to the plan's successful implementation, and discussed the United States' "unprecedented" steps to enforce U.S. anticorruption laws and ensure that U.S. companies do not engage in bribery and other corrupt activities in the countries where they operate. The full text of Secretary Clinton's statement is available at *www.state.gov/secretary/rm/2010/12/152579.htm*.

7. Torture

On July 15, 2010, the U.S. Court of Appeals for the Eleventh Circuit upheld the conviction and sentence of Roy M. Belfast Jr. (also known as Charles McArthur Emmanuel and Charles Taylor, Jr.), son of Charles G. Taylor, former president of Liberia, on five counts of torture, one count of conspiracy to torture, one count of using a firearm during the commission of a violent crime, and one count of conspiracy to use a firearm during the commission of a violent crime. *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010). The prosecution was the first one brought under 18 U.S.C. § 2340A, which provides criminal penalties for "[w]hoever outside the United States commits or attempts to commit torture" and provides jurisdiction over such activity if "(1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender." The extraterritorial criminal torture statute, 18 U.S.C. §§ 2340–2340B, was enacted as § 506 of Public Law 103-236 in 1994 to implement U.S. obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").

Discussion of prior developments in the case is available in *Digest 2007* at 173–80 and *Digest 2008* at 124–25.

In upholding Emmanuel's conviction, the court held that "[t]he Torture Act's proscriptions against both torture and conspiracy to commit torture are constitutional, and may be applied to extraterritorial conduct." Excerpts below from the court's opinion provide its analysis in denying Emmanuel's claims that the Torture Act is invalid because it defines torture more broadly than the CAT (footnotes omitted). *See also* A.4. *supra* for discussion of torture-related challenges to extradition and Chapter 6.F. for discussion of torture generally.

The court also analyzed and rejected Emmanuel's claims that the Torture Act is unconstitutional because it applies to conduct during armed conflicts and that he could not be prosecuted for torture committed before Liberia became a party to the CAT. The court also considered and dismissed Emmanuel's challenge to the Torture Act's grant of federal jurisdiction based solely on an alleged torturer's presence in the United States and his claim that the Torture Act does not apply extraterritorially. Moreover, the court assessed and rejected Emmanuel's arguments that the Torture Act's prohibition of conspiracy to commit torture is unconstitutional because neither the CAT nor international law recognize conspiracy, and that the U.S. criminal prohibition on using and carrying a firearm during and in relation to a crime of violence does not apply extraterritorially.*

The court agreed with arguments the United States had made with respect to the Torture Act in its brief dated September 18, 2009, but did not reach some of the government's alternative arguments. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

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* Editor's note: On February 22, 2011, the Supreme Court denied Emmanuel's petition for a writ of certiorari. *Belfast v. United States*, 131 S. Ct. 1511 (2011).

[III.]A.

The heart of Emmanuel's argument is that the Torture Act is invalid because its definition of torture sweeps more broadly than that provided by the CAT. . . . Because Emmanuel challenges the statute on its face, the hurdle he must clear is an exceedingly high one. See *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Article II gives the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const. art. II, § 2, cl. 2. In determining whether Congress has the authority to enact legislation implementing such a treaty, we look to the Necessary and Proper Clause. [*United States v.*] *Ferreira*, 275 F.3d [1020,] 1027 [(11th Cir. 2001)]. That clause confers on Congress the "Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18. Collectively, these clauses empower Congress to enact any law that is necessary and proper to effectuate a treaty made pursuant to Article II.

In recognition of the expansive language of the Necessary and Proper Clause, the Supreme Court has made clear that the clause "grants Congress broad authority to enact federal legislation." *United States v. Comstock*, __ U.S. __, 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413–14 (1819)) . . . . Thus, the Court has explained, "the word 'necessary' does not mean 'absolutely necessary.'" *Comstock*, 130 S. Ct. at 1956. Rather, "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *Id.* (citation omitted). . . .

Thus, "in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is *rationally related* to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956 (emphasis added) . . . .

Congressional power to pass those laws that are necessary and proper to effectuate the enumerated powers of the Constitution is nowhere broader and more important than in the realm of foreign relations. Correspondingly, the judiciary's role in reviewing the acts of Congress in this area must be appropriately circumscribed. As the D.C. Circuit has explained, "a determination by the political branches concerning the obligations of the United States is also a determination about the conduct of American foreign policy. Defining and enforcing the United States' obligations under international law require the making of extremely sensitive policy decisions, decisions which will inevitably color our relationships with other nations. Such decisions are "delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility . . . ." *Finzer v. Barry*, 798 F.2d 1450, 1458–59 (D.C. Cir. 1986) (quoting *Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948)), aff'd in part and rev'd in part sub nom. *Boos v. Barry*, 485 U.S. 312 (1988). Indeed, there is a particularly strong case for deference to the political branches, "over and above the traditional and general requirement of restraint in the area of foreign relations, [when a court is] asked to review a statute which both Congress and . . . [a] President[] have declared to be necessary to fulfill our obligations under both customary international law and a treaty which we have signed." *Id.* at 1459.

It follows generally that "[i]f [a] treaty is valid there can be no dispute about the validity of [a] statute [passed] under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *see also Lue*, 134 F.3d at 84 ("If the Hostage Taking Convention is a valid exercise of the Executive's treaty power, there is little room to dispute that the legislation passed to effectuate the treaty is valid under the Necessary and Proper Clause."). Thus, while our task in interpreting a treaty is ordinarily to give it a "meaning consistent with the shared expectations of the contracting parties," *Air France v. Saks*, 470 U.S. 392, 399 (1985), our role is narrowed considerably "where the President and the Senate

[have] express[ed] a shared consensus on the meaning of [the] treaty as part of the ratification process," *Auguste v. Ridge*, 395 F.3d 123, 143 (3d Cir. 2005). In such a case, that "shared consensus . . . is to govern in the domestic context." *Id.*

Notably, the existence of slight variances between a treaty and its congressional implementing legislation do not make the enactment unconstitutional; identicality is not required. Rather, as the Second Circuit held in *Lue*, and as we echoed in *Ferreira*, legislation implementing a treaty bears a "rational relationship" to that treaty where the legislation "tracks the language of the [treaty] in all material respects." [*United States v.*] *Lue*, 134 F.3d [79,] 84 [(2d Cir. 1998)] (emphasis added); *see also Ferreira*, 275 F.3d at 1027–28. . . .

Applying the rational relationship test in this case, we are satisfied that the Torture Act is a valid exercise of congressional power under the Necessary and Proper Clause, because the Torture Act tracks the provisions of the CAT in all material respects. . . . [T]he CAT declares broadly that its provisions are "without prejudice to any international instrument or national legislation which does or may contain provisions of wider application," CAT, art. 1(2). Put simply, the CAT created a floor, not a ceiling, for its signatories in their efforts to combat torture. Moreover, settled rules of treaty interpretation require that we construe the CAT generously:

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.

Factor v. Laubenheimer, 290 U.S. 276, 293–94 (1933).

Turning, then, to the Torture Act, we examine each of the three variances that Emmanuel identifies between its provisions and those of the CAT.

First, Emmanuel points out that the CAT and the Torture Act differ in that Article 1(1) of the CAT requires that torture be intentionally inflicted on another person

> for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind,

whereas the Torture Act does not require the government to prove the defendant's motive. This difference, however, is simply not material.

The list provided in the CAT, which is prefaced by the phrase "for such purposes as," is not integral to the definition of torture. Rather, as courts have recognized in the context of other federal statutes that adopt the CAT's definition of torture, the CAT independently requires that torture be committed "intentionally," CAT, art. 1(1), and the "for such purposes" language serves only to "*reinforce*" that requirement—i.e., "that torture requires acts both intentional and malicious." *Price v. Socialist People's Libyan Arab Jamarhiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002) (emphasis added) (internal citations omitted) (discussing similar "for such purposes as" language in the Torture Victim Protection Act and Foreign Sovereign Immunities Act). The "for such purposes" language is meant merely "to illustrate the common motivations that cause individuals to engage in torture . . . [and to] ensure[] that, whatever its specific goal, torture can occur . . . only when the production of pain is purposive, not merely haphazard." *Id.*

Furthermore, the congressional definition of torture contained in the Torture Act fully embodies the considerations that the CAT's "for such purposes" language is intended to "reinforce." Congress properly understood the thrust of this language to require intentionality on the part of the torturer:

> The requirement of intent is emphasized in Article 1 by reference to illustrate motives for torture: obtaining

> information [or] a confession, intimidations and coercion, or any reason based on discrimination of any kind. The purposes given are not exhaustive, as is indicated by the phrasing "for such purposes as." Rather, they indicate the type of motivation that typically underlies torture, and emphasize the requirement for deliberate intention or malice. S. Exec. Rep. 101-30, at 14. The Torture Act in no way eliminates or obfuscates the intent requirement contained in the offense of torture; instead, the Act makes that requirement even clearer by stating that the proscribed acts must have been "specifically intended" to result in torture. 18 U.S.C. § 2340(1). Congress simply did not exceed its power to implement the CAT, pursuant to the Necessary and Proper Clause, by omitting a provision that merely "reinforces" the core definition of torture as an intentional and malicious act.

Again, the Necessary and Proper Clause gives Congress "broad power to enact Laws that are 'convenient, or useful' or 'conducive' to the . . . 'beneficial exercise'" of an enumerated power. *Comstock*, 130 S. Ct. at 1956 (citation omitted). The means chosen by Congress to criminalize torture in the Torture Act "are appropriate, [and] are plainly adapted to that end," *McCulloch*, 17 U.S. (4 Wheat) at 421; they faithfully implement the purpose of the CAT to outlaw, broadly, the cruel, inhuman, and degrading infliction of pain and suffering by official actors. The means by which Congress implemented the CAT therefore fully "consist with the letter and spirit of the constitution, [and] are constitutional." *Id.*

Second, Emmanuel claims that the Torture Act oversteps the bounds of the CAT by criminalizing not only consummated acts of torture, but acts done with no more than the "specific[] intent[ion] to inflict" severe pain or suffering, whether or not such pain or suffering is actually inflicted. Emmanuel correctly characterizes the proscriptions of the Torture Act, *see* 18 U.S.C. § 2340(1) ("'[T]orture' means an act . . . specifically intended to inflict severe physical or mental pain or suffering . . . ."), but he fails to persuade us that they are unconstitutional.

The CAT expressly directs state parties to punish unconsummated crimes of torture. Specifically, it requires that state parties

criminalize not only torture, but also *attempts* to commit torture. CAT, art. 4(1) ("Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture . . . . "). In simple terms, an attempt to commit torture is exactly the same as an act done with the specific intent to commit torture. *See United States v. Yost*, 479 F.3d 815, 819 (11th Cir. 2007) (explaining that the crime of attempt consists of some overt act, e.g., a substantial step, done with the requisite specific intent). There is accordingly no merit to this second claim concerning the definition of torture.

Third, we reject Emmanuel's claim that the Torture Act is invalid because its official-conduct requirement uses the phrase "under the color of law," rather than the phrase "in an official capacity," as found in the CAT. The Senate Executive Committee charged with evaluating the CAT aptly explained that there is no distinction between the meaning of the phrases "under the color of law" and in "an official capacity":

> The scope of the Convention is limited to torture "inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity." Thus, the Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in U.S. law, it applies to torture inflicted "under color of law." S. Exec. Rep. 101-30, at 14.

Similarly, in the context of 42 U.S.C. § 1983, the Supreme Court has explained that "[t]he traditional definition of acting under color of state law requires that the defendant . . . have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)); *see also Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (looking to the § 1983 color-of-law jurisprudence for guidance on whether a defendant engaged in official action under the Alien Tort Statute). There is no material difference between this notion of official conduct and that imparted by the phrase "in an official capacity."

In sum, we can discern no merit to any of Emmanuel's constitutional challenges to the way in which Congress defined torture in the Torture Act. If anything, the arguably more expansive definition of torture adopted by the United States is that much more faithful to the CAT's purpose of enhancing global efforts to combat torture.

* * * *

8. Piracy

a. Overview

In 2010, as this section discusses in detail below, the United States continued its active efforts to counter piracy off the coast of Somalia through various international initiatives and domestic prosecutions of individuals suspected of piracy and related offenses.

b. International support for efforts to bring suspected pirates to justice

In international fora, the United States underscored the importance of bringing suspected pirates to justice through national prosecutions and took steps to help states enhance their capacities to pursue prosecutions and incarcerate individuals convicted of piracy and piracy-related crimes. During the Security Council's debate on piracy on August 25, 2010, for example, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, stressed the importance of successfully prosecuting piracy cases to deter future acts of piracy off the coast of Somalia. Ambassador Rice's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/146263.htm*.

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Mr. President, piracy is an old problem that has taken on troubling modern form. It continues to affect us all through increased risk to our citizens, disruption of global commercial shipping, and damage to property and goods. Ultimately, only security and stability in Somalia will resolve the root causes of its current piracy problem. Even so, the states and international organizations participating in the Contact Group on Piracy off the Coast of Somalia, including the UN, have made considerable contributions to the effort to suppress piracy in this critical region.

But significant challenges remain. The United States commends the efforts of individual states, the European Union's Operation Atalanta, NATO's Operations Allied Protector and Ocean Shield, and the Combined Maritime Forces' Combined Task Force 151 to combat piracy and protect vulnerable ships making their way through the waters off the Somali coast. Still, these tremendous naval efforts will be of limited effect if suspected pirates are captured and released without judicial consequences when there is sufficient evidence to support prosecution. As the UN report notes, prosecution of suspected pirates and imprisonment of convicted ones are essential to end impunity for acts of piracy.

The Secretary-General's report provides a balanced, thorough review of the pros and cons of seven distinct options on the issue. There are no easy answers to the exercise of bringing pirates to justice, and we welcome all creative ideas for tackling this thorny problem. Any long-term solution will require political will and financial resources from the international community and the states in the region.

The options in the Secretary-General's report reflect discussions within the Contact Group on Piracy Off the Coast of Somalia over the past two years, particularly in the Legal Working Group. The United States has been pleased to play an active role in the Contact Group, which is both an effective means of coordinating counter-piracy initiatives and a valuable and appropriate forum for building on the observations in the UN report.

We're particularly grateful that the Secretary-General's report discusses at length the vital issue of imprisonment. We agree with the report's assessment that having sufficient arrangements for imprisonment in the region is just as important—if not more so—than the

mechanism for prosecution. In fact, if such imprisonment arrangements could be identified, many more states may be willing to prosecute suspects in their national courts.

* * * *

In July 2010, the United States concluded a Memorandum of Understanding with the Republic of Seychelles in order to facilitate the transfer of suspected pirates to Seychelles for prosecution in their national courts.

c. U.S. prosecutions

(1) Overview

Domestically, the United States continued to pursue the prosecution of captured individuals suspected in several pirate attacks on U.S. vessels. On May 18, 2010, in a New York federal court, Abduwali Abddukhadir Musé pled guilty to felony counts of hijacking maritime vessels, hostage taking, and kidnapping in connection with the 2009 hijacking of the *Maersk Alabama* container ship off the Somali coast. Musé was sentenced to 33 years and nine months of imprisonment, and he is currently incarcerated in New York. *See Digest 2009* at 96–97 for background.

On September 8, 2010, in the U.S. District Court for the District of Columbia, another Somali national, Jama Idle Ibrahim, a.k.a. Jaamac Ciidle, pled guilty to violating 18 U.S.C. § 371 (conspiracy to commit piracy under the law of nations) and 18 U.S.C. § 924(o) (conspiracy to use a firearm during a crime of violence). The defendant was one of a group of armed Somalis who seized the *M/V CEC Future*, a Danish-owned merchant ship, in the Gulf of Aden in November 2008. The ship and its crew were released on January 16, 2009. For additional background, see the press release issued by the U.S. Attorney for the District of Columbia on September 8, 2010, available at *www.justice.gov/usao/dc/news/2010/sep/10-224.pdf*. As discussed in section 8.c.(2) below, Ciidle also

pled guilty in Norfolk, VA, to charges relating to his involvement with an attack on the *USS Ashland*.

The United States also brought two prosecutions in the U.S. District Court for the Eastern District of Virginia arising from separate attacks on two U.S. naval vessels patrolling the seas off Somalia. In those cases, two different district court judges reached opposite conclusions on whether the U.S. federal law that criminalizes "piracy as defined by the law of nations" applies only to an actual robbery or extends to other attacks that fall within the current customary international law definition of piracy. Sections (2) and (3) below provide details on both cases. Chapter 12.A.1. addresses other issues relating to the UN Convention on the Law of the Sea, and Section A.6. of this chapter discusses the issue of universal jurisdiction in general.

(2) United States v. Ali Said

On August 17, 2010, the district court dismissed the piracy charge against all six defendants suspected of firing upon the *USS Ashland* off the coast of Somalia in April 2010. *United States v. Ali Said*, Crim. No. 2:10cr57; 2010 U.S. Dist. LEXIS 106050. The court did not dismiss the other pending criminal charges: attack to plunder a vessel (18 U.S.C. § 1659); assault with a dangerous weapon (18 U.S.C. § 113(a)(3)), conspiracy to use firearms during a crime of violence (18 U.S.C. § 924(o)); and use of a firearm during the commission of a crime of violence (18 U.S.C. § 924(c)(1)(A)(iii)). As to the piracy charge, the court held that the alleged conduct, which did not include a boarding or robbery of the *USS Ashland*, did not constitute "the crime of piracy as defined by the law of nations" under 18 U.S.C. § 1651.

Rather than apply the modern international law of piracy, the court held that "piracy" under § 1651 remains what the Supreme Court found it to be in 1820 in *United States v. Smith*, 18 U.S. 153 (1820): *i.e.*, "robbery upon the sea." The court rejected the government's argument that the crime of piracy is well defined under modern customary international law to

include "any illegal acts of violence," as provided in both the 1958 High Seas Convention, to which the United States is a party, and the 1982 UN Convention on the Law of the Sea. Instead, the court cited academic literature in concluding that the government failed to demonstrate that the definition of piracy is "settled" under international law.

On August 27, 2010, one of the six defendants, Jama Idle Ibrahim, a.k.a. Jaamac Ciidle, pled guilty to attack to plunder a vessel, assault with a dangerous weapon, conspiracy to use firearms during a crime of violence, and use of a firearm during the commission of a crime of violence. The government dismissed the remaining counts against him. As discussed in 8.c.(1) *supra*, Ciidle subsequently pled guilty in U.S. federal court in the District of Columbia on different charges relating to his participation in an attack on the *M/V CEC Future*.

On September 10, 2010, the government filed its notice of interlocutory appeal in the U.S. Court of Appeals for the Fourth Circuit, seeking review of the district court's order dismissing the piracy charge under 18 U.S.C. § 1651. On October 29, 2010, the United States submitted its brief as appellant to the Fourth Circuit. *United States v. Said*, Case No. 10-4970 (4th Cir. 2010). Excerpts below from the U.S. brief summarize the U.S. arguments for reversal of the district court's order. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*. The Fourth Circuit's decision remained pending at the end of 2010.

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Since the early days of our nation, Congress has sought to combat piracy by criminalizing it in a variety of ways. Beginning in 1819, Congress devoted one statute—what is now Section 1651 of Title 18—to criminalizing "piracy as defined by the law of nations." 18 U.S.C. § 1651. Today, piracy is once again on the rise. Off the coast of Somalia, pirates attack merchant vessels in an effort to capture them and to hold the vessels and their crews for ransom. Sometimes these attacks are successful; many times they are not.

Customary international law, the modern term for the law of nations, prudently includes both the successful and unsuccessful pirate venture in its definition of piracy. The definition of piracy under customary international law is reflected in two broadly accepted multilateral treaties: the 1958 Geneva Convention on the High Seas, which has been ratified by the United States, and the 1982 United Nations Convention on the Law of the Sea. Accordingly, Section 1651, which specifically incorporates that customary international law, reaches the same violent attacks on the high seas that customary international law defines as piracy.

Under the District Court's holding, however, Section 1651 remains frozen in time, tied forever to the definition of piracy in 1819, when an earlier version of the statute was construed by the Supreme Court in 1820. As a result, the United States' sole criminal statute that is devoted to piracy under the law of nations fails to reach exactly that.

The District Court's holding is inconsistent with Section 1651's text and purpose. Like other statutes that reference the law of nations, Congress designed Section 1651 to incorporate the evolving law of nations over time. In that way, Congress and the courts can be certain that Section 1651 will be consistent with international law over time. This consistency is particularly important because Section 1651 is designed to take advantage of the universal jurisdiction that customary international law confers over pirates. Should Section 1651 fail to keep pace with developments in the law of nations, as the District Court held, it would come unhinged from its universal jurisdictional basis, resulting in cases where the statute purported to criminalize conduct over which there is no universal jurisdiction or where, as is the result of the District Court's holding, the statute is construed not to criminalize conduct over which there is universal jurisdiction under international law. Construing Section 1651 to track developments in the law of nations avoids those problems.

The District Court's due process concerns were misplaced. The statute is not vague, as applied to the defendants' conduct, because their armed assault on the USS Ashland is clearly covered by the customary-international-law definition of piracy. Nor is there any doubt that the defendants had adequate notice that their conduct

was criminalized by Section 1651. As a matter of due process, there is no general restriction on Congress' ability to incorporate into a criminal statute a standard that is subject to change independent of federal statutory law. Indeed, a criminal defendant in a prosecution under Section 1651 is particularly well protected. The government must show that the offense conduct rose to the level of piracy under customary international law. Among other evidence demonstrating the scope of piracy under customary international law, two multilateral international treaties reflecting the consensus of over 160 nations, including the defendants' home country of Somalia, declared their conduct to be piracy. The defendants can hardly claim that they did not understand that their violent, armed assault constituted piracy.

* * * *

(3) United States v. Hasan

On October 29, 2010, in the other piracy-related prosecution brought in the Eastern District of Virginia involving similarly situated defendants, a different judge dismissed the five defendants' motion to dismiss the piracy charge against them. *United States v. Hasan*, Crim. No. 2:10cr562010, U.S. Dist. LEXIS 115746. In this case, the government brought charges against the defendants for allegedly firing on the *USS Nicholas* on the high seas between Somalia and the Seychelles in March 2010. In addition to the piracy charge, the defendants were charged with attack to plunder a vessel (18 U.S.C. § 1659), acts of violence against persons on a vessel (18 U.S.C. § 2291(a)(6), (a)(9)), assault with a dangerous weapon (18 U.S.C. § 113(a)(3)), assault with a dangerous weapon on federal officers and employees (18 U.S.C. §§ 111(a)(1), 111(b)), conspiracy to use firearms during a crime of violence (18 U.S.C. § 924(o)), multiple counts of firearms offenses (18 U.S.C. §§ 924(c)(1)(A)(iii), 924(c)(1)(A), 924(c)(1)(B)(ii)), and explosives charges (18 U.S.C. §§ 844(h)(2), 844(m)).

Contrary to the judge's decision in *United States v. Ali Said*, the court held that "both the language of 18 U.S.C.

§ 1651 and Supreme Court precedent indicate that the 'law of nations' connotes a changing body of law, and that the definition of piracy in 18 U.S.C. § 1651 must therefore be assessed according to the international consensus definition at the time of the alleged offense." *United States v. Hasan*, U.S. Dist. LEXIS at *69. The court concluded that the definition of piracy contained in the UN Convention on the Law of the Sea "reflects the current state of customary international law for purposes of interpreting 18 U.S.C. § 1651." *Id.* at 99. The court also dismissed the government's motion to file a supplemental response to the defendants' motion to dismiss and a declaration of State Department Legal Adviser Harold Hongju Koh, dated September 3, 2010. The court based its dismissal on the untimeliness of the government's filing and the analysis in the court's order, "which essentially reaches the same conclusion as the Koh Declaration." *Id.* at 5–6 (n.2).

Mr. Koh's declaration, excerpted below, expressed the legal opinion "that it is a matter beyond question that the definition of piracy contained in Article 15 of the Convention on the High Seas of 1958 and in Article 101 of the United Nations Convention on the Law of the Sea of 1982 constitutes the definition of piracy under the law of nations." (Most footnotes are omitted.) The full text of Mr. Koh's declaration is available at *www.state.gov/s/l/c8183.htm*. The defendants were convicted on November 24, 2010.*

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The Definition of Piracy under the Law of Nations

9. Piracy is well-established and specifically and clearly codified in Article 15 of the Convention on the High Seas of 1958 and in

* Editor's note: On March 14, 2011, the defendants were sentenced to life in prison plus 80 years and are expected to serve their terms in Virginia. *See* the press release issued by the U.S. Attorney's Office for the Eastern District of Virginia on March 14, 2011, available at *www.justice.gov/usao/vae/Pressreleases/03-MarchPDFArchive/11/20110314hasannr.html*. The defendants have appealed to the Fourth Circuit.

Article 101 of the United Nations Convention on the Law of the Sea of 1982.[3] That definition is as follows:

> "Piracy consists of any of the following acts:
> (1) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
> (3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article."

10. As set forth in detail below, the actions and statements of the Executive Branch over more than six decades reflect the consistent U.S. view that this definition is both reflective of customary international law and universally accepted by states.

Convention on the High Seas, 1958

11. The Convention on the High Seas of 1958 was ratified by the President of the United States of America on March 24, 1961, pursuant to the advice and consent of the Senate provided on May 26, 1960. The treaty entered into force on September 30, 1962.

12. The preamble to the Convention expresses the Parties' desire "to codify the rules of international law relating to the high seas." During the Senate's consideration of the High Seas

[3] Convention on the High Seas, Geneva, April 29, 1958, 13 UST 2312, 450 UNTS 92; United Nations Convention on the Law of the Sea ("Law of the Sea Convention"), December 10, 1982, 1833 UNTS 397, 21 ILM 1261. The only difference in the definition of piracy between these two conventions is a small grammatical improvement in the first paragraph of the definition. Upon the recommendation of the Drafting Committee, the Third United Nations Conference on the Law of the Sea adopted the phrase "violence or detention, or any act of depredation" in place of the phrase "violence, detention or any act of depredation" found in Article 15 of the 1958 Convention.

Convention, the Executive and the Senate supported the view that this treaty generally reflected settled customary international law, including regarding the definition of piracy. With respect to the Executive, the transmittal package for the 1958 law of the sea conventions stated the following:

> "Also included in the [High Seas] convention are eight articles dealing with the suppression of piracy. These articles dealing with slavery and piracy correspond closely to those drafted by the International Law Commission and reflect the existing state of international law on the subject."

With respect to the Senate, the Senate Executive Report pertaining to the 1958 conventions quoted as follows from the list of benefits provided by the Department of State:

> "While the Convention on the High Seas is generally declaratory of existing principles of international law, by codifying these principles in agreed terms, the convention should help provide stability and avoid disputes in this field of international law."

U.N. Law of the Sea Convention, 1982

13. As stated above, piracy is defined in Article 101 of the U.N. Law of the Sea Convention of 1982, which mirrors the definition found in the Convention on the High Seas of 1958. The fact that the definition of piracy remained substantively unchanged reflects the consistent and universal acceptance by States of this definition of piracy.

14. One hundred fifty-nine States and the European Union are now party to the Law of the Sea Convention, reflecting its near-universal acceptance. Although the United States is not party to this convention, recent Republican and Democratic Administrations alike have urged that the United States become a party. Moreover, the United States' consistent view has been that this Convention—like the Convention on the High Seas of 1958—reflects customary international law with respect to the definition of piracy.

The Reagan Administration and the Law of the Sea Convention

15. After the conclusion of the Law of the Sea Convention negotiations, the United States government indicated that it did

not intend to become a party due to concerns relating to the Convention's deep seabed mining provisions. In expressing opposition to these particular provisions, however, President Ronald Reagan clarified in his 1983 Ocean Policy Statement that "the convention also contains provisions with respect to traditional uses of the oceans which *generally confirm existing maritime law and practice* and fairly balance the interests of all states." The definition of piracy is one of the provisions of existing law "confirmed" by the Convention, as it was adopted unchanged from 1958.

16. In his Ocean Policy Statement, President Reagan also announced a decision that "the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight." The phrase "traditional uses of the ocean"—which is intended to exclude Part XI of the Convention concerning deep seabed mining—includes Part VII of the Convention concerning the high seas. The definition of piracy is contained in this section dealing with the high seas. Thus, since 1983, it has been the established policy and practice of the United States to accept and act in accordance with the Convention on the Law of the Sea with respect to traditional uses of the ocean, including all matters relating to piracy.

17. For instance, the U.S. Navy and U.S. Coast Guard apply the definition of piracy in the 1958 and 1982 Conventions to their operations, as reflected in *Commander's Handbook on the Law of Naval Operations*, which is designed to provide officers in command and their staffs with an overview of the rules of law governing naval operations. This publication has informed the operational doctrine of many navies around the world, which similarly apply the definition of piracy in the 1982 Convention to their naval operations.

Submission of the Law of the Sea Convention for Consideration by the U.S. Senate

18. After the deep seabed mining provisions of the Convention were changed to the satisfaction of the United States and other countries through the 1994 Implementing Agreement, President William J. Clinton submitted the Convention and its Implementing Agreement to the Senate for its consideration. The Executive

Branch's transmittal package of the treaty to the United States Senate treats piracy in the following manner:

> "**Piracy (Articles 100–107).** Despised by all nations since earliest recorded history, piracy continues to be a major problem in certain parts of the world. Articles 100–107 reaffirm the rights and obligations of all States to suppress piracy on the high seas. The U.S. Constitution (article I, section 8) provides that:
>
> > The Congress shall have Power . . . to define and punish piracies and felonies committed on the high seas, and offences against the Law of Nations.
>
> Congress has exercised this power by enacting 18 U.S.C. § 1651, which provides that:
>
> > Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.
>
> . . . Th[is and related] statutes provide a firm basis for implementing the relevant provisions of the Convention and other applicable international law."

United Nations Security Council

19. The international community continues to recognize as authoritative the definition of piracy found in the 1982 U.N. Law of the Sea Convention. In its most recent resolution relating to piracy, the United Nations Security Council unanimously "Reaffirm[ed] that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 ("the Convention"), in particular its articles 100, 101 and 105, sets out the legal framework applicable to combating piracy and armed robbery at sea. . . ."[11] The Council made particular reference to Article 101 of the Convention which, as noted above, provides

[11] Resolution 1918 (2010), adopted by the Security Council at its 6301st meeting, on April 27, 2010.

for the definition of piracy. This article, together with related provisions in the Convention, constitutes the specific legal framework relating to piracy that is universally agreed among states.

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C. INTERNATIONAL, HYBRID, AND OTHER TRIBUNALS

1. Overview

On October 27, 2010, State Department Legal Adviser Harold Hongju Koh addressed the challenges and future of international criminal justice as part of a panel discussion on the topic at New York University's Center for Global Affairs. Mr. Koh discussed three issues, as excerpted below: (1) the Obama administration's effort to achieve an "integrated approach" toward international criminal justice; (2) the effect of that integrated approach on the United States' developing relationship with the International Criminal Court ("ICC" or "Court"); and (3) challenges to international criminal justice in the coming year. Mr. Koh's remarks are available in full at *www.state.gov/s/l/releases/remarks/150497.htm*.

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First, by an integrated approach to international criminal justice I mean that the United States has an historic commitment to the cause of international justice that dates back to the Nuremburg and Tokyo Tribunals, and which has continued with strong commitment to the ad hoc tribunals regarding the former Yugoslavia, Rwanda, Cambodia, Sierra Leone and Lebanon. Our country has never been silent in the face of war crimes, crimes against humanity and genocide—crimes against the basic code of humanity that call for condemnation in the strongest possible way.

What has this meant in concrete terms? Funding the ad hoc tribunals. Supporting their work, politically and diplomatically. Providing evidence and concrete support to the prosecutors. And, in the interest of human rights, due process and the proper

administration of justice, supporting defendants as well when they seek information and other assistance from us.

An integrated approach has also meant providing steadfast assistance to countries around the world aimed at promoting the rule of law. Assisting countries where the rule of law has been shattered to rebuild and restore their own system of protection and accountability. Reducing the need for international bodies to act by ensuring justice at home. Those programs have become an increasingly important part of our efforts to ensure justice in the aftermath of mass atrocities and prevent their repetition.

At the same time, however, we should frankly acknowledge that the United States has at times not extended to the International Criminal Court the same support we have provided to the ad hoc tribunals, even as our commitment to international justice in other areas remained strong. There were, and there remain, fundamental concerns about the Rome Statute that have prevented us from becoming a party. And we all lived through a period that could be described as one of outright hostility towards the ICC.

That having been said, the United States has always recognized that there are certain times when justice will be found only when the international community unites in ensuring it. It was with this principle in mind that during the Bush Administration, the United States first encouraged the ICC investigation of the situation in Darfur starting in 2005.

Nonetheless, the two halves of our international justice policy presented an incongruous approach to international justice. We supported the ad hoc tribunals, whose days were numbered, but we remained equivocal toward the court that no doubt will become the standing institution for international criminal justice. Our approach to the ICC was incongruent not just with our support for the ad hoc tribunals, but in many ways with respect to some of the work being done by the ICC itself. We supported the court's work in Darfur—which from early on we wanted to succeed—but were too often silent as to the other investigations, even though the U.S. government had no real objection to what those other ICC investigations were trying to achieve.

So when I began my work as Legal Adviser in the State Department, one of my goals was to find a way to rationalize our

international justice policy, and as much as possible, to align, integrate, and make congruent our approach towards these institutions.

That brings me to my second point: what has the Obama Administration done thus far to make our approach to the ICC more congruent with our broader approach to international criminal justice. Three things:

First, in the time we have been in office we have ended the hostility and the harsh rhetoric. As you know, much of that harshness had already begun to temper in the waning years of the Bush Administration, particularly in the public statements of my predecessor as Legal Adviser, John Bellinger. With this Administration, you saw a clean break. . . .

Second, we began to engage the Assembly of States Parties. . . . A third and final area in which we sought to realign our approach was to state our support for all of the court's prosecutions that are currently underway. We made that announcement in March of this year, at the same time that we announced our desire to meet with the ICC Prosecutor and court officials to find ways we may be able to support the ICC's current prosecutions. [Editor's note: The U.S. announcement is contained in the remarks of Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, to the Resumed Eighth Session of the Assembly of States Parties to the Rome Statute, available at *http://usun.state.gov/briefing/statements/2010/138999.htm*.]

Since then, we have held a number of these meetings and have found them mutually productive. And although for obvious reasons I am not at liberty to discuss the details, we help where we can, consistent with our laws. One way we have particularly sought to help is through our public diplomacy. You have seen this administration be both quite vocal in its support for bringing persons accused of atrocities by the ICC to justice, and be critical of those who try to thwart that justice. This public diplomacy will continue.

But what you see is an important difference in approach. You just heard President Song describe our new policy toward the court

as one of "positive engagement." That is his term. We would use the express words of President Obama's national security strategy, which so clearly explained:

> "The end of impunity and the promotion of justice are not just moral imperatives; they are stabilizing forces in international affairs."

What you quite explicitly do not see from this Administration is U.S. hostility towards the Court. You do not see what international lawyers might call a concerted effort to frustrate the object and purpose of the Rome Statute. That is explicitly not the policy of this administration. Because although the United States is not a party to the Rome Statute, we share with the States parties a deep and abiding interest in seeing the Court successfully complete the important prosecutions it has already begun.

This brings me to my final point, some of the challenges we are likely to face in the coming year.

One important challenge is to deal with some lingering matters from Kampala. And of course here I am speaking of the amendments concerning the crime of aggression. . . .

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. . . A second area is more technical: planning for the wrap-up of the ad hoc tribunals and, at the same time, helping the ICC deal with a growing case load and the challenges that accompany it. These are the fairly technical and sometimes mundane challenges such as budgets and oversight mechanisms and changes to court rules. They don't get the headlines, but they are important. . . .

And a third area of challenge is with respect to arresting fugitives from criminal tribunals. The ICC, the ICTY and the ICTR all have very important and high-profile suspects still at large. Some of those individuals are in hiding. Some are in plain sight. And some are given a red carpet welcome, even by states that are legally bound to arrest them. These are sensitive and difficult matters. And it will take a concerted effort by the international community to solve them.

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2. International Criminal Court

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

The United States participated as an observer in the Resumed Eighth Session of the Assembly of States Parties to the Rome Statute, held in New York, New York, March 22–25, 2010. On March 23, 2010, 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 remarks, as excerpted below, Ambassador Rapp announced the United States' willingness to meet with the International Criminal Court's Prosecutor and other Court officials to discuss ways in which the United States might be able to assist the Court's existing prosecutions. Ambassador Rapp also described other ways the United States hoped to contribute to the session's discussions on issues such as "positive complementarity," ways to meet the expectations of victims, and ways to reconcile the demands of restoring peace and providing justice. The full text of Ambassador Rapp's statement is available at *http://usun.state.gov/briefing/statements/2010/138999.htm*.

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My own government, which has provided strong and steadfast support for ad hoc tribunals established since the 1990s, hopes that our experience could be of some value to the ICC, for example, in identifying ways to enhance effective cooperation, particularly when it comes to ensuring that those who are now the subject of an arrest warrant are brought before the bar of justice.

But we also recognize that it is the Court officials themselves who know what assistance is needed. The Obama Administration would therefore like to meet with the Prosecutor and other officials at the International Criminal Court to examine ways that the United States might be able to support the efforts of the ICC that are already underway in the Democratic Republic of Congo,

Sudan, Central African Republic, and Uganda. We believe that the ICC must successfully conclude the cases it has launched, that it must keep faith with the victims for whom it must achieve justice.

The United States also looks forward to contributing to the program on "positive complementarity," which will explore ways to catalyze and assist in broader efforts of societies ravaged by violence to strengthen their own systems of protection and accountability. The United States is actively engaged in capacity-building and rule-of-law assistance programs around the world, and we have a strong interest in ensuring that our efforts complement the activities of the States parties and of the ICC itself.

. . . [T]he United States also looks forward to sharing our own experiences and "lessons learned" when it comes to meeting the expectations of victims and reconciling the demands of peace and justice in situations where special care is needed to realize both core values without compromising either. . . .

. . . Even as a non-party State, the United States hopes and believes that it can be a valuable partner and ally in the cause of advancing international justice.

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Harold Hongju Koh, Department of State Legal Adviser, also addressed the Assembly of States Parties on March 23, 2010. Mr. Koh's statement, excerpted below, focused on the States Parties' efforts to amend the Rome Statute to define the crime of aggression and the conditions under which the International Criminal Court would exercise jurisdiction over that crime. The full text of Mr. Koh's statement is available at available at *http://usun.state.gov/briefing/statements/2010/139000.htm*.

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. . . [A]s we have indicated in our conversations with many of you over these past few months, we are concerned that this moment of new engagement between the United States and the Court takes place at a time when this body is considering amendments that could divert the ICC from its core mission and politicize this

young institution. Wisely, a number of those amendments have been set aside for the time being, but our concern remains with respect to the proposal to adopt the amendments on the Crime of Aggression.

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As we have informed the Chair [of the Working Group on the Review Session, Prince Zeid Ra'ad Zeid Al-Hussein of Jordan], with respect to the first question he posed,* even if one were to look to consent as a basis for exercising jurisdiction, we believe that the crime of aggression fundamentally differs from the other three crimes under the Court's jurisdiction—genocide, war crimes, and crimes against humanity. As the International Law Commission recognized when it looked at this issue in 1996, a state whose leaders are accused of aggression must consent to jurisdiction to be tried in another state's courts. We believe that it follows that the International Criminal Court's jurisdiction over such cases, when it derives from national jurisdiction, must similarly require the consent of the State that is accused of aggression.

With respect to the Chair's second question,** our views are well-known: that investigation or prosecution of the crime of aggression should not take place absent a determination by the UN Security Council that aggression has occurred. The UN Charter confers on the Security Council the responsibility for determining when threats to peace and security, including aggression, have taken place. We are concerned by the confusion that might arise if

* Editor's note: The Chair posed questions in a non-paper he prepared on outstanding issues concerning conditions for the Court to exercise jurisdiction over the crime of aggression. His first question concerned whether, in cases that a state refers to the Court or the prosecutor pursues on his or her own initiative, the state whose leaders are accused of aggression must consent to the Court's jurisdiction. *See www.icc-cpi.int/Menus/ASP/Sessions/Official+Records/8th+session.htm* (Annex II at 42–25 and Appendix I, in ICC-ASP/8/20/Add.1 under "Annexes").

** Editor's note: The Chair's second question concerned whether, once the prosecutor has decided to investigate, any additional determinations must be made, either by the Security Council or another body, before the investigation could proceed. *See www.icc-cpi.int/Menus/ASP/Sessions/Official+Records/8th+session.htm* (Annex II at 42–25 and Appendix I, in ICC-ASP/8/20/Add.1 under "Annexes").

more than one institution were legally empowered to make such a determination in the same case, especially since these bodies, under the current proposal, would be applying different definitions of aggression.

Mr. Chairman, while the two questions you have posed are important, and have yielded a wide range of answers, we respectfully submit that they are not the only questions that must be answered before Kampala. We recognize the difficulties of raising these questions now, having not participated in the previous discussions. But I hope you all appreciate that we do not believe the Court's interests would be best served if we were to remain silent. We have heard from many of you questions about the proposals concerning the crime of aggression that should be taken up between now and Kampala.

The first set of questions are raised by the terms of the definition itself—the manner in which the State act of aggression, the threshold clause, and the individual crime of aggression are set out in the proposed amendments—including the degree to which they may depart from customary international law.*** A second set of questions relates to how such a crime would potentially affect the Court at this point in its development. Mindful of the challenges the ICC now faces in securing justice for those who committed crimes against humanity, genocide, and war crimes, we are concerned—as many of you are—about the new burdens this would place on the Court. How would the still-maturing Court be affected if its Prosecutor were mandated to investigate and prosecute this crime, which by its very nature, even if perfectly defined, would inevitably be seen as political—both by those who are charged, as well as by those who believe aggressors have been wrongly left uncharged? To what extent would the availability of such a charge place burdens upon the Prosecutor in every case, both those

*** Editor's note: In his keynote address to the 104th Annual Meeting of the American Society of International Law on March 24, 2010, Mr. Koh elaborated on the types of questions that the definition raised, asking, "[W]hat does it mean when the current draft definition requires that an act of aggression must be a 'manifest'—as opposed to an 'egregious' violation of the U.N. Charter?" The full text of Mr. Koh's address is available at *www.state.gov/s/l/c8183.htm*. *See also* Chapter 18.A.1.a., A.3.a., and A.3.d.(1).

in which he chooses to charge aggression and those in which he does not?

Third, would adopting the crime of aggression at this time advance or hinder the key goals of the stocktaking exercise: complementarity, cooperation and universality? As my colleague Ambassador Rapp has said, the United States appreciates the important work that has been undertaken by the focal points who are preparing the stocktaking exercise at Kampala. But with respect to complementarity, do we want national courts to pass judgment on public acts of foreign states that are elements of the crime of aggression? Would adding at this time a crime that would run against heads of state and senior leaders enhance or obstruct the prospects for state cooperation with the Court? And will the States Parties enhance the prospects for universality of the Court by moving to adopt this politicized crime at a time when there is genuine disagreement on such issues?

This raises the fourth and most important set of questions: Has a genuine consensus yet emerged to finalize a definition of the crime of aggression, or do we need further work and discussion? And what outcome in Kampala will truly strengthen the Court at this critical moment in its history?

Mr. Chairman, this decision would bring about an organic change in the Court's work. Because this is such a momentous decision for this institution, we should leave no stone unturned in search of genuine consensus. . . .

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b. Kampala Review Conference

The United States participated as an observer at the first Review Conference of the Assembly of States Parties to the Rome Statute in Kampala, Uganda, which was held from May 31–June 11, 2010. On June 1, 2010, Ambassador Rapp addressed the review conference. Ambassador Rapp opened his remarks by discussing challenges confronting the Court, including the need to apprehend the leaders of the Lord's Resistance Army, who are the subject of outstanding arrest warrants.

Ambassador Rapp gave examples of several other challenges and stressed the importance of the conference's stocktaking exercise as a means to address these and other challenges facing the Court:

- How can we better ensure that perpetrators of the most savage crimes known to humankind are brought before the bar of justice?
- How can we ensure that justice *fortifies* peace when it may seem challenging to reconcile these two aims, peace and justice,—and yet, we know, both are essential?
- What more can we do to assist countries whose courts have been shattered by lawless violence to rebuild and strengthen the rule of law?
- And how can we ensure that the justice that unfolds in a courtroom in The Hague transforms the daily lives of peoples in countries that have been wracked by violence—the sort of violence that thrives in places beyond the reach of law and conscience?

Ambassador Rapp also announced that the United States, together with Norway and the Democratic Republic of the Congo, would cosponsor a side event on positive complementarity. Finally, he discussed U.S. views on the conference's other main agenda item: considerations of proposed amendments to the Rome Statute, including amendments to enable the Court to prosecute the crime of aggression. Ambassador Rapp's statement is available at *www.state.gov/s/wci/us_releases/remarks/142520.htm*.

At a pledging ceremony held on June 1, 2010, the United States was the only non-party to the Rome Statute to make a pledge. The U.S. pledge emphasized the United States' commitment to help countries develop the capacity to bring to justice those responsible for mass atrocities. For information about the U.S. pledge and pledges of the States Parties to the Rome Statute, see *www.icc-cpi.int/Menus/ASP/Review Conference/Pledges.htm*.

On June 4, 2010, State Department Legal Adviser Harold Hongju Koh addressed the review conference on the proposed amendments to the Rome Statute, focusing on those relating to the crime of aggression. Mr. Koh's remarks, excerpted below, are available in full at *www.state.gov/s/l/releases/remarks/142665.htm*.

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As my colleague Ambassador Stephen Rapp noted earlier this week, the United States comes to this Conference in the spirit of renewed engagement, with the aims of supporting a constructive outcome that is based on consensus, that strengthens the Court as an institution, and that advances the cause of human rights and international criminal justice. We are engaged in a complex exercise of making international criminal law for the real world. To be a success, this Review Conference must promote a principled, workable system of international criminal justice that is consistent with existing international law and institutions and fair both to victims of abuse and to individuals who may eventually be prosecuted for the crime of aggression. We cannot credibly claim success if we produce an unworkable and divisive compromise that weakens the Court, diverts it from its core human rights mission, or undermines our multilateral system of peace and security.

At the midpoint of this Review Conference, we can discern two points of genuine agreement among the delegates with regard to the proposed amendments. The first is that if any amendments to the Rome Statute are adopted, they should be adopted by consensus. The second is that there are several significant issues on which no consensus solution appears to be emerging.

The first question is what is the legitimate way to adopt amendments that add crimes to the Rome Statute? This is a bedrock procedural question that affects both the amendments regarding aggression and the Belgian amendment.[****] We have heard states from every continent urge that any amendments regarding the

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[****] Editor's note: The so-called Belgian amendment, which was adopted by the review conference, relates to the prohibition on using flattening

crime of aggression be adopted by consensus. At the same time, we have heard disagreements over whether proposed amendments should be adopted under Article 121(4), Article 121(5), or some combination thereof. Further disagreements exist about the extent to which amendments under Article 121(5) apply to states that do not accept the amendments and non-state parties; and about whether states that do not accept the amendments are obligated to cooperate with the Court in cases involving nationals of accepting states. This lack of clarity about the amendment rule applies to the Belgian amendment as well, which we believe should also be adopted by genuine consensus. Under these circumstances, we can only conclude that, at this moment, proceeding by consensus is the only procedure that enjoys consensus support.

For something as fundamental to this Court as its core crimes, a rule of amendment by consensus is both necessary and appropriate. In the history of the International Criminal Court, the definitions of all of the crimes over which the Court has jurisdiction and all of the elements of these crimes have been adopted by consensus. We should not deviate from that decision-making principle for these even more sensitive and highly-charged offenses. Proceeding by consensus is the soundest way to develop international law, and the best way to build a strong institution that can effectively improve the plight of victims. We cannot adopt amendments relating to a crime under conditions that ensure that every aggression prosecution will begin with a challenge to the legitimacy of the process by which the crime was adopted.

A second question is when should any aggression amendments enter into force and become operational? In listening to all of the statements, we have heard no consensus that it would be wise or desirable to operationalize the crime of aggression at this moment in the Court's development. Nor have we heard any consensus that the elements of the crime, which have been little discussed, should be completed here in Kampala. For the three existing crimes—genocide, war crimes, and crimes against humanity—the elements of the crimes were not finalized until nearly four years after Rome.

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bullets, poison or poisoned weapons, and poisonous or asphyxiating gases in non-international armed conflicts.

Even if a definition of aggression were adopted, we would need a similar period of careful deliberation regarding the elements of what is a far less well-settled offense.

A third question is what jurisdictional conditions—filters or triggers—must be satisfied before the ICC could exercise jurisdiction over the crime of aggression? Although the Princeton Process addressed this issue at length, it was unable to bridge very significant differences of views among states on these issues. The Princeton Process did show support for the proposition that investigations and prosecutions for the crime of aggression could go forward where the Security Council had determined that aggression had occurred. But apart from that, there was little agreement regarding any filters or triggers beyond the Security Council. At the Resumed Session in New York, the views of states were categorized into four "Boxes," depending on whether states considered that there should be a requirement for a Security Council determination, and whether the consent of the involved states would be a prerequisite for exercising jurisdiction. We heard a number of states express preferences for Box 1 (Security Council filters); others for Box 3 (consent-based jurisdictional filters); and still others for Box 4 (no jurisdictional filter) solutions. Based on this striking diversity of views, we can only conclude that no consensus has emerged for a jurisdictional filter that could operationalize this crime, and that more work on this issue still needs to be done.

A fourth major question is whether, despite the considered attention that has been given to Article 8bis, genuine consensus has been reached regarding the meaning of the proposed definition of the crime of aggression? Here, we acknowledge that the Special Working Group was able to develop a definition, Article 8bis, on whose wording many nations agreed. Although we respect the considerable effort that has gone into the Princeton Process, we believe that without agreed-upon understandings, the current draft definition remains flawed. We are concerned that the apparent consensus on the wording of Article 8bis masks sharp disagreement on particular points regarding the meaning of that language that must be addressed before the amendments on the crime of aggression can enter into force.

In this regard, the two papers circulated by the Chair to help facilitate today's meeting—the Conference Room Paper and the Chairman's Non-paper—make a valuable contribution. They introduce the idea of addressing concerns through understandings or other documents, without the need for disturbing the language of Article 8bis itself. This is a constructive approach that we believe is worthy of further exploration and development. If the States Parties were to adopt the definition here in Kampala, we believe that understandings would be essential to minimize at least three undesirable risks.

First is the risk of criminalizing lawful uses of force. No one has ever before successfully prosecuted mere acts of aggression, as opposed to the "wars of aggression" that were prosecuted in Nuremberg and Tokyo. Many of the acts listed in Article 8bis might be elements of an illegal "war of aggression"—the crime that was actually prosecuted at Nuremberg and that is discussed in Resolution 3314—but if committed in isolation, would not necessarily qualify as the crime of aggression. The current definition in Article 8bis does not fully acknowledge, as President Obama did in his recent Nobel acceptance speech, that certain uses of force remain both lawful and necessary. If Article 8bis were to be adopted as a definition, understandings would need to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide—the very crimes that the Rome Statute is designed to deter—do not commit "manifest" violations of the U.N. Charter within the meaning of Article 8bis. Regardless of how states may view the legality of such efforts, those who plan them are not committing the "crime of aggression" and should not run the risk of prosecution. At the same time, in order for an investigation or prosecution to proceed, it must be shown that it was manifest that the action was not undertaken in self-defense, without the consent of the state in question, and without any authorization provided by the Security Council.

A second risk is that adopting Article 8bis as the definition of aggression does not truly reflect customary international law, i.e., widespread and consistent state practice followed out of a sense of legal obligation. Although supporters of the Article 8bis definition claim that it mirrors the provisions of General Assembly Resolution

3314, in fact the text departs from that resolution in significant ways. Resolution 3314 states that only the most serious and dangerous forms of illegal uses of force constitute aggression, with the determination whether an act of aggression has occurred requiring careful consideration of the circumstances of each particular case, including the purpose for which force was used. Unlike genocide, war crimes, and crimes against humanity—which plainly violated customary international law when the Rome Statute was adopted—as yet, no authoritative definition of aggression exists under customary international law. If the Article 8bis language is not adapted to bring it into conformity with customary international law, it should be made clear that the language is being adopted only for purposes of implementing the Rome Statute and is not intended as an authoritative statement of customary international law. In any event, adopting the substance of a definition that might make sense as a General Assembly recommendation to a political body, such as the Security Council, does not necessarily make sense as a crime punishable by a judicial body. If the proposed definition were adopted, understandings should make clear that only the most serious and dangerous forms of illegal use of force constitute acts of aggression, and all relevant factors must be considered in each particular case to assess whether any particular use of force constitutes an act of aggression.

A third risk is that of unjustified domestic prosecutions. Too little attention has yet been paid to the question of how, if at all, the principle of complementarity would apply to the crime of aggression. The definition does little to limit the risk that State Parties will incorporate a definition—particularly one we believe is flawed—into their domestic law, encouraging the possibility that under expansive principles of jurisdiction, government officials will be prosecuted for alleged aggression in the courts of another state. Even if states incorporate an acceptable definition into their domestic law, it is not clear whether or when it is appropriate for one state to bring its neighbor's leaders before its domestic courts for the crime of aggression. Such domestic prosecutions would not be subject to any of the filters under consideration here, and would ask the domestic courts of one country to sit in judgment upon the state acts of other countries in a manner highly unlikely to promote peace and security.

In addition, any understandings must acknowledge that the question of how properly to define the crime of aggression is not logically independent from the issue of triggers and filters. The Princeton Process repeatedly reaffirmed that nothing is agreed until everything is agreed. If the issue of filters and triggers is decided separately from the definition itself, it should be clearly understood that the definition might need to be revisited upon future consideration of the filter and other related issues.

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Mr. Koh also delivered the U.S. delegation's closing intervention at the review conference, in which he underscored the Security Council's primary responsibility under the UN Charter with respect to matters of international peace and security, including the primary role of the Security Council in determining whether an act of aggression has occurred. Mr. Koh welcomed the conference's decision to delay implementation of the crime of aggression. The statement, excerpted below, is available in full at *www.state.gov/s/l/releases/remarks/143218.htm*. *See also* Official Records, Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June, 2010, at p. 126.

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The United States associates itself with the critical point of principle expressed in the views just presented by the Governments of France and the United Kingdom regarding the primacy of the Security Council under Article 39 of the U.N. Charter in determining the existence of an act of aggression and the Council's primary responsibility with regard to matters of international peace and security.

We believe that the Review Conference has made a wise decision to delay implementation of the crime of aggression to permit examination of the practical implications of the two methods being proposed for the operationalization of this crime. We note with interest your new provisions, which state first, that affirmative decisions must be taken after 1 January 2017 with regard to both Security Council referrals and referrals proprio motu and by states; and second,

that those decisions must be made by the same majority of States parties as is required for the adoption of an Amendment to the Rome Statute. As our deliberations here these past two weeks have plainly shown, there is an important difference between the procedures that should be used for constitutional decisions of the ICC and for routine decisions of this body. Decisions regarding organic amendments to the Rome Statute should take place in periodic, constitutional gatherings such as the Review Conference—where the precedents set by this Review Conference strongly indicate that the rule of decision is consensus—and not as part of contested votes held amid the shifting representation and ordinary decisionmaking that occurs at regular meetings of the Assembly of States Parties, where there are many distractions, and complex questions of constitutional architecture cannot be as fully and thoughtfully evaluated.

For that reason, and based on our broad discussion with many delegations here, we understand that there is broad support for any decisions to be taken after 1 January 2017 regarding potential adoption of jurisdictional conditions for the exercise of the crime of aggression to be taken at a future Review Conference, where the decisions must be taken at least by the same majority of States Parties as is required for the adoption of an amendment to the Rome Statute or preferably by consensus. We also believe that at such a Review Conference, the States Parties should be allowed to consider any related amendments proposed for the Statute with the aim of strengthening the Court. We read the wording of paragraphs 3 of new Articles 15 bis and 15 ter to allow for this sensible approach. In sum, examining the need for amendments and other organic changes to the Rome Statute at Review Conferences, rather than at ordinary Assembly of States Parties meetings will be the wisest, most prudent strategy for developing the ICC as a sound international institution.

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On June 15, 2010, Mr. Koh and Ambassador Rapp briefed the press on the outcome of the Kampala Review Conference. Both officials' remarks, excerpted below, are available in full at *www.state.gov/s/wci/us_releases/remarks/143178.htm*.

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[MR. KOH] The conference completed three main tasks. It endorsed and supported the court's core work with respect to the traditional crimes of genocide, war crimes, and crimes against humanity, and highlighted issues of state cooperation, peace and justice, stocktaking, and participation of victims . . . . It also adopted two new crimes, prohibition [in] non-international armed conflict of certain weapons, the so-called Belgian amendment,***** and a crime of aggression whose elements will be reconsidered and affirmatively considered after seven more years.

We think that with respect to the two new crimes, the outcome protected our vital interests. The court cannot exercise jurisdiction over the crime of aggression without a further decision to take place sometime after January 1st, 2017. The prosecutor cannot charge nationals of non-state parties, including U.S. nationals, with a crime of aggression. No U.S. national can be prosecuted for aggression so long as the U.S. remains a non-state party. And if we were to become a state party, we'd still have the option to opt out from having our nationals prosecuted for aggression. So we ensure total protection for our Armed Forces and other U.S. nationals going forward.

Under the terms of the resolution adopted, any crime of aggression couldn't become operational unless it were affirmatively adopted after another review by consensus or a two-thirds decision of all states parties no earlier than January 1, 2017. It could not be exercised except for acts committed one year after 30 states parties accepted the amendment. And two ways of referring to the crime would be created—one channel that would go through an exclusive Security Council trigger, and a second channel which would go through a prior Security Council review subject to four conditions.

If the Security Council did not make a determination that aggression had occurred, the prosecutor would have to offer a reasonable basis for investigating the crime under a definition that's been clarified by understandings we suggested. The prosecution would have to get a majority vote of six judges of the court's pretrial division. The Security Council would still, at that point, have

***** Editor's note: *See* note **** *supra*.

the authority to stop the prosecution with a red light Chapter 7 resolution disapproving the resolution. And as I said, the channel would not apply to nationals of non-state parties or any non-consenting state party who opted out.

This issue has occupied the states parties and, in some sense, diverted the court from its core human rights mission. Many states . . . expressed an impulse to finalize the crime. Now, a non-final approach has been tentatively reached which takes the issue off the table for the next seven years with a notional solution that can be reexamined in 2017.

The United States considered the definition of aggression flawed, but a number of important safeguards were adopted. Understandings were adopted to make the definition more precise, to ensure that the crime will be applied only to the most egregious circumstances. And while we think the final resolution took insufficient account of the Security Council's assigned role to define aggression, the states parties rejected solutions that provided for jurisdiction without a Security Council or consent-based screen. We hope that crime will be improved in the future and will continue to engage toward that end.

The big picture going forward, I think we should keep in mind, is that as the country of Nuremberg prosecutor Justice Jackson, we are the only country that has successfully prosecuted the crime of aggression at Nuremberg and Tokyo. Of course, we do not commit aggression and the chances are extremely remote that a prosecution on this crime will, at some point in the distant future, affect us negatively.

So to paraphrase Churchill, this is not the end, it was not the beginning of the end, but it did feel like the end of the beginning of the U.S's 12-year relationship with this court. After 12 years, I think we have reset the default on the U.S. relationship with the court from hostility to positive engagement. In this case, principal engagement worked to protect our interest, to improve the outcome, and to bring us renewed international goodwill. As one delegate put it to me, the U.S. was once again seen, with respect to the ICC, as part of the solution and not the problem. The outcome in Kampala demonstrates again principled engagement can protect and advance our interests, it can help the states parties to find

better solutions, and make for a better court, better protection of our interests, and a better relationship going forward between the U.S. and the ICC.

AMBASSADOR RAPP: . . . I think one of the main aspects of this conference in which I think our principal engagement was so positive was working with the court in the stocktaking exercises . . . .

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We've had a concern in the past that the prosecutor of the ICC could make—could undertake politically motivated prosecutions, could perhaps come after Americans who were engaged in protecting people from atrocity instead of emphasizing those that were committing the crimes. Thus far, this court has been appropriately focused. The cases that it has taken up in Northern Uganda involving Joseph Kony and the crimes of the Lord's Resistance Army in the DRC, the various militia groups that have engaged in campaigns of mass atrocity in Darfur, Sudan, and in the Central African Republic were cases that cried out for justice and accountability and for the protection of the victims.

And if it weren't for the ICC, the UN would have been having to go in and establish a special court for those kinds of situations. So as we recognized in March when we participated in the Assembly of States Parties in New York, it's in our interest to support those prosecutions—not at this time as a member of the ICC, but in kind with assistance as long as it's consistent with our law. And at the same time that we support those prosecutions, also work on the whole of the international justice system, the key part of which is that that is below the level of the international system, the massive amount of work that needs to be done at the national level. That message of our commitment and our support for appropriate prosecutions at this court, I think, resonated very well when we came to this issue of aggression, where those of us that have worked in international justice know how challenging it is to prosecute, to arrest, to obtain cooperation. Even when you're going after the cases that involve mass atrocity, people accuse you of being politically motivated.

But what's happened, as we've seen in the last 15 years, is that when a leader has been charged by one of these courts, and there's strong evidence of his involvement in mass atrocity against

innocent civilians, eventually it becomes possible to dislodge that leader, as we saw with Milosevic and as we saw with Charles Taylor, and bring that person to justice. If the court, on the other hand, were to get into the political area and to deal with crimes not against individual civilians, as in war crimes or crimes against humanity or genocide, but crimes against states and the crime of aggression, it would find it even more difficult to obtain cooperation, and it would quickly find itself . . . really stymied from the point of view of getting the kind of cooperation that it needs to deal with atrocity crimes.

And that was an argument that resonated very strongly, and 50 human rights organizations across the world agreed with us on that point and put out a letter to the foreign ministers of the ICC countries, saying it wasn't a good idea for this court to go there. . . .

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In remarks at New York University's Center for Global Affairs, discussed *supra*, Mr. Koh elaborated on his previous statement concerning the outcome of the Kampala Review Conference. As excerpted below, Mr. Koh reemphasized the U.S. view that, consistent with article 121(5) of the Rome Statute, the aggression amendments (and the amendments relating to the so-called Belgian amendment)******do not provide authority for the Court to exercise jurisdiction regarding these crimes when committed by the nationals of a state party that does not ratify or accept them or on the territory of such a state. The full text of Mr. Koh's remarks is available at *www.state.gov/s/l/releases/remarks/150497.htm*.

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Those who were at the Review Conference know that the negotiations lasted late into the very last night. Some of the things left until those final moments of the conference were in fact complicated issues relating to the manner in which the amendments would enter into force. A further decision of the states parties is

****** Editor's note: *See* note **** *supra*.

required to bring the crime of aggression within the active jurisdiction of the court. But most fundamentally, the amendments must still be adopted by states parties in accordance with the terms of the Rome Statute. And after we all returned home from Kampala, and reread the outcome document, some people began to ask questions about how these complicated provisions would work in practice. One question, for example, relates to how the amendments would interplay with article 121, paragraph 5 of the original Rome Statute, which states that:

> "In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory."

Some asserted that the "opt-out" provisions adopted in Kampala must mean that article 121.5 did not apply to aggression. Yet the very resolution adopted by the Review Conference quite clearly stated that the amendments:

> "are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5" of the Rome Statute.

The United States has been and remains of the firm view that those states parties who do not ratify or accept the aggression amendments are not bound by them, and the court, as article 121.5 states, "shall not exercise its jurisdiction" with respect to aggression committed by that state's nationals or on its territory. To read the amendments any other way is to make article 121.5 a nullity.

Whether and how a treaty is amended is a most serious matter, and I am sure more will be said on this topic. Ambiguity may be inevitable in some treaty negotiations, but uncertainty about the amendment procedures—and how the rights of a party under a treaty can be changed without that party's consent—is decidedly not a good selling point for a treaty, particularly not a treaty conferring jurisdiction to prosecute the most serious international criminal offenses.

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c. Situation in Darfur, Sudan

During an interview with the South African Broadcasting Service on July 14, 2010, President Obama responded to questions relating to the July 12, 2010 decision of the Pre-Trial Chamber of the International Criminal Court to issue a second arrest warrant for Sudanese President Omar al-Bashir, adding the charge of genocide to the other charges contained in the first arrest warrant for al-Bashir.* In his response, President Obama stated:

> . . . [T]he ICC has put forward an arrest warrant. We think that it is important for the government of Sudan to cooperate with the ICC. We think that it is also important that people are held accountable for the actions that took place in Darfur that resulted in, at minimum, hundreds of thousands of lives being lost. And so there has to be accountability, there has to be transparency. We want to move forward in a constructive fashion in Sudan, but we also think that there has to be accountability, and so we are fully supportive of the ICC.
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> . . . I think that peace is at risk if there's no transparency and accountability of the actions that are taking place, whether it's in Sudan or anywhere else in the world.

The full text of President Obama's interview is available at *www.whitehouse.gov/the-press-office/interview-president-south-african-broadcasting-corporation*. *See also* the statement of Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at a Security Council briefing on Sudan on June 14, 2010, in which she expressed concern about the Government of Sudan's continuing violation of its obligation to cooperate with the ICC under Security Council Resolution 1593 (2005). Ambassador Rice's

* Editor's note: In Resolution 1593, adopted on March 31, 2005, the UN Security Council decided to refer to the ICC Prosecutor the situation in Darfur since July 1, 2002. U.N. Doc. S/RES/1593.

statement is available at *http://usun.state.gov/briefing/statements/2010/143101.htm*.

On August 27, 2010, Kenya adopted a new constitution at a ceremony attended by African leaders, including al-Bashir. In a statement welcoming Kenya's new constitution, President Obama also said, "I am disappointed that Kenya hosted Sudanese President Omar al-Bashir in defiance of International Criminal Court arrest warrants for war crimes, crimes against humanity, and genocide. The Government of Kenya has committed itself to full cooperation with the ICC, and we consider it important that Kenya honor its commitments to the ICC and to international justice, along with all nations that share those responsibilities." For the full text of President Obama's remarks, see Daily Comp. Pres. Docs., 2010 DCPD No. 00704.

d. Situation in the Democratic Republic of the Congo

On October 11, 2010, French authorities arrested Callixte Mbarushimana, following a warrant of arrest issued by the International Criminal Court for his alleged criminal responsibility for war crimes and crimes against humanity committed by the Democratic Forces for the Liberation of Rwanda ("FDLR") in the Democratic Republic of the Congo in 2009.** On October 13, 2010, Philip J. Crowley, then Assistant Secretary, Bureau of Public Affairs, Department of State, issued a statement welcoming the arrest and underscoring U.S. support for the Court's investigation into atrocities committed in the DRC. Mr. Crowley's statement, excerpted below, is available in full at *www.state.gov/r/pa/prs/ps/2010/10/149362.htm*.***

** Editor's note: On April 19, 2004, the Government of the Democratic Republic of the Congo referred to the ICC Prosecutor the situation of crimes within the jurisdiction of the Court committed on the territory of the DRC since the Rome Statute's entry into force on July 1, 2002.

*** Editor's note: On January 25, 2011, French authorities transferred Mbarushimana to the ICC detention center in The Hague.

The United States welcomes the October 11, 2010 arrest . . . of Callixte Mbarushimana . . . . As a top official of the FDLR, Mbarushimana had also been listed in 2008 for targeted UN and U.S. sanctions.

Mbarushimana's arrest sends an important signal that the international community will not tolerate the FDLR's continuing efforts to destabilize the eastern provinces of the Democratic Republic of the Congo, including the recent mass rapes in Walikale territory in which FDLR forces are believed to have participated. The United States continues to encourage FDLR soldiers and their dependents to demobilize and repatriate to Rwanda.

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e. Situation in the Republic of Kenya

In March 2010, a Pre-Trial Chamber of the International Criminal Court authorized the opening of an investigation initiated by the ICC Prosecutor relating to alleged crimes against humanity committed during the post-election violence in Kenya in 2007 and 2008. ICC Prosecutor Luis Moreno Ocampo filed applications for summonses for six individuals allegedly responsible for such crimes on December 15, 2010. On the same day, President Obama issued a statement urging "all of Kenya's leaders, and the people whom they serve, to cooperate fully with the ICC investigation and remain focused on implementation of the reform agenda and the future of your nation." For the full text of President Obama's remarks, see Daily Comp. Pres. Docs., 2010 DCPD No. 01071.

3. International Criminal Tribunals for the Former Yugoslavia and Rwanda

a. Overview

On June 18, 2010, Ambassador Brooke Anderson, then U.S. Alternate Representative for Special Political Affairs, U.S. Mission to the United Nations, addressed the Security Council

on the ICTY and the ICTR. Ambassador Anderson's statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/2010/143368.htm*. *See also* Ambassador Anderson's remarks to the Security Council on December 6, 2010, available at *http://usun.state.gov/briefing/statements/2010/152427.htm*.

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The Tribunals have had many successes: more than 250 people have been indicted, proceedings against approximately 170 people have concluded, and about 70 persons are on trial or have appeals pending. Just eight days ago, the ICTY delivered a judgment in the trial of seven high-ranking Bosnian Serb military and police officials accused of a range of crimes, including genocide. The judgment reaffirmed that the murder of Bosnian Muslim men at Srebrenica was genocide and convicted all seven of the accused for Srebrenica-related crimes—a particularly important verdict since it comes as the international community prepares to gather in less than a month to commemorate the 15th anniversary of the 1995 genocide.

We applaud the many accomplishments of the Tribunals, but we note that the projected timelines for completion have significantly slipped. We urge the Tribunals to take all possible steps to move their remaining cases forward in a disciplined, fair, and efficient manner. We also urge them to focus on completing their core mandate: prosecuting those responsible for violating international humanitarian law.

Nevertheless, we recognize that some factors are well beyond the Tribunals' control, and we encourage our fellow Council members to take a practical approach to dealing with such matters as extending the judges' terms of office so that we do not find ourselves dealing with further delays caused by premature departures from the bench. Retaining experienced staff is a growing and real concern, and it will become even more important as the completion dates near. We encourage the Tribunals and relevant UN offices to develop flexible and cost-effective solutions to these challenges.

Despite the Tribunals' efforts to finish their work, indicted individuals remain at large. They 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 steps necessary to ensuring that the remaining fugitives are apprehended.

In particular, let me underscore what has already been said about the need to apprehend ICTR fugitive Felicien Kabuga. The Government of Kenya has still not responded to the Prosecutor's requests—last made on March 27, 2009—for access to investigative files and other government records relating to Kabuga. Nor has it provided details to support the claim that he has left Kenya. The Kenyan authorities have also not responded to the Prosecutor's requests for meetings with Kenyan officials to discuss these issues. We urge the Government of Kenya to immediately respond to the Tribunal's requests, to make good-faith efforts to locate and seize Kabuga's assets, and to cooperate with the Tribunal to find him and arrest him. Similarly, we urge regional cooperation to apprehend two other major figures in the Rwandan genocide: former Commander of the Rwandan Presidential Guard Protais Mpiranya and former Minister of Defense Augustin Bizimana. The United States applauds the cooperation among MONUC and the Governments of Uganda and the Democratic Republic of Congo that resulted in two fugitive arrests last year. This type of cooperation must continue to bring the remaining fugitives in the region to justice.

Mr. President, the United States commends states' efforts to cooperate with the ICTY. . . .

The most critical unmet duty is the arrest of the two remaining fugitives, Ratko Mladic and Goran Hadzic, and their transfer to the Tribunal to face justice.* In addition, we urge all states to support requests from the Prosecutor in connection with ongoing trials, including cooperation on protecting witnesses and providing access to archives, documents, and witnesses.

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* Editor's note: Serbian authorities arrested Mladic on May 26, 2011, and he was transferred to the ICTY on May 31, 2011. *See www.state.gov/secretary/rm/2011/05/164353.htm*.

We welcome the Government of Serbia's cooperation and commend the seizure of materials, including 18 notebooks containing Mladic's handwritten wartime notes and associated audiotapes. We urge Serbia to do everything in its power to locate, arrest, and transfer Mladic and Hadzic to the Tribunal. Their arrests are vital for the successful completion of ICTY's mandate.

We commend Croatia's cooperation with the ICTY and its renewed, high-level commitment to continue a credible, ongoing investigation to locate artillery documentation from Operation Storm—and, if that documentation cannot be located, to expand the investigation into its fate. We encourage the Croatian authorities to continue to explore additional investigative techniques that might help recover responsive documents or account for them.

Bosnia-Herzegovina has made good progress in its cooperation with the Tribunal. We would encourage the Bosnian government take a more proactive approach in implementing the National War Crimes Strategy adopted in December 2008. In addition, all possible measures must be taken by countries in the region to apprehend Radovan Stankovic, who escaped from prison in Bosnia while serving his 20-year sentence.

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b. Residual mechanism

On December 22, 2010, recognizing the importance of finishing the Tribunals' work, the Security Council adopted Resolution 1966. The new resolution established the International Residual Mechanism for Criminal Tribunals, which will continue the jurisdiction, rights and obligations, and essential functions of the Tribunals. After the resolution's adoption, Ambassador Rosemary A. DiCarlo, U.S. Deputy Representative to the United Nations, addressed the Council in her national capacity. Ambassador DiCarlo stated:

> The resolution we have adopted today creating a durable and appropriate institution that will outlast the Tribunals themselves and complete their functions assures the

> legacy of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. We applaud the work of the Austrian Chair of the Informal Working Group on International Tribunals, Ambassador Mayr-Harting, as well as the support of the Office of Legal Affairs and the Tribunals themselves in getting this important task accomplished.

The full text of Ambassador DiCarlo's statement is available at *www.state.gov/s/l/c8183.htm.*

4. Special Court for Sierra Leone

On November 22, 2010, the Department of State provided a grant of almost $4.5 million to enable the Special Court for Sierra Leone to continue its trial of former Liberian President Charles Taylor. The Department of State issued a press statement on November 23, 2010, announcing the U.S. grant and its purpose. The press statement, excerpted below, is available in full at *www.state.gov/r/pa/prs/ps/2010/11/151810.htm.*

. . . This grant demonstrates the U.S. commitment to ensuring that those most responsible for the atrocities committed during the war in Sierra Leone are brought to justice. This grant was expedited due to the financial crisis the Court is currently facing. By all calculations, the Court would have run out of money by early December which could have jeopardized the continuation of the Charles Taylor trial before the Court reached a verdict.

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. . . The trial of Charles Taylor is close to completion; the defense evidence concluded on November 12 and a trial judgment is due in mid-2011 with an appeal to be resolved by early 2012. The trial of Charles Taylor is of enormous historical and legal significance as he is the first African head of state to be brought before an international tribunal to face charges for mass atrocities and gross violations of international humanitarian law. The Taylor

prosecution delivers a strong message to all perpetrators of atrocities, including those in positions of power that they will be held accountable. It is imperative the international community prevents the Taylor trial from being suspended due to lack of financial resources, which is why the United States rushed its FY2011 contribution to the Court. We hope other donor states will follow our lead and find ways to financially support the Court until it has finished its mandate and justice has been served.

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5. Special Tribunal for Lebanon

In 2010, the United States continued to support the Special Tribunal for Lebanon. During a Security Council debate on the Middle East on October 18, 2010, for example, Ambassador Brooke Anderson reinforced the Secretary-General's October 6 statement affirming the independence of the Special Tribunal for Lebanon. Ambassador Anderson stated:

> On October 6, the Secretary-General rightly and unequivocally noted that the Tribunal is an independent body, with a clear mandate from the Security Council to uncover the truth and end the era of impunity for political assassinations in Lebanon. The Tribunal is an independent judicial entity; its work is not a matter of politics but of law. The Tribunal is fulfilling its independent judicial mandate under this Council's Resolution 1757, at the request of the sovereign government of Lebanon. We completely endorse the Secretary-General's statement that the Tribunal's efforts must go forward without interference. Efforts to discredit, hinder, or delay the Tribunal's work should not be tolerated, and those who engage in them do not have the interests of Lebanon or justice at heart.

The full text of Ambassador Anderson's statement is available at *http://usun.state.gov/briefing/statements/2010/149556.htm*.

On November 3, 2010, Susan E. Rice, U.S. Permanent Representative to the United Nations, announced that the United States would contribute an additional $10 million to the tribunal. Previously, the United States had provided $20 million to the tribunal. In her statement, Ambassador Rice stressed that "efforts to discredit, hinder, or influence the Tribunal's work must not be tolerated. The Tribunal must continue to operate according to the highest standards of judicial independence and integrity, and we have full confidence in its ability to do so." The full text of Ambassador Rice's statement is available at *http://usun.state.gov/briefing/statements/2010/150341.htm.*

6. Khmer Rouge Tribunal ("ECCC")

On March 23, 2010, then Deputy Secretary of State Jacob J. Lew certified that "the United Nations and Government of Cambodia are taking credible steps to address allegations of corruption and mismanagement within the Khmer Rouge Tribunal." Deputy Secretary Lew provided his certification to the U.S. Congress pursuant to § 7071(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act ("SOFAA"), 2010, which "provides that funds appropriated in the Act for a United States contribution may only be made available if the Secretary of State certifies to the Committees on Appropriations that the United Nations and Government of Cambodia are taking credible steps to address allegations of corruption and mismanagement within the Extraordinary Chambers in the Courts of Cambodia (ECCC), also commonly known as the 'Khmer Rouge Tribunal' (KRT)." Excerpts below from the accompanying memorandum of justification set forth the bases for the certification. 75 Fed. Reg. 17,197 (Mar. 23, 2010).

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Factors Justifying Determination and Certification

In late 2008 the former Director in the ECCC Office of Administration, the person in charge when allegations of administrative corruption at the court first surfaced, was put on indefinite medical leave, effectively removing him from the court. His replacement, the current Acting Director, is considered to have shown himself a competent Administrator who has cooperated well with the donor community, other court officials, and the United Nations Office of Legal Affairs. The Deputy Administrator, selected by the UN and a person with many years of administrative experience, has a constructive working relationship with the Acting Director and plays an active and positive role with the UN and the donor community. Since before the departure of the ECCC Director of Administration, there have been no reports alleging new instances of corruption at the Khmer Rouge Tribunal. In the view of the State Department, other countries in the donor community, prominent court officials, and non-governmental organizations (NGOs), the court appears corruption-free at this time.

These administrative corruption allegations did not compromise the fundamental integrity of the court. In November of 2009 the court successfully concluded Case 001—the trial against the former chief of the Tuol Sleng torture center, Kaing Guek Eav ("Duch"). His trial was the first meaningful attempt to hold a Khmer Rouge official accountable for war crimes committed under the Khmer Rouge regime. The United States, foreign governments, and NGOs monitoring the court agree that proceedings met international standards of justice.

Most recently, the investigative phase of Case 002, against four surviving senior leaders of the Khmer Rouge regime, was closed. Motions and appeals are now being heard in accordance with the rules of the court, and an indictment is expected in the fall of 2010.

In August 2009 the United Nations Office of Legal Affairs and the Government of Cambodia reached agreement to establish an Independent Counsellor to serve as a deterrent against corruption and address potential future incidents of corruption or other forms of misconduct at the court. By mutual agreement . . . the Cambodian Auditor General, was selected to serve this role. . . . The United States, in coordination with other donor nations, is conducting

ongoing diplomatic efforts with both the United Nations Office of Legal Affairs and Government of Cambodia to assist in making the Independent Counsellor fully operational.

The United Nations Office of Legal Affairs and Government of Cambodia have also recently reached agreement on a new international co-prosecutor . . . . He has been well received by the donor community and NGOs, and has over a decade of experience in international justice, having worked at the International Criminal Tribunal for the former Yugoslavia, International Criminal Court, and Special Court for Sierra Leone. [His selection] is another indicator of ongoing cooperation between the two parties and their willingness to work constructively together to advance the court.

As a result of its first contribution of $1.8 million in 2009, the United States is playing a leadership role with respect to oversight of the court by currently serving as the chair of the KRT Steering Committee, a position which rotates on a quarterly basis. The United States also plays a leading role in the donors group in Phnom Penh, Cambodia. . . .

Last month, the KRT's budget was approved. The budget reflected good management practices, including meaningful and realistic projections of the timelines for completion of the court's caseload. The State Department had an opportunity to review and approve the budget during its consideration by the Steering Committee and was satisfied that it was administratively and financially sound.

The KRT provides a monthly report to the UN Controller and the UN Department of Economic and Social Affairs, which closely monitors the activities of the court including its expenditures. In addition, all hiring on the international side of the court is vetted by the UN Department of Economic and Social Affairs. The UN Office of Legal Affairs actively engages on judicial management issues, such as shifting the pre-trial Chamber to sit on a full-time basis in order to improve the efficiency of the court and to expedite its decision-making.

Certification and United States Policy Objectives

Certification recognizes the efforts of the United Nations and the Government of Cambodia to address allegations of corruption

and mismanagement within the tribunal. It is not an indication, however, that no further work needs to be done. Both parties must continue to exercise oversight of court operations, and the donor community and NGOs must continue their vigilant engagement with the United Nations and Cambodian government to ensure that the Khmer Rouge Tribunal remains corruption-free and well-managed.

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On May 25, 2010, Ambassador Brooke Anderson, then U.S. Alternate Representative for Special Political Affairs, U.S. Mission to the United Nations, announced that the United States planned to contribute $5 million to support the ECCC. Ambassador Anderson's statement at the Pledging Conference for the ECCC, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/142505.htm*.

. . . The United States strongly supports bringing to justice senior leaders and those most responsible for the atrocities committed under the Khmer Rouge Regime. In 2009, tens of thousands of Cambodians visited the Extraordinary Chambers in the Courts of Cambodia to witness the head of the infamous Tuol Sleng prison being tried for horrific crimes in a credible, internationally-backed court. It was an important step in bringing justice to the people of Cambodia and an important stand against impunity.

Indictments for a second case are currently being prepared against the four most senior Khmer Rouge leaders still living. A third case is also being investigated.

The Court needs our support here today to continue this work. The Court deserves our support, having made progress in areas beyond the court room.

Since allegations of administrative corruption at the court were raised in 2007, the Royal Government of Cambodia and the United Nations have worked together to effectively strengthen the court, including through the appointment of an Independent Counsellor. We support the important progress that has been made to strengthen management of the Court. We are hopeful that the court's continued

progress will cement its legacy as a vehicle for justice for all Cambodians.

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We encourage all nations to make a generous contribution to either the national or international side of the court. . . .

Together we can help record for all time the atrocities that were committed in Cambodia and the efforts people made to end impunity for those crimes.

Cross References

Crimes committed against women in conflict zones, **Chapter 6.B.2.c.**
U.S. policy against transferring detainees to countries where it is determined they are more likely than not to be tortured, **Chapter 18.A.3.c.(2)**

Chapter 4

Treaty Affairs

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

1. Reservations to Treaties

On October 26, 2010, Darin E. Johnson, Attorney Adviser, Office of the Legal Adviser, Department of State, 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-second session. Mr. Johnson's statement included a preliminary discussion of the Commission's draft guidelines on reservations to treaties, which it adopted provisionally during its sixty-second session. Excerpts follow from Mr. Johnson's preliminary comments and questions on the ILC's draft guidelines on "invalid" or "impermissible" reservations to treaties. The full text of Mr. Johnson's statement is available at *http://usun.state.gov/briefing/statements/2010/150292.htm*; the ILC report is available at *http://untreaty.un.org/ilc/reports/2010/2010report.htm*.

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Now included in Part 3 is the recently proposed guideline that provides that even if a reservation is invalid, if no party objects to it after having been expressly informed of its invalidity by the depositary at the request of a party, the reservation "shall be deemed permissible."

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The commentary explains that the theory behind this guideline is that such a tacit acceptance of the reservation could constitute a subsequent agreement among the parties modifying the original treaty and enabling the particular reservation to be made.

Assuming arguendo that this is a workable theory, there are at least two questions we would raise regarding the guideline's approach. First, if a subsequent agreement can be made among the parties through a tacit acceptance of the invalid reservation, why wouldn't this be true regardless of whether the depositary had separately circulated a second notice at the request of a contracting state indicating that the reservation is invalid? In other words, the logic of this guideline appears to lead to the conclusion that any reservation that is invalid, which has been circulated and not objected to by the parties has been "collectively accepted" and thus "shall be deemed permissible." It is difficult to understand why, if a tacit acceptance is enough, a second notice is necessary in order for the reservation to be "deemed accepted." Second, this guideline seems impractical. Is it likely that another State would ask the depositary to bring attention to the fact that the reserving State's reservation is invalid, but not object to it?

In Part 4, a new approach has been suggested regarding the consequences of making an invalid reservation that is not collectively accepted by the parties to a treaty. The draft guidelines provide that when an invalid reservation has been formulated, the reserving State is considered a party to the treaty without benefit of the reservation, unless the reserving State has expressed a contrary intent. We have a number of concerns and questions regarding this approach. It is the long-standing view of the United States that an attempt to assign an obligation expressly not undertaken by a country, even if based on an invalid reservation, is inconsistent with the fundamental principle of consent, which is the foundation upon which the law of treaties is based, as the Special Rapporteur himself has recognized. When you combine this principle of consent with a good faith assumption that States do not make reservations lightly and should be presumed to do so only when such reservations are an essential condition of the reserving State's consent to be bound by the treaty, the presumption in the proposed guidelines appears to be leaning in the wrong direction.

In other words, it seems to us that when an invalid reservation has been formulated, the reserving State should only be considered a party to the treaty without benefit of the reservation if the reserving State has expressly indicated that upon objection, the reserving State would effectively withdraw the reservation and thus be a party without the benefit of the reservation.

In addition, we are concerned that the presumption, as currently set forth, would be difficult to apply in practice and could undermine the stability of treaty obligations that the Vienna Conventions were designed to foster. For example, a reserving State could consider its reservation valid, despite an objecting State's view that it is not and in such a case, if the objecting State had decided on its own that the presumption had been overcome by the reserving State based on the factors listed in the proposed guideline, there would be no consensus among the parties regarding whether the reserving State was bound at all to the treaty.

Furthermore, in order to most effectively rebut the presumption, the reserving State would presumably indicate when making a reservation whether it is willing to be bound without benefit of the reservation if it turns out that the reservation is considered invalid. Yet, to do so would suggest that the reserving State is concerned that the reservation is invalid. Thus, to most effectively rebut the presumption a State is, in a sense, forced to concede that its actions may be impermissible. It is not obvious to us that this approach is practical or would improve the process for clarifying the effect of reservations in treaty relations among states.

Finally, it is worth noting that the draft guidelines leave the reserving state that has made an invalid reservation with only two choices—to become a party without the benefit of the reservation consistent with the presumption, or to refrain from becoming party to the treaty at all. This does not allow for the possibility that the objecting State may prefer to have a treaty relationship, even with the invalid reservation, than no treaty relationship at all, assuming the reserving State has overcome the presumption. From a practical perspective, as we all know, 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.

The questions being addressed in these particular guidelines are of fundamental importance. Furthermore, these draft guidelines address an issue not clearly articulated in the Vienna Conventions and on which, as is noted in the commentary, there are widely varying views and thus no customary international law rules to codify. Under such circumstances, substantial caution in the approach taken is warranted and perhaps more time should be devoted to this issue. We certainly will be interested in the views of others on this complex topic.

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2. Treaties Over Time

On November 1, 2010, Todd Buchwald, Assistant Legal Adviser, Office of the Legal Adviser, Department of State, 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-second session. Excerpts follow from Mr. Buchwald's statement, addressing the introductory report of the Commission's Study Group on the topic of "Treaties over time." The full text of Mr. Buchwald's statement is available at *http://usun.state.gov/briefing/statements/2010/150375.htm*; the ILC report is available at *http://untreaty.un.org/ilc/reports/2010/2010report.htm*.

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. . . Among other things, the report demonstrates that there is a great deal of useful work to be done on the subject of subsequent agreements and practice, and thus little need to broaden the topic, at least at this point, to include other aspects of "Treaties over time."

In conducting its work on subsequent agreements and practice, we note the proposed request for information from governments on this subject, particularly regarding instances of subsequent practice and agreements that have not been addressed by an international body.

In light of this request, we believe that it would be extremely helpful if states responded with information on the jurisprudence of their national courts that have considered the role that subsequent agreement and practice play in treaty interpretation. This information is less accessible to States than the jurisprudence of international tribunals and is of considerable interest. Among other things, we are curious to learn how other States address the domestic legal questions raised by shifting interpretations of international agreements on the basis of subsequent practice after ratification, and if the legislative branch is involved in approving such agreements prior to ratification.

One of the questions raised in the Introductory Report is whether the topic lends itself to the elaboration of "guidelines," "practice pointers," or "conclusions." It may be too early to make such a decision, but based on the work done thus far, it would seem that "practice pointers" would be helpful, while there may not be enough consistent practice among states in this area for the Commission to formulate strict "guidelines or "conclusions." . . .

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3. Effect of Armed Conflict on Treaties

On February 1, 2010, the United States submitted comments to the UN Secretariat concerning the International Law Commission's ("ILC" or "Commission") draft articles on the effects of armed conflicts on treaties, which the ILC adopted, on first reading, at its sixtieth session in 2008. The United States provided its views in response to a request from the Secretariat, dated September 15, 2009. The United States reiterated its support for the general approach taken by the draft articles and underscored its view that the draft articles require further work and consideration. The full text of the U.S. submission is provided below and is also available at *www.state.gov/s/l/c8183.htm*. The ILC's draft articles are available in the footnotes to the ILC's report on its sixty-second session;

see *http://untreaty.un.org/ilc/reports/2010/2010report.htm* (n. 1273, 1277, 1281, 1283–84, 1285, 1286–89, 1290–94).

The United States recognizes and applauds the significant work of the Commission and the former Special Rapporteur in completing a first reading of the draft articles on this important topic. The United States has consistently supported the general approach taken by the draft articles, which preserves the reasonable continuity of treaty obligations during armed conflict and identifies several factors relevant to determining whether a treaty should remain in effect in the event of an armed conflict. In providing our most significant points here, we do not foreclose the possibility of raising additional issues at a later time.

Regarding the Commission's recent work, we agree that the determination as to whether a treaty is susceptible to termination or suspension in the event of an armed conflict is to be made based on the circumstances surrounding the particular treaty and armed conflict, and on Articles 31 and 32 of the Vienna Convention (*i.e.*, the general rules of treaty interpretation based on the relevant terms' ordinary meaning in their context and in light of their object and purpose). In addition, while we still have some concerns with the effort in the annex to categorize by subject matter treaties that generally would continue in operation during armed conflict, we support the decision to characterize this list of categories as indicative and non-exhaustive. In particular, we support the statement in the commentary to Article 5 that it may well be that only the subject matter of particular provisions of a treaty in one of these categories may carry the necessary implication of their continuance. For example, treaties of friendship, commerce and navigation often contain provisions regarding bilateral commerce that might need to be suspended during armed conflict between the parties. It would be useful to make these points in the final commentary.

Notwithstanding our support for the general approach taken by the Commission on this topic, the United States continues to believe that the draft articles require further work and consideration. In particular, we reiterate our serious doubts regarding the appropriateness of including a definition of "armed conflict" in draft

Article 2. It is worth noting that even treaties directly relating to armed conflict, such as the Geneva Conventions, do not define this term. There is a wide variety of views on this question and such a definition would be more properly addressed in a treaty negotiated between states. If a definition of armed conflict is thought necessary, the one contained in Article 2 seems doubtful, in that it is quite different from any contemporary treatment in modern treaties or judicial decisions. Regarding the commentary on this provision, the definition of armed conflict included here appears to conflate military occupation with armed conflict, when the two terms have distinct meanings in the law of armed conflict and thus should be referred to separately in the context of the draft articles, if they are referred to at all.

A better approach in draft Article 2 would be to make clear that armed conflict refers to the set of conflicts covered by common Articles 2 and 3 of the 1949 Geneva Conventions (*i.e.*, international and non-international armed conflicts). This approach would reach virtually every situation that the Commission's work intends to reach. Any effort to craft a definition in this context (even with the disclaimer that it is intended to apply only in this context) risks complicating the matter.

In addition, we have concerns that Article 13 might be misread to suggest that a state acting in self-defense has a general right to suspend treaty provisions that might affect its exercise of self-defense. At a minimum, the commentary should clarify that, to the extent such a right exists it would be a limited right that does not affect treaty provisions that are designed to apply in armed conflict, in particular the provision of treaties on international humanitarian law and regulation of armed conflict such as the 1949 Geneva Conventions.

Third, we have concerns with aspects of draft Article 15, which prohibits an "aggressor State" from benefiting from the possibility of termination or suspension of a treaty as a consequence of the armed conflict it has provoked. This article is problematic to the extent it incorporates the definition of aggression set forth in U.N. General Assembly Resolution 3314 (XXIX). In resolution 3314, the General Assembly recommended that the Security Council, as appropriate, take account of its definition as guidance

in determining, in accordance with the UN Charter, the existence of an act of aggression. By directly incorporating that definition into draft Article 15 and specifying the legal consequences that flow from actions falling within the definition, the United States believes that the provision fails to properly recognize the process described in the UN Charter for making an authoritative determination of aggression, and arguably leaves to the belligerent state the ability to decide whether it has committed aggression. In addition, this provision may be unnecessarily limited in scope as it does not address circumstances where a state has illicitly used force in a way that does not amount to aggression. It is not clear to us why this rule only should be limited as such and we urge the Commission to revisit the issue of scope.

As a result, we recommend that the reference to resolution 3314 be deleted and that, instead, the first clause of the article, at a minimum, provide as follows: "A State committing an act of aggression as determined in accordance with the Charter of the United Nations shall not terminate. . . ." We believe that this alternative appropriately recognizes that there is a process under the Charter to determine when aggression has occurred, from which other legal consequences may follow.

Finally, on a more minor note, draft Article 8.2 regarding the effective date of notification of termination, withdrawal, or suspension should be made subject to the proviso: "unless the notice states otherwise" in order to preserve the possibility that a State may wish to provide notice in advance of the effective date of termination.

On October 29, 2010, Mark A. Simonoff, Acting Legal Adviser, 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-second session. In his statement, Mr. Simonoff reiterated the views the United States expressed earlier in 2010 on the ILC's draft articles concerning the effect of armed conflict on treaties. *See supra*. With respect to draft Article 2(b), for example, Mr. Simonoff stated:

> . . . [W]e note the proposal of a new definition of "armed conflict" in Draft Article 2(b) based on a formulation by the International Criminal Tribunal for the Former Yugoslavia

in the Tadic decision, but continue to feel strongly that attempting to define this term is likely to be confusing and counterproductive. The wide variety of views that have been expressed about what the definition should be is evidence of the challenges that such an exercise involves.

The Tadic formulation is one example of a definition that may be a useful reference point in some circumstances, but it is a standard that has evolved, and may continue to evolve, and in any case we believe that the crystallization of this definition must in the final analysis be left in the hands of States. For purposes of the present exercise, a better approach, as we have previously advocated, would be to make clear that armed conflict refers to the set of conflicts covered by common Articles 2 and 3 of the Geneva Conventions (i.e., the universe of conflicts of an international and of a non-international character). An advantage of this approach is that it will cover the entire universe of armed conflicts in a manner that should be readily acceptable to States, given that common Articles 2 and 3 of the Geneva Conventions were developed by states and enjoy nearly universal acceptance. We have also expressed concerns that Draft Article 2(b) conflates "occupation" and "armed conflict," when the two terms refer to distinct concepts in the law of armed conflict. Thus, we continue to believe that if occupation is covered, it should be referred to in addition to armed conflict, rather than only as a part of armed conflict.

The full text of Mr. Simonoff's statement is available at *http://usun.state.gov/briefing/statements/2010/150315.htm*; the ILC report is available at *http://untreaty.un.org/ilc/reports/2010/2010report.htm*.

B. OTHER ISSUES

President's Committee on the International Labor Organization

On May 4, 2010, the President's Committee on the International Labor Organization met for the first time since

May 2000. The Committee, which President Jimmy Carter established on June 18, 1980 by Executive Order 12216, is responsible for formulating and coordinating U.S. policy toward the International Labor Organization ("ILO"). A key aspect of the Committee's mandate is to consider U.S. ratification of ILO conventions. The Secretary of Labor chairs the Committee, and its members are the Secretaries of State and Commerce, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and the presidents of the AFL-CIO and the U.S. Council for International Business. Following the meeting, Secretary of Labor Hilda L. Solis welcomed the renewal of the Committee's work, stating, "Re-starting this committee shows the world that the United States takes the ILO and international labor standards seriously." Additional excerpts below from the Department of Labor's press release provide details on the Committee and the outcome of its meeting. The full text of the release is available at *www.dol.gov/opa/media/press/ilab/ILAB20100496.htm*.

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A key component of the committee's work is the review of ILO conventions for possible U.S. ratification. This function is performed by a subgroup called the Tripartite Advisory Panel on International Labor Standards ["TAPILS"].

On the basis of its discussion, the committee agreed to:

- Call upon TAPILS to resume its work of reviewing the legal feasibility of ratification of selected ILO conventions.
- Work toward the successful completion of the ratification process for ILO Convention No. 111 on employment discrimination (one of the ILO's eight fundamental conventions), which was submitted to the Senate in 1998.
- Request that TAPILS submit to the committee a short list of other conventions that appear to be suitable for legal review and possible U.S. ratification in the near term.

Cross References

U.S. treaty obligations and domestic legislation establishing criminal jurisdiction, **Chapter 3.A.6.**
U.S. prosecution under domestic legislation to implement U.S. obligations under the Convention Against Torture, **Chapter 3.B.7.**
International comity considerations in litigation in U.S. courts, **Chapters 5.C.2. and 15.C.7.**
CEDAW, **Chapter 6.A.2.b. and B.2.a.**
Disabilities Convention, **Chapter 6.A.2.b.**
Forum non conveniens in international civil litigation in U.S. courts, **Chapter 15.C.3.**
New START, **Chapter 18.B.5.**

Chapter 5

Foreign Relations

A. CONSTITUTIONALITY OF STATE LAW CONCERNING IMMIGRATION

On July 6, 2010, the United States filed an action in the U.S. District Court for the District of Arizona, seeking "to declare invalid and preliminarily and permanently enjoin the enforcement of S.B. 1070," an Arizona law signed on April 23, 2010. Complaint, *United States v. Arizona* (D. Ariz. 2010), available at *www.justice.gov/opa/documents/az-complaint.pdf*. As the U.S. complaint explained, the law contains "a sweeping set of provisions that are designed to 'work together to discourage and deter the unlawful entry and presence of aliens' by making 'attrition through enforcement the public policy of all state and local government agencies in Arizona.'" Complaint, ¶ 3 (quoting S.B. 1070 (as amended by H.B. 2162)). The United States argued that Arizona's law is unconstitutional as it conflicts with the federal government's plenary authority over immigration. The complaint stated in part:

> S.B. 1070 (as amended) attempts to second guess federal policies and re-order federal priorities in the area of immigration enforcement and to directly regulate immigration and the conditions of an alien's entry and presence in the United States despite the fact that those subjects are federal domains and do not involve any legitimate state interest. Arizona's adoption of a maximal "attrition through enforcement" policy disrupts the

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> national enforcement regime set forth in the INA and reflected in federal immigration enforcement policy and practice, including the federal government's prioritization of enforcement against dangerous aliens. S.B. 1070 also interferes with U.S. foreign affairs priorities and rejects any concern for humanitarian interests or broader security objectives, and will thus harm a range of U.S. interests. Thus, because S.B. 1070 attempts to set state-specific immigration policy, it legislates in an area constitutionally reserved to the federal government, conflicts with the federal immigration laws and federal immigration policy, conflicts with foreign policy, and impedes the accomplishment and execution of the full purposes and objectives of Congress, and is therefore preempted.

Complaint, ¶ 36.

The United States' motion for a preliminary injunction included a declaration by then Deputy Secretary of State James B. Steinberg, dated July 2, 2010, which discussed the United States' foreign policy concerns about Arizona's law. The district court granted the injunction in part on July 28, 2010. *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010).*

The Deputy Secretary's declaration is excerpted below and available in full at *www.state.gov/s/l/c8183.htm*.

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5. . . . U.S. federal immigration law incorporates foreign relations concerns by providing a comprehensive range of tools for regulating entry and enforcement. These may be employed with sensitivity to the spectrum of foreign relations interests and priorities of the national government. By contrast, Arizona law S.B. 1070 establishes a single, inflexible, state-specific immigration policy based

* Editor's note: The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's judgment and remanded the case on April 11, 2011. *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011).

narrowly on criminal sanctions that is not responsive to these concerns, and will unnecessarily antagonize foreign governments. If allowed to enter into force, S.B. 1070 would result in significant and ongoing consequences for U.S. foreign relations.

6. Through the Immigration and Nationality Act ("INA") and other federal laws, the national government has developed a comprehensive regime of immigration regulation, administration, and enforcement, in which the Department of State participates. This regime is designed to accommodate complex and important U.S. foreign relations priorities that are implicated by immigration policy—including humanitarian and refugee protection, access for diplomats and official foreign visitors, national security and counterterrorism, criminal law enforcement, and the promotion of U.S. human rights policies abroad. To allow the national government flexibility in addressing these concerns, the INA provides the Executive Branch with a range of regulatory options governing the entry, treatment and departure of aliens. Moreover, foreign governments' reactions to immigration policies and the treatment of their nationals in the U.S. impacts not only immigration matters, but also any other issue in which we seek cooperation with foreign states, including international trade, tourism, and security cooperation. These foreign relations priorities and policy impacts are ones to which the national government is sensitive in ways that individual states are not.

7. By rigidly imposing a singular, mandatory form of criminal immigration enforcement through mandatory verification of immigration status and criminal enforcement of alien registration, S.B. 1070 deviates from the national government's policy of calibrated immigration enforcement. The Arizona law also uniquely burdens foreign nationals by criminalizing work and travel beyond the restrictions imposed by U.S. law. These multiple, interlinking procedural and criminal provisions, adopted in order to enforce an explicit state policy of "attrition through enforcement," all manifest Arizona's intention to globally influence immigration enforcement. S.B. 1070 thereby undermines the diverse immigration administration and enforcement tools made available to federal authorities, and establishes a distinct state-specific immigration policy, driven by an individual state's own policy choices, which

risks significant harassment of foreign nationals, is insensitive to U.S. foreign affairs priorities, and has the potential to harm a wide range of delicate U.S. foreign relations interests.

8. Indeed, although it was only adopted in April 2010, is the law of only one state, and has not yet gone into effect, Arizona law S.B. 1070 already has provoked significant criticism in U.S. bilateral relationships with many countries, particularly in the Western Hemisphere, as well as in a variety of regional and multilateral bodies. Foreign governments and international bodies have expressed significant concerns regarding the potential for discriminatory treatment of foreign nationals posed by S.B. 1070, among other issues.

9. By deviating from federal immigration enforcement policies as well as federal rules governing work and travel by foreign nationals, S.B. 1070 threatens at least three different serious harms to U.S. foreign relations. *First*, S.B. 1070 risks reciprocal and retaliatory treatment of U.S. citizens abroad, whom foreign governments may subject to equivalently rigid or otherwise hostile immigration regulations, with significant potential harm to the ability of U.S. citizens to travel, conduct business, and live abroad. Reciprocal treatment is a significant concern in immigration policy, and U.S. immigration laws must always be adopted and administered with sensitivity to the potential for reciprocal or retaliatory treatment of U.S. nationals by foreign governments.

10. *Second*, S.B. 1070 necessarily antagonizes foreign governments and their populations, both at home and in the U.S., likely making them less willing to negotiate, cooperate with, or support the United States across a broad range of important foreign policy issues. U.S. immigration policy and treatment of foreign nationals can directly affect the United States' ability to negotiate and implement favo[]rable trade and investment agreements, to coordinate disaster response arrangements, to secure cooperation on counterterrorism or drug trafficking operations, and to obtain cooperation in international bodies on priority U.S. goals such as nuclear non-proliferation, among other important U.S. interests. The law has already complicated our efforts to pursue broader U.S. priorities. S.B. 1070's impact is likely to be most acute, moreover, among our many important democratic allies, as those governments are most

likely to be responsive to the concerns of their constituents and the treatment of their own nationals abroad.

11. *Third*, S.B. 1070 threatens to undermine our standing in regional and multilateral bodies that address migration and human rights matters and to hamper our ability to advocate effectively internationally for the advancement of human rights and other U.S. values. Multilateral, regional and bilateral engagement on human rights issues and the international promotion of the rule of law is a high priority for the United States, and for this Administration. Consistency in U.S. practices at home is critical for us to be able to argue for international law consistency abroad. By deviating from national policy in this area, S.B. 1070 may place the U.S. in tension with our international treaty obligations and commitments and compromise our position in bilateral, regional and multilateral conversations regarding human rights.

12. In all activities relating to U.S foreign relations, including immigration, the United States is constantly engaged in weighing multiple competing considerations and choosing among priorities in order to develop an overall foreign policy strategy that will most effectively advance U.S. interests. The United States likewise is constantly seeking the support of foreign governments through a delicately-navigated balance of interests across the entire range of U.S. national policy goals. Only the national government has the information available to it to be able to appropriately evaluate these choices on a continuing basis in response to fluctuating events on the international stage. Because of the broad-based and often unintended ways in which U.S. immigration policies can adversely impact our foreign relations, it is critically important that national immigration policy be governed by a uniform legal regime, and that decisions regarding the development and enforcement of immigration policy be made by the national government, so that the United States can speak to the international arena with one voice in this area.

13. While isolated state enactments that incidentally touch on immigration may not implicate foreign policy concerns (or may implicate them only slightly), Arizona's law more directly and severely impacts United States foreign policy interests by establishing an alternative immigration policy of multiple, interlinking procedural

and criminal provisions, all of which manifest Arizona's intention to globally influence immigration enforcement. As I understand it, Arizona's effort to set its own immigration policy is markedly different from instances in which states and localities assist and cooperate with the federal government in the enforcement of federal immigration laws. When states and localities work in concert with the federal government, the likelihood for conflicts with U.S. foreign policy interests is greatly diminished. When states and localities assist the federal government, and take measures that are in line with federal priorities, then the United States retains its ability to speak with one voice on matters of immigration policy, which in turn enables it to keep control of the message it sends to foreign states and to calibrate responses as it deems appropriate, given the ever-changing dynamics of foreign relations.

14. By contrast, by pursuing a singular policy of criminal enforcement-at-all-costs through, among other things, imposing an extraordinary mandatory verification regime coupled with what is effectively state criminalization of unlawful presence, S.B. 1070 is likely to provoke retaliatory treatment of U.S. nationals overseas, weaken public support among key domestic constituencies abroad for cooperating with the U.S, and endanger our ability to negotiate international arrangements and to seek bilateral, regional or multilateral support across a range of economic, human rights, security, and other non-immigration concerns, and be a source of ongoing criticism in international fora. Arizona's unprecedented effort to set its own, contrary immigration policy predictably conflicts with U.S. foreign policy interests and with the United States' ability to speak with one voice.

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B. 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 entries discuss 2010 developments in a selection of cases brought under the ATCA and the TVPA.

a. Pfizer, Inc. v. Abdullahi

On June 29, 2010, the Supreme Court denied a petition for the writ of certiorari filed by the pharmaceutical company Pfizer, Inc., the defendant in two lawsuits that Nigerian citizens

brought under the Alien Tort Claims Act ("ATCA") to recover damages for deaths or serious injuries allegedly suffered as a result of the administration of an experimental antibiotic ("Trovaflozacin Mesylate") during an epidemic of bacterial meningitis in northern Nigeria. *Pfizer, Inc. v. Abdullahi*, 130 S. Ct. 3541 (2010). On January 30, 2009, the U.S. Court of Appeals for the Second Circuit had reversed and the remanded the district court's dismissal of the plaintiffs' claims for lack of subject matter jurisdiction under the ATCA, holding "that the appellants have pled facts sufficient to state a cause of action under the ATS for a violation of the norm of customary international law prohibiting medical experimentation on human subjects without their consent. In such an instance, ATS jurisdiction exists over plaintiffs' claims." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009). On July 8, 2009, Pfizer had petitioned for certiorari on two questions:

1. Whether jurisdiction under the Alien Tort Statute (ATS), 28 U.S.C. 1350, can extend to a private actor based on alleged state action by a foreign government where there is no allegation that the government knew of or participated in the specific acts by the private actor claimed to have violated international law.
2. Whether, absent state action, a complaint that the private actor has conducted a clinical trial of a medication without adequately informed consent can surmount the "high bar to new private causes of action" under the ATS that this Court recognized in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

Gov't Brief, *Pfizer, Inc. v. Abdullahi*, No. 09-34, at 1.

On May 28, 2010, the United States had filed an *amicus curiae* brief in the case at the invitation of the U.S. Supreme Court. The government's brief argued that "[n]either of the questions presented warrants this Court's review. The court of appeals did not itself decide either of the questions, and there is no conflict in the circuits about them." Gov't Brief, *Pfizer, Inc. v. Abdullahi*, No. 09-34, at 9. Moreover, the brief argued, "the procedural posture of the case counsels strongly

against further review at this time." *Id.* Excerpts below from the government's brief set out the government's main substantive arguments that the petitioner's questions "are not of general significance for litigation under the ATS" because, as presented in the case, they "concern only the adequacy of respondents' specific allegations of state involvement, or, in the alternative, the enforceability of a norm prohibiting non-consensual medical testing 'absent state action.'" *Id.* (Citations to the petition and the petitioner's supplemental brief are omitted from the excerpts.) Section C. of the brief, which is not excerpted below, provided the government's arguments that "the procedural posture of the case counsels strongly against further review at this time." *Id.* at 14. The full text of the government's brief is available at *www.justice.gov/osg/briefs/2009/2pet/6invit/2009-0034.pet.ami.inv.pdf*.

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DISCUSSION

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A. The Court Of Appeals Did Not Depart From Other Circuits When It Allowed Respondents' ATS Claims To Proceed On The Basis Of The Nigerian Government's Alleged Participation In The Trovan Test

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1. The premise of petitioner's argument is that the court of appeals did not require respondents to allege that the Nigerian government had any actual knowledge of, or direct participation in, the alleged violations of international law. Respondents, however, alleged that the government "was intimately involved and contributed, aided, assisted and facilitated [petitioner's] efforts to conduct the Trovan test." The government's cooperation allegedly included requesting Trovan's export to Nigeria, providing accommodations for the test in Kano, "assigning Nigerian physicians to assist" with the test, "acting to silence Nigerian physicians" who criticized the test, and back-dating a letter approving the test.

The court of appeals read respondents' complaints as alleging that the government "participated *in the conduct that violated international law*." (emphasis added). At most, therefore, petitioner's challenge is to the court's application of a legal standard, rather than to the standard itself. Whether the court's application of that standard to the circumstances of this case was correct or incorrect, certiorari "is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Moreover, while it is true that the court of appeals did not mention any allegation of specific knowledge on the part of the government of the allegedly nonconsensual nature of the test, it also did not affirmatively hold that state action, or liability in actions under the ATS more generally, can be proved in the absence of such knowledge or participation in the alleged acts. That issue has been left undecided by the court of appeals.[3]

2. Although petitioner contends that there is disagreement in the courts of appeals about the standard for assessing the presence of state action for purposes of ATS claims, the cases it cites do not conflict with the decision in this case.

Petitioner relies extensively on *Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733 (9th Cir. 2008). In that case, however, the Ninth Circuit merely "assume[d], because the parties d[id], that the Rome Statute accurately states the elements of a crime against humanity," including the existence of a course of conduct "pursuant

[3] Much of the gravamen of petitioner's objections to the court of appeals' decision seems to be that respondents' allegations of state involvement are too general or conclusory to satisfy the standards articulated in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Cf. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266 (11th Cir. 2009) (finding that "naked allegation" that paramilitary forces "were in a symbiotic relationship with the Colombia government" was too conclusory to be credited as true under *Iqbal*). That question, however, can presumably be addressed by the district court on remand without any intervention from this Court, because *Iqbal* post-dates the court of appeals' decision. In any event, this Court should not be the first to consider how *Iqbal* should apply to the pleadings in this case. And respondents might also wish to respond to *Iqbal*, which they might do by amending their complaints. See Fed. R. Civ. P. 15(a)(2) (providing that courts should "freely give leave" to amend pleadings before trial "when justice so requires").

to or in furtherance of a State [or State-like organization's] policy." *Id*. at 741 (citation omitted). Thus, the Ninth Circuit's state-action discussion in *Abagninin* (*id*. at 742) was not a general conclusion that any ATS claim must satisfy a state "plan-or-policy test"—much less a determination that domestic law is irrelevant to questions of state action under the ATS.[4] It was instead a holding about the elements of the specific kind of violation alleged in that case (a crime against humanity). There is accordingly no conflict between the Ninth Circuit's decision in *Abagninin* and the decision below.[5]

Petitioner also contends that decisions of the Eleventh Circuit "require[] that the foreign government know of the specific wrongful conduct alleged to violate international law." But that is not the test employed by the Eleventh Circuit, and the cases petitioner cites are not inconsistent with the decision below. In *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005), cert. denied, 549 U.S. 1032 (2006), the court followed the Second Circuit and held that the police's general policy of registering and tolerating private security forces did not "transform those forces'

[4] Nor has the Second Circuit clearly held that only domestic law is relevant to the state-action inquiry. The earlier decision cited by the court of appeals in this case looked to both international law and jurisprudence under 42 U.S.C. 1983 to conclude that sufficient state action had been alleged. See *Kadic v. Karadzic*, 70 F.3d 232, 243–245 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (19966). Cf. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258–259 (2d Cir. 2009) (noting that "domestic law might provide guidance on whether to recognize a violation of international norms" but using international law to identify "the *mens rea* standard for aiding and abetting liability in ATS actions"), petitions for cert. pending, No. 09-1262 (filed Apr. 15, 2010), and No. 09-1418 (filed May 20, 2010).

[5] Petitioner's supplemental brief also discusses the Second Circuit's recent decision in *Presbyterian Church of Sudan*. But that case involved a claim for aiding and abetting alleged wrongdoing by a foreign government, an issue not presented here. Moreover, the decision petitioner cites, following circuit precedent that aiding-and-abetting liability is valid under the ATS, indicated that such liability may be controlled by a different legal standard than is primary liability. See 582 F.3d at 258–259. Assuming such a claim for secondary liability is a valid basis for liability under the ATS, the decision in *Presbyterian Church of Sudan* does not speak to the issues in this case. And to the extent that the decision conflicts with the decision in this case, such an intra-circuit disagreement would not warrant this Court's review. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam).

acts into state acts." *Id.* at 1247–1248. It also held that state action had been established when a governmental actor (the mayor) was "not a mere observer" but someone who "actually 'assisted' the [private] security force." *Id.* at 1249. The court's discussion of what the Guatemalan police "knew of the events in question" was part of the court's attempt to determine whether state action arose from "police *in*action." *Id.* at 1248 (emphasis added). This case, however, does not involve allegations of government inaction. There is accordingly no inconsistency between *Aldana* and the court of appeals' conclusion in this case that petitioner could be liable for acts that allegedly "occurred in a Nigerian facility *with the assistance of the Nigerian government*." The same is true of the other Eleventh Circuit cases on which petitioner relies.[6]

B. This Court Should Not Be The First To Decide Whether The ATS Allows A Claim About Nonconsensual Medical Testing In The Absence Of State Action

* * * *

1. Petitioner tacitly acknowledges that the court of appeals did not decide the second question presented in its petition. Petitioner says certiorari on that question is "required *if* the Second Circuit decision is understood alternatively to expand ATS jurisdiction over purely private actors." Petitioner also says: "[t]he panel majority *suggested*, in the alternative," that an ATS cause of action could exist "against a purely private actor without any state involvement."

Notwithstanding petitioner's inferences, the court of appeals' decision about the viability of respondents' ATS claims plainly depended on the allegation that petitioner acted in concert with

[6] See *Sinaltrainal*, 578 F.3d at 1266 (finding no state action on the basis of a general allegation that state police "tolerated and permitted [private] paramilitary forces to exist"; noting that the complaint had not alleged that the government was either "aware of" or "involved in" the illegal conduct); *Romero v. Drummond Co.*, 552 F.3d 1303, 1317–1318 (11th Cir. 2008) (finding no state action in a case arising under the Torture Victim Protection Act of 1991, 28 U.S.C. 1350 note, where the general "symbiotic relationship" alleged between paramilitary organizations and the state military was not alleged to "involve[] the torture or killing alleged in the complaint").

the Nigerian government. Although the court's preceding discussion of customary international law and nonconsensual medical testing did not focus on allegations of state action, those allegations were a necessary part of its analysis.

Thus, in addressing whether the international-law norm had sufficiently "concrete content" to satisfy *Sosa*, the court found it unnecessary to address "[w]hatever uncertainty may exist at the margin * * * because [respondents] allege a complete failure on the part of [petitioner] *and the Nigerian government* to inform [respondents] of the existence of the Trovan experiments. Indeed, in discussing the Nuremberg Code's "prohibition on nonconsensual medical experimentation," the court invoked Article 32 of the Fourth Geneva Convention, which it described as applying only to the conduct of "civilian or military *agents of the state parties*." . . . [S]ee International Comm. of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 221 (Ronald Griffin & C.W. Dumbleton trans., Jean S. Pictet ed. 1958) (noting that Article 32 of the Fourth Geneva Convention contains a formal pledge by "each Contracting Party" to the Convention that is "equally binding on *those under its authority* or acting in its name") (emphasis added). In any event, after discussing the substantive norm, the court immediately proceeded to its discussion of state action and found it adequately pleaded. The conclusion that the court did not hold that purely private conduct is actionable under the ATS is reinforced by Judge Wesley's dissenting opinion, which expressly criticized the panel majority for addressing the international-law norm without taking petitioner's status as a private party into account.

2. Once stripped of the premise that the court of appeals found a tort committed by a "purely private actor[]" to be actionable under the ATS, the petition's claim of a conflict in the circuits on the second question evaporates. Moreover, none of the decisions petitioner cites purported to adopt a standard for the level of state action necessary for all violations of international law. Each of those decisions rejected a particular cause of action under the ATS. But two of them ([*Cisneros v. Aragon*, 485 F.3d 1226 (10th Cir. 2007) and *Taveras v. Taveraz*, 477 F.3d 767 (6th Cir. 2007)]) did not discuss state action at all. As noted above, *Abagninin* discussed

state action only in the context of an alleged "crime against humanity." 545 F.3d at 741. Similarly, *Aldana* discussed state action in the context of a claim involving "state-sponsored torture." 416 F.3d at 1247–1248. As a result, there is not even a conflict with petitioner's reading of the decision below.

Furthermore, petitioner identifies no other court that has addressed whether state action is required for a valid ATS claim arising out of nonconsensual medical testing by a purely private actor. There is no good reason for this Court to be the first to do so.

* * * *

b. Al-Aulaqi v. Obama

On December 7, 2010, the U.S. District Court for the District of Columbia dismissed claims brought under the U.S. Constitution and the Alien Tort Claims Act ("ATCA" or "Alien Tort Statute" or "ATS") against President Obama, the Secretary of Defense, and the Director of the Central Intelligence Agency. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010). In this case, the father of a U.S. citizen alleged that the U.S. government had placed his son on a list of individuals that the Central Intelligence Agency and Department of Defense are authorized to target using lethal force. The plaintiff's son is an operational leader of al-Qa'ida in the Arabian Peninsula ("AQAP"), which the government asserted in its filings is an organized armed group that is either part of al-Qaeda, or is an associated force, or co-belligerent of al-Qaeda, that has directed attacks against the United States in the noninternational armed conflict between the United States and al-Qaeda. Def. Mem. at 8. The government noted that Anwar Al-Aulaqi had, among other things, since late 2009 "taken on an increasingly operational role in [AQAP], including preparing Umar Farouk Abdulmutallab . . . to detonate an explosive device aboard a U.S. airplane over U.S. airspace and thereafter attempted to do so aboard a Northwest Airlines flight from Amsterdam to Detroit . . . ." *See* Def. Mem. at 6. Based in part on this information, the Department of the Treasury's

Office of Foreign Assets Control designated the plaintiff's son as a Specially Designated Global Terrorist pursuant to subsection 1(c) of Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594. 75 Fed. Reg. 43,233 (July 23, 2010). *See also* Chapter 3.B.1.e. and 16.A.4.b. for discussion of terrorism-related designations and sanctions. The plaintiff asked the court (1) to declare that the U.S. Constitution and international law prohibit the U.S. government from carrying out targeted killings "outside of armed conflict except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury;" and (2) issue an injunction prohibiting the U.S. government from targeting his son outside of this narrow context.

The United States filed its motion to dismiss, available at *www.state.gov/s/l/c8183.htm*, on October 18, 2010, arguing that the plaintiff lacked standing, that the plaintiff's claims would require the court to decide non-justiciable political questions, that the court should exercise its equitable discretion not to grant the relief sought, and that the plaintiff had no cause of action under the ATCA. The government also argued that the military and state secrets privileges foreclosed litigation of the plaintiff's claims, although it noted that the state secrets privilege need not and should not be reached in this case. Def. Mem. at 43. Finally, the United States also asserted that "it is sufficient to note that, consistent with the AUMF, and other applicable law, including the inherent right to self-defense, the President is authorized to use necessary and appropriate force against AQAP operational leaders, in compliance with applicable domestic and international legal requirements, including the laws of war." Def. Mem. at 9. The government's reply brief, filed October 18, 2010, is available at *www.state.gov/s/l/c8183.htm*.

In dismissing the plaintiff's claims under the U.S. Constitution, as the government had requested, the court held that (1) the plaintiff failed to provide an adequate explanation for his son's inability to appear on his own behalf, as would be necessary to establish "next friend" standing; (2) the plaintiff failed to show that he actually represented

the best interests of his son, who had given no indication that he wanted to bring the lawsuit; and (3) the plaintiff failed to establish third-party standing because he could not show an identity of interests with his son or that a parent suffers an injury if his adult child is threatened with a future extrajudicial killing. *See Al-Aulaqi v. Obama*, 727 F. Supp. 2d at 16–35. In so doing, the court noted that "Defendants have made clear—and indeed, both international and domestic law would require—that if Anwar al-Aulaqi were to present himself [peacefully], the United States would be 'prohibit[ed] [from] using lethal force or other violence against him in such circumstances.'" *Id.* at 17 (quoting Def. Mem. at 2).

The court also dismissed the plaintiff's claims under the ATCA, as the government had requested. The court concluded that the plaintiff had not satisfied the requirements for a claim to proceed under the ATCA. Specifically, the court determined that the plaintiff had not shown that he "suffers a legally cognizable tort—which rises to the level of a "customary international law norm" killing. *Id.* at 35.

The court found further that the political question doctrine barred the case. *See* C.3. below for discussion of this aspect of the court's opinion.

The court did not reach the government's claim of the state secrets privilege, consistent with the government's request that the court dispose of the case on other grounds if possible. The plaintiff did not appeal the court's judgment.

Excerpts follow from the court's analysis in dismissing the plaintiff's claim under the ATCA. (Footnotes are omitted.)

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* * * *

II. The Alien Tort Statute

* * * *

A. Plaintiff's Alleged ATS Cause of Action

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court explained that Congress, in enacting the ATS as part of the

Judiciary Act of 1789, "intended the ATS to furnish jurisdiction for a relatively modest set of actions" that were recognized at common law as being "torts in violation of the law of nations." *Id.* at 720. . . . Since *Sosa*, it has become clear that "[w]hile the ATS may provide subject-matter jurisdiction for modern causes of action not recognized at the time of its initial passage in 1789, there is a 'high bar to new private causes of action for violating international law.'" *Ali Shafi v. Palestinian Auth.*, 686 F. Supp. 2d 23, 26 (D.D.C. 2010) (quoting *Sosa*, 542 U.S. at 727) . . . .

Plaintiff maintains that his alleged tort—extrajudicial killing—meets the high bar of *Sosa*, since there is a customary international law norm against state-sponsored extrajudicial killings . . . . Plaintiff is correct insofar as many U.S. courts have recognized a customary international law norm against past state-sponsored extrajudicial killings as the basis for an ATS claim. . . . Significantly, however, plaintiff cites no case in which a court has ever recognized a "customary international law norm" against a *threatened* future extrajudicial killing, nor does he cite a single case in which an alien has ever been permitted to recover under the ATS for the extrajudicial killing of his U.S. citizen child. These two features of plaintiff's ATS claim—that it is based on a threat of a future extrajudicial killing, not an actual extrajudicial killing, that is directed not to plaintiff or to his alien relative, but to his U.S. citizen son—render plaintiff's ATS claim fundamentally distinct from all extrajudicial killing claims that courts have previously held cognizable under the ATS.

Even assuming that the threat at issue were directed to plaintiff (rather than to plaintiff's U.S. citizen son), there is no basis for the assertion that the threat of a future state-sponsored extrajudicial killing—as opposed to the commission of a past state-sponsored extrajudicial killing—constitutes a tort in violation of the "law of nations." A threatened extrajudicial killing could possibly—depending on the precise nature of the threat—form the basis of a state tort law claim for assault, . . . or for intentional infliction of emotional distress . . . . But common law tort claims for assault and intentional infliction of emotional distress do not rise to the level of international torts that are "sufficiently definite and accepted 'among civilized nations' to qualify for the ATS jurisdictional grant."

See Ali Shafi, 686 F. Supp. 2d at 29 (quoting *Sosa*, 542 U.S. at 732). Plaintiff cites no treaty or international document that recognizes assault or intentional infliction of emotional distress as a violation of the "present-day law of nations," nor does he cite any case in which a court has ever found such common law torts cognizable under the ATS. Indeed, there appears to be only one case in which a court has even considered whether "fear" and "anguish" could form the basis of an ATS claim. *See Mujica*, 381 F. Supp. 2d at 1183. There, the court expressly rejected the plaintiffs' contention that psychic, emotional harms were sufficient to state a claim under the ATS. . . .

In *Sosa*, the Supreme Court instructed federal courts to exercise "great caution" in recognizing new causes of action under the ATS as violations of the "present-day law of nations," and urged courts to consider "the practical consequences" of making such causes of action available to litigants worldwide. *See Sosa*, 542 U.S. at 728, 732–33. If this Court were to conclude that alleged government threats—no matter how plausible or severe they may be—constitute international torts committed in violation of the law of nations, federal courts could be flooded with ATS suits from persons across the globe who alleged that they were somehow placed in fear of danger as a result of contemplated government action. Surely, as interpreted in *Sosa*, the ATS was not intended to provide a federal forum for such speculative claims.

* * * *

Moreover, even if the mere threat of a future state-sponsored extrajudicial killing did constitute a violation of the present-day law of nations, plaintiff could not bring an ATS claim based on the alleged threat of an extrajudicial killing of his U.S. citizen son. Significantly, the ATS authorizes federal jurisdiction over "civil actions *by an alien* for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350 (emphasis added). Although plaintiff is an alien, his son is a U.S. citizen, and as such . . . is not authorized to sue under the ATS. . . . [P]laintiff can only sue under the ATS if he alleges that he himself has suffered a tort that rises to the level of a "customary international law norm."

* * * *

. . . [P]laintiff seeks to create a novel "hybrid" ATS claim, under which a party can sue in his individual capacity not for his own injuries, but for injuries inflicted upon his adult child. Plaintiff analogizes his unique ATS claim to an action for wrongful death, in which, he alleges, a claimant can sue "for the wrongful death of another individual, for harm that [the] claimant herself has suffered."

But domestic wrongful death law provides no basis for plaintiff's contention that an alien parent can bring an ATS claim "in his own right" for the threatened extrajudicial killing of his adult U.S. citizen child. . . .

* * * *

Ultimately, the Court concludes, plaintiff's ATS claim is not based on any pecuniary or emotional injuries sustained by plaintiff, but on the injury that his U.S. citizen son would suffer if he were to be subject to a state-sponsored extrajudicial killing. And despite his assertions to the contrary, plaintiff cannot bring such a claim in his own right, since it is Anwar Al-Aulaqi, and not plaintiff, who has allegedly been "targeted" for killing by the United States. Thus, even if plaintiff could establish that the threat of a future extrajudicial killing—as opposed to the commission of a past extrajudicial killing—did constitute a violation of "customary international law" (which he cannot), plaintiff would not be authorized to bring such a claim under the ATS on behalf of his U.S. citizen son, who himself is not within the class of persons who can sue under the Act.

* * * *

c. Arar v. Ashcroft

On June 14, 2010, the Supreme Court denied a writ of certiorari to the U.S. Court of Appeals for the Second Circuit in a case that a Canadian national, Maher Arar, brought under the Torture Victim Protection Act and the U.S. Constitution against former Attorney General John Ashcroft and other U.S. officials for alleged detention and torture by Syrian officials. *Arar v. Ashcroft*, 130 S. Ct. 3409 (2010). On November 2,

2009, the U.S. Court of Appeals for the Second Circuit, sitting en banc, affirmed a district court decision dismissing the plaintiff's suit. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009); *Digest 2006* discusses the district court's decision, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), at 284–85.

On May 12, 2010, the United States filed a brief in opposition to the petition on behalf of Mr. Ashcroft and the federal officials sued in their official capacities. The U.S. brief expressed the view that "[f]urther review . . . is unwarranted" because "[t]he court of appeals was correct in rejecting each of [the petitioner's] contentions and its decision does not conflict with any decision of this Court or of another court of appeals." Gov't Brief, *Arar v. Ashcroft*, 09-923, at 10. The brief also stated:

> The nature of petitioner's factual allegations and the tenor of his petition warrant a clarification of the scope of the issues before this Court. This case does not concern the propriety of torture or whether it should be "countenance[d]" by the courts. Torture is flatly illegal and the government has repudiated it in the strongest terms. Federal law makes it a criminal offense to engage in torture, to attempt to commit torture, or to conspire to commit torture outside the United States. *See* 18 U.S.C. 2340A. The President has stated unequivocally that the United States does not engage in torture. See May 21, 2009 Remarks by the President on National Security; cf. Exec. Order No. 13,491, § 3, 74 Fed. Reg. 4894 (Jan. 22, 2009) (directing that individuals detained during armed conflict "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))."
>
> This case instead presents three narrow questions. First, petitioner argues that the court of appeals erred in refusing to recognize a *Bivens* claim and applied an incorrect standard for determining whether "special factors" counsel against judicial creation of such a remedy.*

* Editor's note: For discussion of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), see *Digest 2002* at 233–34.

> Second, he contends that the defendants were acting under color of Syrian law when they ordered his removal to that country, and therefore that the court of appeals should have upheld his claim under the TVPA. And third, petitioner argues that the court erroneously affirmed the district court's ruling that he insufficiently pleaded his due process claim based on his detention and alleged denial of access to courts in the United States. . . .

Id. at 9–10 (citations to petition omitted). The full text of the U.S. brief is available at *www.justice.gov/osg/briefs/2009/0responses/2009-0923.resp.pdf*.

C. ACT OF STATE AND POLITICAL QUESTION DOCTRINES

1. *In re Refined Petroleum Products Antitrust Litigation*

On August 16, 2010, the United States submitted a brief as *amicus curiae* in the U.S. Court of Appeals for the Fifth Circuit, supporting affirmance of a district court's decision dismissing class-action lawsuits that alleged antitrust violations in the oil and refined petroleum product industry. The Fifth Circuit had requested the United States' views on whether the act of state doctrine bars the lawsuits and whether they present a political question, as the district court had held in dismissing the complaints. *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, No. 09-20084.

In re Refined Petroleum Products Antitrust Litigation consolidates several lawsuits that were brought in four judicial districts.* The various cases name as defendants Saudi Aramco and Petroleos de Venezuela ("PdVSA"), the state oil companies of

* Editor's note: These cases are *Countywide Petroleum Co. v. Petroleos de Venezuela, S.A.* (N.D. Ohio), *Fast Break Foods, LLC v. Saudi Aramco Corp.* (N.D. Ill.), *Green Oil Co. v. Saudi Arabian Oil Co.* (N.D. Ill.), *S-Mart Petroleum Inc. v. Petroleos de Venezuela, S.A.* (D.D.C.), *Spectrum Stores, Inc. v. CITGO Petroleum Corp.* (S.D. Tex.), *Central Ohio Energy, Inc. v. Saudi Arabian Oil Co.* (N.D. Ill.), and *Gokey v. CITGO Petroleum Corp.* (N.D. Tex.).

Saudi Arabia and Venezuela respectively, as well as Lukoil, a private Russian oil company, and various subsidiaries of these companies. Plaintiffs are domestic purchasers of refined petroleum products ("RPPs") who allege that defendants entered into an illegal conspiracy with OPEC member states in order to manipulate and fix the price of oil and RPPs in violation of the Sherman Act and the Clayton Act. They seek treble damages, an injunction against the alleged restraint of trade, and divestiture of defendants' U.S.-based subsidiaries. The U.S. District Court for the Southern District of Texas had dismissed the case on the basis of the act of state and political question doctrines.

Excerpts below from the government's brief summarize the government's argument in support of affirmance based on the applicability of the act of state and political question doctrines (footnotes and citations to other submissions in the case omitted). The full text of the brief is available at *www.state.gov/s/l/c8183.htm*. The Fifth Circuit's decision remained pending at the end of 2010.**

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* * * *

. . . The heart of the plaintiffs' causes of action runs afoul of the act of state doctrine, which forbids judicial inquiry into the validity of the public acts of a foreign sovereign committed within its own territory. *See Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 401 (1964). These cases also present a nonjusticiable political question because it is for the Executive Branch, not the courts, to determine how best to protect United States foreign policy and national security interests in regard to foreign oil-producing states.

None of this is to condone any cartelization in oil markets; it is rather a recognition that federal courts are not a proper place

** Editor's note: On February 8, 2011, the Fifth Circuit affirmed the district court's judgment in an opinion that accepted the arguments in the government's brief. *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938 (5th Cir. 2011). *Digest 2011* will discuss relevant aspects of the court's opinion.

for resolution of such disputes. *See Sabbatino*, 376 U.S. at 431–32 (act of state doctrine is to avoid "dangers of * * * adjudication" due to limitations of the judicial process); *U.S. Dep't of Commerce v. Mont.*, 503 U.S. 442, 457–58 (1992) (conclusion that issue presents a political question is not decision on the merits, but "rather * * * the *abstention* from judicial review"); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1262 (D.C. Cir. 2006) ("A dismissal based upon the political question doctrine is not an adjudication on the merits").

These lawsuits fail because plaintiffs cannot properly ask this Court to judge the legality of acts of state by foreign governments. The district court's judgment of dismissal should accordingly be affirmed because adjudication of these cases would require the courts to pass on the legality of the sovereign decisions of foreign states concerning the production of their core, but nonrenewable domestic oil resources—in particular, whether the Saudi Arabian, Venezuelan, and Russian governments engaged in anti-competitive conduct when they decided to restrict the output of crude oil within their sovereign territory. The act of state doctrine precludes U.S. courts from probing, through private litigation, the legality of those acts. *See Sabbatino*, 376 U.S. at 401.

The policies animating the act of state doctrine, which has "constitutional underpinnings" (*Sabbatino*, 376 U.S. at 423), fully justify its application here. Adjudication of plaintiffs' complaints would touch "sharply on national nerves" (*id.* at 428). The judicial action sought by plaintiffs to displace the processes and policies of the Executive Branch with regard to the oil-producing foreign states could give rise to significant foreign policy friction with potentially serious adverse consequences for the Nation's energy needs, the U.S. economy, and national security. Judicial action on such a sensitive matter could result in oil embargoes, the divestiture of foreign state assets in the United States, retaliatory conduct against U.S. oil producers, and reduction in cooperation on unrelated but critically important issues.

For similar reasons, these cases also present a nonjusticiable political question. *See Baker v. Carr*, 369 U.S. 186, 211 & n.31 (1962). As the district court determined, these claims rest at bottom on allegations that sovereign states decided and agreed to limit

production of crude oil from their territories. Adjudicating these claims would improperly interfere with the Executive Branch's management of our Nation's relations with those foreign states regarding their oil production, which is of such unique and fundamental importance to the security and economic well-being of the United States as well as those states.

Although in the 50 years since the founding of the Organization of Petroleum Exporting Countries (OPEC)[1] the various Presidential Administrations have taken diverse approaches to our Nation's foreign policy toward foreign oil-producing states, one constant reality across Administrations has been the Executive Branch's conclusion that this matter should not be managed through private litigation. Instead, the Executive Branch has pursued flexible and sustained engagement on a state-to-state basis. The Executive Branch has been and remains the proper and best suited branch of government to consider how to protect this Nation's vital energy and national security interests in this context, while working simultaneously to minimize anti-competitive conduct and its consequences in the global oil market, all in the broader context of this Nation's multi-faceted relations with the countries involved.

In retaining the ability to deploy all the tools at its disposal, including diplomacy, in dealing with OPEC nations, the Executive Branch has flexibility to respond to rapidly changing circumstances. By contrast, litigation pursued by private parties (and the final judgments such litigation would produce) comes at a particular moment in time and thus cannot be constantly adjusted to take account of new developments. Neither courts nor private parties have access to all relevant information or the broader foreign relations perspective. And the complex policy judgments on how most effectively to address the anti-competitive practices of oil-producing

[1] OPEC is an intergovernmental organization headquartered in Vienna, Austria. Founded by Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela, OPEC currently has twelve country members. The organization's professed aim is "to co-ordinate and unify petroleum policies among Member Countries, in order to secure fair and stable prices for petroleum producers; an efficient, economic and regular supply of petroleum to consuming nations; and a fair return on capital to those investing in the industry." Brief History of OPEC (available at www.opec.org/opec_web/en/about_us/24.htm).

foreign states are so intertwined with questions touching on foreign affairs, national security, energy policies, and the global and domestic economies as to render such judgments an inappropriate subject of a sweeping order by a court that would strike at the practices and decisions of several foreign governments regarding their oil production.

* * * *

2. *Guevara v. Republic of Peru*

On June 18, 2010, the U.S. Court of Appeals for the Eleventh Circuit reversed a lower court decision ordering Peru to pay the plaintiff a $5 million reward (plus interest) for information concerning the whereabouts of Vladimiro Lenin Montesinos Torres, who headed Peru's National Intelligence Agency in the 1990s. *Guevara v. Republic of Peru*, 608 F.3d 1297 (11th Cir. 2010). A Special Committee in Peru appointed to administer reward claims had previously determined that the claimant was not entitled to the reward. The Eleventh Circuit held that Peru's foreign sovereign immunity deprived the district court of subject matter jurisdiction and remanded the case to the district court for dismissal without prejudice.

The United States had urged the Eleventh Circuit to reach this result in a brief filed in support of Peru in March 2010, but on different grounds. The U.S. brief had argued for reversal based on the act of state doctrine and principles of international comity, stating:

> In practical effect, Jose Guevara's lawsuit against the Peruvian government in the United States is both a collateral attack in another nation's courts on the Special Committee's decision that he was not entitled to the reward and a challenge to the authority of the Peruvian President to delegate to the Special Committee the exclusive authority to administer the reward program. Not only would the district court's order requiring the Peruvian government to pay the reward violate the act of state

doctrine, which the Supreme Court has held to have "constitutional underpinnings." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). It would also, if affirmed, introduce considerable friction into the United States' bilateral relationship with Peru. To protect the prerogatives of the Executive Branch in its conduct of foreign affairs, both the act of state doctrine and principles of international comity generally preclude U.S. courts from reviewing and overriding the sovereign decisions of foreign states and foreign tribunals. Particularly because this judgment against Peru presents two serious foreign-relations dilemmas for the United States, the doctrines are fully applicable here.

First, the district court's entry of a multi-million [dollar] judgment against Peru would, if affirmed, become an irritant in the United States' relationship with that country. Peru justifiably believes that the district court overstepped its authority when it overrode the authoritative decision of the Special Committee denying Guevara's claim for the reward. Second, the United States itself administers several reward programs for the capture of international fugitives. To preserve the ability of U.S. officials to make delicate and context-sensitive judgments about whether an individual is or is not entitled to a reward, decisions made pursuant to those reward programs are generally not subject to judicial review even in domestic courts. Yet the district court's judgment stands as an invitation to *foreign* courts to accept jurisdiction over litigation challenging decisions by U.S. officials concerning reward claims. The threat of oversight by foreign courts would not only seriously hamper the administration of these important reward programs; it would also present the risk that foreign courts will demand the release of confidential information relating to ongoing law enforcement investigations—or even order the U.S. to disclose classified information.

Gov't brief, *Guevara v. Republic of Peru*, No. 08-17213, at 13–14.

The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*. For an overview of the factual background of the case and discussion of the Eleventh Circuit's analysis of Peru's immunity, see Chapter 10.A.1.a.(1)(ii). The U.S. Supreme Court denied Guevara's petition for a writ of certiorari on November 29, 2010. *Guevara v. Republic of Peru*, 131 S. Ct. 651 (2010). For discussion of another case raising the issue of international comity, see Chapter 15.C.7.

3. *Al-Aulaqi v. Obama*

As discussed in A.1.b. *supra*, in *Al-Aulaqi v. Obama*, the U.S. District Court for the District of Columbia found in part that the political question doctrine barred the court from exercising jurisdiction over the case. In a lengthy analysis, excerpted below, the court wrote that even though the conclusion may be "somewhat unsettling," "there are circumstances in which the Executive's unilateral decision to kill a U.S. citizen overseas is 'constitutionally committed to the political branches' and judicially unreviewable," and "this case squarely presents such a circumstance." *Al-Aulaqi v. Obama*, 727 F. Supp. 2d at 51. (Footnotes and citations to the complaint, other submissions in the case, and the hearing transcript are omitted from the excerpt.)

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III. The Political Question Doctrine

Defendants argue that even if plaintiff has standing to bring his constitutional claims or states a cognizable claim under the ATS, his claims should still be dismissed because they raise non-justiciable political questions. Like standing, the political question doctrine is an aspect of "the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the 'case or controversy' requirement of Article III of the Constitution." *Schlesinger* [*v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974)]. The political question doctrine "is 'essentially a function

of the separation of powers,'" *El-Shifa* [*Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (en banc)] (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)), and "'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.'" *Id.* (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). The precise "'contours'" of the political question doctrine remain "'murky and unsettled.'" *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 n.3 (D.C. Cir. 1984) (Bork, J., concurring)) . . . . Still, the Supreme Court has articulated six factors which are said to be "[p]rominent on the surface" of cases involving nonjusticiable political questions:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. The first two factors—a textual commitment to another branch of government and a lack of judicially manageable standards—are considered "the most important," see *Harbury*, 522 F.3d at 418, but in order for a case to be non-justiciable, the court "need only conclude that one factor is present, not all," *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

* * * *

Judicial resolution of the "particular questions" posed by plaintiff in this case would require this Court to decide: (1) the precise nature and extent of Anwar Al-Aulaqi's affiliation with AQAP;

(2) whether AQAP and al Qaeda are so closely linked that the defendants' targeted killing of Anwar Al-Aulaqi in Yemen would come within the United States's current armed conflict with al Qaeda; (3) whether (assuming plaintiff's proffered legal standard applies) Anwar Al-Aulaqi's alleged terrorist activity renders him a "concrete, specific, and imminent threat to life or physical safety;" and (4) whether there are "means short of lethal force" that the United States could "reasonably" employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests. Such determinations, in turn, would require this Court, in defendants' view, to understand and assess "the capabilities of the [alleged] terrorist operative to carry out a threatened attack, what response would be sufficient to address that threat, possible diplomatic considerations that may bear on such responses, the vulnerability of potential targets that the [alleged] terrorist[] may strike, the availability of military and nonmilitary options, and the risks to military and nonmilitary personnel in attempting application of non-lethal force." Viewed through these prisms, it becomes clear that plaintiff's claims pose precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine.

Most recently, in *El-Shifa v. United States* the D.C. Circuit examined whether the political question doctrine barred judicial resolution of claims by owners of a Sudanese pharmaceutical plant who brought suit seeking to recover damages after their plant was destroyed by an American cruise missile. President Clinton had ordered the missile strike in light of intelligence indicating that the plant was "'associated with the [Osama] bin Ladin network' and 'involved in the production of materials for chemical weapons.'" *El-Shifa*, 607 F.3d at 838 (internal citation omitted). The plaintiffs maintained that the U.S. government had been negligent in determining that the plant was tied "to chemical weapons and Osama bin Laden," and therefore sought "a declaration that the government's failure to compensate them for the destruction of the plant violated customary international law, a declaration that statements government officials made about them were defamatory, and an injunction requiring the government to retract those statements." *Id.* at 840. Dismissing the plaintiffs' claims as nonjusticiable under

the political question doctrine, the D.C. Circuit explained that "[i]n military matters . . . the courts lack the competence to assess the strategic decision to employ force or to create standards to determine whether the use of force was justified or well-founded." *Id.* at 844. Rather than endeavor to resolve questions beyond the Judiciary's institutional competence, the court held that "[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target." *Id.*

Here, plaintiff asks this Court to do exactly what the D.C. Circuit forbid in *El-Shifa*—assess the merits of the President's (alleged) decision to launch an attack on a foreign target. Although the "foreign target" happens to be a U.S. citizen, the same reasons that counseled against judicial resolution of the plaintiffs' claims in *El-Shifa* apply with equal force here. Just as in *El-Shifa*, any judicial determination as to the propriety of a military attack on Anwar Al-Aulaqi would "'require this court to elucidate the . . . standards that are to guide a President when he evaluates the veracity of military intelligence.'" *Id.* at 846 (quoting *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1365 (Fed. Cir. 2004)). Indeed, that is just what plaintiff has asked this Court to do. But there are no judicially manageable standards by which courts can endeavor to assess the President's interpretation of military intelligence and his resulting decision—based on that intelligence—whether to use military force against a terrorist target overseas. *See El-Shifa*, 378 F.3d at 1367 n. 6 (expressing the view that "it would be difficult, if not extraordinary, for the federal courts to discover and announce the threshold standard by which the United States government evaluates intelligence in making a decision to commit military force in an effort to thwart an imminent terrorist attack on Americans"). Nor are there judicially manageable standards by which courts may determine the nature and magnitude of the national security threat posed by a particular individual. In fact, the D.C. Circuit has expressly held that the question whether an organization's alleged "terrorist activity" threatens "the national security of the United States" is "nonjusticiable."

People's Mo[j]ahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999). Given that courts may not undertake to assess whether a particular organization's alleged terrorist activities threaten national security, it would seem axiomatic that courts must also decline to assess whether a particular individual's alleged terrorist activities threaten national security. But absent such a judicial determination as to the nature and extent of the alleged national security threat that Anwar Al-Aulaqi poses to the United States, this Court cannot possibly determine whether the government's alleged use of lethal force against Anwar Al-Aulaqi would be "justified or well-founded." *See El-Shifa*, 607 F.3d at 844. Thus, the second *Baker* factor—a "lack of judicially discoverable and manageable standards" for resolving the dispute—strongly counsels against judicial review of plaintiff's claims.

The type of relief that plaintiff seeks only underscores the impropriety of judicial review here. Plaintiff requests both a declaration setting forth the standard under which the United States can select individuals for targeted killing as well as an injunction prohibiting defendants from intentionally killing Anwar Al-Aulaqi unless he meets that standard—i.e., unless he "presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat." Yet plaintiff concedes that the "'imminence' requirement" of his proffered legal standard would render any "real-time judicial review" of targeting decisions "infeasible," and he therefore urges this Court to issue his requested preliminary injunction and then enforce the injunction "through an after-the-fact contempt motion or an after-the-fact damages action." But as the D.C. Circuit has explained, "[i]t is not the role of judges to second-guess, with the benefit of hindsight, another branch's determination that the interests of the United States call for military action." *El-Shifa*, 607 F.3d at 844. Such military determinations are textually committed to the political branches. *See Schneider*, 412 F.3d at 194–95 (explaining that "Article I, Section 8 of the Constitution . . . is richly laden with the delegation of foreign policy and national security powers to Congress," while "Article II likewise provides allocation of foreign relations and national

security powers to the President, the unitary chief executive" and Commander in Chief of the Army and Navy). Moreover, any post hoc judicial assessment as to the propriety of the Executive's decision to employ military force abroad "would be anathema to . . . separation of powers" principles. *See El-Shifa*, 607 F.3d at 845. The first, fourth, and sixth *Baker* factors thus all militate against judicial review of plaintiffs' claims, since there is a "textually demonstrable constitutional commitment" of the United States's decision to employ military force to coordinate political departments (Congress and the Executive), and any after-the-fact judicial review of the Executive's decision to employ military force abroad would reveal a "lack of respect due coordinate branches of government" and create "the potentiality of embarrassment of multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217.

The mere fact that the "foreign target" of military action in this case is an individual—rather than alleged enemy property—does not distinguish plaintiff's claims from those raised in *El-Shifa* for purposes of the political question doctrine. The D.C. Circuit has on several occasions dismissed claims on political question grounds where resolution of those claims would require a judicial determination as to the propriety of the use of force by U.S. officials against a specific individual abroad. . . .

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Plaintiff's claim is distinguishable from those asserted in these cases in only one meaningful respect: Anwar Al-Aulaqi . . . is a U.S. citizen. The significance of Anwar Al-Aulaqi's U.S. citizenship is not lost on this Court. Indeed, it does not appear that any court has ever—on political question doctrine grounds—refused to hear a U.S. citizen's claim that his personal constitutional rights have been violated as a result of U.S. government action taken abroad.

Nevertheless, there is inadequate reason to conclude that Anwar Al-Aulaqi's U.S. citizenship—standing alone—renders the political question doctrine inapplicable to plaintiff's claims. Plaintiff cites two contexts in which courts have found claims asserting violations of U.S. citizens' constitutional rights to be

justiciable despite the fact that those claims implicate grave national security and foreign policy concerns. Courts have been willing to entertain habeas petitions from U.S. citizens detained by the United States as enemy combatants, *see, e.g.*, *Hamdi,* 542 U.S. at 509, and they have also heard claims from U.S. citizens alleging unconstitutional takings of their property by the U.S. military abroad, *see, e.g.*, *Ramirez de Arellano*, 745 F.2d at 1511–12. But habeas petitions and takings claims are both much more amenable to judicial resolution than the claims raised by plaintiff in this case.

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Contrary to plaintiff's assertion, in holding that the political question doctrine bars plaintiff's claims, this Court does not hold that the Executive possesses "unreviewable authority to order the assassination of any American whom he labels an enemy of the state." Rather, the Court only concludes that it lacks the capacity to determine whether a specific individual in hiding overseas, whom the Director of National Intelligence has stated is an "operational" member of AQAP, *see* [Unclassified Dec. of James R. Clapper, Dir. of Nat'l Intelligence,] ¶ 15, presents such a threat to national security that the United States may authorize the use of lethal force against him. This Court readily acknowledges that it is a "drastic measure" for the United States to employ lethal force against one of its own citizens abroad, even if that citizen is currently playing an operational role in a "terrorist group that has claimed responsibility for numerous attacks against Saudi, Korean, Yemeni, and U.S. targets since January 2009," *id.* ¶ 13. But as the D.C. Circuit explained in *Schneider*, a determination as to whether "drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking." 412 F.3d at 197. Because decision-making in the realm of military and foreign affairs is textually committed to the political branches, and because courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff's claims, the Court finds that the political question doctrine bars judicial resolution of this case.

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D. REVIEW OF COMPACT OF FREE ASSOCIATION WITH PALAU

Section 432 of the Compact of Free Association between the Government of the United States of America and the Government of Palau ("Compact") requires that the United States and Palau formally review the Compact after it has been in effect 15 years. With the Compact's entry into force on October 1, 1994, Palau became a self-governing state and the last of the United States' obligations under the Trusteeship Agreement of 17 July 1947 establishing the UN Trust Territory of the Pacific Islands ("TTPI") terminated. *See Cumulative Digest 1991–1999* at 819–25.* The fifteenth anniversary of the Compact's effective date was October 1, 2009. The U.S.–Palau review concluded on September 3, 2010, with the signature of the Agreement between the Government of the United States of America and the Government of the Republic of Palau following the Compact of Free Association Section 432 Review ("Agreement"). The Agreement requires the United States to provide Palau with various forms of direct and indirect financial assistance through Fiscal Year 2024. The Agreement also requires Palau to undertake economic, legislative, financial, and management reforms and permits the United States to withhold financial assistance if Palau fails to make significant progress in implementing those reforms. The Agreement also requires citizens of Palau to have passports for entry to the United States. The Agreement will not take effect until the U.S. Congress adopts legislation to amend Title I of Pub. L. No. 99-658, 100 Stat. 3672 (Nov. 14, 1986), which approved

* Editor's note: The Compact differs from the Compact of Free Association between the United States and the Republic of the Marshall Islands ("RMI") and the Compact of Free Association between the United States and the Federated States of Micronesia ("FSM"), both of which initially entered into force in 1986 and were amended subsequently. Congress approved the amended Compacts with the RMI and FSM in Pub. L. No. 108-188, 117 Stat. 2720 (Dec. 17, 2003). These amended Compacts took effect in 2004. *See Digest 2003* at 271–73; *Digest 2004* at 219.

the Compact, by adding a section that approves the Agreement and appropriates funds to implement its provisions.**

Cross References

Immigration and nationality, **Chapter 1.**
Protection of migrants, **Chapter 6.F.**

** Editor's note: The executive branch transmitted draft legislation to Congress on January 14, 2011. The draft legislation and accompanying transmittal letters are available at *www.state.gov/s/l/c8183.htm.*

Chapter 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On March 11, 2010, the Department of State released the 2009 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. The report is available at *www.state.gov/g/drl/rls/hrrpt/2009*; Secretary Clinton's remarks on the release of the report are available at *www.state.gov/secretary/rm/2010/03/138241.htm*.

2. Human Rights Council

a. Overview

On February 16, 2010, State Department Legal Adviser Harold Hongju Koh participated in a panel discussion on "U.S. Leadership at the U.N. Human Rights Council" at the Brookings Institution in Washington, D.C. Mr. Koh discussed five points: (1) the emerging Obama-Clinton Doctrine in foreign policy; (2) how that doctrine affects the U.S. approach

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to the Human Rights Council; (3) differences between the Obama administration's and the previous administration's approaches to the Council; (4) the implications of the Obama administration's approach to the Council for issues before the Council; and (5) the U.S. government's efforts relating to U.S. human rights practices. Mr. Koh's remarks, which are excerpted below, are available in full at *http://geneva.usmission.gov/2010/02/16/harold-koh-hrc*.

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Let me start first with what I'd call the Obama-Clinton Doctrine. . . .

. . . I believe that the foreign policy of this administration is guided by four basic commitments. The first is to multilateral commitments, a strategic multilateralism, and I think this is just something that's very endemic to our President's approach to thinking. . . .

The second plank is what I would call a universality, and this has been expressed both by President Obama from his inaugural address to Secretary Clinton in the speech that she gave in Georgetown, that our commitment to human rights starts with the universal standards, holding everyone accountable to those standards, including ourselves.

The third, and this is where my current role as Legal Advis[e]r comes in, is commitment to our values and expressed in fidelity to laws, domestic and international law. If there's a difference between our counterterrorism policy, it is one that is going to be conducted consistently with our values and consistently with the law, domestic and international.

Now that doesn't mean that we are not able or not able to operate within the legal framework to battle against people who are trying to blow [up] buildings in the United States or blow up aircraft or anything else. There's nothing illegal about certain forms of response. It's a basic tenet that the last administration too quickly abandoned these values and fidelity to law, in doing what was a necessary national task, and what we're trying to do is to bring that policy back within the framework of law and our values.

And this suggests, as the President said in his Nobel lecture, that adhering to international standards strengthens those who do and isolates those in don't. In other words, it's a reaffirmation of our basic commitment to the framework of international law.

And then fourth and finally, the approach to be applied to this multilateralism, this commitment to universal values, this fidelity to our values and the rule of law should be expressed through the exercise of what Secretary Clinton likes to call smart power—in other words, not just military tools but a kind of principled pragmatism, the intelligent use of all policy tools at our disposal, not just diplomacy, development, human rights, but also promotion of democracy and use of the legal tool.

What I would argue is that our approach to the Human Rights Council is just a particular instance of the application of this broader Obama-Clinton Doctrine. You can see it in many different settings, but the first and most important focus was the decision to join the Human Rights Council.

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Now I would urge [you] to read Mike Posner's introductory remarks at the September [2009] session, where he talked about our commitments to principled engagement, by which he means looking for common ground but being willing to stand alone when necessary, trying to transcend traditional geographical groupings and a very special concern of Secretary Clinton—making sure the Human Rights Council is not just a talk shop, that it actually works for change on the ground, affecting real individuals, and particularly to take up the cause of human rights defenders, who I know are represented broadly in this group, who are obviously the critical force multiplier on human rights issues. [Editor's note: *See Digest 2009* at 158–60 for discussion of Mr. Posner's remarks, which are available in full as document 19 for *Digest 2009* at *www.state.gov/s/l/2009/list/index.htm*.]

Secondly, the commitment to apply standards universally.

And third, a deep commitment to truth telling, which means that we are concerned by efforts to eliminate or weaken country mandates. On the other hand, we urge that application of country mandates be done in an objective and unbiased and consistent way.

So one of the first things that Mike Posner pointed out, and I think just any fair-minded person would say it, is that the human rights mechanisms of the United Nations have been disproportionately focused on Israel. If you look at the grand scale of human rights conduct and the amount of attention that's actually devoted to one country that has its own item, it's disproportionate.

So, with this background, we are very much focused on the 2011 review. Again, the basic focus of the U.S. government is three-fold: First, to help the Human Rights Council become a better collector of information, not just through special rapporteurs, the UPR mechanism. Then secondly, to make sure that information is assessed. And then third, to make sure that action is actually directed or guided based on the collection and the assessment of information.

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Now I think there are those who would say that this administration hasn't done enough on human rights. I think that the main point is that it's a long-term effort to get from where we were to where we would like to be. We are in an important step along the way. I think our commitment to the Human Rights Council is long-term.

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b. U.S. Universal Periodic Review

On August 20, 2010, the United States submitted a report to the UN High Commissioner for Human Rights in connection with the UN Human Rights Council's Universal Periodic Review ("UPR") of the United States' human rights record. According to the State Department's Bureau of Human Rights, Democracy, and Labor:

> The Universal Periodic Review (UPR) was established by the UN General Assembly in 2006 as a process through which the human rights records of the United Nations' 192 Member States could be reviewed and assessed. This review, conducted through the UN Human Rights

> Council (HRC), is based upon human rights obligations and commitments expressed in the UN Charter, the Universal Declaration of Human Rights, human rights instruments to which the State is party . . . . The United States is a strong supporter of the UPR process, which provides a unique avenue for the global community to discuss human rights around the world. Individual countries are slated for review every four years . . . . UPR sessions take place at the HRC in Geneva, and are framed by reports submitted by national governments.

See www.state.gov/g/drl/upr. Excerpts below from the introduction to the U.S. report provide U.S. views on the importance of U.S. participation in the UPR process and explain the methodology the United States followed in preparing the report. The full text of the U.S. report is available at *www.state.gov/g/drl/upr/index.htm*, and other documentation relating to the U.S. UPR is available at *www.ohchr.org/EN/HRBodies/UPR/PAGES/USSession9.aspx*.

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6. The ultimate objective of the UPR process, and of the UN Human Rights Council, is to enhance the protections for and enjoyment of human rights. Our participation signifies our commitment to that end, and we hope to contribute to it by sharing how we have made and will continue to make progress toward it. Some may say that by participating we acknowledge commonality with states that systematically abuse human rights. We do not. There is no comparison between American democracy and repressive regimes. Others will say that our participation, and our assessment of certain areas where we seek continued progress, reflects doubt in the ability of the American political system to deliver progress for its citizens. It does not. As Secretary Clinton said in a speech on human rights last year, "democracies demonstrate their greatness not by insisting they are perfect, but by using their institutions and their principles to make themselves . . . more perfect." Progress is our goal, and our expectation thereof is justified by the

proven ability of our system of government to deliver the progress our people demand and deserve.

7. This document gives a partial snapshot of the current human rights situation in the United States, including some of the areas where problems persist in our society. In addressing those areas, we use this report to explore opportunities to make further progress and also to share some of our recent progress. For us, the primary value of this report is not as a diagnosis, but rather as a roadmap for our ongoing work within our democratic system to achieve lasting change. We submit this report with confidence that the legacy of our past efforts to embrace and actualize universal rights foreshadows our continued success.

8. This report is the product of collaboration between the U.S. Government and representatives of civil society from across the United States. Over the last year, senior representatives from more than a dozen federal departments and agencies traveled the country to attend a series of UPR consultations hosted by a wide range of civil society organizations. At these gatherings, individuals presented their concerns and recommendations and often shared stories or reports as they interacted with government representatives. Those conversations shaped the substance and structure of this report. Nearly a thousand people, representing a diversity of communities and viewpoints, and voicing a wide range of concerns, attended these gatherings in New Orleans, Louisiana; New York, New York; El Paso, Texas; Albuquerque, New Mexico; Window Rock, Arizona; the San Francisco Bay Area; Detroit, Michigan; Chicago, Illinois; Birmingham, Alabama; and Washington, D.C. . . .

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On November 5, 2010, a large inter-agency delegation co-led by Assistant Secretary of State for International Organizations Esther Brimmer; Assistant Secretary of State for Human Rights, Democracy, and Labor Michael Posner; and State Department Legal Adviser Harold Hongju Koh presented the U.S. report to a Working Group of the Universal Periodic Review. On November 9, 2010, Mr. Koh provided the initial U.S. response to the 228 recommendations that the Working Group made to the United States during its review. Mr. Koh's statement,

excerpted below, is available in full at *http://geneva.usmission.gov/2010/11/09/un-hrc-recommendations*.

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As indicated in our written report and in our presentation last Friday, the United States is very proud of its human rights record. We always strive for a "more perfect union" to help promote a "more perfect world." To do that, the Obama Administration is developing a thoroughgoing approach with respect to human rights in our country that recognizes that progress requires the coordinated action of many federal government agencies—eleven of which appeared at our initial presentation—as well as the collaborative efforts of state and local governments, and civil society, many of whom attended our Town Hall here at the Palais last Friday.

The recommendations received fall into three broad categories. First, many of the recommendations fit well with the Obama Administration's existing approach to human rights, and can be implemented in due course. Second, several recommendations are plainly intended as political provocations, and cannot be taken seriously. Yet a third group of recommendations invite fuller discussion within our government and with our own civil society. Because we take this process seriously, we now plan to conduct a considered, interagency examination of all 228 recommendations, and to give our formal response at the March 2011 Council session.* But our initial review suggests that the recommendations fall under ten broad headings:

1. Recommendations about politics and pending judicial cases: A small set of comments do not make bona fide recommendations for the UPR. These statements, those

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* Editor's note: The United States presented its response to the 228 recommendations in a written submission on March 4, 2011, see *www.state.gov/g/drl/upr/157986.htm*, and in an oral presentation on March 18, 2011, see *http://geneva.usmission.gov/2011/03/18/us-upr-adoption*. *Digest 2011* will discuss relevant aspects of the U.S. response.

styled as "recommendations," are actually political criticisms of U.S. policies or polemical comments about judicial cases, based on unsubstantiated or false allegations, which refer to individual matters that are either ongoing or already completed under court proceedings conducted under due process of law.

2. Recommendations regarding treaties: This largest group of recommendations urged us to either ratify or consider ratifying treaties—or to consider withdrawing reservations and understandings to treaties that are already ratified. Under our Constitution, treaty ratification requires not just executive approval, but also the consent of our Senate, which requires a supermajority two-thirds vote. That is why the United States has often pursued a practice of "compliance before ratification," in contrast to the practice of "ratification before compliance" that some other nations may pursue. The Obama Administration is working to obtain Senate advice and consent to a number of human rights treaties, particularly the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities.
3. Recommendations on criminal justice: This set of recommendations focused on the role of race, trafficking, police brutality, violence against women, juvenile justice, and the death penalty. . . . Many recommendations concern the administration of capital punishment by those governments within our federal system that still apply it. While we respect those who make these recommendations, we note that they reflect continuing policy differences, not a genuine difference about what international human rights law requires.
4. Recommendations to combat discrimination: The United States is committed to end discrimination by ensuring equal opportunity for political participation by all qualified voters through enforcement of voting rights laws, and by vigorously enforcing laws to ensure equal access to housing, credit, employment, educational opportunities, and environmental justice. We are committed to ensuring that

distinctions such as race, gender, disability, religion, age, ethnicity, or sexual orientation do not interfere with opportunities to live a fulfilling life.

5. Recommendations respecting immigration: . . . With respect to immigration, the United States is committed to addressing concerns about detention, discrimination, and racial and ethnic profiling. We are committed to advancing comprehensive immigration reform as an alternative to piecemeal state and local measures.
6. Recommendations regarding national security: Most of these recommendations referred to our country's continuing armed conflicts in Afghanistan, Iraq, and against Al Qaeda and associated forces. The Obama Administration abides by all applicable law in these armed conflicts, including laws respecting humane treatment, detention, and use of force. We defend the legality under the laws of war of using detention to remove adversaries from the conflict, but do not—and will not—countenance torture or inhumane treatment of detainees in our custody, wherever they are held. Allegations of past abuse of detainees by U.S. forces in Afghanistan, Iraq and Guantanamo have been investigated and appropriate corrective action taken. The Administration is committed to closing Guantanamo as expeditiously as possible, but will need the help of our allies, Congress and the courts to do so. The International Committee of the Red Cross has access to Guantanamo, and an independent review ordered by President Obama found the conditions there far surpass the standards of Common Article III of the Geneva Conventions. Military Commissions procedures have been amended by Congress to address human rights concerns, and both terrorism and electronic surveillance laws have been scrutinized to respect privacy and protect human rights. Finally, this morning I participated on behalf of the United States in the signing ceremony of the International Code of Conduct for Private Security Service Providers, which has been developed as a follow-on to the Montreux Document. [Editor's note: *See* Chapter 18.A.1.d.(3)(ii) for discussion of Mr. Koh's statement at the signing ceremony

for the International Code of Conduct for Private Security Service Providers.]

7. Recommendations respecting indigenous issues: . . . Tribal consultations are at an all-time high after President Obama hosted the White House Tribal Nations Conference, where he directed agencies to submit plans for and progress reports on implementation of the Executive Order on Consultation and Coordination with Indian Tribal Governments. . . .
8. The eighth set of recommendations concern freedom of expression and religion: The United States is committed to vigilance in the continued protection of fundamental freedoms of expression and religion for all, including laws and policies to protect Muslim, Arab, and other Americans from discrimination and to secure their freedom to practice their religion.
9. The ninth set of recommendations concern economic, social and cultural rights: We have continued to establish programs that empower our citizens to live what FDR [President Franklin Delano Roosevelt] called a "healthy peacetime life." The recent landmark healthcare reform is the latest major example, and we are committed to continue pursuing policies that will build an economy and society that lifts us all.
10. And the tenth set of recommendations concern domestic implementation of human rights: The most common recommendation in this category highlighted an issue currently under discussion in our country: to create a national, independent human rights institution, which follows the Paris Principles or similar guidelines. We believe the best human rights implementation combines overlapping enforcement by all branches of the federal government working together with state and local partners.

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c. Procedure and practice

When it decided to establish the Human Rights Council in 2006, the General Assembly also decided to review the

Council's work and functioning in 2011. U.N. Doc. A/RES/60/251 (March 15, 2006). In 2010, the Human Rights Council began to prepare for the 2011 review, addressing the issue under Agenda Item 3: General Discussion on the Work and Functioning of the Council. On October 25, 2010, Ambassador Eileen Chamberlain Donahoe, U.S. Permanent Representative to the Human Rights Council, delivered a statement outlining U.S. objectives for the review and the proposals the United States intended to make as part of the review. Excerpts follow from Ambassador Donahoe's remarks, which are available in full at *http://geneva.usmission.gov/2010/10/26/hrc-2011-review*. Additional proposals the United States circulated are available at *www.state.gov/s/l/c8183.htm*.

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The overall goal of this review should be to ensure that the Council is able to live up to its potential as the UN's primary organization for promoting universal respect for all human rights and fundamental freedoms. It is critical to the United States that this review strengthens the Council's ability to fulfill its mandate to "address situations of violations of human rights, including gross and systemic violations." We also must look for ways to enhance our ability to work cooperatively to achieve that goal, and reduce polarization in the Council. . . .

The United States will be presenting a number of proposals throughout the week, a few of which I will mention here. Specifically, we will be proposing some adjustments to the Universal Periodic Review to make this mechanism even more effective as it enters its second round—by expanding the speakers list as needed, and by focusing on implementation of recommendations from the first round of the UPR, from reports of the Office of the High Commissioner, and from Special Procedures.

We will also be proposing ways to improve the independence and work of the special procedures, which are widely recognized as one of the Council's best tools. These proposals include encouraging more cooperation with the special procedures, providing

more support for their work, and ensuring better follow-up on their recommendations.

Because addressing situations of violations of human rights is one of the most important mandates of the Council, we will also propose ways to better address both crises and chronic situations. Many of our proposals involve better utilization of tools that already exist within the Institution Building Package, but others involve expanding the time allotted to discuss country situations and adding new tools to ensure more regular dialogue on these important issues.

To ensure we are working as efficiently as possible, the United States will also propose rationalizing the agenda to make it more predictable, to make it possible to focus more time on the most important human rights issues, and to address all countries in an even-handed [manner]. . . .

As we move forward in this review, we must ensure that all proposals considered actually strengthen the Council's ability to protect and promote human rights. We will oppose any proposals that we believe would limit the work of the Council or its Special Procedures, threaten the independence of the Office of the High Commissioner, or reduce or otherwise constrain the tools available for meaningful action to protect victims and human rights defenders on the ground.

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On October 27, 2010, in a meeting of the Open-ended Working Group concerning the 2011 review, Mark Cassayre, then Political Counselor, U.S. Mission to the United Nations, Geneva, elaborated on U.S. goals for the review. In the Working Group's discussion of Agenda Item 4.4: Agenda and framework for Programme of Work, Methods of Work and Rules of Procedure, Mr. Cassayre proposed several reforms to improve the Council's procedures and working methods. The U.S. statement, excerpted below, is available at *http://geneva.usmission.gov/2010/10/29/hrc-2011-item-4-4*.

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I believe we all agree that the current calendar and program of work could be significantly improved. The Council spends too much time on some issues, while rushing through some of the highest priorities in relation to the Council's mandate. And the practice of allowing new resolutions to be raised throughout the Council session up to the tabling deadline often prevents meaningful, well-informed engagement. It stops many delegations from fully participating in the debate. To remedy these problems, both the calendar and the agenda must be rationalized to make them more predictable.

Specifically, the United States proposes requiring delegations to submit a list of any resolutions they plan to table during a Council session before that session begins, and to table the first draft of all resolutions one week before the tabling deadline, although exceptions will need to be made for crisis situations. In addition, the United States proposes that resolutions to renew thematic resolutions without mandates and country mandates should come up only once every two years so as to significantly cut down on unnecessary repetition of resolutions.

We propose expanding the time allotted to interactive dialogues with Special Procedures, and requiring more predictability and advance notice of such dialogues. Monthly mini-sessions are one way to accomplish this. Of course, these mini-sessions will have to be announced far enough in advance to allow for full participation by states and NGOs.

During this review, the Council also needs to make strides towards reducing the stigma associated with action on country situations in the Council, improving everyone's perception of the fairness and even handedness of this Council. This would reduce polarization, improve efficiency and enhance the positive engagement of all. The most entrenched and indefensible manifestation of structural bias in this Council comes in the form of Item 7, the only agenda item devoted on one country situation, whereas the UN's other 191 members are all grouped together under items 10 and 4. Item 7 can be understood solely as a tool to apply pressure on Israel, ostracize Israel, and spotlight Israel's conduct. The United States believes strongly that Israel can and must uphold its international human rights obligations, and maintains a continuous

dialogue with Israel to advance that goal. We are convinced that the built-in structural bias against Israel within the UN human rights system has unhelpfully distanced Israel from institutions and mechanisms with which it might otherwise cooperate more closely, as well as undermining our other very positive and fruitful work together. For some, the political objectives accomplished through this structural bias may outweigh its negative consequences. But as a group charged with examining what must be done to improve the credibility and efficacy of this Council it is incumbent upon us to see beyond those potent political considerations in the context of this review, and to do what is right to help the Council become more evenhanded and depoliticized. We hope that in the coming months we can all engage in a reasoned conversation about how to rationalize the Council's treatment of country situations in a way that demonstrates our collective commitment to fairness, that shields no country from scrutiny or reproach, and that positions the Council to achieve the aspirations we have all vested in it. To that end, the United States proposes combining agenda items 4, 7, and 10. The institution of one, consolidated country situation agenda item to replace 4, 7, and 10 would go a very long way towards helping to do away with bias and stigma for the benefit of all, and towards ensuring that this Council lives up to its mandate in 60/251 to abide by the principles of impartiality, objectivity, and constructive international dialogue and cooperation. To ensure the Council does not spend less time on these situations, interventions for this new agenda item should be ten minutes each.

Mr. President,

The Council has not effectively used its full range of tools from the Institution Building Package to address situations of violations of human rights, including gross and systematic violations, and make recommendations, as mandated by OP 3 of resolution 60/251. We need to better use these tools, and allow for more time for discussion.

The United States proposes developing criteria to assure Council meetings in appropriate cases. For example, we propose that if five different thematic special procedures cite a country as a

specific country of concern, this should trigger a meeting that represents an opportunity for dialogue, with no predetermined outcome. We propose establishing a dedicated Working Group on Prevention or Early Warning with the authority to request immediate meetings of the Council. Again, these meetings would be critical opportunities for real time dialogue, with no predetermined outcomes. We recognize that the issue of automatic triggers is not simple and requires discussion to find the most workable ones. Other triggers we propose for consideration at this stage include: 1) a request from the Secretary General, on advice from any of his Under Secretaries, including the High Commissioner, or from his special representatives; 2) requests from National human rights institutes operating under the Paris principles when they request a special meeting on their own country.

Finally, we would propose the following improvements to the rules of procedure to help ensure Council members meet their obligation to uphold the highest standards in the promotion and protection of human rights. Specifically, that member states "take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments" when selecting Council members. This criteria is already established in 60/251.

We propose that candidates for membership in the Council shall present their voluntary pledges and other commitments at an interactive dialogue before the General Assembly in accordance with a standardized format to be developed. OHCHR should prepare a report for this interactive dialogue that includes, inter alia, implementation of human rights treaties the candidate country has ratified, whether the country is under any sanctions related to human rights, the nature of human rights complaints against a country, the status of implementation of accepted UPR recommendations, how the country has cooperated with special procedures, and how the candidate country has contributed to human rights initiatives. There should be more candidate countries from each region than available openings on the Council to allow for full evaluation of candidate countries.

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d. Work of Special Rapporteurs

In 2010, the United States emphasized the importance of the Human Rights Council's Special Rapporteurs. On March 5, 2010, for example, Mark Cassayre, then Political Counselor, U.S. Mission to the United Nations, Geneva, stressed the need for states to respect the Special Rapporteurs' independence and engage constructively with them. Excerpts follow from Mr. Cassayre's statement during the Human Rights Council's interactive dialogue with the Special Rapporteur on Human Rights While Countering Terrorism and the Special Rapporteur on Torture. The full text of the statement is available at *http://geneva.usmission.gov/2010/03/08/interactive-dialogue-with-special-rapporteur*.

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While we may have disagreements on substantive issues, such substantive disagreements should not be misinterpreted as attacks on the independence of Special Procedures. We strongly support their work, and we recognize that these Special Mechanisms are often able to achieve results where others, including States, cannot. They provide an important resource for us all, in our efforts to comply with our international human rights obligations and to encourage respect for human rights and fundamental freedoms throughout the world.

While States may disagree with mandate holders over factual or legal issues, we encourage them to engage with special rapporteurs in a constructive manner, and we appreciate the efforts of mandate holders to do the same. States should defend the independence of the Special Mechanisms in general, even when it is not politically convenient to do so. For this reason, we supported the Special Rapporteurs' efforts to present their report on Secret Detentions during the normal Interactive Dialogue process this session, even though over 50 pages contain allegations against our country, and despite serious substantive concerns and disagreements with the report. Similarly, we were concerned and dismayed by the account the Rapporteur on Torture gave of States not

responding to or denying his visit requests, postponing visits at the last minute or obstructing his fact-finding activities during visits. We encourage States to welcome the Special Rapporteur to engage with them on matters within his mandate.

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e. Special Session

For discussion of the Human Rights Council's Special Session on Cote d'Ivoire in December 2010, see K.3. below.

3. Protection of Persons

On October 29, 2010, Mark A. Simonoff, Acting Legal Adviser, 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-second session. Excerpts follow from Mr. Simonoff's discussion of 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, which also addressed the ILC's work concerning expulsion of aliens and the effects of armed conflict on treaties, is available at *http://usun.state.gov/briefing/statements/2010/150315.htm*; the ILC report is available at *http://untreaty.un.org/ilc/reports/2010/2010report.htm*.

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The United States commends the Commission for its progress in this important topic, including its work on Draft Articles 6 through 8, 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 believe that the Commission could contribute greatly to State efforts to plan and prepare for disaster relief efforts through a focus on providing practical guidance to countries in need of, or providing, disaster relief.

We commend the Special Rapporteur for addressing the role that core humanitarian principles of neutrality, impartiality, and independence play in the coordination and implementation of humanitarian assistance in disaster response. We would encourage the Special Rapporteur to continue to consider, in his ongoing work, the possible ways in which these principles relate to and shape the context of disaster relief in the present project.

We also appreciate the fact that the Special Rapporteur has included in Draft Article 8 language that the affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The report indicates debate among Commission members regarding the issue of whether, in the words of the report, primary responsibility means exclusive responsibility. Issues surrounding this debate are likely to attract a wide range of diverging views, and it may be that—in the interests of facilitating the likelihood of the Commission being able to develop a product that is of the most practical use to the international community—the Commission would best be served by structuring its work on this project in a way that avoids the need for a definitive pronouncement on these issues.

At the same time, the United States strongly supports international cooperation and collaboration in providing disaster relief. We appreciate the Special Rapporteur's ongoing efforts to ensure that the duty of States to cooperate set forth in Draft Article 5 is understood in the context of the principle that the affected State has the primary responsibility for protection of persons and provision of humanitarian assistance on its territory.

4. Memoranda Regarding U.S. Human Rights Treaty Reports

On January 21, 2010, State Department Legal Adviser Harold Hongju Koh sent memoranda to the governors of the 50 U.S. states; the mayor of the District of Columbia; and the

governors of the five U.S. territories (American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands), providing information on five human rights treaties to which the United States is a party and advising recipients of the reports the United States is obligated to submit to the treaties' monitoring bodies on U.S. implementation of its obligations under them. Each memorandum advised recipients that "[b]ecause implementation of these treaties may be carried out by officials at all levels of government (federal, state, insular, and local) under existing laws applicable in their jurisdictions, we want to make sure that the substance of these treaties and their relevance to the United States is known to appropriate governmental officials and to members of the public." Each memorandum requested its recipient to forward it to officials in their governments with responsibility for implementing the treaties and included links to the websites providing the treaties, U.S. reports to treaty implementation bodies, the treaty bodies' responses, and other relevant documents. The full texts of the memoranda are available at *www.state.gov/g/drl/hr/treaties/index.htm*.

B. DISCRIMINATION

1. Race

a. Overview

In 2010, the United States continued to promote implementation by States Parties of their obligations under the International Convention on the Elimination of All Forms of Racial Discrimination and to advocate international cooperation to combat racial discrimination. The United States also pursued its domestic efforts to counter racial discrimination and other intolerance and stressed its view that fighting racial discrimination and intolerance must not and need not occur at the expense of the right to freedom of expression.

On March 23, 2010, for example, Ambassador Eileen Chamberlain Donahoe, U.S. Permanent Representative to the Human Rights Council, outlined U.S. views and approaches to combating racial discrimination internationally and domestically in a statement during the Human Rights Council's general debate on Agenda Item 9: Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up and implementation of the Durban Declaration and Programme of Action. Excerpts follow from Ambassador Donahoe's statement, discussing U.S. initiatives to fight racism domestically. The full text of Ambassador Donahoe's statement is available in full at *http://geneva.usmission.gov/2010/03/23/donahoeitem9*.

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The United States Government recognizes that our history reflects lapses, challenges, struggles, and, encouragingly, on-going progress. We continue to examine ourselves, knowing that we are not immune to acts of intolerance and that it is only through hard work and careful scrutiny that we can push back against intolerance and discrimination both in the U.S. and around the world.

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Our diverse society has become a source of pride for the United States. Earlier this month, during her trip to Latin America, Secretary Clinton spoke about her pride in the progress the United States has made, through the hard work of leaders like Dr. Martin Luther King and others in the civil rights movement, to combat racial discrimination. She noted, however, that it is not enough to simply write the laws that constitute visible legal barriers to discrimination; rather, eliminating racism is an ongoing struggle for the United States and for the rest of the world.

The Civil Rights Division of the Department of Justice fights this battle daily as it enforces the country's civil rights laws, ensuring respect for our human rights treaty obligations. I would like to elaborate on some of the concrete initiatives our government is taking in this regard:

In October 2009, President Obama signed the Matthew Shepard and James Byrd Jr. Hate Crimes Protection Act, which expands

protections under the federal hate crimes statute and removes barriers to prosecution. This legislation gives our Justice Department and state and local law enforcement important tools and increased capacity to deter and prosecute such acts of violence.

During our nationwide housing crisis, the enforcement of fair housing and fair lending protections have been the most pressing civil rights needs of families and communities. Among other successes in the past year, the Division obtained the Justice Department's largest ever settlement in a rental housing discrimination case, 2 million, 725 thousand dollars, in a case that involved discrimination against African Americans and Latinos in several apartment communities in the Los Angeles area.

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The United States provided additional information on its domestic efforts to counter racial discrimination when the Chairperson-Rapporteur of the Working Group of Experts on People of African Descent, Mirjana Najcevska, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Mugai, each reported to the Human Rights Council on September 28, 2010. Excerpts from the U.S. statement, responding to the Working Group's report on its January 2010 visit to the United States, are provided below. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*.

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We fully agree with the conclusion of the Working Group that a "comprehensive solution to inadequate access to quality education is needed." To that end, the Obama Administration has created the Race to the Top Fund, a competitive grant program designed to encourage and reward U.S. States that are creating the conditions for education innovation and reform; achieving significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers; and implementing ambitious plans in core education reform areas.

We would like to clarify the reference in the conclusions to the abolition of slavery. The Thirteenth Amendment allows the state/federal government to compel the labor of anyone convicted of a crime—it does not apply only to African Americans. Because the term "slavery" is associated with the chattel slavery of African Americans before the civil war, use of the term to apply to convicted prisoners may be misleading. Section one of the Thirteenth Amendment abolishes slavery, but equally important is the fact that Section two gives Congress the power to enforce the Amendment "by appropriate legislation."

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As mentioned above, throughout 2010 the United States stressed its desire to work collaboratively with other states to promote concrete global action to combat racial discrimination. In her March 23 statement to the Human Rights Council, discussed *supra*, Ambassador Donahoe said, "We continue to believe that the Human Rights Council, and the Ad Hoc Committee [on Complementary Standards] in particular, can and should make a real contribution to the fight against discrimination. We look forward to our continued work with all delegations to provide a clear signal to victims of racial and religious discrimination that the UN is committed to taking steps to combat these scourges." Ambassador Donahoe elaborated on U.S. views in a statement to the Human Rights Council on March 25, 2010, when the United States joined consensus in adopting a resolution on the "Ad Hoc Committee on Complementary Standards." Ambassador Donahoe's explanation of the U.S. position on the resolution, excerpted below, is available at *http://geneva.usmission.gov/2010/03/26/eop-donahoe-comp-standards*. Background on the Ad Hoc Committee is available in *Digest 2009* at 179–83. *See also www2.ohchr.org/english/issues/racism/adhoccommittee.htm*.

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The United States returned to the Human Rights Council last year with a sincere desire to pursue the important work of combating racial and religious intolerance and discrimination. These disturbing incidents occur in all parts of the world. We owe it to the victims of intolerance, discrimination and violence to take effective measures to strengthen our collective efforts against these scourges.

Mr. President, in recent years these efforts in the Council have been polarized. Lines have been drawn that have made it difficult to make progress.

Some of the disputes are substantive: For example, some delegations believe that a key step in combating negative stereotypes and hate crimes involves governments banning . . . hate speech. Others, my government included, believe strongly that such restrictions on expression are unacceptable and dangerous. Other disagreements are over form—whether measures such as new treaty instruments need to be adopted . . . or whether greater efforts need to be made to strengthen implementation of existing obligations. Our long standing belief is that actions rather than new norms are required to address these concerns. In this respect, we share the concerns raised by other delegations here today.

Mr. President, the United States has made an all out effort over the last six months to try to find a way to break this impasse. We have searched for an approach that would command support sufficient to make real progress. We offered a comprehensive Action Plan in the Ad Hoc Committee last fall designed to put into action the ideas most members do agree upon, even as we continue to debate those on which there remains strong disagreement.

We join consensus on this text today in the sincere hope that it represents a new spirit of cooperation towards bridging old divides and focusing on positive actions to directly help victims who face intolerance and discrimination. We end on a positive note, seeing the consensus achieved on this issue at long last, as the first step towards putting into action things most members do agree upon, actions that will give meaningful help to those who need it the most.

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b. Durban follow up

(1) Human Rights Council

Throughout 2010, when UN bodies or other States raised issues relating to the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa and the Durban Declaration and Programme of Action ("DDPA"), the United States continued to articulate its longstanding concerns with the conference and its outcome document. For background see *Digest 2001* at 267–68, *Digest 2007* at 315–17, *Digest 2008* at 284–85, and *Digest 2009* at 174–75. On June 18, 2010, for example, the United States disassociated from consensus when the Human Rights Council adopted a resolution entitled, "From rhetoric to reality: a global call for concrete action against racism, racial discrimination, xenophobia and related intolerance." U.N. Doc. A/HRC/RES/14/16. Excerpts follow from the U.S. statement, explaining the U.S. concerns about the resolution's preambular language on the DDPA that required the United States to disassociate from consensus on the resolution. 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 has long been a party to the International Convention on the Elimination of All Forms of Racial Discrimination. While we have struggled to overcome the legacies of racism and the effects of past discriminatory policies, we are proud of our record of domestic legislation and policies and programs designed to vigorously combat such activities. Our commitment to this important issue is unwavering.

It is, therefore, with sincere regret that the United States must disassociate from consensus on the resolution before us. We are confident that beneath our differences we share the same goals, and we are proud of efforts we have jointly made in this and other

forums to underscore this fact and to adopt important resolutions by consensus.

Our position on the Durban Declaration and Programme of Action (DDPA) is well known. As such, our most serious concerns regarding this resolution relate to preambular paragraph 8. Its status as a preambular rather than operative paragraph of the resolution is what allows us to disassociate from consensus, rather than call for a vote. Because of our views on the DDPA, we cannot endorse all efforts undertaken by the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action, or the Durban Declaration and Programme of Action itself. Despite our differences, we believe it is important that we collectively focus, in a constructive way on the future. Ten years later, problems of racism and discrimination continue to plague all regions of the world. Rather than focus on commemorating a meeting; we should commit to finding ways to effectively address racism and reinvigorate the vision of a world free from racial discrimination.

(2) General Assembly

Similarly, on November 23, 2010, the United States called for a vote and voted against a resolution in the Third Committee of the UN General Assembly 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 and available in full at *http://usun.state.gov/briefing/statements/2010/151912.htm*.

Mr. Chairman, the United States is deeply committed to fighting racism, racial discrimination, xenophobia, and related forms of intolerance at home and abroad. Our founding commitment to the principle that all people are created equal is manifested today in both our record of strong legislation and policies to vigorously

fight discrimination and promote equal opportunity and equal treatment, as well as in our ongoing work with the international community to fight prejudice based on race, nationality, ethnicity, religion, gender, disability or sexual orientation.

We believe the United Nations must continue to address the issues of race and racism, and the United States will work with all people and nations to build enduring political will and to find concrete ways to halt racism and racial discrimination wherever they occur.

We remain deeply concerned about speech that advocates national, racial, or religious hatred, particularly when it seeks to incite violence, discrimination, or hostility. However, based on our own experience, the United States remains convinced that the best antidote to offensive speech is not bans and punishments but a combination of three key elements: robust legal protections against discrimination and hate crimes, proactive government outreach to racial and religious groups, and the vigorous defense of freedom of expression.

My delegation regrets that this resolution contains elements that require us to vote no, and we hope to work together to find common ground on concrete approaches that both protect freedom of expression and combat all forms of racism and racial discrimination.

In addition to these concerns with the resolution, we are also deeply troubled by the choice of time and venue for the 10th anniversary commemorative event. Just days earlier, we will have honored the victims of 9/11, whose loved ones will be marking a solemn 10-year anniversary for them and the entire nation. It will be an especially sensitive time for the people of New York and a repeat of the vitriol sadly experienced at past Durban-related events risks undermining the relationship we have worked hard to strengthen over the past few years between the United States and the UN.

The poor choice of time and venue for the 10th anniversary commemorative event places a premium on the need for all participants to put forth genuine, good-faith efforts to ensure that this event focuses on the substantive issues at stake in the global fight against racism, and that it does not become a forum for politicization,

or efforts that run counter to mutual respect and fundamental human rights.

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On December 24, 2010, the General Assembly adopted the resolution by a vote of 104 in favor and 33 opposed, with 22 abstentions. U.N. Doc. A/RES/65/240. On the same day, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, issued a statement concerning the U.S. vote against the resolution. Ambassador Rice stated:

> . . . We voted no because the Durban Declaration process has included ugly displays of intolerance and anti-Semitism, and we do not want to see that commemorated. The United States is fully committed to upholding the human rights of all individuals and to combating racial discrimination, intolerance and bigotry. We stand ready to work with all partners to uphold human rights and fight racism around the world.

Ambassador Rice's statement is available in full at *http://usun.state.gov/briefing/statements/2010/153736.htm*.

c. Other issues relating to protecting freedom of expression while countering racism or intolerance

On November 16, 2010, the United States again expressed its view that attempting to counter racism by prohibiting freedom of speech is inappropriate, ineffective, and can run counter to human rights. In voting against a resolution concerning "Inadmissibility of Practices that Contribute to Fueling Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance," Laurie Shestack Phipps, Adviser for Economic and Social Affairs, U.S. Mission to the United Nations, explained U.S. concerns about language in the resolution that would require states to prohibit freedom of speech. The U.S. statement to the General Assembly's Third Committee, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/151125.htm*.

The General Assembly adopted the resolution on December 21, 2010, by a vote of 129 states in favor, three abstaining, and 52 opposing. U.N. Doc. A/RES/65/199. For general discussion of U.S. views on and initiatives to promote freedom of expression, see Section K. of this chapter.

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The United States supports many elements of this resolution. We join other members of the Third Committee in expressing revulsion at any attempt to glorify or otherwise promote Nazi ideology. The United States has been a strong supporter of the UN's efforts to remember the Holocaust and has a deep commitment to honoring the memory of the millions of lives lost. We also condemn without reservation all forms of religious intolerance or hatred.

We remain concerned, however, that the resolution fails again this year to distinguish between actions and statements that, while offensive, should be protected by freedom of expression, and criminal actions motivated by bias that should always be prohibited. The United States shares the concern expressed in this resolution regarding increases in the number of racist incidents expressed in any medium or forum, including on the Internet. However, we do not consider curtailing expression to be an appropriate or effective means of combating racism and related intolerance. Rather, it is our firm conviction, as reflected in the U.S. Constitution and laws of the United States, that individual freedoms of speech, expression and association should be robustly protected, even when the ideas represented by such expression are full of hatred. It is for this reason that the United States has taken a reservation to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. We remain convinced of the need for this reservation.

In a free society hateful ideas will fail on account of their own intrinsic lack of merit. The best antidote to intolerance is not criminalizing 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 freedom of expression.

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d. Committee on the Elimination of Racial Discrimination

The United States became a party to the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") on October 21, 1994, and reports regularly to the Committee on the Elimination of Racial Discrimination on U.S. implementation of its obligations under the CERD. On November 22, 2010, the United States joined consensus in adopting a resolution on the CERD in the Third Committee of the General Assembly. Following the resolution's adoption, the United States made a statement, provided below, stressing its support for the goals of the CERD and the work of the Committee on the Elimination of Racial Discrimination and its concern about language in the resolution concerning an amendment to the CERD, not yet in force, that would require the Committee's expenses to be paid from the regular UN budget rather than from contributions of States Parties to the CERD. The U.S. statement is also available at *www.state.gov/s/l/c8183.htm*. On December 21, 2010, the General Assembly adopted the resolution without a vote. U.N. Doc. A/RES/65/200.

We would like to emphasize that the United States strongly condemns racial discrimination and has worked, and continues to work, in UN fora toward its eradication. We are a party to the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") and strongly support its goals. We appreciate the important work of the Committee on the Elimination of Racial Discrimination (Committee).

With regard to preambular paragraph 8 and operative paragraph 20 of this resolution, the United States reiterates its position that treaty body expenses should be funded by States Parties, and not from the regular budget of the UN.

Operative paragraph 16 of this resolution decides to extend the temporary measure providing additional meeting time as a means of addressing the current backlog the Committee faces. In providing this extension, we strongly support efforts being undertaken to increase the efficiency of all the treaty bodies and to

improve working methods such that resources are used as effectively as possible. These efforts to play an important role in achieving a sustainable solution to reducing backlogs.

e. OAS Resolution on the Draft Inter-American Convention Against Racism

On May 27, 2010, W. Lewis Amselem, Deputy Permanent Representative to the Organization of American States, made a statement concerning the OAS resolution on the draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance during a meeting of the OAS Permanent Council. The U.S. statement, excerpted below, is available in full at *www.state.gov/s/l/c8183.htm*. The resolution (AG/RES. 2606 (XL-O/10), which the OAS adopted in its fourth plenary session on June 8, 2010, is available at p. 385 of "Declarations and Resolutions Adopted by the General Assembly." *See www.oas.org/consejo/sp/AG/Documentos/AG05071E03.doc*. At the request of the United States, the U.S. statement also was recorded in the OAS's minutes of the meeting. *See* OAS Doc. CP/ACTA 1758/10, available at *www.oas.org/consejo/sp/actas/acta1758.pdf* (p. 34).

The United States is able to support the language contained in operative paragraph 1 of the draft resolution on the Draft Inter-American Convention Against Racism referencing continuing efforts to conclude negotiations on the draft convention because it is drawn from consensus language that States agreed to in the Declaration of Commitment in the Fifth Summit of the Americas that recognizes the need to bring the protracted negotiations of this draft convention to an end.

As many of you know, as early as 2002, the Inter-American Juridical Committee, articulated serious concerns about the advisability of these negotiations. In its March 2002 report it concluded that "it is not advisable to undertake to negotiate and conclude a general convention to prevent, sanction and eradicate racism and all forms of discrimination and intolerance, insofar as it would be

repetitive, producing overlapping that would lead to serious and inevitable problems of interpretation and generate doubts and confusion as to which were the obligations and rights of the Member-States parties to the former conventions and the new convention." The Committee also had the foresight to note that in light of the existing comprehensive regime to combat broad-ranging forms of racial discrimination under the Convention on the Elimination of All Forms of Racial Discrimination, "there is no justification for the enormous diplomatic effort nor for the complicated and usually lengthy negotiations required to conclude a new convention on this matter."

The long-standing position of the United States regarding the negotiations has been to oppose them on similar grounds. We made clear our objections to this draft convention from the start and have declined thereafter to participate in them. As you know, for many years, during the negotiations of previous OAS resolutions on this topic, the United States articulated its objections in the form of a footnote which underscored that there is no need for a new convention against racism in the hemisphere as there already is a robust global treaty regime on this topic, to which some 170 countries are State Parties and that a regional instrument is therefore not only unnecessary but it runs the risk of creating inconsistencies with this global regime. Our view, both in this context as well as in U.N. fora when similar exercises have been proposed, has and continues to be that the OAS and the Member States should focus on concrete measures to improve implementation of existing commitments. The continued persistence of acts of racial discrimination and related violence throughout the hemisphere is evidence of the reality that there continue to be serious gaps in implementation that need to be urgently addressed. The time and resources of the OAS and its member states would be better served engaging in practical efforts to improve implementation, including through the convening of meeting[s] of experts from capital, the exchange of technical expertise and assistance, and other concrete steps. There is serious work to be done on norm implementation and it is unbalanced and not helpful to victims on the ground to have an almost exclusive focus on norm creation.

2. Gender

a. CEDAW

On November 10, 2010, Melanne Verveer, Ambassador-at-Large, Office of Global Women's Issues, U.S. Department of State, testified in support of U.S. ratification of the Convention on the Elimination of All Forms of Discrimination Against Women before the Senate Committee on the Judiciary. Ambassador Verveer's testimony, excerpted below, is available in full at *http://judiciary.senate.gov/pdf/10-11-18%20Verveer%20Testimony.pdf.* The related testimony of Samuel Bagenstos, then Principal Deputy Assistant Attorney General for Civil Rights, U.S. Department of Justice, is available at *http://judiciary.senate.gov/pdf/10-11-18%20Bagenstos%20Testimony.pdf.*

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U.S. ratification of the Women's Treaty matters because the moral leadership of our country on human rights matters. Some governments use the fact that the U.S. has not ratified the treaty as a pretext for not living up to their own obligations under it. Our failure to ratify also deprives us of a powerful tool to combat discrimination against women around the world, because as a non-party, it makes it more difficult for us to press other parties to live up to their commitments under the treaty.

The United States is firmly committed to the principles of women's equality as enshrined in the U.S. Constitution. Our ratification will send a powerful and unequivocal message about our commitment to equality for women across the globe. It will lend much needed validation and support to advocates fighting the brutal oppression of women and girls everywhere, who seek to replicate in their own countries the strong protections against discrimination that we have in the United States. And it will signal that the United States stands with the women of the world.

Importantly, ratification will also advance U.S. foreign policy and national security interests. . . .

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I would like to briefly describe what the Women's Treaty is, the principles it enshrines, and how it can be used to challenge discrimination against women around the world. The Women's Treaty was adopted by the United Nations nearly 31 years ago and is the first treaty to comprehensively address women's rights and fundamental freedoms. The treaty builds on several previous international human rights instruments, including the UN Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights (ICCPR). It obliges parties to end discrimination against women and addresses areas that are crucial to women's equality, from citizenship rights and political participation to inheritance and property rights to freedom from domestic violence and sex trafficking. It is consistent with the approach that we have already taken on these issues domestically. To date, 186 out of 192 UN member states are party to the treaty.

Around the world, women are using the Women's Treaty as an instrument for progress and empowerment. There are countless stories of women who have used their countries' commitments to the treaty to bring constitutions, laws, and policies in line with the principle of nondiscrimination against women. Over the course of my travels, I have seen firsthand its incredible influence in helping women change their societies. . . .

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. . . But much work remains to be done. And it is long overdue for the United States to stand with the women of the world in their effort to obtain the basic rights that women in this country enjoy.

As Secretary Clinton has said, "the United States must remain an unambiguous and unequivocal voice in support of women's rights in every country, every region, on every continent." By ratifying the Women's Treaty, we will speak with this clarity of voice and purpose. We will strengthen the efforts of those who toil for women's rights, for equal treatment, and for human dignity. And we will make clear our belief that human rights are women's rights and women's rights are human rights, once and for all.

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b. Establishment of UN Women

On July 2, 2010, with strong U.S. support, the General Assembly decided to establish a new consolidated entity, UN Women, to enhance the UN's efforts to promote gender equality and women's advancement worldwide. *See* Chapter 7.A.2. for discussion.

c. Women and armed conflict

(1) Security Council Resolution 1325

On October 26, 2010, the UN Security Council met to commemorate the tenth anniversary of the adoption of Security Council Resolution 1325 on women, peace, and security. The Council issued a Presidential Statement during its meeting, reaffirming its commitment to Resolution 1325 and subsequent, related resolutions and setting out practical steps to improve implementation of the resolution. *See* U.N. Doc. S/PRST/2010/22.

The day before the Council's meeting, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, made a statement stressing the importance of the resolution, which, she explained, "committed the Security Council and all UN Member States to strengthen the participation and representation of women in UN decision-making, peacebuilding and peacekeeping." Ambassador Rice also stressed the need for states to implement the resolution:

> Resolution 1325 inspired a broad and welcome shift in approach at the UN during the last ten years—including a focus on the abhorrent use of rape as a weapon of war. Still, women continue to lack decision-making power in post-conflict processes. Despite often leading calls for peace, women are too frequently excluded from helping to achieve it, remaining chronically underrepresented as signatories to peace agreements and in negotiating delegations, in national governments and in the uniformed

> ranks of UN peacekeeping operations. Member States are falling far behind on national efforts to implement Resolution 1325. Women and girls continue to bear the brunt of horrifying violence in armed conflict, tearing at the fabric of societies and impeding lasting peace. This must change.

The full text of Ambassador Rice's statement is available at *http://usun.state.gov/briefing/statements/2010/149887.htm*.

At the Security Council's commemorative meeting, Secretary Clinton delivered a statement, excerpted below, which is available in full at *http://usun.state.gov/briefing/statements/2010/150014.htm*. For a State Department fact sheet on U.S. efforts to support implementation of Resolution 1325, see *www.state.gov/r/pa/prs/ps/2010/10/150006.htm*.

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. . . [W]e're here to reaffirm the goals set forth in this historic resolution, but more than that, to put forth specific actions, as my colleague, the foreign minister of Austria, just did in such a commendable set of proposals. [Editor's note: For Foreign Minister Michael Spindelegger's proposals, see U.N. Doc. S/PV.6411 or *www.bmeia.gv.at/en/austrian-mission/austrian-mission-new-york/news/statements-and-speeches/2010/statement-by-he-dr-michael-spindelegger-federal-minister-for-foreign-affairs-of-the-republic-of-austria.html*.] The only way to achieve our goals—to reduce the number of conflicts around the world, to eliminate rape as a weapon of war, to combat the culture of impunity for sexual violence, to build sustainable peace—is to draw on the full contributions of both women and men in every aspect of peacemaking, peacekeeping, and peace building.

Now, women's participation in these activities is not a "nice thing to do." It's not as though we are doing a favor for ourselves and them by including women in the work of peace. This is a necessary global security imperative. Including women in the work of peace advances our national security interests, promotes political stability, economic growth, and respect for human rights and

fundamental freedoms. Just as in the economic sphere, we cannot exclude the talents of half the population, neither when it comes to matters of life and death can we afford to ignore, marginalize, and dismiss the very direct contributions that women can and have made.

President Obama's National Security Strategy recognizes that "countries are more peaceful and prosperous when women are accorded full and equal rights and opportunity. When those rights and opportunities are denied, countries lag behind." Well, it is also true when it comes to issues of human security—accountability for sexual violence, trafficking of women and girls, and all of the other characteristics of stable, thriving societies that provide maternal and child healthcare, education, and so much else.

Now, in defense, diplomacy, and development, which we consider the three pillars of our foreign policy, we are putting women front and center, not merely as beneficiaries of our efforts but as agents of peace, reconciliation, economic growth, and stability.

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But the United States and none of the member states can do this work alone. We need the international community. We certainly need organizations like the International Committee of the Red Cross, which trains women to treat landmine victims in Afghanistan, and the UN High Commissioner for Refugees, which works with men and boys to promote support for women's rights, and the UN itself, which is building up new capacities to combat sexual violence. These and other partners are absolutely essential to fulfilling the promise of 1325.

There is no starker reminder of the work still ahead of us than the horrific mass rapes in Democratic Republic of Congo last summer. Those rapes and our failure as an international community to bring that conflict to an end and to protect women and children in the process stands as a tragic rebuke to our efforts thus far. And we all must do more and we must think creatively. And yes, we may have to challenge some conventional wisdom about how best to end the impunity of those who not only conduct these horrible violations of human rights, but those who permit them to do so.

While visiting Goma last year, I pledged $17 million to help prevent and respond to sexual and gender-based violence. This money is now flowing to provide medical and legal services for survivors. In addition, the U.S. military's Africa Command has trained a battalion of Congolese soldiers to work to prevent sexual violence, help victims and prosecute perpetrators. We know that that is still not happening, and we know that, unfortunately, there is not yet the will, either in DRC itself or in the UN or in the international community, to help bring about an end to impunity.

Looking ahead, I am pleased to announce two important steps the U.S. is taking to advance the goals of Resolution 1325. First, the United States will commit nearly $44 million to a set of initiatives designed to empower women. . . .

* * * *

In addition to this new funding, our second step will be to develop our own National Action Plan to accelerate the implementation of Resolution 1325 across our government and with our partners in civil society. . . .

Now, the National Action Plan and the new funding I've announced are two important steps, and we will pursue them with total commitment. But as several have already said: Action plans and funding are only steps toward a larger goal.

The presidential statement that we hope will be adopted calls for another stock-taking in five years. But we better have more to report and we better have accomplished more between now and then, otherwise, there will be those who will lose faith in our international capacity to respond to such an overwhelming need . . . .

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(2) Security Council Resolution 1960

On December 16, 2010, the UN Security Council adopted U.S.-led Resolution 1960, concerning sexual violence in armed conflict. U.N. Doc. S/RES/1960. The resolution built upon Security Council Resolutions 1820 (2008) and 1888 (2009), which also addressed sexual violence in armed conflict

and stressed that such violence can hinder significantly the restoration of peace and security. Among other things, the resolution encouraged the Secretary-General to list, in annexes to his annual reports to the Security Council on implementation of Resolutions 1820 and 1888, names of parties who are credibly suspected of committing or bearing responsibility for rapes or other acts of sexual violence in the armed conflicts on the Security Council's agenda. The resolution also requested the Secretary-General to set up arrangements to monitor, analyze, and report on sexual violence relating to armed conflict, and it expressed the Council's intent, "when adopting or renewing targeted sanctions in situations of armed conflict, to consider including, where appropriate, designation criteria pertaining to acts of rape and other forms of sexual violence." U.N. Doc. S/RES/1960, ¶ 7. Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, delivered a statement, excerpted below, welcoming the resolution and the additional tools it provides to strengthen the UN's efforts to prevent and combat sexual violence in armed conflict. The full text of Ambassador Rice's statement is available at *http://usun.state.gov/briefing/statements/2010/153048.htm*.

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We are gathered because we all agree on the importance of addressing an issue that cries out for the world's conscience—and that is sexual violence in conflict. We agree that the challenge is urgent and immense. The human cost is all too real. Armed conflicts continue to have a devastating impact, particularly on women and girls. Rape, sexual assault, and gender-based violence are all too often used deliberately and cynically as a weapon of war. And the fight to end sexual violence has yet to be universally recognized as central to securing international peace and security.

* * * *

The United States commends the United Nations, especially UN Action, for its leadership in finding effective ways to address

this problem. We have been encouraged by the UN's response and follow-up to the appalling August attacks in the Democratic Republic of Congo, including the additional steps it's taken to build mission-wide strategies to better protect civilians. The UN has increased random patrols, recruited more female peacekeepers, and improved communications. It's also employing scenario-based training for peacekeepers to help combat sexual violence. But obviously, more must still be done. We hope the UN will continue to identify women's protection advisers and put them in more peacekeeping operations and complete a gaps analysis of UN protection strategies.

In her brief tenure so far, Special Representative [on Sexual Violence and Armed Conflict Margot] Wallstrom has brought leadership, passion and clarity to efforts to end impunity for the heinous crimes of sexual violence in conflict zones. . . . We particularly hope that the team of experts will become a valuable tool in helping member states develop appropriate judicial responses to sexual violence in conflict.

Data collection is also vital for non-humanitarian activities to prevent and respond to gender-based violence. The resolution we adopted today will improve the collection and analysis of information required to better understand the patterns of sexual violence in armed conflict. Of course, better information by itself will not halt sexual violence. But it will inform our decisions as a Council and as member states and bring us one step closer to our ultimate goal.

We must also shine the international spotlight on the perpetrators and use this mechanism to inform targeted actions by this Council and by member states. With improved information, the UN will be able to assist states to respond more robustly to these crimes. As in the DRC after the Walikale rapes, we expect our actions will spur commanding officers to turn those who commit sexual violence over to the authorities to be brought to justice.

Finally, we cannot separate the challenge of sexual violence from the broader security issues facing this Council. Resolution 1960 and its predecessors and our follow-up actions must send a clear message: we do not just condemn sexual violence and rape as weapons of war, but we are taking concrete steps to end it. We are

working to make clear that rape and sexual violence are unacceptable and that perpetrators will face consequences.

Our shared responsibility for the maintenance of international peace and security includes a profound responsibility to safeguard the lives and the security of women and girls, who make up at least half of humanity.

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d. New Human Rights Council mechanism

On October 1, 2010, the United States joined consensus in adopting a resolution of the Human Rights Council on elimination of discrimination against women. U.N. Doc. A/HRC/RES/15/23. The resolution established a new mechanism within the Human Rights Council mandated to promote the elimination of laws and practices that discriminate against women. The United States was among the countries that cosponsored the resolution, which Colombia and Mexico sponsored.

Before the Council adopted the resolution, Ambassador Eileen Chamberlain Donahoe delivered a statement urging states to support it. Ambassador Donahoe's statement, excerpted below, is available at *http://geneva.usmission.gov/2010/10/01/discrimination-women*. For discussion of UN Women, which Ambassador Donahoe mentioned in her remarks, see Chapter 7.A.2.

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This resolution reinforces the role States play in taking appropriate measures to address the problem of discrimination against women and calls upon States to revoke laws that discriminate on the basis of sex. It stresses the need to promote equal pay for equal work or work of equal value, which the United States interprets as calling for non-discrimination in terms of remuneration.

Support of this resolution moves the international community a step closer to realizing the goal that women everywhere enjoy all

human rights without prejudice or discrimination. That "women's rights are human rights and human rights are women's rights" is at the core of this powerful mandate.

With UN Women becoming operational in January 2011, this resolution is also extraordinarily timely. That body "will enhance, not replace, efforts by other parts of the UN system," as it is geared toward mainstreaming gender throughout the UN system. UN bodies such as the Human Rights Council "will continue to have a responsibility to work for gender equality and women's empowerment." In fact, UN bodies are expected to redouble their efforts to do so.

By creating this mechanism, the Council would serve as an example within the UN system for striving toward these goals. Every state has an interest in eliminating discrimination against women. . . .

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Also on October 1, 2010, Secretary Clinton welcomed the Human Rights Council's action, stating, "I applaud the UN Human Rights Council for adopting an historic resolution to create a new mechanism that will promote the elimination of laws that discriminate against women." Secretary Clinton's statement is available in full at *www.state.gov/secretary/rm/2010/10/148552.htm*.

3. Sexual Orientation

On November 16, 2010, the General Assembly's Third Committee voted narrowly—despite opposition by the United States and other states—to delete language referring specifically to killings based on sexual orientation from its resolution on extrajudicial, summary, and arbitrary executions. *See* discussion below in Section I.3. of this chapter. The United States subsequently sponsored an amendment to restore the deleted language and make clear that states should investigate killings based on the sexual orientation of victims. On December 21, 2010, the General Assembly adopted the U.S. amendment by a vote of 95 states in favor and 33 against,

with 27 abstentions. After the vote, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, made a statement welcoming the Assembly's action. *See http://usun.state.gov/briefing/statements/2010/153474.htm*. On December 21, 2010, the White House Office of the Press Secretary also issued a statement expressing President Obama's thanks to countries that supported the U.S.-sponsored amendment. It stated:

> Killing people because of their sexual orientation cannot be rationalized by diverse religious values or varying regional perspectives. Killing people because they are gay is not culturally defensible—it is criminal.
>
> While today's adoption of an inclusive resolution is important, so too are the conversations that have now begun in capitals around the world about inclusion, equality, and discrimination. Protecting gays and lesbians from state-sponsored discrimination is not a special right, it is a human right. Today's vote in the United Nations marks an important moment in the struggle for civil and human rights. The time has come for all nations to redouble our efforts to end discrimination and violence against lesbian, gay, bisexual, and transgender people.

The statement is also available at *www.whitehouse.gov/the-press-office/2010/12/21/statement-press-secretary-adoption-us-sponsored-amendment-ensure-gays-an*. *See also* the statement that Ambassador Rick D. Barton, U.S. Representative to the Economic and Social Council of the United Nations, made on the same day, available at *http://usun.state.gov/briefing/statements/2010/153477.htm*.

Also on December 21, 2010, the General Assembly voted to adopt the resolution on extrajudicial, summary, and arbitrary executions, including the amendment the United States proposed. The United States abstained from adopting the resolution, as discussed below in Section I.3. of this chapter.

C. CHILDREN

1. Optional Protocols to the Convention on the Rights of the Child

In January 2010, the United States submitted its first periodic reports to the UN Committee on the Rights of the Child concerning two protocols to the Convention on the Rights of the Child: (1) the Optional Protocol on the Involvement of Children in Armed Conflict ("Armed Conflict Protocol") and (2) the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography ("Sale of Children Protocol"). The U.S. reports also responded to the recommendations in the Committee's concluding observations of June 25, 2008 (U.N. Doc. CRC/C/OPAC/USA/CO/1 (Armed Conflict Protocol) and U.N. Doc. CRC/C/OPSC/USA/CO/1 (Sale of Children Protocol)), concerning the initial U.S. reports on the protocols. *See Digest 2007* at 333–45 and 345–54 for discussion of the respective initial U.S. reports on the Sale of Children Protocol and the Armed Conflict Protocol. The 2010 U.S. submission on the Armed Conflict Protocol included seven annexes, five of which are statistical in nature: 1. Data Report: 17 Year-old Recruits (Accessions); 2. U.S. Asylum-Seekers from Conflict-Affected Countries; 3. Unaccompanied Minors who were Principal Applicants for Refugee Status (Conflict-Affected Countries); 4. Department of Homeland Security Interviews of Unaccompanied Minors from Conflict-Affected Countries who were principal applicants for refugee status; 5. Defensive Asylum Applications Filed by Juveniles from Conflict-Affected Countries in their Own Right; 6. Military Recruiting and Recruiter Irregularities; and 7. Text of Recent Relevant Legislation (CSPA and CSAA). The 2010 U.S. submission on the Sale of Children Protocol included the following annexes: 1. Principal Statutes Cited in the U.S. Periodic Report; 2. Biennial Comprehensive Research and Statistical Review and Analysis of Severe Forms of Trafficking, Sex Trafficking, and Unlawful Commercial Sex Acts in the United States; 3. USG Funds Obligated in FY 2008 for Trafficking in

Persons (TIP) Projects; 4. Department of Education Cover Letter and Fact Sheet; 5A. Sale of Organs and Related Statutes; 5B. Sale, Kidnapping, Trafficking for Adoption and Related Statutes; 6. U.S. Submission to the World Congress III. Both U.S. submissions and their accompanying annexes are available at *www.state.gov/g/drl/hr/treaties*.

Although it is not a party to the Convention on the Rights of the Child, the United States became party to the two protocols on December 24, 2002. *See Digest 2008* at 290–312, *Digest 2002* at 183–86 and 293–300, and *Digest 2000* at 356–64 for additional background.

2. Children and Armed Conflict

a. Optional Protocol on the Involvement of Children in Armed Conflict

See C.1. *supra*.

b. Security Council

On June 16, 2010, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, made a statement at a Security Council Open Debate on Children and Armed Conflict. Excerpted below, Ambassador Rice's statement is available in full at *http://usun.state.gov/briefing/statements/2010/143201.htm*.

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The United States fully and firmly embraces our responsibility to protect children and we will not rest until the last abuse is halted and the last child soldier is released.

We welcome the Secretary General's report as an important tool to help us uphold that common responsibility. [Editor's note: *See* U.N. Doc. S/2010/181.] We're glad to note that, for the first time, the report's annexes include parties that have engaged in patterns of

killing, maiming, raping, and sexually abusing children, in contravention of applicable international law. We urge that all information on violations identified by the monitoring and reporting mechanism be thoroughly verified to ensure a high degree of accuracy.

We agree with the report's recommendation to ensure that specific language on protecting children is placed in the mandates of both the relevant UN peacekeeping operations and in those of political, humanitarian, and peacebuilding missions. We also agree that, given the regional dimensions of some conflicts highlighted in the report, these missions should speed their development of strategies and coordination mechanisms for better information exchange and cooperation on cross-border child-protection issues.

We support the Secretary General's recommendation to include the unlawful recruitment or use of children as a listing criteria in appropriate Security Council sanctions regimes, and we strongly encourage closer cooperation and coordination among the Working Group on Children and Armed Conflict, these sanctions committees, and their expert panels. As the Secretary General suggests, such coordination would let us weigh the application of "more vigorous measures against persistent violators" when that is appropriate.

* * * *

c. Human Rights Council

On September 14, 2010, the Human Rights Council conducted an interactive dialogue with the Secretary-General's Special Representative on Children in Armed Conflict. Mark Cassayre, then Political Counselor, U.S. Mission to the United Nations, Geneva, delivered a statement stressing U.S. concerns about continuing reports of abuse and exploitation of children in armed conflict and supporting efforts to protect children in armed conflict. Mr. Cassayre's statement, excerpted below, is available in full at *http://geneva.usmission.gov/2010/09/14/children-in-armed-conflict.*

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In the ten years since the adoption of the Optional Protocols to the Convention on the Rights of the Child, we are hopeful [about] the progress that has been made. We welcome efforts by the international community to recognize the importance of protecting children as they face the trauma and uncertainty of armed conflict. . . .

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The United States supports the Special Representative's recommendation that parties listed in the Secretary-General's report for the recruitment and use of children, killing and maiming of children, and/or rape and other sexual violence against children, in contravention of applicable international law, prepare and implement concrete time-bound action plans to halt those violations and abuses. We support . . . taking appropriate measures against any participants within their ranks that fail to comply with these plans and international human rights and humanitarian law.

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d. Child soldiers

Consistent with the Child Soldiers Prevention Act of 2008 ("CSPA"), Title IV of Public Law 110-457, the State Department's 2010 Trafficking in Persons report listed the governments of Burma, Chad, Democratic Republic of the Congo, Somalia, Sudan, and Yemen as foreign governments that have violated the standards under the CSPA and have been "clearly identified" during the previous year as "having governmental armed forces or government-supported armed groups, including paramilitaries, militias, or civil defense forces, that recruit and use child soldiers." Excerpts below from the TIP report provide additional background on the statutory requirement and the State Department's determinations. The full text of the TIP report is available at *www.state.gov/g/tip/rls/tiprpt/2010*; discussion of designations under the CSPA is available at *www.state.gov/g/tip/rls/tiprpt/2010/142750.htm#4*. For

additional discussion of the TIP report and related issues, see Chapter 3.B.3.

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. . . According to the CSPA, and generally consistent with the provisions of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, the term "child soldier" means:

> (i) any person under 18 year[s] of age who takes a direct part in hostilities as a member of governmental armed forces; (ii) any person under 18 years of age who has been compulsorily recruited into governmental armed forces; (iii) any person under 15 years of age who has been voluntarily recruited into governmental armed forces; or, (iv) any person under 18 years of age who has been recruited or used in hostilities by armed forces distinct from the armed forces of a state. The term "child soldier" includes any person described in clauses (ii), (iii), or (iv) "who is serving in any capacity, including in a support role such as a cook, porter, messenger, medic, guard, or sex slave."

Governments identified on the list are subject to restrictions, in the following fiscal year, on certain security assistance and commercial licensing of military equipment. The CSPA prohibits the following forms of assistance to governments identified on the list: international military education and training, foreign military financing, excess defense articles, section 1206 assistance, and the issuance of licenses for direct commercial sales of military equipment. Beginning October 1, 2010 and effective throughout FY 2011, these types of assistance will be prohibited to the countries listed, absent a presidential national interest waiver, applicable exception, or reinstatement of assistance pursuant to the terms of the CSPA.

The determination to include a government in the CSPA list is informed by a range of sources, including first-hand observation

by U.S. government personnel and research and reporting from various United Nations entities, international organizations, local and international NGOs, and international media outlets.

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In a memorandum for the Secretary of State dated October 25, 2010, President Obama determined pursuant to § 404(a) of the CSPA "that it is in the national interest of the United States to waive the application to Chad, the Democratic Republic of the Congo, Sudan, and Yemen of the prohibition in section 404(a) of the CSPA." Daily Comp. Pres. Docs., 2010 DCPD No. 00911; 75 Fed. Reg. 75,855 (Dec. 7, 2010). The accompanying memorandum of justification provided an explanation for the President's determination with respect to each country. The memorandum of justification is available at 75 Fed. Reg. 75,856–75,863 (Dec. 7, 2010).

3. Resolutions on Rights of the Child

a. Human Rights Council

On March 26, 2010, the United States joined consensus in adopting a resolution on the rights of the child in the Human Rights Council. A member of the U.S. delegation delivered a statement explaining the U.S. position on the resolution, which is excerpted below and available in full at *http://geneva.usmission.gov/2010/03/26/rights-child*.

. . . Our decision [to join consensus] reflects our deep commitment to promoting and protecting the rights of children in our own country and around the world, and, in particular, to protecting children from sexual violence.

As a party to the Optional Protocol on the sale of children, child pornography, and child prostitution, we are deeply committed to combating sexual violence against children. We recently submitted our periodic report to the UN Committee on the Rights of the Child on our implementation of this Optional Protocol; our

report details our efforts in all the areas addressed by the OP as well as in areas of concern highlighted in the resolution. [Editor's note: *See* discussion in C.1. *supra*; the full text of the report is available at *www.state.gov/documents/organization/136023.pdf*.] For example, our periodic report highlights U.S. legislation designed to prevent and punish sexual violence against children as well as assistance programs offered in this regard and efforts to reduce demand in regards to practices such as sex tourism.

The United States has continued to strengthen protections for children in this area and the William Wilberforce Trafficking Victims Protection Act of 2008 contains many provisions protecting children from severe forms of trafficking in persons. The United States is also committed to combating serious child exploitation issues such as child pornography and child labor. 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 nor that they must implement obligations under human rights instruments they are not a party to. By joining this resolution, we do not recognize any change in the current state of treaty or customary international law.

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b. General Assembly

On November 23, 2010, the United States joined consensus on and for the first time co-sponsored the annual resolution on the rights of the child when the Third Committee adopted it. Excerpts follow from the statement that John Sammis, U.S. Deputy Representative to ECOSOC, delivered before the Committee acted, providing U.S. views on the resolution. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*. On December 21, 2010, the General Assembly adopted the resolution by consensus. U.N. Doc. A/RES/65/197.

The United States is extremely pleased to co-sponsor the Rights of the Child resolution and thanks the co-sponsors for their

transparency, flexibility and support throughout lengthy negotiations. Consistent with the principles of the Convention on the Rights of the Child and its Optional Protocols and the objectives expressed in the resolution, 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. Further, around the world, the United States shows our commitment to advancing the protection of children through our efforts to work with the countries represented in this room to improve the lives of children everywhere.

The United States recognizes that investments in early childhood education play a major role in building the foundation for the long-term prosperity of our children and their families. Domestically, the United States has undertaken important initiatives to support and strengthen early childhood education by investing additional funds and encouraging targeted resources for early learning. For example, new far-reaching education reform initiatives—including the Race to the Top and the Investing in Innovation grant competitions—included priorities for activities to improve outcomes for high-need students from birth through third grade. Agencies also are collaborating in six early learning areas to help build better and more coherent systems of early learning: early learning standards, curriculum and assessment; program standards; early learning workforce; data systems; health promotion; and family engagement.

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Finally, we co-sponsor this resolution today with the express understanding that it does not imply that States must implement obligations under human rights instruments to which they are not a party and, by co-sponsoring this resolution, we do not recognize any change in the current state of treaty or customary international law. Further we understand the resolution's reaffirmation of prior documents to apply to those who affirmed them initially, including with regard to abolition of juvenile life imprisonment without parole.

D. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, AND RELATED ISSUES

1. Water and Sanitation and Human Rights

a. General Assembly resolution on the right to water and sanitation

On July 28, 2010, the United States called for a vote and abstained on a General Assembly resolution on the "human right to water and sanitation." John F. Sammis, U.S. Deputy Representative to ECOSOC, delivered a statement explaining why the United States abstained from adopting the resolution, as excerpted below. The full text of the U.S. statement is available at *http://usun.state.gov/briefing/statements/2010/145279.htm*. The General Assembly adopted the resolution by a vote of 122 states in favor and no states opposed. Forty-one states abstained. U.N. Doc. A/RES/64/292.

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The United States is deeply committed to finding solutions to our world's water challenges. . . .

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The United States had hoped to negotiate and ultimately join consensus on this text, on a text, that would uphold and support the international process underway at the Human Rights Council. Instead, we have here a resolution that falls far short of enjoying the unanimous support of member States and may even undermine the work underway in Geneva. This resolution describes a right to water and sanitation in a way that is not reflective of existing international law; as there is no "right to water and sanitation" in an international legal sense as described by this resolution.

The United States regrets that this resolution diverts us from the serious international efforts underway to promote greater coordination and cooperation on water and sanitation issues.

This resolution attempts to take a short-cut around the serious work of formulating, articulating and upholding universal rights. It was not drafted in a transparent, inclusive manner, and the legal implications of a declared right to water have not yet been carefully and fully considered in this body or in Geneva. . . .

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b. Human Rights Council resolution on the right to safe drinking water and sanitation

On September 30, 2010, the United States joined consensus when the Human Rights Council adopted a resolution on human rights and access to safe drinking water and sanitation. After the resolution's adoption, a U.S. delegate made a statement to the Human Rights Council, explaining the U.S. vote. The U.S. statement, excerpted below, is available in full at *www.state.gov/s/l/c8183.htm*.

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The United States is proud to take the significant step of joining consensus on this important resolution regarding the right to safe drinking water and sanitation, which is to be progressively realized. The United States remains deeply committed to finding solutions to our world's water challenges. Safe drinking water and sanitation are essential to the rights of all people to an adequate standard of living, and to the enjoyment of the highest attainable standard of physical and mental health.

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The human right to safe drinking water and sanitation is derived from the economic, social and cultural rights contained in the International Covenant on Economic, Social and Cultural Rights and, as such, States Parties to that Covenant undertake to take steps with a view to achieving progressively its full realization. This concept is encapsulated in OP8 of the current resolution. The right to safe drinking water and sanitation is not one that is protected in our Constitution, nor is it justiciable as such in

U.S. courts, though various U.S. laws protect citizens from contaminated water. As a matter of public policy, our people have created a society in which there is a widespread expectation that all ought to have access to safe drinking water and sanitation. Public authorities throughout the United States take significant measures to provide access to safe drinking water and sanitation, and these are protected by law. It is in this spirit we join consensus.

By joining consensus today, we signal our satisfaction with the general substance of this resolution, but in no way do we condone the process by which the resolution was negotiated. During the negotiation of this resolution, we were disappointed with the lack of consideration for other countries' textual proposals. This attitude has resulted in a text that still needs improvement in several respects. For example, its quotation from the July 2010 General Assembly resolution incorrectly suggests a hierarchal relationship between human rights, contrary to the widely recognized principle that human rights and fundamental freedoms should be treated on the same footing. The resolution's language regarding private actors could also be improved significantly.

We hope that in the future we can work with other nations committed to the provision of safe drinking water to craft better worded resolutions. Nevertheless, we join consensus on this resolution because of our support for its animating spirit, a conviction that safe drinking water and sanitation are essential to an adequate standard of living. . . .

2. Food

a. Human Rights Council resolution

On March 5, 2010, the Human Rights Council held an interactive dialogue after the Special Rapporteur on the right to food, Olivier De Schutter, presented his report to the Council. A/HRC/13/33. A member of the U.S. delegation made a statement providing views on the report and the right to food. Among other things, the U.S. statement stressed that

> we read the report as making policy recommendations, rather than legally mandatory or binding interpretations.

> That understanding of the report is particularly applicable in the case of countries, such as the United States, that have not ratified the International Covenant on Economic, Social and Cultural Rights. We also note that the report makes recommendations to private firms. Recognizing that international human rights law generally applies to governmental action, it may be more useful for recommendations to focus likewise on governments and their role in promoting food security.

The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*.

On March 24, 2010, the United States joined consensus when the Human Rights Council adopted a resolution on the right to food. A/HRC/13/L.17. Upon its adoption, Erik Woodhouse, Attorney Adviser, Office of the Legal Adviser, Department of State, made a statement explaining U.S. views on the resolution. Excerpts follow from the U.S. statement, which is available in full at *www.state.gov/s/l/c8183.htm*.

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Combating global hunger and promoting food security is a key foreign policy objective of President Obama and his Administration. . . .

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. 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 emphatically support what we see as the chief objective underlying this resolution—achieving greater global food security—but we have concerns about many of the points made in the resolution. Our concerns include the resolution's unbalanced concentration on certain categories of countries, evidenced by its frequent use of phrases such as "particularly in developing countries." While we recognize that concerns regarding food security are much greater in some developing countries, this resolution's unfortunate imbalance could be seen as contrary to the fact that human rights concerns are universal. We reiterate that human rights obligations do not apply differently in different categories of countries.

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While we join this resolution's taking note with appreciation and welcoming, respectively, the 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 December 2009 report on agribusiness and the right to food, and the Committee's General Comment No. 12. We refer to our comments on the report earlier in this session . . . .

With respect to this resolution's statements regarding trade and trade negotiations, the United States believes that trade negotiations are beyond both the subject-matter and the expertise of the Human Rights Council and, hence, that such statements are inappropriate for the Council. In light of them, it is appropriate here to reaffirm that 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 ongoing trade negotiations. To be clear, it is the U.S. position that a free and open world trade system, under appropriate rules, can have significant benefits in the area of food security.

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b. General Assembly resolution

On November 22, 2010, 2010, the United States joined consensus when the General Assembly's Third Committee adopted its annual resolution on the right to food. After the vote, the U.S. representative addressed the Committee and explained the U.S. position on the resolution. The U.S. statement, available at *www.state.gov/s/l/c8183.htm*, reiterated the points the United States provided to the Human Rights Council in March, discussed *supra*. The United States also made several additional points. For example, the United States "reiterate[d] 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 encouraging policies that will enable countries to use tools and incentives, including biotechnology, that increase agricultural productivity. 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." The General Assembly adopted the resolution without a vote on December 21, 2010. U.N. Doc. A/RES/65/220.

3. Housing

a. Human Rights Council resolution

On September 30, 2010, the United States joined consensus when the Human Rights Council adopted a resolution on

adequate housing as a component of the right to an adequate standard of living. A/HRC/15/8. Upon its adoption, a U.S. delegate made a statement explaining U.S. views on the resolution. Excerpts follow from the U.S. statement, which is available in full at *www.state.gov/s/l/c8183.htm*.

The United States is pleased to join consensus on a resolution that addresses housing. We recognize that housing presents important issues related to human rights and is an essential element of human happiness and dignity. . . . The United States is dedicated to addressing housing issues. We strongly agree with the principle expressed by this resolution that in the context of hosting, or seeking to host, the events that here are called "mega-events," large international events such as the Olympic Games, the World Cup, and International Expositions or World's Fairs, it is important that hosting States respect housing-related rights. Such rights include rights of individuals with respect to nondiscrimination and participation in governmental processes.

The resolution includes references to "the right to adequate housing." We read this phrase to be an abbreviation of the longer description in the resolution's title, and thus consistent with the language in Article 25 of the Universal Declaration of Human Rights. Domestically, the United States has established numerous programs both at the state and federal levels to assist our citizens in accessing housing. On the international level, we look forward to continuing our work within the UN system and with countries around the world to improve housing and, more generally, to improve the lives and future for people everywhere.

b. Special Rapporteur's mission

On March 5, 2010, the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Raquel Rolnik, presented a report to the Human Rights Council concerning, among other topics, her October 2009 mission to the United States. A/HRC/13/20/Add.4. On the same date, a U.S. delegate made a statement in response

to her report. Excerpts follow from the U.S. statement, which is available in full at *www.state.gov/s/l/c8183.htm*.

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The United States welcomed the Special Rapporteur's visit and appreciated the opportunity for constructive dialogue and openness. The Obama Administration is committed to creating and preserving affordable housing for the American people, and we viewed this visit as an opportunity to learn from the Special Rapporteur's experience and to have an honest conversation about the successes and challenges of domestic housing issues in this country. The United States arranged numerous meetings with various federal government agencies and showed our government's work to address housing issues. We appreciated the professionalism and intellectual interest the Special Rapporteur exhibited in the course of these meetings. The United States also appreciates the Special Rapporteur's report and its constructive spirit.

While the United States has not ratified the International Covenant on Economic, Social and Cultural Rights, we have made a political commitment to a human right related to housing in the Universal Declaration on Human Rights. Although United States law does not treat adequate housing as a legally enforceable right, our law does provide certain legally enforceable rights-related protections regarding housing, such as antidiscrimination requirements and provisions of adequate housing to persons in government custody.

The United States recognizes that the housing and economic crisis affects the most vulnerable. The Administration has sought the implementation of a fair housing mortgage rescue initiative to remedy this problem. The government is taking action on foreclosures, particularly with regard to discriminatory lending. In Fiscal Year 2010, Congress appropriated $11 million in the Fair Housing Initiatives Program to assist those families that are most vulnerable in today's lending/mortgage crises. The $11 million will be used to educate the public about lending discrimination, enforce the fair lending requirements of the Act, and to train investigators to conduct [investigations of] lending discrimination.

While we were pleased that the Special Rapporteur was able to meet with numerous federal agencies and spend significant time outside of Washington, the cities selected by the Special Rapporteur and the properties toured did not present a complete picture of housing for low income families and individuals in the United States. It is of course important that any report highlight the challenges a country faces, but we also believe it is helpful to note the many and considerable positive aspects of housing in the United States, including in comparison to other countries. Examples include the high rate of homeownership, the high quality of the vast majority of housing, the high availability and quality of utility services, and significant improvements in these and other areas over recent decades.

We hope that this visit to the United States is part of what will be an ongoing dialogue with the Special Rapporteur on housing in the United States and generally. We believe strongly, for example, that federal-level government policies, the focus of the report, are only one part of the equation of the housing system in many countries and certainly in the United States. While the report does acknowledge the large roles of local authorities and the private sector in housing in the United States, its approach and recommendations do not appear to reflect those realities. In the United States, and we suspect, in a number of other countries, the federal government's role is a limited part of the picture.

We look forward to engaging with the Special Rapporteur on questions like this as we continue to explore how to improve housing in the United States and contribute to a global conversation to address significant problems such as homelessness.

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4. Right to Development

a. Human Rights Council resolution

On October 1, 2010, the United States called a vote in the Human Rights Council and abstained from a resolution on the right to development. The Council adopted the resolution

by 45 states in favor, no states against, and one state abstaining. U.N. Doc. A/HRC/RES/15/25. A member of the U.S. delegation delivered a statement, excerpted below and available at *www.state.gov/s/l/c8183.htm*, explaining U.S. concerns about the resolution.

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The United States has a longstanding and strong commitment to support development. . . .

We also reaffirm that development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. We believe that, where leaders govern responsibly, set in place good policies, and make investments conducive to development, sustainable outcomes can be achieved. And, as President Obama said last week, the United States is committed to working with nations to achieve those outcomes, to actually develop, to move from poverty to prosperity.

We 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 have appreciated working with the Working Group and the High Level Task Force. We continue to believe that it is not appropriate for this resolution to suggest explicitly the possibility that any criteria related to the right to development would 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.

b. General Assembly resolution

On November 22, 2010, the United States called for a vote and voted against a resolution on the right to development in the Third Committee. On December 21, 2010, the General Assembly adopted the resolution by a vote of 133 states in favor, 24 abstaining, and 24 opposed. U.N. Doc. A/HRC/

RES/65/219. A U.S. representative delivered a statement, set forth below and also available at *www.state.gov/s/l/c8183.htm*, explaining U.S. concerns about the resolution.

During his September 22 address to the Millennium Development Goal Summit, President Obama announced a new U.S. Global Development Policy, the first ever for a U.S. Administration. This new policy places a premium on broad-based economic growth, democratic governance, innovation, and sustainable systems for meeting basic human needs. It recognizes that development is a long-term proposition and that progress depends to a great extent on the choices of policies and the quality of institutions in developing countries.

The objectives of the U.S. Global Development Policy align closely with the broader thrust of this resolution on the right to development. The United States regrets that it must nevertheless call a vote, as we do not believe that the current text of the resolution reflects consensus on the best way to achieve our shared commitment to development.

The lead sponsor did not negotiate this resolution in an open and constructive manner, and refused to consider many reasonable suggestions from negotiating partners that could have moved this resolution towards consensus.

In particular, we do not consider it appropriate, as the resolution states in OP8 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.

While the resolution contains other problematic elements, it is primarily for this reason that the United States will vote no. We urge other delegations to do so as well.

5. Human Rights and Extreme Poverty

On November 11, 2010, the United States joined consensus in the Third Committee on a resolution on human rights and extreme poverty. Laurie Shestack Phipps, Adviser for

Economic and Social Affairs, U.S. Mission to the United Nations, delivered a statement explaining the U.S. position on the resolution. As Ms. Phipps emphasized:

> 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. By joining this resolution, we do not recognize any change in the current state of treaty or customary international law. We also understand the resolution's reaffirmation of prior documents to apply to those who affirmed them initially. That said, we have every intention of continuing our role as a leader in the global effort to reduce and progressively eliminate extreme poverty.

The U.S. statement is available in full at *http://usun.state.gov/briefing/statements/2010/151112.htm*. The General Assembly adopted the resolution without a vote on December 21, 2010. U.N. Doc. A/RES/65/214.

6. Foreign Debt and Human Rights

On June 17, 2010, the United States voted against a Human Rights Council resolution on "The effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights." U.N. Doc. A/HRC/RES/14/4. The Council adopted the resolution by a vote of 31 states in favor and 14 against, with three abstentions. Excerpts follow from Ambassador Eileen Chamberlain Donahoe's statement explaining the U.S. vote based on the view that foreign debt is not a human rights issue for the Council to address. The full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*.

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. . . [W]e believe that it is incorrect to treat the issue of foreign debt as a human rights problem to be addressed by this Council. Rules other than human rights law are most relevant to the contractual arrangements between States and lenders, and several of this resolution's statements have no basis in human rights law. For example, the resolution inappropriately seeks to limit the operation of a secondary market in sovereign debt with the aim of combating so-called "vulture" funds. In addition to having no basis in human rights law, this approach would in fact be counterproductive, in that it would ultimately serve to deny responsible countries the ability to raise much needed funds.

We also note that other international fora are much better equipped to deal with the questions of foreign debt and debt forgiveness, which are principally economic and technical in nature. Given the Human Rights Council's lack of technical competency on this subject, we regret the allocation of resources to this subject. The Council's limited time and resources should be deployed in other, more appropriate and effective ways.

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7. Cultural Rights

On June 18, 2010, the Human Rights Council adopted by consensus a resolution entitled "Promotion of the enjoyment of cultural rights of everyone and respect for cultural diversity." John C. Mariz, International Relations Officer, U.S. Mission to the United Nations, Geneva, delivered a statement explaining the position of the United States on the resolution, including the U.S. concern that cultural diversity should not be misused to undermine respect for human rights. Mr. Mariz's statement, excerpted below in major part, is available in full at *www.state.gov/s/l/c8183.htm*.

Mr. President, the United States supports the promotion of cultural diversity, pluralism, tolerance, cooperation and dialogue among people from all cultures. Cultural diversity has played a

critical role in our own country's history, which has shown that cultural diversity can strengthen human rights. Respect for our differences has contributed to the significant legal protections for members of minority groups.

Human rights are universal, and all governments are responsible for abiding by their obligations under international human rights law. Under the UN Charter, we have committed ourselves not just to respecting human rights domestically, but to promoting and encouraging respect for human rights and for fundamental freedoms abroad, without distinction as to race, sex, language, or religion. We believe that respect for human rights also substantially enhances respect for diversity.

We do have concerns, however, that the concept of cultural diversity, particularly when espoused in a human rights context, could be misused by non-democratic governments. Cultural diversity should neither be used to undermine or limit the scope of human rights, nor to justify or legitimize human rights abuses. We would like to reinforce that efforts to promote cultural diversity should not infringe on the enjoyment of human rights. Instead, cultural diversity and international human rights can be mutually reinforcing concepts that help us all achieve a better world.

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E. INDIGENOUS ISSUES

On December 16, 2010, President Obama announced U.S. support for the UN Declaration on the Rights of Indigenous Peoples ("Declaration"), marking a shift in the U.S. position on the Declaration. As part of his address at the White House Tribal Nations Conference, President Obama stated, "The aspirations [the Declaration] affirms—including the respect for the institutions and rich cultures of Native peoples—are one we must always seek to fulfill. And we're releasing a more detailed statement about U.S. support for the declaration and our ongoing work in Indian Country. But I want to be clear: What matters far more than words—what matters far more than any resolution or declaration—are actions to match

those words." The full text of President Obama's address is available at Daily Comp. Pres. Docs., 2010 DCPD No. 01076, pp. 1–5.

On the same day, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, also issued a statement stressing U.S. support for the Declaration. Ambassador Rice described the Declaration as "a milestone in the international community's efforts to identify and address the needs of indigenous peoples around the world, to protect their ways of life and to help their communities to flourish" and explained that the U.S. decision to support the Declaration occurred after an extensive review within the U.S. government. The full text of Ambassador Rice's statement is available at *http://usun.state.gov/briefing/statements/2010/153009.htm*. The full text of the written statement the United States issued on December 16, explaining U.S. support for the Declaration and discussing U.S. initiatives to promote the government-to-government relationship between the United States and federally recognized tribes and improve the lives of indigenous peoples is set forth below. The statement is also available at *www.state.gov/documents/organization/153223.pdf*.

I. Introduction

In his Presidential Proclamation last month honoring National Native American Heritage Month, President Obama recommitted "to supporting tribal self-determination, security and prosperity for all Native Americans." He recognized that "[w]hile we cannot erase the scourges or broken promises of our past, we will move ahead together in writing a new, brighter chapter in our joint history."

It is in this spirit that the United States today proudly lends its support to the United Nations Declaration on the Rights of Indigenous Peoples (Declaration). In September 2007, at the United Nations, 143 countries voted in favor of the Declaration. The United States did not. Today, in response to the many calls from Native Americans throughout this country and in order to further

U.S. policy on indigenous issues, President Obama announced that the United States has changed its position. The United States supports the Declaration, which—while not legally binding or a statement of current international law—has both moral and political force. It expresses both the aspirations of indigenous peoples around the world and those of States in seeking to improve their relations with indigenous peoples. Most importantly, it expresses aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.

U.S. support for the Declaration goes hand in hand with the U.S. commitment to address the consequences of a history in which, as President Obama recognized, "few have been more marginalized and ignored by Washington for as long as Native Americans—our First Americans." That commitment is reflected in the many policies and programs that are being implemented by U.S. agencies in response to concerns raised by Native Americans, including poverty, unemployment, environmental degradation, health care gaps, violent crime, and discrimination.

II. The Review of the U.S. Position on the Declaration

The decision to review the U.S. position on the Declaration came in response to calls from many tribes, individual Native Americans, civil society, and others in the United States, who believed that U.S. support for the Declaration would make an important contribution to U.S. policy and practice with respect to Native American issues. The decision by the United States to support the Declaration was the result of a thorough review of the Declaration by the relevant federal agencies.

In conducting its review of the Declaration, U.S. agencies consulted extensively with tribal leaders during three rounds of consultations, one in Rapid City, South Dakota, and two in Washington, D.C. In addition, the agencies conducted outreach to indigenous organizations, civil society, and other interested individuals. Tribal leaders and others contributed to the review through their attendance at the consultation and outreach sessions, participation in those sessions by means of conference calls, and written submissions. In total, over 3,000 written comments were received and reviewed.

Tribes, groups, and individuals who participated in the review of the U.S. position on the Declaration presented a wide range of views on the meaning and importance of the Declaration. While they could not all be directly reflected in the U.S. position on the Declaration, they were all considered in the process.

III. The Declaration and U.S. Initiatives on Native American Issues

The United States is home to over two million Native Americans, 565 federally recognized Indian tribes, and other indigenous communities. U.S. support for the Declaration reflects the U.S. commitment to work with those tribes, individuals, and communities to address the many challenges they face. The United States aspires to improve relations with indigenous peoples by looking to the principles embodied in the Declaration in its dealings with federally recognized tribes, while also working, as appropriate, with all indigenous individuals and communities in the United States.

Moreover, the United States is committed to serving as a model in the international community in promoting and protecting the collective rights of indigenous peoples as well as the human rights of all individuals. The United States underlines its support for the Declaration's recognition in the preamble that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess certain additional, collective rights. The United States reads all of the provisions of the Declaration in light of this understanding of human rights and collective rights.

U.S. agencies are currently engaged in numerous initiatives to address the concerns raised by Native American leaders and issues addressed in the Declaration. Many involve the continuation of activities highlighted in the White House Tribal Nations Conference Progress Report released in June 2010. Additional efforts to strengthen the government-to-government relationship, protect lands and the environment and provide redress, address health care gaps, promote sustainable economic development, and protect Native American cultures are addressed below.

III. 1 Strengthening the Government-to-Government Relationship

As President Obama noted: "Washington can't—and shouldn't—dictate a policy agenda for Indian Country. Tribal

nations do better when they make their own decisions." The record over the forty years since the United States adopted its policy of greater tribal autonomy is clear—tribal self-determination has enabled tribal governments to establish, develop, and enhance tribal institutions and infrastructure ranging from those addressing the health, education, and welfare of their communities to those such as tribal courts, fire protection, and law enforcement. The clear lesson is that empowering tribes to deal with the challenges they face and that taking advantage of the available opportunities will result in tribal communities that thrive.

The United States is therefore pleased to support the Declaration's call to promote the development of a new and distinct international concept of self-determination specific to indigenous peoples. The Declaration's call is to promote the development of a concept of self-determination for indigenous peoples that is different from the existing right of self-determination in international law. The purpose of the Declaration was not to change or define the existing right of self-determination under international law. Further, as explained in Article 46, the Declaration does not imply any right to take any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. For the United States, the Declaration's concept of self-determination is consistent with the United States' existing recognition of, and relationship with, federally recognized tribes as political entities that have inherent sovereign powers of self-governance. This recognition is the basis for the special legal and political relationship, including the government-to-government relationship, established between the United States and federally recognized tribes, pursuant to which the United States supports, protects, and promotes tribal governmental authority over a broad range of internal and territorial affairs, including membership, culture, language, religion, education, information, social welfare, community and public safety, family relations, economic activities, lands and resource management, environment and entry by nonmembers, as well as ways and means for financing these autonomous governmental functions.

Federal agencies are engaged in a wide range of activities to enhance tribal self-determination in areas crucial to the well-being of tribal members.

The Department of Justice (DOJ), for example, is deeply committed to strengthening tribal police and judicial systems. Accordingly, the President's FY 2011 Budget Request provides $321 million to DOJ for tribal public safety initiatives, an increase of 42% over FY 2010. This includes $255.6 million for grants to Indian tribes for tribal law enforcement efforts. The FY 2011 Budget Request also sustains FY 2010 appropriations increases of over 21% for Bureau of Indian Affairs-funded public safety and law enforcement efforts and includes an additional $19 million to support 81 new FBI positions (45 agents) to investigate violent crimes in Indian Country. These increases build on over $250 million in American Reinvestment and Recovery Act (Recovery Act) funds made available to tribes in FY 2009 to address criminal justice needs.

In addition, on July 29, 2010, President Obama signed into law the Tribal Law and Order Act (TLOA). This comprehensive bill is aimed at improving public safety on tribal lands. The statute gives tribes greater authority to prosecute crimes and increases federal accountability for public safety in tribal communities. In conformity with the TLOA, the Attorney General established the Office of Tribal Justice as a separate component within the organizational structure of the Department of Justice. The Office has played, and will continue to play, a key role in DOJ's ongoing initiative to improve public safety in Indian Country, and it serves as the primary channel for tribes to communicate their concerns to the Department, helps coordinate policy on Indian affairs both within DOJ and with other federal agencies, and seeks to ensure that DOJ and its components work with tribes on a government-to-government basis. The Departments of the Interior, Justice, and Health and Human Services are engaged in an unprecedented effort to consult with tribes to develop policy and implement this new law.

In response to tribal input, DOJ has also streamlined its grant-making process. The Coordinated Tribal Assistance Solicitation (CTAS) combines ten different grant programs into a single solicitation. In September 2010, hundreds of American Indian and Alaska Native communities received the first grants under CTAS—almost $127 million to enhance law enforcement, bolster justice systems, prevent youth substance abuse, serve sexual assault

and elder abuse victims, and support other tribal efforts to combat crime.

During consultation sessions conducted by the Department of Education with over 350 tribal leaders in 2010, those leaders stressed the importance of greater tribal control over the education of Indian students. The Administration agrees. Therefore, the Department of Education has proposed changes to the Elementary and Secondary Education Act of 1965 (ESEA) to enhance the role of tribes in Indian education and allow greater flexibility in the use of federal education funds to meet the unique needs of Native American students.

Sixteen different tribes, from Maine to Alaska, participated this summer in the Department of the Interior's Bureau of Indian Affairs Water Training Program. The Training Program is taught by instructors from several Department of the Interior bureaus. The program strengthens tribal governments and prepares them to manage their own natural resources with qualified tribal government employees who have the necessary expertise to help alleviate the shortage of technical expertise on Indian reservations.

Other agency programs that enhance tribal self-determination are discussed in subsequent sections.

In addition to enhancing the self-determination of federally recognized tribes, the Obama Administration has supported the Native Hawaiian Government Reorganization Act, which provides a process for forming a Native Hawaiian governing entity that would be recognized by, and have a government-to-government relationship with, the United States. Congress has also enacted many more narrowly focused statutes for Native Hawaiians similar to those for other native people, such as the National Historic Preservation Act, which provides protections to properties with religious and cultural importance to Native American Indian tribes and Native Hawaiians; the Native Hawaiian Education Act, which establishes programs to facilitate the education of Native Hawaiians; the Native American Housing Assistance and Self-Determination Act, which provides housing assistance in the form of grants and loans; and the Native American Graves Protection and Repatriation Act, which protects Native American Indian, Alaska Native, and Native Hawaiian gravesites.

U.S. Government efforts to strengthen the government-to-government relationship with tribes cannot be limited to enhancing tribal self-determination. It is also crucial that U.S. agencies have the necessary input from tribal leaders before those agencies themselves take actions that have a significant impact on the tribes. It is for this reason that President Obama signed the Presidential Memorandum on the implementation of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," and directed all federal agencies to develop detailed plans of action to implement the Executive Order. In this regard, the United States recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.

The United States intends to continue to consult and cooperate in good faith with federally recognized tribes and, as applicable, Native Hawaiians, on policies that directly and substantially affect them and to improve our cooperation and consultation processes, in accordance with federal law and President Obama's call for better implementation of Executive Order 13175. The United States does so with the firm policy objective, where possible, of obtaining the agreement of those tribes consistent with our democratic system and laws. At the same time, the United States intends to improve our engagement with other indigenous individuals and groups. The United States will also continue to implement the many U.S. laws that require the agreement of federally recognized tribes or indigenous groups before certain actions can be taken or that require redress for takings of property.

U.S. Government efforts in this area are numerous. Federal agencies have submitted the consultation plans required by the Presidential Memorandum and are currently implementing them. A number of agencies have created new offices to ensure proper implementation of their consultation policies. Examples are the Office of Tribal Government Relations in the Department of Veterans Affairs, which will be established in 2011, and the Office of Tribal Relations in the Department of Agriculture. Other agencies, like the Department of Energy, found it appropriate to establish a Tribal Steering

Committee to analyze the agencies' consultation practices. Similarly, the Department of Health and Human Services established a Secretary-level Tribal Advisory Committee to create a coordinated, department-wide strategy to improve consultations with Indian tribes. In addition, some agencies have experimented with "webinars" and other online technology to permit tribal leaders to participate in consultations without incurring the costs and time commitments of in-person sessions. These innovations show the seriousness with which federal agencies are taking consultations.

In addition, the Administration is continuing its multi-agency collaborations with tribal governments to develop comprehensive policy for Indian Country. Several agencies are working together on policy priorities and are coordinating on consultation sessions. For example, the Departments of the Interior and Education have been working closely to combine and coordinate their resources, and to maximize their efforts to impact Indian education. As part of the United States review of its position on the Declaration, fourteen federal agencies participated in tribal consultations, which included sessions held in Indian Country and at the State Department.

Federal agencies have put their consultation plans to work over the past year in a wide variety of contexts, and the valuable input received from tribal leaders is reflected throughout U.S. policies and programs in Indian Country.

III. 2 Protection of Native American Lands and the Environment, and Redress

The United States recognizes that some of the most grievous acts committed by the United States and many other States against indigenous peoples were with regard to their lands, territories, and natural resources. For this reason, the United States has taken many steps to ensure the protection of Native American lands and natural resources, and to provide redress where appropriate. It is also for this reason that the United States stresses the importance of the lands, territories, resources and redress provisions of the Declaration in calling on all States to recognize the rights of indigenous peoples to their lands, territories, and natural resources. Consistent with its understanding of the intention of the States

that negotiated and adopted the Declaration, the United States understands these provisions to call for the existence of national laws and mechanisms for the full legal recognition of the lands, territories, and natural resources indigenous peoples currently possess by reason of traditional ownership, occupation, or use as well as those that they have otherwise acquired. The Declaration further calls upon States to recognize, as appropriate, additional interests of indigenous peoples in traditional lands, territories, and natural resources. Consistent with that understanding, the United States intends to continue to work so that the laws and mechanisms it has put in place to recognize existing, and accommodate the acquisition of additional, land, territory, and natural resource rights under U.S. law function properly and to facilitate, as appropriate, access by indigenous peoples to the traditional lands, territories and natural resources in which they have an interest.

U.S. agency initiatives in this area are numerous.

Perhaps most significantly, the Obama Administration has acquired over 34,000 acres of land in trust on behalf of Indian tribes, which is a 225 percent increase since 2006. Lands held in trust for tribes are used for housing, economic development, government services, cultural and natural resource protection, and other critical purposes. Recovering and protecting the tribes' land base is a hallmark objective of this Administration. After the recent Supreme Court decision in *Carcieri v. Salazar*, Congress introduced, and the Administration has fully supported, legislation to reaffirm the authority of the United States to take land into trust on behalf of all federally recognized Indian tribes.

In addition, the United States intervened in a federal suit, *Saginaw Chippewa Indian Tribe of Michigan and United States v. Granholm*, and worked to facilitate a settlement that recognizes the tribe's entire reservation to be Indian Country, resolving over a century of disputes over the boundaries and existence of the reservation. The court approved that settlement on November 23, 2010. This settlement, which involves the tribe, the United States, the State of Michigan, and local governments, will promote greater intergovernmental cooperation and provide the clarity necessary for effective law enforcement and civil regulation on the reservation. The United States has also sought to protect tribal lands, and

tribal jurisdiction over those lands, in several other court cases, including the *City of Sherrill v. Oneida Indian Nation*, *Cayuga Nation v. Gould*, and *Water Wheel v. LaRance*.

Other agency initiatives include the release by the Forest Service of $37.3 million in Recovery Act funds directly to tribes for wild land fire management and the improvement of habitat and watersheds. Of the total Forest Service funding received under the Recovery Act, $213 million was provided to benefit tribes and tribal lands.

The Obama Administration has also made extensive efforts to resolve longstanding Native American legal claims against the United States and private entities related to lands, natural resources, and other issues.

In 2009, the United States reached an agreement for over $1.79 billion to address contamination at over 80 sites in 19 states pursuant to resolution of the American Smelting and Refining Company, LLC (ASARCO) bankruptcy. The settlement includes approximately $194 million for the recovery of wildlife, habitat, and other natural resources managed by the federal, state, and tribal governments at more than a dozen sites. The settlement is part of the largest environmental damage bankruptcy case in U.S. history, and resolves ASARCO's environmental liabilities from mining and smelting operations that contaminated land, water, and wildlife resources on federal, state, tribal, and private land.

In late October 2010, the Administration reached a $760 million settlement with Native American farmers and ranchers, in *Keepseagle v. Vilsack*, a case alleging discrimination by the Department of Agriculture in loan programs. Under the agreement, the Department of Agriculture will pay $680 million in damages and forgive $80 million of outstanding farm loan debt. The federal government also agreed to create a 15-member Native American Farmer and Rancher Council to advise the Department, appoint a Department ombudsman, provide more technical assistance to Native American borrowers, and conduct a systematic review of farm loan program rules.

On December 9, 2010, President Obama signed into law the Claims Resolution Act, which includes the *Cobell v. Salazar* settlement agreement. In 1996, Elouise Cobell charged the Department

of the Interior with failing to account for billions of dollars that it was supposed to collect on behalf of more than 300,000 individual Native Americans. After fourteen years of litigation, enactment of the Claims Resolution Act finally closes an unfortunate chapter in our history. The Act creates a fund of $1.5 billion dollars to address historic accounting and trust management issues, and it also allocates up to $1.9 billion dollars to convert some of the most highly fractionated individual Indian lands into land that can be managed for the broader benefit of the respective tribe. As part of the $1.9 billion, a trust fund of up to $60 million dollars is being created for a scholarship fund for Native Americans.

In addition, this law includes an unprecedented package of four water settlements benefitting seven tribes in Arizona, Montana, and New Mexico. This law finally gives the Crow, White Mountain Apache Tribe, and the Pueblos of Taos, Tesuque, Nambe, Pojoaque, and San Ildefonso permanent access to secure water supplies year round.

As noted by Secretary of the Interior Salazar, "Congress' approval of the Cobell settlement and the four Indian water rights settlements is nothing short of historic for Indian nations." He explained that the settlements "represent a major step forward in President Obama's agenda to empower tribal governments, fulfill our trust responsibilities to tribal members and help tribal leaders build safer, stronger, healthier and more prosperous communities." They demonstrate not only that the United States has a well-developed court system that provides a means of redress for many wrongs suffered by U.S. citizens, residents and others—including federally recognized tribes and indigenous individuals and groups—but also that redress is available from the U.S. Congress under appropriate circumstances. The United States will interpret the redress provisions of the Declaration to be consistent with the existing system for legal redress in the United States, while working to ensure that appropriate redress is in fact provided under U.S. law.

The Administration is likewise committed to protecting the environment, and recognizes that many indigenous peoples depend upon a healthy environment for subsistence fishing, hunting and gathering. The Administration therefore acknowledges the importance of the provisions of the Declaration that address

environmental issues. While there is far more that needs to be done, the United States is taking many steps to address environmental challenges in Indian Country and beyond.

In July 2010, President Obama signed Executive Order 13547, Stewardship of the Ocean, our Coasts, and the Great Lakes, drafted with substantial input from tribes, which established a Governance Coordination Committee with three tribal representatives, as well as tribal engagement in developing priority action areas. Of special interest are the priority areas of the Arctic and developing coastal and marine spatial plans.

In 2010, the Department of the Interior (DOI) provided grants worth more than $7 million through the Tribal Wildlife Grants Program for 42 Native American tribes to fund a wide range of conservation projects in sixteen states. The Tribal Wildlife Grants program has provided more than $50 million in the past eight years for 400 conservation projects administered by 162 federally-recognized tribes. The grants provide technical and financial assistance for the development and implementation of projects that benefit fish and wildlife resources and their habitat, including non-game species.

DOI has also engaged in numerous cooperative resource protection efforts with tribes, including a water quality and biologic condition assessments agreement with the Sac and Fox on the Iowa River, restoration of the Klamath River th[r]ough possible dam removal and in partnership with the Klamath River Basin tribes, and assistance to the Great Lakes Indian Fish and Wildlife Commission to assess the impact of land use and climate change on wetlands.

Over the past year, the U.S. Environmental Protection Agency (EPA) awarded targeted grants to tribes for specific preventative tasks to address environmental degradation, including $150,000 to the Eight Northern Indian Pueblo Council to establish a Brownfields Tribal Response Program that will promote environmental health for several Pueblos and tribes in New Mexico and West Texas. Two additional grants were made for projects run by tribes in the Upper Peninsula of Michigan as a part of President Obama's Great Lakes Restoration Initiative, a $475 million program that represents the largest investment in the Great Lakes

in two decades. The grants are to the Keweenaw Bay Indian Community to develop a sustainable hazardous waste collection program to serve tribal and non-tribal community members, and help prevent toxic contaminants from entering Lake Superior, and to the Little Traverse Bay Bands of Odawa to improve habitat and water quality in the Bear River Watershed, which directly affects waters flowing into Little Traverse Bay on Lake Michigan.

The Department of Agriculture also invested $84.8 million dollars in water and environmental projects benefitting tribal communities in the lower 48 U.S. states during FY 2010 and an additional $66.2 million dollars for similar projects benefitting tribal communities in Alaska through the Rural Alaska Village Grants program. A further $120.8 million was invested in essential community facilities benefitting tribal communities.

The Department of Energy (DOE) provides grants to many Indian communities to allow them to develop renewable energy resources and energy efficiency measures in their communities in ways that benefit not only those communities, but the whole planet, while serving as models for other U.S. communities. With DOE assistance, tribes are developing a wide-range of renewable energy resources and conservation measures, including geothermal, solar energy, wind and biomass technologies and comprehensive recycling programs. These programs reduce the carbon footprint of tribal communities, while creating jobs and reducing costs.

DOE has also worked closely with the Shoshone-Bannock Tribes to clean up contamination from Cold War storage of hazardous waste at the Idaho National Laboratory, the tribes' ancestral home. The Shoshone-Bannock Tribes have the technical capabilities and qualifications, funded by a DOE-Idaho Cooperative Agreement, to assist the Department and the regulators in reviewing the effectiveness of the cleanup work and assuring that the environment, and particularly the Snake River Plain Aquifer, are not contaminated or threatened.

The Fisheries and the Northwest Protected Resources Division of the National Oceanic and Atmospheric Administration (NOAA) also consults formally and informally with the Northwest treaty tribes when considering the designation of critical habitat for endangered species, including salmon, to ensure the agency is

informed of relevant tribal science and any potential impacts to the tribe that may arise from a designation of tribal lands as critical habitat. Documented information from these consultations with NOAA has ensured the protection of listed species and minimized any impact to tribal trust resources. Additionally, NOAA Fisheries and NOAA General Counsel for the Northwest consult with four tribes with ocean treaty fishing rights for groundfish in conjunction with the Pacific Fishery Management Council process. An example of the success of this practice is that, in 2010, NOAA Fisheries adopted a tribal whiting allocation that was agreed to by all affected tribes and the State of Washington.

III. 3 Addressing Health Care Gaps

The Obama Administration understands the priority tribal leaders place on improving the delivery of health care services in their communities, as well as the significance of related provisions in the Declaration. The Administration has responded, as evidenced by the 13% increase in funding for the Indian Health Service (IHS) in FY 2010 and the 9% additional increase for IHS proposed in the President's FY 2011 Budget Request. These increases are on top of $500 million provided to the IHS under the Recovery Act.

After President Obama signed the Affordable Care Act into law in March, making permanent the Indian Health Care Improvement Act, IHS initiated consultations with tribal leaders to implement the Act and determine their priorities. Tribes identified long-term care, behavior health, and diabetes/dialysis as their primary concerns. IHS held a meeting on Long Term Care in Indian Country on November 1–2, 2010 to begin the conversation about implementation priorities with tribes. IHS is also continuing the Special Diabetes Program for Indians, a Congressionally-approved grant program now in its thirteenth year, which has resulted in increased control of diabetes in indigenous communities and decreasing rates of end stage renal disease. Related demonstration projects have also shown significant promise.

Tribes also stressed the need to improve the collaboration and coordination of services for veterans eligible for both the Department of Veterans Affairs (VA) and IHS services. The IHS Director met with VA Secretary Shinseki in May 2010, and they

agreed to update the 2003 VA-IHS MOU governing their agencies' cooperation. The updated MOU was signed in October 2010 and a letter to tribal leaders initiating a consultation on the implementation of the MOU was released in November 2010.

The Department of Health and Human Services and the Department of the Interior are working together to combat the problem of suicide in Indian Country. The two Departments launched a series of listening sessions between November 2010 and February 2011 to obtain the input of tribal leaders on how the agencies can effectively work within their communities to prevent suicide. The information gathered will inform a major Suicide Prevention Summit to be held in Spring 2011.

III. 4 Promoting Sustainable Economic Development

The Obama Administration has also taken numerous steps, consistent with the Declaration, to promote the economic wellbeing of indigenous peoples in the United States.

A priority for the Administration has been to combat unemployment in Indian Country as evidenced by the President's FY 2011 Budget Request, which includes $55 million, representing a 4% increase over FY 2010 funding, for the Department of Labor's Employment and Training Administration's Indian and Native American Program, which grants funding to tribes and Native American non-profits to provide employment and training services to unemployed and low-income Native Americans, Alaska Natives, and Native Hawaiians. Additionally, the Recovery Act allocated over $17 million for the Native American Supplemental Youth Service Program to support summer employment and training opportunities for disconnected youths.

In addition, this summer, the Department of Labor awarded approximately $53 million to 178 grantees to provide quality employment and training services specifically for Native American adults who are unemployed, underemployed and low-income individuals. It awarded an additional $13.8 million in grants to 78 tribes, tribal consortiums, and tribal non-profit organizations to offer summer employment and training activities for American Indian, Alaska Native and Native Hawaiian youth between the ages of 14 and 21, residing on or near Indian reservations or Alaska

Native villages. The youth program targets high school dropouts and youth in need of basic skills training and provides an array of employment and training services, including job placement assistance, work experience, and occupational skills training. In addition, the Recovery Act included $17.8 million in grant funding for Native American youth activities, including summer employment and training opportunities.

The Department of Labor has also been working to address the needs of Native Americans with disabilities. It has collaborated with tribal colleges and universities through the Workforce Recruitment Program to provide internship opportunities for students with federal employers. The Department, tribal colleges and universities, and the National Indian Health Board have worked together to develop a training curriculum for tribal members with disabilities that will provide the opportunity for them to become Community Health Aides. In addition, Add Us In, a new initiative sponsored by the Department, is designed to identify and develop strategies to increase employment opportunities within the small business community for individuals with disabilities. This initiative includes targeted Native American owned and operated small businesses.

In addition, the Treasury Department has a program to strengthen the economic health of Native American communities generally. The Native American Community Development Financial Institutions (CDFI) Assistance Program, or NACA Program, now includes 57 certified Native CDFIs. CDFIs are non-government financial entities whose primary mission is to promote community development, principally by serving and being accountable to a low-income community, and by providing development services. Native participation in NACA increased significantly in 2009 and 2010, and on April 30, 2010, the CDFI Fund announced awards totaling $10.3 million to be used for small business/venture capital, affordable housing, and consumer loans.

Tribal leaders regularly identify the lack of adequate housing as a major impediment to economic development in their communities. To assist with addressing housing needs, the Recovery Act allocated $510 million to the Department of Housing and Urban Development (HUD) for the Native American Housing Block Grant program for new housing construction, acquisition, rehabilitation,

and infrastructure development. By December 1, 2010, tribal recipients had already expended almost two-thirds of those funds for new construction, rehabilitations, energy-efficient improvements, and infrastructure development in Indian Country.

In addition, the Department of Housing and Urban Development (HUD) has a number of other housing initiatives.

On October 12, 2010, President Obama signed into law the Indian Veterans Housing Opportunity Act. The Act amends the definition of "income" for HUD's Indian Housing Block Grant program so that the determination of a family's income excludes amounts received from the Department of Veterans Affairs for a service-related disability, dependency, or indemnity compensation. The new law will benefit disabled Native American veterans and their families who might otherwise be ineligible for low-income housing assistance under HUD's program.

In 2011 and 2012, HUD will conduct a comprehensive, national Native American Housing Needs Assessment Study. Before field research begins, the Office of Native American Programs is sponsoring a series of seven regional outreach meetings with tribal housing stakeholders, including tribal leaders; federal agencies; and private sector, non-profit, and state entities to discuss the upcoming study and to lay the groundwork for maximum participation. These outreach meetings will provide a forum for discussing the community and economic impact housing has on tribal communities as well as identifying the needs for creating sustainable reservation communities and economies. These meetings will continue the ongoing dialogue between HUD and tribal leaders in Indian Country.

The Administration is also committed to supporting Native Americans' success in K-12 and higher education. The Recovery Act invested $170.5 million in Indian education at the Department of Education and $277 million in Indian school construction at the Department of the Interior. The President's FY 2011 Budget Request provides $31.7 million in funding for Tribally Controlled Colleges and Universities in the Department of Education, a 5% increase over FY 2010. The Budget Request includes $127 million for postsecondary education for Native Americans under the Department of the Interior.

The Health Care and Education Reconciliation Act increases the maximum Pell Grant award by the Consumer Price Index, which is estimated to raise the award from $5,550 to $5,975, according to the Congressional Budget Office. In addition, the law provides $300 million for Tribally Controlled Colleges and Universities, $50 million for Native American-Serving Nontribal Institutions, and $150 million for Alaska Native and Native Hawaiian-Serving Institutions over the next ten years. These investments will be made in order to renew, reform, and expand programming so that students at these institutions are given every chance to reach their full potentials. These efforts respond to the concerns of Native American leaders as well as priorities identified in the Declaration.

In addition, President Obama appointed members to the Department of Education's National Advisory Council on Indian Education (Council), as authorized by the ESEA, who met for the first time on November 3, 2010. The current Council consists of fourteen members who are Native Americans. The Council is required to advise the Secretary of Education concerning the funding and administration of Department programs that include or may benefit American Indians and Alaska Natives, make recommendations to the Secretary of Education for filling the position of Director of Indian Education, and submit a report to Congress on any recommendations that the Council considers appropriate for the improvement of federal education programs that include or may benefit Native Americans.

The Department of Education is also working to combat discrimination against Native Americans in education. In March 2011, the Department's Office for Civil Rights will provide technical assistance on civil rights issues that affect Native American communities in California, with particular focus on national origin and race discrimination, harassment, and bullying, to an audience of parents, activists, tribal leaders, teachers, and school leaders. Together with the Department of Health and Human Services, it will also provide in Fall 2011 technical assistance to parents and students, as well as social outreach service providers for the Native American communities, on civil rights issues that affect Native American communities in Minnesota and North Dakota.

The Administration is also working with tribal leaders to bring their communities into the 21st Century by equipping them with high speed access to the Internet. Both the Department of Agriculture and the Department of Commerce have programs to do so.

The Department of Agriculture recently awarded $32 million to bring high speed, affordable broadband to the Navajo Nation. The Department of Agriculture also received Recovery Act funds to expand broadband access. It provided grants and loans totaling over $158 million to expand broadband access in tribal communities through the Broadband Initiatives Program. This included ten infrastructure investments directly to tribes and tribally-owned businesses and eleven technical assistance awards to tribes to assist with regional broadband plans to promote economic development.

The National Telecommunications and Information Administration of the Department of Commerce awarded almost 30 percent of the $4.7 billion that the Department received from the Recovery Act to Indian tribes and recipients that indicated that their projects will benefit tribal areas. This funding will be used to increase access to broadband services in underserved areas of the country.

Similarly, the Department of Agriculture's Rural Development office made $216.3 million in Recovery Act investments benefiting American Indian and Alaska Native populations, including $36.3 million for community water and wastewater infrastructure, $97.5 million for community facilities, and $81.1 million for single family housing (691 home loans). In addition, the Recovery Act allocated $310 million to the Department of Transportation for the Indian Reservation Roads Program and over $142 million to the Department of the Interior for roads maintenance.

III. 5 Protecting Native American Cultures

As President Obama has recognized, the indigenous peoples of North America have "invaluable cultural knowledge and rich traditions, which continue to thrive in Native American communities across our country." The many facets of Native American cultures—including their religions, languages, traditions and arts—need to be protected, as reflected in multiple provisions of the Declaration.

Because of the breadth and depth of Native American cultures, they affect and are affected by the activities of many U.S. agencies. Some of those agencies' efforts are noted in this section.

In July, President Obama signed into law the Indian Arts and Crafts Amendments Act to strengthen the Indian Arts and Crafts Act, which makes it illegal to sell, offer, or display for sale any art or craft product in a manner that falsely suggests it is Indian-produced, an Indian product, or the product of a particular Indian tribe. The new act empowers all federal law enforcement officers to enforce this prohibition and differentiates among penalties based on the price of the goods involved in the offense. The total market for American Indian and Alaska Native arts and crafts in the United States is estimated at a billion dollars, with an unknown but substantial amount of those sales going to misrepresented, non-authentic works.

The Secretary of Agriculture, in a letter of July 2, 2010, directed the Department of Agriculture's Office of Tribal Relations and the Forest Service to begin a process of review of all Forest Service policies and to consult with interested tribes about how the Department and the Forest Service can do a better job addressing sacred site issues while simultaneously balancing pursuit of the agency's mission to deliver forest goods and services for current and future generations. He emphasized the need to examine the effectiveness of existing laws and regulations in ensuring a consistent level of sacred site protection that is more acceptable to the tribes.

On July 30, 2010, the United Nations inscribed the Papahānaumokuākea Marine National Monument as the first mixed (natural and cultural) World Heritage Site in the United States. The Department of the Interior played a leading role in coordinating the development of the nomination dossier and successful inscription by the World Heritage Committee. Papahānaumokuākea's inscription as a World Heritage Site is important to Native Hawaiians because it recognizes and incorporates the richness of the habitat and wildlife with the living, indigenous, cultural connections to the sea where modern Hawaiian wayfinders (non-instrument navigators) still voyage for navigational training on traditional double-hulled sailing canoes; an

aspect of inscription unique to Papahānaumokuākea. Additionally, World Heritage status places this traditional skill, which was used to navigate across the world's largest ocean—one of the greatest feats of human kind—onto the world stage.

Since April 2010 the Department of Education has held six regional consultations with tribal officials regarding reauthorization of the ESEA. Among the statements heard time and time again were those on the importance of preserving Native languages. In response, the Administration has proposed changes to the ESEA that support, among other things, flexibility in the use of federal education funds to allow funding for Native language immersion and Native language restoration programs.

Due to joint efforts of federal agencies and tribes, 152 notices of decisions to repatriate human remains and cultural items were published in the Federal Register in 2010. Each of these notices is a direct consequence of museums and federal agencies consulting with tribes concerning the repatriation of human remains and cultural items previously held in collections. These notices account for 1,628 human remains and 9,062 associated funerary objects, an additional 2,052 funerary objects not associated with an individual, 11 sacred objects, 10 objects of cultural patrimony, and an additional 388 items that are both sacred objects and objects of cultural patrimony. In addition, the Forest Service is exercising its authority to assist tribes over the next several years in reburial of over 3,000 sets of human remains and their associated cultural items that had been removed from National Forests.

The Department of the Interior, through the Fish and Wildlife Service, has also begun efforts with tribes to facilitate eagle feather possession for cultural and traditional uses and to promote coordination in wildlife investigations and enforcement efforts to protect golden and bald eagles.

Moreover, the Department of the Interior awarded over $8 million to support historic preservation programs and projects for Indian tribes, Alaska Natives, and Native Hawaiian organizations. $7,250,000 was awarded to 100 Tribal Historic Preservation Officer programs, and $899,316 to 26 communities for a broad range of cultural heritage projects.

IV. Conclusion

The United States has made great strides in improving its relationship with Native Americans and indigenous peoples around the world. However, much remains to be done. U.S. agencies look forward to continuing to work with tribal leaders, and all interested stakeholders, so that the United States can be a better model for the international community in protecting and promoting the rights of indigenous peoples.

F. PROTECTION OF MIGRANTS

On November 18, 2010, the United States joined consensus when the Third Committee adopted a resolution on the protection of migrants. After the Committee adopted the resolution, a U.S. delegation member delivered a statement that explained the U.S. position on the resolution, including U.S. concerns about it. The statement reiterated some of the points the U.S. delegation made during the Committee's consultations on the draft resolution and many of the points the United States had made to the Third Committee in previous years concerning the annual resolutions on the protection of migrants. The statement is available at *www.state.gov/s/l/c8183.htm. See also Digest 2008* at 338–39 and *Digest 2009* at 242. The General Assembly adopted the resolution without a vote on December 21, 2010. U.N. Doc. A/RES/65/212.

G. CLIMATE CHANGE

On March 25, 2010, the United States joined consensus in the Human Rights Council in adopting a resolution on the Social Forum. U.N. Doc. A/HRC/RES/13/17. After the Council adopted the resolution, a U.S. delegation member made a statement, providing U.S. views on the relationship between human rights and climate change. The full text of the U.S. statement, which is excerpted below, is available at *http://geneva.usmission.gov/2010/03/25/social-forum*. Background on the Social Forum is available

at *www2.ohchr.org/english/issues/poverty/sforum.htm*. For discussion of issues relating to climate change generally, see Chapter 13.A.1.

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— The United States . . . considers that climate change—as with other societal and natural phenomena—may affect the enjoyment of human rights. Climate protection is an essential and shared goal, and reducing the impacts of climate change can—as noted in the Universal Declaration of Human Rights—"promote social progress and better standards of life in larger freedom."

— The United States takes this opportunity to reiterate its view that a "human rights approach," however, is unlikely to be effective in addressing the complex global challenge of climate change. We believe that climate change can be more appropriately addressed through traditional systems of international cooperation, including through the United Nations Framework Convention on Climate Change process.

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H. TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

1. Presidential Statement

On June 26, 2010, President Barack H. Obama issued a statement to mark the UN International Day in Support of Victims of Torture. In his statement, excerpted below, President Obama reaffirmed the U.S. commitment to the UN Convention Against Torture and stressed that the United States does not use or support brutal methods of interrogation. The full text of President Obama's statement is available at Daily Comp. Pres. Docs., 2010 DCPD No. 00549, p. 1. President Obama also discussed U.S. initiatives to help victims of torture worldwide.

Today we celebrate the anniversary of the United Nations' Convention Against Torture, one of the foremost international human rights documents. The United States was a leader in the document's drafting, and remains dedicated to supporting its principles at home and abroad.

I continue to believe that brutal methods of interrogation are inconsistent with our values, undermine the rule of law, and are not effective means of obtaining information. They alienate the United States from the world, and serve as a recruitment and propaganda tool for terrorists. They increase the will of our enemies to fight against us, and endanger our troops when they are captured. The United States will not use or support these methods.

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2. Special Rapporteur

On March 5, 2010, Mark Cassayre, then Political Counselor, U.S. Mission to the United Nations, Geneva, delivered a statement during the Human Rights Council's interactive dialogue with the Special Rapporteur on Human Rights While Countering Terrorism and the Special Rapporteur on Torture. Excerpts below from Mr. Cassayre's statement provide U.S. views on substantive issues in the Special Rapporteur on Torture's report. The full text of the U.S. statement is available at *http://geneva.usmission.gov/2010/03/08/interactive-dialogue-with-special-rapporteur*. Mr. Cassayre's comments on human rights and counterterrorism are discussed in Section O. of this chapter. For U.S. views on the importance of the Special Rapporteurs in general, see A.2.d. *supra*.

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. . . [W]e note with great concern the Special Rapporteur on Torture's conclusion that in the vast majority of States, torture not only occurs in isolated cases, but is practiced in a more regular, widespread or even systematic manner. We join in his recommendation that States that have not already done so become parties to

the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and that all States Parties fully implement the Convention's provisions.

The Special Rapporteur further states in his report complaint mechanisms are a safeguard where the legally required protection differs from reality in a glaring and devastating way. We would be interested in his elaboration on what he believes to be the key elements necessary for an effective complaint mechanism at the local, national, and international levels.

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I. JUDICIAL PROCEDURE, PENALTIES, AND RELATED ISSUES

1. Inter-American Commission on Human Rights: Petition of Victor Saldaño

In 1996 Victor Saldaño, an Argentine national, was sentenced to death for capital murder by a jury in a Texas state court. In 2000 the U.S. Supreme Court vacated the sentence, and in 2004 a Texas jury re-imposed the sentence. Saldaño appealed the sentence and sought writs of habeas corpus from both a Texas state court and a federal district court in Texas. Saldaño also filed a complaint with the Inter-American Commission on Human Rights, Case No. 12.254, alleging violations of the American Declaration of the Rights and Duties of Man, specifically Articles I (death penalty violates right to life), II (right to equality before the law), XVIII (right to a fair trial), XXV (right to protection from arbitrary arrest), and XXVI (right to due process of law). On November 2, 2009, the United States submitted a filing to the Commission, expressing the view that "as a matter of law, the American Declaration on the Rights and Duties of Man is respected, and the Petitioner's rights are respected, through the availability of strong constitutional protections in the United States, including the pending domestic federal habeas corpus proceedings, which provide a venue to address Petitioner's allegations and to redress any violations."

At a hearing on Saldaño's petition on November 3, 2009, the Commission requested the United States to file an amicus brief in Mr. Saldaño's federal habeas corpus proceeding. In response, on May 10, 2010, State Department Legal Adviser Harold Hongju Koh wrote Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, concerning Saldaño's petition to the Commission. On June 2, 2010, the United States filed Koh's letter and the accompanying 2009 U.S. submission to the Commission in Saldaño's federal habeas proceeding. *Saldaño v. Thaler* (E.D. Texas No. 4:08cv193). Excerpts below from Mr. Koh's letter summarize the arguments in the U.S. submission to the Commission concerning the domestic remedies available to Mr. Saldaño, discuss U.S. support for the Commission, and address the implications of the case for U.S. reporting on its obligations under the International Covenant on Civil and Political Rights and its bilateral relations with Argentina. The full text of Mr. Koh's letter and the accompanying U.S. submission to the Commission are available at *www.state.gov/s/l/c8183.htm*.

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. . . At a hearing before the Commission on November 3, 2009, the United States defended against Petitioner's allegations by representing to the Commission that United States domestic legal proceedings are currently available, timely, effective, and capable of remedying any alleged violation of Petitioner's rights. The United States stressed that "the availability of strong constitutional protections in the United States, including the pending domestic federal habeas corpus proceedings," serve to "provide a venue to address Petitioner's allegations and to redress any violations." United States Submission to the Commission in IACHR Case #12.254—Victor Saldano, dated November 2, 2009 ("United States Submission"), attached, page 1. The United States further stated that:

[t]he right to life, right to equality under the law, right to a fair trial, right to humane treatment while in custody,

> and right to due process, including the right not to receive cruel, infamous or unusual punishment, as set forth in the American Declaration, are fully protected in the United States under the United States Constitution and other provision[s] of U.S. law, *and by affording to persons in custody access to the writ of habeas corpus*. The writ of habeas corpus, made available to a person in custody pursuant to the judgment of a state court under 28 U.S.C. 2254, applies to cases in which a state prisoner, like Petitioner, is alleged to be held in custody in violation of the Constitution or federal law of the United States. . . . .
>
> **Petitioner therefore has an immediate and available avenue for vindication and remedying of any human rights and civil rights violation that he alleges has occurred.[]**

United States Submission, at 1. (Italicized emphasis in original; bolded emphasis added.)

The United States further described in its Submission the constitutional protections available for defendants in criminal proceedings in the United States under the Fifth, Sixth, Eighth and Fourteenth Amendments, including "significant protection against the trial, conviction and punishment of individuals with significant mental infirmities or disabilities." *Id*. at 4. The United States accordingly argued that the Commission should defer a final decision on the Petition to "allow the independent and robust federal judicial branch of the United States to conduct a review of Petitioner's claims, determine whether a violation of his rights has occurred, and fashion an appropriate remedy." *Id*. at 8.

During the November 3rd hearing, the Commission requested that the United States file an amicus brief in Petitioner's federal habeas corpus proceeding supporting his request for an evidentiary hearing, an action that could result in a "friendly settlement' of the twelve-year old Commission case. The United States would like to respond to the Commission as favorably as possible. The Inter-American Commission was established under the OAS Charter "to promote the observance and protection of human rights and to serve as a consultative organ of the Organization on these matters." Article 106. The United States strongly supports

the work of the Commission, and participates and cooperates actively in its proceedings. We are one of the Commission's most vocal supporters and defenders among all OAS Member States, and are also one of its largest financial contributors, as a result of strong bipartisan Congressional support. The United States recognizes the Commission as an important mechanism for the promotion and protection of human rights in the Americas, in other states as well as our own.

In addition to the pendency of this matter before the Inter-American Commission, the United States will be expected to report on its handling of this case before numerous United Nations bodies. . . . The unusual facts of this case—that Petitioner is a foreign national whose original death sentence was vacated as tainted by admitted unconstitutional racial bias during his initial penalty hearing and who now alleges that he has suffered severe mental deterioration during his lengthy confinement on death row—set against the international community's broader concerns regarding discriminatory application of the death penalty in the United States, provides a strong additional basis for the Department of State to demonstrate to those UN bodies that the United States has taken every available step to address Petitioner's claims of violations of his constitutional (and human) rights.

Additionally, the Government of Argentina, a democratic and close ally, has a strong interest in this case, has closely followed the proceedings since the outset, and filed an amicus brief before the United States Supreme Court in 2007. Their Ambassador attended the November 3rd hearing before the Commission and called on officials at the Departments of State and Justice to urge that we comply with the Commission's request to file an amicus brief in support of an evidentiary hearing.

* * * *

2. Death Penalty

On November 11, 2010, the United States voted in the General Assembly's Third Committee against a resolution regarding the moratorium on the use of the death penalty. Laurie Shestack

Phipps, Adviser for Economic and Social Affairs, U.S. Mission to the United Nations, delivered a statement explaining the U.S. vote. The statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/2010/151111.htm*. The General Assembly adopted the resolution on December 21, 2010, by a vote of 109 states in favor, 41 states abstaining, and 35 states opposing. U.N. Doc. A/RES/65/206.

. . . The United States appreciates the openness with which the co-sponsors have approached this resolution and their attempts to focus more on international dialogue.

There is a robust political debate on the issue of the death penalty—both within and among nations. While we appreciate that this resolution sets forth policy objectives shared by advocates of an abolition to this form of punishment, we believe that the ultimate decision regarding these issues must be addressed through the domestic democratic processes of individual Member States and be consistent with their obligations under international law.

As the United States has consistently noted in this context, capital punishment is not prohibited by international law. Under the International Covenant on Civil and Political Rights, to which the United States is a party, the death penalty may be imposed for the most serious crimes when carried out pursuant to a final judgment rendered by a competent court and accompanied by exacting procedural safeguards and the observance of due process. U.S. and international law are also relevant to the manner in which the death penalty is carried out. The Eighth Amendment of the U.S. Constitution prohibits methods of execution that would constitute cruel and unusual punishment.

These and other protections are guaranteed by the U.S. Constitution and criminal statutes at both the federal and state levels. In recent years, the United States Supreme Court has further narrowed both the class of individuals on whom the death penalty may be imposed and the types of offenses that may be subject to the death penalty.

Just as the United States is committed to complying with its international obligations, we strongly urge other countries that

employ the death penalty to do so only in full compliance with international law.

Greater efforts are required to ensure that capital punishment is not applied in an extrajudicial, summary or arbitrary manner. We believe that capital defendants must be provided a fair trial before a competent, independent, and impartial tribunal established by law, with full due process guarantees. Moreover, states should carefully evaluate both the class of defendants subject to the death penalty, as well as the crimes for which it may be imposed, in order to ensure that their use of capital punishment comports with their international obligations. Methods of execution designed to inflict undue pain or suffering must be strictly prohibited.

The United States urges all States, and particularly the supporters of this resolution, to focus their attention towards addressing and preventing human rights violations that may result from the improperly imposed application of capital punishment.

3. Extrajudicial, Summary or Arbitrary Executions

On November 16, 2010, the United States voted in the General Assembly's Third Committee to abstain from the adoption of a resolution on extrajudicial, summary or arbitrary executions. The U.S. statement explaining the U.S. vote and the concern that the resolution obscured the distinction between international humanitarian law and international human rights law, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/151133.htm*. *See also* the U.S. statement from the same day, explaining the U.S. vote against an amendment to remove a reference to "sexual orientation" in the draft text, available at *http://usun.state.gov/briefing/statements/2010/151135.htm*.

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Although we abstained on the adoption of this resolution today, we wish to join the sponsors of the text in condemning extrajudicial, summary or arbitrary executions against all persons, irrespective of

their status. We of course agree that all States have obligations to protect human rights and fundamental freedoms and should take effective action to combat all extrajudicial killings and punish the perpetrators. We agree that countries such as ours, which have capital punishment, should abide by their international obligations, including those related to due process, fair trial, and use such punishment for only the most serious of crimes. Indeed, we agree with much of the text of this resolution. However, we have some concerns.

* * * *

. . . Much as we agree with the goals and sponsors of the resolution, we are not in a position to vote for a text that obscures a fundamental point: there are not one, but two bodies of law that regulate unlawful killings of individuals by governments—international human rights law and international humanitarian law. As noted by the resolution, these two bodies of law are complementary and mutually reinforce one other. We also recognize that determining what international law rules apply to any particular government action during an armed conflict is highly fact-specific and made even more difficult by the changing nature of warfare. However, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict outside a nation's territory are typically found in international humanitarian law. Rather than clarifying, the resolution as worded only contributes to legal uncertainty about how these two important bodies of law apply to an array of factual circumstances.

On December 21, 2010, the United States abstained when the General Assembly adopted the resolution on extrajudicial, summary, and arbitrary executions. One hundred and twenty-two states voted for the resolution and one voted against it, with 61 other countries joining the United States in abstaining. U.N. Doc. A/RES/65/208. The United States abstained based on its concerns about the resolution's mischaracterization of international law, in particular, the relationship between international humanitarian law and human rights law.

Notwithstanding its objection to the text, the United States believed that any text addressing extrajudicial, summary, and arbitrary executions should rightfully condemn the killings of individuals because of their sexual orientation. Accordingly, the United States successfully proposed an amendment to the resolution that restored language condemning extrajudicial killings of lesbian, gay, bisexual, and transgender individuals. U.S. statements concerning that amendment are discussed in B.4. *supra*.

4. Administration of Justice

On November 19, 2010, the United States joined consensus in the Third Committee in adopting a resolution on "Human Rights in the Administration of Justice." After the Committee acted, a U.S. delegation member delivered a statement explaining the U.S. position on the resolution, including the concern that it calls upon states to comply with various principles that the United States has not undertaken as legal obligations. Excerpts follow from the U.S. statement, which is available in full at *www.state.gov/s/l/c8183.htm*.

The United States is pleased to join consensus on this year's resolution on human rights in the administration of justice and to reaffirm the importance of ensuring respect for the rule of law and human rights in the administration of justice. We welcome in particular the focus this year on issues related to women and children in the justice system. We are committed to the idea that states should address the vulnerability of women, juveniles and children to violence, abuse, and injustice, and to the importance of integrating women's, juvenile's and children's issues into rule of law and justice programs and policies.

However, we have concerns that the resolution calls upon States to comply with various principles that are not obligations that the United States has undertaken. For example, the resolution rightly emphasizes the importance of the interests of the child

when deciding on pre-trial measures or sentencing a parent or primary care-giver, but we note that other factors such as public safety are also important. The resolution also calls upon States to ensure that life imprisonment without the possibility of release is not imposed on individuals under the age of 18. This requirement is not an obligation that customary international law imposes on states; rather, it reflects treaty obligations that the United States has not undertaken. We interpret the resolution as re-affirming such obligations to the extent that States have accepted them.

J. DETENTION AND MISSING PERSONS

On November 11, 2010, the United States joined consensus in the Third Committee on a resolution entitled "Proclamation of 24 March as the International Day for the Right to the Truth Concerning Gross Human Rights Violations and the Dignity of Victims." After the Committee adopted the resolution, Laurie Shestack Phipps, Adviser for Economic and Social Affairs, U.S. Mission to the United Nations, delivered a statement explaining the U.S. position on it and underscoring the U.S. view that the right to truth "is inextricably intertwined with the promotion of democratic ideals, human rights, and justice." The U.S. statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/151114.htm*. The General Assembly adopted the resolution without a vote on December 21, 2010. U.N. Doc. A/RES/65/196.

* * * *

One of the core tenets guiding our participation as a member of the UN General Assembly is fidelity to the truth. We see the right to truth as closely linked to the right to seek, receive, and impart information under Article 19 of the International Covenant on Civil and Political Rights. We also observe that the right to truth may be characterized differently in certain legal systems, such as our own, as the right to be informed, freedom of information, or the right to know.

With regard to the right to know, the United States continues to acknowledge, as it did at the ICRC Conference on the Missing

in February 2003, that a right to know is referred to in Article 32 of the 1977 Additional Protocol I to the Geneva conventions. Although the United States is not a party to that instrument and has no obligations under it vis-a-vis a right to know, the United States supports the principle that families have a right to know of the fate of their missing family member or members.

* * * *

K. RULE OF LAW AND DEMOCRACY PROMOTION

1. Rule of Law at the National and International Levels

a. Security Council debate

On June 29, 2010, the Security Council held a debate on justice and the rule of law. Mary McLeod, then Legal Adviser to the U.S. Mission to the United Nations, delivered a statement stressing the centrality of the rule of law to the United States. Excerpts below from Ms. McLeod's statement describe U.S. support for strengthening the rule of law internationally. Ms. McLeod's statement is available in full at *http://usun.state.gov/briefing/statements/2010/143756.htm*. For discussion of U.S. support for the efforts of the UN Commission on International Trade Law ("UNCITRAL") to promote the rule of law, see Chapter 15.A.1.

Mr. President, the rule of law lies at the heart of my country's democracy, and it is also central to the maintenance of international peace and security and the pursuit of global progress. President Obama has said, "In an increasingly interconnected world, legal issues of human rights, criminal justice, intellectual property, business transactions, dispute resolution, human migration, and environmental regulation affect us all." My government is deeply committed to enduring legal principles: due process, equal protection under law, judicial independence, and justice for all. Beyond our fierce dedication to the rule of law at home, we are

also working to support and expand respect for the law and human rights around the world.

As a member of the Security Council, we have worked to ensure that the rule of law is an important component of peacekeeping missions. We have brought that same commitment to the General Assembly committees responsible for operationalizing and financing peacekeeping. By integrating the rule of law into the mandates of peacekeeping and peacebuilding missions and following through on those precepts, the Security Council and the United Nations can help to achieve more lasting, stable, and sustainable peace in nations emerging from conflict.

In addition, the United States strongly supports the important work done by the Office of the High Commissioner for Human Rights, particularly its capacity-building activities to strengthen national rule-of-law systems and respect for human rights around the world. As a member of the Human Rights Council, the U.S. is working to promote human rights and strengthen international law and to create a more credible Human Rights Council that can be a voice for those suffering under the world's cruelest regimes.

Our commitment to the rule of law is also reflected in our strong support for ratification of the Convention on the Elimination of All Forms of Discrimination Against Women and our signing of the UN Convention on the Rights of Persons with Disabilities—the first new human rights convention of the 21st century. But the international rule of law does not depend on multilateral discussions alone; international judicial mechanisms can help peacefully resolve conflicts and end impunity.

One such institution is the International Court of Justice, which plays a vital role in the peaceful resolution of international disputes. The United States was pleased that its national group co-nominated Ambassador Xue to fill the seat vacated by the retirement of the distinguished Judge Shi. One of my fellow citizens, Judge Thomas Buergenthal, has also served with great distinction on the Court. He will be retiring effective in September, and I am pleased that the U.S. national group has nominated as his replacement Joan Donoghue, the State Department's Principal Deputy Legal Adviser and a lifelong advocate of respect for international law.

Mr. President, the United States strongly supports international tribunals to bring to justice those who commit horrific atrocities. We have been proud to serve on the Management Committees of the Special Court for Sierra Leone and the Special Tribunal for Lebanon and to provide major funding for these two vital tribunals. The United States also recently joined the Steering Committee of the Khmer Rouge Tribunal and announced a major contribution to it. The United States continues to play an active role with the International Tribunals for the former Yugoslavia and Rwanda, serving on the Security Council's Working Group on Tribunals as it grapples with the challenges of the successor institution to those two important bodies.

The United States was pleased to participate as an observer in the first Review Conference of the International Criminal Court's Assembly of States Parties. We did so with the clear recognition that international tribunals such as the ICC can be an important part of the effort to prevent and combat crimes that shock the universal conscience.

Mr. President, at its heart, the rule of law depends on developing strong domestic institutions around the world. The United States therefore continues to provide strong bilateral support for the rule of law. We are now working with scores of countries, as well as international and regional organizations on programming that supports the domestic rule of law. In 2011, for instance, the State Department and the U.S. Agency for International Development proposed nearly $900 million for rule-of-law and human rights programs—a 28 percent increase from Fiscal Year 2009.

When we plan our bilateral work, we try to work closely with the UN Department of Peacekeeping Operations, donors, other UN agencies, and NGOs. The number of actors working on international rule-of-law promotion can be daunting, but we must coordinate and prioritize together to provide a better future for host nations.

The responsible departure of UN peacekeepers in post-conflict situations often requires improving and expediting UN and other efforts to build up national criminal-justice sectors and security institutions, which are central to local authorities' abilities to

sustain a hard-won peace on their own. The political, development, and recovery challenges that post-conflict countries face are often complex, and a broad array of actors may be helping host countries strengthen the rule of law. We must ensure that our efforts are mutually reinforcing and helping to build national capacity. We welcome the Secretary-General's recent efforts to further develop civilian expertise in these areas.

Mr. President, the rule of law is one of the founding values of the United States. And we believe that strengthening the rule of law around the world reinforces peace, progress, and security.

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b. General Assembly Sixth Committee debate

On October 12, 2010, Gregory Nickels, U.S. Senior Adviser to the 65th General Assembly, addressed the Sixth (Legal) Committee of the General Assembly during its annual consideration of its agenda item on the rule of law at the national and international levels. The Committee focused its debate on a specific sub-topic relevant to the agenda item: "laws and practices of Member States in implementing international law." Excerpts below from the U.S. statement address U.S. efforts to ensure that it implements its treaty obligations effectively. The full text of the U.S. statement is available at *http://usun.state.gov/briefing/statements/2010/149639.htm.*

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The United States takes its international legal obligations very seriously. Before the United States becomes party to a treaty, the practice of the United States Government is to review its terms to ensure that we will be in a position to implement the obligations contained in it. When necessary or appropriate, this review includes consulting with other federal agencies, members of the United States Congress, local and state authorities, private industry, and civil society. In many instances, this process can take considerable time, but it is necessary so that we can be confident

that we will be in a position to fulfill the treaty obligations to which we commit.

For example, the implementation of private international law treaties, which focus on the harmonization and unification of national laws relating to various cross-border transactions, frequently requires substantial cooperation between authorities, including the judiciary, at the federal and state levels. It may take years for the United States, as it did in the case of the Hague Adoption Convention, to establish an effective framework for implementation, but establishing such a framework is crucial to obtaining compliance. It is also important to recognize that, often, the United States—like other countries—works to fine-tune its implementation of treaties even after entry into force. We recognize that it sometimes is not enough to simply create a framework prior to joining, for inevitably unexpected problems arise.

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2. Civil Society

On July 3, 2010, Secretary Clinton addressed the Community of Democracies meeting in Krakow, Poland, in a speech entitled "Civil Society: Supporting Democracy in the 21st Century." Secretary Clinton highlighted the importance of the nongovernmental sector to promoting democracy and human rights and discussed how increasing crackdowns on nongovernmental organizations globally threaten democracy. Secretary Clinton also proposed four steps for supporting civil society worldwide, including the suggestion that the Human Rights Council do more to protect civil society. Secretary Clinton's remarks are available at *www.state.gov/secretary/rm/2010/07/143952.htm.*

3. Cote d'Ivoire

On December 23, 2010, the Human Rights Council held a special session to address the political crisis that broke out

in Cote d'Ivoire after the country held democratic run-off elections for president in November 2010 and outgoing President Laurent Gbagbo refused to cede office. For background on the crisis, see *www.state.gov/r/pa/prs/dpb/2010/12/153518.htm*. Ambassador Betty King, U.S. Permanent Representative to the United Nations in Geneva, made a statement on behalf of the United States that welcomed the Human Rights Council's decision to convene a special session, expressed support for democratic processes in Cote d'Ivoire, and condemned human rights violations and abuses in the country. Ambassador King's statement, excerpted below, is available in full at *http://geneva.usmission.gov/2010/12/23/hrc-cdi*.*

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The United States is very pleased that the Council is holding this special session to address the ongoing crisis in Cote d'Ivoire. The membership of the Human Rights Council has a strong interest in speaking up in this emergency situation to help prevent further violence. By convening this session on an urgent basis this week, the international community is sending a strong, unified and clear message that the democratic processes in Cote d'Ivoire will be supported and human rights abuses and violations . . . will not be tolerated there. The decision of the African Group to lead this session also sends a strong signal of common purpose and commitment to ensure respect for human rights, and to address the most serious abuses.

The United States deplores the growing violence and recent human rights violations and abuses occurring in Cote d'Ivoire and the deterioration of security. We deeply regret the loss of life during the demonstrations and call for all Ivoirians to remain calm and peaceful. Reports of mass human rights violations and abuses,

* Editor's note: On April 11, 2011, former Ivoirian President Gbagbo was arrested after several weeks of violent conflict between his supporters and those of elected President Ouattara.

including enforced disappearances, targeted killings, arbitrary detentions, and intimidation of those that oppose former President Gbagbo, as well as the discovery of possible mass graves, must be investigated. Hundreds have been arbitrarily arrested or detained, and we have credible reports that almost 200 people may have been killed already, with dozens more likely tortured or mistreated, while others have been snatched from their homes in the middle of the night. Reports continue to come in about these violations and abuses in Abidjan districts such as Abobo, Adjame, Yopougon, Williamsville, Port Bouet, Koumassi, Treicheville, as well as towns like Grand Bassam, Agboville, Tiebissou, Toumodi, Yamoussoukro, all with high concentrations of people who are either supporters of the legitimate president or are members of the Dioula, Senoufo, or Baoule ethnic groups.

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We welcome efforts by the African Union, the Economic Community of West African States (ECOWAS), the United Nations, and countries in the region to assist in restoring peace and stability in Côte d'Ivoire. Today, we stand united in this Council, and with the international community, in support of the people of Cote d'Ivoire in their rightful exercise of democratic processes and condemn all human rights violations and abuses in Cote d'Ivoire. We call for the immediate end to the violence and the other abuses and violations, and will work to ensure that those responsible for these human rights violations will be held accountable. President Alassane Dramane Ouattara is the legitimately elected leader of Côte d'Ivoire. The rights of the Ivoirians can only be fully realized when the will of the people is respected and democracy and the rule of law is restored in Cote d'Ivoire.

4. Iran

See Chapter 16.A.2.c.(1)(v) for discussion of the human rights-related sanctions the United States imposed against eight Iranian officials in 2010.

L. FREEDOM OF EXPRESSION

1. Press Freedom

On May 17, 2010, President Obama signed into law H.R. 3714, the Daniel Pearl Freedom of the Press Act of 2009. Pub. L. No. 111-166, 124 Stat. 118. Section 2 of the statute further amends the Foreign Assistance Act of 1961 to require the State Department to include the following additional information, wherever applicable, relating to freedom of the press worldwide in the annual country reports on human rights practices:

> (A) a description of the status of freedom of the press, including initiatives in favor of freedom of the press and efforts to improve or preserve, as appropriate, the independence of the media, together with an assessment of progress made as a result of those efforts;
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> (B) an identification of countries in which there were violations of freedom of the press, including direct physical attacks, imprisonment, indirect sources of pressure, and censorship by governments, military, intelligence, or police forces, criminal groups, or armed extremist or rebel groups; and
>
> (C) in countries where there are particularly severe violations of freedom of the press—
>
> > (i) whether government authorities of each such country participate in, facilitate, or condone such violations of the freedom of the press; and
> > (ii) what steps the government of each such country has taken to preserve the safety and independence of the media, and to ensure the prosecution of those individuals who attack or murder journalists.

2. Internet Freedom

On January 21, 2010, Secretary Clinton underscored the United States' commitment to promoting the Internet as a

means for fostering human progress and freedom in a speech at the Newseum in Washington, D.C. The speech was one in a series of significant foreign policy addresses Secretary Clinton had delivered since taking office, becoming Secretary, and the audience included members of Congress, the diplomatic corps, and the public. In her speech, Secretary Clinton discussed the benefits and freedom the Internet supports and the threats posed by those who misuse the Internet, particularly governments that use it as tool for censorship and repression. Secretary Clinton also discussed the value of the Internet and new connection technologies in creating economic opportunities worldwide. After she outlined the principles that "will guide our approach in addressing the issue of internet freedom and the use of these technologies," Secretary Clinton then described specific U.S. initiatives to promote Internet freedom and to counter Internet repression. Excerpts below from Secretary Clinton's speech provide U.S. views on the importance of freedom of expression on the Internet. Secretary Clinton's remarks are available in full at *www.state.gov/secretary/rm/2010/01/135519.htm*.

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On their own, new technologies do not take sides in the struggle for freedom and progress, but the United States does. We stand for a single internet where all of humanity has equal access to knowledge and ideas. And we recognize that the world's information infrastructure will become what we and others make of it. Now, this challenge may be new, but our responsibility to help ensure the free exchange of ideas goes back to the birth of our republic. . . .

Franklin Roosevelt built on these ideas when he delivered his Four Freedoms speech in 1941. Now, at the time, Americans faced a cavalcade of crises and a crisis of confidence. But the vision of a world in which all people enjoyed freedom of expression, freedom of worship, freedom from want, and freedom from fear transcended the troubles of his day. And years later, one of my heroes, Eleanor Roosevelt, worked to have these principles adopted as a cornerstone of the Universal Declaration of Human Rights. They have provided

a lodestar to every succeeding generation, guiding us, galvanizing us, and enabling us to move forward in the face of uncertainty.

So as technology hurtles forward, we must think back to that legacy. We need to synchronize our technological progress with our principles. In accepting the Nobel Prize, President Obama spoke about the need to build a world in which peace rests on the inherent rights and dignities of every individual. And in my speech on human rights at Georgetown a few days later, I talked about how we must find ways to make human rights a reality. Today, we find an urgent need to protect these freedoms on the digital frontiers of the 21st century.

There are many other networks in the world. Some aid in the movement of people or resources, and some facilitate exchanges between individuals with the same work or interests. But the internet is a network that magnifies the power and potential of all others. And that's why we believe it's critical that its users are assured certain basic freedoms. Freedom of expression is first among them. This freedom is no longer defined solely by whether citizens can go into the town square and criticize their government without fear of retribution. Blogs, emails, social networks, and text messages have opened up new forums for exchanging ideas, and created new targets for censorship.

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Some countries have erected electronic barriers that prevent their people from accessing portions of the world's networks. They've expunged words, names, and phrases from search engine results. They have violated the privacy of citizens who engage in non-violent political speech. These actions contravene the Universal Declaration on Human Rights, which tells us that all people have the right "to seek, receive and impart information and ideas through any media and regardless of frontiers." With the spread of these restrictive practices, a new information curtain is descending across much of the world. And beyond this partition, viral videos and blog posts are becoming the samizdat of our day.

As in the dictatorships of the past, governments are targeting independent thinkers who use these tools. . . .

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3. Religion

a. Freedom of religion

(1) Annual Report on International Religious Freedom

On November 17, 2010, the Department of State released the 2010 Annual Report on International Religious Freedom, covering the period July 1, 2009 through June 30, 2010, 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/2010*. In a press briefing on the release of the report, Secretary of State Clinton's remarks included a reiteration of the U.S. view that banning speech that is critical about or offensive toward religion is an inappropriate way to protect religious freedom. Secretary Clinton's statement is available at *www.state.gov/secretary/rm/2009a/10/130937.htm*.

(2) Special Rapporteur on freedom of religion or belief

On June 23, 2010, the Human Rights Council adopted a resolution entitled "Freedom of religion or belief: Mandate of the Special Rapporteur on freedom of religion or belief." U.N. Doc. A/HRC/RES/14/11. Following adoption of the resolution, a U.S. delegation member made a statement explaining the U.S. position on it, including the importance of the Special Rapporteur's work. The U.S. delegate stated:

> The United States firmly supports the work of the Special Rapporteur on Freedom of Religion. This is an important mandate and we came to this session committed to renewing the mandate to support the Human Rights Council's ability to monitor and report on religious intolerance, curtailments of freedom of religion, and practices that protect freedom of religion. The right to freedom of religion, in both its private and public dimensions, is enshrined in the Universal Declaration of Human Rights

> and other international instruments. This right is the birthright of all people, regardless of their faith or lack thereof, and is essential for respecting human dignity. The freedom to profess, practice, and propagate one's faith, as well as the freedom to change or adopt a religion, must be respected by all societies and governments. It provides a cornerstone for every healthy society. It empowers faith-based service. It fosters tolerance and respect among different communities. And it allows nations that uphold it to become more stable, secure, and prosperous.

The full text of the U.S. statement is also available at *www.state.gov/s/l/c8183.htm*.

b. Defamation of religions

(1) Human Rights Council resolution

On March 25, 2010, the United States voted against a resolution on combating defamation of religion in the Human Rights Committee. U.N. Doc. A/HRC/RES/1316. Ambassador Eileen Chamberlain Donahoe, U.S. Permanent Representative to the Human Rights Council, made a statement explaining the U.S. vote. Ambassador Donahoe's statement, excerpted below, is available in full at *http://geneva.usmission.gov/2010/03/25/combatting-defamation-of-religions-u-s-explanation-of-vote*. For discussion of other U.S. statements concerning freedom of speech, see B.1. *supra*.

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Over the course of the last year, fueled by our President's commitment to engage actively and sincerely in this Council, my government has sought to build common ground, to overcome the differences that have defined this debate, and to make progress on the many imperatives that we share in common. . . .

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The issues of intolerance, violence, and expression are squarely on the table, and have provoked debate on how to address our differences. Yet at this point, with great respect, we assert that the defamation resolution has become an instrument of division. It has failed to galvanize international support for real solutions that would improve the lives of people on the ground.

The United States will vote against this resolution because we view it as an ineffective way to address these concerns. We cannot 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 Human Rights Council. 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 causes behind the resolution in the spirit of consensus. Until then, however, we urge others to join us in voting no.

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(2) Submission to the Office of the High Commissioner for Human Rights

On May 7, 2010, 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 the General Assembly's 2009 resolution on defamation of religion. The resolution, which the United States voted against, was adopted by 80 votes in favor and 61 against, with 42 abstentions, and requested the High Commissioner to report to the General Assembly at its sixty-fifth session. U.N. Doc. A/RES/64/156. The U.S. submission referred to the 2008 and 2009 U.S. submissions to the Secretary-General concerning defamation of religion, which are discussed in *Digest 2008*

at 288–90 and *Digest 2009* at 209–11. The full text of the 2010 U.S. submission is available at *www.state.gov/s/l/c8183.htm*. *See also* B.1. *supra*.

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As stated in our 2008 submission on this topic 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 that this resolution seeks unacceptable limitations on the freedoms of religion and expression and that such measures do not properly address the underlying concerns we believe to be animating the resolution, such as discrimination and religious intolerance. To foster tolerance and religious understanding and pluralism, it is individuals, belonging to minority and majority groups, who need protection against discrimination and to ensure their rights. Not only are religions not protected under human rights law, attempting to protect religions can undermine an individual's human rights to freedoms of religion and expression.

The United States shares a deep concern about discrimination, the targeting and ridiculing of individuals based on their religion, and interreligious violence. We also share concerns about undue restrictions on places of worship and on religious attire and concerns about actions that willfully exploit tension or perpetuate negative stereotypes. We believe that governments have a moral responsibility to speak out and condemn intolerance, and a duty to ensure the right of all individuals to freely express their faith. Governments also have an obligation to promote and protect the freedom of expression, which fundamentally undergirds our freedom to worship and manifest our belief.

The United States recognizes that religion is a key source of identity and a powerful mobilizing force around the world. Religion, and the freedom of religion, play an important societal role in many countries, including our own, and are also crucial to the creation of tolerant and respectful societies that welcome the diversity of religious belief. The United States strongly believes that protecting freedom of religion promotes mutual respect and

pluralism, and is essential to human dignity, robust civil society, and political and economic development. It is the duty of all governments to protect the ability of every individual to profess and practice his or her own faith.

As stated in our 2009 submission to the United Nations, we strongly believe that our shared concerns can form the basis of a new approach that could command consensus and demonstrate the potential of UN bodies to address global problems. The issues of intolerance, bigotry, violence, and discrimination are squarely on the table, and there is a debate within the UN system on how to address these issues most effectively. With great respect and unflagging commitment in our search for a solution to the underlying concerns, the United States asserts that the defamation resolution has failed to galvanize international support for real solutions nor has it resulted in greater respect or tolerance; instead, it has become an instrument of division.

We are deeply disturbed by the recent targeting of members of religious minorities and outbreaks of inter-religious violence in virtually every region of the world. These worrying developments demonstrate the need for the international community to take concerted action to challenge stereotyping, discrimination, and violence motivated by racial or religious hatred with an action-oriented approach that combats discrimination and intolerance, in particular toward members of racial and religious minorities.

The United States strongly believes that governments have the tools to address intolerance, and these tools include a combination of robust legal protections against discrimination and hate crimes, proactive government outreach to members of minority groups, inter-religious efforts, education, and the vigorous defense of freedoms of religion and expression. Respectful societies are built by individuals on the basis of open dialogue. In such societies, when hateful ideas are held up to the bright light of public scrutiny, they are shown for what they are—lacking merit, and based on fear and ignorance.

To that end, we look forward to a constructive dialogue on these important issues. . . .

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(3) General Assembly resolution

On November 23, 2010, 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 is available at *http://usun.state.gov/briefing/statements/2010/151904.htm*. The General Assembly adopted the resolution on December 21, 2010, by a vote of 79 states in favor, 20 against, and 67 abstaining. U.N. Doc. A/RES/65/224.

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. . . [W]e are disappointed to see that despite our efforts and discussions on this resolution, the text once again seems to take us farther apart, rather than helping to bridge the historical divides.

Most importantly, the resolution still seeks to curtail and penalize speech. The changes that have been made from the original tabled version, while representing an important gesture, unfortunately do not get the heart of our concerns—the text's negative implications for both freedom of religion and freedom of expression. For example, the resolution continues to request that governments prohibit or punish offensive speech, including creating laws to do so. It also continues to refer to the problematic defamation concept, excludes many religions or belief systems, and equates defamation to a human rights violation or incitement. Additionally, as we have discussed in this year's negotiations, human rights are held by individuals—not by governments, institutions, or religions—and language in the resolution that addresses human rights should reflect this.

We look forward to continuing to work with the OIC and all delegations to find an action oriented approach that can inclusively combat religious intolerance, while not penalizing those who exercise the freedoms of speech or religion, keeping in mind that such a consensus must be forged not through negotiations within one group, but through negotiations among groups. Such talks

will take time, and demand patience and understanding on all sides. In the meantime, we will continue to cast our vote—and encourage others to do the same—against a resolution that can be used to justify the infringement of human rights under the guise of promoting human rights.

c. OHCHR ICCPR Article 20 Conferences

On November 3, 2010, the United States submitted written comments to the UN Office of the High Commissioner for Human Rights ("OHCHR"), responding to OHCHR's requests for member states to share their "experiences with regard to implementing the prohibition of incitement to hatred through national legislation, judicial practices, and different types of policies" as part of OHCHR's preparations for a series of regional expert workshops it planned to host on the topic. The U.S. submission noted the U.S. reservation to Article 20 of the International Covenant on Civil and Political Rights and attached the Action Plan the United States proposed in October 2009 in the context of the Human Rights Council Ad Hoc Committee on the Elaboration of Complementary Standards, which is discussed in *Digest 2009* at 179–82 and is available as document 31.b. for *Digest 2009* at *www.state.gov/s/l/c8183.htm*. The U.S. submission, excerpted below with some footnotes omitted, is available in full at *www.state.gov/s/l/c8183.htm*. For additional discussion of U.S. views on the need to protect freedom of speech in the context of combating racial discrimination, see B.1. *supra*.

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The United States stands firmly against intolerance and discrimination. We believe, however, that banning and punishing offensive and hateful speech is neither an effective approach to combating such intolerance, nor an appropriate role for government in seeking to promote respect for diversity. As President Obama stated in

Cairo, suppressing ideas never succeeds in making them go away. In fact, to do so can be counter-productive and even raise the profile of such ideas. We believe the best antidote to offensive and hateful speech is constructive dialogue, that counters and responds to such speech by refuting it through principled arguments, causing the hateful speech to fall under its own weight. In addition, we believe governments should speak out against such offensive speech, and employ tools to address intolerance that include a combination of robust legal protections against discrimination and hate crimes, proactive government outreach, inter-religious and similar efforts, education, and the vigorous defense of both freedom of religion and expression.

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The United States is a State Party to the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the ICCPR provides, *inter alia*, that everyone shall have the right to hold opinions without interference as well as the right to freedom of expression. Article 20 of the ICCPR states that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[i] The United States has entered a reservation to Article 20, according to which the Article "does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States." We took this reservation because our constitution provides broader protections for freedom of expression than those provided for in Article 20. While the United States does

[i] While you[r] letter states that your office is seeking to ground the debate in international human rights law, we note that it repeatedly misstates Article 20 of the ICCPR. Your letter says there is a "prohibition on incitement to national, racial, or religious hatred," discusses the "prohibiting of incitement to national, racial or religious hatred," and asks for views on the implementation of the "prohibition of incitement to hatred." The language of Article 20 does not prohibit such incitement. Rather, it prohibits "any *advocacy* of national, racial or religious hatred that *constitutes* incitement to discrimination, hostility or violence." We hope that you will correct such mis-statements consistent with your goal of grounding this discussion in existing international law.

not, therefore, implement Article 20 prohibitions, in the spirit of open dialogue, we would like to take this opportunity to share our experiences and views on this matter.

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Freedom of Speech in the United States Today

Developed over time, our strong belief in freedom of expression does not come without cost. It demands that we allow views we find offensive, or event hateful, to be expressed. For example, U.S. courts have upheld the rights of Neo-Nazis, holocaust deniers, and white supremacist groups to march in public, distribute literature, and attempt to rally others to their cause. The Supreme Court has even ruled that burning an American flag—an act that repulses Americans of all political stripes—is protected under the First Amendment.[v]

We do not agree with these expressions of hate. Yet we protect freedom of expression because our democracy depends on the free exchange of ideas and the ability to dissent. And we protect freedom of expression because the cost of stripping away individual rights is far greater than the cost of tolerating hateful words. We also have grave concerns about empowering governments to ban offensive speech and how such power could easily be misused to undermine democratic principles.

That is not to say that freedom of speech is absolute in the United States; it is not. For example, we do not permit speech that incites *imminent* violence. But this is a limited exception to freedom of expression and is only unlawful where it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Mere advocacy or teaching of violence is not unlawful. We also do not permit speech that falls within the narrow class of true threats of violence. These and other exceptions to freedom of speech have been drawn narrowly in order to preserve the public space for democratic discourse.

Our strong belief in freedom of expression does not mean that we sit idly by as individuals and groups seek to spread toxic expressions of hatred. Rather than ban such expression, however, we

[v] *United States v. Eichman*, 496 U.S. 110 (1990).

employ a robust array of policies on the local, state, and national level to reach out to affected communities, provide conflict resolution services and training, enhance dialogue, and assist communities in avoiding conflict based on race, religion, or nationality. We have found that working towards tolerance and understanding in this way, though by no means easy, is more sustainable and effective than prohibiting expression.

And we do not sit idly by when hateful expression transforms into discrimination or violence. Our Justice Department vigorously prosecutes instances of discrimination based on race, religion, national origin, and other grounds. We forcefully prosecute hate crimes, motivated by racial, religious, and other bias. Our network of civil rights laws—forged through our own painful civil rights struggle—deters and punishes those who would violate the ability of others to live free of discrimination and violence.

This combination of proactive outreach to communities and enforcement of anti-discrimination and hate crimes laws is our response to hateful speech. The alternative option—prohibiting speech for its offensive content—not only sacrifices freedom of expression and its attendant benefits, but forces hateful ideology to fester and find new fora in which to manifest itself and is often counterproductive as it often highlights and magnifies the offensive ideas.

Our history has shown us that, in order to create a society that is ever more tolerant and inclusive, we must protect the rights of individuals to express their views—however distasteful or hateful. Freedom of expression is a fundamental freedom. It is fundamental to our vibrant democracy, and is an important means by which we respect human dignity and promote diversity.

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M. FREEDOM OF ASSEMBLY AND ASSOCIATION

On September 30, 2010, the Human Rights Council adopted by consensus a resolution on the rights to freedom of peaceful assembly and of association, which the United States sponsored together with Czech Republic, Indonesia, Lithuania, the Maldives, Mexico, and Nigeria. Sixty other

countries co-sponsored the resolution. U.N. Doc. A/HRC/RES/15/21. The resolution established a new Special Rapporteur on the rights to freedom of peaceful assembly and association, mandated to gather information concerning the promotion and protection of those rights and report on violations of them, among other responsibilities. Establishment of the new Special Rapporteur also was consistent with Secretary Clinton's call, in her speech to the Communities of Democracy discussed in K.2. *supra*, for the Human Rights Council to do more to promote the rights to freedom of peaceful assembly and association.

In introducing the resolution, Ambassador Eileen Chamberlain Donahoe, U.S. Permanent Representative to the Human Rights Council, said, "The rights to freedom of peaceful assembly and of association are essential components of democracy and pillars of a thriving society. Civil society has played a central role in identifying and eradicating the injustices that have, throughout history, separated nations from the principles enshrined in the Universal Declaration of Human Rights." Further excerpts follow from Ambassador Donahoe's statement, which is available in full at *http://geneva.usmission.gov/2010/10/01/rights-to-freedom*.

Societies move forward when citizens are empowered to mobilize behind common interest and take joint action. . . .

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It therefore gives me great pleasure to see the United Nations Human Rights Council embrace the rights to freedom of peaceful assembly and of association, and create a mechanism to provide the specific attention to these fundamental freedoms that are currently lacking from its special procedures. This resolution directly addresses this gap through the creation of the first-ever Special Rapporteur on freedom of assembly and association. We are especially pleased that a broad group of countries from all regions of the globe have come together to acknowledge the importance of this right. This, in our view, is just the sort of action this Council was meant to take.

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On the same day, Secretary Clinton issued a statement, which is set forth below and is also available at *www.state.gov/secretary/rm/2010/09/148486.htm*, welcoming the resolution and explaining its significance. *See also* the statement issued by National Security Council Spokesman Mike Hammer, available at *www.whitehouse.gov/the-press-office/2010/09/30/statement-nsc-spokesman-mike-hammer-freedom-assembly-and-association-res*.

I applaud today's decision by the Human Rights Council to take action in defense of members of civil society around the globe by creating the first-ever Special Rapporteur on freedom of assembly and association. This unprecedented action is a good first step in defending a fundamental freedom enshrined in the Universal Declaration of Human Rights, one that I emphasized during my July trip to Poland.

We hope this resolution will become an impetus for countries around the world to strengthen protections for this fundamental freedom. This consensus resolution, which won the support of many countries that have not always stood up for such fundamental freedoms, demonstrates clearly how we can all find common ground on challenging issues in order to advance our core beliefs.

An active and vibrant civil society is one of the essential elements of a free nation, and I applaud the action by the international community today to take up the President's call to stand firmly on the side of human rights and civil society and strengthen the ability of civil society activists around the world to bring about change in their countries. The United States will continue our leading effort to expand respect for this fundamental freedom for civil society members and other individuals all over the world.

N. SELF-DETERMINATION

On November 11, 2010, the United States joined consensus in adopting a resolution in the Third Committee entitled "Universal Realization of the Right of Peoples to Self-determination." Laurie Shestack Phipps, Adviser for Economic and Social Affairs, U.S. Mission to the United Nations, made a statement

explaining that "[t]he United States considers the right of self determination of peoples to be important and therefore joins consensus on this resolution. We note, however, as stated by other delegations, that this resolution contains many misstatements of international law and is inconsistent with current practice." The U.S. statement is also available at *http://usun.state.gov/briefing/statements/2010/151115.htm*. The General Assembly adopted the resolution by consensus on December 21, 2010. U.N. Doc. A/RES/65/201.

O. HUMAN RIGHTS AND COUNTERTERRORISM

On March 5, 2010, Mark Cassayre, then Political Counselor, U.S. Mission to the United Nations, Geneva, delivered a statement during the Human Rights Council's interactive dialogue with the Special Rapporteur on Human Rights While Countering Terrorism and the Special Rapporteur on Torture. Excerpts below from Mr. Cassayre's statement provide U.S. views on substantive issues in the report of the Special Rapporteur on Human Rights While Countering Terrorism. The full text of the U.S. statement is available at *http://geneva.usmission.gov/2010/03/08/interactive-dialogue-with-special-rapporteur*. For State Department Legal Adviser Harold Hongju Koh's comments on U.S. counterterrorism efforts and the rule of law, see A.1.a. *supra* and 18.A.1.a., A.3.a., and A.3.d.(1); see also Chapters 3.B.1. and 16.A.4. and B.1.b. For discussion of U.S. views on the importance of the special rapporteurs in general, see A.2.d. *supra*.

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. . . We appreciate the depth and thoughtfulness of [the Special Rapporteur's] analysis of privacy issues, and there is much in the report with which the United States Government can wholeheartedly agree.

For example, we agree with the connections made between privacy, freedom of expression and freedom of association in

paragraph 33 of the report. We also believe strongly in promoting free expression on the Internet and recognize the chilling effect that government surveillance can have on such freedoms. We also believe that privacy and information security should be central considerations in information-sharing related to law enforcement and intelligence-gathering.

Ensuring protection from arbitrary or unlawful interference with privacy in the context of counterterrorism is an extraordinarily complicated issue, and the most effective tools and methods may vary for each state. We believe it is important to recognize that there may not be a "one size fits" all approach. For example, the Special Rapporteur's report suggests that the "best practice" for any democratic society would be to adopt a very detailed constitutional right to data protection, which in some cases governs data processing in both the public and private or commercial sectors. This might be the best solution for some states, but we are not convinced that such a constitutional amendment would be effective, necessary or feasible for all states.

Furthermore, while we agree that data protection is indeed a growing area of concern, we would not necessarily agree that it is an independent human right distinct from the broader right to privacy. We would like to know whether the Special Rapporteur sees data protection emerging as a right separate from the right to privacy in contexts other than in European constitutional law and among EU member states. We disagree that there needs to be a new declaration on data protection and privacy, because the right to privacy is already enshrined in international human rights instruments. We also note that there are existing international and regional frameworks that deal specifically with personal data and privacy, from a technical as well as a human rights perspective.

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Cross References

Trafficking in persons, **Chapter 3.B.3.**
International, hybrid, and other tribunals, **Chapter 3.C.**
Accreditation of LGBT rights group at ECOSOC, **Chapter 7.B.**

U.S. sanctions concerning threats to democratic processes, **Chapter 16.A.6.**
Modification of U.S. sanctions to promote freedom of expression in Iran, Sudan, and Cuba, **Chapter 16.B.2.**
Israeli-Palestinian conflict, **Chapter 17.A.**
Flotilla incident, Gaza, **Chapter 18.A.1.b.(1)(i)**
Goldstone report, **Chapter 18.A.1.b.(1)(ii)**
Private military contractors, **Chapter 18.A.1.d.(3)**
Detainees at Guantanamo and in Afghanistan, **Chapter 18.A.3.**

Chapter 7

International Organizations

A. UN REFORM

1. Security Council

On November 8, 2010, in an address to the Indian Parliament, President Barack H. Obama affirmed that the United States looks forward to a reformed United Nations Security Council that includes India as a permanent member. President Obama said:

> As two global leaders, the United States and India can partner for global security, especially as India serves on the Security Council over the next 2 years. Indeed, the just and sustainable international order that America seeks includes a United Nations that is efficient, effective, credible, and legitimate. That is why I can say today, in the years ahead, I look forward to a reformed United Nations Security Council that includes India as a permanent member.
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> Now, let me suggest that with increased power comes increased responsibility. The United Nations exists to fulfill its founding ideals of preserving peace and security, promoting global cooperation, and advancing human rights. These are the responsibilities of all nations, but especially those that seek to lead in the 21st century. And so we look forward to working with India and other nations that aspire to Security Council membership to ensure that the Security Council is effective, that resolutions

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> are implemented, that sanctions are enforced, that we strengthen the international norms which recognize the rights and responsibilities of all nations and all individuals.

Daily Comp. Pres. Docs., 2010 DCPD No. 00957, p. 5.

On November 11, 2010, during the General Assembly's debate on the Security Council's annual report to the Assembly and Security Council reform, Ambassador Rosemary A. DiCarlo, U.S. Deputy Permanent Representative to the United Nations, elaborated on the themes President Obama had raised before the Indian Parliament. Ambassador DiCarlo's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/150822.htm*.

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As we stated during the first five rounds of these negotiations and will continue to elaborate in more detail in the current round, the United States believes that the long-term viability of the Security Council depends on its reflecting the world of the 21st century. We support expansion of the Council in a way that will neither diminish its effectiveness nor its efficiency.

Let me briefly summarize key elements of my government's position:

The United States is open in principle to a modest expansion of both permanent and non-permanent members. The United States strongly believes that any consideration of an expansion of permanent members must be country-specific in nature.

In assessing which countries merit permanent membership, the United States 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 set out in our National Security Strategy earlier this year, my government is committed to engaging emerging powers into the international architecture.

The United States supports a Security Council membership that upholds human rights and the rule of law at home and abroad, and makes significant contributions to the implementation of Security Council decisions, especially through their enforcement, as well as financial, personnel, and political support.

As we have previously stated, the United States is not open to an enlargement of the Security Council that changes the current veto structure.

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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2. System-wide Coherence: Improving UN Efforts Concerning Gender Equality and Women's Empowerment

On July 2, 2010, the United States joined consensus in adopting a General Assembly resolution that decided to merge and consolidate the UN's four bodies addressing women's issues into a 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 resolution also addressed other ways to make the UN system more coherent and effective. The General Assembly mandated UN Women to strengthen the UN's efforts to promote gender equality and empower women worldwide, including by providing assistance to states on request. To that end, the General Assembly authorized UN Women to act as a secretariat and conduct country-level activities and transferred to UN Women the mandates and roles of the United Nations Development Fund for Women ("UNIFEM"), the Office of the Special Adviser on Gender Issues and Advancement of Women ("OSAGI"), the Division for the Advancement of Women ("DAW"), and the International Research and Training Institute for the Advancement of Women ("INSTRAW"). The General Assembly also directed UN Women to lead, coordinate, and promote accountability in the UN's work concerning women's empowerment and gender equality.

On July 2, 2010, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, welcomed the establishment of UN Women as "an important step

forward in advancing women's rights." She continued, "UN Women recognizes the universality of the goal of improving women's lives, from economic empowerment and increased women's participation in political processes to protection of women and girls from violence and discrimination." The full text of Ambassador Rice's statement is available at *http://usun.state.gov/briefing/statements/2010/143927.htm*.

Similarly, Ambassador Frederick Barton, U.S. Special Representative to the Economic and Social Council, welcomed the establishment of UN Women in a statement to the General Assembly following the resolution's adoption. Ambassador Barton stated, "This new agency must be a catalyst within the UN system, ensuring that UN Funds and Programs and the UN Secretariat fully address the issues within their mandates that affect women and girls. We also expect UN Women to undertake new activities on the ground to support women in areas that have not yet been fully addressed by the UN system." Ambassador Barton's statement is available in full at *http://usun.state.gov/briefing/statements/2010/143935.htm*.

3. Internal Justice System

During fall of 2010, the General Assembly's Fifth (Administrative and Budgetary) and Sixth (Legal) Committees reviewed the implementation of the UN's new system of administration of justice, consistent with General Assembly Resolution 64/153 of December 24, 2008. U.N. Doc. A/RES/63/253. *See Digest 2008* at 385–87 for background. On October 15, 2010, Mark A. Simonoff, Acting Legal Adviser, U.S. Mission to the United Nations, discussed U.S. views on and support for the UN's new internal justice system in a statement to the Sixth Committee. In particular, Mr. Simonoff expressed concern that the Sixth Committee and the General Assembly would not have sufficient time during its sixty-fifth session to review and address adequately the complex issues identified in the Secretary-General's report concerning the new system

(U.N. Doc. A/65/373). Mr. Simonoff also agreed with the Secretary-General's observation that expanding the jurisdiction of the new system's two tribunals would be detrimental to the system. Excerpts follow from Mr. Simonoff's statement, which is available at *http://usun.state.gov/briefing/statements/2010/149537.htm*.

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. . . [Resolution 63/253] 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, have brought the United Nations' internal justice system into the 21st Century. The two Tribunals are already having a significant positive impact on the transparency, fairness, efficiency, and accountability of the United Nations personnel system.

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In connection with the review of Administration of Justice at this session, the Secretary-General on Monday, October 4, issued a report, A/65/373, for which we thank him. The report raises several important issues concerning the jurisprudence of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal. These issues include the relevance of the jurisprudence of the United Nations Administrative Tribunal; the scope of the discretion of the Secretary-General; the harmonization of proceedings before the Dispute Tribunal; the scope of the jurisdiction and competence of the Dispute Tribunal; the Rules of Procedure of the Dispute Tribunal; the production of confidential documents of the United Nations; the interpretation of "appointment, promotion and termination"; the award of remedies; and the deadline for filing an appeal. Depending on the issue, the Secretary-General has recommended either clarifications in a General Assembly resolution or amendments to the UN Dispute Tribunal or UN Appeals Tribunal statutes.

The Secretary-General advises in his report that some of the issues identified in his report are the subject of ongoing appeals.

We think that the issues emerging in connection with the transition from the old system to the new system merit careful consideration. . . .

We also thank the Secretary-General for the additional information on individuals who are not United Nations staff, as well as his analysis of possible recourse mechanisms for these individuals. We agree with the Secretary-General's observation that adding the cases of non-staff individuals to the jurisdiction of the United Nations Dispute and Appeals Tribunals would be detrimental to the new system. Given the many issues identified by the Secretary-General that have emerged during the ongoing transition from the old system to the new, and given the challenges that he has identified with respect to all of the various options regarding non-staff individuals, we think that it would be premature to take any decisions at this time on this question. We think that it would be best to focus on the many issues that the Secretary-General has identified regarding the implementation of the new system before addressing the challenging and complex issues raised by the non-staff questions.

Finally, we thank the Internal Justice Council for its report as well.

In conclusion, we are impressed by the professionalism and productivity of the new system of Administration of Justice, and want to particularly thank the Judges and all of the UN staff who worked on these issues for their tireless efforts. Collectively, you have all contributed to making the new system a success.

On November 10, 2010, Ambassador Joseph H. Melrose, then U.S. Representative for Management and Reform, addressed the Fifth Committee during its review of the new system of justice. Ambassador Melrose reiterated U.S. praise for the new system of internal justice, the judges of the two new tribunals, and the staff working within the new system. With respect to the UN Dispute Tribunal and the UN Appeals Tribunal, Ambassador Melrose stated:

> My delegation recognizes that the caseloads and output of both the UN Dispute Tribunal and the UN Appeals Tribunal

> are still in a period of transition and that the procedures and practices of the two tribunals are still evolving. Under these circumstances, my delegation considers it premature to conduct a definitive review of the implementation of the new system or to make significant changes.

The full text of Ambassador Melrose's statement is available at *http://usun.state.gov/briefing/statements/2010/150805.htm.*

On December 24, 2011, the General Assembly adopted a resolution on administration of justice, which reflected the Fifth and Sixth Committees' initial discussions on the new system. The resolution did not make new substantive changes to the system and decided that the General Assembly would continue to consider the UN's system of justice during its sixty-sixth session. U.N. Doc. A/RES/65/650.

4. Criminal Accountability of UN Officials and Experts on Mission

On October 8, 2010, Gabriel Swiney, Attorney Adviser, Office of the Legal Adviser, Department of State, 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. In his statement, which is excerpted below, Mr. Swiney reiterated the U.S. view that negotiating a new convention on criminal accountability of UN officials and experts on missions would not be the most effective or efficient means for ensuring accountability. Mr. Swiney's statement is available in full at *http://usun.state.gov/briefing/statements/2010/149630.htm.*

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The United States appreciates the General Assembly's continued interest in this issue. We want to reiterate our firmly held belief that UN officials and experts on mission should be held accountable for the crimes they commit. We look forward to working with Member States and the United Nations on efforts in that regard.

We welcome the Secretary-General's report on Criminal Accountability of United Nations officials and experts on mission, including 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. [Editor's note: *See* U.N. Doc. A/65/185.] 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 investigations and prosecutions of such individuals, as well as the information provided concerning activities within the Secretariat in relation to General Assembly resolutions on this topic.

We appreciate the UN's efforts to refer credible allegations against UN officials to the State of the alleged offender's nationality during the July 1, 2009 to June 30, 2010 reporting period. We note that there were five referrals during this period, all of them involving United Nations officials and none involving experts on mission. We urge States to take appropriate action with regard to those individuals and report to the United Nations on the disposition of the cases. States are the key to curbing abuses by their nationals serving in a UN peacekeeping capacity. All UN Member States stand to benefit from the Secretariat's reporting on efforts taken by States to investigate and prosecute referred cases.

We also commend the United Nations on its efforts to take practical measures to strengthen existing training on United Nations standards of conduct, including through pre-deployment and in-mission training.

Finally, with respect to the outstanding issue of the possible negotiation of a multilateral convention on criminal accountability of UN officials 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. We urge States to redouble their efforts to develop practical ways to address the underlying causes of such impediments.

B. ECOSOC: CONSULTATIVE STATUS FOR NON-GOVERNMENTAL ORGANIZATIONS

On July 19, 2010, the UN Economic and Social Council adopted a decision granting consultative status to the International Gay and Lesbian Human Rights Commission ("IGLHRC"). The United States proposed the draft decision after ECOSOC's NGO Committee failed to act upon IGLHRC's application for consultative status. During ECOSOC's debate on the draft decision, Ambassador Rosemary A. DiCarlo, U.S. Deputy Permanent Representative to the United Nations, made a statement supporting IGLHRC's application. Excerpts follow from Ambassador DiCarlo's comments stressing the importance of following ECOSOC's principles for granting consultative status to non-governmental organizations and explaining how IGLHRC met those criteria. The full text of Ambassador DiCarlo's statement is available at *http://usun.state.gov/briefing/statements/2010/144833.htm*.

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In Resolution 1996/31, this Council put forth a set of principles to be applied in the establishment of consultative relations with non-governmental organizations. Let me cite the first three.

The first principle requires that: "The organization shall be concerned with matters falling within the competence of the Economic and Social Council and its subsidiary bodies." The IGLHRC easily meets this standard.

The second principle states: "The aims and purposes of the organization shall be in conformity with the spirit, purposes and principles of the Charter of the United Nations." The IGLHRC clearly satisfies this standard. In fact, the advancement of the Charter lies at the core of its mission.

The third principle states: "The Organization shall undertake to support the work of the United Nations and to promote knowledge of its principles and activities, in accordance with its own

aims and purposes and the nature and scope of its competence and activities." Is there any doubt that the IGLHRC fully complies with this standard as well? As the testimonials from UNAIDS and UNDP demonstrate, the IGLHRC is already making a valuable contribution to the work of the United Nations. Granting it consultative status would help strengthen its existing partnerships with the UN system around the globe and would advance our common objective of achieving the Millennium Development Goals by 2015.

The IGLHRC is a well-known and well-respected NGO that obviously complies with all of the requirements of Resolution 1996/31. One might ask then why some delegations continue to insist that after having answered 44 questions over three sessions of the NGO Committee, and appearing in person on two occasions, the IGLHRC should wait even longer to have its application for consultative status approved.

These delegations claim that they called for a no action motion during the May session of the NGO Committee based on purely procedural considerations that had nothing to do with the IGLHRC's support for LGBT rights. We all know this is disingenuous. We all know the real reason. The NGO Committee has refused to grant consultative status to any LGBT NGO for more than a decade. During that same period, however, ECOSOC has acted to grant consultative status to seven LGBT rights NGO's whose applications had been rejected by the NGO Committee—most recently last year when the application of a Brazilian LGBT NGO was approved 25-12-13.

These seven ECOSOC decisions have firmly established the principle that an NGO's support for LGBT rights should not be a disqualifying factor in the NGO Committee's decisions to grant consultative status. But the NGO Committee unfortunately continues to act in complete disregard of the repeated guidance it has received on this matter from its parent body and to ignore the standards set in 1996/31.

When it became obvious that the IGLHRC's application would remain deferred in the NGO Committee indefinitely, the United States requested that the NGO Committee reach a decision. But rather than allow a vote that would in all likelihood be reversed

yet again by ECOSOC, the IGLHRC's opponents decided to try a different approach this year. They approved a "no action" motion and then argued that the United States had no standing to ask ECOSOC to grant consultative status to the IGLHRC since its application was still pending.

As a legal matter, this argument is deeply flawed. ECOSOC clearly has the authority under Resolution 1996/31 paragraph 15 to approve a decision such as E/2010/L.19. But what would be the consequences if we accepted these delegations' procedural argument as a matter of practice in the future? The NGO Committee could then keep controversial NGO applications in an endless state of deferral by refusing to allow votes that could be reviewed by ECOSOC. The end result would be a sharp curtailment of ECOSOC's legitimate and necessary oversight authority over a subsidiary body that it established for the purpose of promoting—not thwarting—the engagement of civil society with the United Nations.

The great diversity of voices heard at the United Nations is one of its underlying strengths as an institution. The members of this Council—including the United States— may not always agree with the views expressed by the 3,200 NGOs which currently enjoy consultative status, but collectively they play a vital role in promoting peace, security, sustainable development, and human rights. The United States urges you to be guided by the standards for consultative status under Resolution 1996/31 and to adopt E/2010/L.19, so that the IGLHRC can join the UN's vibrant community of civil society organizations, as it so richly deserves.

* * * *

After the vote Ambassador DiCarlo made a statement welcoming ECOSOC's action. Ambassador DiCarlo's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/144834.htm*. President Obama also welcomed the accreditation of the IGLHRC as "an important step forward for human rights." The full text of President Obama's statement is available at Daily Comp. Pres. Docs., 2010 DCPD No. 00607.

The United States would like to thank countries for their support of our draft decision. ECOSOC has once again sent a clear message to the NGO Committee and to the international community that it will ensure that diverse voices of civil society, including those that advocate for LGBT rights, are heard at the United Nations.

Today, ECOSOC has strengthened Resolution 1996/31 and has upheld its basic tenet that NGOs which clearly meet the requirements for ECOSOC status and have exhausted the remedies afforded them by the NGO Committee will be granted that status.

We hope that members of the NGO Committee will follow the guidance they have received today from ECOSOC in their future deliberations.

C. INTERNATIONAL COURT OF JUSTICE

On June 18, 2010, Secretary of State Hillary Rodham Clinton announced the nomination of Joan E. Donoghue, then Principal Deputy Legal Adviser, Department of State, to the International Court of Justice. *See www.state.gov/secretary/rm/2010/06/143348.htm*. On September 9, 2010, the UN General Assembly and UN Security Council both elected Ms. Donoghue to the seat vacated by Thomas Buergenthal, also of the United States.

D. INTERNATIONAL LAW COMMISSION

On March 29, 2010, the State Department's Office of the Legal Adviser cosponsored a conference with George Washington University Law School in Washington, D.C., on "The International Law Commission in the 21st Century: What Should it be Doing to Make a Contemporary Difference?" In his opening remarks, Department of State Legal Adviser Harold Hongju Koh placed the conference in the broader context of the United States' reengagement with multilateral bodies under President Obama and Secretary Clinton.

Increased engagement with the ILC reflects the administration's pursuit of foreign policy initiatives that reflect U.S. values, Mr. Koh said. Observing that the ILC serves a dual purpose of restating international law and reforming international law, Mr. Koh invited participants to explore the tension between the ILC's two functions. He also outlined several key questions he hoped the conference would help address:

(1) What does the ILC do best? What is its comparative advantage? How can the ILC's success be measured?

(2) What does it need the most to adapt to the realities of the 21st century?

(3) How does its traditional assignment comport with national traditions of international law? How can we connect these national traditions with the ILC's activities?

As well as framing issues for discussion, Mr. Koh made observations about the United States' past approach to the ILC, how it had differed from other countries', and the tensions arising from those differences. Unlike other states, Mr. Koh explained, the United States does not treat law as a science, and the U.S. common-law system is characterized by incremental advances in law rather than codification. The nexus of law, policy, and politics also has shaped U.S. approaches to multilateral bodies like the ILC, Mr. Koh observed. For example, in such settings, the United States remains silent or opposes initiatives when it is unable to agree to them, a practice that can create tension with other states. The U.S. government's structure perpetuates the approach the United States takes multilaterally, leading the United States to shy away from supporting broad theories and instead to favor an issue-by-issue approach. In practice, under the United States' approach, urgent matters may take precedence over other important matters, which again can create tensions with other states. The United States must manage such tensions so it is not perceived as a naysayer in matters relating to international law, Mr. Koh said. Finally, Mr. Koh invited participants to consider the relationship

between the U.S. government and any U.S. member of the ILC, questioning how best to strike the balance between protecting the independence of any U.S. member of the ILC and ensuring that the U.S. member understands the U.S. government. In conclusion, Mr. Koh predicted a new "springtime" for international law in the United States.

The conference featured four substantive panels and a lecture by ILC member George Nolte (Germany), Chair for Public Law, Public International Law and European Law, Humboldt University, Berlin. The first panel addressed, "The Process for Selecting ILC Projects—How Does It Work And Can It Be Improved?" The second panel focused on "The Role for Governments in ILC Projects—How Can the ILC Best Reflect the Needs and Views of States?" The third panel considered "The Role for Non-Governmental Actors (Academics, Practitioners, NGOs, Corporations)—What Role Can They Play in the ILC Projects?" The fourth panel's topic was "What Should be the Outcome of the ILC's Work: Draft Treaties, Draft Articles, Reports?" Panelists included current and former members of the ILC from the United States and other countries. Professor Nolte's lecture addressed "The Relevance of the ILC in the 21st Century—What Should It Be Doing to Make a Contemporary Difference?"

On November 18, 2010, the United States transmitted the nomination of Professor Sean Murphy of George Washington Law School as the United States nominee to serve as a member of the ILC, with the election to be held in November 2011.

E. UN SECRETARIAT: DETERMINATION OF PERSONAL STATUS FOR ENTITLEMENTS AND BENEFITS FOR STAFF MEMBERS WHO ARE U.S. NATIONALS

In granting entitlements and benefits to UN staff members, the UN Secretariat makes a determination concerning the personal status of those staff members. If, under the law of his or her country of nationality, the staff member is eligible

for benefits and entitlements based on his or her personal status, the UN Secretariat awards benefits and entitlements to that staff member accordingly. When a UN staff member requests benefits or entitlements based on his or her personal status, the UN Secretariat transmits the request to the Permanent Mission to the United Nations of that staff member's national country for verification.

On March 1, 2010, Russell Graham, Minister Counselor for Host Country Affairs, U.S. Mission to the United Nations, wrote the UN's Assistant Secretary-General of Human Resources Management concerning the recognition that U.S. law provides, for purposes of providing certain benefits and entitlements, to same-sex domestic partners. Mr. Graham set forth a process for verifying the personal status of U.S. nationals employed by the United Nations for the purposes of entitlements and benefits. Mr. Graham's letter, which specifically referred to changes the State Department instituted to the Foreign Affairs Manual with respect to same-sex domestic partners, is set forth below. The text of Mr. Graham's letter, as well as the accompanying affidavit, is also available at *www.state.gov/s/l/c8183.htm*.

I write with regard to verifications by the United States Mission pursuant to the Secretary-General's Bulletin regarding "Personal status for purposes of United Nations entitlements," ST/SGB/2004/13. Under that Bulletin, Permanent Missions to the United Nations verify that the personal status of staff members in connection with their entitlements is "legally recognized under the law of that country for the purposes of granting benefits and entitlements."

Effective on June 26, 2009, the U.S. Department of State amended the Foreign Affairs Manual regulations, inter alia, to provide for a definition of a same-sex "domestic partner" of Foreign Service employees for the purposes of obtaining some benefits and allowances, which consists of Foreign Service members employed by the U.S. Department of State and other U.S. Government agencies. These amendments, adopted under U.S. law, including under the Foreign Service Act of 1980, as well as other amendments to

the Department of State Standardized Regulations implementing provisions contained in Title 5 of the U.S. Code, provide for the granting of some benefits and allowances after a Foreign Service employee has signed and filed an affidavit attesting to certain criteria comprising the definition of same-sex "domestic partner." Accordingly, the status of a same-sex "domestic partner" is legally recognized under the law of the United States for the purposes of granting some benefits and allowances.

The United States has concluded that the most appropriate way to handle verifications of personal status of American United Nations staff members would be to follow a practice similar to that followed by the U.S. Department of State. Therefore, the United States Mission requests that the United Nations, in order to make determinations of the personal status of staff members in connection with their entitlements and benefits, require that the American United Nations staff member file an affidavit with the United Nations along the lines of the sample affidavit attached to this letter. If an American United Nations staff member files such an affidavit, the United Nations may accept that the United States Mission has verified the personal status of that staff member in connection with their entitlements and benefits.

The above verification process is subject to revision depending on changes in U.S. law and practice. The U.S. Mission will consult with the United Nations in the event the U.S. Mission wishes to revise the above verification process.

Cross References

U.S. statements and written submissions relating to the work of the ILC, **Chapters 1.C.3., 3.A.5., 4.A., 6.A.3., 11.D.4., and 13.A.3., C.1., and 2.**
Human Rights Council, **Chapter 6.**
UN peacekeepers' efforts to protect women and girls from sexual exploitation and abuse, **Chapter 6.B.2.c.(2)**
Immunities of international organizations and their officials, **Chapter 10.D.**

Chapter 8

International Claims and State Responsibility

A. INTERNATIONAL LAW COMMISSION

1. Draft Articles on State Responsibility

On February 5, 2010, the United States submitted comments to the UN Secretary-General concerning the International Law Commission's draft articles on state responsibility. The United States responded to the Secretary-General's 2009 request, consistent with the General Assembly's direction in Resolution 62/61 (2006), for states' views on any future action concerning the articles. In its written submission, the United States expressed the belief "that the action of the General Assembly in 2001 in commending the draft articles to the attention of Governments with no further action at that time was the right course of action to adopt. We continue to believe that no further action with regard to the articles is necessary." [Editor's note: *See* General Assembly Resolution 56/83, U.N. Doc. A/RES/56/83.] The full text of the U.S. submission is available at *www.state.gov/s/l/c8183.htm*.

On October 19, 2010, Darin Johnson, Attorney Adviser, Office of the Legal Adviser, Department of State, elaborated on the U.S. written comments in a statement to the General Assembly's Sixth (Legal) Committee during its consideration of Agenda Item 75: Responsibility of States for Internationally Wrongful Acts. Mr. Johnson provided the United States' continuing view that "the draft articles are most valuable in their

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present form, and that future action with regard to the articles is neither necessary nor desirable." Mr. Johnson stated:

> We believe there is little to be gained in terms of additional authority or clarity through the negotiation of a convention. As evidenced by the Secretary General's report (A/65/76) on the application of the draft articles by international courts and tribunals, the draft articles already have tremendous influence and importance. Likewise for States and other international actors, the draft articles have proven to be a useful guide both on what the law is and on how the law might be progressively developed.
>
> However, we share the concern expressed by a number of States in their written comments that the process of negotiating a convention could risk undermining the very important work undertaken by the Commission over several decades, particularly if the resulting convention deviated from important existing rules or did not enjoy widespread acceptance. We believe the better course is to allow the draft articles to guide and settle the continuing development of the customary international law of state responsibility.

The full text of Mr. Johnson's statement is available at *http://usun.state.gov/briefing/statements/2010/149782.htm*.

2. Draft Articles on Diplomatic Protection

On October 20, 2010, Darin Johnson, Attorney Adviser, Office of the Legal Adviser, Department of State, addressed the General Assembly's Sixth Committee during its consideration of Agenda Item 80: Diplomatic Protection. The Sixth Committee's discussions focused on the International Law Commission's ("ILC" or "Commission") 2006 draft articles on diplomatic protection and the ILC's recommendation that the General Assembly use those articles as the basis for an international convention on diplomatic protection. Mr. Johnson

expressed the view that the General Assembly "should take no further action on the draft articles at this time." In his statement, Mr. Johnson elaborated upon the U.S. written submission to the Secretary-General, dated May 27, 2010, which responded to the General Assembly's 2007 invitation for states' views on the ILC's proposal (U.N. Doc. A/RES/62/67). As Mr. Johnson explained:

> We agree with the many written comments received from States [contained in the Secretary-General's report to the General Assembly, U.N. Doc. A/65/182] that, where the draft articles reflect the large body of State practice in this area, they represent a major contribution to the law of diplomatic protection, and are thus valuable to States in their present form. However, we also share the concerns expressed that a limited number of articles are inconsistent with well-settled customary international law.
>
> Much like the draft articles on state responsibility, we are concerned that the process of negotiating a convention would risk undermining the substantial contributions already achieved by the draft articles. We believe, therefore, that the better course is to allow the draft articles some time to inform, influence, and settle State practice in this area.

The full text of Mr. Johnson's oral statement is available at *http://usun.state.gov/briefing/statements/2010/149788.htm*, and the U.S. written statement is available at *www.state.gov/s/l/c8183.htm*. The ILC's draft articles on diplomatic protection are annexed to General Assembly Resolution 62/67. *See* U.N. Doc. A/RES/62/67.

B. NAZI ERA CLAIMS

On January 15, 2010, the U.S. Court of Appeals for the Second Circuit affirmed a district court's dismissal of claims brought against an Italian insurance company for alleged breach of insurance contracts. *In re Assicurazioni Generali S.P.A.*, 592

F.3d 113, 120 (2d Cir. 2010). Errata were filed on February 9, 2010. The Second Circuit held that under *American Insurance Ass'n v. Garamendi*, 539 U.S. 539 (2003), the 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 at its request in 2008 and in 2009, which are discussed in *Digest 2008* at 418–24 and *Digest 2009* at 274–75. Excerpts below from the court's opinion provide an overview of the facts of the case and its procedural history, as well as the court's analysis of the applicability of *Garamendi*. (Footnotes are omitted.)

On July 12, 2010, one of the plaintiffs filed a petition in the U.S. Supreme Court for a writ of certiorari, which the Court denied on October 4, 2010. *Weiss v. Assicurazioni Generali S.P.A.*, 131 S. Ct. 287 (2010). The petitioners filed for rehearing on October 29, 2010, and the Court denied that petition on November 29, 2010. *Weiss v. Assicurazioni Generali S.P.A.*, 131 S. Ct. 698 (2010).

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. . . Plaintiffs are beneficiaries of insurance policies purchased by their ancestors in the years leading up to the Holocaust from Defendant Assicurazioni Generali, S.p.A. ("Generali"), an Italian insurance company. Plaintiffs brought state-law claims alleging breach of the insurance contracts, based on Generali's refusal to pay benefits under those policies. These cases and others were consolidated for pre-trial proceedings. The district court granted Generali's motion to dismiss based on the Supreme Court's decision in *American Insurance Association v. Garamendi*, 539 U.S. 539 (2003), which held that the Plaintiffs' state-law claims were preempted by the foreign policy of the United States, which favors resolution of Holocaust-era insurance claims in the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), an international claims resolution organization founded by private insurance companies and supported by the United States and other foreign government entities. Because we agree with the district court that *Garamendi* controls this case, we affirm.

BACKGROUND

Generali was founded by Jewish merchants in 1831 in Trieste, Italy. In the time between World War I and World War II, Generali operated in Austria, Hungary, Czechoslovakia, Poland, and Yugoslavia. In the late between-Wars period, many families purchased insurance policies from Generali believing this would provide protection against the rise of Nazi power. According to the complaints, Generali betrayed the policyholders by cooperating with the Nazi regime and refusing to pay the beneficiaries of the insurance policies purchased by Jews and other persecuted minorities.

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In July 2000, the United States announced an agreement with Germany in which the German government agreed to enact legislation to establish a foundation that would be used to compensate all victims who suffered at the hands of German companies during the Nazi era. *Id.*

In return, the United States agreed that whenever a German company was sued on a Holocaust-era claim in an American (state or federal) court, the government of the United States would submit a statement of interest to the court explaining that "it would be in the foreign policy interests of the United States for the [German] Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II." *Garamendi*, 539 U.S. at 406 (internal quotation marks omitted) (quoting 39 Int'l Legal Materials 1298, 1303 (2000)). The "German Foundation pact" was a model for similar agreements with Austria and France. There was however, no similar agreement with Italy.

With respect to insurance claims, the agreement specified that the German foundation would work with the ICHEIC to handle insurance claims. The ICHEIC was formed in 1998 by "several European insurance companies, the State of Israel, Jewish and Holocaust survivor associations, and the National Association of Insurance Commissioners," *id.* at 406–07, to negotiate with European insurers to provide information about unpaid policies

issued to Holocaust victims between 1920 and 1945, and to settle any claims that arose in the Holocaust era under these policies, *id.* at 407; ICHEIC, Memorandum of Understanding ¶ 4 (Aug. 25, 1998), *available at* http://www.icheic.org/pdf/ICHEIC_MOU.PDF. To date approximately $300 million dollars have been offered or awarded to more than 48,000 claimants as a result of the ICHEIC process. *See* ICHEIC, http://www.icheic.org (last visited Dec. 17, 2009).

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I. Applicability of *Garamendi*

In *Garamendi*, the Supreme Court explained that state law "must give way" to the foreign policy of the United States, as set by the President, where there is "evidence of clear conflict between the policies adopted by the two." *Garamendi*, 539 U.S. at 420–21. Based on the *amicus* brief of the United States and statements made during negotiations between the United States and Germany, Austria, and France regarding Holocaust-era insurance claims, the Court concluded that the "consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions," and, in the insurance context specifically, "to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures." *Id.* at 421.

California's HVIRA, "by making exclusion from a large sector of the American insurance market the automatic sanction for noncompliance with the State's own policies on disclosure," which required broader disclosure than the ICHEIC, "undercut[] the President's diplomatic discretion and the choice he . . . made in exercising it." *Id.* at 423–24. Because enforcement of the California law would mean that the President could not wield the full "'coercive power of the national economy'" as a tool of diplomacy in negotiating a process for settling claims, the Court concluded that the HVIRA "'compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments' to resolve claims against European companies arising out of World War II." *Id.* at 424 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 377, 381 (2000)).

Garamendi involved only disclosure requirements. The HVIRA's disclosure requirement, although not directly in conflict with government's policy to encourage use of the ICHEIC to resolve Holocaust-era insurance claims, nonetheless undermined the Government's objective by "thwarting the Government's policy of repose for companies that pay through the ICHEIC" and by undercutting privacy protections of European allies. *Id.* at 425. The Court therefore found it sufficiently disruptive to justify preemption. The cases before us, in contrast, essentially seek enforcement of the plaintiffs' claimed contract rights against Generali under state law. Unlike the HVIRA's disclosure requirement, whose effect on foreign policy is only oblique, such law suits are *directly* in conflict with the Government's policy that claims should be resolved exclusively through the ICHEIC. If, as the Supreme Court held in *Garamendi*, a state disclosure requirement conflicts sufficiently to be preempted by the national foreign policy of channeling Holocaust-era insurance claims through the ICHEIC, then, *a fortiori*, a state law suit to enforce a Holocaust-era insurance claim is preempted by that policy, as well.

Plaintiffs put forward several arguments in an effort to distinguish *Garamendi*. First, they point out that Generali is an Italian company and that Italy, unlike Germany, Austria, and France, has not entered an executive agreement with the President of the United States regarding the processing of Holocaust-era insurance claims. The Court in *Garamendi*, however, did not find that the United States policy of encouraging resolution of Holocaust-era insurance claims through the ICHEIC depended on the existence of executive agreements. Rather, the Court viewed the executive agreements as the product of the policy. The agreements, and statements of interest issued by the Government pursuant to them, illustrate or express the national position, rather than define it. . . . A further indication that the Court did not view the existence of an executive agreement as a prerequisite is that Generali was one of the plaintiffs in *Garamendi*, and was not excluded from the judgment on the ground that it is an Italian company and Italy is not party to an executive agreement.

In any event, to erase any such doubt, we solicited the advice of the Secretary of State (in two administrations) on the foreign

policy of the United States. The Government has twice made perfectly clear that "[i]t has been and continues to be the foreign policy of the United States that the [ICHEIC] should be regarded as the exclusive forum and remedy for claims within its purview," and that this policy applies to claims against Generali. . . .

Plaintiffs next argue that strong state interests underlie the laws that form the basis for their suit, and therefore, unlike in *Garamendi*, the balance between state and federal policy tips in their favor. This argument is premised on a misunderstanding of *Garamendi* and preemption law. As the *Garamendi* Court reaffirmed, "[an] express federal policy and [a] clear conflict raised by [a] state statute are alone enough to require state law to yield." *Garamendi*, 539 U.S. at 425. The Court went on to note that, if the conflict were less clear, it would nevertheless be resolved in the federal government's favor because of the weakness of the state's interest in regulating disclosure of Holocaust-era insurance policies. *Id.* In this case, the conflict between the federal policy that the ICHEIC should be the *exclusive* forum for resolving Holocaust-era insurance claims and Plaintiffs' attempt to adjudicate their Holocaust-era insurance claims under state law is even more clear than the conflict in *Garamendi*, which involved only a disclosure requirement, and not a state law suit to enforce the insurance claim. The state law must yield to the federal policy, regardless of the importance of the interests behind the state law.

Finally, Plaintiffs point out that the ICHEIC's December 31, 2003 deadline for accepting claims has passed, so that dismissal of their claims will deny them the opportunity to pursue those claims in any forum. This argument is premised on a misunderstanding of the Government's policy. As the Government made clear in its letters to the court, "[i]t was never the foreign policy of the United States that claims should merely be held in abeyance pending conclusion of the ICHEIC process." Swingle Letter, at 8. The policy is rather that the ICHEIC "should be regarded as the exclusive forum and remedy for claims with its purview." *Id.* at 1 (emphasis added). Permitting state-law claims to proceed now that ICHEIC has ceased operations directly conflicts with that policy goal. *See id.* at 8 ("[I]t would undermine future efforts to secure voluntary compensation agreements if ICHEIC participants became subject to

litigation as soon as ICHEIC had concluded."); Shultz Letter, at 5. If the ICHEIC door has closed on plaintiffs, it is because they chose to allow it to close.

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C. REPUBLIC OF THE MARSHALL ISLANDS

On April 5, 2010, the Supreme Court denied certiorari in two cases, *Bikini v. United States* and *John v. United States*, 130 S. Ct. 2340 (2010), without comment. The cases, which had been consolidated on appeal, concerned claims related to U.S. nuclear testing in the Marshall Islands from 1946 to 1958. The Marshall Islander plaintiffs alleged taking claims under the Fifth Amendment to the U.S. Constitution, breach of fiduciary duties and obligations, and breach of implied-in-fact contract against the United States. On January 29, 2009, the U.S. Court of Appeals for the Federal Circuit had affirmed a lower court's dismissal of the claims. 554 F.3d 996 (Fed. Cir. 2009). The Federal Circuit held that the Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986), which, among other things, referenced and codified an agreement between the United States and the Marshall Islands that settled all claims relating to U.S. nuclear testing in the Marshall Islands, removed the jurisdiction of U.S. courts over such claims.

On March 5, 2010, the United States had filed a brief on the merits, recommending that the Supreme Court deny certiorari because "[t]he decision of the court of appeals is correct and does not conflict with any precedent of this Court or another court of appeals." The brief stated:

> The United States and the Marshall Islands settled all claims including the takings claims, and as part of that settlement agreed to preclude further review of those claims in any federal court. The Federal Circuit's application of the straightforward and unambiguous text of the relevant statutory provisions does not warrant further review. And to the

> extent that petitioners challenge the premise that the Compact settled the claims, they rest on the clearly unavailing theory that Congress and the President could not constitutionally recognize that the Government of the Marshall Islands had the capacity to do so, despite its undertaking to the United States.

Gov't brief, *John v. United States*, No. 09-498; *Bikini v. United States*, No. 09-499, at 8. The U.S. brief is available at *www.justice.gov/osg/briefs/2009/0responses/2009-0498.resp.pdf*.

Cross References

Alien Tort Claims Act litigation, **Chapter 5.B.**
Litigation under terrorism exception of Foreign Sovereign Immunity Act, **Chapter 10.A.1.a.(3), c.(1), and c.(2)(i) and (ii)**
Litigation relating to the Algiers Accords, **Chapter 10.A.1.a.(3)(ii)**
NAFTA dispute settlement, **Chapter 11.B.1.**
Claims under WTO dispute settlement, **Chapter 11.C.1.**
Request for consultations with Guatemala relating to compliance with CAFTA-DR Agreement, **Chapter 11.D.2.**
Arbitration with Canada relating to compliance with Softwood Lumber Agreement, **Chapter 11.D.3.**

Chapter 9

Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues

ICJ ADVISORY OPINION ON KOSOVO'S DECLARATION OF INDEPENDENCE

On July 22, 2010, the International Court of Justice ("ICJ" or "Court") issued 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?" In its advisory opinion, the Court stated that it was of the opinion that the declaration of independence of Kosovo did not violate international law. The United States was among a number of countries that submitted written statements to the Court, and Harold Hongju Koh, Department of State Legal Adviser, delivered an oral statement of the U.S. views to the Court on December 8, 2009. The Court's advisory opinion is available at *www.icj-cij.org/docket/files/141/15987.pdf*. The texts of all of the written submissions and oral proceedings in the case are available at *www.icj-cij.org/docket/index.php?p1=3&p2=4&code=kos&case=141&k=21*. For Mr. Koh's oral statement, see *Digest 2009* at 281–300.

On July 22, 2010, Secretary of State Hillary Rodham Clinton issued a statement concerning the Court's opinion. Secretary Clinton stated:

> The International Court of Justice today issued its advisory opinion and decisively agreed with the longstanding view of the United States that Kosovo's declaration of

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> independence is in accordance with international law. This is the view we set forth in the briefs we submitted to the Court and in the oral proceedings that it held last December. Kosovo is an independent state and its territory is inviolable.
>
> We call on all states to move beyond the issue of Kosovo's status and engage constructively in support of peace and stability in the Balkans, and we call on those states that have not yet done so to recognize Kosovo.
>
> Serbia and Kosovo are both friends and partners of the United States. Now is the time for them to put aside their differences and move forward, working together constructively to resolve practical issues and improve the lives of the people of Kosovo, Serbia, and the region. This is the path toward their future, as part of a Europe, whole, free, and at peace, and we welcome the European Union's efforts to assist both countries in realizing their European aspirations.

Secretary Clinton's statement is also available at *www.state.gov/secretary/rm/2010/07/145042.htm*.

Also on July 22, 2010, Mr. Koh and U.S. Ambassador to Kosovo Christopher Dell briefed the press in Washington, D.C. on the Court's opinion. 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.
>
> . . . We believe that the court's advisory opinion now dispels the legal doubts raised by Serbia in putting forward the advisory opinion and request. The court's

> opinion was closely tailored to Kosovo's unique factual situation and thus did not generally opine on rights of self-determination or secession under international law.

The full text of the briefing is available at *http://fpc.state.gov/145040.htm*.

On September 9, 2010, Ambassador Rosemary A. DiCarlo, U.S. Deputy Permanent Representative to the United Nations, addressed the General Assembly after it adopted a resolution concerning the advisory opinion. U.N. Doc. A/RES/64/298. The resolution acknowledged the ICJ's advisory opinion and welcomed the European Union's willingness to assist the parties in discussions to foster cooperation. Ambassador DiCarlo's statement explained why the United States supported the resolution and joined consensus on it:

> The Court has answered the question posed by the General Assembly. The Court's answer was clear: Kosovo's declaration of independence did not violate general international law and did not violate Security Council Resolution 1244. Our consistent position has been that the situation in Kosovo is a special case and not a precedent for other conflicts. Indeed, the Court's opinion is quite specific that Kosovo's declaration of independence had to be considered within the factual context that led to its adoption. This included, as the opinion described, the framework established by Security Council resolution 1244 to resolve the humanitarian crisis in Kosovo, the establishment of a transitional administration, and the United Nations-facilitated future status process, which concluded that the negotiations on Kosovo's status were exhausted and that further talks on status would not produce a mutually amenable outcome.
>
> Mr. President, this resolution is consistent with the United States' strong support for Kosovo's independence, sovereignty and territorial integrity. Now is the time for the region to move forward and for Serbia and Kosovo to open a new phase in their relations, focused on their shared future within the European Union. We therefore

> welcome the European Union's offer to facilitate a dialogue between Kosovo and Serbia to promote cooperation, achieve progress on their respective European integration paths, and improve the lives of people in the region, thereby enhancing peace, security and stability in the Balkans. [Editor's note: *See* paragraph 2 of the resolution for discussion of the European Union's offer.] The United States is prepared to lend its support to a constructive, forward-looking dialogue. More broadly, we remain fully engaged and committed to assisting Kosovo, Serbia, and all the countries of the region to realize their aspirations for full integration into the Euro-Atlantic community.

The full text of Ambassador DiCarlo's statement is available at *http://usun.state.gov/briefing/statements/2010/146950.htm*.

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, governs immunity from suits for foreign states in U.S. courts. 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 does not participate. The following items describe a selection of the significant proceedings that occurred during 2010 in which the United States intervened or participated as *amicus curiae*.

a. 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

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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) Swarna v. Al-Awadi

In *Swarna v. Al-Awadi*, 622 F.3d 123, 148 (2d Cir. 2010), the U.S. Court of Appeals for the Second Circuit affirmed a district court's dismissal of the plaintiff's claims against Kuwait on foreign sovereign immunity grounds, holding that the FSIA's commercial activity and tort exceptions to immunity were not applicable. For discussion of the facts of the case and the district court's judgment, see *Digest 2009* at 379–81. Excerpts follow from the court's analysis in concluding that the commercial activity exception was not applicable. (Internal cross references are omitted.) For the court's discussion of the FSIA's tort exception to immunity, see a.(2)(ii) below. The court's consideration of the claims against the individual defendants, a former Kuwaiti diplomat to the United Nations and his wife, is discussed below in C.1.

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* * * *

2. FSIA Commercial Activity Exception

As relevant in this appeal, the FSIA's commercial activity exception provides, in part, 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." 28 U.S.C. § 1605(a)(2). The term "commercial activity" is defined in the FSIA to mean "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). The phrase "commercial activity carried on in the United States by a foreign state" is defined in the FSIA to mean a "commercial activity carried

on by such state and having substantial contact with the United States." *Id.* § 1603(e); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 356 (1993) (stating that, for the commercial activity exception to apply, "the [plaintiff's] action must be 'based upon' some 'commercial activity' by [the foreign state] that had 'substantial contact' with the United States within the meaning of the Act").

In light of what the Supreme Court has called the "obtuse" statutory language of the commercial activity exception, the Court has further explained that a foreign state "engages in commercial activity . . . where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Saudi Arabia*, 507 U.S. at 358, 360 ("[A] foreign state engages in commercial activity . . . only where it acts in the manner of a private player within the market." (internal quotation marks omitted)). Thus, to determine the applicability of the commercial activity exception, "we ask not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives but rather whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce." *Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 177 (2d Cir. 2010) (internal quotation marks omitted).

Here, Swarna argues that Kuwait cannot claim sovereign immunity because its diplomats, namely, the individual defendants, "engaged in a commercial activity by employing, paying, and supervising Swarna." Specifically, Swarna argues that her "contract-based claims, wage and hours claims . . ." are "necessarily 'based on' the employment relationship between the Individual Defendants and Swarna" and that Kuwait is vicariously liable for the individual defendants' breach and wrongful acts. . . . Moreover, to the extent Swarna asserts her state law claims, *e.g.*, that the individual defendants breached their contract with her, this argument fails because the commercial activity exception specifically identifies the *foreign state* as the commercial actor. *Compare* 28 U.S.C. § 1605(a)(2) ("A foreign state shall not be immune . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . ."), *with*

28 U.S.C. § 1605(a)(5) ("A foreign state shall not be immune . . . in any case . . . 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 . . . ."). Swarna has never been an employee of Kuwait. She was a servant to the individual defendants for their personal needs and was accordingly paid for by the individual defendants.[13] Any breach of contractual obligations in this case between Swarna and the individual defendants cannot support applying the commercial activity exception to Kuwait's sovereign immunity.

* * * *

(ii) Nexus requirements: Guevara v. Republic of Peru

In *Guevara v. Republic of Peru*, 608 F.3d 1297 (11th Cir. 2010), discussed in Chapter 5.C.2., the U.S. Court of Appeals for the Eleventh Circuit reversed a lower court judgment, holding that Peru's sovereign immunity barred a district court from exercising jurisdiction over a lawsuit brought by a plaintiff claiming a $5 million award from Peru. In a previous decision in the litigation, the Eleventh Circuit had held that Peru engaged in commercial activity when it offered an award of $5 million for information about the whereabouts of its former intelligence director, Vladimiro Lenin Montesinos Torres. *Guevara v. Republic of Peru*, 468 F.3d 1289 (11th Cir. 2006) ("*Guevara I*").

The Eleventh Circuit explained that:

> . . . [W]hile discharging the duties of his office, [Montesinos] purportedly committed several crimes—arms trafficking, drug dealing, money laundering, extortion, bribery, and

[13] Although Kuwait allegedly reimbursed the individual defendants for Swarna's dental care, this does not establish an employment relationship between Swarna and Kuwait. Moreover, Swarna's state law claims do not arise from any breach of agreement regarding reimbursement for her dental care. Rather, her state law claims are based on the individual defendants' private employment of her as a personal servant.

> "more than a few murders." The Peruvian media obtained videotapes of his participation in some of these crimes, including bribery, and after the videotapes became public, President Alberto Fujimori announced in September 2000 that he would dissolve the intelligence agency and step down as president. Montesinos . . . fled the country . . . .
>
> A manhunt ensued, and in April 2001, Peru's Interim President . . . issued an Emergency Decree that provided for a $5 million reward for the "person or persons who provide(s) accurate information that will directly enable locating and capturing" Montesinos. The decree established a committee, the Special High Level Committee ("SHLC"), as part of the Ministry of the Interior to receive such information and assess its accuracy. . . .
>
> . . . Guevara, a Venezuelan national, was providing Montesinos with a hiding place and a security detail in Caracas, Venezuela. In addition, Guevara was handling Montesinos's communications with [a bank] . . . in . . . Florida, where Montesinos maintained a bank account. . . . Montesinos then sent Guevara to Miami . . . .

Guevara v. Republic of Peru, 608 F.3d at 1300–1 (citations and footnotes omitted). Based on the description of the facts in the complaint, the Eleventh Circuit's previous opinion in *Guevara v. Republica del Peru*, 468 F.3d 1289 (11th Cir. 2006), and the "uncontested facts described in the district court record," the U.S. brief provided the following description of developments during and after Guevara's trip to Miami.

> . . . On Guevara's third such trip to Miami in June 2001 to meet with an employee at a Miami bank on Montesinos' behalf, the FBI took Guevara into custody.
>
> According to Peru, Guevara was "charged with fraud against the United States and extortion of the family of a bank official * * * in an effort to access $43 million of Montesinos' deposits at a Miami bank." Appellant's Br. 3. The FBI told Guevara that the case in the United States would be dropped if he provided information concerning Montesinos' whereabouts. The FBI agents in Miami

> consulted over the telephone with a Peruvian official, who confirmed that a $5 million reward for information leading to Montesinos' capture was available to Guevara. *See* DE 230, at 3.* In light of his discussions with the FBI and Peru's reward program, Guevara decided to cooperate, and he placed a telephone call to a colleague in Venezuela. *Id.* Montesinos was arrested the following day by Venezuelan authorities. *Id.*
>
> Guevara then sought to collect the reward in Peru. . . .
>
> In 2005, the Special Committee notified Guevara that his request for the reward had been denied. DE 201-9.

Gov't brief, *Guevara v. Republic of Peru*, 08-17213 (11th Cir. 2010), at 8–9.

In its 2010 decision, the Eleventh Circuit held that Peru's commercial activity did not have a sufficient nexus to the United States to be covered by the FSIA's commercial activity exception to immunity. The court stated:

> Section 1605(a)(2) lists three exclusive bases, or nexuses, for a foreign state's commercial activities to subject it to the United States courts' jurisdiction: in cases (1) based upon commercial activities within the United States, (2) based upon acts performed in the United States "in connection with" commercial activity elsewhere, or (3) based upon acts performed in connection with commercial activity elsewhere that cause a "direct effect" in the United States." [citation omitted]

Guevara v. Republic of Peru, 468 F.3d at 1307.

As to the first nexus, the court concluded that

> [t]he evidence bearing on the first nexus, commercial activities within the United States, establishes that no such activities occurred in the United States. Rather, the commercial activity in this case, described by *Guevara I* as an "offer of a reward for information enabling the capture of a fugitive," 468 F.3d at 1301, took place in Peru.

* Editor's note: Footnote 1 of the U.S. brief explained that "'DE' refers to the docket entry number on the district court docket."

> First, the Emergency Decree, which created the offer, was published in an official publication in Peru. Second, the Decree established the SHLC [Special High Level Committee] to evaluate the veracity of information leading to Montesinos's arrest and decide whether to pay the reward. If the SHLC decided to pay the reward, the payment would be made in Peru from funds the Peruvian government had placed in escrow in a Peruvian bank. In short, all of the SHLC's commercial activity would take place in Peru. Although information leading to Montesinos's capture might be provided by someone in the United States, as it was here, the act of providing the information to the SHLC would not be part of the commercial activity. Therefore, by offering the reward, Peru was not waiving its sovereign immunity from suit in the United States by a person who may have provided information that led to Montesinos's capture.

Id. at 1307–8 (footnotes omitted).

As to the second nexus, the court concluded that a phone conversation between a Peruvian official and U.S. law enforcement agents in the United States and Chile while Guevara was in U.S. custody, in which the Peruvian official allegedly informed a U.S. agent that "Guevara would receive the reward if he provided information that led to Montesinos's capture," was not sufficient to waive Peru's sovereign immunity. The court stated in part, "If what [the Minister] said to [the U.S. agent] constituted an act in connection with Peru's offer of the award, then almost any statement he may have made about the reward to anyone else in the United States would have operated to waive Peru's immunity from suit. We are reluctant to find a waiver based on such *de minimus* evidence." *Id.* at 1308.

Finally, the court concluded that "the evidence bearing on the third nexus" did not "establish that Peru's actions 'in connection with' commercial activity outside the United States caused 'a direct effect' within the United States." *Id.* at 1309.

The U.S. Supreme Court denied Guevara's petition for a writ of certiorari on November 29, 2010. *Guevara v. Republic of Peru*, 131 S. Ct. 651 (2010).

(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.

This section discusses a selection of cases in which the FSIA's tort exception to immunity was at issue.

(i) Holy See v. Doe

On June 28, 2010, the U.S. Supreme Court denied a writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit in a case involving claims brought against the Holy See in connection with alleged sexual abuse by a Catholic priest. *Holy See v. Doe*, 130 S. Ct. 3497 (2010). The Ninth Circuit had held that under the tort exception to immunity, the district court had jurisdiction over the respondent's claim that the petitioner was vicariously liable for the sexual abuse.* On May 21, 2010, the United States had filed a brief as *amicus curiae* at the Court's invitation, which argued that "the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of

* Editor's note: The respondent's other claims against the petitioner were not at issue in the petition for certiorari.

appeals, and remand to the court of appeals for further consideration. In the alternative, the petition for a writ of certiorari should be denied." Gov't brief, *Holy See v. Doe*, No. 09-1, at 1. Excerpts below from the U.S. brief summarize the government's view that "[t]he court of appeals erred in holding that the district court has jurisdiction under the FSIA's tort exception over respondent's claim that petitioner is vicariously liable for sexual abuse committed by a priest" and provide the government's analysis concerning the proper application of the FSIA's tort exception. *Id.* at 7. (Citations to the petition are omitted.) The full text of the brief is available at *www.justice.gov/osg/briefs/2009/2pet/6invit/2009-0001.pet.ami.inv.pdf*.

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* * * *

DISCUSSION

* * * *

I. THE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT'S CLAIM FALLS WITHIN THE FSIA'S TORT EXCEPTION

In the view of the United States, the court of appeals erred in holding that respondent's vicarious liability claim falls within the FSIA's tort exception. Oregon law holds that sexual abuse and similar intentional torts generally do not come within an employee's scope of employment, but that an employer nevertheless may in some circumstances be held vicariously liable for an employee's intentional tort. The Ninth Circuit misunderstood Oregon law, and held that an intentional tort falls within the scope of employment if non-tortious conduct leading to the tort was itself within the scope of employment. . . .

* * * *

B. The Court Of Appeals Appears To Have Further Erred In Conflating The FSIA's Jurisdictional Scope-Of-Employment Inquiry With The Separate Question Of Respondeat Superior Liability Under State Substantive Law

A second misconception also appears to have contributed to the Ninth Circuit's conflation of the scope-of-employment inquiry

for FSIA jurisdictional purposes and the distinct question whether vicarious liability could be imposed under Oregon law. The Ninth Circuit characterized the "'scope of employment' provision of the tortious activity exception" as "essentially requir[ing] a finding that the doctrine of respondeat superior applies to the tortious acts of individuals." That statement suggests that the court of appeals assumed that Section 1605(a)(5) does not require that the employee's tort itself have been committed while the employee was acting within the scope of employment, but rather requires only that the employer may be held vicariously liable for the tort of its employee as a matter of state substantive tort law.[8] Thus, the court of appeals apparently believed that it could look to state-law liability rules to determine whether the tort exception should apply, without regard to whether the tort was within the scope of the priest's employment.[9] As petitioner argues, that view is mistaken.

The FSIA establishes a rule of liability under which a foreign state will be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. But that rule of liability applies only "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607" of the FSIA. *Ibid.* Oregon has chosen as a matter of its substantive law to impose vicarious liability in certain circumstances on an employer for its employee's intentional tort even if the tort itself was committed outside the scope

[8] That reading of the court of appeals' opinion is reinforced by the next sentence in the opinion, which states: "[T]he Oregon Supreme Court has directly addressed whether a church can be liable under respondeat superior for the actions of a priest who sexually assaults a parishioner."

[9] The court of appeals elsewhere stated that it believed that, under Oregon law, sexual abuse was within the scope of employment if the tort resulted from precursor conduct that was within the scope of employment. Those statements might suggest that the court correctly believed that the FSIA's tort exception requires the alleged tortious acts to have been within the scope of employment, see 28 U.S.C. 1605(a)(5). But the court's error as to state law—its conflation of the scope-of-employment determination and the ultimate question of respondeat superior liability—may also have been the result of the court's making a similar error with respect to the FSIA: construing the FSIA's scope-of-employment jurisdictional prerequisite as interchangeable with "a finding that the doctrine of respondeat superior applies to the tortious acts."

of employment. But a foreign sovereign may be found liable under that substantive rule only if the court first determines that it has jurisdiction over the foreign state because the plaintiff's claim comes within the tort exception to sovereign immunity. That exception authorizes suit against a foreign state for a tort by the state's employee only if the employee committed the tort "while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5); cf. *Primeaux v. United States*, 181 F.3d 876, 878 (8th Cir. 1999) (en banc) ("[E]ven if state law extends a private employer's vicarious liability to employee conduct not within the scope of employment, the government's [Federal Tort Claims Act] liability remains limited to employee conduct within the scope of employment, as defined by state law."), cert. denied, 528 U.S. 1154 (2000).

To the extent that the Ninth Circuit equated the FSIA tort exception's scope-of-employment jurisdictional requirement with broader state-law respondeat superior liability, it erred.[10] Because the priest's alleged sexual abuse of respondent was not within the scope of the priest's employment, respondent's vicarious liability claim does not come within the FSIA's tort exception to foreign sovereign immunity, and petitioner may not be subject to suit for that claim under Oregon's respondeat superior liability rule.

II. THE COURT SHOULD REMAND FOR FURTHER CONSIDERATION OF WHETHER THE DISTRICT COURT HAS JURISDICTION OVER RESPONDENT'S VICARIOUS LIABILITY CLAIM UNDER THE FSIA'S TORT EXCEPTION

* * * *

[10] In equating the two concepts, the court of appeals relied on *Joseph*'s statement that the tort exception "essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals." [*Joseph v. Office of the Consulate Gen. of Nig.*, 830 F.2d 1018, 1025 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988)).] But *Joseph*'s actual holding was that the plaintiff's claims fell within the tort exception because the conduct at issue was within the employee's scope of employment under state law. *Id.* at 1025–1026.

A. Plenary review is not warranted at this time. The court of appeals' decision does not conflict with any decision of another court of appeals. . . .

* * * *

B. Nevertheless, in the view of the United States, it may be appropriate for this Court to grant the certiorari petition, vacate the court of appeals' judgment, and remand for further consideration.

The court of appeals held that the FSIA's tort exception permits jurisdiction over a claim that falls outside the bounds established by the exception's plain text: a claim based on tortious conduct that was not committed within the scope of employment. A central purpose of foreign sovereign immunity is to afford foreign states "some present 'protection from the inconvenience of suit,'" unless the case comes within a statutory exception to immunity. *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004) (emphasis omitted) (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003)). That purpose is defeated if a foreign sovereign is forced to litigate on the merits a case in which no applicable exception to immunity applies. [fn. omitted] *See, e.g.*, *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 442–443 (D.C. Cir. 1990). Because improperly subjecting a foreign state to suit can in some circumstances raise foreign-relations and reciprocity concerns, the United States has an interest in ensuring that courts in the United States carefully apply the FSIA, and that they do not expand the exceptions to foreign sovereign immunity set forth in Section 1605 beyond the scope that Congress intended.

* * * *

The court of appeals, in addition to premising its finding of jurisdiction on conduct that is outside the scope of employment as a matter of state law, appears to have also misapprehended the scope of the FSIA's tort exception to foreign sovereign immunity as a matter of federal law. It therefore would be appropriate for this Court to correct any such error by making clear that Section 1605(a)(5) authorizes suit against a foreign state for a tort by the state's employee only if the tort itself was committed by the employee while acting within the scope of his office or employment. . . .

* * * *

(ii) Swarna v. Al-Awadi

In *Swarna v. Al-Awadi*, discussed in a.(1) *supra*, the U.S. Court of Appeals for the Second Circuit affirmed the district court's dismissal of claims against the State of Kuwait. Excerpts follow from the court's analysis in concluding that the FSIA's tort exception to immunity did not apply. For the court's discussion of the immunities issues concerning the individual defendants, see C.1. below.

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* * * *

Under New York law, although an employee's tortious acts are imputable to the employer if "done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions," *Riviello v. Waldron*, 47 N.Y.2d 297, 302 (1979) (internal quotation marks omitted), an employer "is not liable for torts committed by the employee for personal motives unrelated to the furtherance of the employer's business," *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1317 (2d Cir. 1995), *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). . . . "New York courts consistently have held that sexual misconduct and related tortious behavior arise from personal motives and do not further an employer's business, even when committed within the employment context." *Ross v. Mitsui Fudosan, Inc.*, 2 F. Supp. 2d 522, 531 (S.D.N.Y. 1998).

Swarna argues that Kuwait is not entitled to sovereign immunity under the FSIA because the individual defendants were acting within the scope of their employment as diplomats for Kuwait when they subjected her to "slavery and slavery-like practices, including forced labor, involuntary servitude, and sexual slavery." But, as the District Court found, rape and other inhumane acts allegedly committed by the individual defendants are not related to the furtherance of Kuwait's purposes in the United States. Swarna's claim of forced labor is based on services she provided to the individual defendants to meet their private needs. Also, it is beyond question that Al-Awadi did not rape Swarna to further

Kuwait's purposes in the United States. Swarna's ATCA claims "arise from personal motives" and are outside the diplomats' scope of employment with Kuwait. Thus, we reject Swarna's attempt at piercing Kuwait's sovereign immunity through the alleged tortious conduct of Kuwait's diplomats.

To the extent Swarna suggests that Kuwait committed a tort because "[a]n official at the Kuwait Mission opened and translated Swarna's correspondence with her family on behalf of the Individual Defendants"; "Swarna's passport was held by the Kuwait Mission for the duration of her employment"; employees of the Kuwait Mission "periodically provided an escort for Swarna when she was permitted to leave the Individual Defendants' home . . . reinforc[ing] the . . . restriction on Swarna's interaction with outsiders"; and Kuwait failed to "monitor its diplomats to ensure that they were complying with the laws and regulations of the United States," these acts either do not plausibly constitute an imputable tort or are "discretionary functions" which are accorded sovereign immunity under the FSIA. *See* 28 U.S.C. § 1605(a)(5)(A).

The tortious activity exception remains inapplicable if the tort is "based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." *Id.* The language of this "discretionary function" rule is closely replicated in the Federal Tort Claims Act ("FTCA"), and therefore we consider the jurisprudence of other Courts of Appeals in considering FTCA case law when interpreting the FSIA's discretionary function provision. . . .

In the context of the FTCA, the Supreme Court has broadly outlined the contours of "discretionary function" as (1) determined by the nature of the conduct rather than the status of the actor and (2) "plainly . . . encompass[ing] the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813–14 (1984). According to the Supreme Court, the discretionary function rule is designed to prevent "judicial 'second-guessing' of . . . decisions grounded in social, economic, and political policy through the

medium of an action in tort." *Id.* at 814; *accord In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 190 (2d Cir. 2008) ("The FTCA discretionary function exception is . . . a form of retained sovereign immunity.").

Here, Swarna's claim that Kuwait failed to institute procedures or a system to monitor its employees implicates a discretionary function. Any failure to monitor employees was a systemic failure that occurred at the planning level of government. Indeed, the United States Department of State had requested the implementation of such monitoring in a memorandum [diplomatic note to the chiefs of mission] dated May 20, 1996, addressing, *inter alios*, |the *Kuwait government*. Even if Kuwait's failure to implement monitoring of its employees constitutes a tort in light of this prior notice, such failure to fulfill a regulatory function is not included in those acts which qualify under the tortious activity exception to Kuwait's sovereign immunity. *See In re World Trade Ctr.*, 521 F.3d at 190.

Swarna's remaining claims, as to specific operational acts committed by individual employees at the Kuwait Mission, are essentially a restatement of her claim that Kuwait failed to adequately monitor its employees. And, in any event, her claim that the individual employees aided and abetted the individual defendants' tortious acts is not adequately pleaded. . . . Moreover, even if these employees "aided and abetted" the tortious acts committed by the individual defendants, the employees would have only furthered activities that are unrelated to the diplomatic mission and arise from "personal motives"—which, as explained above, are non-imputable acts.

* * * *

(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, to be codified at 28 U.S.C. § 1605A. Section 1083(c) of that statute contained transition rules for applying the new terrorism exception to cases pending at the time of the NDAA's enactment. For background on the legislation and related developments, see *Digest 2008* at 457–63. During 2010, as the examples below discuss, litigation in U.S. federal courts continued to raise issues concerning the interpretation of the new terrorism exception.

(i) Rux v. Republic of Sudan

On March 8, 2010, the United States filed a brief in the U.S. Court of Appeals for the Fourth Circuit in support of affirmance of a district court's dismissal of certain claims brought against the Republic of Sudan. *Rux v. Republic of Sudan*, No. 09-2359 (4th Cir. 2010). The United States appeared as intervenor-appellee to defend the constitutionality of § 1083(c)(2) of the NDAA, which the plaintiffs challenged under the Equal Protection Clause of the U.S. Constitution. Section 1083(c)(2) permits certain plaintiffs who had filed suits under 28 U.S.C. § 1605(a)(7), the terrorism exception repealed by § 1083(b) of the NDAA, to convert their actions into ones under the new terrorism exception to immunity, and to rely on a new private right of action created by § 1083(a) of the NDAA, to be codified at 28 U.S.C. § 1605A(c). The government's brief also addressed § 1083(c)(3), another transition rule that permits certain plaintiffs to file new actions relating to ones brought under the previous terrorism exception. The United States also appeared as *amicus curiae* in support of the district court's determination that the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 30301–30308, affords the exclusive remedy for the plaintiffs' claims against Sudan in connection with al-Qaeda's attack on the *U.S.S. Cole* in Yemen in 2000.

The plaintiffs, relatives of the U.S. Navy sailors murdered in the attack on the *U.S.S. Cole*, sued Sudan in 2004 under 28 U.S.C. § 1605(a)(7), the exception to immunity relating to

support of terrorism then in effect under the FSIA. The plaintiffs asserted claims under the DOHSA, as well as claims under maritime law for wrongful death and state law for intentional infliction of emotional distress. In 2007 the district court held that DOHSA provided the exclusive remedy for the plaintiffs, awarded $7,956,344 to the plaintiffs it identified as eligible under DOHSA, and dismissed the plaintiffs' other claims. After the plaintiffs appealed, Congress enacted the NDAA. The Fourth Circuit then granted the plaintiffs' motion for a summary remand and instructed the district court to "determine whether FSIA's creation of a private right of action for state-sponsored terrorism takes preceden[ce] over DOHSA's remedy for death on the high seas when, as here, terrorism-related deaths occurred on the high seas." The plaintiffs then filed a motion in the district court to amend their original complaint by adding claims under 28 U.S.C. § 1605A. The district court denied that motion on the grounds that the plaintiffs had not met the four requirements under NDAA § 1083(c)(2) for converting their pending suit to a suit under the new terrorism exception in § 1605A, and the plaintiffs appealed to the Fourth Circuit.

Excerpts below from the U.S. brief explain the provisions of the NDAA at issue in the litigation and the government's view that "[b]ecause plaintiffs are not eligible to rely on the new federal right of action, and because the eligibility criteria do not violate plaintiffs' equal protection rights, the district court properly denied plaintiffs' motion to supplement their complaint." (Footnotes and citations to the joint appendix and other submissions in the case are omitted.) The full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

In 2008, Congress amended the terrorism exception to foreign sovereign immunity by repealing the old exception and enacting a new provision. *See* NDAA, Section 1083(a)(1) (to be codified at

28 U.S.C. § 1605A (Supp. II 2008)). Like the former terrorism exception, the new provision eliminates the immunity of designated state sponsors of terrorism for certain acts of terrorism. 28 U.S.C. § 1605A(a)(1). However, Congress . . . enact[ed] for the first time a federal right of action against state sponsors of terrorism. *Id.* § 1605A(c); *see* 154 Cong. Rec. S54, S55 (Jan. 22, 2008) (statement of Sen. Lautenberg). The right of action provides that "damages may include economic damages, solatium, pain and suffering, and punitive damages." *Id.* at 1605A(c).

Congress also enacted transition rules to permit plaintiffs with pending terrorism damages cases and plaintiffs who might otherwise have been barred by the applicable statue of limitations from bringing suit to rely on this new right of action. NDAA Section 1083(c)(2) authorizes plaintiffs who had brought "prior actions" under the old terrorism exception to convert their action into one under the new federal right of action if four conditions are met: (1) the prior action must have been brought under the old terrorism exception or the Flatow Act before the NDAA was enacted; (2) plaintiffs must have relied upon the old terrorism exception or the Flatow Act as a right of action; (3) plaintiffs must have been adversely affected by that reliance; and (4) the action must be pending in any form as of the date of the NDAA's enactment. Even if these conditions were not met, Congress additionally authorized plaintiffs to file "related actions" under the new right of action if their claims arise out of the same terrorist act that is the subject of a separate suit timely brought under the old terrorism exception. NDAA § 1083(c)(3).

Congress imposed time limits on conversions under Section 1083(c)(2) and the bringing of related actions under Section 1083(c)(3). Plaintiffs with pending cases could covert their suits to ones under the new terrorism exception only if they filed an appropriate motion within 60 days of the NDAA's enactment. NDAA § 1083(c)(2)(C). Plaintiffs may bring a related action only if they file suit no later than 60 days after either the NDAA's enactment or entry of judgment in the pending, related suit. NDAA § 1083(c)(3). Because Section 1083(c)(3) permits plaintiffs to bring related actions within 60 days of either "the date of the entry of judgment in the original action" or the date of the NDAA's enactment, a plaintiff who

might otherwise be barred by the new terrorism exception's statute of limitations (see 28 U.S.C. § 1605A(b)) might be able to bring a timely related action. This appears to be the principal practical difference between related actions and actions brought under the new terrorism right of action without regard to the transition rules.

* * * *

ARGUMENT

I. NDAA SECTION 1083 DOES NOT VIOLATE PLAINTIFFS' EQUAL PROTECTION RIGHTS.

Plaintiffs' principal argument on appeal is that Section 1083(c)(2)—the provision of the NDAA permitting conversion of certain pending suits to ones under the new terrorism exception—"creates an irrational class distinction that impermissibly discriminates against Appellants by precluding them from seeking relief pursuant to § 1605A." As the district court explained, plaintiffs are mistaken in suggesting that the statutory classification prevented them from seeking relief under the new terrorism right of action.

Although plaintiffs do not satisfy the requirements for converting their action under NDAA Section 1083(c)(2), plaintiffs could have filed, but did not, a new, "related action" under Section 1083(c)(3), since it would have been an "action arising out of the same act or incident" as that at issue in their current suit. Had plaintiffs filed a new, related action, they would have been able to rely on Section 1605A(c) to provide their new right of action. NDAA § 1083(c)(3) (related action "may be brought under section 1605A of title 28") . . . .

The existence of one provision that would have permitted plaintiffs to seek relief under Section 1605A refutes their claim that a different provision is unconstitutionally discriminatory because it prevents them from seeking such relief. . . . Because plaintiffs could have but "chose not to file [a] § 1083(c)(3) action within the time period set forth in § 1083(c)(3)," plaintiffs' equal protection challenge to Section 1083(c) necessarily fails.

In any event, plaintiffs' contention that the conversion provision creates irrational class distinctions is meritless. . . .

Because plaintiffs do not contend they are members of a suspect class or that the statute burdens a fundamental right, their equal protection challenge is analyzed under rational-basis review. . . .

Plaintiffs identify three reasons for the supposed irrationality of the conversion provision. First, they contend that the distinctions are irrational because it would have been frivolous for plaintiffs to have relied after *Cicippio-Puleo* on the prior terrorism exception as creating a right of action. But contrary to their suggestion, plaintiffs here would not have had to make frivolous arguments in their underlying suit to be able to have relied on the new federal cause of action. As explained, plaintiffs could have filed a related action under Section 1083(c)(3).

Second, plaintiffs contend that the classifications in the conversion provision are irrational because plaintiffs injured by the same terrorist act could fall into different classes, resulting in disparate treatment. But, as the district court concluded, the fact that the statute creates classifications that might treat plaintiffs differently even though they were all affected by the same terrorist act is itself no reason to think that the classifications are irrational. Any statute of limitations, for example, necessarily distinguishes between plaintiffs who bring suit before the deadline and those who bring suit after, even if plaintiffs in both classes were injured by the same act. So long as Congress has a rational basis for creating the statutory classification it employs, classifications may permissibly treat differently those injured by the same act. Plaintiffs make no attempt to show that Congress lacked a rational basis for treating plaintiffs injured by the same act differently under the classifications created in the conversion and related action provisions. Because "legislation is presumed to be valid" (*Lawrence*, 539 U.S. at 579) unless plaintiffs establish the classification's irrationality, plaintiffs cannot establish an equal protection violation merely by pointing to the fact that a classification will lead to disparate treatment of those similarly injured.

Third, plaintiffs suggest that the classification created by the conversion provision is irrational because it does not serve Congress' purpose of "righting the many procedural difficulties that had arisen for plaintiffs in recovering judgments under § 1605(a)(7)." Plaintiffs' final argument amounts to the claim that Section 1083(c) does not perfectly advance Congress' aim of eliminating the difficulties attendant to suit under the former terrorism exception. But equal protection does not require a perfect matching

of means to ends. This is the central teaching of the Supreme Court in *Williamson v. Lee Optical, Inc.*, as the district court noted. . . . [*S*]*ee* 348 U.S. at 489. Congress may permissibly seek to remedy a perceived problem without defining categories with mathematical precision and without eliminating every difficulty it sought to address.

Finally, plaintiffs here do not make any attempt to show that it was irrational for Congress to permit some plaintiffs to convert their actions (under Section 1083(c)(2)) while requiring others to file new actions (under Section 1083(c)(3)). Accordingly, they have waived that argument. *See United States v. Abdelshafi*, 592 F.3d 602, 609 n.6 (4th Cir. 2010). But such an argument could not succeed in any event. As the district court noted, to be a member of the class created by the conversion provision, a plaintiff necessarily had to erroneously and adversely have relied on the former terrorism exception as creating a valid right of action. NDAA § 1083(c)(2)(A)(ii), (iii). By contrast, the class created by the related action provision includes those, like plaintiffs here, who relied on a valid right of action. NDAA § 1083(c)(3). Congress may permissibly have believed that plaintiffs with valid rights of action are more likely to have succeeded in pursuing their claims to a successful judgment than those who asserted invalid claims, and that those in the latter class should be given the extra advantage of converting their existing pending claims into ones under the new federal right of action rather than put to the burden of filing a new suit.

This conclusion is further supported by the fact that the advantage Congress conferred raises possible constitutional issues. Members of both the conversion and related action classes might have final judgments under the prior terrorism exception. *See* NDAA § 1083(c)(2)(A)(iv) (permitting conversion of suits pending "before the courts in any form, including * * * [a] motion under Rule 60(b) of the Federal Rules of Civil Procedure"); *id.* § 1083(c)(3) (permitting related actions without regard to whether plaintiff previously obtained a judgment under prior terrorism exception); *see also id.* § 1083(c)(2)(B) (waiving rules of res judicata and collateral estoppel in actions converted under Section 1083(c)(2)(A) or refiled under Section 1083(c)(3)). As the district court recognized,

statutes directing courts to reopen final judgments raise separation-of-powers concerns. . . . Authorizing a plaintiff to "convert" a final judgment to one under a new right of action and giving that judgment "effect as if the action had originally been filed" under the new right of action (NDAA § 1083(c)(2)) raises greater constitutional concern than creating a new right of action and extending the statute of limitations for a class of plaintiffs (*see* NDAA § 1083(c)(3)). Thus, Congress may have been particularly wary about extending a right to convert too broadly, thus increasing the risk that the legislation would be held constitutionally infirm.

In enacting the NDAA, Congress created a new federal right of action for terrorism-related claims against foreign states, and it provided for rules under which some plaintiffs with pending cases could convert their suits to ones under the new right of action, and other rules by which plaintiffs could bring new cases under the new provision that are factually related to pending cases. The distinctions Congress employed are rationally related to Congress' objective of providing plaintiffs access to the new remedy, taking into account the procedural posture of their claims at the time of the statute's enactment. This is all that equal protection principles require.

* * * *

After the government filed its brief, the plaintiffs filed a new, related action against Sudan under 28 U.S.C. § 1605A(c).* *Kumar v. Republic of Sudan*, No. 2:10cv171 (E.D. Va.). On December 8, 2010, the United States filed a supplemental brief in response to the court's order arguing that the court should dismiss the appeal for lack of jurisdiction. The brief stated:

> By bringing a new suit under 28 U.S.C. § 1605A, plaintiffs have done the very thing they argue Section 1083(c)(2)

* Editor's note: In an unpublished opinion issued on February 3, 2011, the Fourth Circuit ordered the dismissal of the appellants' action under § 1083(c)(2) and affirmed the district court's dismissal of the appellants' claims under maritime and state law. *Rux v. Republic of Sudan*, 410 Fed. Appx. 581 (4th Cir. 2011), 2011 U.S. App. LEXIS 2312.

> prevented them from doing. And because they have disavowed reliance on Section 1083(c)(2), plaintiffs' challenge to the constitutionality of that provision is no longer a live controversy but is, instead, an abstract legal question. Accordingly, plaintiffs' challenge to Section 1083 is moot. . . .

Gov't supplemental brief, *Rux v. Republic of Sudan*, at 8. The full text of the supplemental brief is available at *www.state.gov/s/l/c8183.htm*.

(ii) Private right of action and the Algiers Accords

On September 30, 2010, the U.S. District Court for the District of Columbia dismissed a suit that former American 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*, 742 F. Supp. 2d 1 (D.D.C. 2010). The court granted a motion to dismiss filed by the United States as intervenor on April 21, 2009, which is discussed in *Digest 2009* at 336–41 and is available at *www.state.gov/s/l/2009/list/index.htm* as document 56a. For prior history in the litigation, see *Digest 2009* at 336–41. 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 and *Digest 2003* at 476–78 and 547–49.

In dismissing the case, the court held:

> After careful consideration of the parties' arguments and the applicable law, the Court finds that plaintiffs' ability to sue the government of Iran has not changed since *Roeder I*: § 1083 does not unambiguously create a cause of action for these plaintiffs against Iran. The Court's holding in *Roeder I* applies equally to the new statutory scheme: "Because th[e] statute is ambiguous, and because [§ 1083]

> [n]ever mentions the Algiers Accords in statutory text or legislative history, this Court cannot interpret this legislation to implicitly abrogate a binding international agreement. Therefore this Court must dismiss plaintiffs' claims."

Roeder v. Islamic Republic of Iran, 742 F. Supp. 2d at 16 (citation omitted).

b. Execution of judgments and other post-judgment actions

(1) Attachment under the Terrorism Risk Insurance Act: Bennett v. Iran

On September 10, 2010, the U.S. Court of Appeals for the District of Columbia affirmed a district court's judgment granting the U.S. government's motion to quash writs of attachment served against certain Iranian diplomatic properties to enforce a 2007 judgment against Iran and the Iranian Ministry of Information and Security. *Bennett v. Islamic Republic of Iran*, 618 F.3d 19 (D.C. Cir. 2010), amended 2010 U.S. App. LEXIS 24823 (Dec. 3, 2010). The court held that the diplomatic properties at issue were immune from attachment under § 201 of the Terrorism Risk Insurance Act ("TRIA") because the United States had used them exclusively for diplomatic purposes since it took custody of Iran's diplomatic and consular property. In so holding, the court agreed with views the United States provided in a brief filed in 2009. The U.S. brief, discussed in *Digest 2009* at 348–52, is available at *www.state.gov/s/l/2009/list/index.htm* as document 57. Excerpts below from the court's opinion provide its analysis in concluding that the properties at issue "are not subject to attachment under TRIA." *Bennett v. Islamic Republic of Iran*, 618 F.3d at 24. (Citations to other submissions in the case are omitted.)

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* * * *

II.

Diplomatic properties are generally immune from attachment. *See* 28 U.S.C. §§ 1609–1610. The Terrorism Risk Insurance Act (TRIA) carves out an exception to this general rule, authorizing the attachment of "blocked assets" of state sponsors of terrorism to satisfy judgments for compensatory damages for acts of terrorism. Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337 (2002) (codified at 28 U.S.C. § 1610 note). TRIA defines blocked assets as those "seized or frozen by the United States" for certain foreign policy purposes. *See id.* § 201(d)(2)(A). Blocked assets do not include, however, "property subject to the Vienna Convention on Diplomatic Relations"* that "is being used exclusively for diplomatic or consular purposes." *Id.* § 201(d)(2)(B)(ii). Such property may not be attached.

The government and the Bennetts agree that the properties subject to the writs are seized assets belonging to a state sponsor of terrorism and that their attachment would satisfy a judgment for compensatory damages for an act of terrorism. The parties contest, however, whether the properties are subject to the Vienna Convention on Diplomatic Relations and "[are] being used exclusively for diplomatic or consular purposes." TRIA § 201(d)(2)(B)(ii). The Bennetts concede that all the properties except the diplomatic residence are subject to the Vienna Convention. They have forfeited the argument that the residence is not because they raised it for the first time on appeal. *See Potter v. District of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009). That leaves us with only the question of whether the properties are "being used exclusively for diplomatic or consular purposes." TRIA § 201(d)(2)(B)(ii).

The United States claims that it has held the attached properties in custody since 1980 to fulfill its obligations under Article 45 of the Vienna Convention to "respect and protect" the premises of a former mission after diplomatic relations between two states have been severed, as well as the Foreign Missions Act. *See* Decl.

* TRIA defines "property subject to the Vienna Convention on Diplomatic Relations" as property for which "the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under [the] Vienna Convention." TRIA § 201(d)(3).

of Claude J. Nebel, Deputy Assistant Sec'y for Diplomatic Sec. & Deputy Dir. of the Office of Foreign Missions, July 11, 2008, ¶ 10. On March 10, 1983, the United States announced that it would rent out Iran's diplomatic properties periodically to generate income to pay for the upkeep required by the Vienna Convention. *Id.* ¶ 11. Since then, the United States has at times rented Iran's properties to other foreign missions and to private parties and used the proceeds to maintain and repair the properties consistent with its treaty obligations. Any excess income from the rentals has been placed in an Iranian bank account that, like all Iranian assets in America, has been frozen by the United States. *Id.* ¶ 12.

There is no dispute that the United States has used these properties for a diplomatic purpose. The Bennetts have conceded this point. According to the government, that concession resolves the dispute because the sole inquiry under the statute is the purpose for which the United States uses the properties. The Bennetts insist that the statute requires us to look at the nature of the use as well.

. . . The Bennetts contend that renting the properties to third parties is a nondiplomatic use, which makes the properties subject to attachment. Their argument assumes that TRIA's protection from attachment requires a diplomatic *use* of the property. That requirement finds no support in the text of the statute, which provides only that the property "is being used exclusively for diplomatic and consular *purposes*." TRIA § 201(d)(2)(B)(ii) (emphasis added). . . . The Bennetts cite several cases from our sister circuits interpreting what they consider to be analogous portions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602–11. . . . But unlike the provisions at issue in those cases, TRIA, by its plain language, is concerned only with the *purpose* for which the property is used, and not the way the property is used in service of that end.

The Bennetts argue that our reading of section 201(d)(2)(B)(ii) is mistaken because it fails to take into account section 201(b)(2)(A) of TRIA, which creates another means to protect from attachment properties subject to the Vienna Conventions. Section 201(b)(2)(A) authorizes the President to immunize such properties from attachment so long as they have not "been used by the United

States for any nondiplomatic purpose (including use as rental property)." TRIA § 201(b)(2)(A). The parenthetical phrase, the Bennetts argue, establishes that any "use" of a seized asset "as a rental property" invariably has a nondiplomatic purpose. Not only is that not true as a descriptive matter, but that view of the provision cannot be squared with its plain meaning, which calls for an inquiry into the purpose of the use and not the type of use—the same inquiry required by section 201(d)(2)(B)(ii). Far from announcing a categorical rule that any "use as a rental" is in pursuit of a "nondiplomatic purpose," the parenthetical simply acknowledges that the government may have a nondiplomatic purpose for renting the property.

We are equally unpersuaded by the Bennetts' argument that our interpretation of section 201(d)(2)(B)(ii) renders this provision superfluous because it duplicates protection already found in the Foreign Missions Act. Unlike two provisions within a single statute, we need not construe separate statutes to avoid redundancy. . . . In any event, these statutes are not duplicative. . . .

Finally, we note that it may very well be that the private parties who rented the properties did so in service of nondiplomatic ends. But their purposes are irrelevant to the protection Congress provided for these properties. TRIA says nothing about the purpose anyone other than the United States might have in its use of the properties. "Blocked assets" are assets "seized or frozen *by the United States*." TRIA § 201(d)(2)(A) (emphasis added). Because TRIA's provisions apply only to property possessed by the United States, we think the statute clearly commands that the purpose of the United States is the only relevant inquiry.

Our concurring colleague finds the statute ambiguous on this point, and concludes that the use to which a private tenant puts a former diplomatic property may render it subject to attachment under TRIA. Concurring Op. at 2–3. But if there were such ambiguity, we would still conclude that attachment is precluded in light of the fundamental canon of statutory interpretation that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook v. United States*, 288 U.S. 102, 120 (1933); *see Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 237

(D.C. Cir. 2003). Congress, in defining the terrorist state property available for attachment, explicitly carved out an exception to enable the United States to fulfill its treaty obligations under the Vienna Convention. TRIA § 201(d)(2)(B)(ii). In this case, permitting attachment would render the United States unable to respect and protect Iran's former diplomatic properties as required by Article 45 of the Vienna Convention. We do not think Congress intended to construct such obstacles to the performance of the nation's obligations under the Vienna Convention.

Because there is no question that the sole purpose for which the United States rented the properties was to facilitate compliance with its treaty obligations under the Vienna Convention, the properties are not subject to attachment under TRIA. As the Fifth Circuit has explained, "by using rental proceeds to carry out routine maintenance, the government 'respect[s] and protect[s]' the property presumably for the time when the two countries might resume diplomatic and consular relations." *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 495 (5th Cir. 2004). Collecting rent on a property in order to ensure the upkeep required by the Vienna Convention does not permit its attachment under TRIA.

* * * *

(2) Attachment under the FSIA

(i) Presumption of immunity for foreign state property: Peterson v. Iran

On December 3, 2010, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court order dismissing a motion to compel Iran to assign its right to receive payments from a French shipping company, CMA CGM, for the company's use of Iran's harbor facilities. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117 (9th Cir. 2010). In this case, the family members of U.S. victims of the 1983 bombing of the U.S. Marine barracks in Lebanon sought to satisfy a default judgment against Iran in connection with the bombing. Based on its analysis of the FSIA's text, structure, and legislative history, as well as

relevant case law, the Ninth Circuit held that a court should *sua sponte* consider the question of foreign sovereign immunity from execution and "the district court did not err by raising the issue of immunity *sua sponte*." *Peterson v. Islamic Republic of Iran*, 627 F.3d at 1129. In reaching that conclusion, the court essentially agreed with views the United States had provided in a brief it filed in support of affirmance on June 26, 2009. The U.S. brief, discussed in *Digest 2009* at 352–60, is available as document 59 at *www.state.gov/s/l/2009/list/index.htm*. As discussed in c.2.(ii) and d.(1) below, the court also held that the plaintiffs substantially complied with the FSIA's service requirements and that Iran's rights to payment from CMA CGM are immune from execution because they do not constitute "property in the United States" within the meaning of the FSIA.

Excerpts below from the opinion address the issue of a court's consideration of the question of foreign sovereign immunity from execution *sua sponte*.

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* * * *

A. *Sua Sponte* Consideration of Immunity from Execution

Plaintiffs contend that foreign sovereign immunity from execution is an affirmative defense that should have been pleaded and proved by Iran; therefore, the district court erred by raising the issue of immunity *sua sponte* and denying the CMA CGM assignment motion on that basis. Few courts have squarely addressed the question of who may raise the issue of immunity from execution, and those that have are divided. . . .

. . . The pertinent exception [to immunity from attachment, arrest, and execution under the FSIA], for our purposes, provides that commercial property belonging to a foreign state that is located in the United States may be attached in aid of execution of a judgment that "relates to a claim for which the foreign state is not immune from suit under section 1605A." 28 U.S.C. § 1610(a)(7). Section 1605A, which was previously codified at 18 U.S.C. § 1605(a)(7) (2000), is the terrorist act exception to immunity from suit.

Sections 1609 & 1610 state that immunity from execution and certain exceptions to that immunity exist. They are silent as to who has the burden of pleading and proving immunity from execution, or whether a court may decide immunity *sua sponte*. . . . We must look to the structure, history, and purpose of the FSIA for guidance. . . .

Although the Ninth Circuit has not previously decided who may raise the defense of immunity from execution, we have addressed that question in the context of immunity from suit. Section 1604 creates a "statutory presumption that a foreign state is immune from suit." *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 324 (9th Cir. 1996). To trigger this presumption, the defendant must make a prima facie case that it is a foreign state. . . . The presumption also applies if it is apparent from the pleadings or uncontested that the defendant is a foreign state, as in this case. . . . Once the court has determined that the defendant is a foreign state, "the burden of production shifts to the plaintiff to offer evidence that an exception applies." [*Phaneuf v. Republic of Indon.*, 106 F.3d 302, 307 (9th Cir. 1997) (citing *Randolph*, 97 F.3d at 324); *cert. denied*, 535 U.S. 987 (2002)]; *In re Terrorist Attacks*, 538 F.3d at 80 (citing *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993)); H.R. Rep. No. 94-1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6616. . . . If the plaintiff satisfies her burden of production, jurisdiction exists unless the defendant demonstrates by a preponderance of the evidence that the claimed exception does not apply. *Phaneuf*, 106 F.3d at 307; [*Butler v. Sukhoi Co.*, 579 F.3d 1307, 1313 (11th Cir. 2009)].

This burden-shifting scheme, which puts most of the weight on the plaintiff, is partly motivated by the fact that federal jurisdiction does not exist unless one of the exceptions to immunity from suit applies. *See* 28 U.S.C. § 1330; *Corzo v. Banco Central de Reserva del Peru*, 243 F.3d 519, 522 (9th Cir. 2001). . . .

Federal sovereign immunity from execution does not defeat a court's jurisdiction, therefore it is less obvious that a court must consider immunity from execution *sua sponte*. However, there are other reasons why courts have used a burden-shifting approach to immunity from suit that apply equally well to immunity

from execution. The structure of the FSIA—which codifies the background rule that foreign states are immune from suit and execution, and then creates narrow exceptions—suggest that courts must begin with the presumption that a foreign state is immune and then the plaintiff must prove that an exception to immunity applies. . . . So does the history of foreign sovereign immunity in U.S. courts.

* * * *

Allowing courts to independently raise and decide the question of immunity from execution is not only consistent with historical practice, but also with the purposes underlying the FSIA. A burden-shifting approach, unlike one that places the burden on the foreign state to plead and prove that its property is immune, is appropriately respectful of the "perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse." *The Schoo[]ner Exchange*, 11 U.S. at 137; *see also Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955) . . . . The FSIA was meant to spare foreign states not only from liability on the merits but also from the cost and inconvenience of trial. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) . . . . Requiring the plaintiff to prove that immunity does not exist, rather than placing the burden on the defendant foreign state, best accomplishes that goal.

These policy considerations apply more strongly in the context of immunity from execution. "[T]he judicial seizure of the property of a friendly state may be regarded as an affront to its dignity and may . . . affect our relations with it." *See Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008) (quotation and alteration omitted). Congress was aware that, although the restrictive theory of sovereign immunity from suit had become an accepted principle of international law by the time of the FSIA's enactment, "the enforcement of judgments against foreign state property remain[ed] a somewhat controversial subject." H.R. Rep. No. 94-1487, at 6626; *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 255 (5th Cir. 2002). Accordingly, the exceptions to immunity from execution are more narrow than the exceptions from immunity

from suit. Congress fully intended to create rights without remedies, aware that plaintiffs would often have to rely on foreign states to voluntarily comply with U.S. court judgments. *See Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 749 (7th Cir. 2007); [*Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984)]. In light of the special sensitivities implicated by executing against foreign state property, courts should proceed carefully in enforcement actions against foreign states and consider the issue of immunity from execution *sua sponte*.

Our decision in *Wilmington Trust v. U.S. District Court*, 926 F.3d 1026 (9th Cir. 1991), is not to the contrary. . . .

. . . When a court is not certain that the property in question is covered by the FSIA, a foreign state must make a *prima facie* case of ownership in order for the presumption of immunity to apply. . . . When it is clear that the plaintiff seeks to execute against property owned by a foreign state, as in this case, the presumption of immunity is automatically triggered. *See, e.g.*, *Letelier*, 748 F.2d at 792–93. . . . Because the plaintiffs themselves contend that the rights to payment from CMA CGM belong to Iran, the district court did not err by raising the issue of immunity *sua sponte*.

* * * *

(ii) Rights to payment as property under the FSIA

In *Peterson v. Islamic Republic of Iran*, discussed in c.(2)(i) *supra*, the Ninth Circuit also held that "Iran's rights to payment from CMA CGM" do not "constitute 'property in the United States'" within the meaning of 28 U.S.C. § 1610(a) "and are, therefore, immune from execution." *Peterson*, 627 F.3d. at 1130. In so holding, the court agreed with the United States' argument, in its brief in support of affirmance, that if a foreign state's assets are not subject to execution under the FSIA, a court cannot order that state to assign them to a judgment creditor. Excerpts follow from the section of the court's opinion analyzing the immunity of Iran's rights to payment.

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* * * *

. . . The FSIA does not provide methods for the enforcement of judgments against foreign states, only that those judgments may not be enforced by resort to immune property. *See* 28 U.S.C. §§ 1609–1610. Therefore, California law on the enforcement of judgments applies to this suit insofar as it does not conflict with the FSIA. . . .

California enforcement law authorizes a court to "order the judgment debtor to assign to the judgment creditor . . . all or part of a right to payment due or to become due, whether or not the right is conditioned on future developments." Cal. Civ. Proc. Code § 708.510(a). The FSIA abrogates the immunity of all Iranian commercial property in the United States. 28 U.S.C. § 1610(a)(7). Therefore, a right to payment belonging to Iran is assignable only if that right is located in the United States.

A right to payment is intangible. It is difficult to assign a location to property that by definition "lacks a physical existence." *See* Black's Law Dictionary 1233 (7th ed. 1999); *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 371 (5th Cir. 2004). "The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them." *Severnoe Sec. Corp. v. London & Lancashire Ins. Co.*, 174 N.E. 299, 300 (N.Y. 1931) (Cardozo, J.). This is one of those times. To determine the location of an intangible right to payment, we must look to California state law. . . .

In *Philippine Export and Foreign Loan Corp. v. Chuidian*, 267 Cal. Rptr. 457 (Ct. App. 1990), the Court of Appeal of California squarely held that the location of a right to payment, at least for the purpose of applying section 708.510(a) in a suit against a foreign state defendant, is the location of the debtor. Accordingly, a foreign state defendant's rights to payment from third-party debtors are assignable only if those "debtors[] reside in the United States." *Id.* at 481. . . .

CMA CGM is a French corporation, therefore the debt obligation it owes to Iran is located in France. Iran's rights to payment from CMA CGM are not "property in the United States" and are immune from execution. 28 U.S.C. § 1610(a)(7). . . .

* * * *

(iii) Assets of foreign central banks

On November 3, 2010, at the invitation of the court, the United States filed an *amicus curiae* brief in the U.S. Court of Appeals for the Second Circuit in support of reversal of a lower court judgment holding that funds in an account of the Banco Central de la República Argentina ("BCRA") at the Federal Reserve Bank of New York ("FRBNY") were not immune from attachment. *NML Capital Ltd. v. Republic of Argentina*, No. 10-1487-cv(L) (2d Cir. 2010). Under § 1611(b)(1) of the FSIA, "the property of a foreign state shall be immune from attachment and from execution, if—(1) the property is that of a foreign central bank or monetary authority held for its own account." The district court concluded that BCRA was Argentina's alter ego and therefore "it would be entirely anomalous to hold that the funds belonged to BCRA and were 'held for its own account' within the meaning of § 1611."

The court of appeals posed two questions to the United States: "(1) whether República Argentina ("BCRA") is the 'alter ego' of the Republic of Argentina under *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983), and (2) if so, whether the BCRA's assets at the . . . FRBNY . . . are immune from post-judgment attachment under § 1611(b)(1) . . . ." The U.S. brief summarized the government's argument as follows:

> . . . The plain language of § 1611(b)(1), as well as the history and structure of the relevant provisions of the FSIA, all demonstrate that central bank property is immune from attachment without regard to whether the central bank is independent from its parent foreign government. Such immunity should be afforded to any property held by a central bank used for central banking activities. Adopting the cramped view of central bank immunity that the plaintiffs advocate in this appeal would contravene Congress's intent to protect all foreign state property used for central banking functions from attachment or

> execution, and could cause harm to the interests of the United States. Accordingly, the district court's order should be reversed because the district court erred with respect to Question Number 2.
>
> Although it is not necessary for the Court to reach Question Number 1 in order to resolve this appeal, the district court's analysis of the 'alter ego' issue was also flawed. Specifically, the district court erred in relying on the BCRA's alleged involvement in repaying the Republic's debts to the IMF as evidence that the BCRA is the alter ego of the Republic. Should the Court choose to reach this issue on appeal, the United States urges the Court to clarify that the BCRA's involvement in repaying the IMF does not support disregarding the BCRA's separate juridical status.

Gov't brief, *NML Capital Ltd. v. Republic of Argentina*, at 3–4. Additional excerpts below from the U.S. brief set forth the argument that the FRBNY funds are immune from attachment under § 1611(b)(1) regardless of whether the BCRA is the "alter ego" of the Republic of Argentina. (Citations to other submissions in the case are omitted.) The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

ARGUMENT
POINT I
SECTION 1611(b)(1) BARS ATTACHMENT OF THE FRBNY FUNDS
A. Section 1611(b)(1) Applies to the Property of a Foreign State

* * * *

. . . The plain language of § 1611(b)(1), as well as its history and structure, make clear that foreign state property used for central banking activities is immune from attachment or execution without regard to whether the central bank or monetary authority is independent from its parent foreign state.

First and foremost, the plain language of § 1611(b)(1) makes clear that immune property can be *both* the property of a foreign state and *also* the property of its central bank or monetary authority. Section 1611(b)(1) provides that, "[n]otwithstanding the provisions of section 1610 of this chapter, *the property of a foreign state* shall be immune from attachment and from execution if—(1) *the property is that of a foreign central bank* or monetary authority held for its own account . . . ." (emphasis added). The statute thus refers to immune property as both that "of a foreign state" (which, pursuant to the definition of "foreign state" contained in § 1603(a), includes the parent foreign state, a political subdivision of the parent foreign state, or an "agency or instrumentality" of the foreign state) and that "of a foreign central bank." In light of this plain language, it would be wholly incongruous to hold that immunity cannot apply simply because the central bank has been determined to be the alter ego of the foreign state.

Plaintiffs, relying on the fact that the definition of "foreign state" includes state agencies or instrumentalities, argue that the reference to "property of a foreign state" in § 1611(b)(1) encompasses only the property of an independent central bank. Were that the case, however, Congress could have simply provided that "the property of a foreign central bank or monetary authority held for its own account" is immune from execution, without the need for the language in the introductory preamble regarding "the property of a foreign state." *See Doe v. Chao*, 540 U.S. 614, 630–631 (2004) . . . . Instead, Congress provided that the property can be that of a "foreign state," which, consistent with the FSIA's definitional section (§ 1603(a)), can include the parent foreign government as well as agencies or instrumentalities. Furthermore, if Congress had intended to limit § 1611(b)(1) to independent central banks, one would have expected the introductory language of the subsection—"Notwithstanding the provisions of section 1610 of this chapter"—to refer only to § 1610(b), which provides for execution or attachment of the property of state agencies and instrumentalities, rather than to § 1610 as a whole. Under the plain language, therefore, § 1611(b)(1) immunizes central bank property without regard to whether it is owned by the foreign state itself or is instead owned exclusively by an independent central bank or monetary authority.

Section 1611(b)(1)'s pairing of immunity for property of a "monetary authority" and property of a central bank further supports the conclusion that a foreign state and its central bank need not be independent of each other for immunity under § 1611(b)(1) to apply. At the time of the FSIA's passage, it was not unusual for monetary functions to be performed by departments of the central government, rather than by independent agencies or instrumentalities. Similarly, at the time the FSIA was enacted, it was commonplace for central banks to be subject to substantial control by foreign governments. . . . This dual focus on monetary authorities and central banks suggests that Congress intended for immunity to apply based on the functions performed by the entity holding the property, rather than on the independence *vel non* of the entity. Plaintiffs' argument is thus at odds with the congressional intent apparent from the face of § 1611(b)(1): there is no reason Congress would have intended to confer immunity on foreign state property held by a department of the state and subject to complete executive control, but not on foreign state property held by a nominally independent entity subject to the same degree of direction and control.

The FSIA's legislative history also supports the conclusion that immunity under § 1611(b)(1) is unrelated to the degree of independence of the central bank or monetary authority. The House Report, in discussing § 1611(b)(1), states that the purpose of the provision is to protect "funds of a foreign central bank . . . deposited in the United States," because "execution against the *reserves of a foreign state* could cause significant foreign relations problems." H.R. Rep. No. 94-1487, at 25 (1976) (emphasis added), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630 (quoted in *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 473 (2d Cir. 2007)). Although foreign reserves are frequently under the direct control of central banks, they are also, in a general sense, the property of the foreign state. Congress recognized this in the House Report by speaking of foreign reserves as the property "of a foreign state" as well as "funds of a foreign central bank." By referring to the property of a foreign state and the property of a central bank interchangeably, Congress indicated its understanding that central bank property could be viewed as the property of a foreign state, and nonetheless be immune from attachment.

That understanding is consistent with historical practice as well. Notably, shortly before the enactment of the FSIA, the State Department recognized an immunity claim for foreign reserve assets that were under the direction and control of the foreign state. *See* 1973 Digest of U.S. Int'l Law 227–28 (describing July 24, 1973, letter from Department of State Acting Legal Adviser Charles N. Brower to Department of Justice, requesting the filing of a suggestion of immunity in *Battery Steamship Corp. v. Republic of Viet-Nam*, No. C-72-1440 (N.D. Cal.)). In *Battery Steamship*, the plaintiff sought to attach foreign exchange reserves of the Republic of Vietnam, which were periodically used to pay "debts of the Republic of Viet-Nam to other governments," as well as for other purposes. *Id.* at 227. The State Department's Acting Legal Adviser suggested that the funds would be protected from execution under a draft bill that was substantially identical to the provision ultimately enacted by Congress and codified at 28 U.S.C. § 1611(b)(1), and expressed concern about the negative consequences if foreign states or their monetary authorities were to withdraw their official reserves from U.S. banks. *Id.* at 228–29. This incident lends support to the conclusion that the FSIA sought to immunize the property of foreign states used for central banking functions such as holding foreign exchange reserves, without regard to whether the property was subject to the direction and control of the foreign state.

Plaintiffs suggest that recognizing immunity for central bank assets subject to direction or control by a foreign state would discourage the development of independent central banks. But those were not the concerns animating Congress in enacting § 1611(b)(1). Congress wanted to ensure that execution could not be levied against funds used or held in connection with central banking activities, which might "discourage[]" foreign governments from depositing their foreign funds in the United States. *See EM*, 473 F.3d at 473; H.R. Rep. No. 94-1487, at 25, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630. If the immunity afforded to central bank property were weakened, foreign governments might withdraw reserves from the United States, which could have an immediate and adverse impact on the U.S. economy and global financial system. Reduction of these reserves could result in a substantial

deterioration in the United States' balance of payments. And because foreign reserves are frequently invested in U.S. government securities, withdrawal of those reserves could cause U.S. interest rates to rise as government securities were sold. Moreover, any sharp movement of central bank reserves would likely cause significant currency flow away from the U.S. dollar and into other currencies, which could have an unsettling effect on foreign exchange markets. In addition, Congress wanted to avoid the adverse foreign-relations consequences that might arise from attaching sovereign funds. These are the concerns underlying § 1611(b)(1)—not central bank independence—and they are implicated whenever a plaintiff tries to execute on central bank funds in the United States that are being used for a sovereign purpose, regardless of whether the central bank is independent of the parent government or the funds might be considered the foreign state's property.

* * * *

B. Immunity Under § 1611(b)(1) Should Apply to Funds Used or Held in Connection with Central Banking Activities

* * * *

Section 1611(b)(1) was enacted to permit central banks and monetary authorities to engage in core sovereign banking and monetary activities without fear that the funds used for those activities will be attached by judgment creditors of the foreign state. *See* H.R. Rep. No. 94-1487, at 25, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630 (explaining purpose of § 1611(b)(1) is to protect central bank funds "used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states"). . . .

In addition, the purpose of foreign sovereign immunity is, in part, to shield foreign states and their instrumentalities from the burdens of litigation. . . .

Accordingly, a plaintiff seeking to execute against central bank property should be required to make a threshold showing of non-immunity before a court requires the central bank to provide discovery regarding its activities. In particular, where funds are held in an account in the name of a central bank, the funds should be

presumed to be immune under § 1611(b)(1). Before a court allows a plaintiff to rebut that presumption (or involve the central bank in potentially burdensome discovery), a plaintiff should be required to allege specific facts giving rise to a reasonable inference that the funds are not being used for central banking functions. *See* H.R. Rep. No. 94-1487, at 25, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630 (distinguishing between funds used for central banking activities and funds "used *solely* to finance the commercial activities of other entities or of foreign states" (emphasis added)).

In this case, the record establishes that the funds sought to be attached are immune under § 1611(b)(1). As a threshold matter, it is undisputed that the funds are held in an account in the name of the BCRA. . . . [T]he funds that plaintiffs seek to attach are the property of a central bank for purposes of § 1611(b)(1).

The extensive factual record demonstrates that the presumption that such property is "held for [a central bank's] own account" cannot be rebutted in this case—the uses to which the FRBNY funds were put are central banking activities and therefore fall squarely within the zone of activities that Congress intended to protect. . . .

Finally, the plaintiffs err in suggesting that the BCRA's active role in repaying the IMF, including its transfer of some of its excess reserves to repay the Republic's debt, was an appropriate basis to hold § 1611(b)(1) inapplicable. As an initial matter, this Court has already acknowledged that the funds sought to be executed against were not used to repay the IMF. *EM*, 473 F.3d at 484–85 (holding that FRBNY funds were not used for repayment of the IMF, and therefore not "used for" commercial activities within meaning of § 1610(a) and (d)). Before a district court may order execution under the FSIA, the court must make a determination that the use of the property at that time renders it subject to execution under the FSIA. *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009). Accordingly, the IMF debt repayment is not relevant to the inquiry of whether § 1611(b)(1) applies.

In any event, repayment of IMF debt is within the scope of typical central banking activities. The IMF is a multi-national sovereign lender of last resort, and central banks routinely pay IMF debts of their foreign state. *EM*, 473 F.3d at 485 n.22 ("[C]entral banks regularly execute transactions with the IMF on behalf of their parent governments; IMF members are required to designate

a fiscal agent for financial transactions with the IMF, and the vast majority of members designate their respective central banks."). Furthermore, the United States and the international community rely on the IMF as a key source of support for foreign states facing financial crises and, for the IMF to play its lending role effectively, it must be able to expect timely and complete payments from its borrowers. Central banks frequently play an important role in their parent governments' relationships with the IMF, and it would be highly problematic—and contrary to the interests of the United States—for a U.S. court to rely on a foreign central bank's repayment of debt to the IMF as a basis for finding that the foreign central bank's property is not entitled to immunity under the FSIA. Accordingly, even if the FRBNY funds had been used to pay the IMF, that use would still be a central banking activity and would not remove the funds from the protections of § 1611(b)(1).

* * * *

c. In rem *action*

See Chapter 12.A.7.

d. Service of process

Section 1608(a) of the FSIA provides four methods of service of process on a foreign state:

> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
>
> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
>
> (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring

a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

This section discusses a selection of cases in 2010 in which the interpretation of FSIA § 1608(a) was at issue.

(1) *Service requirements in post-judgment actions:* Peterson v. Iran

In *Peterson v. Islamic Republic of Iran*, discussed in c.2.(i) and (ii) *supra*, the U.S. Court of Appeals for the Ninth Circuit also held that "[t]he district court erred in concluding that it could not enforce the plaintiffs' assignment motion because they had not complied with the FSIA's service requirements." *Peterson*, 627 F.3d. at 1130. In so holding, the court disagreed with the view the United States expressed in its 2009 brief in support of affirmance, which argued that the plaintiffs should have provided Iran meaningful notice not only of the original default judgment but also of the post-judgment motions, that the FSIA provides a helpful model for what constitutes adequate service on a foreign state, and that in this case the notice provided to Iran had been inadequate. The Ninth Circuit stated, "The FSIA is quite clear what a plaintiff must serve on a foreign state before a court may enforce a default judgment against that state: the default judgment. Service of post-judgment motions is not required." *Id.* at 1129.

(2) *Differences between service under the Hague Service Convention and under the FSIA:* Sabbithi v. Al Saleh

On September 15, 2010, at the request of the court, the United States submitted a second Statement of Interest in the U.S. District Court for the District of Columbia, addressing the service of process issues raised in a case brought against a Kuwait diplomat, his spouse, and the Republic of Kuwait by the individual defendants' former domestic servants. *Sabbithi v. Al Saleh*, Civil Action No. 07-115 (EGS). *See Digest 2009* at 378–81 for background. The Statement of Interest addressed the two questions posed by the court: (1) "whether service on a foreign state . . . through diplomatic channels, which was intended to comply with . . . 28 U.S.C. § 1608(a)(4), may qualify as service on a foreign state in accordance with Article 9 of the Hague Convention . . . , within the meaning of . . . 28 U.S.C. § 1608(a)(2)"; and (2) whether "allowing a party to serve a foreign state through diplomatic channels pursuant to Article 9 of the Hague Convention would conflict with long-standing Department of State policy regarding when a party may avail itself of service of process through diplomatic channels." Statement of Interest, *Sabbithi v. Al Saleh*, at 5 (citation omitted).

The Statement of Interest described the relevant facts and procedural history of the litigation as follows:

> . . . The record indicates that, in March 2007, Plaintiffs attempted to satisfy the second method—service in accordance with an applicable international convention, 28 U.S.C. § 1608(a)(2)—by delivering a copy of the summons and complaint to Kuwait's Ministry of Justice, the designated Central Authority under Articles 2 through 6 of the Hague Convention. However, the summons had not been executed by the Clerk of Court. In December 2007, Plaintiffs attempted to satisfy the fourth method—service through diplomatic channels, *id.* § 1608(a)(4)—by transmitting the service papers, including a properly executed summons, to the Department of State, which forwarded them to Kuwait's Ministry of Foreign Affairs via diplomatic channels in August 2008.

> The Court initially granted Kuwait's motion to dismiss, concluding that Plaintiffs' attempt to satisfy § 1608(a)(2) failed because they had not included a properly executed summons and, therefore, they were not yet entitled to attempt service pursuant to § 1608(a)(4). *Sabbithi v. Al Saleh*, 623 F. Supp. 2d 93, 98 (D.D.C. 2009). On Plaintiffs' motion for reconsideration, the Court vacated that decision and held that service through diplomatic channels—although intended to satisfy § 1608(a)(4)—in fact satisfied § 1608(a)(2) because it constituted service in accordance with Article 9 of the Hague Convention. . . .

Id. at 4. Excerpts below from the U.S. Statement of Interest address the differences in the service of process requirements of the FSIA and of the Hague Convention and explain why, in the United States' view, the plaintiffs were incorrect in arguing that "service via diplomatic channels that was intended to satisfy § 1608(a)(4) also satisfies § 1608(a)(2)." *Id.* at 5. The excerpts below also summarize the U.S. response to the court's second question. The full text of the Statement of Interest is available at *www.state.gov/s/l/c8183.htm*. For additional discussion of service of process issues relating to the Hague Convention, see Chapter 15.C.5.

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* * * *

DISCUSSION

I. SERVICE VIA DIPLOMATIC CHANNELS UNDER § 1608(a)(4) CANNOT BE CONSIDERED SERVICE IN ACCORDANCE WITH AN APPLICABLE INTERNATIONAL CONVENTION UNDER § 1608(a)(2)

* * * *

When service papers are transmitted through diplomatic channels under § 1608(a)(4), service is deemed effective "as of the date of transmittal indicated in the certified copy of the diplomatic note." 28 U.S.C. § 1608(c)(1). In other words, service is complete upon transmittal of the diplomatic note to the Ministry of Foreign Affairs of the destination state, without regard to whether the

foreign state certifies receipt of service or, indeed, even accepts delivery of the diplomatic note.

By contrast, under Articles 2 through 6 of the Hague Convention, service is not complete upon the mere delivery of a proper request for service to the Central Authority. Rather, under Article 5, the Central Authority must attempt to serve the documents (or have them served) on the addressee in accordance with its internal laws (or by another method designated by the applicant, if compatible with those laws). *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698–99 (1988) (citing Hague Convention art. 5). And under Article 6, the Central Authority must forward the applicant a certificate stating where, when, and upon whom the document ultimately was served. *See id.* (citing Hague Convention art. 6). Consistent with the Convention, under the FSIA, service is deemed effective as of the date indicated in that certificate. *See* 28 U.S.C. § 1608(c)(2) . . . .

Similarly, under Article 9 of the Convention, service is not automatically complete upon delivery of the diplomatic note to the Ministry of Foreign Affairs of the destination state. Rather, the first paragraph of Article 9 authorizes the use of consular channels to forward documents to the designated authority of another Contracting State, which is then responsible for effecting service. *See* Hague Convention art. 9(1) . . . . The second paragraph of Article 9 then authorizes the use of diplomatic channels "for the same purpose"—that is, for forwarding documents to the designated authority to effect service. *See id.* art. 9(2). Thus, when diplomatic channels are used, the documents are first forwarded to the destination state's Ministry of Foreign Affairs, which forwards them to the designated authority. It is the designated authority that is ultimately responsible for effecting service on the addressee in accordance with local law. . . . Kuwait has designated its Ministry of Justice as the competent authority responsible for serving documents under Article 9.

* * * *

Thus, although there is a superficial similarity between 28 U.S.C. § 1608(a)(4) and Article 9 of the Hague Convention—in that both contemplate the use of diplomatic channels to effect

service—the elements that must be satisfied to complete service under these provisions differ significantly. . . .

Here, although the record indicates that a diplomatic note was transmitted to Kuwait's Ministry of Foreign Affairs, there is no indication that further steps were taken to effect service. Therefore, there is no basis on the current record to conclude that service has been effected under Article 9 of the Hague Convention.

II. PERMITTING SERVICE VIA DIPLOMATIC CHANNELS UNDER § 1608(a)(4) TO SATISFY § 1608(a)(2) WOULD CONFLICT WITH DEPARTMENT OF STATE POLICY

In view of the hierarchical structure of the FSIA, which reserves diplomatic channels as a method of last resort for service on a foreign state, and the general availability of service through established Central Authorities under the Hague Convention, the Department of State does not use diplomatic channels under Article 9 to forward documents for service under § 1608(a)(2). Rather, when a foreign state is a party to the Convention, plaintiffs generally must send requests for service on that state to its Central Authority, in accordance with the procedures laid out in Articles 2 through 6.

This is reflected in Department of State policy, which provides that a request for service through diplomatic channels under § 1608(a)(4) will not be processed without "a *statement in writing* from the plaintiff or the clerk certifying that . . . attempts [at service under §§ 1608(a)(1), (2), and (3)] were made or were otherwise not applicable." U.S. Dep't of State, *Checklist for Plaintiffs: Service of Process upon a Foreign State*, available at http://travel.state.gov/law/ judicial/judicial_685.html (last visited Sept. 15, 2010). Accordingly, the Department would not process a request for service through diplomatic channels under Article 9 that was intended to satisfy § 1608(a)(2), and deeming such service effective here would conflict with that policy.

* * * *

It would not conflict with Department of State policy, however, to allow Plaintiffs another opportunity to forward a request for service with a properly executed summons to the Central Authority and, if service is refused, to permit them to resubmit their request for service through diplomatic channels pursuant to § 1608(a)(4).

2. Foreign Officials

On June 1, 2010, the Supreme Court affirmed the judgment of the U.S. Court of Appeals for the Fourth Circuit in a case that a group of Somalis brought under the Alien Tort Claims Act ("ATCA" or "ATS") and the Torture Victim Protection Act ("TVPA") against Mohamed Ali Samantar, a former Somali Prime Minister and Defense Minister. *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). As the Court explained, the respondents "allege[d] that petitioner exercised command and control over members of the Somali military forces who tortured, killed, or arbitrarily detained them or members of their families; that petitioner knew or should have known of the abuses perpetrated by his subordinates; and that he aided and abetted the commission of these abuses." *Samantar v. Yousuf*, 130 S. Ct. at 2282. The Court held that the FSIA does not apply to individual foreign government officials and therefore Samantar is not immune from suit under the FSIA. *Id.* at 2292. Stressing "the narrowness of [its] holding," the Court remanded for the district court to consider whether Samantar might be entitled to immunity under common law or might assert other defenses. *Id.* at 2293.

In so holding, the Court agreed with the position of the United States in its *amicus curiae* brief on the merits filed at the Court's request on January 27, 2010. In its brief in support of affirmance of the Fourth Circuit's judgment, the government argued that "principles articulated by the Executive Branch, not the FSIA, properly govern the immunity of foreign officials from civil suit for acts in their official capacity." Gov't brief, *Samantar v. Yousuf*, at 6. The U.S. brief is set forth below (apart from the front matter) and is also available at *www.justice.gov/osg/briefs/2009/3mer/1ami/2008-1555.mer.ami.pdf*. (Citations to the petition, other submissions in the case, and the Joint Appendix, as well as internal cross references are omitted.) The United States also participated in oral argument as *amicus curiae* on March 3, 2010.

INTEREST OF THE UNITED STATES

This case presents the question whether the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, governs the immunity from suit of officials of foreign governments acting in their official capacity. At the Court's invitation, the United States recently filed a brief as amicus curiae addressing this question. See U.S. Amicus Br., *Federal Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009) (No. 08-640) (08-640 U.S. Br.). The United States condemns grave human rights abuses of the kind alleged in the complaint in this case, and it has a strong foreign policy interest in promoting the protection of human rights. In addition, the general question of the amenability of foreign officials to suit has significant implications for the reciprocal treatment of United States officials and for our Nation's foreign relations.

STATEMENT

1. For much of our Nation's history, principles adopted by the Executive Branch, which were binding on the courts, determined the immunity of foreign states and their officials in civil suits in courts of the United States. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34–36 (1945). In 1976, Congress enacted the FSIA, which now provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a United States court. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434–435 (1989). Under the FSIA, foreign states and their agencies and instrumentalities are "presumptively immune" unless a claim falls within one of the statute's specified exceptions. *Permanent Mission of India to the U.N. v. City of N.Y.*, 551 U.S. 193, 197 (2007) (*Permanent Mission*); 28 U.S.C. 1604. The exceptions permit, *inter alia*, certain actions against a foreign state that arise out of its commercial activities, 28 U.S.C. 1605(a)(2), and certain torts committed in the United States, 28 U.S.C. 1605(a)(5). Congress later amended the Act to include a specific exception for claims of torture, extrajudicial killing, and other terrorism-related acts if the foreign state has been designated as a state sponsor of terrorism, 28 U.S.C. 1605A(a).[1]

[1] Congress enacted a prior version of the terrorism exception in 1996. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132,

2. Respondents are natives of Somalia, several of whom are now citizens of the United States. They brought this suit against petitioner under the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1350 note), and the Alien Tort Statute (ATS), 28 U.S.C. 1350. Petitioner is a former high-ranking official of the Barre regime in Somalia, which took power in a 1969 coup. Respondents allege that in the 1980s, they or their family members were subjected to systematic torture, extrajudicial killing, and other atrocities by military and intelligence agencies of the governing Supreme Revolutionary Council in Somalia, which targeted the clan to which respondents belong.[2] Respondents further allege that petitioner exercised command and effective control over agents of the Somali government during his tenure as Minister of Defense from 1980 to 1986, and as Prime Minister from 1987 to 1990. Respondents assert that petitioner is liable for compensatory and punitive damages because he knew or should have known about, and tacitly approved, the abuses allegedly committed by the government agents, and conspired with or aided and abetted those personnel in committing those wrongs.

In January 1991, armed opposition factions drove the Barre regime from power, resulting in the complete collapse of Somalia's central government. Bureau of African Affairs, U.S. Dep't of State, *Background Note: Somalia* (Jan. 2010) <http://www.state.gov/r/pa/ei/bgn/2863.htm> (*Background Note*). Respondents allege that in the wake of the government's collapse, petitioner fled the country, and has been living in Virginia since 1997. Although the United

§ 221(a)(1)(C), 110 Stat. 1241 (28 U.S.C. 1605(a)(7) (Supp. II 1996)). In 2008, Congress repealed that provision and enacted an amended terrorism exception. National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, sec. 1083(a)(1), § 1605A, 122 Stat. 338 (to be codified at 28 U.S.C. 1605A (Supp. II 2008)); NDAA § 1083(b)(1)(A)(iii), 122 Stat. 341; see *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2186–2187 (2009). All references to 28 U.S.C. 1605A are to that section as it will be codified in Supplement II (2008).

[2] At the time, the State Department documented massive human rights violations by the Somali government. *See*, *e.g.*, Staffs of the House Comm. on Foreign Affairs & the Senate Comm. on Foreign Relations, 101st Cong., 2d Sess., *Country Reports on Human Rights Practices for 1989*, at 321–326 (Joint Comm. Print 1990) (prepared by Dep't of State).

States recognized the Barre regime, since the fall of that government, the United States has not recognized any entity as the government of Somalia.[3] *Background Note*.

3. Petitioner filed a motion to dismiss the complaint, contending that he is immune from this suit under the FSIA, and that the district court accordingly lacked subject-matter jurisdiction. Respondents did not contend that their suit came within any of the FSIA's exceptions to immunity. Instead, they argued that petitioner was not immune because his alleged actions violated international human rights law and so were outside the scope of his official authority.

The district court rejected that contention. It observed that respondents' complaint alleged that petitioner acted in his capacity as Defense Minister or Prime Minister of Somalia. The court also accorded "great weight" to the representation by the Somali Transitional Federal Government (TFG)—which the court incorrectly described as "supported by and recognized by the United States as the governing body in Somalia"—that petitioner's alleged actions were taken in his official capacities. The district court therefore concluded that the FSIA conferred immunity on petitioner.

4. The court of appeals reversed and remanded. The court first considered petitioner's argument that the FSIA, which governs the immunity of a "foreign state" and any "agency or instrumentality" of the state, see 28 U.S.C. 1603(a), provides immunity to foreign officials from personal damage actions because the officials are instrumentalities of the state. The court rejected that argument, reasoning that Section 1603(b) defines an "agency or instrumentality" to include only corporate and other legal entities, not natural persons. The court found support for that conclusion in the

[3] Following the collapse of the Barre regime, reconciliation conferences among warring Somali factions have resulted in the creation of a transitional Somali government, the Transitional Federal Government (TFG). See *Background Note*. The United States supports the efforts of the TFG to establish a viable central government, see Hillary Rodham Clinton, Secretary of State, *Remarks with Somali Transitional Federal Government President Sheikh Sharif Sheikh Ahmed* (Aug. 6, 2009) <http://www.state.gov/secretary/rm/2009a/08/126956.htm>, but does not recognize the TFG as the sovereign government of Somalia. The United States does continue to recognize the State of Somalia.

structure and legislative history of the FSIA. The court therefore held that "the FSIA does not apply to individuals and, as a result, [petitioner] is not entitled to immunity under the FSIA."[4]

The court further concluded that even if the FSIA did apply to individual foreign officials, it would provide immunity only for individuals who were state officials at the time suit was brought. The court relied on *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), which held that because Section 1603(b) uses the present tense in describing the necessary attributes of an "agency or instrumentality," the entity in question must satisfy Section 1603(b)'s requirements at the time the suit is filed.

The court of appeals therefore reversed the district court's dismissal of the action based on the FSIA, and remanded for the district court to consider petitioner's contention that he is immune from suit under common law immunity principles, as well as the other issues raised by petitioner.

SUMMARY OF ARGUMENT

In the view of the United States, principles articulated by the Executive Branch, not the FSIA, properly govern the immunity of foreign officials from civil suit for acts in their official capacity.

I. Throughout the Nation's history, the Executive and Judicial Branches have recognized that a foreign state is usually immune from suit in United States courts. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). In light of the potentially significant foreign relations consequences of subjecting another sovereign state to suit, courts traditionally deferred to the Executive Branch's judgment whether the foreign state should be accorded immunity in a given case. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). These Executive Branch principles, which are informed by customary international law and practice, similarly included the recognition that both current and former officials of a foreign state usually enjoy immunity for acts

[4] Respondents also argued that the FSIA was inapplicable because Somalia currently does not exist in a form that could qualify it as a "foreign state" for purposes of the FSIA. In light of its conclusion that the FSIA does not govern claims of immunity by individual foreign officials, the court of appeals did not address that issue.

undertaken in their official capacity. See, *e.g.*, *Underhill v. Hernandez*, 65 F. 577, 579–580 (2d Cir. 1895), aff'd, 168 U.S. 250 (1897).

Enacted against this backdrop, the FSIA sets forth a general rule of immunity for a "foreign state." 28 U.S.C. 1604. The FSIA makes no reference to the immunity of individual foreign officials, and its text, structure and legislative history demonstrate that Congress did not intend the FSIA to govern such determinations or to displace Executive Branch principles governing the immunity of current and former officials. Particularly because the historical practice of deferring to the Executive's determinations as to immunity arose out of the Executive's traditional prerogative with respect to the sensitive diplomatic and foreign-policy judgments implicated by immunity questions, the FSIA should not be read to have altered that practice *sub silentio*. Therefore, foreign officials' immunity continues to be governed by the generally applicable principles of immunity articulated by the Executive Branch.

That conclusion derives additional support from the complexity of certain official immunity determinations, which could not be accommodated under the rigid statutory framework of the FSIA. In this case, for example, the Executive reasonably could find it appropriate to take into account petitioner's residence in the United States rather than Somalia, the nature of the acts alleged, respondents' invocation of the statutory right of action in the TVPA against torture and extrajudicial killing, and the lack of any recognized government of Somalia that could opine on whether petitioner's alleged actions were taken in an official capacity or that could decide whether to waive any immunity that petitioner otherwise might enjoy. It is unlikely that Congress, in enacting the FSIA, intended to divest the Executive of the ability to evaluate complex considerations like these in deciding whether to recognize a foreign official's immunity.

II. If this Court should hold, contrary to our view, that the FSIA governs the immunity of foreign officials, that holding should not serve to strip former officials of their immunity. Nothing in the FSIA suggests that Congress intended to accord immunity to current officials but not former officials. The grounds of the Court's decision, however, will determine whether the immunity of former officials derives from the FSIA itself or from background common law principles. Again assuming that the Court holds that the FSIA

plays any role in questions of official immunity, the Court should select the theory—resting on the "agency or instrumentality" language on the FSIA, 28 U.S.C. 1603(a)—that allows most room for these principles of Executive judgment to operate. Under either theory, a remand would be required to apply the relevant standards and determine whether petitioner has immunity.

ARGUMENT

I. PRINCIPLES ADOPTED BY THE EXECUTIVE BRANCH, INFORMED BY CUSTOMARY INTERNATIONAL LAW, GOVERN THE IMMUNITY OF FOREIGN OFFICIALS ACTING IN THEIR OFFICIAL CAPACITY

A. The Foreign Sovereign Immunities Act Was Enacted Against The Backdrop Of Judicial Deference To Suggestions And Principles Of Immunity Articulated By The Executive Branch For Foreign States And Foreign Officials

1. The United States has long adhered to the principle that foreign states are generally immune from suit in our courts. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137. Wrongs perpetrated by foreign sovereigns have been recognized as ordinarily appropriate "for diplomatic, rather than legal," resolution. *Id.* at 146. In light of the potentially significant foreign relations consequences of subjecting another sovereign state to suit in our courts, the Court historically looked to "the political branch of the government charged with the conduct of foreign affairs" to determine whether immunity should be recognized. *Hoffman*, 324 U.S. at 34.

The Executive Branch traditionally provided the judiciary with suggestions of immunity, based on the Executive Branch's judgments regarding customary international law and reciprocal practice. *Verlinden*, 461 U.S. at 487; see, *e.g.*, *Ex parte Peru*, 318 U.S. 578, 589 (1943). When the Executive Branch made no specific recommendation, the courts decided the immunity question "in conformity to the principles" the Executive Branch had previously articulated. See *Hoffman*, 324 U.S. at 35.

Until 1952, the Executive Branch followed a theory of absolute foreign sovereign immunity. Under that doctrine, "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign," regardless of the nature of the acts alleged to

have been committed. *Permanent Mission*, 551 U.S. at 199 (quoting Letter from Acting Legal Adviser Tate to Acting Attorney General Perlman (1952) (*Tate Letter*), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 App. (1976)). In 1952, the State Department adopted the "restrictive" theory of foreign sovereign immunity, under which foreign states are afforded immunity only for their sovereign or public acts, and not for their commercial or other private acts. See *Dunhill*, 425 U.S. at 698; *id*. App. at 711 (*Tate Letter*); see also *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir.) (deferring to Executive's determination that alleged conduct was "of a public, as opposed to a private/commercial, nature," and therefore state was immune), cert. denied, 404 U.S. 985 (1971). After 1952, the Executive Branch relied upon the restrictive theory to inform its suggestions of immunity, and courts applied the restrictive theory when the Executive did not express its views.

2. The United States also has recognized the immunity of individual foreign officials "from suits brought in [United States] tribunals for acts done within their own States, in the exercise of governmental authority." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The Executive asserted that position on several occasions early in the Nation's history. See, *e.g.*, *Suits Against Foreigners*, 1 Op. Att'y Gen. 45, 46 (1794) ("[I]f the seizure of the vessel is admitted to have been an official act, done by the defendant * * *, [that] will of itself be a sufficient answer to the plaintiff's action."); *Actions Against Foreigners*, 1 Op. Att'y Gen. 81, 81 (1797) ("[A] person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States.").

The courts too have long recognized foreign official immunity in a variety of contexts. See, *e.g.*, *The Schooner Exchange*, 11 U.S. (7 Cranch) at 138; *Jones v. Le Tombe*, 3 U.S. (3 Dall.) 384, 385 (1798) ("[T]he contract was made on account of the government * * * and therefore, there was no cause of action against the present defendant."). As in suits against foreign states, the courts traditionally deferred to the Executive Branch's judgment whether an official should be accorded immunity in a given case, see, *e.g.*, *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841,

at *1–*2 (S.D.N.Y. Nov. 23, 1976); *Waltier v. Thomson*, 189 F. Supp. 319, 320–321 (S.D.N.Y. 1960), and applied the principles articulated by the Executive in cases in which the Executive did not express a position, see *Heaney v. Government of Spain*, 445 F.2d 501, 504–506 (2d Cir. 1971).

The immunity of foreign officials was traditionally not limited to current employees of the foreign government. See, *e.g.*, *Underhill*, 65 F. at 580; *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596, 600 (1876) ("The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity."). That is because the immunity of foreign officials arises from the official character of their acts.[5] See *ibid.* (Immunity "springs from the capacity in which the acts were done, and protects the individual who did them."). The Executive Branch has therefore recognized that the immunity enjoyed by a foreign official generally survives his departure from office. Affording former officials residual immunity from civil suits based on actions in their official capacity is consistent with customary international law. See, *e.g.*, Vienna Convention on Diplomatic Relations (VCDR), *done* Apr. 18, 1961, art. 39(2), 23 U.S.T. 3227, 3245; *Report of the International Law Commission on the Work of its Forty-Third Session* at 25, U.N. Doc. A/46/10(Supp.) (Sept. 1, 1991) (Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property). It also promotes the United States' interests in comity with other nations. See *The Schooner Exchange*,

[5] Under customary international law, head-of-state immunity is distinct from, and provides greater protection than, the immunity of lower-level foreign officials. See *Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, 21–22. The Executive Branch retains its traditional pre-FSIA authority to suggest the immunity from suit of heads of state and other high officials. See, *e.g.*, *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005). After these high ranking officials leave office, they generally retain residual immunity only for their official acts. See 1 *Oppenheim's International Law* 1043–1044 (Robert Jennings & Arthur Watts, eds., 9th ed. 1996). Respondents have sued petitioner for conduct, in part, when he was Prime Minister of Somalia, and the court of appeals remanded in part to permit the district court to consider petitioner's claim of head-of-state immunity. That issue is not before the Court.

11 U.S. (7 Cranch) at 137; *Hatch*, 14 N.Y. Sup. Ct. at 600; see also *Boos v. Barry*, 485 U.S. 312, 323–324 (1988).[6]

As petitioner notes, the basis for recognizing the immunity for current and former foreign officials is that "the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers." *Underhill*, 65 F. at 579. But petitioner is incorrect to extrapolate from that principle the conclusion that a suit against a foreign official is invariably equivalent to a suit against the foreign state itself.

Suits like this one "seek to impose individual liability upon a government officer," not the state itself. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). They seek damages against the individual personally, not against the foreign state. To be sure, personal damage suits against foreign officials based on actions taken in their official capacity may require the court to sit in judgment of a foreign state's actions, much as in a suit against the state itself. See, *e.g.*, *Greenspan*, 1976 WL 841, at *2; *Jaffe v. Miller*, 13 O.R.3d 745 (1993), *reprinted in* 95 I.L.R. 446. But the remedial, substantive, and prudential concerns raised by suits against officials and suits against the state are not identical.

For this reason, the scope of immunity for foreign officials is not necessarily co-extensive with that of foreign states—and can diverge in either direction. After endorsing the restrictive theory of immunity for foreign states, the Executive Branch has recognized the immunity of foreign officials for their official acts in some circumstances in which the state itself would not be immune. See *Greenspan*, 1976 WL 841, at *2 (Executive suggestion that officials were immune from fraud suit based on state's commercial activities).

[6] The Executive Branch's recognition of foreign official immunity in the civil context does not imply that foreign officials are entitled to immunity in a criminal case brought by the United States. In choosing to prosecute a foreign official, the Executive Branch has necessarily determined that the official is not properly protected by immunity. See, *e.g.*, *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998); cf. *Regina* v. *Bow St. Metro. Stipendiary Magistrate*, [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Eng.) (*Ex parte Pinochet*) (former official not entitled to immunity from criminal liability under the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for torture committed in an official capacity).

Conversely, there are circumstances in which a foreign state would be immune (and indeed potentially not implicated at all) but the individual officer would not be immune, as when the individual acts outside his official capacity.

B. The FSIA Does Not Govern The Immunity Of Foreign Officials From Private Damages Actions

In 1976, Congress enacted the FSIA, which, "[f]or the most part, * * * codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden*, 461 U.S. at 488. By its terms, the FSIA governs the immunity of a "foreign state," 28 U.S.C. 1604, which is defined to "include[]" a "political subdivision" and an "agency or instrumentality" of the foreign state. 28 U.S.C. 1603(a). The FSIA makes no reference to the immunity of individual foreign officials.

Accordingly, as the Solicitor General recently informed this Court, the United States generally recognizes foreign officials to enjoy immunity from civil suits with respect to their official acts, but that immunity is properly founded on non-statutory principles articulated by the Executive Branch, not the FSIA. 08-640 U.S. Br. 6. Because the FSIA does not address the immunity of foreign officials, the FSIA left in place the pre-existing practice of recognizing official immunity in accordance with suggestions of immunity by the Executive Branch.

Petitioner nonetheless argues that the FSIA confers immunity on him as a statutory matter. Petitioner first argues that foreign officials are encompassed within the term "foreign state" because they are agents of the state and their acts constitute the acts of the state itself. Therefore, he continues, wherever the FSIA refers to the "foreign state," that term should be construed to include foreign officials. Petitioner also contends that a foreign official is an "agency or instrumentality" of the state. Neither argument can be reconciled with the text, structure, and legislative history of the FSIA.

1. a. The FSIA sets forth a general rule of immunity of a "foreign state," 28 U.S.C. 1604, without mentioning the immunity of individuals. At the time of the FSIA's enactment, the term "state" had long been understood to refer to a group of people within a defined territory, not to individual officials within that territory. See, *e.g.*, J.L. Brierly, *The Law of Nations* 126 (Humphrey Waldock ed.,

6th ed. 1963) (referring to "a state" as an "institution"); William Edward Hall, *A Treatise on International Law* 17 (A. Pearce Higgins ed., 8th ed. 1924) (state is a "community" that is permanently established for a political end, has a defined territory, and is independent of outside control); Theodore Dwight Woolsey & Theodore Salisbury Woolsey, *Introduction to the Study of International Law* § 36, at 34 (6th ed. 1901) (state is a "community of persons living within certain limits of territory" under an organization). It is therefore unlikely that Congress would have used the term "foreign state" to refer both to the state itself and to the individuals it employs.

b. Indeed, the FSIA's text expressly distinguishes between a "foreign state" and its officials, thereby confirming that Congress did not view the term "foreign state" as including individual officials. In enacting the FSIA, Congress created an exception to foreign sovereign immunity for certain domestic torts, providing that "[a] *foreign state* shall not be immune" in a case "in which money damages are sought against a foreign state for personal injury * * * 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." 28 U.S.C. 1605(a)(5) (emphases added). If Congress believed, as petitioner argues, that "individual agents of a foreign state, when they perform their official duties, *are* the 'foreign state' for purposes of the FSIA," Congress would not have needed to separately mention the acts of a foreign official or employee in Section 1605(a)(5).

When Congress subsequently established another exception to immunity, applicable to claims of torture, extrajudicial killing, and certain other acts of terrorism brought against states designated as state sponsors of terrorism, Congress again differentiated between the state and its officials. Congress there provided that "[a] foreign state" shall not be immune for such acts "engaged in by *an official, employee, or agent of such foreign state* while acting within the scope of his or her office, employment, or agency." 28 U.S.C. 1605A(a)(1) (emphasis added). Petitioner asserts that Section 1605A(a)(1) "creat[es] an exception to individual immunity" that would be unnecessary if officials were not otherwise immune under the FSIA. But the provision expressly abrogates immunity only for

the "foreign state" itself; it does not relate at all to the immunity of individual officials.

Moreover, Section 1605A(c) creates a right of action against "[a] foreign state that is or was a state sponsor of terrorism * * * and any official, employee, or agent of that foreign state while acting within the scope of his or her office." 28 U.S.C. 1605A(c). The absence of any provision in Section 1605A separately addressing the immunity of those individuals—even though Subsection (a) refers to their acts in its abrogation of the *state*'s immunity, and Subsection (c) creates a cause of action against them—reinforces the conclusion that the FSIA does not govern the immunity of those foreign officials to begin with.[7]

c. It also is significant that Section 1603(a)'s definition of "foreign state" specifically "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state," but makes no mention of individual foreign officials. 28 U.S.C. 1603(a). Petitioner nonetheless insists that the "agency or instrumentality" language supports him, seeing that language both as itself encompassing foreign officials, and as demonstrating that Congress intended the term "foreign state" to "include[]" natural persons who are agents of the state. Both arguments are without merit.

Section 1603(b) defines "agency or instrumentality" as an "entity" that satisfies all of the following conditions: (1) it is a "separate legal person, corporate or otherwise"; (2) it is an organ of, or a majority of its shares is owned by, a foreign state or political subdivision; and (3) it is neither "a citizen of a State of the United States as defined in" the corporate-citizenship provisions of 28 U.S.C. 1332(c) and (e), nor an entity "created under the laws of any third country." 28 U.S.C. 1603(b). This definition is replete with terms that are "not usually used to describe natural persons." *Tachiona v. United States*, 386 F.3d 205, 221 (2d Cir. 2004), cert. denied, 547 U.S. 1143 (2006); see *Enahoro v. Abubakar*, 408 F.3d

[7] Contrary to petitioner's argument, the creation of a statutory right of action in Section 1605A(c) against officials as well as the state itself does not suggest that the immunity provisions of the FSIA apply to individuals. See, *e.g.*, *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004) (noting "distinction * * * between statutory provisions that waive sovereign immunity and those that create a cause of action").

877, 881 (7th Cir. 2005), cert. denied, 546 U.S. 1175 (2006). Thus, contrary to petitioner's arguments, the statutory definition makes clear that Congress intended Section 1603(b) to reach only corporate and other organizational entities, not individual foreign officials. See *Patrickson*, 538 U.S. at 474 (Section 1603(b) indicates that "Congress had corporate formalities in mind.").

Petitioner further contends, however, that even if "agency or instrumentality" does not encompass natural persons, Section 1603(a)'s use of the term "includes" indicates that Congress intended to define "foreign state" broadly, to include not only "agenc[ies]" and "instrumentalit[ies]," but also individual "agents" and any "other means through which nations necessarily act." As petitioner notes, the term "includes" can connote "an illustrative application of the general principle." *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99–100 (1941). But that does not mean that Section 1603(a) is devoid of any limiting principle. Under the canon of *noscitur a sociis*, "a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Here, the categories expressly included within the definition of "foreign state"—political subdivisions, agencies, and instrumentalities—are all entities that are created by, or are a part of, the state. None are natural persons. This focus demonstrates that Congress intended to limit the term "foreign state" to the state itself and the non-natural entities that it creates. See *Enahoro*, 408 F.3d at 881–882 ("If Congress meant to include individuals acting in their official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms."). Petitioner's reading would thus expand Section 1603(a) well beyond its natural and intended scope. See *Jarecki*, 367 U.S. at 307.

2. The FSIA's legislative history confirms that Congress did not intend to supplant existing principles regarding the immunity of foreign officials, as opposed to foreign states. The House Report emphasizes that the FSIA was not "intended to affect either diplomatic or consular immunity." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976) (*FSIA Report*). In discussing Section 1605(a)(5)—which excepted certain torts committed by the state or its officials from immunity, and was the only contemporaneously enacted

provision that mentioned foreign officials—the *FSIA Report* reiterated that the FSIA would "deal[] only with the immunity of foreign states and not its diplomatic or consular representatives." *FSIA Report* 21.[8]

Congress thus assumed that existing law would continue to govern the immunity of those officials. See *FSIA Report* 8 (contrasting "diplomatic immunity (which is drawn into issue when an individual diplomat is sued)" with "sovereign immunity," which applies to "foreign state[s]"). In particular, the *FSIA 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.

The legislative history also confirms that Congress had corporations and not natural persons in mind when it defined "agency or instrumentality." The *FSIA Report* explains that "[a]s a general matter, entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name." *FSIA Report* 15–16. No natural person appears in the list of examples. In addition, in discussing an amendment to the venue statute addressing suits "against an agency or instrumentality of a foreign state as defined in section 1603(b)," 28 U.S.C. 1391(f)(3), the *FSIA Report* explains (at 32) that the amendment "is based on 28 U.S.C. 1391(c)," the provision regarding venue in suits against corporations. Congress made no reference to the provision for venue of suits against individuals.

3. The legislative history of the TVPA, enacted in 1992, does contain a discussion of the FSIA and its potential application to

[8] Hearing testimony also underscored the FSIA's inapplicability to foreign officials. See *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 16 (1973) (statement of Bruno Ristau, U.S. Dep't of Justice) ("[W]e are not talking * * * in terms of permitting suit against the Chancellor of the Federal Republic [of Germany]. * * * That is an altogether different question.").

individual officials, but that history does not compel any different result. In the TVPA, Congress created a right of action against individuals alleged to have committed torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." TVPA § 2(a), 106 Stat. 73. The TVPA's legislative history indicates that the Senate Judiciary Committee believed that the TVPA would not affect traditional diplomatic or head-of-state immunities but, consistent with longstanding principles, that these immunities would not protect such officials after they left office. See S. Rep. No. 249, 102d Cong., 1st Sess. 7–8 (1991) (*TVPA Report*). In addition, the House and Senate Committees appeared to assume, consistent with the Ninth Circuit's then-recent decision in *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990), that the FSIA would govern the determination of immunity for other foreign officials while in office and for all former foreign officials. *TVPA Report* 8 (citing 28 U.S.C. 1603(b), which defines "agency or instrumentality" of the foreign state, as providing the basis for official immunity); H.R. Rep. No. 367, 102d Cong., 1st Sess. Pt. 1, at 5 (1991).[9] That apparent assumption, however, was incorrect. As noted above, the text, structure and legislative history of the FSIA as originally enacted demonstrate that Congress did not intend the FSIA to govern individual officials' immunity. Against that background, the assumption of a congressional committee years later, following a single appellate court decision, would be a "hazardous basis for inferring the intent of an earlier Congress" in enacting the FSIA. See *United States v. Texas*, 507 U.S. 529, 535 n.4 (1993) (citation omitted).

[9] The TVPA's legislative history also describes the Senate Committee's understanding of how to decide whether an official covered by the FSIA would have immunity from suit. In the Committee's view, that determination would require the official to prove "an agency relationship to [the] state," which it suggested would require the state to "admit some knowledge or authorization of the relevant acts." *TVPA Report* 8. The Committee further observed that because all states are officially opposed to torture and extrajudicial killing, the FSIA should normally not provide a defense to an action brought under the TVPA against an individual acting "under actual or apparent authority, or color of law, of any foreign nation," TVPA § 2(a), 106 Stat. 73. *TVPA Report* 8.

4. Petitioner contends that Congress must have intended the term "foreign state" to encompass foreign officials, despite the absence of any provision to that effect, because a suit against a foreign official "for actions undertaken on behalf of the state is in reality a suit against the 'foreign state' itself." To be sure, immunity ordinarily attaches when (and because) the individual was acting as an officer of the foreign state. See, *e.g.*, *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918); *Underhill*, 65 F. at 579. But it does not follow that Congress must have treated suits against individual foreign officials identically to suits against foreign states. To the contrary, if Congress intended the FSIA to govern the amenability to suit of foreign officials, it likely would have addressed a number of issues raised by such suits. Yet the statute does not do so.

First, as noted earlier, the scope of immunity that individual foreign officials enjoy under traditional principles can be either more or less extensive than the immunity of the state itself. In some circumstances, individual immunity will be narrower. For example, a foreign state is entitled to immunity for any acts unless one of the FSIA's exceptions applies, 28 U.S.C. 1604, but officials are usually immune only for acts taken in their official capacity. Conversely, the Executive Branch has on occasion suggested the immunity of a foreign official even when the state would lack immunity for the same conduct. See *Greenspan*, 1976 WL 841, at *2 (official immunity for commercial activities). That would be the case, for example, when a suit falls within one of the exceptions to foreign sovereign immunity for contractual or other commercial activities or expropriations, see 28 U.S.C. 1605(a)(2) and (3), and a state, but not an individual, is appropriately held liable for the potentially huge monetary sums at stake. In a variety of contexts, personal damage actions against foreign officials can unduly chill their performance of duties, trigger reciprocity concerns about the treatment of United States officials sued in foreign courts, and interfere with the Executive Branch's conduct of foreign affairs—even when a state itself can be sued.

Given these and other relevant factors, Congress is unlikely to have inflexibly linked the immunity of foreign officials to that of their states—and, without saying so, to have substituted a rigid statutory regime for the preexisting authority of the Executive to

take into account, in determining whether to suggest immunity, the distinctive considerations that suits against foreign officials may raise.[10] At the least, had Congress contemplated that the FSIA would address the immunity of individual foreign officials, it would have specified the category of acts for which such immunity would lie. The foreign state and its agencies and instrumentalities are absolutely immune from suit on any basis and for any acts unless one of the express exceptions in the FSIA applies. But Congress surely would not have intended to confer an absolute immunity on individual foreign officials, including for their wholly private conduct. Accordingly, if those individuals were to be covered, Congress presumably would have included in the general rule of immunity in 28 U.S.C. 1604 an express limitation to clarify when an official's conduct could be considered an act of the foreign state for immunity purposes. Congress might also have expanded or restricted one or another of the exceptions to immunity in Section 1605(a) as applied to individual officials to take account of the differences between suits against the state and suits against individual officials.

Second, if Congress had intended the FSIA to govern suits against individual foreign officials, the statute likely would have addressed the available remedies. Section 1610 provides litigants with broader rights to attach the property of agencies and instrumentalities compared to the property of the foreign state itself, and Section 1606 similarly permits punitive damages against agencies and instrumentalities but not against the state. 28 U.S.C. 1606, 1610(a) and (b). Congress's careful calibration of these remedies renders its silence with respect to the personal funds and property of individual foreign officials particularly telling.

Third, the FSIA does not expressly provide for service of process on individuals. Section 1608(b), which governs service on agencies and instrumentalities, provides that in the absence of a special arrangement, service may be made on "an officer, a managing or

[10] This case vividly illustrates the point. For apparently under petitioner's view the FSIA, *sub silentio*, would have altogether divested the Executive of the ability to consider in its immunity determination such features of this case as petitioner's residence in the United States rather than in Somalia, respondents' invocation of the statutory cause of action in the TVPA, and the absence of a recognized government in Somalia.

general agent, or to any other agent [so] authorized by appointment or by law." 28 U.S.C. 1608(b)(2). That provision parallels the corporate service method set forth in Federal Rule of Civil Procedure 4(h)(1)(B), providing further confirmation that natural persons are not agencies or instrumentalities. Section 1608(a), which governs service on the state itself, also makes no mention of service on individuals; rather, it permits service by special arrangement with the state; in accordance with an international convention; on the head of the ministry of foreign affairs of the state; or "through diplomatic channels to the foreign state." 28 U.S.C. 1608(a). Notably, Section 1608(a) does not invoke any of Rule 4's detailed provisions for serving individuals in the United States and foreign countries. See Fed. R. Civ. P. 4(e) and (f).

5. The conclusion that the FSIA does not govern foreign official immunity is reinforced by the number of complexities that could attend the immunity determination in this and other cases—complexities that could not be accommodated under the rigid and ill-fitting statutory regime of the FSIA. Even in an ordinary case, in considering whether to recognize immunity of a foreign official under the generally applicable principles of immunity discussed above, the Executive might find it appropriate to take into account issues of reciprocity, customary international law and state practice, the immunity of the state itself, and, when appropriate, domestic precedents. But in this case, the Executive may also find the nature of the acts alleged—and whether they should properly be regarded as actions in an official capacity—to be relevant to the immunity determination. Respondents have not only relied on the ATS to assert a federal common law cause of action, but have also invoked the statutory right of action in the TVPA for damages based on torture and extrajudicial killing. And respondents, some of whom are United States citizens, have brought that action against a former Somali official who now lives in the United States, not Somalia.

Furthermore, as noted above, the *TVPA Senate Report* contemplated—and a number of courts have held—that the foreign state's position on whether the alleged conduct was in an official capacity would be an important consideration in determining an official's immunity. See, *e.g.*, *Matar v. Dichter*, 563 F.3d 9, 11, 14

(2d Cir. 2009) (noting Executive Branch's recognition of the Israeli government's assertion that its former official acted "in furtherance of official policies of the State of Israel"); *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467, 1471 (9th Cir. 1994) (finding no immunity, relying in part on Philippine government's representation that former president's acts were "not official acts pursuant to his authority as President"), cert. denied, 513 U.S. 1126 (1995); see also *Jones v. Ministry of Interior*, [2007] 1 A.C. 270, 281 (H.L. 2006) (appeal taken from Eng.) (finding immunity where Saudi Arabia asserted it for sitting officials).[11] Here, however, the United States does not recognize any government that can speak on behalf of Somalia.

Also, a foreign state may seek to waive the immunity of a current or former official, because immunity is accorded to foreign officials not for their personal benefit, but for the benefit of the foreign state. See, *e.g.*, VCDR, pmbl., art. 32(1), 23 U.S.T. at 3230, 3241; Vienna Convention on Consular Relations, *done* Apr. 24, 1963, pmbl., 21 U.S.T. 77, 79; *Paul v. Avril*, 812 F. Supp. 207, 210–211 (S.D. Fla. 1992). But the issue of waiver is likewise rendered difficult in this case because the United States does not currently recognize any government of Somalia that could render a formal waiver.

In sum, it is unlikely that in enacting the FSIA, Congress *sub silentio* removed the Executive's ability to take complex considerations like these into account in deciding whether to recognize immunity of foreign officials from civil actions.

6. Petitioner contends that a number of adverse consequences would flow from construing the FSIA not to govern the immunity of foreign officials. That is incorrect. Petitioner's arguments that his interpretation is necessary to avoid abrogating the immunity of foreign officials, to avoid violating international law by subjecting officials to suit, to avoid opening United States officials to a "heightened risk of reciprocal actions abroad", and to avoid inviting a flood of litigation in U.S. courts, all assume that foreign officials

[11] In *Jones*, [2007] 1 A.C. at 290, the House of Lords held that the British State Immunity Act 1978 provided immunity to sitting officials for alleged acts of torture, but noted that officials sued in United States courts for torture or extrajudicial killing under the TVPA might not be immune from suit, *id.* at 297.

have immunity under the FSIA or not at all. But that is not so: officials generally continue to enjoy immunity under background principles for their official acts, and fidelity to international norms and the protection of United States officials abroad are important factors that the Executive Branch considers in determining whether to suggest immunity for particular foreign officials. Indeed, in some circumstances the immunity of officials under Executive Branch principles may be broader than (as in other circumstances it may be narrower than) that of the state under the FSIA.

C. The FSIA Did Not Abrogate The Long-Recognized Immunity From Suit Of Foreign Officials, Rooted In The Executive Branch's Constitutional Authority To Conduct Foreign Affairs

1. In the FSIA, Congress codified the substantive principles that the Executive Branch had used to govern its immunity determinations with respect to foreign states and their instrumentalities. At the same time, Congress altered the pre-existing procedure for making such determinations, replacing the prior regime of Executive suggestions of immunity with statutory standards to be applied by the courts. *FSIA Report* 7 ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch.").

By contrast, the FSIA contains no text altering or otherwise addressing the background common law principles relating to foreign officials' immunity to suit. Sensitive diplomatic and foreign policy judgments are involved in determining the contours of official immunity and any refinements or exceptions to it, and in assessing the significance of unfolding international law and practice in making those determinations. Such judgments are ordinarily committed to the Executive as an aspect of the Executive Branch's prerogative to conduct foreign affairs on behalf of the United States, see, *e.g.*, *Ex parte Peru*, 318 U.S. at 588. The FSIA should not be read to have altered that practice *sub silentio*. See *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles."). Therefore, foreign officials' immunity continues to be governed by the pre-existing practice, under which courts defer to Executive suggestions

and principles of immunity with respect to foreign officials. See *Enahoro*, 408 F.3d at 881–882; *Ye*, 383 F.3d at 625; *Noriega*, 117 F.3d at 1212.

2. After concluding that the district court erred in holding that this suit must be dismissed under the FSIA, the court of appeals declined to consider whether petitioner is entitled to official immunity under background principles recognized by the Executive and the courts. It instead remanded to the district court to consider that question in the first instance. That was the correct disposition. Because neither court below passed on that question, there is no occasion for this Court to do so.

II. IF THE FSIA GOVERNS THE IMMUNITY FROM SUIT OF SITTING FOREIGN GOVERNMENT OFFICIALS FOR ACTIONS IN AN OFFICIAL CAPACITY, THEY GENERALLY RETAIN THAT IMMUNITY AFTER LEAVING OFFICE

If this Court were to agree with petitioner that the FSIA applies to sitting foreign officials, former officials generally will retain immunity for their official acts. That would be so under either of the two theories petitioner has advanced in arguing that the FSIA governs his immunity. But petitioner's "agency or instrumentality" theory offers the better approach to that result because under that theory the FSIA would not intrude so deeply on pre-existing common law principles of official immunity.

1. At the time of the FSIA's enactment, the background common law rule generally recognized the immunity of former officials for actions taken in an official capacity. See, *e.g.*, VCDR art. 39(2), 23 U.S.T. at 3245. That rule reflects the principle that functional immunity "based on acts—rather than status—does not depend on tenure in office." *Matar*, 563 F.3d at 14. As a general matter, affording immunity to former officials for matters within their official capacity serves the important purposes of protecting the reciprocal interests of sovereigns, ensuring that officials are not unduly chilled in the performance of their duties, and preventing litigants from circumventing the FSIA's stringent limitations on suit against the state through suits against its former officials. *Belhas v. Ya'alon*, 515 F.3d 1279, 1286 (D.C. Cir. 2008); *Chuidian*, 912 F.2d at 1101.

Accordingly, nothing in the FSIA should be read to establish a scheme in which current officials, but not former officials, could enjoy immunity. Congress surely did not intend to depart from established domestic and international practice in so dramatic a manner. That is especially so given the requirement that Congress speak clearly when it intends to change settled common law principles. See *Texas*, 507 U.S. at 534. Nor would such abrogation be consistent with the understanding that one of Congress's "well-recognized" purposes in enacting the FSIA was the "codification of international law [of immunity] at the time of the FSIA's enactment." *Permanent Mission*, 551 U.S. at 199.

2. If the Court concludes that foreign officials are "agenc[ies] or instrumentalit[ies]" of the foreign state, 28 U.S.C. 1603(b), the immunity of former officials should continue to be governed by the common law regime, guided by executive judgment, that predated the FSIA. The court of appeals held that were foreign officials considered "agenc[ies] or instrumentalit[ies]," individuals no longer employed by the foreign state at the time of the suit's filing would not be entitled to immunity under the FSIA. In so concluding, the court relied on this Court's decision in *Patrickson*, which held that because the majority-share-ownership prong of Section 1603(b)'s definition of an "agency or instrumentality" is "expressed in the present tense," corporate entities that satisfied Section 1603(b)'s definition at the time of the acts in question but not at the time of suit fall outside of the FSIA's coverage. 538 U.S. at 478. Under the rationale of *Patrickson*, former officials likewise would no longer be agencies or instrumentalities of the foreign state. At that point, they should once again receive immunity (or not) under common law principles. Nothing in Section 1603(b) or any other provision of the FSIA indicates any intent to abrogate common law immunity for former officials. See *Matar*, 563 F.3d at 13 ("[t]he FSIA is a statute that 'invade[d] the common law' and accordingly must be 'read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'") (citation omitted); *id*. at 14. Accordingly, the Second Circuit has held that "if * * * the FSIA does not apply to former government officials," such

officials may be "immune from suit under common-law principles that pre-date, and survive, the enactment of that statute." *Ibid.*

Under the "agency or instrumentality" theory of the FSIA's application to individuals, petitioner's status as a former official removes him from the FSIA and returns him to the world of common law principles of immunity. In that event, as noted earlier, the remand ordered by the court of appeals will allow the district court to determine in the first instance whether petitioner is immune from this suit.

3. Should this Court instead adopt petitioner's alternative theory and conclude that the term "foreign state," see 28 U.S.C. 1603(a), covers foreign officials, the Court's construction would apparently apply to former as well as current officials. The very reason for including individual officials within the term "foreign state" presumably would have to do with the relationship between the acts of the official and the acts of the state. If so, the state's immunity would extend to all acts in an official capacity, even when the individuals who committed them no longer hold office. See *Matar*, 563 F.3d at 14. Accordingly, this theory would work an even greater invasion of the preexisting common law than would petitioner's first theory, and for this reason alone should be rejected.

If the Court concludes otherwise, however, the question still remains under the FSIA whether petitioner acted in an official rather than a personal capacity. A remand to the district court to make that determination would therefore be required.[12]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[12] As noted previously, the district court relied upon letters from the TFG stating that the actions alleged in the complaint "would have been taken by [petitioner] in his official capacities." But the United States does not recognize the TFG as the government of Somalia, and absent contrary guidance from the Executive Branch, the TFG is not in a position to assume that role in United States courts. The district court therefore should not attach significance to the statements of the TFG unless the Executive Branch advises it to do so.

Excerpts below from the Court's opinion provide its analysis in holding that, based on the FSIA's text, purpose, and history, the Fourth Circuit "correctly held the FSIA does not govern petitioner's claim of immunity" and the FSIA "therefore did not deprive the District Court of subject matter jurisdiction." *Id.* (Footnotes and internal cross references are omitted.)

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* * * *

. . . The question we face in this case is whether an individual sued for conduct undertaken in his official capacity is a "foreign state" within the meaning of the Act.

The Act defines "foreign state" in § 1603 as follows:

"(a) A 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

"(b) An 'agency or instrumentality of a foreign state' means any entity—

"(1) which is a separate legal person, corporate or otherwise, and

"(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

"(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country."

The term "foreign state" on its face indicates a body politic that governs a particular territory. See, *e.g.*, Restatement § 4 (defining "state" as "an entity that has a defined territory and population under the control of a government and that engages in foreign relations"). In § 1603(a), however, the Act establishes that "foreign state" has a broader meaning, by mandating the inclusion of the state's political subdivisions, agencies, and instrumentalities. Then, in § 1603(b), the Act specifically delimits what counts as an

agency or instrumentality. Petitioner argues that either "foreign state," § 1603(a), or "agency or instrumentality," § 1603(b), could be read to include a foreign official. Although we agree that petitioner's interpretation is literally possible, our analysis of the entire statutory text persuades us that petitioner's reading is not the meaning that Congress enacted.

We turn first to the term "agency or instrumentality of a foreign state," § 1603(b). It is true that an individual official could be an "agency or instrumentality," if that term is given the meaning of "any thing or person through which action is accomplished," *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 83 (CA2 2008). But Congress has specifically defined "agency or instrumentality" in the FSIA, and all of the textual clues in that definition cut against such a broad construction.

First, the statute specifies that "'agency or instrumentality . . .' means any *entity*" matching three specified characteristics, § 1603(b) (emphasis added), and "entity" typically refers to an organization, rather than an individual. See, *e.g.*, Black's Law Dictionary 612 (9th ed. 2009). Furthermore, several of the required characteristics apply awkwardly, if at all, to individuals. The phrase "separate legal person, corporate or otherwise," § 1603(b)(1), could conceivably refer to a natural person, solely by virtue of the word "person." But the phrase "separate legal person" typically refers to the legal fiction that allows an entity to hold personhood separate from the natural persons who are its shareholders or officers. Cf. *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983) ("Separate legal personality has been described as 'an almost indispensable aspect of the public corporation'"). It is similarly awkward to refer to a person as an "organ" of the foreign state. See § 1603(b)(2). And the third part of the definition could not be applied at all to a natural person. A natural person cannot be a citizen of a State "as defined in section 1332(c) and (e)," § 1603(b)(3), because those subsections refer to the citizenship of corporations and estates. Nor can a natural person be "created under the laws of any third country." *Ibid.* Thus, the terms Congress chose simply do not evidence the intent to include individual officials within the meaning of "agency or instrumentality." Cf. *Dole Food Co. v. Patrickson*, 538 U.S. 468,

474 (2003) (describing § 1603(b) as containing "indicia that Congress had corporate formalities in mind").

Petitioner proposes a second textual route to including an official within the meaning of "foreign state." He argues that the definition of "foreign state" in § 1603(a) set out a nonexhaustive list that "includes" political subdivisions and agencies or instrumentalities but is not so limited. It is true that use of the word "include" can signal that the list that follows is meant to be illustrative rather than exhaustive. And, to be sure, there are fewer textual clues within § 1603(a) than within § 1603(b) from which to interpret Congress' silence regarding foreign officials. But even if the list in § 1603(a) is merely illustrative, it still suggests that "foreign state" does not encompass officials, because the types of defendants listed are all entities. See *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923) ("[A] word may be known by the company it keeps").

Moreover, elsewhere in the FSIA Congress expressly mentioned officials when it wished to count their acts as equivalent to those of the foreign state, which suggests that officials are not included within the unadorned term "foreign state." Cf. *Kimbrough v. United States*, 552 U.S. 85, 103 (2007) ("Drawing meaning from silence is particularly inappropriate . . . [when] Congress has shown that it knows how to [address an issue] in express terms"). For example, Congress provided an exception from the general grant of immunity for cases in which "money damages are sought against a foreign state" for an injury in the United States "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." § 1605(a)(5) (emphasis added). The same reference to officials is made in a similar, later enacted exception. See 28 U.S.C.A. § 1605A(a)(1) (Supp. 2009) (eliminating immunity for suits "in which money damages are sought against a foreign state" for certain acts "engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency"); see also § 1605A(c) (creating a cause of action against the "foreign state" and "any official, employee, or agent" thereof). If the term "foreign state" by definition includes an individual acting within the scope of his office, the phrase "or of any

official or employee . . ." in 28 U.S.C. §1605(a)(5) would be unnecessary. See *Dole Food Co.*, 538 U.S., at 476–477 ("[W]e should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous").

Other provisions of the statute also point away from reading "foreign state" to include foreign officials. Congress made no express mention of service of process on individuals in §1608(a), which governs service upon a foreign state or political subdivision. Although some of the methods listed could be used to serve individuals—for example, by delivery "in accordance with an applicable international convention," § 1608(a)(2)—the methods specified are at best very roundabout ways of serving an individual official. Furthermore, Congress made specific remedial choices for different types of defendants. See § 1606 (allowing punitive damages for an agency or instrumentality but not for a foreign state); § 1610 (affording a plaintiff greater rights to attach the property of an agency or instrumentality as compared to the property of a foreign state). By adopting petitioner's reading of "foreign state," we would subject claims against officials to the more limited remedies available in suits against states, without so much as a whisper from Congress on the subject. (And if we were instead to adopt petitioner's other textual argument, we would subject those claims to the different, more expansive, remedial scheme for agencies). The Act's careful calibration of remedies among the listed types of defendants suggests that Congress did not mean to cover other types of defendants never mentioned in the text.

In sum, "[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole." *United States v. Morton*, 467 U.S. 822, 828 (1984). Reading the FSIA as a whole, there is nothing to suggest we should read "foreign state" in § 1603(a) to include an official acting on behalf of the foreign state, and much to indicate that this meaning was not what Congress enacted. The text does not expressly foreclose petitioner's reading, but it supports the view of respondents and the United States that the Act does not address an official's claim to immunity.

IV

Petitioner argues that the FSIA is best read to cover his claim to immunity because of its history and purpose. . . . [O]ne of the

primary purposes of the FSIA was to codify the restrictive theory of sovereign immunity, which Congress recognized as consistent with extant international law. See § 1602. We have observed that a related purpose was "codification of international law at the time of the FSIA's enactment," *Permanent Mission of India to United Nations v. City of New York*, 551 U.S. 193, 199 (2007), and have examined the relevant common law and international practice when interpreting the Act, *id.*, at 200–201. Because of this relationship between the Act and the common law that it codified, petitioner argues that we should construe the FSIA consistently with the common law regarding individual immunity, which—in petitioner's view—was coextensive with the law of state immunity and always immunized a foreign official for acts taken on behalf of the foreign state. Even reading the Act in light of Congress' purpose of codifying *state* sovereign immunity, however, we do not think that the Act codified the common law with respect to the immunity of individual officials.

The canon of construction that statutes should be interpreted consistently with the common law helps us interpret a statute that clearly covers a field formerly governed by the common law. But the canon does not help us to decide the antecedent question whether, when a statute's coverage is ambiguous, Congress intended the statute to govern a particular field—in this case, whether Congress intended the FSIA to supersede the common law of official immunity.

Petitioner argues that because state and official immunities are coextensive, Congress must have codified official immunity when it codified state immunity. But the relationship between a state's immunity and an official's immunity is more complicated than petitioner suggests, although we need not and do not resolve the dispute among the parties as to the precise scope of an official's immunity at common law. The very authority to which petitioner points us, and which we have previously found instructive, see, *e.g.*, *Permanent Mission*, 551 U.S., at 200, states that the immunity of individual officials is subject to a caveat not applicable to any of the other entities or persons to which the foreign state's immunity extends. The Restatement provides that the "immunity of a foreign state . . . extends to . . . any other public minister, official, or agent of the state with respect to acts performed in his official

capacity *if the effect of exercising jurisdiction would be to enforce a rule of law against the state*." Restatement § 66 (emphasis added). And historically, the Government sometimes suggested immunity under the common law for individual officials even when the foreign state did not qualify. See, *e.g.*, *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL841 (SDNY, Nov. 23, 1976). There is therefore little reason to presume that when Congress set out to codify state immunity, it must also have, *sub silentio*, intended to codify official immunity.

Petitioner urges that a suit against an official must always be equivalent to a suit against the state because acts taken by a state official on behalf of a state are acts of the state. We have recognized, in the context of the act of state doctrine, that an official's acts can be considered the acts of the foreign state, and that "the courts of one country will not sit in judgment" of those acts when done within the territory of the foreign state. See *Underhill v. Hernandez*, 168 U.S. 250, 252, 254 (1897). Although the act of state doctrine is distinct from immunity, and instead "provides foreign states with a substantive defense on the merits," *Altmann*, 541 U.S., at 700, we do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity. But it does not follow from this premise that Congress intended to codify that immunity in the FSIA. It hardly furthers Congress' purpose of "clarifying the rules that judges should apply in resolving sovereign immunity claims," *id.*, at 699, to lump individual officials in with foreign states without so much as a word spelling out how and when individual officials are covered.

Petitioner would have a stronger case if there were any indication that Congress' intent to enact a comprehensive solution for suits against states extended to suits against individual officials. But to the extent Congress contemplated the Act's effect upon officials at all, the evidence points in the opposite direction. . . . [T]he legislative history points toward an intent to leave official immunity outside the scope of the Act. And although questions of official immunity did arise in the pre-FSIA period, they were few and far between. The immunity of officials simply was not the particular problem to which Congress was responding when it

enacted the FSIA. The FSIA was adopted, rather, to address "a modern world where foreign state enterprises are every day participants in commercial activities," and to assure litigants that decisions regarding claims against states and their enterprises "are made on purely legal grounds." H. R. Rep., at 7. We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity.

Finally, our reading of the FSIA will not "in effect make the statute optional," as some Courts of Appeals have feared, by allowing litigants through "artful pleading . . . to take advantage of the Act's provisions or, alternatively, choose to proceed under the old common law," *Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, 1102 (CA9 1990). Even if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law. And not every suit can successfully be pleaded against an individual official alone. Even when a plaintiff names only a foreign official, it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party, because that party has "an interest relating to the subject of the action" and "disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." Fed. Rule Civ. Proc. 19(a)(1)(B). If this is the case, and the entity is immune from suit under the FSIA, the district court may have to dismiss the suit, regardless of whether the official is immune or not under the common law. See *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) ("[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign"). Or it may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest. Cf. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity" (citation omitted)).

We are thus not persuaded that our construction of the statute's text should be affected by the risk that plaintiffs may use artful pleading to attempt to select between application of the FSIA or the common law. And we think this case, in which respondents have sued petitioner in his personal capacity and seek damages from his own pockets, is properly governed by the common law because it is not a claim against a foreign state as the Act defines that term. Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.

* * * *

B. HEAD OF STATE IMMUNITY

On July 26, 2010, the United States filed a Suggestion of Immunity in the U.S. District Court for the Central District of California, suggesting the immunity of His Highness Sheikh Khalifa Bin Zayed Al Nahyan ("Sheikh Khalifa"), the President and sitting head of state of the United Arab Emirates ("UAE"), from the jurisdiction of the court. *Al Hassen v. Sheikh Khalifa Bin Zayed Al Nahyan*, Case Number: 2:09-CV-1106-DMB (FMOx) (C.D. Ca.). The complaint in the case named two additional defendants. A letter from State Department Legal Adviser Harold Hongju Koh, attached to the Suggestion of Immunity, stated:

> . . . [T]he Government of the UAE has formally asked the Department of State to take the steps necessary to have this action against the Sheikh dismissed on the basis of his immunity from U.S. jurisdiction as a foreign head of state.
>
> The Department of State recognizes and allows the immunity of Sheikh Khalifa from this suit. Under the rules of customary international law, recognized and applied in the United States, Sheikh Khalifa, as the sitting head of state of a foreign state, is immune from the jurisdiction of the United States courts. . . .

> This letter recognizes the particular importance attached by the United States to obtaining the prompt dismissal of the proceedings against Sheikh Khalifa in view of the significant foreign policy implications of such an action.

Excerpts below from the U.S. Suggestion of Immunity provide the United States' views on the law applicable to head of state immunity in U.S. courts (footnotes omitted). The full texts of the Suggestion of Immunity and the attached letter from Mr. Koh are available at *www.state.gov/s/l/c8183.htm*.

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* * * *

3. Under rules of customary international law recognized and applied in the United States as a matter of common law, Sheikh Khalifa is immune from the Court's jurisdiction in this case. Such head of state immunity decisions are made by the Executive Branch, incident to the Executive Branch's authority in the field of foreign affairs.

4. When the Executive Branch has determined that an individual is entitled to head of state immunity, the courts have routinely accepted that determination as dispositive of the issue. . . .

5. The United States has previously suggested the immunity of Sheikh Khalifa's predecessor as the President of the UAE, Sheikh Zayed. *First American Corp.*, 948 F. Supp. at 1119. In that case, the district court held that the plaintiffs were "barred from asserting claims against H.H. Sheikh Zayed, the sitting head of state of the United Arab Emirates, because he is entitled to immunity from the Court's jurisdiction." *Id.* (citing *Ex Parte Peru*, 318 U.S. at 588–89). The District Court accepted the United States' Suggestion of Immunity as determinative, noting that "[t]he United States has filed a Suggestion of Immunity on behalf of H.H. Sheikh Zayed, and courts of the United States are bound to accept such head of state determinations as conclusive." *Id.*

6. Judicial deference to the Executive Branch's suggestion of immunity is predicated on compelling considerations arising out

of the Executive Branch's authority to conduct foreign affairs under the Constitution. *See Ye* [*v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004)] (citing [*Spacil v. Crowe*, 489 F.2d 614, 618 (5th Cir. 1974)]. Judicial Branch deference to the Executive Branch in these matters, the circuit court noted, is "motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved." *Id. See also Ex parte Peru*, 318 U.S. at 588. And as other courts have explained, the Executive Branch possesses substantial institutional resources to pursue and extensive experience to conduct the country's foreign affairs. *See, e.g.*, *Spacil*, 489 F.2d at 619; *United States v. Truong Dinh Hung*, 629 F.2d 908, 913–14 (4th Cir. 1980). By comparison, "the judiciary is particularly ill-equipped to second-guess" the Executive Branch's determinations affecting the country's interests. *See Spacil*, 489 F.2d at 619. Finally, and "[p]erhaps most importantly, in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves." *Id.*

C. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

1. Residual Immunity

On September 24, 2010, the U.S. Court of Appeals for the Second Circuit affirmed in part, vacated in part, and remanded "for further proceedings consistent with [its] opinion" a district court's judgment in a case brought by a former domestic worker against her former employers, a former Kuwaiti diplomat to the United Nations and his wife, and the State of Kuwait under the Alien Tort Claims Act and New York state law. *Swarna v. Al-Awadi*, 622 F.3d 123, 148 (2d Cir. 2010). For discussion of the facts of the case and the district court's judgment, see *Digest 2009* at 379–81.

The appeals court held that "[r]esidual immunity . . . is no barrier to Swarna's claims against the individual defendants." *Swarna v. Al-Awadi*, 622 F.3d at 140. In so holding, the court

accepted arguments in a brief in support of affirmance that the United States filed at the court's request on June 2, 2010. The U.S. brief is available at *www.state.gov/s/l/c8183.htm*. The appeals court also held that the district court improperly granted a default judgment and, as discussed in A.1.a.(1) and A.1.a.(2)(ii) *supra*, affirmed the district court's dismissal of the claims against Kuwait, on the grounds that the FSIA's commercial activities and tort exceptions to immunity do not apply. *Swarna v. Al-Awadi*, 622 F.3d at 143, 146, 148.

Excerpts follow from the court's opinion, providing its analysis of the issue of residual diplomatic immunity as it applied in this case (footnote omitted). For discussion of the residual immunity of former UN officials, see E.1. below.

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* * * *

B. Residual Diplomatic Immunity

Under 22 U.S.C. § 254d, a district court must dismiss "[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the [Vienna Convention]." This statutory dictate is consistent with the Vienna Convention itself, which provides that a "diplomatic agent shall enjoy immunity from the criminal . . . civil and administrative jurisdiction" of the receiving state. Vienna Convention art. 31(1) (emphasis added). *Cf. Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (sovereign immunity means immunity from jurisdiction). . . .

Although diplomats enjoy broad immunity pursuant to the Vienna Convention from civil and criminal process, *see Brzak v. United Nations*, 597 F.3d 107, 113 (2d Cir. 2010), diplomats lose much of their immunity following the termination of their diplomatic status, Vienna Convention art. 39(2); *see also Brzak*, 597 F.3d at 113. Article 39(2) of the Vienna Convention states:

> 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.*

Vienna Convention art. 39(2) (emphasis added).

Article 39(2) of the Vienna Convention thus provides for so-called "residual" immunity, which is a less expansive immunity that remains with the former diplomats for certain acts committed during their occupation of the diplomatic station. Specifically, once a diplomat becomes a "former" diplomat, he or she is not immune from suit for prior acts unless those acts were performed "in the exercise of [the former diplomat's] functions as a member of the mission." Vienna Convention art. 39(2).

Initially, we address whether Al-Shaitan, the wife of a diplomat, is entitled to residual diplomatic immunity under Article 39(2). She is not. Residual immunity applies only to a person who was "a member of the mission." *See* Vienna Convention art. 39(2). Al-Shaitan was accredited by Kuwait as Al-Awadi's spouse, but she was never a member of the Kuwait Mission. Thus, she "enjoys no residual immunity from the civil jurisdiction of the United States." Br. for the United States as Amicus Curiae, at 29 ("Al-Shaitan was never a member of the Kuwait Mission. . . . Accordingly, Al-Shaitan could not have conducted any acts under Article 39(2) 'as a member of the mission.'"). To be sure, "members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities [of the diplomatic agent] specified in articles 29 to 36." Vienna Convention art. 37(1). But residual immunity is contained in Article 39, which, in turn, specifically limits its application to "member[s] of the mission." Vienna Convention art. 39(2). In short, while Al- Shaitan enjoys the same scope of immunity as her diplomat-husband while he is a member of the mission, once the husband's tenure as diplomat has expired, such derivative immunity "normally cease[s] at the moment when [s]he leaves [the United States], or on expiry of a reasonable period in which to do so." Vienna Convention art. 39(2).

With respect to Al-Awadi, it is undisputed that he was a "member of the [Kuwait] mission," and so our inquiry turns to whether

Al-Awadi's employment and treatment of Swarna were "acts performed . . . in the exercise of his functions as a member of the mission." Vienna Convention art. 39(2). To this end, we find it significant that Article 39(2) does not immunize acts that are "incidental to" the exercise of his functions as a member of the mission. Residual immunity, as consistent with the Vienna Convention's purpose of "not . . . benefit[ting] individuals but . . . ensur[ing] the efficient performance of the functions of diplomatic missions," Vienna Convention pmbl, cl. 4, is limited to a narrow set of acts that are committed "*in* the exercise of his functions *as a member of the mission*," Vienna Convention art. 39(2) (emphasis added). "[M]odern international law has adopted diplomatic immunity under a theory of functional necessity." *767 Third Ave. Assocs. v. Permanent Mission of the Republic of Zaire*, 988 F.2d 295, 300 (2d Cir. 1993). Accordingly, a diplomat enjoys broad personal immunity from civil and criminal jurisdiction while performing the functions of a member of a diplomatic mission. *See* Vienna Convention art. 31. This immunity exists "not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." Vienna Convention pmbl. cl. 4. For this reason, while *residual* diplomatic immunity applies to the "acts performed by such a person in the exercise of his functions as a member of the mission," Vienna Convention art. 39(2), it does not apply to actions that pertain to his household or personal life and that may provide, at best, "an indirect" rather than a "direct . . . benefit to" diplomatic functions. *Park v. Shin*, 313 F.3d 1138, 1142 (9th Cir. 2002) (defining the concept of residual consular immunity under the Vienna Convention on Consular Relations). Although Al-Awadi asserts at one point that residual immunity encompasses all acts that are incidental and indispensable to diplomatic activities, acts incidental and indispensable to diplomatic activities include, in this context, only such acts as are directly imputable to the state or inextricably tied to a diplomat's professional activities.

This conclusion is supported by the Vienna Convention's drafting history. The Vienna Convention grew out of the work of the International Law Commission which was tasked with "undertak[ing] the codification of the topic of '[d]iplomatic intercourse and immunities,' [in light of] existing principles and

rules and recognized practice." G.A. Res. 685 (VII), ¶ ¶ 2, 5 (Dec. 5, 1952), *available at* http://www.un.org/documents/ga/res/7/ares7.htm; *see also 767 Third Ave Assocs.*, 988 F.2d at 300 (noting that the Vienna Convention "codified longstanding principles of customary international law with respect to diplomatic relations"); *Finzer v. Barry*, 798 F.2d 1450, 1458 (D.C. Cir. 1986) ("'[T]he 1961 Vienna Conference examined the articles in the light of modern conditions, surveying the body of law and practice which had developed over the years regarding the rights, duties, and privileges of diplomatic missions . . . .'" (quoting Leonard Meeker, Legal Adviser of the Dep't of State, *Hearing on the Vienna Convention on Diplomatic Relations Before the Subcomm. of the S. Comm. on Foreign Relations*, 89th Cong. at 2 (1965))).

The draft version of Article 39(2) was written by the International Law Commission's Special Rapporteur . . . . *See* [1955] II INT'L L. COMMISSION Y.B. 9–17. According to the 1957 Report of the International Law Commission, "[u]nder the first sentence of paragraph 2 it appeared that all members of diplomatic missions, including diplomatic staff proper, would lose all immunity in respect of acts that had not been performed in the exercise of their functions as soon as such functions came to an end." [1957] I INT'L L. COMMISSION Y.B. 142, ¶ 34. One delegate asked the Special Rapporteur whether he would agree to "replace the words 'in the exercise of his functions' by 'during the exercise of his functions.'" *Id.* ¶ 35. In response, the Special Rapporteur explained that "in his view, immunity should subsist only in respect of acts performed in the exercise of diplomatic functions." *Id.* ¶ 38; *accord* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 464 n.10 (1987) . . . .; SATOW'S DIPLOMATIC PRACTICE 131 (Desmond Pakenham, ed., 5th rev. ed. 1979) . . . .

Consistent with the text and drafting history of Article 39(2), the United States, through the Department of State, has limited the application of residual immunity to "official acts only." Br. for the United States as Amicus Curiae at 11. We note that "[i]t is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott*, 130 S. Ct. at 1993 (quoting *Sumitomo*, 457 U.S. at 184–85 n.10). In fact, more than twenty years ago, the Legal Adviser of the Department of State explained

the practices of the United States with respect to diplomatic immunity and declared that only "official acts" and "official functions" were protected under Article 39(2)'s provision for residual immunity. *See* Declaration of Abraham D. Sofaer 3–7 (July 5, 1988), *reprinted in* Br. for the United States as Amicus Curiae, add. 3–7.

The Legal Adviser further observed, at the time, that the United States' interpretation of Article 39(2) was "consistent with [the] practice of other sovereign states, including the almost 150 states which are party to the Vienna Convention." *Id.* at 8, *reprinted in* Br. for the United States as Amicus Curiae, at add. 8; *see also Abbott*, 130 S. Ct. at 1993 ("In interpreting any treaty, the opinions of our sister signatories are entitled to considerable weight." (internal quotation marks, ellipsis, and alteration omitted)) . . . . Article 31 establishes that the "diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State" and "from its civil and administrative jurisdiction" except in three cases—none of which are relevant here. Article 32(9), on residual immunity, does not distinguish between civil or criminal jurisdiction. In light of a long history of granting broad jurisdictional immunity to former diplomats who acted in their official capacities, and a "well established canon of deference" with regard to Executive Branch interpretation of treaties, *Abbott*, 130 S. Ct. at 1993, it seems to us appropriate to apply the Legal Adviser's declaration regarding criminal acts to civil acts as well, in accordance with the advice of the United States in its *amicus* brief.

* * * *

Having determined that Article 39(2) is limited to official acts, we now consider whether Al-Awadi's employment and treatment of Swarna constituted official acts. In conducting this analysis, we must not judge "whether the underlying conduct actually occurred, or whether it was wrongful." *Brzak*, 597 F.3d at 113. Rather, our consideration is a functional one, which "parallels the objective tests we have adopted in applying other forms of immunity." *Id.* & n.** ("In applying th[e] functional test, we . . . look[] to the objective acts . . . in question, not to the type of injury alleged."). . . .

Al-Awadi argues that Swarna was "employed . . . to assist [him] in the exercise of [his] mission-related functions," and, therefore, all acts arising from that employment relationship are immune from suit under the Vienna Convention's provision for residual immunity. Ultimately, however, Al-Awadi's argument must be rejected, as it assumes a fact that is not supported by the record. The alleged facts clearly show that Swarna was employed to meet Al-Awadi's and his family's private needs and not any mission-related functions. . . . Although Swarna also cooked and served guests at official functions from time to time and taught other servants how to cook Kuwaiti dishes, these duties were incidental to her regular employment as Al-Awadi's personal servant. *Cf. Park*, 313 F.3d at 1143 . . . .

Moreover, the facts that Swarna was paid out of Al-Awadi's private funds and that she received a G-5 visa further indicate that she was employed by Al-Awadi and not by the Kuwait Mission. In the application for Swarna's visa, the individual defendants represented to the United States that they would pay Swarna's salary. Only some of her expenses (such as dental care) were covered by the mission. Recipients of the G-5 visa are "aliens employed in a domestic or personal capacity by a principal alien, who are paid from the private funds of the principal alien and seek to enter the United States solely for the purpose of such employment." 22 C.F.R. § 42.21(a)(4). Had Swarna been an employee of the Kuwait Mission, she would have been issued a G-2 visa. . . . Swarna's nonimmigrant status reflected precisely her occupation in the United States: a personal servant hired to meet the individual defendants' private needs.

* * * *

2. Immunity of Family Members of Accredited Diplomats

On October 28, 2010, the United States filed a Statement of Interest in the Superior Court of New Jersey, responding to the court's questions to the Department of State in connection with an action filed against the daughter of a diplomat accredited to the Permanent Mission of Zimbabwe to the

United Nations. *Davis v. Samakande*, Docket No. FD-02-315-11, (Superior Ct. N.J.). In this case, the plaintiff sought a temporary restraining order to prevent the diplomat's daughter from taking the couple's child out of New Jersey or the United States and an order permitting him to spend time with the child. The court asked the Department of State whether orders from the court for collecting samples of DNA from the daughter and the child would be enforceable and whether the court was authorized to order the child to remain in New Jersey.

The U.S. Statement of Interest stated that the defendant, as the unmarried daughter living in the household of her father, an accredited diplomat, is immune from the court's jurisdiction and the case brought against her is subject to dismissal. The United States also stated that the child was not immune from the court's jurisdiction, although "the exercise of jurisdiction over the child must be accomplished consistent with the requirements of the Vienna Convention."* Excerpts below from the U.S. Statement of Interest explain the applicable provisions of the Vienna Convention, as extended by the UN Headquarters Agreement. The full text of the Statement of Interest is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

The Vienna Convention, a multilateral treaty that entered into force for the United States in 1972, governs the legal status of bilateral diplomatic missions and diplomatic mission personnel.

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* Editor's note: The Statement of Interest addressed the court's question about the taking of DNA samples in a footnote that read:

> In communications with the Department of State, the Permanent Mission of the Republic of Zimbabwe has acknowledged that [the plaintiff] is the father of Ms. Samakande's child. This acknowledgement appears to obviate the need to address this Court's question regarding the taking of DNA samples either from Ms. Samakande or her child.

The UN Headquarters Agreement provides that diplomats accredited to the United Nations are entitled to the same privileges and immunities in the United States as the United States accords diplomatic envoys who are accredited to it. *See* UN Headquarters Agreement art. V, § 15. The UN Headquarters Agreement thus extends the same privileges and immunities provided under the Vienna Convention to the members of the diplomatic staff of foreign government missions accredited to the United Nations and, derivatively, to their family members.

Among the key immunities established by the Vienna Convention is immunity from the jurisdiction of the receiving state, in this case the United States. Specifically, Article 31 provides that a diplomatic agent[3] shall enjoy immunity from the criminal, civil, and administrative jurisdiction of the receiving state. Vienna Convention art. 31.[4] Article 31 also provides that diplomats are "not obliged to give evidence as a witness," and prohibits any "measures of execution" taken by the receiving state. *Id.* art. 31(2), (3). And Article 37(1) extends Article 31's immunities to "[t]he members of the family of a diplomatic agent forming part of his household," so long as they are "not nationals of the receiving state." *Id.* art. 37(1). As discussed above, the UN Headquarters Agreement makes these immunities applicable to members of the diplomatic staff of foreign government missions accredited to the United Nations, and to their family members.

The Vienna Convention does not define the term "members of the family" referred to in Article 37. This omission was deliberate. The International Law Commission, which drafted Article 37, explained that: "The Commission did not feel it desirable to lay down either a criterion for determining who should be regarded as a member of the family, or a maximum age for children. The spouse

[3] The Vienna Convention defines "diplomatic agent" as the "head of the mission or a member of the diplomatic staff of the mission." Vienna Convention art. 1(e). Hereinafter, the terms "diplomatic agent" and "diplomat" are used interchangeably and include members of the diplomatic staff of foreign government missions to the United Nations (as well as those of the diplomatic staff of bilateral foreign government missions).

[4] Article 31 provides three exceptions from immunity from the civil jurisdiction of the receiving state. None is relevant here.

and children under age at least, are universally recognized as members of the family, but cases may arise where other relatives too come into the matter." Rep. of the Int'l Law Comm'n, 9th sess, April 23—June 28, 1957, U.N. Doc. A/CN.4/SER.A/1957/Add.l, 2 Y.B. Int'l L. Comm'n 141 (1957). Accordingly, states universally accept the accreditation under Article 37 of spouses and children below the age of majority. *See* Eileen Denza, *Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations* 393 (3d ed. 2008) (hereinafter "Diplomatic Law"). The Supreme Court has long recognized that "[i]n interpreting any treaty, the opinions of our sister signatories . . . are entitled to considerable weight." *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010) (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) (quoting *Air France v. Saks*, 470 U.S. 392, 404 (1985) (internal alterations and quotation marks omitted).

Consistent with this universal interpretation and practice, the Department of State has long interpreted Article 37(1) of the Vienna Convention, in conjunction with the UN Headquarters Agreement, to extend diplomatic privileges and immunities to the children of diplomatic and UN Mission members who are unmarried, are under 21 years of age, and who "reside exclusively" in a diplomatic or U.N. Mission member's household. The United States Mission to the United Nations has implemented this longstanding interpretation by advising United Nations Missions of the Department of State's interpretation of Article 37(1) and the UN Headquarters Agreement for purposes of accreditation. *See* Dip. Note HC-60-02, United States Mission to the United Nations New York (Nov. 13, 2002) . . . .[5] However, absent unusual circumstances,[6] neither the Department of State nor the United

[5] Children under the age of 23 who attend an institution of higher learning on a full-time basis are also considered "family" for Vienna Convention purposes by the United States. *See id*. Similarly, the United States advises bilateral diplomatic missions of the same definition of family members whose accreditation it will accept by diplomatic note. *See* Dip. Note 5/22/1986, Department of State to Embassies in Washington, D.C. . . .

[6] As Denza notes, "each receiving State applies its own rules with some degree of flexibility and unusual cases are settled in negotiation at the time of notification rather than left to any kind of arbitration or adjudication in the

Nations accepts a diplomat's or a UN Mission member's grandchild as a "member[] of the family" for purposes of extending diplomatic privileges and immunities.

In order to facilitate the identification of qualifying "members of the family" and to extend to them whatever diplomatic privileges and immunities they may enjoy, the Vienna Convention requires the sending state to notify the receiving state of the arrival and departure of mission members and their family members. Vienna Convention art. 10. Under similar procedures established pursuant to the UN Headquarters Agreement art. V, § 15, Mr. Samakande was notified to the United Nations as the Second Secretary of the Permanent Mission of Zimbabwe and accepted by the United States in that capacity on September 18, 2006. At the same time, Mr. Samakande's unmarried, then-sixteen-year-old daughter—Ms. Samakande—was notified to the United Nations and the United States as a member of Mr. Samakande's family residing exclusively in his household. [fn. omitted] As a properly notified member of Mr. Samakande's household, therefore, Ms. Samakande enjoys in the United States the privileges and immunities extended to an accredited family member of a diplomatic agent. Ms. Samakande's child, however, as the grandchild of a UN Mission member, is not entitled to the privileges and immunities established by the UN Headquarters Agreement and the Vienna Convention.

The immunities established for diplomats and their family members by the Vienna Convention and extended by the UN Headquarters Agreement to UN diplomats and their family members reflect a centuries-old practice in international law, which recognizes that the immunity from jurisdiction of diplomats and their dependents is essential to their ability to act on behalf of their sending sovereign and to fulfill their critical role in international relations. Thus, "the United States recognizes the privileges of

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context of legal proceedings." Diplomatic Law 393. In the unusual situation in which a sending state requests that a grandchild be treated as a family member for Vienna Convention purposes and attests, with evidentiary support, that the diplomat who is a grandparent has legal custody of the grandchild living in the household, the United States will consider such requests. No such request has been received by the Department of State here.

foreign diplomats in the U.S. with the understanding that American diplomats abroad will be afforded the same protections from intrusions by the host state." *767 Third Ave. Assocs. v. Permanent Mission of the Republic of Zaire*, 988 F.2d 295, 300 (2d Cir. 1993).

DISCUSSION

* * * *

Although this Court may exercise jurisdiction over Ms. Samakande's child, the exercise of jurisdiction over the child must be accomplished consistent with the requirements of the Vienna Convention. Specifically:

(1) Any order this Court might issue must be enforced in a manner that would not result in this Court also exercising jurisdiction over Mr. Samakande, Ms. Samakande, or accredited family members in Mr. Samakande's household. As explained above, Article 31 also forbids any "measures of execution" taken with respect to a diplomat or family member who is entitled to immunity.

(2) In addition, any order must be enforced in a manner that does not require any intrusion into the premises of the mission or into Mr. Samakande's private residence. *See* Vienna Convention art. 22(1) ("the premises of the mission shall be inviolable" and "agents of the receiving State may not enter them, except with the consent of the head of the mission."); *id.* art. 30(1) ("the private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.").

(3) Any order must not subject Mr. Samakande, Ms. Samakande, or other accredited family member in Mr. Samakande's household to any form of arrest or detention. *See id.* art. 29(1) (ensuring the "inviolab[ility]" of "[t]he person of a diplomatic agent" and making clear that a diplomat "shall not be liable to any form of arrest or detention.").

* * * *

D. OTHER ISSUES OF STATE REPRESENTATION

Designation of a Benefit Under the Foreign Missions Act

On August 17, 2010, the U.S. Court of Appeals for the Second Circuit reversed a district court's judgment and vacated the district court's opinion upholding 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 India's case, of its consular post as well. *City of New York v. Permanent Mission of India to the United Nations*, 618 F.3d 172 (2d Cir. 2010). The appeals court remanded the case to the district court "with instructions to dismiss the actions brought against the Missions." *City of New York v. Permanent Mission of India to the United Nations*, 618 F.3d at 203. For prior developments in the litigation, see *Digest 2006* at 592–603; *Digest 2007* at 455–62; *Digest 2008* at 456–57 and 495–98; and *Digest 2009* at 395–99.

On June 23, 2009, while the appeal was pending, then Deputy Secretary of State for Management and Resources Jacob J. Lew made a determination under the Foreign Missions Act ("FMA") that exempted the properties from taxation and nullified existing tax liens on foreign government-owned property used, *inter alia*, as residences for staffs of UN missions and of consular posts. 74 Fed. Reg. 31,788 (July 2, 2009); see discussion in *Digest 2009* at 393–95, 395–99. The Second Circuit held that the Deputy Secretary of State had lawfully exercised the State Department's discretion under the Act "and that the Notice operates in this case to render Appellants exempt from the property taxes imposed by the City, and so nullifies the City's existing tax liens against Appellants." *City of New York v. Permanent Mission of India to the United Nations*, 618 F.3d at 172. The court also held that the Administrative Procedure Act's "foreign affairs function" exception applied to the State Department's notice and thus the State Department properly issued the Notice without notice and comment. *Id.* at 202–3.

In so holding, the Second Circuit agreed with arguments the United States made in briefs it filed in the appeals court in 2009 after then Deputy Secretary Lew made his determination. The U.S. briefs, discussed in *Digest 2009* at 395–99, are available as documents 67.a. and 67.b. at *www.state.gov/s/l/2009/list/index.htm*.

Excerpts below from the court's opinion provide an overview of its analysis of the State Department's authority under the FMA, as well as of the Notice's preemptive and retroactive effect with respect to New York City's property tax law. (Footnotes are omitted.)*

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* * * *

DISCUSSION

* * * *

[II.]B.

The first question we must answer . . . is whether the FMA authorizes the State Department to designate property tax exemptions for mission and consular staff residences as "benefits." . . .

1.

We begin our interpretation of a federal statute with the statutory text. *See United States v. Hasan*, 586 F.3d 161, 166 (2d Cir. 2009). Section 4302(a) defines "benefit" as follows: It first provides that "benefit" means "any acquisition, or authorization for an acquisition," of a variety of thereafter enumerated goods and services. 22 U.S.C. § 4302(a)(1)(A)–(G). Then, in a phrase set-off from aforementioned list of examples, it states that "benefit" also "includes such other benefits as the Secretary may designate," *id.* § 4302(a)(1). The State Department relies on the second part of this definition for the authority to designate as a benefit the tax exemption for mission and consular residences.

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* Editor's note: On June 27, 2011, the Supreme Court denied New York City's petition for a writ of certiorari. *New York City v. Permanent Mission of India*, 2011 U.S. LEXIS 4951.

We agree that the broad and open-ended language of the second part of this definition empowers the State Department to grant positive benefits, such as property tax exemptions. Nothing in 22 U.S.C. § 4302(a)(1) limits the category of "other benefits" in the second part of the definition to the enumerated list of "acquisition[s]" in the first-part. To the contrary, the illustrations used in the definition are explicitly non-exclusive, and the second part of the definition is best read as authorizing the State Department to designate additional benefits that are consistent with the FMA's general purposes. Such a delegation is unexceptional in a statute that confers discretionary authority to an executive department to manage foreign affairs. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965) . . . . And though this delegation is broad, it is not unguided. Section 4301(c), for instance, directs that the treatment of a foreign mission "shall be determined . . . after due consideration of the benefits, privileges, and immunities provided to missions of the United States in the country or territory represented by that foreign mission, as well as matters relating to the protection of the interests of the United States." In addition, section 4304 sets forth the grounds on which the Secretary should rely in deciding whether to provide benefits and whether to set terms and conditions on their use. Indeed, in the Notice, the State Department expressly referenced the statutory objectives identified in sections 4301 and 4304 of the FMA as the basis for its benefit designation. *See* 74 Fed. Reg. 31,788 . . . .

* * * *

2.

We next consider the City's argument that the FMA's purpose and history indicate that Congress intended to establish a limited and technical meaning of "benefit" that the Notice in this case contravened.

A review of the legislative history of the FMA suggests that the City correctly characterizes the primary mischief that Congress intended to address in the statute: the imposition of restrictions and burdens on U.S. missions overseas and the State Department's inability to respond with targeted and proportionate measures. . . .

We reject, however, the City's invitation to treat evidence that Congress passed the FMA in part to create a reciprocal-sanctions

regime as proof that Congress intended to limit the State Department's authority to designate benefits to this function only. First, we find no evidence that Congress sought to proscribe the State Department from using benefits as "carrots" rather than as "sticks" in instances where the State Department believed that doing so would best advance the national interest and improve treatment for United Sates missions abroad. The State Department made just such a judgment in this case. The Notice a) describes how the tax treatment foreign missions have received in the United States has led to adverse "[r]esponsive measures taken against the United States" and b) explains why, if the United States were to pursue reciprocal retaliation rather than confer a positive benefit, it would likely leave the United States worse off. *See* 74 Fed. Reg. 31,788 . . . . Of course, just because a certain diplomatic tool is desirable does not mean that Congress has authorized it. But in the context of a statute in which Congress has "expressed a clear intention that the executive branch's authority . . . be broad," *Palestine Info. Office*, 853 F.2d at 938, and in which Congress gave interpretive authority to the State Department to "avoid conflicting interpretations by . . . courts," S. Rep. No. 97-283, at 7 (1981), it would be improper to read Congress's focus on the use of benefits as restrictions to exclude, implicitly, such other perfectly ordinary uses of "benefits."

Second, the legislative history suggests that in addition to providing the State Department with new authority to respond to the treatment of United States missions abroad, the FMA also had the purpose of giving the State Department the ability "to assist foreign missions, at their request, to obtain benefits" in order to "enhance the ability of foreign missions to conduct their representational duties in the United States." S. Rep. No. 97-283, at 8 (1981); *accord* H.R. Rep. No. 97-102, Part 1, at 31 (1981). This additional purpose, which is reflected in [the] statute's statement of policy in section 4301(b), clearly contemplates the granting of affirmative benefits by the State Department.

Apart from the legislative history, the City also seeks to rely on the FMA's post-enactment regulatory history as providing support for its interpretation. The City contends that while the State Department has previously used the FMA to impose restrictions on specific foreign missions by placing conditions on their acquisition

of property, goods or services, the Department has not historically attempted to use its authority under domestic law to grant legal exemptions. The fact that the FMA can be used (and indeed has been used) to impose reciprocal sanctions does not, however, limit the State Department's authority to designate benefits in other ways that are also consistent with the statute. And in the context of a statute that was designed to facilitate flexibility, we do not believe that the supposed novelty of this benefit designation makes such a designation suspect.

We therefore conclude that the FMA empowers the State Department to grant positive benefits, as well as to place restrictions on existing benefits.

C.

* * * *

. . . [W]e turn now to the question of the preemptive effect of the State Department Notice. . . . In determining whether the Notice preempts the City's property tax laws, we must . . . answer two questions: (1) whether the action taken by the State Department in the Notice was intended to preempt the City's property tax laws, and if so (2) whether the State Department acted within the scope of its delegated authority in preempting those laws. *See Drake v. Lab. Corp. of Am. Holdings*, 458 F.3d 48, 56 (2d Cir. 2006).

The answer to the first question is not in doubt: The State Department expressly addressed the preemptive effect of the Notice, and provided that "any state or local laws to the contrary [of the Notice's benefit designation] are hereby preempted." 74 Fed. Reg. 31,788. And even aside from that explicit assertion, it is clear that the City's property taxes cannot coexist with the State Department's Notice, and so, if the latter is valid, it must prevail. . . .

We also answer the second question in the affirmative. The State Department acted within its statutory authority in recognizing a property tax exemption as a benefit that has the effect of preempting the City's inconsistent tax laws. In reaching this conclusion, we reject the City's contention that section 4307—which provides that nothing in the FMA "may be construed to preempt

any State or municipal law or governmental authority *regarding zoning, land use, health, safety, or welfare,* except that a denial by the Secretary involving a benefit for a foreign mission within the jurisdiction of a particular State or local government shall be controlling," 22 U.S.C. § 4307—precludes the State Department from granting a benefit that affirmatively displaces State or local tax laws. The problem with the City's argument is apparent from the text of section 4307 emphasized above. Section 4307 does not bar the State Department from providing benefits that contravene *all* local laws. Rather, by its terms it specifically shields only those State or local laws "regarding zoning, land use, health, safety, or welfare." The section is tellingly silent with regard to State and local tax laws. . . .

* * * *

The language, structure, and subject-matter of the FMA all strongly indicate that Congress meant to give the State Department authority to designate benefits that might conflict with and therefore preempt State and local law. . . . As we have already explained, the FMA's delegation of authority to the State Department is exceptionally broad. The Secretary of State is given the power not only to designate benefits, 22 U.S.C. § 4302(a), but also to make "[d]eterminations with respect to the meaning and applicability" of that term, *id.* § 4302(b). More generally, the Act specifies that "[e]xcept as otherwise provided, *any* determination required under [the FMA] shall be committed to the discretion of the Secretary." *Id.* § 4308(g) (emphasis added). Furthermore, these allocations are made in the context of foreign affairs, "the precise realm in which the Constitution accords [the executive branch] greatest power," *Palestine Info. Office*, 853 F.2d at 934, and which is also an area in which there is often a need for the Nation to speak with one voice, *see Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 413–14 (2003).

The "plenitude of Executive authority," given to the Secretary of State to regulate foreign missions under the FMA controls the question of whether the State Department acted permissibly in designating a tax exemption benefit that preempted inconsistent State and local tax law. *See Crosby v. Nat'l Foreign Trade Council*,

530 U.S. 365, 376 (2000) (concluding that the fullness of Presidential authority delegated by Congress to impose calibrated sanctions and use economic leverage against a foreign country "controll[ed] the issue of preemption"). . . . By granting the State Department the power to implement an expansive statutory term—"benefit"—and by providing the Department with significant discretionary authorities designed to achieve a foreign affairs objective, the FMA authorizes the Department to take actions that preempt conflicting State or local laws that implicate the Department's supervisory function over foreign missions. . . . . The FMA authorizes preemption, that is, unless, as the City argues, section 4307 constitutes statutory language to the contrary.

But, understood in context, section 4307 supports, rather than detracts from, our conclusion that the State Department acted within the scope of its statutory authority. That section demonstrates that Congress recognized that the State Department might wish to designate benefits that contravened State or local law, and that Congress chose to limit the State Department's authority over some of these laws, namely State or local *police powers*, to negative preemption only. The City's argument to the contrary notwithstanding, section 4307 cannot in its natural meaning be read as describing the FMA's full-preemptive scope, but rather as a savings c[l]ause that insulates certain listed State and municipal powers from preemption. As such, section 4307 provides additional support for the conclusion that the State Department has the power to preempt any and all State and local laws that are not specifically protected. . . .

The legislative history of section 4307 of the FMA, which the City recounts at length, if anything gives further backing to this interpretation. While the legislative history confirms that Congress was concerned about preemption under the FMA and attempted to balance carefully the diplomatic interests of the federal government against the interests of State and local governments, it in no ways suggests that Congress intended for section 4307 to impose limits on the State Department's ability to designate tax exemptions with preemptive effect.

* * * *

III.

. . . [W]e now consider whether the Notice also invalidates taxes previously assessed by the City and nullifies the City's tax liens. Once again, our inquiry involves two questions: (1) Does the language of the Notice require that it be given retroactive effect? And if so, (2) has Congress provided the State Department with statutory authority to exempt missions from taxation retroactively? *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208–09 (1988); *Rock of Ages Corp. v. Sec'y. of Labor*, 170 F.3d 148, 158 (2d Cir. 1999).

The language of the Notice clearly resolves the first question. The Notice states: "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 . . . ." 74 Fed. Reg. 31,788 (emphasis added). And there can be no doubt that what the State Department has done is to create a retroactive rule because it "attaches a new disability" to prior tax assessments made by the City in the form of invalidation through federal preemption. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994) . . . .

We therefore turn to whether the State Department had the statutory authority to confer such a retroactive property tax exemption.

A.

"Retroactivity is not favored in the law." *Sweet v. Sheahan*, 235 F.3d 80, 89 (2d Cir. 2000) (quoting *Bowen*, 488 U.S. at 208). Courts, accordingly, have regularly employed a presumption against retroactivity as a default rule for statutory interpretation. *See Landgraf*, 511 U.S. at 272–73. . . .

* * * *

Retroactive laws are not always pernicious. . . . But retroactive lawmaking (whether by legislation or regulation) typically risks unfairness. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 533 (1998). . . .

In view of the values the presumption against retroactivity is designed to serve, it is not surprising that it has most frequently

been applied in cases involving contractual or property rights, where "predictability and stability are of prime importance," *id.* at 271 & n.25, and especially to cases involving private rights, where it is particularly undesirable—unfair even—to undermine good-faith reliance on established legal rules, *see* [*Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004)]. But where the evils of retroactivity are not present, the strength of the antiretroactivity presumption may be correspondingly diminished both because the presumption is less likely to reflect the intent of a reasonable legislator and because it is not needed to promote Congressional accountability. *Cf. Landraf*, 511 U.S. at 272–73. In such circumstances, it may become necessary for a court to look to the statute as a whole and to determine, even in the absence of a clear statement, whether Congress meant the statute to have retroactive effect, or, in the case of a delegation, whether Congress intended to have the statute authorize retroactive executive rulemaking. Thus, in *Altmann*, the Court declined to rely on the absence of a clear statement in the FSIA and applied the FSIA to pre-enactment conduct. It did so after recognizing that retroactive application of the statute would not a) affect private rights, or b) upset significant reliance interests (because sovereign immunity laws are not meant to create reliance). *See* 541 U.S. at 696. We find similar considerations relevant in the instant case, and these lead us to conclude that the FMA gave the State Department the power to confer a retroactive tax exemption to foreign missions.

First, the State Department Notice implicates only the public rights of States and municipalities, not of private persons. We have explained that under our case law, this fact is not independently sufficient to negate the antiretroactivity presumption. *See Yale-New Haven Hosp.*, 470 F.3d at 87 n.16. But when it is combined with other factors that suggest that the typical costs of retroactivity are not at stake, it is germane. The City is not a politically weak actor. And while there is perhaps some unfairness to the City when the federal government retroactively declares property taxes imposed by the City against foreign countries to be null and void, this unfairness inheres in the federal government's unquestioned supremacy in the management of foreign relations. *Cf. United States v. Cnty. of Arlington, Va.*, 702 F.2d 485, 488

(4th Cir. 1983) . . . . In other words, this is manifestly not a case where retroactive lawmaking is being used to burden an unpopular or underrepresented person, group, or entity.

Second, and most important, the Notice does not upset expectations that were genuinely settled. It is true that this suit, which was brought to establish the validity of the City's tax liens, involves "rights in . . . property," *see Permanent Mission of India to the United Nations*, 551 U.S. at 202 (internal quotation marks omitted), an area in which reliance interests are particularly strong, *see Landgraf*, 511 U.S. at 271 & n.25. Yet the property interests at stake here are based on the City's right to impose and to collect property taxes against portions of foreign missions used for staff housing, and the status of such rights has long been uncertain. Both the India Mission and the Mongolia Mission have consistently taken the position that their entire buildings, including those portions used for staff residences, are tax exempt under the VCCR and the VCDR. We need not decide today whether the Missions' interpretation of these treaties is correct. But we do think that the Missions' arguments have considerable force, and we find this fact relevant in assessing the degree to which the State Department Notice undermined the City's preexisting expectations.

. . . [T]he VCDR exempts from taxation "the premises of the mission," VCDR art. 23, 23 U.S.T. 3227, which are defined as "the buildings or parts of buildings . . . used for the purposes of the mission, including the residence of the head of the mission," *id.* art. 1(i). Similarly, the VCCR establishes a tax exemption for "[c]onsular premises and the residence of the career head of consular post." VCCR, art. 32, 21 U.S.T. 77. . . . .

* * * *

. . . We disagree . . . with the District Court's conclusion that the "plain language of the VCCR and the VCDR unequivocally supports the City's position." *Permanent Mission II*, 533 F. Supp. 2d at 461. Instead, we find the proper scope of the tax exemptions in these treaties decidedly ambiguous— a judgment its drafters might well have shared. In so regarding the treaties' language, we are in accord with the view—though not necessarily the final conclusion—expressed by the Fourth Circuit in *County of Arlington*, 702 F.2d 485, which

is the only federal appellate decision to have addressed whether the tax exemption in Article 23 of the VCDR applies to residential housing for mission staff. The *County of Arlington* court acknowledged several possible arguments in favor of an exemption, including one akin to the argument rejected by the District Court in this case. *See id.* at 487–88 ("While the residence of the head of mission is specifically mentioned as a mission purpose, there is no language compelling a conclusion that living quarters of other mission staff are not also a mission purpose."). The court ultimately endorsed the United States' "candid[] conce[ssion]" in its briefing for that case that the relevant provisions of the VCDR are "ambiguous with respect to the tax immunity of the property in question," and the court itself stated that "[t]here are interpretations [of the VCDR] calling for tax-exemption at least as tenable as those to the contrary." *Id.* at 487–88. With the question of interpretation in equipoise, the Court relied on the position of the State Department—which based its view on "generally accepted principle[s] of customary international law"—to "tip[] the scales" in favor of finding an exemption for the staff residences. *Id.* at 488.

* * * *

We do not deny that the City had a good-faith belief that it would be able to impose property taxes on the staff residences for the Missions. But that does not alter the fact that the right to impose taxes was anything but settled prior to the Notice. The governing language of the VCDR and VCCR is ambiguous; the leading federal appellate court decision rejected the City's interpretation of these treaties and recognized a tax exemption for an apartment building located in Arlington, Virginia that housed the staff of a foreign mission to the United States; the State Department issued a public notice subsequent to that decision affirming its position that, at least with respect to bilateral missions, "property owned by diplomatic missions used to house the staff of such missions is exempt from general property tax, subject to reciprocal treatment of comparable property owned by the United States abroad," *Public Notice 975: Property Owned by Diplomatic Missions and Used to House the Staff of Those Missions is Exempt*

From General Property Taxes, 51 Fed. Reg. 27,303, 27,304 (July 30, 1986); and while the City points to several statements issued by the State Department that suggest staff residences for missions to the United Nations and consular offices were considered taxable, none of these statements either a) explain why the Department considered these properties taxable even though analogous properties held by bilateral missions to the United States were not, or b) address whether residential housing located on the same premises as diplomatic offices might serve the purposes of a mission or consular office.

For these reasons, we find that the presumption against retroactivity is not determinative in this case. We emphasize that our holding on this issue is narrow. We do not adopt the Government's contention that the antiretroactivity presumption is generally inapplicable to foreign affairs cases involving public rights. Rather, we conclude that in the circumstances of this case, application of the antiretroactivity clear statement rule is misplaced because the values that underlie that rule are not sufficiently implicated.

B.

While the FMA does not contain the sort of *express* authorization for the State Department to issue a rule that operates retroactively that overcoming full application of the antiretroactivity presumption would require, *see Rock of Ages Corp.*, 170 F.3d at 158, we believe that the statute is best read to permit the State Department to do what it seeks to do and apply the exemption to "taxes that have been . . . assessed" and to "nullify any existing tax liens," 74 Fed. Reg. 31,788. This follows not only from the FMA's substantial delegation of discretionary authority to the State Department, but also from the criteria guiding the Secretary's benefit determinations and from the policies embodied in the statute.

The FMA directs the State Department "to support the secure and efficient operation of United States missions abroad" and to do likewise for foreign missions located in the United States. 22 U.S.C. § 4301(b). Achieving this goal may require the mediation of conflicts between the United States and foreign countries, a prospect that the FMA explicitly contemplates in setting forth criteria for the provision of benefits. *See* 22 U.S.C. § 4304(b)(4) . . . .

We think it would be anomalous to read the FMA as requiring the State Department to resolve disputes involving foreign missions through the designation of benefits, and yet to tie the Department's hands by limiting it to prospective solutions that may not address the sources of the conflicts.

In the instant case, for instance, the State Department asserted that action on its part was needed to "resolv[e] 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." 74 Fed. Reg. 31,788. It seems unlikely that this disagreement—which the State Department tells us has "become a major irritant in the United States' bilateral relations and threatens to cost the United States hundreds of millions of dollars," *id.*—could be effectively resolved by the establishment of an exemption that was only forward-looking and that left the Missions on the hook for decades of property taxes along with significant back interest payments. Accordingly, we cannot read the FMA, which was intended to give the State Department flexible tools to carry out United States foreign-policy objectives, as so restricted.

* * * *

E. INTERNATIONAL ORGANIZATIONS

1. Immunity of the United Nations and Former UN Officials

On March 2, 2010, the U.S. Court of Appeals for the Second Circuit affirmed a district court's dismissal of a lawsuit against the United Nations and three former UN officials for lack of subject matter jurisdiction due to the defendants' immunities. *Brzak v. United Nations*, 597 F.3d 107 (2d Cir. 2010). The plaintiffs alleged sex discrimination and other causes of action relating to sexual harassment one of the plaintiffs allegedly suffered as a UN employee. For prior history in the litigation, see *Digest 2008* at 501–4.

The Second Circuit held that the United Nations "enjoys absolute immunity and the district court's decision to dismiss claims against the United Nations was correct."

Brzak v. United Nations, 597 F.3d at 112. The court also held that the individual defendants had residual immunity with respect to six of the plaintiffs' seven claims because those claims alleged actions that took place in the course of the defendants' official duties. *See id.* at 113–14. For discussion of other litigation concerning residual immunity, see C.1. *supra.* The court affirmed the district court's dismissal of the remaining claim against one of the individual defendants, for battery under state law, without reaching the argument that the alleged acts did not fall within the defendant's official duties. In doing so, the court made clear that the plaintiff could file the battery claim in state court, in which case that court would have to assess the defendant's immunity. *Brzak*, 597 F.3d at 113–14. Finally, the court dismissed the plaintiffs' claims that granting immunity to the defendants would violate their rights under the U.S. Constitution. *Id.* at 114. Excerpts below from the court's opinion provide the main points of its analysis of the immunities of the United Nations and of the individual defendants (footnote omitted).*

* * * *

DISCUSSION

As the District Court correctly concluded, the United States has ratified the CPIUN [Convention on Privileges and Immunities of the United Nations], which extends absolute immunity to the United Nations. Specifically, the CPIUN provides that "[t]he United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." *Id.* art. II, § 2. If the CPIUN applies, then appellants' claims fail. The answer to this question turns on whether the CPIUN is self-executing.

* * * *

* Editor's note: On June 6, 2010, the plaintiffs filed a petition for a writ of certiorari in the U.S. Supreme Court, which the Court denied on October 4, 2010. *Brzak v. United Nations*, 131 S. Ct. 151 (2010).

In determining whether a treaty is self-executing, we look to the text, the negotiation and drafting history, and the postratification understanding of the signatory nations. *Medellin*, 552 U.S. at 506–07. Additionally, the executive branch's interpretation of a treaty "is entitled to great weight." *Id.* at 513 (quoting *Sumitomo Shoji America, inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)). Based on these criteria, we have little difficulty concluding that the CPIUN is self-executing.

CPIUN Section 34 states "[i]t is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this convention." When the United States acceded to the CPIUN in 1970 (by the President's ratification, with the advice and consent of the Senate), it was affirming that it was "in a position under its own law to give effect" to the CPIUN's terms at that time. This means that the treaty became effective at ratification, and therefore, is self-executing. "[T]he label 'self-executing' usually is applied to any treaty that according to its terms takes effect upon ratification." *Mora v. New York*, 524 F.3d 183, 193 n.16 (2d Cir. 2008) (quoting *United States v. Li*, 206 F.3d 56, 67 (1st Cir. 2000) (en banc) (Selya & Boudin, JJ., concurring)).

The ratification history of the CPIUN reinforces this conclusion. During testimony before the Senate Foreign Relations Committee as it considered whether to recommend that the Senate ratify the CPIUN, the Legal Advisor to the State Department stated that: "It is clear from the language of the convention . . . that the convention is self-executing and no implementing legislation is necessary." S. Exec. Rep. No. 91-17, App. at 16 (Statement of John R. Stevenson, Legal Advisor, Department of State); *see also id.* at 13 ("I would like to have the record reflect[] that we regard the convention as self-executing."). The Foreign Relations Committee's report on the CPIUN also expressed the view that "the convention is self-executing and will require no implementing legislation." *Id.* at 5.

Finally, the executive branch continues to assert that the CPIUN is self-executing. *See* Letter of United States Attorney for the Southern District of New York, *Brzak v. United Nations*, 06-Civ. 3432 (S.D.N.Y., Oct. 2, 2007). These views, as we have

seen, are entitled to "great weight." *Medellin*, 552 U.S. at 513; *Mora*, 524 F.3d at 204. Consequently, we hold that the CPIUN is self-executing and applies in American courts without implementing legislation.

As the CPIUN makes clear, the United Nations enjoys absolute immunity from suit unless "it has expressly waived its immunity." *Id.* art. II, § 2. Although the plaintiffs argue that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word "expressly" out of the CPIUN. The United Nations has not waived its immunity. *See* Letter from Nicolas Michel, United Nations Under-Secretary-General for Legal Affairs, to Alejandro D. Wolff, Deputy Permanent Representative of the United States of America to the United Nations (May 15, 2006); Letter from Nicolas Michel, United Nations Under-Secretary-General for Legal Affairs, to John R. Bolton, Permanent Representative of the United States, to the United Nations (Oct. 19, 2006). Consequently, the United Nations enjoys absolute immunity and the district court's decision to dismiss the claims against the United Nations was correct.

Our conclusion is further confirmed by the International Organizations Immunities Act of 1945, 22 U.S.C. § 288a(b) (the "IOIA"), which provides that international organizations designated by the President should receive the "same immunity from suit and every form of judicial process as is enjoyed by foreign governments." The United Nations has been so designated. *See* Exec. Ord. No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946). The plaintiffs argue that designated international organizations no longer have absolute immunity in all cases, because, since that act was passed, Congress has passed the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602–11("FSIA"), which strips foreign sovereigns of their immunity in certain circumstances. Plaintiffs argue that it is this narrower definition of sovereign immunity that now defines what sort of immunity the IOIA applies to international organizations. Although this argument has been rejected by at least one other Court of Appeals, *see Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1340–42 (D.C. Cir. 1998), we need not resolve whether plaintiffs' argument is correct for at least two reasons. The first is that, whatever immunities are possessed by other

international organizations, the CPIUN unequivocally grants the United Nations absolute immunity without exception. The second is that the plaintiffs have not presented any argument, either at the district level or to us, which would suggest that one of FSIA's exceptions to immunity would apply. Therefore, even under the plaintiffs' interpretation of the IOIA, the United Nations would still be immune from suit.

The plaintiffs also sued three former United Nations officials. The CPIUN also addresses their immunity: "The Secretary-General and all Assistant Secretaries-General shall be accorded . . . the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law." *Id.* art. v, sect. 19. As we have determined above that the CPIUN is a self-executing treaty, this provision is binding on American courts. International law provides extensive protection for diplomatic envoys. *See* The Vienna Convention on Diplomatic Relations, Apr. 18, 1961, *entered into force with respect to the United States Dec.* 13, 1972, 23 U.S.T. 3227 (the "VCDR"). Although current diplomatic envoys enjoy absolute immunity from civil and criminal process, *see id.* art. 31, former diplomatic envoys retain immunity only "with respect to acts performed by such a person in the exercise of his functions" as a diplomatic envoy. *Id.* art. 39, para. 2. As the plaintiffs have sued former United Nations officials, each of whom held a rank of Assistant Secretary-General or higher, it is this functional immunity, which the CPIUN incorporates by reference, that is relevant. The Diplomatic Relations Act of 1978, 22 U.S.C. § 254d, makes pellucid that American courts must dismiss a suit against anyone who is entitled to immunity under either the VCDR or other laws "extending diplomatic privileges and immunities." As CPIUN section 19 is such a law, the remaining question is whether the plaintiffs' allegations against the individual defendants involve acts that the defendants performed in the exercise of their United Nations functions.

When a court attempts to determine whether a defendant is seeking immunity "with respect to acts performed by such a person in the exercise of his functions," VCDR art. 39, para. 2, the court must do so without judging whether the underlying conduct actually occurred, or whether it was wrongful. Of the plaintiffs'

seven claims, all except the fourth make allegations with respect to acts that the defendants performed in exercise of their official functions, namely, their management of the office in which the plaintiffs worked. The first two claims allege that defendants discriminated against Brzak in the conditions of her employment and retaliated against her, both in violation of Title VII. The fifth claim alleges that the defendants retaliated against Ishak in violation of Title VII as well. These allegations involve personnel management decisions falling within the ambit of the defendants' professional responsibilities. Brzak's third claim, for intentional infliction of emotional distress, also relates to the management of the office, because it challenges the defendants' conduct in investigating Brzak's claims, and charges retaliation through changes of her work assignments. The sixth and seventh claims, which allege violations of RICO, also relate to Annan's and Lubbers' roles as United Nations officials.

The only remaining claim is the fourth, in which Brzak alleges Lubbers committed the state law tort of battery. We have said that if a plaintiff's federal claims are dismissed before trial, "the state claims should be dismissed as well." *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 250 (2d Cir. 2008) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966)). Because Bzrak's federal claims were dismissed on jurisdictional grounds at the very beginning of the case, there was no colorable basis for the district court to exercise supplemental jurisdiction over her state law claim. We thus affirm the district court's dismissal without reaching Bzrak's argument that the claim involves conduct outside the scope of the defendant's immunity. Bzrak is free to refile her battery claim in the state courts. If she does so, the state court would need to adjudicate in the first instance the defendant's claim of immunity.

* * * *

2. Extension of Immunities

Section 2 of the Extending Immunities to the Office of the High Representative in Bosnia and Herzegovina and the

International Civilian Office in Kosovo Act of 2010, Pub. L. No. 111-177, amended the International Organizations Immunities Act, 22 U.S.C. § 288f-7, by adding a new § 17 concerning the Office of the High Representative in Bosnia and Herzegovina (and its officers and employees) and the International Civilian Office in Kosovo (and its officers and employees). New § 17 states:

> The provisions of this title may be extended to the Office of the High Representative in Bosnia and Herzegovina (and to its officers and employees) or the International Civilian Office in Kosovo (and to its officers and employees) in the same manner, to the same extent, and subject to the same conditions, as such provisions may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation. Any such extension may provide for the provisions of this title to continue to extend to the Office of the High Representative in Bosnia and Herzegovina (and to its officers and employees) or the International Civilian Office in Kosovo (and to its officers and employees) after that Office has been dissolved.*

Cross References

Litigation under the Alien Tort Claims Act and the Torture Victim Protection Act, **Chapter 5.B.**
Act of state, **Chapter 5.C.**

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* Editor's note: On March 8, 2011, President Barack H. Obama issued Executive Order 13568, extending "all privileges, exemptions, and immunities provided by the International Organizations Act . . . to the Office of the High Representative in Bosnia and Herzegovina, and to its officers and employees, and to the International Civilian Office in Kosovo and to its officers and employees." 76 Fed. Reg. 13,497 (Mar. 11, 2011).

Chapter 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. U.S.–EU Air Transport Agreement

On June 24, 2010, representatives of the United States, of the one part, and the European Union and its Member States, of the other part, signed a Protocol to Amend the Transport Agreement between the United States of America and the European Community and its Member States, signed April 25 and 30, 2007. The protocol is being applied provisionally, to the extent permitted under applicable domestic law. The Department of State issued a media note on June 24, 2010, excerpted below, providing details on the agreement to enable greater cooperation on aviation issues between the United States and the European Union. The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2010/06/143593.htm*. The agreement is available at *www.state.gov/documents/organization/143930.pdf*. Links to related documents and the agreement are available at *www.state.gov/e/eeb/rls/othr/ata/e*. For discussion of the air transport agreement between the United States, of the one part, and the European Community and its Member States, of the other part, signed in 2007, see *Digest 2007* at 529–31.

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Today's accord builds on the historic U.S.–EU "Open Skies" agreement that was signed in April 2007. That pro-consumer, pro-competitive agreement eliminated restrictions on air services between the United States and EU member states, allowing airlines from both sides to select routes and destinations based on consumer demand for both passenger and cargo services, without limitations on the number of U.S. or EU carriers that can fly or the number of flights they can operate.

The agreement signed today affirms that the terms of the 2007 agreement will remain in place indefinitely. It also deepens U.S.–EU cooperation in aviation security, safety, competition, and ease of travel. In addition, it provides greater protections for U.S. carriers from arbitrary restrictions on night flights at European airports and provides for further discussion of whether legislation in the fields of noise regulation and foreign investment in airlines is appropriate. It also adds a new article on the importance of high labor standards in the airline industry and underscores the importance of close transatlantic cooperation on aviation environmental matters in order to advance a global approach to global challenges.

2. U.S.–Japan Memorandum of Understanding

On October 25, 2010, the U.S. Ambassador to Japan, John Roos, and Japan's Minister of Land, Infrastructure, Transport and Tourism, Sumio Mabuchi, signed a Memorandum of Understanding ("MOU") relating to implementation of the Civil Air Transport Agreement of August 11, 1952, between the United States of America and Japan ("1952 Agreement"). The preamble to the MOU explained that its provisions were negotiated "with a view to ensuring" implementation of the 1952 Agreement "in a manner appropriate to the Japan–U.S. aviation relationship." The preamble also stated:

> The provisions of this Memorandum of Understanding . . ., as incorporated into an agreement to be concluded between the Government of Japan and the Government of the United States of America by an exchange of diplomatic notes (hereinafter referred to as "the Agreement"), will

constitute either understandings relating to implementation of the 1952 Agreement or amendments of the Schedule attached to the 1952 Agreement.

A State Department media note issued October 25, 2010, explained further that the MOU is "aimed at establishing an Open Skies air transportation relationship between the two countries." The media note explained that the bilateral agreement which incorporates the MOU's provisions "will strengthen and expand our already strong trade and tourism links with Japan, benefiting U.S. and Japanese businesses and travelers by expanding air service and encouraging vigorous price competition by airlines, while safeguarding aviation safety and security." The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2010/10/149921.htm*.

On November 13, 2010, the United States and Japan exchanged diplomatic notes constituting an agreement between the two governments to implement the provisions of the MOU. The agreement entered into force on November 13, 2010. The exchange of notes and the accompanying MOU are available at *www.state.gov/documents/organization/154335.pdf*.

3. Other U.S. Open Skies and Air Transport Agreements

Information on other U.S. Open Skies and air transport agreements, by country, is available at *www.state.gov/e/eeb/tra/c661.htm*.

4. Application of the Tokyo and Warsaw Conventions: *Eid v. Alaska Airlines*

On July 30, 2010, the U.S. Court of Appeals for the Ninth Circuit affirmed in part, reversed in part, and remanded a lower court's decision in a case brought by nine plaintiffs after their international flight to Las Vegas, Nevada, was diverted, because a crew member asserted she had lost control of the first class cabin in an incident allegedly involving the plaintiffs.

Eid v. Alaska Airlines, Inc., 621 F.3d 858 (9th Cir. 2010). The plaintiffs were forced to disembark at Reno-Tahoe Airport, where law enforcement officials questioned them. The plaintiffs were allowed to complete their trip on a different airline, and no charges were ever filed against them. The plaintiffs sought damages for delay under the Warsaw Convention. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (entered into force in the United States in 1934) ("Warsaw Convention"), reprinted in 49 U.S.C. § 40105 note. The plaintiffs also brought state-law claims alleging (1) defamation due to formal statements made by the captain and crew to Reno Police and Transportation Security Administration officials regarding the incident; (2) defamation for an announcement a crew member made about them to the other passengers after their original flight left Reno; (3) intentional infliction of emotional distress; and (4) invasion of privacy/false light. For prior history in the litigation, including discussion of the *amicus curiae* brief the United States filed at the Ninth Circuit's request on July 18, 2008, see *Digest 2008* at 519–25.

The Ninth Circuit reversed the district court's grant of summary judgment to the defendants on the plaintiffs' claims for delay under the Warsaw Convention and remanded them for consideration at trial, along with the plaintiffs' claims for defamation relating to the in-flight announcement about them after the airplane left Reno. The Ninth Circuit affirmed the district court's dismissal of the plaintiffs' defamation claims concerning the captain and crew members' statements to law enforcement authorities in Reno. The Ninth Circuit also affirmed the district court's denial of the plaintiffs' motion to add various defamation-related claims to their complaint.

Excerpts below from the Ninth Circuit's opinion provide its analysis in concluding that "airlines are immune from liability for conduct covered by the Tokyo Convention only to the extent flight commanders act reasonably in exercising the powers granted to them under the treaty" and in reversing the district court's dismissal of the plaintiffs' defamation claim concerning

the crew member's statement about them after the aircraft left Reno. *Eid v. Alaska Airlines, Inc.*, 621 F.3d at 868, 874.

The parties sought panel rehearing and rehearing en banc, and on October 26, 2010, the Ninth Circuit denied rehearing. The defendants also filed a petition for certiorari, which the Supreme Court denied on May 2, 2011. *Alaska Airlines, Inc. v. Eid*, 131 S. Ct. 2874 (2011).

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Analysis

I. Original Complaint

A. Warsaw and Tokyo Conventions

In the absence of statute, common carriers such as airlines have the duty "to secure the utmost care and diligence in the performance of their duties," which means "in regard to passengers, . . . the highest degree of carefulness and diligence." *Liverpool & G.W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 440 (1889); *see also Andrews v. United Airlines, Inc.*, 24 F.3d 39, 40 (9th Cir. 1994). . . . When it comes to ejecting passengers from flights, that duty has been modified by federal law. In the case of domestic flights, 49 U.S.C. § 44902(b) grants air carriers immunity if they act reasonably in excluding passengers from a flight. *See Newman v. Am. Airlines, Inc.*, 176 F.3d 1128 (9th Cir. 1999); *Cordero v. Cia Mexicana De Aviacion, S.A.*, 681 F.2d 669 (9th Cir. 1982).

As to international flights, the common law rule is abrogated by treaty. Any claim by a passenger based on an airline's conduct during flight, or during the process of boarding or leaving an airplane (embarkation or disembarkation), is limited to three kinds of damages: for bodily injury, for mishandled luggage and for delay; and the maximum amount awarded may not exceed $75,000. *See, e.g.*, *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 32–33 (2d Cir. 1975) (explaining the Warsaw Convention's basic provisions). Liability is further limited when a passenger's claim results from actions taken by the pilot or crew to preserve order and safety on board. The Tokyo Convention authorizes pilots to deplane passengers, deliver passengers to law enforcement and

forcibly restrain passengers during flight; the airline is immune from any liability if the pilot has "reasonable grounds" to support his actions. As far as we're aware, this is the first case in the United States, and the second reported opinion anywhere, to interpret the Tokyo Convention, the first being the *Zikry* case from Israel. . . .

1. Standard of Care. Alaska and its supporting amici, the Air Transport Association of America and the International Air Transport Association, argue that the airline should not be held liable for its treatment of passengers under the Tokyo Convention unless [the captain] acted in an arbitrary and capricious manner. But the treaty and its drafting history say nothing about "arbitrary and capricious." The standard the treaty adopts is reasonableness. Article 8 of the Tokyo Convention empowers the captain to disembark anyone "who[m] he has reasonable grounds to believe has committed" an act which "jeopardize[s] good order and discipline on board." Article 9 empowers a captain to turn passengers over to the police if he has "reasonable grounds to believe" that they have committed a "serious offence according to the penal law of the State of registration of the aircraft."

"It is well settled that the '[i]nterpretation of [a treaty] . . . must, of course, begin with the language of the Treaty itself.'" *Medellin v. Texas*, 552 U.S. 491, 518–19 (2008) (quotation and citation omitted) (alterations in original). The treaty here clearly provides immunity to the airline only if the pilot has "reasonable grounds" to support his actions. "[W]here the text is clear, as it is here, we have no power to insert an amendment." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989).

"Because a treaty ratified by the United States is an agreement among sovereign powers, we have also considered as aids to its interpretation the negotiation and drafting history of the treaty. . . ." *Medellin*, 552 U.S. at 507 (quotation omitted). Here, the drafting history is entirely consistent with the treaty's plain language. The American delegate to the Tokyo Convention wanted reasonableness to be the standard because it is a familiar term for American judges and juries. When another delegate moved to replace the phrase "reasonable grounds" with "serious grounds," our delegate objected: "At least in the United States legal system, the phrase 'serious grounds' had no significant legal meaning, while, on the other hand,

the phrase 'reasonable grounds' had a substantial legal significance." *International Conference on Air Law*, Vol. 1 ("Minutes"), Doc 8565-LC.152-1 (1966) at 155. Our delegate went on to explain that:

> Within the general concept of United States law, the phrase "reasonable grounds" would give the impression that the aircraft commander would be required to have a substantial basis for his belief, that he could not act on the basis of facts which were inadequate to support his belief to the effect that a person had committed or was about to commit the kind of act under consideration.

Id.

Delegates from other nations expressed similar sentiments. The Dutch delegate, for example, said "there had always been an attempt to keep in sight two objectives: Firstly, the safety of civil aviation, and, secondly, the guarantees for individual freedom. For that reason the word 'reasonable' had been introduced." *Id.* at 156 (Netherlands Delegate). The negotiators spent considerable time striking a balance between the need of flight commanders to maintain order and the legitimate expectation of passengers that they be treated fairly and with dignity.

President Johnson's message transmitting the Tokyo Convention to the Senate for ratification and the Senate Report recommending ratification strike the same balance by recognizing that air crews must act reasonably in exercising their authority to deplane passengers. In his message to the Senate, President Johnson wrote that the Convention "provides that only those persons whom the aircraft commander has reasonable grounds to believe have committed, on board his aircraft, an act which is a serious offence can be 'delivered' [to the police]." Message from the President of the United States, transmitting *The Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Signed at Tokyo on September 14, 1963*, S. Exec. Rep. 90-L at 8 (Sept. 25, 1968). The Senate Report recommending ratification explains that "if their actions are reasonable and comply with the Convention, each aircraft crew member and passenger, the aircraft owner or operator, and the person for whom the flight is made, all would have legal immunity." S. Rep. No. 91-1083 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 3996, 3997.

When interpreting international agreements, we must also consult "the postratification understanding of signatory nations." *Medellin*, 552 U.S. at 507 (quotation omitted). The only other reported case interpreting the Tokyo Convention, the Israeli decision of *Zikry v. Air Canada*, Civil File No. 1716/05 A (Magistrates Court of Haifa 2006), also required aircrews to act reasonably as a condition for Tokyo immunity. In *Zikry*, the court held that the key questions were "whether reasonable grounds [existed to support] the suspicion that the Plaintiff had committed an offense on board the aircraft, as well as the question of the reasonableness of the steps taken against him." *Id.* § 5.

Finally, our interpretation is consistent with our cases applying the analogous statute for domestic air travel, 49 U.S.C. § 44902(b), which provides that "an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." . . .

Reasonableness is a well-established and easily-understood standard, one that American courts are accustomed to applying in a wide variety of situations involving the behavior of individuals. "Arbitrary and capricious," by contrast, is a standard normally applied to actions of government agencies or judicial officers; it is seldom used to judge the conduct of individuals in the real world. Juries determine whether conduct is reasonable many times every day but almost never whether conduct is "arbitrary and capricious." If "arbitrary and capricious" means something other than "reasonable grounds," we see no basis for adopting a standard that departs from that specified in the treaty. And, if "arbitrary and capricious" is the same as "reasonable grounds," using different language to express the same idea can only cause confusion.

* * * *

B. Defamation

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2. Plaintiffs further allege that after Flight 694 took off from Reno to complete the trip to Las Vegas, a member of the crew made an in-flight announcement blaming plaintiffs for causing the diversion. Plaintiffs filed an additional defamation claim for this statement. Like the other defamation claims, the district court dismissed this claim on the pleadings as preempted by the Warsaw Convention.

In supplemental briefing, both the United States and Egypt urge us to reverse this dismissal. Their views deserve serious consideration. *See, e.g.*, *El Al Israel Airlines, Ltd.* [*v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999)] (interpreting the Warsaw Convention and explaining that "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty"); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) ("Because a treaty ratified by the United States is . . . an agreement among sovereign powers, we have traditionally considered as aids to its interpretation . . . the postratification understanding of the contracting parties.").

Quoting from Articles 1(1) and 17, the United States in its amicus brief argues that "[t]he Warsaw Convention by its terms applies only to injuries suffered during the 'international carriage of persons.' Such carriage ends when 'the operations of . . . disembarking' have completed." Egypt agrees, quoting from Article 17 and explaining that the key question is "whether *the passengers* were still involved 'in the course of any of the operations of . . . disembarking.'"

Both the United States and Egypt argue that the Warsaw Convention's preemptive effect exists only so long as the plaintiff is still on the airplane, embarking onto the plane or disembarking from the plane. Nothing in the Convention suggests that it extends to lawsuits filed by former passengers for things that happen on planes long after they've disembarked. We therefore reverse the district court's dismissal of plaintiffs' defamation claim for the post-disembarkation, in-flight announcement.

* * * *

B. NORTH AMERICAN FREE TRADE AGREEMENT

1. Investment Dispute Settlement Under Chapter 11

a. Venue transfer under Article 2005(4) of the NAFTA: Dolphin-safe tuna dispute

On September 24, 2010, the United States requested the North American Free Trade Agreement ("NAFTA") Free Trade Commission to establish a dispute settlement panel 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. In 2009, the United States had sought to change the venue under Article 2005 of the NAFTA. *See Digest 2009* at 416–18. Excerpts below from a press statement the U.S. Office of the Trade Representative ("USTR") issued on September 24, 2010, provide background on the U.S. request for a dispute settlement panel. The full text of the press statement is available at *www.ustr.gov/about-us/press-office/press-releases/2010/september/united-states-requests-dispute-settlement-panel.*

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Mexico's challenge to the U.S. dolphin safe labeling provisions meets the criteria in the NAFTA choice of forum. This provision states that certain disputes which pertain to matters arising under both the WTO Agreement and the standards-related provisions of the NAFTA, and which concern human, animal or plant life or health or the environment and raise factual issues concerning the environment or conservation, shall be heard—at the responding party's option—solely under the NAFTA's dispute settlement procedures.

NAFTA rules provide that once a responding party invokes the choice of forum provision, the complaining party must withdraw from the WTO proceedings and may pursue the dispute solely under the NAFTA.

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 continued to pursue 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.

The United States and Mexico held consultations on the choice of forum dispute in December 2009. When consultations did not

resolve the dispute, the United States requested the NAFTA Free Trade Commission, which is composed of the NAFTA countries' trade ministers or their designees, meet to discuss the matter. The Commission met on May 7, 2010 but was also unable to resolve the dispute.

Under NAFTA rules, a dispute settlement panel is established immediately upon delivery of the request to the Commission.

b. U.S. Article 1128 submission: Mobil Investments Canada Inc. v. Gov't of Canada

On July 8, 2010, in an arbitration brought under NAFTA Chapter 11, the United States made a submission pursuant to Article 1128 on a question of interpretation of the NAFTA. *Mobil Investments Canada Inc. v. Gov't of Canada*. Mexico also made a submission in the same arbitration. In doing so, the United States took no position on how its interpretive position applied to the facts of the proceedings. The dispute involved two oil companies incorporated in Delaware that alleged that Canada violated NAFTA Article 1106 (prohibition on performance requirement) in connection with regulatory changes affecting the exploitation of two oil fields off the coast of Canada.

Excerpts follow from the U.S. submission, arguing that the measures reserved on a Party's Annex I or Annex III Schedule of non-conforming measures can include not only subordinate measures that existed prior to the NAFTA's entry into force, but also subordinate measures that were adopted after the NAFTA's entry into force.* The full text of the U.S. submission is available at *www.state.gov/s/l/c29743.htm*.

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* Editor's note: On January 21, 2011, the United States filed a second submission, available at *www.state.gov/s/l/c29743.htm*, which responded to the tribunal's questions concerning paragraph 5 of this submission. *Digest 2011* will discuss relevant aspects of the second submission.

2. Article 1108, entitled "Reservations and Exceptions," provides that Articles 1102, 1103, 1106, and 1107 do not apply to certain non-conforming measures.[1] Under Article 1108(1)(a)(i), Articles 1102, 1103, 1106, and 1107 do not apply to "any existing non-conforming measure that is maintained by . . . a Party at the federal level, as set out in its Schedule to Annex I or III" to the Agreement. "Existing" is defined under Article 201(1) to mean "in effect on the date of entry into force of this Agreement."

3. In addition, Article 1108(1)(b) and Article 1108(1)(c) provide, respectively, that Articles 1102, 1103, 1106, and 1107 do not apply to the "continuation or prompt renewal" or to the "amendment" of any non-conforming measures set out in a Party's Schedule to Annex I or Annex III to the Agreement, which include actions occurring after entry into force. Under Article 1108(1)(c), Articles 1102, 1103, 1106, and 1107 do not apply to an "amendment" of a non-conforming measure set out in a Party's Schedule to Annex I or Annex III only "to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1102, 1103, 1106, and 1107."

4. The headnote to Annex I of the Agreement, entitled "Reservations for Existing Measures and Liberalization Commitments," further provides that for each reservation, a "measure" identified in the "Measures" element of the Party's Schedule means "the measure as amended, continued or renewed as of the date of entry into force of this Agreement, and . . . includes any subordinate measure adopted or maintained under the authority of and consistent with the measure."[2]

5. By including subordinate measures that are "adopted or maintained" by a Party, the headnote to Annex I provides that each measure listed on a Party's Schedule pursuant to Article 1108(1)

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[1] *See* 1108; *see also* NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-159, Vol. 1, 103d Cong., 1st Sess. at 142 (1993) ("Article 1108 creates a system of limited 'reservations' and 'grandfathering' to exempt certain laws and regulations that are not in conformity with the non-discrimination, performance requirement, and senior management obligations" in the Chapter).

[2] Annex I at 2(f)(i)–(ii).

includes any existing subordinate measures—*i.e.* subordinate measures in effect on the date of entry into force—that are "maintained" by a Party, as well as any new subordinate measures—*i.e.* subordinate measures that come into effect after entry into force—that are "adopted" by a Party, so long as such subordinate measures are adopted or maintained under the authority of and consistent with the listed measure.[3]

6. This conclusion is confirmed by analyzing the text of Annex I in the context of other provisions in Chapter Eleven as well as the drafting conventions employed by the NAFTA Parties when negotiating the Agreement.

7. For example, the scope and coverage provision of Chapter Eleven, Article 1101, provides that Chapter Eleven applies to "measures *adopted or maintained* by a Party" relating to investors of another Party and their investments in the territory of the Party.[4] By using the phrase "adopted or maintained," the NAFTA Parties intended to include within the scope of Chapter Eleven not only existing measures that a Party might choose to *maintain* after the Agreement's entry into force, but also new measures that a Party might choose to *adopt* after entry into force. Such an understanding of the phrase "adopted or maintained" is consistent with the document entitled "Conventions to be used in the NAFTA Texts," which was drawn up by the NAFTA Parties to guide their negotiations. In that document, the NAFTA Parties indicated that they would use the term "adopt" when referring "to the establishment or introduction of *new* measures," and "maintain" when referring "to *existing* measures."[5]

8. Similarly, under the headnote to Annex I, each measure listed on a Party's Schedule pursuant to Article 1108(1) includes any existing subordinate measure—*i.e.* one in effect on the date of entry into force—that a Party might choose to "maintain," and

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[3] *Id.* at 2(f)(ii).

[4] Article 1101(1) (emphasis added).

[5] *Conventions to be used in the NAFTA Texts*, at 3 (July 9, 1992) (emphasis added) . . . . This document was a joint product of the NAFTA Lawyers' Subgroup, which was composed of representatives of the three parties.

any new subordinate measure—*i.e.* one in effect only after entry into force—that a Party might choose to "adopt," so long as the subordinate measure is adopted or maintained under the authority of and consistent with the listed measure.

2. Trucking

In August 2010, Mexico announced its intention to impose tariffs on additional U.S. products due to the failure of the United States to implement the provisions of the NAFTA that require the parties to provide reciprocal treatment for cross-border long-haul trucking. Mexico had initially imposed tariffs on 89 U.S. products in 2009, and its 2010 announcement reflected its plans "to add several products and reduce or eliminate duties on several others, for a total of 99 products." USTR press release, Aug. 16, 2010, available at *www.ustr.gov/about-us/press-office/press-releases/2010/august/statement-ambassador-ron-kirk-regarding-announcemen*. For background, see *Digest 2009* at 418–19. As of the end of 2010, the United States and Mexico were seeking to resolve the dispute.

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 2010 Annual Report of the President of the United States on the Trade Agreements Program ("2010 Annual Report"), available at *www.ustr.gov/2011_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

The United States requested consultations with China on three matters during 2010. Excerpts below from the 2010 Annual Report at 65–66 describe the status of the three disputes.

(i) China—Certain Measures Affecting Electronic Payment Services (DS413)

On September 15, 2010, as summarized below, the United States requested consultations with China concerning certain Chinese restrictions on and requirements affecting suppliers of electronic payment services for processing credit and debit card transactions and other similar transactions.*

On September 15, 2010, the United States requested consultations with China concerning issues relating to certain restrictions and requirements maintained by China pertaining to electronic payment services (EPS) for payment card transactions and the suppliers of those services. EPS involve the services through which transactions involving credit card, debit card, charge card, check card, automated teller machine (ATM) card, prepaid card, or other similar card or money transmission product, are processed and through which transfers of funds between institutions participating in the transactions are managed and facilitated.

China undertook both market access and national treatment commitments with respect to electronic payment services, as set out in its Schedule of Specific Commitments on Services. Despite those commitments, China appears to impose market access restrictions and requirements on services suppliers of other

* Editor's note: On February 11, 2011, USTR announced that the United States had requested the WTO to establish a panel in this dispute. See USTR's press release of February 11, 2011, available at *www.ustr.gov/about-us/press-office/press-releases/2011/february/ustr-requests-wto-dispute-settlement-panels-two-c*. On March 25, 2011, the WTO established a panel.

Members seeking to supply EPS in China. It appears that China UnionPay (CUP), a Chinese entity, is the only entity that China permits to supply EPS for payment card transactions denominated and paid in renminbi (RMB) in China. In addition, China also requires all payment card processing devices at merchant locations to be compatible with CUP's system, and that all payment cards, including "dual currency" cards, issued in China for transactions denominated and paid in RMB, bear the CUP logo. These and other requirements and restrictions maintained by China appear to be inconsistent with China's market access commitments and to accord less favorable treatment to EPS suppliers of other WTO Members than to Chinese suppliers of these services.

The United States and China held consultations on October 27 and 28, 2010.

(ii) China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States (DS414)

On the same day, the United States also requested consultations with China concerning the antidumping and countervailing duties China imposed in 2010 on certain electrical steel imported from the United States, as discussed below.**

On September 15, 2010, the United States filed a request for consultations regarding China's imposition of antidumping (AD) duties and countervailing duties (CVD) on imports of grain oriented flat-rolled electrical steel (GOES) from the United States.

In June 2009, China's Ministry of Commerce (MOFCOM) initiated two investigations on GOES from the United States. On April 10, 2010, based on determinations that American steel had been dumped into their market and subsidized, MOFCOM imposed

** Editor's note: On February 11, 2011, USTR announced that the United States had requested the WTO to establish a panel in this dispute. See USTR's press release of February 11, 2011, available at *www.ustr.gov/about-us/press-office/press-releases/2011/february/ustr-requests-wto-dispute-settlement-panels-two-c*. On March 25, 2011, the WTO established a panel.

antidumping duties ranging from 7.8 percent to 64.8 percent and countervailing duties ranging from 11.7 percent and 44.6 percent.

China's antidumping and subsidy determinations in the GOES investigations appear to violate numerous WTO requirements. Specifically, the United States is concerned that China initiated both investigations without sufficient evidence; failed to objectively examine the evidence; failed to disclose "essential facts" underlying its conclusions; failed to provide an adequate explanation of its calculations and legal conclusions; improperly used investigative procedures; failed to provide non-confidential summaries of Chinese submissions; and included U.S. federal and state programs that were not identified in the notice of initiation of the CVD investigation.

The United States and China held consultations on November 1, 2010.

(iii) China—Subsidies on Wind Power Equipment (DS419)

In December 2010, as discussed in the excerpts below from the 2010 Annual Report, the United States requested consultations with China concerning a Chinese program that provides grants to Chinese manufacturers in the wind power equipment sector. In announcing the U.S. action, the Office of the U.S. Trade Representative ("USTR") explained that China's program appears to violate, *inter alia*, Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures, which "prohibits subsidies conditioned on the use of domestic over imported goods—known as import substitution subsidies." U.S. Trade Representative Ronald Kirk stated, "Import substitution subsidies are particularly harmful and inherently trade distorting, which is why they are expressly prohibited under WTO rules." Ambassador Kirk continued:

> These subsidies effectively operate as a barrier to U.S. exports to China. Opening markets by removing barriers to our exports is a core element of the President's trade strategy. Our decision today, along with the two other WTO cases that we recently filed against China, underscores our commitment to ensuring a level playing field with China for American workers and businesses.

The full text of USTR's press release, issued December 22, 2010, is available at *www.ustr.gov/about-us/press-office/press-releases/2010/december/united-states-requests-wto-dispute-settlement-con.****

On December 22, 2010, the United States requested consultations with China concerning a program known as the Wind Power Equipment Fund. Under this program, China appears to provide subsidies that are prohibited under WTO rules because the grants awarded under the program seem to be contingent on Chinese wind power equipment manufacturers using parts and components made in China rather than foreign-made parts and components. The United States also included in its consultations request transparency-related claims, which address China's failure to comply with its obligation to notify the subsidies at issue under the WTO's Agreement on Subsidies and Countervailing Measures and China's failure to translate the measure into one or more of the official languages of the WTO under China's Protocol of Accession. On December 31, 2010, China accepted the request for consultations.

This case arises out of an investigation initiated in response to a petition filed by the United Steelworkers (USW) under section 301 of the Trade Act of 1974, as amended. . . .

(2) Disputes brought by the United States against the European Union

(i) European Communities—Tariff Treatment of Certain Information Technology Products (WT/DS375)

In August 2010, a WTO panel issued a report in favor of U.S. claims that the duties the European Union imposed on imports of three types of high-technology products, including flat panel computer monitors and certain printers, violated

*** Editor's note: The United States and China held consultations in the dispute, and on June 7, 2011, USTR announced that China had ended certain wind power equipment subsidies. See USTR's press release of June 7, 2011, available at *www.ustr.gov/about-us/press-office/press-releases/2011/june/china-ends-wind-power-equipment-subsidies-challenged*.

the EU's WTO obligations. Excerpts below from page 71 of the 2010 Annual Report discuss the panel's report and subsequent developments in 2010. In announcing the panel's decision, USTR explained that the products at issue "were included in the WTO's ITA [Information Technology Agreement], a major achievement of the post-Uruguay Round WTO that resulted in the elimination of duties on a wide range of high-tech products. . . . The EU claimed it could charge duties on them simply because they incorporate newer technologies or additional features." U.S. Trade Representative Ronald Kirk stated, "This ruling affirms the principle that changes in technology are not an excuse to apply new duties to products covered by the Information Technology Agreement." The full text of USTR's press statement is available at *www.ustr.gov/about-us/press-office/press-releases/2010/august/united-states-wins-wto-dispute-eu-high-tech-product*. In 2008, the United States had requested the WTO to establish a dispute settlement panel to consider the EU's measures.

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The panel issued its report on August 16, 2010. The panel agreed with the United States with respect to all three products at issue, finding that the EU measures result in the imposition of duties on products that are entitled to duty-free treatment under the EU's schedule of concessions and are inconsistent with GATT Article II:1(a) and (b). In addition, the Panel agreed with the United States that the EU's failure to promptly publish its Explanatory Note on set top boxes and its enforcement of an April 2007 set top box measure before its official publication were inconsistent with GATT Article X:1 and X:2, respectively.

The report was adopted at the meeting of the DSB on September 21, 2010. On October 13, 2010, the EU informed the Chairman of the DSB that it intended to implement the recommendations and rulings of the DSB and would need a reasonable period of time to do so. On December 20, 2010, the United States and the EU notified the DSB that they had agreed on a nine month and nine day period of time for implementation, to end on June 30, 2011.

(ii) European Union—Subsidies on large civil aircraft (DS316)

On July 20, 2005, at the request of the United States, the WTO's Dispute Settlement Body established a panel to consider U.S. challenges to subsidies that the European Union, France, Germany, Spain, and the United Kingdom provided to Airbus, a manufacturer of large civil aircraft. In its report issued in June 2010, the panel agreed with the United States that the EU measures were inconsistent with the Subsidies and Countervailing Measures Agreement. Excerpts below from page 69 of the 2010 Annual Report discuss 2010 developments in the dispute. For additional background, see *Digest 2004* at 603–4 and *Digest 2005* at 622.****

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The Panel issued its report on June 30, 2010. It agreed with the United States that the disputed measures of the European Union, France, Germany, Spain, and the United Kingdom were inconsistent with the SCM Agreement. In particular:

- Every instance of "launch aid" provided to Airbus was a subsidy because in each case, the terms charged for this unique low-interest, success-dependent financing were more favorable than were available in the market.
- Some of the launch aid provided for the A380, Airbus's newest and largest aircraft, was contingent on exports and, therefore, a prohibited subsidy.
- Several instances in which German and French government entities created infrastructure for Airbus were subsidies because the infrastructure was not general, and the price

**** Editor's note: On June 1, 2011, the WTO's Dispute Settlement Body adopted the report of the Appellate Body, which affirmed the panel's main findings in favor of the United States, and the panel's report as modified. *See* USTR's press release, dated June 1, 2011, available at *www.ustr.gov/about-us/press-office/press-releases/2011/wto-dispute-settlement-body-report-airbus*.

charged to Airbus for use resulted in less than adequate remuneration to the government.

- Several government equity infusions into the Airbus companies were subsidies because they were on more favorable terms than available in the market.
- Several EU and Member State research programs provided grants to Airbus to develop technologies used in its aircraft.
- These subsidies caused adverse effects to the interests of the United States in the form of lost sales, displacement of U.S. imports into the EU market, and displacement of U.S. exports into the markets of Australia, Brazil, China, Chinese Taipei,***** Korea, Mexico, and Singapore.

The EU filed a notice of appeal on July 21, 2010. . . .

(iii) European Union—Regime for the importation, sale, and distribution of bananas—Recourse to Article 21.5 of the DSU by the United States (WT/DS27)

On June 8, 2010, the United States and the European Union signed an agreement designed to lead to the settlement of a longstanding dispute concerning the EU's regime for imports of bananas. Excerpts below from pages 69–70 of the 2010 Annual Report discuss developments in the dispute since 2007, when the United States requested the WTO's Dispute Settlement Body to establish a compliance panel under Article 21.5 of the Dispute Settlement Understanding. For prior history concerning the dispute, see *II Cumulative Digest 1991–1999* at 1415 and *Digest 2001* at 649–50.

On June 29, 2007, the United States requested the establishment of a panel under Article 21.5 of the DSU to review whether the EU had failed to bring its import regime for bananas into compliance with its WTO obligations and the DSB recommendations and rulings

***** Editor's note: In World Trade Organization practice, the formal name "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsue" is abbreviated as "Chinese Taipei."

adopted on September 25, 1997. The request related to the EU's apparent failure to implement the WTO rulings in a proceeding initiated by Ecuador, Guatemala, Honduras, Mexico, and the United States. That proceeding had resulted in findings that the EU's banana regime discriminated against bananas originating in Latin American countries and against distributors of such bananas, including a number of U.S. companies. The EU was under an obligation to bring its banana regime into compliance with its WTO obligations by January 1999. The EU committed to shift to a tariff-only regime for bananas no later than January 1, 2006. Despite these commitments, the banana regime implemented by the EU on January 1, 2006 included a zero-duty tariff-rate quota allocated exclusively to bananas from African, Caribbean, and Pacific countries. All other bananas did not have access to this duty-free tariff rate quota and were subject to a 176 euro per ton duty. The United States brought challenges under GATT Articles I:1 and XIII.

Ecuador requested the establishment of a similar compliance panel on February 23, 2007, and a panel was composed in response to that request on June 15. In response to the United States request, the panel was established on July 12, 2007. . . .

* * * *

The panel issued its report on May 19, 2008. The panel agreed with the United States that the EU's regime was inconsistent with the EU's obligations under Articles I:1, XIII:1, and XIII:2 of the GATT 1994, and that the EU had failed to implement the recommendations and rulings of the DSB.

On August 28, 2008, the EU filed a notice of appeal. . . . The Appellate Body issued its report on November 26, 2008. The Appellate Body found that the EU had failed to bring itself into compliance with the recommendations and rulings of the DSB. In particular, the Appellate Body rejected all of the EU's procedural arguments alleging the United States was barred from bringing the compliance proceeding and agreed with the panel that the EU's duty-free tariff rate quota reserved only for some countries was inconsistent with Article XIII of the GATT 1994. The panel in this dispute had also found that the EU's banana import regime was in violation of GATT Article I. The EU did not appeal that finding.

The DSB adopted the Appellate Body report on December 22, 2008.

On December 15, 2009, the United States and the EU initialed an agreement designed to lead to settlement of the dispute. In the agreement, the EU undertakes not to reintroduce measures that discriminate among bananas distributors based on the ownership or control of the distributor or the source of the bananas, and to maintain a non-discriminatory, tariff-only regime for the importation of bananas. The U.S.–EU agreement complements an agreement initialed on the same date between the EU and several Latin American banana-supplying countries (the GATB). That agreement provides for staged EU tariff cuts that will bring the EU into compliance with its obligations under the WTO Agreement. The GATB was signed on May 31, 2010, and the U.S.–EU agreement was signed on June 8, 2010. The agreements will enter into force following completion of certain domestic procedures. Upon entry into force, the EU will need to request formal WTO certification of its new tariffs on bananas. The GATB provides that once the certification process is concluded, the EU and the Latin American signatories to the GATB will settle their disputes and claims. Once that has occurred, the United States will also settle its dispute with the EU.

b. Disputes brought against the United States

(1) United States—Subsidies on Upland Cotton (WT/DS267)

In 2010, the United States and Brazil took steps toward resolving their longstanding dispute concerning certain U.S. subsidies and export credit guarantees for cotton ("Cotton dispute"). As the excerpts below from page 79 of the 2010 Annual Report discuss, the two countries agreed upon a Memorandum of Understanding and a Framework Agreement, as a result of which Brazil did not impose trade countermeasures of more than $800 million against the United States in June 2010. The text of the MOU is available at *www.state.gov/documents/organization/143669.pdf.*

The Framework Agreement is available at *www.ustr.gov/about-us/press-office/press-releases/2010/june/kirk-comments-signing-framework-regarding-wto-cotton.*

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On April 6, 2010, the United States and Brazil reached agreement on certain steps to help make progress in the dispute. Pursuant to this agreement, on April 20, 2010, the United States and Brazil signed a Memorandum of Understanding (MOU) establishing 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 Farm Bill or a mutually agreed solution to the Cotton dispute is reached. The MOU also provides that the United States may end the fund if Brazil imposes countermeasures.

With the conclusion of the MOU, Brazil announced that countermeasures would not be imposed for at least 60 days from signature of the MOU. During this period, 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 on cotton support, the GSM-102 program,* and further discussion between the United States and Brazil.

Brazil and the United States met for discussions under the framework on October 20, 2010.

(2) United States—Definitive Antidumping and Countervailing Duties on Certain Products from China (China) (WT/DS379)

In 2010, a panel of the WTO issued a report in a dispute concerning antidumping and countervailing duties the

* Editor's note: Information on GSM 102, the Department of Agriculture's Export Guarantee Credit Program, is available at *www.fast.usda.gov/excredits/exp-cred-guar-new.asp*.

United States imposed on certain Chinese products in 2008. Excerpts below from pages 87–88 of the 2010 Annual Report discuss the dispute and the panel's findings. *See also* USTR's press release, available at *www.ustr.gov/about-us/press-office/press-releases/2010/october/united-states-prevails-wto-countervailing-duty-dis*.**

On September 19, 2008, the United States received from China a request for consultations pertaining to definitive antidumping and countervailing duties imposed by the United States pursuant to final antidumping and countervailing duty determinations and orders issued by the U.S. Department of Commerce (DOC) in investigations on circular welded carbon quality steel pipe, certain pneumatic off-the-road tires, light-walled rectangular pipe and tube, and laminated woven sacks. China claimed that these measures were inconsistent with U.S. commitments and obligations under the GATT 1994, the SCM Agreement, the Antidumping Agreement, and China's Protocol of Accession.

The United States and China held consultations on November 14, 2008. On December 9, 2008, China requested that the DSB establish a panel. The DSB did so at its meeting on January 20, 2009. . . .

The panel circulated its report on October 22, 2010. The panel found in favor of the United States in several respects, including that the concurrent application of antidumping duties calculated using a nonmarket economy (NME) methodology and countervailing duties to imports from China resulting from the investigations at issue was not inconsistent with the WTO obligations of the United States. The panel also made several other findings related to claims China advanced against countervailing duty determinations made by Commerce, including that Chinese state-owned enterprises (SOEs) and state-owned commercial banks (SOCBs) can be "public bodies"

** Editor's note: On March 11, 2011, the WTO Appellate Body issued its report, which reversed some of the panel's findings in favor of the United States but upheld some of the panel's other findings rejecting some of China's claims. *See* USTR's press release of March 11, 2011, available at *www.ustr.gov/about-us/press-office/press-releases/2011/march/ustr-statement-regarding-wto-appellate-body-report-c*.

capable of providing financial contributions, that the United States did not act inconsistently with its WTO obligations by finding that the SOEs and SOCBs in question were "public bodies" in the investigations under review, and that Commerce correctly determined to use external benchmarks, rather than private prices in China, to measure the benefit of goods, loans, and land-use rights provided by the government. On the other hand, it found that: Commerce's calculation of the benefit of government-provided rubber and preferential lending was not consistent with U.S. WTO obligations, that, with respect to loans, Commerce's use of an *annual* average lending rate as a benchmark was impermissible, and on specificity, that the evidence on the record of the investigation did not support Commerce's determination that the government provision of land-use rights was specific to companies within a particular industrial zone. Finally, the panel found that Commerce did not properly rely on facts available when making its subsidy determinations in two investigations. Consequently, the panel recommended that the United States bring the measures into conformity with the WTO agreements.

On December 1, 2010, China filed a notice of appeal of certain of the panel's findings. . . .

(3) United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China (DS399)

In 2010, a WTO panel found that the increased duty on passenger vehicle and light truck tires imported from China that the United States began applying in 2009 did not violate the GATT 1994 or the Protocol on the Accession of the People's Republic of China. Excerpts below from page 92 of the 2010 Annual Report discuss the panel's decision and the background of the dispute. *See also* USTR's press release, available at *www.ustr.gov/about-us/press-office/press-releases/2010/december/united-states-prevails-wto-section-421-safeguard.*

On September 14, 2009, China requested consultations with respect to the imposition of additional duties on imports of certain passenger

vehicle and light truck tires from China under section 421 of the Trade Act of 1974, as amended, and section 16 of the Protocol on the Accession of the People's Republic of China (Protocol of Accession). China alleges that the additional tariffs are inconsistent with the GATT 1994 . . . 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 January 19, 2010, the DSB established a panel at China's request. . . . The Panel circulated its report on December 13, 2010. The Panel found that, in imposing the additional duties, the United States had not failed to comply with its obligations under section 16 of the Protocol and Articles I:1 and II:1 of the GATT 1994.

(4) Zeroing

In 2010, the United States took an initial step to comply with findings adopted by the WTO Dispute Settlement Body in several longstanding disputes challenging the U.S. practice of "zeroing" in antidumping administrative reviews. On December 28, 2010, pursuant to § 123(g)(1) of the Uruguay Round Agreements Act ("URAA" or "Act"), the Department of Commerce's International Trade Administration published and requested comments on a proposed rule to modify the Department's methodology for calculating the weighted average dumping margin and assessment rate in certain antidumping duty proceedings.*** 75 Fed. Reg. 81,533 (Dec. 28, 2010).

*** Editor's note: The Federal Register publication explained that "[p]ursuant to section 123(g)(1) of the . . . URAA, '[i]n any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements,' certain requirements must be met before 'that regulation or practice' may be 'amended, rescinded or otherwise modified * * * .' Section 123(g)(1)(C) of the URAA requires that the

Excerpts below from the preamble to the proposed rule provide background on the WTO's findings, and the Commerce Department's proposal for complying with them. Details on the disputes are available in the 2010 Annual Report at 81–82, 83–85, 85–86, and 86–87. The 2010 Annual Report also discussed the following other disputes challenging the U.S. practice of zeroing: *United States—Antidumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil (WT/DS382)*; *United States—Antidumping Measures on Polyethylene Retail Carrier Bags from Thailand (Thailand) (WT/DS383)*; *United States—Use of Zeroing in Antidumping Measures Involving Products from Korea (DS402)*; and *United States—Anti-dumping Measures on Certain Shrimp from Vietnam (DS404)*, at 89–90 and 92–93.

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. . . The WTO Appellate Body in *US-Zeroing (EC), US-Zeroing (Japan), US-Stainless Steel (Mexico), US-Continued Zeroing (EC)* found denial of offsets for non-dumped comparisons in antidumping duty administrative reviews to be inconsistent with Article 9.3 of the Antidumping Agreement and Article VI:2 of the GATT 1994, either "as such," or "as applied" in certain administrative reviews, or both. [fn. omitted] In *US-Zeroing (Japan)*, the WTO Appellate Body also found denial of offsets for non-dumped comparisons in antidumping duty original investigations using transaction-to-transaction comparisons was inconsistent with Articles 2.4 and 2.4.2 of the Antidumping Agreement. [fn. omitted] In addition, in *US-Zeroing (Japan)*, the WTO Appellate Body found denial of offsets for non-dumped comparisons in antidumping duty new shipper reviews was inconsistent with Articles 2.4 and 9.5 of the Antidumping Agreement. Finally, in *US-Zeroing (EC), US-Zeroing (Japan), and US-Continued Zeroing (EC)*, the WTO Appellate Body

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Department provide opportunity for public comment by publishing 'the proposed modifications and the explanation of the modification' in the Federal Register." 75 Fed Reg. at 81,534.

found reliance on weighted average margins of dumping calculated without granting offsets for non-dumped comparisons as the basis for determinations made in certain five-year (sunset) reviews was inconsistent with Article 11.3 of the Antidumping Agreement.

. . . In response to the findings of inconsistency identified above, the Department now proposes to modify its methodology for calculating weighted average margins of dumping and assessment rates to provide offsets for non-dumped comparisons while using monthly average-to-average comparisons in reviews in a manner that parallels the WTO-consistent methodology the Department currently applies in original investigations. In particular, except where the Department determines that application of a different comparison method is more appropriate, in reviews, the Department proposes to compare monthly weighted average export prices with monthly weighted average normal values and to grant an offset for such comparisons that show export price exceeds normal value in the calculation of the weighted average margin of dumping and assessment rate. Where the weighted average margin of dumping is zero or *de minimis*, no antidumping duties will be assessed. In addition, to the extent that any prior original antidumping duty investigations using transaction-to-transaction comparisons could be considered as establishing a practice of the Department with respect to the granting or denial of offsets for non-dumped comparisons when calculating the weighted average margin of dumping, [fn. omitted] the Department proposes to withdraw any such practice. With respect to the findings of inconsistency in certain of the Department's five-year (sunset) reviews, the Department notes that the underlying issue is the methodology for calculating weighted average dumping margins in investigations and reviews, which is addressed by the modifications the Department has made with respect to investigations and is proposing herein to make with respect to reviews. Moreover, the Department recognizes that while section 752(c) of the Act provides that the Department shall consider the weighted average dumping margins determined in the investigation and subsequent reviews, among other factors, the Act does not require the Department to rely on the weighted average dumping margins, or any particular weighted average dumping margin, as the basis for its determinations in five-year (sunset)

reviews where such reliance would render the determination inconsistent with the United States' international obligations.

* * * *

2. WTO Accession: Yemen

On December 13, 2010, U.S. Trade Representative Ronald Kirk and Yemen's Trade Minister Yahya Al-Mutawakel signed a bilateral agreement on market access issues as part of Yemen's WTO accession effort. Excerpts below from a press release USTR issued on December 13, 2010, describe the agreement and the process for Yemen to become a member of the WTO. The full text of the press release is available at *www.ustr.gov/about-us/press-office/press-releases/2010/december/us-and-yemen-conclude-bilateral-wto-accession-agr*.

. . . The bilateral agreement provides new market access opportunities for U.S. providers of agriculture, goods and services, and sets the stage for Yemen to complete accession negotiations with WTO Members. Both governments have been working intensively to finalize the tariff and services schedules after reaching an agreement in princip[le] in April 2010. Officials from USTR and Yemen's Ministry of Industry and Trade have signed the final schedules reflecting the results of the negotiations and deposited them with the WTO Secretariat. Both governments will continue to work with other WTO Members to conclude the multilateral Working Party negotiations in the coming weeks so that Yemen may become a member of the WTO as early as possible in 2011.

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Yemen has been negotiating its terms of accession to the WTO since 2002. This bilateral market access agreement and those concluded with other WTO members in the course of the negotiation will be consolidated. The Report of the Working Party and Protocol of Accession will become part of Yemen's overall package containing the terms of its accession to the WTO. This package must be formally approved by WTO Members and then accepted by the Government

of Yemen. Thirty days after the WTO receives its notice of acceptance, Yemen will become a member of the WTO. No Congressional action is required on the accession since Yemen already receives Permanent Normal Trade Relations from the United States.

D. OTHER TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Trade Legislation and Trade Preferences

On May 24, 2010, President Barack H. Obama signed into law the Haiti Economic Lift Program Act of 2010, Pub. L. No. 111-171, 124 Stat. 1194. Excerpts below from the 2010 Annual Report at 185–86 provide details on key aspects of the legislation, which expanded and extended the trade benefits available under the Haitian Hemispheric Opportunity through Partnership Encouragement Act ("HOPE") through September 30, 2020. For details on U.S. trade preference programs, see Chapter V, "Trade Enforcement Activities," of the 2010 Annual Report of the President of the United States on the Trade Agreements Program, at 180–86, available at *www.ustr.gov/webfm_send/2591*.

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. . . Among other provisions, the legislation:

- Extended the Caribbean Basin Trade Partnership Act (CBTPA) and the Haitian Hemispheric Opportunity through Partnership Encouragement Act (HOPE) through September 30, 2020.
- Provided duty-free treatment for additional textile and apparel products that are wholly assembled or knit-to-shape in Haiti regardless of the origin of the inputs.
- Increased from 70 million square meter equivalents (SMEs) to 200 million SMEs the respective tariff preference levels (TPLs) under which certain Haitian knit and woven apparel products may receive duty-free treatment regardless of the

origin of the inputs. The increase will be triggered in any given year if 52 million SMEs of Haitian apparel enter the United States under the existing knit or woven TPL. Once the increase is triggered, certain knit apparel products entering duty-free under the knit TPL will be subject to an 85 million SME sublimit, and certain woven apparel products entering duty-free under the woven TPL will be subject to a 70 million SME sublimit.

- Permitted the duty-free importation into the United States of one SME of apparel wholly assembled or knit-to-shape in Haiti regardless of the origin of the inputs for every two SMEs of qualifying fabric purchased from the United States.

* * * *

2. Labor: CAFTA-DR Request for Consultations with Guatemala

On July 30, 2010, the United States requested consultations with the Government of Guatemala to discuss issues and matters related to Guatemala's obligations under Article 16.2.1(a) of the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR"), as well as under Chapter Sixteen of the CAFTA-DR more broadly. Article 16.2.1.(a) requires that "[a] Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement." The United States requested consultations pursuant to Article 16.6.1 of the CAFTA-DR, which permits "[a] Party [to] request consultations with another Party regarding any matter arising under this Chapter. . . ." The U.S. request is excerpted below and is available in full through the link at *www.ustr.gov/trade-topics/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr*. The text of the CAFTA-DR is available at *www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text*.

In announcing the U.S. action, U.S. Trade Representative Ronald Kirk explained:

> This is the first labor case the United States has ever brought against a trade agreement partner.
>
> With this case, we are sending a strong message that our trading partners must protect their own workers, that the Obama Administration will not tolerate labor violations that place U.S. workers at a disadvantage, and that we are prepared to enforce the full spectrum of American trade rights from labor to the environment.

The full text of Ambassador Kirk's remarks is available at *www.ustr.gov/about-us/press-office/speeches/transcripts/2010/july/remarks-ambassador-ron-kirk-enforcement-alleghn*. The Department of Labor's press release is available at *www.dol.gov/opa/media/press/ilab/ILAB20101078.htm*.

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* * * *

. . . Over the last 11 months, the United States has conducted an extensive examination of Guatemala's compliance with its obligations under Chapter Sixteen. This examination has included (1) a careful review of Guatemala's labor laws, within the meaning of Article 16.8, particularly with respect to laws intended to protect the right of association, the right to organize and bargain collectively, and the right to acceptable conditions of work, (2) extensive collection of factual evidence, and (3) a careful analysis of Guatemala's obligations under Article 16.2.1(a).

Based on this examination and review of matters of law and fact, the Government of Guatemala appears to be failing to meet its obligations under Article 16.2.1(a) with respect to effective enforcement of Guatemalan labor laws related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work. For example, we have identified a significant number of failures to enforce, constituting a sustained or recurring course of action or inaction, including: (1) Ministry of Labor failures to investigate alleged labor law violations; (2) Ministry of Labor

failures to take enforcement action once the Ministry has identified a labor law violation; and (3) court failures to enforce Labor Court orders in cases involving labor law violations.

We note that Article 16.6.6 provides that "[i]f the matter concerns whether a Party is conforming to its obligations under Article 16.2.1(a), and the consulting Parties have failed to resolve the matter within 60 days of a request . . . , the complaining Party may request . . . a meeting of the Commission under Article 20.5 . . . and, as provided in Chapter Twenty (Dispute Settlement), thereafter have recourse to the other provisions of that Chapter." We also note that Article 16.6.7 provides that "[n]o Party may have recourse to dispute settlement under this Agreement for any matter arising under any provision of this Chapter other than Article 16.2.1(a)" and Article 20.5 provides for a meeting of Free Trade Commission if the consulting Parties fail to resolve the matter.

* * * *

The United States also has grave concerns about the problem of labor-related violence in Guatemala, which is serious and is apparently deteriorating. The United States is seriously concerned about the Government of Guatemala's response to the use and threats of violence that appear to be related to the exercise or attempted exercise of labor rights in Guatemala, including the right of association and the right to organize and bargain collectively. The concerns of the United States include apparent failures by the Government of Guatemala to respond adequately to protect those threatened with violence and apparent failures to adequately investigate and prosecute such crimes. The United States has repeatedly raised this serious problem with the Government of Guatemala and intends to examine and take this issue up with the Government of Guatemala in the near future.

3. Arbitration and Related Actions Arising from the Softwood Lumber Agreement

On October 8, 2010, the United States requested formal consultations with Canada regarding compliance with paragraph 1 of Article XVII of the Softwood Lumber Agreement. The United

States acted pursuant to the dispute settlement provisions set forth in Article XIV of the Softwood Lumber Agreement. *See* letter from U.S. Trade Representative Ron Kirk to Canadian Minister for International Trade Peter van Loan, available at *www.ustr.gov/webfm_send/2350*. The letter identified two issues on which the United States sought consultations: "the apparent under-pricing of timber provided by the Government of British Columbia ('BC') to producers of Canadian Softwood Lumber Products and the resulting apparent circumvention of the Export Measures provided for under the SLA 2006."

In a press release issued October 8, USTR described the U.S. request, as excerpted below. The full text of the press release is available at *www.ustr.gov/about-us/press-office/press-releases/2010/october/united-states-requests-consultations-canada-under*.*

* * * *

The price of timber is a key factor in the pricing of softwood lumber. The SLA was agreed in part to resolve disputes as to whether Canada was unfairly subsidizing the price of timber sold to its softwood lumber producers. Under the SLA, Canada agreed to impose export measures under certain circumstances to affect the price of softwood lumber exports to the United States. The SLA also provides that neither party is to circumvent those export measures, including through providing grants or other benefits.

The SLA "grandfathers" British Columbia's timber pricing system as it existed on July 1, 2006. Under the grandfathered system, timber harvested from public lands in the Interior region of British Columbia meeting the definition of "Grade 4" is priced at a fixed rate of 25 cents per cubic meter, while timber meeting the definitions of "Grade 1" or "Grade 2" is priced at a variable rate,

* Editor's note: On January 18, 2011, the United States submitted its request for arbitration in the matter, available at *www.ustr.gov/about-us/press-office/press-releases/2011/january/united-states-requests-arbitration-canada-under-so*. *Digest 2011* will discuss relevant aspects of the U.S. request and related 2011 developments.

which can in no case be lower than 25 cents per cubic meter, and often has been significantly higher. The share of timber harvested from public lands in the Interior region of British Columbia and provided as "Grade 4" (or otherwise priced at 25 cents per cubic meter) has increased dramatically since the SLA entered into force. This increase does not appear to be justified under the grandfathered BC provincial timber pricing system, even when known factors affecting timber quality in BC (such as the mountain pine beetle) are taken fully into consideration.

The United States has sought information from Canadian federal and British Columbia provincial authorities. However, so far Canada has not sufficiently addressed the U.S. concerns.

. . . Consultations are the first step in the SLA dispute settlement process and are designed to facilitate the exchange of views and resolution of differences short of arbitration. Under the SLA, consultations are to be held within 20 days. If the matter is not resolved within 40 days of the request for consultations, either party may refer the matter to arbitration. . . .

4. Most Favored Nation Clauses

On November 1, 2010, Todd Buchwald, Assistant Legal Adviser, Office of the Legal Adviser, Department of State, addressed the General Assembly's Sixth (Legal) Committee during its annual consideration of Agenda Item 79: Report of the International Law Commission on the Work of its Sixty-Second Session. In his statement, Mr. Buchwald addressed the work of the Study Group the ILC established to consider its new topic on Most Favored Nation provisions. Mr. Buchwald stated:

> Most Favored Nation provisions are principally a product of treaty formation and tend to differ considerably in their structure, scope and language. They also are dependent on other provisions in the specific agreements in which they are located, and thus resist a uniform approach. Given the nature of Most Favored Nation provisions, we do not believe interpretive tools or revised draft articles are appropriate outcomes. We encourage the Study Group to

> continue with the study and description of current jurisprudence, which can serve as a useful resource for governments and practitioners who have an interest in this area.

The full text of Mr. Buchwald's statement is available at *http://usun.state.gov/briefing/statements/2010/150375.htm.*

E. COMMUNICATIONS

1. Licensing of Telecommunications Services to Cuba

On January 12, 2010, the State Department provided policy guidance to the Federal Communications Commission ("Commission") on licensing the provision of telecommunications services to Cuba. The guidance, which replaced the Department's 1993 guidance to the Commission on the same topic, was consistent with the new policy to promote human rights and democracy in Cuba that President Obama announced on April 13, 2009. *See Digest 2009* at 635–39.

In its guidance, the State Department recommended that the Commission apply the Commission's International Settlement Policy and benchmark settlement rate, granting limited waivers as necessary to enable carriers to provide telecommunications service between the United States and Cuba. According to the Commission, the ISP

> was initially developed to prevent anticompetitive behavior on U.S.-international routes at a time when, in most countries, telephone service was provided by only one company—a monopoly provider. The Commission established the policy to create a unified bargaining position for U.S. carriers [negotiating agreements with foreign telecommunications carriers to provide service] because foreign carriers with monopoly power could take advantage of the presence of multiple U.S. carriers by "whipsawing" or engaging in anticompetitive behavior. "Whipsawing" generally involves the abuse of market power by a foreign carrier or a combination of carriers within a foreign market that is intended to play U.S. carriers against one another

> in order to gain unduly favorable terms and benefits in arrangements for exchange of traffic.

See www.fcc.gov/ib/pd/pf/account.html. *See also* 47 C.F.R. § 64.1002.

The Commission's 1997 Benchmarks Policy also seeks to protect U.S. consumers from market abuses. According to the Commission:

> International settlement rates are the most important component of the marginal cost of international telephone service. While the ISP protected U.S. customers from the abuses of market power such as "whipsawing," international calling rates remained high, in spite of the fact that technological advances and competition were causing U.S domestic rates to fall. These rates remained high because in many countries, competition was non-existent or insufficient to drive settlement rates down to cost-based levels. In an effort to drive settlement rates closer to cost, the Commission exercised its jurisdiction over U.S. carriers in 1997 and prohibited them from paying inappropriately high rates to foreign companies to the detriment of U.S. consumers. . . . The benchmarks policy requires U.S. carriers to negotiate settlement rates at or below benchmark levels set by the Commission in its 1997 Benchmarks Order. . . .

Id.

On January 21, 2010, the Commission issued a public notice advising that it would act on applications to provide facilities-based telecommunications services between the United States and Cuba consistent with the State Department's new guidance and the Commission's policies and rules.

The public notice and the State Department's guidance to the Commission are available at *www.state.gov/s/l/c8183.htm*. Excerpts follow from the State Department's guidance.

. . . The President announced on April 13, 2009, several changes to United States' Cuba policy that are designed to facilitate greater contact between separated family members in the United States and

Cuba and increase the flow of information to the Cuban people, including through greater telecommunications links. The President directed the Secretaries of the Treasury and Commerce, in consultation with the Secretary of State, to take such actions as necessary to:

- Authorize U.S. telecommunications network providers to enter into agreements to establish fiber-optic cable and satellite telecommunications facilities linking the U.S. and Cuba.
- License U.S. telecommunications service providers to enter into and operate under roaming service agreements with Cuba's telecommunications service providers.
- License U.S. satellite radio and satellite television service providers to engage in transactions necessary to provide services to customers in Cuba.
- 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.
- Authorize, consistent with national security concerns, the export or re-export to Cuba of donated personal communications devices such as mobile phone systems, computers and software, and satellite receivers through a license exemption.

In September 2009, the Departments of Treasury and Commerce published new regulations under their respective regulatory regimes to implement the President's announcement. These regulations are designed to promote the free flow of information between Cuba and the United States through greater telecommunications links.

As a result of these changes, State is rescinding its 1993 policy guidance to the Commission and replacing it with the guidance outlined below. State recommends that the Commission use the following policy guidelines in reviewing proposals for telecommunications services between the United States and Cuba:

a) The Commission should apply its International Settlements Policy (ISP) and the appropriate benchmark settlement rate with respect to proposals for the provision of telecommunications services to Cuba; however, in implementing this

recommendation, the Commission should be prepared, to the extent necessary, to grant waivers reasonably limited in duration to enable carriers within its jurisdiction to provide telecommunications service between the United States and Cuba.

b) The Commission should send applications for the provision of telecommunication services between the United States and Cuba to the State Department for review. If the State Department does not object within 30 days of receipt, the Commission should assume that the State Department does not object to the grant of the application on foreign policy grounds.

Nothing in this guidance should be interpreted as establishing a policy to authorize investment in Cuba's domestic infrastructure. All applications approved by the FCC may also need to be licensed, as appropriate, by the Office of Foreign Assets Control (OFAC) at the Treasury Department and/or the Bureau of Industry and Security (BIS) at the Department of Commerce.

* * * *

2. Iran, Sudan, and Cuba: Personal Communications on the Internet

See Chapter 16.B.2. for discussion of regulatory amendments the Treasury Department's Office of Foreign Assets Control ("OFAC") issued in 2010 to enable private individuals in Iran, Sudan, and Cuba to communicate more easily over the Internet.

F. OTHER ISSUES

1. Intellectual Property: Special 301 Report

On April 30, 2010, the Office of the U.S. Trade Representative ("USTR") announced the issuance of the 2010 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. 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 2010 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 IPR protection, enforcement, or market access for persons relying on intellectual property protection. *See Digest 2007* at 605–7 for additional background.

The 2010 Special 301 Report identified a wide range of concerns, ranging from troubling "indigenous innovation" policies that may unfairly disadvantage U.S. rights holders in China, to the continuing challenges of Internet piracy in countries such as Canada and Spain, to the ongoing IPR enforcement challenges in many other countries around the world. The 2010 Report also recognized positive accomplishments in a number of areas. These accomplishments included improved IPR protection and enforcement efforts by the Czech Republic, Hungary, and Poland, resulting in the removal of these trading partners from the Watch List. In addition, after successful Out-of-Cycle Reviews in 2009, Saudi Arabia was removed from the Watch List. Israel also entered into an IPR Understanding with the United States in which it committed to address key outstanding IPR issues. The full text of the report is available at *www.ustr.gov/webfm_send/1906*. For a list of the 41 countries identified in the 2010 report, see USTR's press release of April 30, 2010, available at *www.ustr.gov/about-us/press-office/press-releases/2010/april/ustr-releases-2010-special-301-report-intellectual-p*.

2. Tax-related Issues

a. Bilateral tax treaties and tax information exchange agreements

In 2010, 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 protocol

amending the U.S. tax treaty with New Zealand and a tax treaty with Malta entered into force on November 12 and 23, 2010, respectively. The United States signed a tax treaty with Chile and a tax convention with Hungary on February 4, 2010, as well as a tax information exchange agreement with Panama on November 30, 2010.* President Obama transmitted the tax convention with Hungary and a protocol amending the tax convention with Luxembourg to the Senate for its advice and consent on November 15, 2010. *See* S. Treaty Docs. 111-7 and 111-8.

b. Multilateral tax treaties

On May 27, 2010, then Deputy Secretary of State Jacob J. Lew signed a Protocol to the Convention on Mutual Administrative Assistance on Tax Matters at the Organization for Economic Cooperation and Development ("OECD") in Paris, France. Representatives of 14 other countries signed the Protocol, which was negotiated within the OECD and the Council of Europe. A Treasury Department press release explained that the Protocol, upon its entry into force, would

> bring the existing Convention into conformity with current international standards for the exchange of information for tax purposes between national revenue authorities. For example, the Protocol provides for the full exchange of information on request in tax matters without regard to a domestic tax interest requirement or bank secrecy laws. The proposed Protocol also provides updated rules regarding the confidentiality and permitted uses of exchanged information as well as the level of detail that countries must provide when making a request for information. The Protocol also permits countries which are not members of the OECD or of the Council of Europe to become parties to the Convention, subject to unanimous consent by the existing parties.

* Editor's note: The tax agreement with Panama entered into force on April 18, 2011.

The full text of the press release, issued May 27, 2010, is available at *www.treasury.gov/press-center/press-releases/Pages/tg726.aspx*.

3. International Monetary Issues

On November 22, 2010, the United States joined consensus in the Second (Economic and Financial) Committee of the UN General Assembly in adopting a resolution on the international financial institutions and development. Courtney R. Nemroff, Counselor, U.S. Mission to the United Nations, made a statement to the Committee that explained the U.S. vote on the resolution. The U.S. statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/152343.htm*. The General Assembly adopted the resolution by consensus on December 20, 2010. U.N. Doc. A/RES/65/143.

Mr. Chairman, the United States is pleased to join consensus today on this important resolution that underscores both the challenges that the global economic crisis poses and the progress that the international community has made in mitigating the impact of the crisis on developing countries.

We support closer consultation between the UN System and other international organizations, including the Bretton Woods Institutions, in order to advance the UN's core development mandate. But the dialogue among these institutions must respect their differing mandates and responsibilities. My government does not interpret the language in this resolution as endorsing a formal United Nations role in decisions affecting the international financial institutions or international financial architecture.

The United States continues to believe that the United Nations is not the best forum for meaningful discussion on reform of the international monetary system, and we would hope that future resolutions refer in a more explicit and constructive way to the important work already being done at the IMF and in the G-20.

The G-20 Leaders, at their April 2009 Summit in London, supported a general SDR [Special Drawing Rights] allocation of

$250 billion to help stop a serious capital drain and contagion risk facing emerging market and developing countries. The action was an exceptional measure taken during the height of the global financial crisis. The role of the SDR in the international monetary system raises complex considerations, and there is very little consensus on its role. We wish to underscore decisions on the SDR are within the sole purview of the IMF.

* * * *

4. Extraterritorial Application of U.S. Securities Law and Regulation

On June 24, 2010, the U.S. Supreme Court held that § 10(b) of the Securities and Exchange Act of 1934 does not apply extraterritorially and, therefore, does not "provide[] a cause of action to foreign plaintiffs suing foreign and American defendants [in U.S. courts] for misconduct in connection with securities traded on foreign exchanges." *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2875 (2010). As the Court explained, "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance *only* in connection with [i] the purchase or sale of a security on an American stock exchange, and [ii] the purchase or sale of any other security [i.e., an off-exchange security] in the United States." (Emphasis added.)

The case involved allegations of securities fraud by National Australia Bank Limited ("National Bank")—an Australian bank whose Ordinary Shares traded on stock exchanges in Australia and several other countries (but not the United States)—and its wholly-owned Florida subsidiary, HomeSide Lending, Inc.*According to the complaint, HomeSide and several of its senior officers allegedly inflated the value of

* Editor's note: National Bank also traded American Depository Receipts ("ADR") on the New York Stock Exchange. An ADR represents one or more shares of foreign stock or a fraction of a share, and affords the holder the right to obtain the foreign stock it represents. *See www.sec.gov/answers/adrs.htm*. None of the petitioners had purchased these ADRs, however, so the Court did not have the opportunity to consider whether § 10(b) reaches ADRs traded on an American securities exchange.

HomeSide's financial assets, and National Australia Bank in turn used these misleading figures in its annual reports and other public documents from 1998 until 2001. The complaint further alleged that National Bank and two of its senior officers "were aware of this deception by July 2000, but did nothing about it." *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. at 2876. Beginning in mid-2001, National Bank wrote down the value of HomeSide's assets, causing the prices for National Bank's Ordinary Shares to drop. The Australian petitioners, who bought National Bank's Ordinary Shares outside the United States before it wrote down HomeSide's assets, sued National Bank, HomeSide, and several executives of both companies in federal district court in New York, alleging violations of § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. Part 240.**

Excerpts follow from the Supreme Court's analysis in concluding that "there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially" and, therefore, affirming the dismissal of the petitioners' complaint. *Id.* at 2883. (Footnotes are omitted.)

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* * * *

III

A

It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) *(Aramco)* (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

** Editor's note: The complaint also alleged violations of § 20(a) of the Exchange Act. As the Court explained in footnote 2 of its opinion, § 20(a) claims are "derivative of liability under some other provision of the Exchange Act" and in this case § 10(b) "is the only basis petitioners asserted." The inability of the petitioners to state a claim under § 10(b) necessarily disposed of the derivative § 20(a) claim.

This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate, see *Blackmer v. United States*, 284 U.S. 421, 437 (1932). It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters. *Smith v. United States*, 507 U.S. 197, 204, n.5 (1993). Thus, "unless there is the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect "we must presume it is primarily concerned with domestic conditions." *Aramco*, *supra*, at 248 (internal quotation marks omitted). The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law, see *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173–174 (1993). When a statute gives no clear indication of an extraterritorial application, it has none.

Despite this principle of interpretation, long and often recited in our opinions, the Second Circuit believed that, because the Exchange Act is silent as to the extraterritorial application of §10(b), it was left to the court to "discern" whether Congress would have wanted the statute to apply. *See* 547 F.3d, at 170 (internal quotation marks omitted). This disregard of the presumption against territoriality did not originate with the Court of Appeals panel in this case. It has been repeated over many decades by various courts of appeals in determining the application of the Exchange Act, and § 10(b) in particular, to fraudulent schemes that involve conduct and effects abroad. That has produced a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in application.

* * * *

With *Schoenbaum* [*v. Firstbrook*, 405 F.2d 206 (2d Cir. 1967)] and *Leasco* [*Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1325 (1972)] on the books, the Second Circuit had excised the presumption against extraterritoriality from the jurisprudence of § 10(b) and replaced it with the inquiry whether it would be reasonable (and hence what Congress would have wanted) to apply the statute to a given situation. As long as there was prescriptive jurisdiction to regulate, the Second Circuit explained, whether to apply § 10(b) even to "predominantly foreign" transactions became

a matter of whether a court thought Congress "wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries."

The Second Circuit had thus established that application of § 10(b) could be premised upon either some effect on American securities markets or investors *(Schoenbaum)* or significant conduct in the United States *(Leasco)*. It later formalized these two applications into (1) an "effects test," "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens," and (2) a "conduct test," "whether the wrongful conduct occurred in the United States." *SEC v. Berger*, 322 F.3d 187, 192–193 (CA2 2003). These became the north star of the Second Circuit's § 10(b) jurisprudence, pointing the way to what Congress would have wished. Indeed, the Second Circuit declined to keep its two tests distinct on the ground that "an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court." *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122 (1995). The Second Circuit never put forward a textual or even extratextual basis for these tests. . . .

* * * *

B

Rule 10b-5, the regulation under which petitioners have brought suit, was promulgated under § 10(b), and "does not extend beyond conduct encompassed by § 10(b)'s prohibition." *United States v. O'Hagan*, 521 U.S. 642, 651 (1997). Therefore, if § 10(b) is not extraterritorial, neither is Rule 10b–5.

On its face, § 10(b) contains nothing to suggest it applies abroad:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities

and Exchange] Commission may prescribe. . . ." 15 U.S.C. § 78j(b).

. . .

[In arguing that § 10(b) or the Exchange Act has at least some extraterritorial application, the petitioners and the Solicitor General] point to the definition of "interstate commerce," a term used in § 10(b), which includes "trade, commerce, transportation, or communication . . . between any foreign country and any State." 15 U.S.C. § 78c(a)(17). But "we have repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to 'foreign commerce' do not apply abroad." *Aramco*, 499 U.S., at 251; see *id.*, at 251–252 (discussing cases). The general reference to foreign commerce in the definition of "interstate commerce" does not defeat the presumption against extraterritoriality.

* * * *

The concurrence claims we have impermissibly narrowed the inquiry in evaluating whether a statute applies abroad, citing for that point the dissent in *Aramco*. . . . But we do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a "clear statement rule," *ibid.*, if by that is meant a requirement that a statute say "this law applies abroad." Assuredly context can be consulted as well. But whatever sources of statutory meaning one consults to give "the most faithful reading" of the text . . . there is no clear indication of extraterritoriality here. The concurrence does not even try to refute that conclusion, but merely puts forward the same (at best) uncertain indications relied upon by petitioners and the Solicitor General. As the opinion for the Court in *Aramco* (which we prefer to the dissent) shows, those uncertain indications do not suffice.

In short, there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.

IV

A

Petitioners argue that the conclusion that § 10(b) does not apply extraterritorially does not resolve this case. They contend

that they seek no more than domestic application anyway, since Florida is where HomeSide and its senior executives engaged in the deceptive conduct of manipulating HomeSide's financial models; their complaint also alleged that Race and Hughes made misleading public statements there. This is less an answer to the presumption against extraterritorial application than it is an assertion—a quite valid assertion—that that presumption here (as often) is not self-evidently dispositive, but its application requires further analysis. For it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case. . . .

. . . [W]e think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States. Section 10(b) does not punish deceptive conduct, but only deceptive conduct "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." 15 U.S.C. § 78j(b). See *SEC v. Zandford*, 535 U.S. 813, 820 (2002). Those purchase-and-sale transactions are the objects of the statute's solicitude. It is those transactions that the statute seeks to "regulate," see *Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971); it is parties or prospective parties to those transactions that the statute seeks to "protec[t]," *id.*, at 10. See also *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.

* * * *

Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States. This case involves no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States. Petitioners have therefore failed to state a claim on which relief can be granted. We affirm the dismissal of petitioners' complaint on this ground.

Cross References

Counternarcotics Majors List, **Chapter 3.B.2.a.**
Commercial private international law, **Chapter 15.A.**
International civil litigation in U.S. courts, **Chapter 15.C.**
Sanctions, **Chapter 16.**

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. Support for U.S. accession

On May 20, 2010, David A. Balton, Deputy Assistant Secretary of State for Oceans and Fisheries, delivered a statement on behalf of Secretary of State Hillary Rodham Clinton at the Thirty-fourth Annual Conference of the University of Virginia's Center for Oceans Law and Policy, concerning "United States Interests in Prompt Adherence to the Law of the Sea Convention." The Secretary's statement described the executive branch's support for U.S. accession to the 1982 United Nations Convention on the Law of the Sea ("LOS Convention" or "Convention"). Excerpts follow from the Secretary's statement, the full text of which is also available at *www.state.gov/s/l/c8183.htm*.

. . . Every Administration—whether Democratic or Republican—since the treaty was first submitted to the Senate in 1994 has supported United States' accession to the Convention and ratification of the associated 1994 Agreement.

It is an important goal of this Administration to secure Senate approval of the Convention, which has the support of every living Chief of Naval Operations, four Commandants of the U.S. Coast

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Guard, the endorsement of every Secretary of State since the Reagan Administration, various industry groups, environmental groups, and other affected associations, as well as security experts, practitioners, and scholars.

By joining this Convention, the United States would be joining 159 other nations and the European Union as States Parties to a Convention that fundamentally advances the rule of law in the world's oceans—one that also advances U.S. national security interests, facilitates the exercise of U.S. sovereign rights, benefits the U.S. economy, and promotes the sustainable development of ocean resources. United States accession to the Convention would also help to restore U.S. leadership in ocean affairs.

b. Meeting of States Parties to the Convention

The United States participated as an observer in the Twentieth Meeting of the States Parties to the Law of the Sea Convention ("SPLOS"), June 14–18, 2010, at UN headquarters in New York. As the LOS Convention prescribes, the role of the meetings of states parties is to conduct elections for the International Tribunal for the Law of the Sea and the Commission on the Limits of the Continental Shelf and to determine the ITLOS budget. The SPLOS also receives and notes the UN Secretary-General's report on general issues that have arisen with respect to the Convention (pursuant to article 319 of the LOS Convention), reports from ITLOS and CLCS, and information provided by the Secretary-General of the International Seabed Authority. Documents related to the meeting are available at *www.un.org/Depts/los/meeting_states_parties/twentiethmeetingstatesparties.htm*.

At the meeting, Dr. Elizabeth Kim, head of the U.S. delegation, made a statement regarding discussions under the agenda item regarding the report of the Secretary-General under article 319 of the Convention. Dr. Kim stated:

> As we and others have stated in this and previous Meetings of States Parties, the role of the Meeting is not as if it were a Conference of Parties with plenary authority.

> Proposals to that effect did not garner sufficient support during the Third Conference, and there is no supporting text to that effect in the Convention. Rather, the role of the Meetings of States Parties is prescribed in the Convention: to conduct elections for the International Tribunal for the Law of the Sea and the Commission on the Limits of the Continental Shelf, and to determine the Tribunal's budget. In addition, the Meeting receives the report of the Secretary-General on oceans and the law of the sea. As with the reports from the Commission and the Tribunal, and information provided by the Secretary-General of the International Seabed Authority, Members have the opportunity to comment on these reports, and these reports are simply noted. In conclusion, Article 319 is not intended to, and does not, empower the Meeting of States Parties to perform general or broad reviews of general topics of interest, or to engage in interpretation of the provisions of the Law of the Sea Convention.

The U.S. statement reiterated views the U.S. delegation had delivered at previous meetings of the States Parties.

2. Other Boundary or Territorial Issues

On July 23, 2010, Secretary Clinton made remarks to the press in Hanoi, Vietnam, following the forty-third ASEAN Ministerial Meeting and the seventeenth conference of the ASEAN Regional Forum. In her remarks, excerpted below, Secretary Clinton discussed the U.S. position on territorial and maritime disputes in the South China Sea. The full text of the press briefing is available at *www.state.gov/secretary/rm/2010/07/145095.htm*.

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The United States supports a collaborative diplomatic process by all claimants for resolving the various territorial disputes

without coercion. We oppose the use or threat of force by any claimant. While the United States does not take sides on the competing territorial disputes over land features in the South China Sea, we believe claimants should pursue their territorial claims and accompanying rights to maritime space in accordance with the UN Convention on the Law of the Sea. Consistent with customary international law, legitimate claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features.

The U.S. supports the 2002 ASEAN–China declaration on the conduct of parties in the South China Sea. We encourage the parties to reach agreement on a full code of conduct. The U.S. is prepared to facilitate initiatives and confidence building measures consistent with the declaration [b]ecause it is in the interest of all claimants and the broader international community for unimpeded commerce to proceed under lawful conditions. Respect for the interests of the international community and responsible efforts to address these unresolved claims . . . help create the conditions for resolution of the disputes and a lowering of regional tensions. Let me add one more point with respect to the Law of the Sea Convention. It has strong bipartisan support in the United States, and one of our diplomatic priorities over the course of the next year is to secure its ratification in the Senate.

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3. Piracy

For discussion of U.S. piracy prosecutions in 2010, see Chapter 3.B.8.

4. Freedom of Navigation

a. Northern Canada Vessel Traffic Services Zone

On February 27, 2010, the Canadian government published a notice of proposed regulations announcing its intention to

establish the Northern Canada Vessel Traffic Services Zone Regulations ("NORDREG"), effective July 1, 2010, in Canadian-claimed waters of the Arctic. The regulations took effect on July 1, 2010, and have two main elements. First, the regulations established the NORDREG Zone ("Zone") (covering Canada's claimed northern waters, extending up to 200 nautical miles offshore, and other areas), which no vessel may enter, leave or proceed within unless it has previously obtained a clearance from Canadian authorities (pursuant to the Canada Shipping Act, 2001). As set forth in the Canada Shipping Act, persons or vessels not obtaining such clearances commit an offense under Canadian law and are liable to a monetary fine or imprisonment.

Second, the regulations established a mandatory ship reporting system within the Zone. In doing so, the regulations eliminated the voluntary reporting system that had been in place since 1977. The regulations prescribe certain classes of vessels that are subject to the clearance and ship reporting requirements.

On March 19, 2010, during the Canadian government's public comment period, the U.S. Embassy in Ottawa expressed the U.S. government's concerns about the draft regulations in a letter to the Canadian Department of Transport. The U.S. comments are provided below and are also available in full at *www.state.gov/s/l/c8183.htm*.

On behalf of the Government of the United States of America, the Embassy wishes to provide comments on the proposed Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) published in the Canada Gazette on February 27, 2010.

The United States of America compliments the Government of Canada's continued efforts to provide for the safety of navigation and protection of the marine environment in the Arctic area. As conditions in the Arctic evolve, all Arctic coastal states will need to consider ways to protect and preserve this sensitive region. We note the collaborative efforts we have taken with Canada in this regard.

The notice of proposed regulations states that the proposed regulations are "consistent with international law regarding ice-covered areas." In light of this, the United States understands that Canada considers Article 234 of the Law of the Sea Convention (LOSC), entitled, "Ice-covered areas," to provide an international legal basis for its proposed NORDREG Zone Regulations. That article provides a coastal state with authorities to adopt and enforce certain laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of its exclusive economic zone when certain conditions are met. While we appreciate Canada's stewardship efforts in the Arctic region, we wish to take this opportunity to express our concerns that the new regulations appear to be inconsistent with international law, including LOSC Article 234.

First, the regulatory impact analysis statement accompanying the proposed regulations indicates that Canadian permission would be required for foreign flagged vessels to enter and transit certain areas that are within Canada's claimed exclusive economic zone and territorial sea and that enforcement action could include prosecution. If so, this would be a sweeping infringement of freedom of navigation within the exclusive economic zone and the right of innocent passage within the territorial sea, both of which are bedrock principles of the law of the sea. While Article 234 of the LOSC allows Coastal States to adopt and enforce certain laws and regulations in ice-covered areas within the limits of the exclusive economic zone, these laws and regulations must be for the prevention, reduction and control of marine pollution from vessels and have "due regard to navigation." The United States does not believe that requiring permission to transit these areas meets the obligation set forth in Article 234 of having due regard to navigation.

Second, under LOSC Article 234, laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone must also be non-discriminatory. The proposed regulations rely on Canada's Shipping Control Act, which exempts vessels chartered to the Canadian Forces. However, it appears neither the Shipping Control Act nor the proposed regulations contain a

provision for similarly-situated foreign vessels. This would be discriminatory, in contravention of LOSC Article 234.

Third, while the Shipping Control Act exempts vessels belonging to a foreign military force, the proposed regulations do not appear to provide an exemption for all sovereign immune vessels, including chartered vessels carrying military supplies. However, LOSC Article 236 specifies that Article 234 is among those provisions of the Convention that "do not apply" to sovereign immune vessels.

Fourth, under LOSC Article 234, laws and regulations adopted must be based on the "best available scientific evidence." The Notice of the regulations did not refer to any scientific studies in developing the proposed regulations. The United States is interested to know the scientific evidence that was considered in the development of these proposed regulations. Article 234 is likewise limited to "ice-covered areas," namely those areas covered by ice for "most of the year." Recognizing that the Notice states that "ice levels have recently been observed to be at an all-time low," the United States is likewise interested to know what information has been used to determine how this condition has been met throughout the entire area covered by the NORDREG Zone.

Finally, we note that the usual process for ensuring safety of navigation and prevention of pollution from ships is to establish such measures at the International Maritime Organization (IMO). In this regard, we would like to bring to Canada's attention relevant provisions of the International Convention for the Safety of Life at Sea, in particular Chapter V, Regulations 10 and 11, that require mandatory ship routing and reporting systems to be submitted to the IMO for adoption. We would be interested to learn whether Canada will avail itself of such an approach. The United States would welcome the opportunity to work with Canada and with others at the IMO in this regard.

The United States also reiterates its longstanding view that the Northwest Passage constitutes a strait used for international navigation. At a minimum, a measure such as the NORDREG Zone Regulations for an international strait would need to be proposed and adopted at the IMO.

In conclusion, we wish to emphasize that the United States does not oppose the Government of Canada's voluntary vessel

traffic services zone and voluntary provisions for vessel registration and reporting. We likewise do not discount the need for action to protect the sensitive areas of the Arctic.

The United States supports the stewardship goals of the proposed NORDREG Zone Regulations. Such proposals, however, must have a firm international legal foundation and be implemented in a manner consistent with the law of the sea.

Thank you for the opportunity to comment on the proposed regulations. We look forward to our continued collaboration on this and other areas of mutual interest.

After the NORDREGs took effect on July 1, 2010, the U.S. Embassy in Ottawa delivered a diplomatic note to the Canadian Department of Foreign Affairs and International Trade that expressed the United States' continuing concerns with the regulations. The diplomatic note stated, "The Government of the United States of America advises . . . that it continues to be concerned that the NORDREGs are inconsistent with important law of the sea principles related to navigational rights and freedoms and recommends that the Government of Canada submit its vessel traffic services and mandatory ship reporting system to the IMO for adoption." The note then reiterated points contained in the comments the United States submitted to the Canadian Ministry of Transport in March 2010. The diplomatic note also advised that, "from a safety of navigation perspective, the United States has concerns about whether the NORDREGs vessel traffic services system is consistent with IMO guidance on the establishment of vessel traffic services." Finally, the United States "noted with concern the references to 'sovereignty' in the statements accompanying the announcement of the regulations. The United States wishes to note that that NORDREGs do not, and cannot as a matter of law, increase the 'sovereignty' of Canada over any territory or marine area." The U.S. diplomatic note is available in full at *www.state.gov/s/l/c8183.htm*.

On September 22, 2010, the United States and INTERTANKO, the International Association of Independent

Tanker Owners, a nongovernmental organization with consultative status at the IMO, submitted a paper to the International Maritime Organization's Maritime Safety Committee ("MSC") concerning the NORDREGs. The paper expressed concern about Canada's failure to submit the regulations to the IMO before they took effect and noted areas where the regulations lack clarity and may not be in compliance with the International Convention for the Safety of Life at Sea ("SOLAS"). *See* IMO Doc. MSC/88/11/2. In a statement to the MSC on November 29, 2010, Jeffrey Lantz, head of the U.S. delegation, introduced the U.S. paper and discussed its objectives. Canada also presented a paper to the MSC, which replied to U.S. concerns and asserted that Article 234 of the Law of the Sea Convention gave it authority to adopt the regulations.

Excerpts follow from the statement introducing the U.S. paper. The full texts of the U.S. statement and the U.S. submission to the MSC are available at *www.state.gov/s/l/c8183.htm*.

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. . . We commend Canada on its desire to improve marine safety and environmental protection in the Arctic waters off its coast. However, we have a number of serious marine safety concerns related to the recent enactment of Canada's NORDREG mandatory ship reporting and VTS system requirements, which was done without referring the regulations to this Organization for adoption. Such unilateral action is not consistent with the normal practice of IMO, and is contrary to both the letter and spirit of SOLAS.

The NORDREG, as we understand it, conditions entry into Canada's claimed territorial sea and EEZ on mandatory ship reporting of certain information from covered vessels—essentially all non-sovereign immune ships. It is not clear from the NORDREG or the other information provided by Canada that it complies with the communications capability guidelines or the operator training

and proficiency skill set forth in the Organization's or IALA's guidelines for the development and implementation of a control VTS. That participation is mandatory for ships seeking to enter and transit Canada's claimed EEZ is also problematic under SOLAS V/12.

Mr. Chairman, this Organization is the only international body competent to develop guidelines and criteria for regulations of ship reporting systems on an international level, and SOLAS does not permit unilateral adoption of this kind of mandatory ship reporting system. Additionally, SOLAS also provides that a Contracting Government's VTS may only be made mandatory in that State's territorial sea. SOLAS V/11 and 12 are very clear in that respect.

Our paper requests a declaration from MSC that the NORDREG is not consistent with the requirements of SOLAS V for a mandatory ship reporting system, and for vessel traffic services.

Finally, Mr. Chairman, we reiterate our desire to work cooperatively with Canada and others in this Organization on adoption by this Organization of a mandatory ship reporting system and VTS system to be proposed by Canada that is consistent with SOLAS and the other guidelines of the Organization. In the meantime, the Committee may wish to urge IMO member States to encourage ships entitled to fly their flag to comply voluntarily with Canada's NORDREG (but not as a matter of law).

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b. Torres Strait

On July 22, 2005, the IMO's Marine Environment Protection Committee ("MEPC") adopted Resolution 133(53), which designated the Torres Strait as an extension of the Great Barrier Reef Particularly Sensitive Sea Area and recommended among other things that governments advise ships flying their flag to act in accordance with Australia's pilotage system when navigating the strait. In joining consensus on the resolution, the United States made clear its view that the resolution did not

provide an international legal basis for mandatory pilotage for ships exercising the right of transit passage through the Torres Strait or any other international strait. On May 16, 2006, Australia issued a Marine Notice announcing that Australia would establish a compulsory pilotage scheme for the Torres Strait on October 6, 2006. The United States subsequently conveyed its concerns about the Marine Notice to Australia, objecting that unless Australia implemented its compulsory pilotage system as a condition of entry into Australian ports, its system would run counter to Resolution 133(53). For additional background, see *Digest 2005* at 686–87 and *Digest 2006* at 810–12.

In July 2009, the Australian Maritime Safety Authority published revised Marine Notice 7/2009 indicating that "if a vessel passes through the Torres Strait and it does not comply with Australia's system of pilotage . . . , the Government of Australia will notify the vessel's Flag State, Owner, Operator and Master that the vessel failed to take a pilot and henceforth cannot enter an Australian port without the risk of . . . being subject to a non-custodial penalty under Australian law." During the 61st session of the MEPC in London, September 17–October 1, 2010, Jeffrey Lantz, the head of the U.S. delegation, addressed Australia's pilotage requirements for the Torres Strait in a statement concerning a French-Italian proposal to adopt a compulsory pilotage scheme in the Strait of Bonifacio. Mr. Lantz expressed the U.S. understanding that the 2009 Marine Notice clarified that Australia had imposed its pilotage requirement for the Torres Strait as a condition for permitting foreign-flagged vessels to enter Australian ports, as customary international law permits, rather than based on MEPC Resolution 133(53), which provides no such legal basis. The U.S. statement is provided below and is also available at *www.state.gov/s/l/c8183.htm*.

The United States is sympathetic to the objectives outlined in document MEPC 61/9 and commends France and Italy for their continued efforts to enhance the safety of navigation and the protection

of the marine environment in the area of the Strait of Bonifacio. At this point, we are supportive of the proposal, in principle, however, our review of the proposal to the Revised PSSA [Particularly Sensitive Sea Area] Guidelines indicates that perhaps more information is needed; especially as the proposal contains mandatory measures to be established in a strait used for international navigation.

We are grateful to France and Italy for revising their proposed measure concerning pilotage for ships navigating through the Strait. We had concerns that the original proposal for mandatory pilotage did not identify the legal basis for that measure. We were unsure if the intention was to rely on the Committee's resolution that may be adopted to establish a PSSA in the Strait of Bonifacio as the legal basis for mandatory pilotage. An MEPC resolution does not provide an international legal basis for mandatory pilotage for ships in transit in any strait used for international navigation. In this regard and as a point of reference, the United States understands that the international legal basis for enforcing the system of pilotage in the Torres Strait is as a condition of entry into an Australian port, and that compliance with this system is as recommended by the IMO. We appreciate the revisions that France and Italy have made to their proposal by replacing their proposed measure for mandatory pilotage with a scheme for recommended pilotage.

Again, I reiterate that we are supportive of this proposal in principle and it is not our desire to slow the process for designation of the PSSA. However, we also wish to see a principled application of the Revised Guidelines through a rigorous assessment of the elements of this proposal against the Guidelines. Therefore, we believe it would be appropriate for the Committee to establish a technical group as set out in paragraph 8.3.1 of the Revised PSSA Guidelines to conduct the assessment as set forth in the Guidelines.

c. Archipelagic states

In separate diplomatic notes delivered October 26, 2010, the embassies of the United States and the United Kingdom

informed the Ministry of Foreign Affairs of the Dominican Republic that the U.S. and UK governments continued to contest the definition of the Dominican Republic as an archipelagic state and certain other claims contained in a law the Dominican Republic enacted on May 22, 2007. The two governments referred to and reiterated the views expressed in diplomatic notes both governments presented to the Ministry of Foreign Affairs of the Dominican Republic on October 28, 2007. The notes also reiterated a similar demarche presented to the Ministry of Foreign Affairs of the Dominican Republic on December 16, 2008. *See Digest 2007* at 641–43 for discussion of the 2007 demarche. The substantive paragraphs of the 2010 diplomatic note are set forth below in full.

The Embassy of the United States in the Dominican Republic presents its compliments to the Ministry of Foreign Relations and has the honor to refer to Law No. 66-07 of May 22, 2007, by which the Dominican Republic:

a) declared itself an Archipelagic State;
b) drew straight baselines connecting a number of turning points on certain banks and keys;
c) claimed certain bodies of waters as internal waters and others as historic bays;
d) sets out the coordinates of the outer limits of its claimed exclusive economic zone (EEZ);
e) purported to limit the right of innocent passage through its archipelagic waters and territorial sea (and over-flight) to those ships and aircraft not carrying cargoes of radioactive substances or highly toxic chemicals;
f) does not recognize the right of archipelagic sea lanes passage; and
g) claimed rights over old shipwrecks within its EEZ.

The Embassies of the United States and the United Kingdom informed the Ministry that their governments contested these claims by the Dominican Republic and requested clarifications in

U.S. Diplomatic Note 234 of October 18, 2007, and UK Diplomatic Note 64 of that same date, and in their concurrent joint representation to the Ministry of Foreign Relations.

The Embassies of the United States, the United Kingdom and Japan made a similar demarche to the Ministry of Foreign Relations on December 16, 2008, requesting that the Ministry of Foreign Relations respond to the requests for clarifications contained in U.S. Diplomatic Note 234 of October 18, 2007, and UK Diplomatic Note 64 of that same date.

No substantive reply has yet been received from the Ministry of Foreign Relations to any of these requests for clarification.

The Embassy of the United States emphasizes that the Government of the United States of America contests the Government of the Dominican Republic's claim to be an archipelagic state and requests that the Ministry of Foreign Relations respond to these requests for clarification of the Dominican Republic's claims.

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5. Safety Zones

Article 60 of the 1982 United Nations Convention on the Law of the Sea ("LOS Convention" or "Convention") permits a coastal state to establish safety zones of up to 500 meters around artificial islands, installations, and structures in its exclusive economic zone ("EEZ"). The LOS Convention permits enlargement of a safety zone if the competent international organization (i.e., the International Maritime Organization) recommends it. In 2007, Brazil submitted a proposal to the IMO's Sub-Committee on Safety of Navigation ("Sub-Committee") that sought approval to establish two-nautical-mile-safety zones around its oil drilling units in the Campos Basin off the southeast coast of Brazil. During the Sub-Committee's discussion of Brazil's proposal in 2008, the United States proposed that the Sub-Committee instead consider establishing guidelines for considering requests for enlarging safety zones. In 2008, the United States and Brazil jointly proposed that the Maritime Safety

Committee ("MSC") authorize the Sub-Committee to develop such guidelines.

Subsequently, after considering the matter further, the United States concluded that the need for larger safety zones had not been demonstrated. The United States submitted a new proposal that suggested that the Sub-Committee update its guidance for vessels with respect to existing 500-meter safety zones around offshore structures. The U.S. submission included a draft circular containing proposed revisions to the guidance. At its 56th session, July 26–30, 2010, the Sub-Committee endorsed the U.S. proposal. At its 88th session, November 24–December 3, 2010, the MSC adopted the U.S. approach and approved the issuance of the new circular. The text of the U.S. proposal is available at *www.state.gov/s/l/c8183.htm*. The draft circular the MSC adopted is available at *www.uscg.mil/imo/nav/default.asp*, in Annex 6 of the NAV 56 Final Report.

6. Maritime Security and Law Enforcement

On March 24, 2010, representatives of the U.S. Coast Guard and the Peruvian National Maritime Authority signed an arrangement on Operational Procedures for Boarding and Inspecting Vessels Suspected of Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The authorities agreed upon the arrangement, which is not binding under international law, consistent with Article 17(9) of the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("1988 Convention"). Under the 1988 Convention, as the arrangement noted, "bilateral agreements or operational arrangements can be arranged to carry out, or to enhance the effectiveness of, cooperation between Parties to the 1988 Convention to suppress illicit traffic by sea." For additional background see *Digest 1989–90* at 450.

The arrangement establishes procedures for the Peruvian Coast Guard to confirm or deny the nationality of a vessel displaying or claiming Peruvian nationality if a U.S. Coast

Guard or naval vessel or aircraft detects it and it is acting suspiciously or "information is received about it being engaged in illicit trafficking." The arrangement also provides a mechanism for the Peruvian Coast Guard to authorize the U.S. Coast Guard to board and inspect a vessel whose nationality the Peruvian Coast Guard confirms and to detain the vessel and persons on board if it finds evidence of illicit trafficking.

In April 2010, the two authorities modified Annex 2 to the arrangement, which contained a form for Peru's Coast Guard to confirm the registration and status of a vessel to the U.S. Coast Guard. The modification addresses the scenario in which Peru's Coast Guard cannot confirm a vessel's registration within two hours. Under that scenario, the modification clarifies that the U.S. Coast Guard may board the vessel under presumptive flag State authority pending the results of the registry check. The arrangement and its annexes are available at *www.state.gov/s/l/c8183.htm*. Chapter 3.B.2. discusses other U.S. actions relating to international narcotics trafficking in 2010.

7. Salvage at Sea

On August 2, 2010, the United States filed a brief as *amicus curiae* in *Odyssey Marine Exploration, Inc. v. Kingdom of Spain*, before the U.S. Court of Appeals for the Eleventh Circuit. On December 22, 2009, the lower court had dismissed the in rem action, involving claims to the remains of a shipwreck and related artifacts discovered in international waters. *See Digest 2009* at 367–69 and 476–79.

The United States argued that "the district court correctly held that international agreements predating the Foreign Sovereign Immunities Act preclude in rem suits against Spanish warships, their contents, and their debris sites" and therefore the appeals court should affirm the district court's opinion in that regard. As excerpted below, the United States expressed the view that "[i]f, as the district court found, the

subject of Odyssey's in rem action is a Spanish warship, the 1958 Convention on the High Seas and the 1902 Treaty of Friendship and General Relations with Spain foreclose Odyssey's claims under the law of salvage or the law of finds." The U.S. brief also addressed and rebutted two additional arguments raised by Odyssey, i.e., that a Spanish warship is not entitled to sovereign immunity if it is engaged in commercial activities and that the two agreements do not provide immunity to cargo on a warship. That portion of the brief is not excerpted below. The United States did not take a position on the district court's factual findings or the merits of any dispute between Spain and Peru, which also claimed items at the shipwreck site. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*. For discussion of other litigation in 2010 concerning foreign sovereign immunities, see Chapter 10.

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1. Under the Foreign Sovereign Immunities Act ("FSIA"), foreign states and their property are immune from jurisdiction of United States courts unless one of an enumerated set of statutory exceptions applies. 28 U.S.C. §§ 1604, 1609. This immunity, however, is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment." *Id.* Accordingly, if such preexisting international agreements establish that Spanish warships are not subject to suit in United States courts, that result obtains regardless of the FSIA's immunity provisions. Two international agreements to which the United States was a party when the FSIA was enacted so provide.

The Convention on the High Seas, 450 U.N.T.S. 82, was adopted in 1958 "as generally declaratory of established principles of international law." Article 8 of the Convention states that "[w]arships on the high seas have complete immunity from the jurisdiction of any State other than the flag State," and defines a warship as "a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government

and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline." Article 9 of the Convention, by comparison, limits the immunity of other state-owned vessels to noncommercial conduct: "[s]hips owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State."[2]

Article X of the Treaty of Friendship and General Relations with Spain, 33 Stat. 2105 (1903), provides that "[i]n cases of shipwreck, damages at sea, or forced putting in, 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." The United States protects its military vessels through the Sunken Military Craft Act, Pub. L. No. 108-375, tit. XIV, 118 Stat. 1811, 2094–98 (2004).[3] The Act prohibits "any activity directed at a sunken military craft that disturbs, removes, or injures any sunken military craft" except as otherwise authorized, and provides that "[n]o person may possess, disturb, remove, or injure any sunken military craft" in violation of its provisions or other applicable law. *Id.* § 1402, 118 Stat. 2094–95. The Act states that the law of finds shall not apply to "any United States sunken military craft, wherever located," and that no salvage rights or awards shall be granted with respect to such vessels absent

[2] Articles 95 and 96 of the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"), 1833 U.N.T.S. 3, maintain the same distinction. The United States generally recognizes UNCLOS as reflective of customary international law that "protects and strengthens the key principle of sovereign immunity for warships and military aircraft." President's Transmittal of UNCLOS and the Agreement Relating to the Implementation of Part IX to the U.S. Senate with Commentary, 34 I.L.M. 1393, 1412 (Oct. 7, 1994).

[3] The United States also protects several of its sunken vessels, including the U.S.S. Monitor and the U.S.S. Arizona, under the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431 *et seq.*, and related laws applicable to National Parks, Seashores, and Monuments. Regulations under the Act specify that "[t]he same degree of regulatory protection and preservation planning policy extended to historical resources on land shall be extended, to the extent practicable, to historical resources in the marine environment within the boundaries of designated National Marine Sanctuaries. 15 C.F.R. § 922.2(e).

the United States' express permission. *Id.* §§ 1406(c)(1), (d)(1), 118 Stat. 2097.

Where the subject of a suit is a Spanish warship, the consequence of these international agreements is clear. Under the High Seas Convention, the res is immune from the jurisdiction of United States courts. Under the Treaty of Friendship, the res is entitled to the same protections as a United States warship—including from unauthorized disturbance, possession, and claims under the law of finds or salvage absent Spain's permission.

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8. U.S. Executive Order on Oceans, Coasts, and the Great Lakes

On July 19, 2010, President Barack H. Obama signed Executive Order 13547, "Stewardship of the Ocean, Our Coasts, and the Great Lakes." Daily Comp. Pres. Docs, 2010 DCPD No. 00608, pp. 1–5. The order adopted the recommendations of the Interagency Ocean Policy Task Force, with certain exceptions, and directed executive agencies of the U.S. government to implement those recommendations under the guidance of the National Ocean Council established by the order. *See Digest 2009* at 458–59 for background on the Interagency Ocean Policy Task Force, which President Obama established in 2009. Section 1 of the order stated in part:

> . . . [T]his order establishes a national policy to ensure the protection, maintenance, and restoration of the health of ocean, coastal, and Great Lakes ecosystems and resources, enhance the sustainability of ocean and coastal economies, preserve our maritime heritage, support sustainable uses and access, provide for adaptive management to enhance our understanding of and capacity to respond to climate change and ocean acidification, and coordinate with our national security and foreign policy interests.

Various provisions of the order referred to international law and its significance. Section 2(a)(vii) of the order stated

that it is U.S. policy to "(vii) exercise rights and jurisdiction and perform duties in accordance with applicable international law, including respect for and preservation of navigational rights and freedoms, which are essential for the global economy and international peace and security." Section 2(b) stated in part, "The United States shall promote this policy by: . . . (iii) pursuing the United States' accession to the Law of the Sea Convention." For discussion of the executive branch's support for accession to the Law of the Sea Convention, see A.1.a. *supra*.

Moreover, § 9(c) stated, "In carrying out the provisions of this order and implementing the Final Recommendations [of the Interagency Ocean Policy Task Force], all actions of the [National Ocean] Council and the executive departments, agencies, and offices that constitute it shall be consistent with applicable international law, including customary international law, such as that reflected in the Law of the Sea Convention."

On December 7, 2010, the UN General Assembly adopted its annual resolution on oceans and the law of the sea, which the United States cosponsored. U.N. Doc. A/RES/65/37A. In a statement to the General Assembly before the resolution's adoption, Gregory Nickels, Public Delegate, U.S. Mission to the United Nations, described the new U.S. executive order and underscored the importance of the oceans, the United States' coasts, and the Great Lakes to the United States' "transportation, economy, and trade, as well as the global mobility of our Armed Forces and the maintenance of international peace and security." The full text of the U.S. statement, which also discussed the General Assembly's annual resolution on sustainable fisheries, is available at *http://usun.state.gov/briefing/statements/2010/152512.htm*. For discussion of the fisheries resolution, see Chapter 13.B.2.a.

B. OUTER SPACE

On June 28, 2010, President Barack H. Obama announced a new national space policy providing direction for U.S. activities

in outer space. President Obama explained that the new policy followed in the tradition of previous national space policies issued by every U.S. President since Dwight Eisenhower. President Obama stated:

> Our policy reflects the ways in which our imperatives and our obligations in space have changed in recent decades. No longer are we racing against an adversary; in fact, one of our central goals is to promote peaceful cooperation and collaboration in space, which not only will ward off conflict, but will help to expand our capacity to operate in orbit and beyond. In addition, this policy recognizes that as our reliance on satellites and other space-based technologies increases, so too does our responsibility to address challenges such as debris and other hazards. No longer is space just a destination to reach; it is a place where we must be able to work in ways that are responsible, sustainable, and safe. And it is central to our security and the security of our allies . . . .
>
> But, above all, this policy is about the boundless possibilities of the future. That is why we seek to spur a burgeoning commercial space industry, to rapidly increase our capabilities in space while bolstering America's competitive edge in the global economy. . . .

The full text of President Obama's statement is available at Daily Comp. Pres. Docs., 2010 DCPD No. 00555, pp. 1–2.

The introduction to the policy, which echoed similar themes to the ones President Obama stressed in his announcement, and the policy's statement of principles are excerpted below. The full text of the policy is available at *www.whitehouse.gov/the-press-office/fact-sheet-national-space-policy*, along with a fact sheet on it.

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. . . [W]e find ourselves in a world where the benefits of space permeate almost every facet of our lives. The growth and evolution of the global economy has ushered in an ever-increasing number of

nations and organizations using space. The now-ubiquitous and interconnected nature of space capabilities and the world's growing dependence on them mean that irresponsible acts in space can have damaging consequences for all of us. For example, decades of space activity have littered Earth's orbit with debris; and as the world's space-faring nations continue to increase activities in space, the chance for a collision increases correspondingly.

As the leading space-faring nation, the United States is committed to addressing these challenges. But this cannot be the responsibility of the United States alone. All nations have the right to use and explore space, but with this right also comes responsibility. The United States, therefore, calls on all nations to work together to adopt approaches for responsible activity in space to preserve this right for the benefit of future generations.

From the outset of humanity's ascent into space, this Nation declared its commitment to enhance the welfare of humankind by cooperating with others to maintain the freedom of space.

The United States hereby renews its pledge of cooperation in the belief that with strengthened international collaboration and reinvigorated U.S. leadership, all nations and peoples—space-faring and space-benefiting—will find their horizons broadened, their knowledge enhanced, and their lives greatly improved.

Principles

In this spirit of cooperation, the United States will adhere to, and proposes that other nations recognize and adhere to, the following principles:

- It is the shared interest of all nations to act responsibly in space to help prevent mishaps, misperceptions, and mistrust. The United States considers the sustainability, stability, and free access to, and use of, space vital to its national interests. Space operations should be conducted in ways that emphasize openness and transparency to improve public awareness of the activities of government, and enable others to share in the benefits provided by the use of space.
- A robust and competitive commercial space sector is vital to continued progress in space. The United States is committed to

encouraging and facilitating the growth of a U.S. commercial space sector that supports U.S. needs, is globally competitive, and advances U.S. leadership in the generation of new markets and innovation-driven entrepreneurship.

- All nations have the right to explore and use space for peaceful purposes, and for the benefit of all humanity, in accordance with international law. Consistent with this principle, "peaceful purposes" allows for space to be used for national and homeland security activities.
- As established in international law, there shall be no national claims of sovereignty over outer space or any celestial bodies. The United States considers the space systems of all nations to have the rights of passage through, and conduct of operations in, space without interference. Purposeful interference with space systems, including supporting infrastructure, will be considered an infringement of a nation's rights.
- The United States will employ a variety of measures to help assure the use of space for all responsible parties, and, consistent with the inherent right of self-defense, deter others from interference and attack, defend our space systems and contribute to the defense of allied space systems, and, if deterrence fails, defeat efforts to attack them.

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Cross References

Fisheries issues, **Chapter 13.B.2.**
U.S. initiatives to protect cultural heritage, **Chapter 14.**

Chapter 13

Environment and Other Transnational Scientific Issues

ENVIRONMENT AND CONSERVATION

A. LAND AND AIR POLLUTION AND RELATED ISSUES

1. Climate Change

a. Copenhagen Accord: U.S. submission

In December 2009, during the Fifteenth Session of the Conference of the Parties to the UN Framework Convention on Climate Change ("UNFCCC") in Copenhagen, Denmark, the United States and 27 other key economies negotiated the Copenhagen Accord, and the Conference of the Parties agreed to "take note" of the Accord. Although not legally binding, the Copenhagen Accord provided for the listing by States of the mitigation steps to be implemented by them, respectively, with the submission of information about those steps to be provided to the UNFCCC Secretariat by January 31, 2010. The Accord included two appendices, providing the format for States to use in making their submissions to the Secretariat, with Appendix 1 applicable to Annex I parties to the UNFCCC (i.e., listed industrialized countries) and Appendix II applicable to non-Annex 1 parties (i.e., other countries, largely developing), respectively. As of the end of 2009, States Parties to the UNFCCC had the opportunity to associate themselves with the Copenhagen

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Accord by advising the UNFCCC Secretariat accordingly. *See Digest 2009* at 488–92 for additional background.

In a letter dated January 28, 2010, Todd Stern, U.S. Special Envoy for Climate Change, informed Yvo de Boer, Executive Secretary of the UNFCCC, of the United States' desire to be associated with the Copenhagen Accord. Mr. Stern's letter also transmitted the United States' target for reducing its emissions by 2020, consistent with the Accord. Mr. Stern wrote in part:

> The U.S. listing [of its emission reduction target] is provided on the assumption that other Annex 1 Parties, as well as the more advanced non-Annex 1 parties, have, by January 31, associated with the Accord and submitted mitigation actions for compilation in accordance with paragraph 4 or paragraph 5 of the Accord, as the case may be.
>
> We look forward to implementing the Accord, including those portions of the Accord that call for COP decisions.

The appendix to Mr. Stern's letter stated that the U.S. emissions reduction in 2020 would be "[i]n the range of 17%, in conformity with anticipated U.S. energy and climate legislation, recognizing that the final target will be reported to the Secretariat in light of enacted legislation."* [fn. omitted] Mr. Stern's letter is available in full at *www.state.gov/s/l/c8183.htm*. Along with the United States, 112 other states and the European Union had associated themselves with the Copenhagen Accord as of the end of 2010.

b. Climate change negotiations

(1) Legal form

On October 8, 2010, Mr. Stern discussed issues relating to the climate change negotiations under the UN Framework Convention on Climate Change ("UNFCCC") in an address to the University of Michigan Law School's Environmental

* Editor's note: As of the end of 2010, U.S. climate change legislation had not been enacted.

Law & Policy Program. In his remarks, "A New Paradigm: Climate Change Negotiations in the Post-Copenhagen Era," Mr. Stern included a discussion of whether any new climate change agreement that States might reach would need to be binding under international law. Excerpts follow from Mr. Stern's discussion of that issue; his remarks are available in full at *www.state.gov/g/oes/rls/remarks/2010/149429.htm*.

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. . . Let me shift gears now to consider another issue in the negotiations . . . —whether a new agreement, this year, next year or the year after, needs to be legally binding at the international level.

I am not here asking the question of whether national actions should have the force of law. The answer to that question seems to me to be clearly yes; climate change poses far too serious a threat to treat as a matter of voluntarism; we need mandatory national laws and regulations. Rather, the question is whether we need an agreement that is legally binding at the international level as opposed to an accord, a la Copenhagen, that is binding politically and morally, but not legally.

Now, it has long been an article of faith among most countries that we need a legal treaty to govern international climate action. And the United States has supported this objective and continues to support it, as long as such a treaty is legally binding for major developing countries as well. But it is worth examining both the upsides and potential downsides of a legally binding agreement as we think about the world going forward.

Denmark, in effect, put this question on the table for the first time last fall, when they publicly suggested that a legal treaty might be beyond reach for Copenhagen and that we ought to focus on reaching a politically binding deal instead. We thought that made sense, but many countries protested, and most of those who accepted the Danes' logic did so only on the basis that a legal treaty would be concluded, at Cancun or before. And yet, a year later, with Cancun just 7 ½ weeks away, a legal treaty is nowhere in sight. So what is going on here?

To begin with, why is the idea of a legal treaty so compelling? First, I think that it conveys a sense of seriousness; if an agreement is legally binding, then the parties clearly mean it. Second, a legal agreement is often presumed to include compliance provisions creating incentives, mostly negative, some positive, designed to push countries to meet their commitments. Third, some, especially in Europe, argue that a legal agreement is necessary if you want to build an international carbon market, in which parties—whether countries or companies—could trade rights to emit greenhouse gases.

At the same time, at least in the near term, a legal treaty would be extraordinarily difficult to achieve. As noted, the United States, as well as a number of other countries, would not accept legally binding commitments unless China and other emerging markets did so as well, and they have made abundantly clear that they will not.

Second, the legal character of an agreement will almost inevitably lead to many countries *reducing* their level of ambition, whether to make sure they can live up to their commitments, out of fear of the consequences of failing to meet commitments, or both. And this is true even if no consequences are written into the agreement.

Third, negotiating a legal treaty takes a lot of time. The Kyoto Protocol was agreed to in 1997 and didn't go into effect for 8 years—until 2005. Had a handful of countries not blocked the adoption of the Copenhagen Accord last year, we could be elaborating its provisions and starting to implement it right now.

As for the markets argument, countries with emissions trading systems at a national level could enter into bilateral or plurilateral agreements with others who had their own systems in order to establish transnational trading. Over time, such a process could be built out to a broader international system. So we don't agree that an internationally legally binding agreement is a precondition for markets.

In light of the trials and tribulations of negotiating a strong, effective legal treaty, it is worth recognizing that if an international accord included countries making political commitments to each other to implement serious, mandatory national laws and

regulations; to be internationally transparent in what they do; and to provide appropriate mitigation, technology, adaptation and forestry assistance to poor countries, you'd be much of the way home. Indeed, you might argue that that is exactly what the Copenhagen Accord did last year.

None of this is to say that a legally binding agreement shouldn't be our objective at such time as countries are genuinely ready for it. But that objective should not stop, or slow down, our quest for immediate concrete progress. The issue is far too urgent and important to put all our climate eggs in the legally binding basket.

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(2) UN Framework Convention on Climate Change: Conference of the Parties

The United States participated in the Sixteenth Session of the Conference of the Parties ("COP") to the UN Framework Convention on Climate Change ("UNFCCC") in Cancun, Mexico, November 29–December 10, 2010. Parties to the Kyoto Protocol, to which the United States is not a party, met at the same time at Cancun for the Meeting of Parties to the Kyoto Protocol ("CMP"). On December 10, 2010, the COP adopted an extensive, non-legally binding decision under the UNFCCC designed to mitigate the effects of climate change and implement the UNFCCC. The decisions, available at *http://unfccc.int/meetings/cop_16/items/5571.php*, have been referred to variously as the "Cancun Agreements," "Cancun agreement," and "Cancun agreements."

The COP adopted the broadest and most detailed one of those decisions, entitled "The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention," I/CP.16 (FCCC/AWGLCA/2010/L.7), as the final act of its session. Before the COP adopted the decision, the Bolivian delegate objected to its adoption. After the President of the COP stated her view that consensus did not mean that one Party could veto the work of the rest of the Parties, the delegate continued to oppose its approval. He stated that Bolivia's concerns about

the text had not been discussed sufficiently during the negotiations, and he requested additional discussion of Bolivia's proposals. In response, the President of the COP noted that the Bolivian delegation's concerns would be reflected in the formal records of the COP and proposed that the COP adopt the decision unless States objected. Mr. Stern made a brief statement expressing support for the President's conclusion but suggested, "a better basis for your decision is that the practice in this body has been closer to general agreement than consensus for the reason that this body has actually never adopted its decision-making rules." Bolivia reiterated its concerns with adoption of the decision, and the COP President concluded that the decision had been adopted.

On December 14, 2010, Mr. Stern briefed the press on the results of the Cancun conference. Excerpts follow from Mr. Stern's discussion of the Cancun agreement and its significance. The full text of the press briefing is available at *www.state.gov/g/oes/rls/remarks/2010/152847.htm. See also* Secretary of State Clinton's December 11 statement welcoming the results of the UNFCCC's conference, available at *www.state.gov/secretary/rm/2010/12/152672.htm.*

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. . . This result was fundamentally consistent with U.S. objectives. Throughout the year, our strategic vision was to consolidate and elaborate on the progress made last year in Copenhagen by many of the world's leaders, including President Obama, and to have such outcome fully endorsed by the Conference of the Parties, all the nations to the Climate Treaty, as the Copenhagen Accord obviously was not.

The resulting Cancun agreement advances each of the core elements of the Copenhagen Accord. Specifically, it anchors the accord's mitigation pledges by both developed and developing countries in a parallel manner. It outlines a system of transparency with substantial detail and content, including international consultations and analysis; that was the negotiated phrase from the

Copenhagen Accord. And this will provide confidence that a country's pledges are being carried out and help the world keep track of the track that we're on in terms of reducing emissions.

The agreement in Cancun also launches a new Green Climate Fund with a process for setting it up, creates a framework to reduce deforestation in developing countries, establishes a so-called technology mechanism which . . . will include a new technology executive committee and a climate technology center and network, and it will also set up a framework and committee to promote international cooperation and action on adaptation.

The U.S. is pleased that parties showed the flexibility and pragmatism that was necessary to make progress in each of these areas. The two-week conference posed a number of quite difficult challenges. It was anything but clear for a long time that we were actually going to get this agreement. But guided by what I think was a really outstanding Mexican team, parties worked through the various problems with patience, and again, pragmatism, allowing us to reach the result that we did.

This package obviously is not going to solve climate change by itself, but it is a very good step and a step that's very much consistent with U.S. interests and will help move . . . the world down a path toward a broader global response . . . to stopping climate change.

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In the question-and-answer session following Mr. Stern's introductory remarks, a reporter asked, "Can you explain to a layperson why they shouldn't conclude that Cancun basically punted the hardest issue, which is to say mandatory emissions caps, until next year when there's nothing particularly to suggest that there will be any more success on that issue next year?" Excerpts follow from Mr. Stern's response.

That's actually not what happened. The issue that was rolled over to next year is what happens in the Kyoto Protocol track. One of the . . . complicated things, particularly for lay people in this negotiation, is that there are simultaneously two negotiating tracks

going forward. One is the Kyoto Protocol track, which doesn't involve the United States, because we're not part of it. And the issue there is will there be a second so-called commitment period of Kyoto, the first being 2008-12. . . .

[W]e don't take a side on this. We are comfortable with however the Kyoto issue gets resolved. . . . Kyoto is not the larger agreement . . . that includes emission commitments from the U.S., China, India, Brazil . . . .

On that track, at the moment, while there may be . . . some kind of legal treaty down the road, that's not happening, I think, anytime soon for the reason that we're not prepared to enter into legally binding commitments to reduce our emissions unless China, India, and so forth, are also prepared to do that. And at the moment, they're not . . . .

2. Ozone Depletion

On April 29, 2010, the United States, Canada, and Mexico submitted a joint proposal to amend the Montreal Protocol on Substances that Deplete the Ozone Layer ("Montreal Protocol") to reduce the use of hydrofluorocarbons ("HFCs"). The proposal, which the three countries submitted to the UN Environment Program's Ozone Secretariat for consideration at the Thirtieth Meeting of the Open-Ended Working Group of the Parties to the Montreal Protocol, June 15–18, 2010, was a revised version of a proposal the three countries had presented in 2009. *See Digest 2009* at 493–95. The Working Group considered the proposal, and the three countries then presented it at the Twenty-second Meeting of the Parties to the Montreal Protocol, November 8–12, 2010. Although the parties did not adopt the proposal, more States expressed support for it than had supported the three States' 2009 proposal, and 90 Parties joined a declaration stating that action to reduce HFC emissions should be taken in the Montreal Protocol.

On April 30, 2010, the Department of State issued a media note describing the new proposal, as excerpted below.

The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2010/04/141074.htm*. The full text of the U.S.–Canadian–Mexican proposal (UNEP/OzL.Pro.22/5) is available at *http://ozone.unep.org/Meeting_Documents/mop/22mop/conf-presession-en.shtml*.

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At the United Nations Framework Convention on Climate Change meeting in Copenhagen this past December, President Obama called on leaders to build on momentum created by the Convention to ensure sustained actions on emissions and emphasized that success depends on engagement based on mutual interest and respect. This proposal reflects this commitment. If adopted, it would bolster multilateral efforts to reduce global emissions 50% by 2050. Together with our partners Canada and Mexico, the United States believes that global action on HFCs is needed and that the Montreal Protocol provides an established, effective and efficient instrument for tackling this problem.

This North American amendment proposal calls on all countries to take action to reduce their consumption and production of HFCs, with developed countries taking the lead in this effort, as they have consistently under the Montreal Protocol. The proposal, backed by an accompanying decision, also takes action on HFC-23, a byproduct from the production of HCFC-22 and a powerful greenhouse gas with a global warming potential more than 14,000 times that of CO2.

The problem of HFCs is closely linked with the phaseout of ozone-depleting compounds, including the phaseout of hydrochlorofluorocarbons (HCFCs). As the demand for air conditioning and refrigeration increases globally, and as countries accelerate their efforts to phase out HCFCs, producers of such products will turn increasingly to HFCs unless suitable alternatives can be identified. Phasing down consumption and production of HFCs will encourage the development of innovative alternatives that do not harm the ozone layer or the climate system.

The Montreal Protocol Multilateral Fund agreed earlier this month on guidance to implement the accelerated phaseout of HCFCs. This is a welcome development—one that should smooth the transition to replacements that pose no problem for the ozone layer and that will incentivize the adoption of alternatives with reduced impact on the climate system.

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3. Transboundary Harm and Allocation of Loss

On August 18, 2010, the United States submitted written comments to the UN Secretariat concerning the International Law Commission's ("ILC" or "Commission") draft articles on prevention of transboundary harm from hazardous activities. The ILC completed the draft articles at its fifty-third session in 2001, and the General Assembly annexed them to Resolution 62/68, which it adopted on December 6, 2007. U.N. Doc. A/RES/62/68. The United States' written comments also addressed the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, which the Commission completed at its fifty-eighth session in 2006. The General Assembly annexed the draft principles to Resolution 61/36, which it adopted on December 4, 2006. U.N. Doc. A/RES/61/36.

On October 21, 2010, Darin Johnson, Attorney Adviser, Office of the Legal Adviser, Department of State, addressed the General Assembly's Sixth (Legal) Committee during its debate on Agenda Item 81: Consideration of Prevention of Transboundary Harm from Hazardous Activities. Mr. Johnson's statement to the Sixth Committee, available at *http://usun.state.gov/briefing/statements/2010/150406.htm*, reiterated the views provided in the United States' written comments. Those written comments, excerpted below, are available in full at *www.state.gov/s/l/c8183.htm*.

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As we have previously stated, the Commission's draft articles on prevention have marked a positive step toward encouraging states to establish means to address such issues as notification in specific national and international contexts. The principles on allocation of loss are also a positive step toward encouraging states to establish mechanisms to provide prompt and adequate compensation for victims of transboundary harm. The principles incorporate progressive ideas such as the responsibility of operators, the desirability of backup financial security measures, the importance of prompt response measures, and broad concepts of compensable harm. They also stress the importance of national, bilateral, regional and sectoral arrangements to carry out these ideas. The Commission urged States to take national and international action to implement the principles, and we similarly urge national action and State-to-State agreements in specific contexts, as that is what the principles were designed to encourage.

The General Assembly has commended both the draft articles on prevention and the principles on allocation of loss to the attention of Governments and invited comments on their form. We strongly support retaining these products in their current form. As we have previously noted, both the draft articles and draft principles go beyond the present state of international law and practice, and are clearly innovative and aspirational in character rather than descriptive of current law or State practice. Both documents were designed as resources to encourage national and international action in specific contexts, rather than to form the basis of a global treaty.

Accordingly, we continue to believe it is most appropriate for the principles to take the form of non-binding standards of conduct and practice, and for the work on prevention to remain formulated as draft articles. Retaining the current, recommendatory form of these draft articles and principles increases the likelihood that they will gain widespread acceptance and fulfill their intended purpose.

B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION

1. Air Pollution from Ships: Designation of Emission Control Area Under MARPOL Annex VI

At the sixtieth session of the International Maritime Organization's Marine Environment Protection Committee ("MEPC"), March 22–26, 2010, States Parties to MARPOL Annex VI (Regulations for the Prevention of Air Pollution from Ships) adopted amendments to Annex VI to designate an emissions control area ("ECA") in specific areas off the coasts of the United States, Canada, and French overseas territories. The amendments will enter into force on August 1, 2011. MARPOL Annex VI, as amended in October 10, 2008, establishes control levels to reduce emissions from ships, including emissions of nitrogen oxides and sulfur oxides, and it imposes emissions standards of heightened stringency on ships operating in areas designated through subsequent amendments to Annex VI as ECAs.

The States Parties, working through IMO committee procedures, acted on a U.S.–Canadian proposal, submitted on March 27, 2009, which France cosponsored in July 2009 with respect to Saint-Pierre and Miquelon, its territories in the North Atlantic Ocean. An EPA fact sheet explained:

> Ships are significant contributors to the U.S. and Canadian mobile-source emission inventories, though most are flagged or registered elsewhere. Ships complying with ECA standards will reduce their emissions of nitrogen oxides (NOx), sulfur oxides (SOx), and fine particulate matter (PM2.5).
>
> In 2020, emissions from these ships operating in the ECA are expected to be reduced annually by 320,000 tons for NOx, 90,000 tons for PM2.5, and 920,000 tons for SOx, which is 23 percent, 74 percent, and 86 percent, respectively, below predicted levels in 2020 absent the ECA. The overall cost of the North American ECA is

> estimated at $3.2 billion in 2020, while its benefits are expected to include preventing as many as 14,000 premature deaths and relieving respiratory symptoms for nearly five million people each year in the U.S. and Canada. The monetized health-related benefits are estimated to be as much as $110 billion in the U.S. in 2010.
>
> The area of the North American ECA includes waters adjacent to the Pacific coast, the Atlantic/Gulf coast and the eight main Hawaiian Islands. [fn. omitted] It extends up to 200 nautical miles from coasts of the United States, Canada and the French territories, except that it does not extend into marine areas subject to the sovereignty, sovereign rights, or jurisdiction of other States.

For the full text of the EPA's fact sheet, see *www.epa.gov/otaq/regs/nonroad/marine/ci/420f10015.htm*.

Excerpts below from the initial U.S.–Canadian submission to the IMO summarize the proposal and provide the criteria for designation of an ECA under MARPOL Annex VI. The full text of the U.S.–Canadian proposal (IMO Doc. MEPC 59/6/5) is available at *www.epa.gov/otaq/oceanvessels.htm#regs*.

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1.2 Criteria for Designation of an Emission Control Area

Pursuant to Annex VI, an ECA may be considered for adoption by the Organization if supported by a demonstrated need to prevent, reduce, and control air pollution from ships. Section 3 of Appendix III to Annex VI sets out the following eight criteria for designation of an ECA:

3.1.1 a clear delineation of the proposed area of application, along with a reference chart on which the area is marked;

3.1.2 the type or types of emission(s) that is or are being proposed for control (i.e. NOx or SOx and particulate matter or all three types of emissions);

3.1.3 a description of the human populations and environmental areas at risk from the impacts of ship emissions;

3.1.4 an assessment that emissions from ships operating in the proposed area of application are contributing to ambient concentrations of air pollution or to adverse environmental impacts. Such assessment shall include a description of the impacts of the relevant emissions on human health and the environment, such as adverse impacts to terrestrial and aquatic ecosystems, areas of natural productivity, critical habitats, water quality, human health, and areas of cultural and scientific significance, if applicable. The sources of relevant data including methodologies used shall be identified;

3.1.5 relevant information pertaining to the meteorological conditions in the proposed area of application to the human populations and environmental areas at risk, in particular prevailing wind patterns, or to topographical, geological, oceanographic, morphological, or other conditions that contribute to ambient concentrations of air pollution or adverse environmental impacts;

3.1.6 the nature of the ship traffic in the proposed Emission Control Area, including the patterns and density of such traffic;

3.1.7 a description of the control measures taken by the proposing Party or Parties addressing land-based sources of NOx, SOx and particulate matter emissions affecting the human populations and environmental areas at risk that are in place and operating concurrent with the consideration of measures to be adopted in relation to provisions of regulations 13 and 14 of Annex VI; and

3.1.8 the relative costs of reducing emissions from ships when compared with land-based controls, and the economic impacts on shipping engaged in international trade.

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On April 10, 2010, the EPA published a final rule to complement the IMO's designation of the North American ECA.

Among other things, the new rule imposed on large U.S.-flagged ships engine and fuel standards equivalent to those that MARPOL Annex VI establishes for vessels traveling in ECAs. 75 Fed. Reg. 22,896 (Apr. 30, 2010).

2. Fish and Marine Mammals

a. General Assembly resolution

In a statement to the General Assembly on December 7, 2010, Gregory Nickels, Public Delegate, U.S. Mission to the United Nations, introduced the annual resolution on sustainable fisheries on behalf of the resolution's cosponsors. The General Assembly adopted the resolution without a vote. U.N. Doc. A/RES/65/38.

In his statement, as excerpted below, Mr. Nickels explained the significance of the resolution, which addressed the problem of illegal, unregulated and unreported fishing, among other issues. The statement also discussed the annual General Assembly resolution on oceans and the law of the sea, which the United States cosponsored and the General Assembly adopted on December 7, 2010. U.N. Doc. A/RES/65/37A. For discussion of issues relating to oceans and the law of the sea, see Chapter 12.A. The full text of the U.S. statement is available at *http://usun.state.gov/briefing/statements/2010/152512.htm*.

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This year's resolution on sustainable fisheries once again contains important provisions to address critical issues such as combating illegal, unregulated and unreported (IUU) fishing through strengthened control by States operating open registries over all fishing vessels flying their flag; reducing global fishing capacity for tunas; addressing the impacts of climate change on the sustainability of fish stocks; strengthening conservation and management of sharks and the collection of data on species caught as bycatch; and implementation of

the recommendations from Resumed Review Conference for the 1995 UN Fish Stocks Agreement, among other important matters. The United States is also pleased that the resolution contains a renewed emphasis on implementing and enforcing the moratorium on large scale high-seas drift nets and the critical need for science-based conservation and management measures, including protecting and conserving fish stocks during critical life stages.

Mr. President, much work remains if we are to ensure the sustainability of global fish stocks. RFMOs [Regional Fisheries Management Organizations] continue to be the best available mechanism for regulating international fisheries. Nonetheless, there is much room for improvement within these organizations to advance our common goals. To this end, a number of RFMOS which conducted systematic reviews of their performance are beginning to assess and implement the recommendations from those reviews. These efforts by RFMOs to improve implementation of their mandates must be recognized and commended. Such reform must also address how States implement and enforce the rules that they adopt as members of such organizations and how effective States are at carrying out their responsibilities as flag States.

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b. Illegal, unreported, and unregulated fishing

On September 27, 2010, the Commerce Department's National Oceanic and Atmospheric Administration ("NOAA") issued a final rule to implement measures applicable to vessels that have engaged in illegal, unreported, and unregulated ("IUU") fishing. 75 Fed. Reg. 59,136 (Sept. 27, 2010). The rule implemented measures that several regional fishery management organizations ("RFMOs") had adopted previously, and as a member of these RFMOs, the United States is obligated to implement those measures. The preamble to the rule provided information on the rule and its legal basis, as excerpted below.

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On January 11, 2010, NMFS published a proposed rule in the *Federal Register* (75 FR 1324) to address vessels that are on the IUU vessel lists maintained by RFMOs to which the United States is a party. As mentioned in the proposed rule, the effective management of certain marine resources is dependent on compliance with conservation and management measures of RFMOs. The vessels that are included on the IUU vessels lists were identified by RFMOs as having engaged in activities that undermine the effectiveness of conservation and management measures. Examples of such IUU fishing activity include:

- Fishing in an RFMO's management (or convention) area without authorization;
- Failing to record or declare their catches, or making false reports;
- Using prohibited fishing gear in contravention of conservation measures;
- Transshipping with, or participating in joint operations with, re-supplying, or re-fueling vessels included in IUU vessel lists.

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NMFS is issuing these regulations pursuant to its authority to administer and enforce the statutes that implement the conventions of the following RFMOs: ICCAT, CCAMLR, NAFO, WCPFC, IATTC, and the AIDCP (the AIDCP is not an RFMO per se, but is referred to as such for the purposes of this action). Statutes that authorize rulemaking to implement RFMO conservation and management measures include the Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971 *et seq*., the Antarctic Marine Living Resources Convention Act of 1984, 16 U.S.C. 2431 *et seq*., the Northwest Atlantic Fisheries Convention Act of 1995, 16 U.S.C. 5601 *et seq*., the Western and Central Pacific Fisheries Convention Implementation Act, 16 U.S.C. 6901 *et seq*., the Tuna Conventions Act of 1950, 16 U.S.C. 951 *et seq*., and the Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq*. These statutes authorize the promulgation of regulations as necessary to carry out the purposes and management measures of each RFMO convention.

These regulations detail the authorities of the Assistant Administrator to take actions, in accordance with the requirements of the appropriate RFMO conservation measure, against foreign vessels that are included on the final IUU vessel lists of the above RFMOs. The regulations provide the Assistant Administrator some discretion, albeit in accordance with the relevant RFMO measures, in determining the appropriate action to take with respect to a listed IUU vessel seeking entry into, or use of, a U.S. port.

These regulations also specify the prohibitions applicable to listed IUU vessels, as well as those persons or entities subject to the jurisdiction of the United States who may consider business relationships with listed vessels. . . .

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On October 13, 2010, NOAA issued a press release providing additional information on the new rule and its objectives. The press release, excerpted below, is available in full at *www.noaanews.noaa.gov/stories2010/20101013_fishing.html.*

A new federal rule will allow NOAA's assistant administrator for fisheries to deny a vessel entry into a U.S. port or access to port services if that vessel has been listed for engaging in illegal, unreported and unregulated (IUU) fishing by one of the world's international fishery management organizations. . . .

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Foreign vessels are required to provide a notice to the U.S. Coast Guard prior to arriving in the U.S. If the vessel is on one of the IUU vessel lists, NOAA Fisheries will be notified and a consultation with federal agencies will ensue. NOAA's assistant administrator for fisheries will determine whether to deny entry to the vessel or if other restrictions will be placed on the vessel consistent with our international obligations.

The new rule will also prohibit persons and businesses from providing certain services to, and engaging in commercial transactions with, listed IUU vessels. Those services would include at-sea transporting of fish harvested by a listed IUU vessel, processing

fish harvested by a listed IUU vessel or processing fish using a listed IUU vessel; joint fishing operations; providing supplies, fuel, crew, or otherwise supporting a listed IUU vessel; and entering into a chartering arrangement with a listed IUU vessel.

Current U.S. law has largely discouraged IUU fishing vessels from arriving in U.S. ports. However, there have been a few instances when transport vessels identified on IUU lists have reached U.S. ports. This rule clarifies actions that the U.S. can take to deny these vessels entry into, or access to, the United States.

The new rule is part of international efforts to address IUU vessels, which often flout other rules as well, including labor rights, habitat protection, safety-at-sea and food safety requirements.

In recent years, several organizations, such as the International Commission for Conservation of Atlantic Tunas and the Western and Central Pacific Fisheries commissions, have adopted binding measures that establish both procedures for identifying vessels that engaged in IUU fishing activities and actions to be taken against such vessels. Such measures can act as a strong deterrent to IUU fishing by reducing the profitability of such activities. Nations that are members of these organizations are required to take actions against the listed IUU vessels, such as today's action which essentially closes markets to the vessels.

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c. Conservation and management of migratory sharks

On February 12, 2010, the United States and nine other governments signed a Memorandum of Understanding ("MOU") to promote the conservation and management of migratory sharks. On February 19, 2010, the Department of State issued a media note, excerpted below, which described the MOU and its significance. The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2010/02/136957.htm*.

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The MOU was negotiated under the auspices of the Convention on Migratory Species to foster scientific research on, and to enhance the conservation and management of, seven initial species of migratory sharks: the Basking, Great White, Longfin and Shortfin Mako, Porbeagle, northern hemisphere Spiny Dogfish and Whale sharks. Signatories to the MOU may subsequently include other shark species in need of conservation.

Under the Chairmanship of the Philippines and with the support of the Secretariat of the Convention on Migratory Species, the negotiations successfully navigated several technically complex and challenging issues in order to reach agreement. These included the number of species to be covered, the legal nature of the MOU, and the relationship between the MOU and the overarching Conservation of Migratory Sharks.

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Migratory sharks are threatened primarily through unsustainable or unregulated fishing, as well as loss of habitat and other changing ocean conditions. Given their migratory patterns, the sharks require international cooperation in order for any conservation and management measures to be effective.

3. *Sea Turtle Conservation and Shrimp Imports*

The Department of State makes annual certifications related to conservation of sea turtles, consistent with § 609 of Public Law 101-162, 16 U.S.C. § 1537, which prohibits imports of shrimp and shrimp products harvested with methods that may adversely affect sea turtles. In March 2010, the Department of State withdrew its May 1, 2009 certification of Mexico, and on April 30, 2010, the Department of State made its annual certifications related to conservation of sea turtles. As excerpted below, the Federal Register notice announcing the State Department's April 30 certifications explained the Department's earlier action concerning Mexico, its subsequent

determinations concerning other States, and the applicable legal framework. 75 Fed. Reg. 27,855 (May 18, 2010).

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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 April 30, 2010, the Department certified 13 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, Nicaragua, Nigeria, Pakistan, Panama and Suriname.

The Department also certified 25 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. Nine 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 nine nations and one economy are: The Bahamas, China, the Dominican Republic, Fiji, Hong Kong, Jamaica, Oman, Peru, Sri Lanka and Venezuela.

The Department of State withdrew Mexico's certification in March 2010 because Mexico's turtle protection program is not currently comparable to the U.S. program. An import prohibition went into effect on April 20, 2010. The United States Government and the Government of Mexico are working together to strengthen Mexico's Turtle Excluder Device (TED) program and to advance shared sea turtle conservation goals. Both governments are engaged to ensure renewal of Mexican certification within the shortest period of time consistent with the requirements of U.S. law.

The Department has certified Venezuela once again, albeit on a different basis than last year. In March 2008, the Government of Venezuela passed a law banning industrial shrimp trawling in its waters. The ban remains in effect. As a result, the Department has certified Venezuela as a nation whose fishing environment does not pose a threat of the incidental taking of sea turtles.

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On October 15, 2010, the State Department announced that it had certified Mexico under § 609 of Public Law 101-162, "based on a determination that Mexico's turtle excluder devices (TEDs) program is comparable in effectiveness to the U.S. program." Additional excerpts below from the State Department's announcement provide details on the action. The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2010/10/149535.htm*.

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The United States and Mexico have been working in close cooperation on sea turtle conservation as well as a range of bilateral fisheries and marine conservation issues of importance to the two Nations. The Government of Mexico implemented a plan of action in the past several months to strengthen sea turtle conservation in its shrimp trawl fisheries. This plan of action represents significant improvements in the use of turtle excluder devices by its fishing industry. The U.S. government's decision regarding Mexico's certification means that wild-harvested shrimp from Mexico's commercial trawl fisheries now may be imported into the United States.

. . . This law has proven to be an effective conservation method to protect endangered sea turtles species by encouraging foreign governments to regulate the use of well-designed and installed turtle excluder devices. Other countries are currently assessing TED technology and the United States assists those efforts through technology transfers and capacity building in the hope that more countries can contribute to sea turtle species recovery and be added to the certified list.

4. Biodiversity Beyond National Jurisdiction

The UN General Assembly's ad hoc open-ended informal working group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction met from February 1–5, 2010, in New York. Major topics of discussion included environmental impact assessments, marine protected areas, and marine genetic resources. The working group adopted recommendations that the General Assembly endorsed subsequently in its resolution on oceans and the law of the sea, which it adopted on December 7, 2010. U.N. Doc. A/RES/65/37A.

At the meeting, Dr. Elizabeth Kim, head of the U.S. delegation, stated that the United States supports the use of environmental impact assessments for planned activities that may cause significant and harmful changes to the marine environment in areas beyond national jurisdiction and that the United States supports making progress on establishing marine protected areas beyond national jurisdiction, including by applying existing criteria and/or developing additional criteria to identify and select specific areas in need of protection, and management measures by States and competent organizations within their mandate and jurisdiction to protect these areas. Dr. Kim also explained the U.S. position on marine genetic resources beyond national jurisdiction, as excerpted below.

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. . . The use and protection of marine genetic resources in areas beyond national jurisdiction fall under the high seas regime of the Law of the Sea Convention (part VII). Marine genetic resources are not covered by the provisions pertaining to the Seabed Authority or the Area (Part XI), except as part of the marine environment that must be protected in connection with "activities in the Area" (defined as activities of exploration for, and exploitation of, the resources of the Area; and in the context of the Area, "resources" are expressly defined to include only mineral resources). . . . [W]e do not believe that a new legal regime regarding benefit sharing for marine genetic resources in areas beyond national jurisdiction would lead to greater conservation and sustainable use of marine biodiversity. On the contrary, we are concerned that such a regime would impede research and developments from which humanity at large benefits. . . .

C. OTHER CONSERVATION ISSUES

1. Shared Natural Resources: Transboundary Aquifers

On June 30, 2010, the United States submitted written comments to the UN Secretariat on the International Law Commission's ("ILC" or "Commission") draft articles on transboundary aquifers. The ILC completed the draft articles at its sixtieth session in 2008, and the UN General Assembly took note of them in the resolution it adopted on the law of transboundary aquifers on December 11, 2008. U.N. Doc. A/RES/63/124. The U.S. comments reiterated the U.S. view that the articles are a useful tool that states might use in negotiating bilateral or regional arrangements but that, given the varying and context-specific nature of transboundary aquifer issues and the degree to which the draft articles go beyond customary law in some respects and lack clarity in others, incorporating the draft articles into a multilateral treaty would not be appropriate. The U.S. submission is set forth below and is also available at *www.state.gov/s/l/c8183.htm*.

The United States continues to believe that the Commission's work on transboundary aquifers has constituted an important advance in providing a possible framework for the reasonable use and protection of underground aquifers, which are playing an increasingly important role as water sources for human populations. For all States, and especially those struggling to cope with pressures on transboundary aquifers, the Commission's efforts to develop a set of flexible tools for using and protecting these aquifers has been a very useful contribution.

Nevertheless, there is still much to learn about transboundary aquifers in general, and specific aquifer conditions and state practices vary widely. The draft articles that the General Assembly took note of in resolution 63/124, moreover, go beyond current law and practice. For these reasons, [the] United States continues to believe that context-specific arrangements provide the best way to address pressures on transboundary groundwaters, as opposed to a global framework treaty. As decided in resolution 63/124, States concerned should take into account the provisions of these draft articles when negotiating appropriate bilateral or regional arrangements for the proper management of transboundary aquifers. Numerous factors might appropriately be taken into account in any specific negotiation, such as hydrological characteristics of the aquifer at issue; present uses and expectations regarding future uses; climate conditions and expectations; and economic, social and cultural considerations. Maintaining the articles in their present, draft form is suitable for these purposes.

If the draft articles were fashioned into a global treaty, we remain unconvinced that it would garner sufficient support. We recognize, however, that many States have expressed an interest in such a framework convention. If the draft articles were to take the form of a treaty, there are a number of important issues that we believe would need to be addressed. For example, appropriate final articles for a convention would need to be developed, as well as articles that establish the relationship between the proposed convention and other bilateral or regional arrangements. In particular, care would need to be taken not to supersede existing bilateral or regional arrangements or to limit the flexibility of States entering into such arrangements.

2. Shared Natural Resources: Transboundary Oil and Gas

On November 1, 2010, Todd Buchwald, Assistant Legal Adviser, U.S. Department of State, 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-second session. U.N. Doc. A/65/10, available at *http://untreaty.un.org/ilc/reports/2010/2010report.htm*. In commenting on the ILC's work concerning the issue of shared natural resources, Mr. Buchwald stated in part:

> We agree with the conclusion of the working paper and the recommendation from the Working Group [on Shared Natural Resources] to the Commission that the transboundary oil and gas aspects of the Shared Natural Resources topic should not be pursued further by the Commission. We appreciate the significant work that the Commission has undertaken on the Shared Natural Resources topic.

The full text of Mr. Buchwald's statement is available at *http://usun.state.gov/briefing/statements/2010/150375.htm*.

3. Forest Conservation

In 2010, the United States entered into debt-for-nature agreements to conserve tropical forests in Brazil and Costa Rica, bringing the number of such agreements the United States has concluded under the Tropical Forest Conservation Act to 17. Under the agreement with Brazil, signed August 12, the United States committed to provide Brazil with nearly $21 million in debt relief over five years. Brazil agreed to use the funds to make grants to conserve its tropical forests. A Department of State media note, issued on August 12, 2010, explained:

> . . . The Agreement with Brazil was made possible by the innovative Tropical Forest Conservation Act (TFCA) of 1998. Under the Agreement, grants will support activities

> to conserve protected areas, improve natural resource management, and develop sustainable livelihoods for communities that rely on forests.
>
> . . . Funds generated by the Agreement will help Brazil protect the Atlantic Rainforest (Mata Atlantica) as well as the Caatinga and the Cerrado ecosystems. . . .

The full text of the press statement is available at *www.state.gov/r/pa/prs/ps/2010/08/145943.htm*; *see Digest 2001* at 738–39 for background on the TCFA.

Under the agreement with Costa Rica, signed October 15, the United States agreed to provide Costa Rica with more than $19.6 million in debt relief. The Nature Conservancy, a U.S. nongovernmental organization, concluded a related agreement with Costa Rica on the same day, under which the Nature Conservancy agreed to donate more than $3.9 million to Costa Rica. On October 15, 2010, the Department of State issued a media note, excerpted below, describing the agreements. The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2010/10/149536.htm*.

The Governments of the United States of America and the Republic of Costa Rica, the Central Bank of Costa Rica, and The Nature Conservancy have concluded agreements that will provide more than $27 million over the next 15 years for tropical forest conservation in Costa Rica. The agreements were made possible by the Tropical Forest Conservation Act of 1998 (TFCA). Together with a previous TFCA program established in 2007, these agreements make Costa Rica, one of the most biologically-diverse countries on earth, the largest beneficiary under the TFCA, with more than $50 million generated for the conservation, restoration, and protection of tropical forests. [Editor's note: *See Digest 2007* at 732–34 for discussion of the 2007 agreements.]

The new TFCA program will support the efforts of the Costa Rican Government, working with the Forever Costa Rica project, a new public-private conservation initiative, to develop and sustainably finance a complete and integrated system of protected areas.

TFCA grants will benefit areas such as the Osa Peninsula, including the Terraba-Sierpe mangrove swamps, the Naranjo/Savegre River complex, which contains some of the highest levels of biodiversity in Costa Rica, as well as La Amistad International Park, home to one of Central America's largest and most diverse ecosystems.

The new agreements were made possible by the contribution of over $19.6 million by the U.S. Government under the TFCA, as well as a donation of more than $3.9 million from The Nature Conservancy. . . .

Cross References

World Trade Organization, **Chapter 11.C.**

Chapter 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

1. El Salvador

In 2010, the United States took steps to continue the protection of the cultural heritage of El Salvador by extending import restrictions on certain archaeological material from El Salvador for an additional five years. This action was based on determinations by the Department of State's Bureau of Educational and Cultural Affairs, finding that the cultural heritage of El Salvador "continue[d] to be in jeopardy from pillage of archaeological materials." 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 ("Convention"), to which the United States became a State Party 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 which has requested such protections and which has ratified, accepted, or acceded to the Convention. The President may also impose import restrictions on cultural property in an emergency situation pursuant to 19 U.S.C. §§ 2603 and 2604.

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Effective March 8, 2010, the United States and El Salvador extended and amended their existing Memorandum of Understanding ("MOU") concerning the imposition of import restrictions on certain categories of archaeological material from the pre-Hispanic cultures of El Salvador. A statement issued by the Department of State's Office of the Spokesman on March 8, 2010, explained that the extension of the MOU recognizes that "certain of El Salvador's heritage remains in jeopardy from pillage" and "enables the continued imposition of import restrictions on certain categories of archaeological material ranging in date from approximately 8000 B.C. to approximately 1550 A.D., including objects made of ceramic, metal, and stone." The full text of the State Department's media note is available at *www.state.gov/r/pa/prs/ps/2010/03/137946.htm*. The amendments replaced and updated the previous text of Article II of the MOU, which sets forth measures (in addition to the import restrictions) for each government to take relating to El Salvador's cultural patrimony. For example, one provision requires both governments to "endeavor to permit the exchange of pre-Columbian archaeological material under circumstances in which such exchange does not jeopardize the cultural patrimony of El Salvador, such as through temporary loans for exhibition purposes and study abroad, to benefit the people of both countries, including persons of Salvadoran heritage currently living in the United States of America." [MOU, Article II, para D.]

The original MOU that imposed the import restrictions was concluded in 1995. The 1995 MOU also extended emergency protections on pre-Hispanic artifacts from El Salvador's Cara Sucia region that the United States had imposed in 1987, in the first such action the United States took under the Convention on Cultural Property Implementation Act. The two countries previously renewed and amended the MOU in 2000 and 2005. *See* 60 Fed. Reg. 13,352 (Mar. 10, 1995); 65 Fed. Reg. 12,470 (Mar. 9, 2000); 70 Fed. Reg. 11,539 (Mar. 9, 2005). Under the newly amended MOU, the United States will continue the existing import restrictions until March 8, 2015. The text of the amended MOU and related documents

are available at *http://exchanges.state.gov/heritage/culprop/esfact.html*.

On March 8, 2010, the Department of Homeland Security, U.S. Customs and Border Protection ("CBP"), and the Department of the Treasury extended the import restrictions imposed previously with respect to certain categories of archaeological materials from the pre-Hispanic cultures of El Salvador. 75 Fed. Reg. 10,411 (Mar. 8, 2010).

2. Nicaragua

In 2010, the United States also acted to continue to protect Nicaragua's cultural heritage. Effective October 20, 2010, the United States and Nicaragua amended and extended for five years the Agreement Between the Government of the United States of America and the Government of the Republic of Nicaragua Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Hispanic Cultures of the Republic of Nicaragua ("Agreement"). The amendments replaced and updated Article II of the Agreement, which sets forth measures (in addition to the import restrictions) for each government to take relating to Nicaragua's cultural patrimony. The original agreement entered into force on October 20, 2000, and the two countries extended it for the first time on October 20, 2005. *See* 65 Fed. Reg. 64,140 (Oct. 26, 2000); 70 Fed. Reg. 61,031 (Oct. 20, 2005); *see also II Cumulative Digest 1991–1999* at 1800–1 and *Digest 2005* at 775–76. The text of the amended Agreement and related documents are available at *http://exchanges.state.gov/heritage/culprop/nifact.html*.

Also on October 20, 2010, the Department of Homeland Security, U.S. Customs and Border Protection ("CBP"), and the Department of the Treasury extended the import restrictions imposed previously with respect to certain archaeological material from the pre-Hispanic cultures of Nicaragua. 75 Fed. Reg. 64,654 (Oct. 30, 2010).

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 1991–1999* at 1793–94. In 2010, four agreements the Commission had concluded previously entered into force for the United States. An agreement with Moldova, signed on June 20, 2001, entered into force on July 19, 2010, and an agreement with Macedonia, signed on December 10, 2002, entered into force on July 12, 2010. An agreement with Poland, signed on May 11, 2004, entered into force on August 3, 2010, and an agreement with Bosnia and Herzegovina, signed on July 2, 2002, entered into force on September 30, 2010. The texts of three of the agreements are available at *www.state.gov/documents/organization/148510.pdf* (Poland), *www.state.gov/documents/organization/147390.pdf* (Moldova), and *www.state.gov/documents/organization/146423.pdf* (Macedonia).

Cross References

Underwater cultural heritage, **Chapter 12.A.7.**
Protection of cultural property in armed conflict, **Chapter 18.A.1.d.(1)**

Chapter 15

Private International Law

A. COMMERCIAL LAW

1. UNCITRAL

a. Review of work

On October 11, 2010, Gabriel Swiney, Attorney Adviser, U.S. Department of State, addressed the UN General Assembly's Sixth (Legal) Committee during its debate on the report of the UN Commission on International Trade Law ("UNCITRAL") on the work of its forty-third session. *See* U.N. Doc. A/65/17. In his statement, Mr. Swiney expressed the United States' continued strong support for UNCITRAL's work and welcomed in particular UNCITRAL's adoption of revisions to its 1976 Arbitration Rules, a supplement to the *UNCITRAL Legislative Guide on Secured Transactions* concerning security rights in intellectual property, and part III of the *UNCITRAL Legislative Guide on Insolvency Law* on the treatment of enterprise groups in insolvency. Mr. Swiney's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/149638.htm*.

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We are pleased to note the adoption of revisions to the 1976 UNCITRAL Arbitration Rules, which are in wide use internationally.

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The 2010 Arbitration Rules, which became effective on August 15, incorporate important updates reflecting current arbitration practice, and should promote even greater use of the UNCITRAL Rules.

We are also pleased to note the adoption of a supplement to the *UNCITRAL Legislative Guide on Secured Transactions* concerning security rights in intellectual property, a complex area of increasing importance in commercial transactions. That work involved effective coordination with the World Intellectual Property Organization (WIPO).

There was also important progress made in the area of cross-border insolvency, with the adoption of part III of the *UNCITRAL Legislative Guide on Insolvency Law* on the treatment of enterprise groups in insolvency. The global economic problems of the past couple of years have highlighted the importance of effective cross-border cooperation in this area.

The Plenary Session noted progress in Working Group I in revising the 1994 UNCITRAL Model Law on Procurement, and the United States hopes that those revisions and the accompanying Guide to Enactment can be finalized and adopted at the 44th Session next summer.

Madame Chairperson, we are pleased that agreement was reached at the Plenary Session on the issue of UNCITRAL rules of procedure and working methods, which have evolved over more than 30 years of practice. This will permit UNCITRAL to maintain its historic role as one of the UN's most effective bodies.

In terms of future work, the United States welcomes the establishment of a new working group to consider online dispute resolution (ODR), which has great potential to assist the growing number of consumers who make purchases via the Internet. The United States also strongly supports the work to be undertaken in other working groups: consideration of enhanced transparency in treaty-based investor-State arbitration, preparation of model regulations for registration of security rights in movable assets, and development of additional mechanisms to promote cooperation on cross-border insolvency.

We welcome the colloquium early next year on electronic commerce, which is expected to produce the outlines of future work

involving a combination of transferability of rights and single windows for the importation of goods. We also look forward to the colloquium early next year on microfinance.

Madame Chairperson, we would also like to note favorably the special attention given at the 43rd Session to the role of UNCITRAL in promoting the rule of law. We believe that UNCITRAL's work to harmonize commercial law can make an important contribution to broader UN rule of law efforts. [Editor's note: For discussion of other issues concerning U.S. support for the promotion of the rule of law, see Chapter 6.K.]

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b. UN General Assembly resolutions

On November 5, 2010, the United States joined consensus in the Sixth Committee in adopting four resolutions relating to UNCITRAL's work. The first resolution, concerning the revisions to the 1976 UNCITRAL Arbitration Rules that UNCITRAL adopted in 2010, included a provision recommending their use in settling international commercial disputes. U.N. Doc. A/RES/65/22. Similarly, the second resolution, concerning the *UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property*, included a recommendation for States to use it "to assess the economic efficiency of their intellectual property financing" and to consider it favorably "when revising or adopting their relevant legislation." U.N. Doc. A/RES/65/23. The third resolution, concerning part III of the *UNCITRAL Legislative Guide on Insolvency Law*, recommended that states use it "to assess the economic efficiency of their insolvency law regimes" and to consider it favorably "when revising or adopting legislation relevant to insolvency." U.N. Doc. A/RES/65/24. The final resolution was the Assembly's annual resolution on UNCITRAL's work. U.N. Doc. A/RES/65/25. U.S. comments welcoming UNCITRAL's adoption of the revised Arbitration Rules, *Supplement on Security Rights in Intellectual Property*, and part III of the *UNCITRAL Legislative Guide on Insolvency Law* are discussed in A.1.a. *supra*.

2. UNIDROIT: Commentary on Model Leasing Law

The Governing Council of the International Institute for the Unification of Private Law ("UNIDROIT") adopted and authorized publication of an Official Commentary on UNIDROIT's model leasing law during its eighty-ninth session in Rome, Italy, May 10–12, 2010. *See Digest 2008* at 745–47 for discussion of the model law. Representatives of the United States, Canada, and France, as members of the Drafting Committee of the Joint Session, drafted the commentary together with members of the UNIDROIT Secretariat and the Chairman of the UNIDROIT Committee of Governmental Experts. A link to the commentary (Study LIXA–Doc. 24) is available at *www.unidroit.org/english/studies/study59a/main.htm*.

B. FAMILY LAW

1. Convention on International Recovery of Child Support and Other Forms of Family Maintenance

a. Senate resolution of advice and consent

On September 29, 2010, the Senate provided its advice and consent to ratification of the Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance, adopted at The Hague on November 23, 2007. *See* S. Treaty Doc. 110-21; for additional background, see *Digest 2008* at 751–59 and *Digest 2009* at 536–40. The Senate's approval of the treaty was subject to two reservations, one understanding, and three declarations. All of those except two of the declarations were to be included in the U.S. instrument of ratification.

The executive branch had proposed the two reservations and one of the declarations. In its report on the treaty, the Senate Committee on Foreign Relations explained that the first reservation "ensures, pursuant to Articles 20 and 62 of the Convention, that the United States will not be obligated to

recognize and enforce maintenance obligation decisions when their jurisdictional bases would violate U.S. constitutional due process standards." S. Exec. Rept. No. 111-2, at 8. For additional discussion, see *Digest 2006* at 938–40 and *Digest 2008* at 754–56 or S. Treaty Doc. 110-21 at XV. The second reservation, which the executive branch also recommended and is in accordance with Articles 44 and 62 of the Convention, "objects to the use of the French language in communications between the Central Authority of any other Contracting State and the Central Authority of the United States of America." For additional discussion, see *Digest 2008* at 757 or S. Treaty Doc. 110-21 at XXI–XXII. The executive branch also recommended the first declaration, which provides, "in accordance with Articles 61 and 63 of the Convention, . . . for the United States of America the Convention shall extend only to the following: all 50 U.S. states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands." The Senate Committee on Foreign Relations explained that the declaration clarifies that the Convention would apply only to the U.S. jurisdictions that participate in the federal child support program, known as the "Title IV-D program." See S. Exec. Rept. No. 111-2, at 8. For additional discussion, see *Digest 2008* at 757–58 or S. Treaty Doc. 110-21 at VII (n.3) and XXV.

The understanding, which was added by an amendment introduced on the floor of the Senate, addressed a provision in the preamble of the treaty that refers to the Convention on the Rights of the Child. The preambular paragraph states:

> Recalling that, in accordance with Article 3 and 27 of the United Nations *Convention on the Rights of the Child* of 20 November 1989,
>
> —in all actions concerning the children the best interests of the child shall be a primary consideration,
>
> —every child has a right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development,
>
> —the parent(s) or others responsible for the child have the primary responsibility to secure, within their

> abilities and financial capacities, the conditions of living necessary for the child's development, and
>
> —States Parties should take all appropriate measures, including the conclusion of international agreements, to secure the recovery of maintenance for the child from the parent(s) or other responsible persons, in particular where such persons live in a State different from that of the child[.]

The understanding stated:

> The United States is not a party to the Convention on the Rights of the Child and understands that a mention of the Convention in the preamble of this Treaty does not create any obligations and does not affect or enhance the status of the Convention as a matter of the United States or international law.

The Senate did not request inclusion of the other two declarations in the U.S. instrument of ratification. One of these declarations reflected an understanding the executive branch and the Senate reached with respect to Article 55 of the Convention, which sets forth a process for amending the forms annexed to the Convention. The declaration stated in part, "In the event that the United States of America does not want a particular amendment to the forms adopted in accordance with Article 55 to enter into force for the United States of America on the first day of the seventh calendar month after the date of its communication by the depositary to all parties, the Executive Branch may by notification in writing to the depositary make a reservation, in accordance with Article 62 of the Convention, with respect to that amendment and without the approval of the Senate." The second declaration stated, "This Convention is not self-executing." In its executive report on the treaty, the Senate Committee on Foreign Relations explained the declaration, noting that "[i]n the past, the committee generally included such statements in the committee's report, but in light of the Supreme Court decision in *Medellín v. Texas*, 128 S. Ct. 1346 (2008), the

committee has determined that a clear statement in the Resolution is warranted." S. Exec. Rept. No. 111-2, at 8; for discussion of the Supreme Court's decision in *Medellín*, see *Digest 2008* at 175–93.

b. Executive branch statements

On October 1, 2010, Secretary of State Hillary Rodham Clinton issued a statement welcoming the Senate's action and underscoring the treaty's significance. Secretary Clinton's statement, excerpted below, is available in full at *www.state.gov/secretary/rm/2010/10/148555.htm*.

. . . The United States has been active in the Convention's development since negotiations began in 2003, and we were the first country to sign the Convention in 2007. This week, we have taken another step toward ratification, again reaffirming our commitment to protecting the welfare of children around the world.

Protecting our most vulnerable citizens, especially children, is one of the primary duties of any government. When a child and one parent are in one country while the other parent is in [a] different country, recovering child support can be difficult and often impossible. The United States has a comprehensive system in place to establish, recognize, and enforce domestic and international child support obligations. The Convention requires that all treaty partners develop similar systems to facilitate the recovery of funds between nations. This will help more children around the world receive the support they need more expeditiously than ever before.

The Department of State will continue to work closely with the Department of Health and Human Services as we continue toward ratification by the full Senate and the United States becoming a party to the Convention.

We look forward to working with the Hague Conference and other countries to implement this important Convention worldwide.

2. Child Protection Convention

On October 22, 2010, the United States signed the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Also on October 22, 2010, Secretary Clinton issued a statement underscoring U.S. support for the treaty, as excerpted below. The full text of Secretary Clinton's statement is available at *www.state.gov/secretary/rm/2010/10/149860.htm*.

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* * * *

This agreement ensures international recognition and enforcement of custody and visitation orders, complements and reinforces the Hague Convention on the Civil Aspects of International Child Abduction, and contains provisions addressing cooperation on key issues such as runaway children and the cross-border placement of children in foster families or institutional care.

Signing this Convention reaffirms the deep commitment of the United States to protecting the rights and welfare of children around the world. Our country is also a party to the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. The U.S. Senate also recently approved the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. [Editor's note: *See* B.1.b. *supra*.]

Going forward, the State Department will work closely with Congress, other Federal agencies, and state and local officials to address implementation of the Convention in the United States. And we look forward to working with the Hague Conference on Private International Law and other countries to implement it around the world.

C. INTERNATIONAL CIVIL LITIGATION

1. Convention on Contracts for the International Sale of Goods

On July 21, 2010, the U.S. Court of Appeals for the Third Circuit issued an opinion in a contract dispute that raised a novel question concerning the interpretation of the United Nations Convention on Contracts for the International Sale of Goods ("Convention" or "CISG"). *Forestal Guarani S.A. v. Daros Int'l, Inc.*, 613 F.3d 395 (3d Cir. 2010). In this case, an Argentina-based company that makes lumber products sued an import-export company based in New Jersey for breach of contract, alleging that the defendant failed to provide full payment for wooden finger joints the Argentine company shipped to the defendant to sell in the United States under an oral agreement between the parties. *Forestal Guarani S.A. v. Daros Int'l, Inc.*, 613 F.3d at 396. Both parties agreed that the Convention covered their dispute, *id.* at 397, but differed on how to interpret a provision in the Convention that, as the appeals court explained, "allow[s] a contract to be proved even if it is not in writing but also authorizes a . . . state [party] to make a declaration opting out of that and related provisions." *Id.* at 396. Argentina, but not the United States, has made such a declaration. The district court granted the defendant's motion for summary judgment on the grounds that the Convention barred the suit because the parties had no written contract. *Id.* at 397. The appeals court held that, "where, as here, one party's country of incorporation has made a declaration while the other's has not, a court must first decide, based on the forum state's choice-of-law rules, which forum's law applies, and then apply the law of the forum designated by the choice-of-law analysis." *Id.* at 396. The court determined that the record was insufficient for it to determine whether New Jersey or Argentine law applied and declined to determine whether the laws of either jurisdiction would permit the plaintiff's claim. Accordingly, the court vacated the lower

court's grant of summary judgment and remanded for further proceedings. *Id.*

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* * * *

The CISG "applies to contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States[.]" 15 U.S.C. App., Art. 1(1)(a); *see Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 444 n.7 (3d Cir. 2003). . . . To resolve the parties' dispute, we turn to the text of the CISG itself, . . . giving effect to its plain language "absent extraordinarily strong contrary evidence," *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).[5]

"The CISG strives to promote certainty among contracting parties and simplicity in judicial understanding by (1) reducing forum shopping, (2) reducing the need to resort to rules of private international law, and (3) establishing a law of sales appropriate for international transactions." A. E. Butler, *A Practical Guide to the CISG: Negotiations through Litigation* § 1.08, at 1–15 (2007 Supp.) (footnote omitted). These goals are explicitly enshrined in the CISG. Article 7 directs a court, in interpreting the CISG, to be mindful of "its international character and . . . the need to promote uniformity in its application and the observance of good faith in international trade." 15 U.S.C. App., Art. 7(1). In furtherance of these principles, as relevant here, the CISG dispenses with certain formalities associated with proving the existence of a contract. Specifically, Article 11 instructs that "[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." *Id.*, Art. 11. Similarly, Article 29 permits a

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[5] The CISG vests private parties with a private right of action. *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 336 (5th Cir. 2003) (citing *Delchi Carrier*, 71 F.3d at 1027–28). As a treaty to which the United States is a signatory, the CISG, as opposed to state law, ordinarily controls. *See* 28 U.S.C. § 1652; *see also* David Frisch, *Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit*, 74 Tul. L. Rev. 495, 503–04 (1999). As we shall see, however, that default rule gives way under certain circumstances.

contract modification to be proved even if it is not in writing. *Id.*, Art. 29. And Part II of the CISG, titled "Formation of the Contract," outlines requirements governing offer and acceptance but does not impose a writing requirement.

Article 11's elimination of formal writing requirements does not apply in all instances in which the CISG governs. Article 96 of the CISG carves out an exception to Article 11, Article 29 and Part II. It says that

> [a] Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

Id., Art. 96.

Article 12, to which Article 96 refers, states that

> [a]ny provision of article 11, article 29 or Part II of this Convention that allows a contract of sale . . . to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

Id., Art. 12.

The United States has not made an Article 96 declaration, so Article 11 governs contract formation in cases involving a United States-based litigant and a litigant based in another nondeclaring signatory state. Argentina, however, has made a declaration under Article 96, thereby opting out of Article 11, Article 29 and Part II.

Our research has turned up almost no case law from courts in the United States informing how to address a case, such as this

one, in which one state has made an Article 96 declaration and the other has not. Courts in foreign jurisdictions and commentators alike are divided over how to proceed in such a scenario. *See* UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods 46, 48 (2008) (outlining the conflict). According to one school of thought, a court must at the outset conduct a choice-of-law analysis based on private international law principles to determine which state's law governs contract formation, and then apply that law to a party's claim. *See*, *e.g.*, Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the CISG*, 20 J.L. & Com. 155, 167 (2001) (citing various commentators and a decision by a Hungarian court). Our study of the available sources on the subject establishes this position as the clear majority view. In contrast, under what appears to be the minority view, a court should simply require the existence of a writing without reference to either state's law, though it is unclear what form such a writing would have to take to be considered sufficient. . . .

Although none of the supporters of what we perceive as the majority view have explained their reasoning in any detail, we conclude that the majority has it right. Our conclusion is compelled by the CISG's plain language. *Cf. Maximov v. United States*, 373 U.S. 49, 54 (1963) (interpreting a treaty according to its plain language); *Rocca v. Thompson*, 223 U.S. 317, 331–32 (1912) (similar). The CISG says that "[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law [i.e. choice of law]." 15 U.S.C. App., Art. 7(2). Because Argentina has opted out of Articles 11 and 29 as well as Part II of the CISG, the CISG does not "expressly settle" the question whether a breach-of-contract claim is sustainable in the absence of a written contract. So Article 7(2) tells us to consider the CISG's "general principles" to fill in the gap. We have already outlined some of the general principles undergirding the CISG, but we fail to see how they inform the question whether Forestal's contract claim may proceed. Indeed, given the inapplicability in this case of

any of the CISG's provisions relaxing or eliminating writing requirements, we do not believe that we can answer the question presented here based on a pure application of those principles alone. Given that neither the CISG nor its founding principles explicitly or implicitly settle our inquiry, Article 7(2)'s reference to "the rules of private international law" is triggered. In other words, we have to consider the choice-of-law rules of the forum state, in this case New Jersey, to determine whether New Jersey or Argentine . . . requirements govern Forestal's claim. *See*, *e.g.*, *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 231 (1996).

In making a choice-of-law determination in a breach-of-contract case, New Jersey courts ask which forum has the most significant relationship with the parties and the contract. *See State Farm Mut. Auto. Ins. Co. v. Estate of Simmons*, 417 A.2d 488, 491–92 (N.J. 1980); *Keil v. Nat'l Westminster Bank*, 710 A.2d 563, 569–70 (N.J. Super. Ct. App. Div. 1998). To that end, the New Jersey Supreme Court has adopted the principles set forth in § 188 and § 6 of the Restatement (Second) of Conflicts of Laws. *See Gilbert Spruance Co. v. Pa. Mfrs. Ass'n Ins. Co.*, 629 A.2d 885, 888 (N.J. 1993). Section 188 directs courts to consider, among other things:

> (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporaion and place of business of the parties.

Restatement (Second) of Conflicts of Laws § 188(2) (1971).

Section 6 lists the following nonexclusive factors relevant to a choice-of-law analysis:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Id. § 6(2).

We ordinarily decline to consider issues not decided by a district court, choosing instead to allow that court to consider them in the first instance. *See*, *e.g.*, *In re Montgomery Ward & Co.*, 428 F.3d 154, 166 (3d Cir. 2005); *Montrose Med. Group Participating Sav. Plan v. Bulger*, 243 F.3d 773, 778 (3d Cir. 2001). This case bolsters the rationale behind our reluctance to wade into matters that the parties have not joined and that a district court has not addressed, as the record here sheds practically no light on many, if not most, of the choice-of-law considerations listed above.

* * * *

2. Enforceability of Arbitration Clauses

On August 26, 2010, at the invitation of the Court, the United States filed an *amicus curiae* brief in the U.S. Supreme Court opposing a petition for writ of certiorari by a Louisiana insurer who sought to prevent compulsory arbitration of a contractual dispute among the petitioner and the respondents, Certain Underwriters at Lloyd's, London ("Underwriters") and Safety National Casualty Corporation. *Louisiana Safety Ass'n of Timberman-Self Insurers Fund v. Certain Underwriters at Lloyd's London*, No. 09-945. The question before the Court was "[w]hether Article II of the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention' or 'Convention')], as implemented by 9 U.S.C. §§ 201–208, is an 'Act of Congress' subject to the anti-preemption provision of the McCarran-Ferguson Act." Gov't Brief, *Louisiana Safety Ass'n of Timberman-Self Insurers Fund v. Certain Underwriters at Lloyd's London*, No. 09-945, at I. 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, or which imposes a fee or tax upon such business,

unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

The U.S. brief explained the facts and history of the litigation as follows (citations to the petition omitted):

> 2. a. Petitioner is a self-insurance fund that provides workers' compensation coverage for its members. Petitioner entered into reinsurance agreements with respondent Certain Underwriters at Lloyd's, London (Underwriters), under which Underwriters provides coverage for workers' compensation claims that exceed petitioner's self-insurance retention. Those agreements contain a mandatory arbitration clause.
>
> Petitioner allegedly assigned its rights under the reinsurance agreements to Safety National Casualty Corporation (Safety National), which is also a respondent in this Court. Underwriters refused to recognize the assignment.
>
> b. Safety National sued Underwriters in federal district court, seeking reimbursement for excess workers' compensation claims. The district court initially granted Underwriters' motion to compel arbitration, but the court subsequently quashed arbitration on petitioner's motion after petitioner intervened in the suit. The court held that agreements to arbitrate insurance disputes are unenforceable under Louisiana law. The court further held that, under the McCarran-Ferguson Act, the Louisiana unenforceability rule was not preempted by the applicable federal law (*i.e.*, the Convention as implemented by Chapter 2 of the FAA).
>
> c. On interlocutory appeal, a panel of the court of appeals reversed, holding that the McCarran-Ferguson Act does not bar application of the Convention as implemented to enforce the arbitration provisions of the insurance policies. The panel declined to decide whether the Convention is self-executing. The panel instead reasoned that the Convention had been implemented by Congress and that Congress did not intend for implemented treaties to be included "within the scope of an 'Act of Congress' when it used those words in the McCarran-Ferguson Act."

> d. On rehearing en banc, the court of appeals (by a 15-3 vote) again held that the McCarren-Ferguson Act did not bar application of the Convention as implemented, and it therefore vacated the district court's order denying the motion to compel arbitration.

Gov't Brief, *Louisiana Safety Ass'n of Timberman-Self Insurers Fund v. Certain Underwriters at Lloyd's London*, No. 09-945, at 4–5.

The United States argued that the Supreme Court should not grant review in this case because "[t]he court of appeals reached the correct result." *Id.* at 7. The government stated:

> . . . The court of appeals did not decide the threshold question whether Article II of the Convention is self-executing. The better view of the matter, however, is that Article II *is* self-executing, and all parties agree that the McCarran-Ferguson Act does not apply to self-executing treaties.
>
> Even if Article II were not self-executing, the McCarran-Ferguson Act would not bar its application. The Convention's implementing legislation does not impose substantive rules of decision, but rather directs United States courts to enforce the Convention itself. As implemented by Chapter 2 of the FAA, moreover, the Convention establishes an exclusive scheme specifying the circumstances under which domestic courts must enforce arbitration provisions in international commercial agreements. Neither the Convention nor the implementing legislation excepts insurance contracts from its coverage, and the federal regime would be disrupted if a state law-arbitration ban were allowed to have that effect.

Id.

Excerpts follow from Sections A.1. and A.2. of the U.S. brief (most footnotes and citations to the petition omitted). The full text of the brief is available at *www.justice.gov/osg/briefs/2010/2pet/6invit/2009-0945.pet.ami.inv.pdf*. For prior developments in the litigation, see *Digest 2009* at 550–56 and

Digest 2008 at 777–82. The Supreme Court denied certiorari on October 4, 2010. *Louisiana Safety Ass'n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd's London*, 131 S. Ct. 65 (2010).

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A. The Judgment Of The Court Of Appeals Is Correct

1. The parties correctly agree that if Article II of the Convention is self-executing, the McCarran-Ferguson Act would not bar its application (because the Convention is not an "Act of Congress"), and Article II would preempt any contrary state law. In the government's view, Article II of the Convention is self-executing. That conclusion, endorsed by Judge Clement (the only judge below to decide the issue), provides an independent basis for the court of appeals' judgment.

In *Medellín v. Texas*, 128 S. Ct. 1346 (2008), this Court noted the longstanding distinction between a self-executing treaty, which upon entry into force "automatically constitute[s] binding federal law enforceable in United States courts," and a non-self-executing treaty, which does not. *Id.* at 1356. In determining whether a treaty provision is self-executing, the Court has focused on the intent of the U.S. treatymakers as evidenced by the treaty's text. *Id.* at 1357, 1364. The Court has also considered the negotiation and drafting history, as well as the post-ratification understanding of signatory nations (including the views of the Executive Branch). *Id.* at 1357, 1361.

The text of Article II of the Convention strongly supports the conclusion that Article II is self-executing. Article II(3) requires that the "*court* of a Contracting State, when seized of an action in a matter with 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." 21 U.S.T. 2519 (emphases added). In *Medellín*, the Court noted the relevance of language mandating compliance, specifically terms such as "shall" or "must," especially when those terms constitute "a directive to domestic courts." 128 S. Ct. at 1358. Those are precisely the elements present in Article II(3).

Both the mandatory nature of Article II(3)'s text, and its direction to the "court[s]" (rather than to the governments) of the contracting States, suggest that the provision was intended to be immediately enforceable in domestic courts.

Relatedly, neither Article II(3) nor Article II(1)—which provides that "[e]ach Contracting State *shall* recognize an agreement in writing under which the parties undertake to submit to arbitration," 21 U.S.T. 2519 (emphasis added)—appears to envisage that steps beyond ratification are necessary before the Convention creates binding obligations enforceable in domestic courts. The language in those provisions stands in stark contrast to that in the treaty provision at issue in *Medellín*—"each Member of the United Nations *undertakes to comply* with the decision of the International Court of Justice," Charter of the United Nations, June 26, 1945, Art. 94(1), 59 Stat. 1051 (emphasis added)—which the Court determined did "not contemplate * * * automatic enforceability." *Medellín*, 128 S. Ct. at 1358–1359; see, *e.g.*, *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (distinguishing between treaty language that "act[s] directly on" property rights and language reflecting a commitment to enact legislation to modify those rights).

In arguing that the Convention is not self-executing, petitioner relies principally on this Court's generic citation in *Medellín* to the legislation implementing the Convention as evidence that "Congress is up to the task of implementing non-self-executing treaties." The Court's passing reference to the implementing legislation cannot bear the weight that petitioner would give it. The dispute in *Medellín* concerned the enforceability in domestic courts of a judgment of the International Court of Justice, see 128 S. Ct. at 1353, and the citation on which petitioner relies immediately follows the Court's statement that "[t]he judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress," *id.* at 1366. That statement implicates only Article III of the Convention, which establishes the binding nature and enforceability of foreign arbitral awards. 21 U.S.T. 2519. Even as to Article III, the *Medellín* Court's statement was dictum, since no part of the Convention was actually at issue in that case. And unlike Article II(3), Article III is not framed as a directive to the "court[s]" of the contracting States. See *ibid.*

It is well established that some provisions of a treaty can be self-executing even if others are not. See 1 Restatement (Third) of Foreign Relations Law of the United States § 111, cmt. h (1987). The *Medellín* dictum therefore provides no meaningful guidance on the question whether Article II of the Convention is self-executing.

Petitioner also relies on the fact that, in submitting the Convention to the Senate for its consent, the President stated that legislative changes would be "required before the United States becomes a party to the Convention." Pet. 19 n.4 (quoting 114 Cong. Rec. 10,488 (1968)). The Legal Adviser's testimony before the Senate Foreign Relations Committee put that statement into context: "The Department of Justice * * * has suggested that implementing legislation * * * is desirable * * * to insure the coverage of the act extends to all cases arising under the treaty and * * * to take care of related venue and jurisdictional requirement problems." S. Exec. Rep. No. 10, 90th Cong., 2d Sess. 5–6. Consistent with that explanation of the purposes the implementing legislation would serve, Chapter 2 of the FAA vests the federal district courts with jurisdiction over actions falling under the Convention, 9 U.S.C. 203; specifies the proper venue for such actions, 9 U.S.C. 204; and authorizes removal of cases from state to federal court, 9 U.S.C. 205. The legislation on those subjects does not establish substantive rules of decision but merely facilitates implementation of the Convention, and is consistent with the conclusion that provisions of the Convention are self-executing. Furthermore, enactment of such legislation is consistent with the approach taken in the context of certain tax and extradition treaties that are self-executing but nevertheless are accompanied by implementing legislation to facilitate their enforcement. Accordingly, the fact that domestic legislation may have been necessary to clarify jurisdiction- and venue-related issues pertaining to the implementation of the Convention does not contradict the conclusion that Article II is self-executing.

To the extent the Court finds the Convention's status ambiguous, it should defer to the State Department's view—as articulated in this brief—that Article II is self-executing. See, *e.g.*, *Medellín*, 128 S. Ct. at 1361 (citing Brief for United States as Amicus Curiae

for Executive Branch's view of treaty status); *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010) (Executive Branch's interpretation of treaty entitled to "great weight").

2. Even if (as the court of appeals assumed) Article II of the Convention were not self-executing, the Convention as implemented would preempt any contrary state law, including a state law barring enforcement of agreements to arbitrate insurance disputes. That is so for two reasons. First, Chapter 2 of the FAA does not establish substantive rules of decision that courts are bound to apply; rather, it directs courts to enforce the Convention itself. Second, the Convention and its implementing legislation were intended to establish an exclusive scheme for the enforceability of arbitration provisions in international commercial agreements.

a. The implementing legislation provides that "[t]he Convention * * * shall be enforced in United States courts in accordance with this chapter," 9 U.S.C. 201, and it vests federal district courts with jurisdiction over "[a]n action or proceeding falling under the Convention," 9 U.S.C. 203. It further provides that Chapter 1 of the FAA applies to actions and proceedings under Chapter 2 (which codified the Convention) to the extent that Chapter 1 "is not in conflict with this chapter *or the Convention as ratified by the United States*." 9 U.S.C. 208 (emphasis added). The italicized language indicates that the Convention itself may sometimes supersede Chapter 1 of the FAA even if the superseded Chapter 1 provision does not conflict with any part of Chapter 2. The clear import of those provisions is that, within the parameters and pursuant to the procedures established by Chapter 2 of the FAA, federal courts will interpret and enforce the Convention itself, not simply the statute that Congress enacted to implement it. Cf. Louis Henkin, *Foreign Affairs and the United States Constitution* 200 n.* (2d ed. 1996) (explaining that in certain circumstances the effect of the implementing legislation is to "give[] the treaty itself legal effect).[2]

[2] In that respect, Chapter 2 of the FAA is quite different from a hypothetical Act of Congress that directed federal courts to enforce arbitration clauses and to enforce foreign arbitral awards, but that made no express reference to the Convention itself. Such a statute might "implement the Convention, in the sense of facilitating compliance with the United States'

The McCarran-Ferguson Act comes into play only when an "Act of Congress" is "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). Because a treaty is not an "Act of Congress," the McCarran-Ferguson Act does not save state insurance regulation from the preemptive effect of a treaty provision that is enforceable in United States courts. That is so even if the judicially-enforceable character of the relevant treaty provision depends on the antecedent enactment of an implementing statute. Thus, even if legislation were necessary to make Article II of the Convention binding upon United States courts, Congress has enacted such legislation, and Article II accordingly supersedes contrary state law, including state insurance regulation.

b. It is a well-established canon of construction that a statute should be interpreted, whenever possible, to comply with international law. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). The McCarran-Ferguson Act contains no evidence that, in protecting against "implied preemption by domestic commerce legislation" of state regulation of insurance, Congress intended to interfere with the Executive's ability to enter into and comply with international agreements—let alone those governing foreign commerce. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003) (noting McCarran-Ferguson Act was intended to address domestic commerce). To the contrary, the Act was not intended "to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess" prior to *South-Eastern Underwriters*. H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945); see *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 412–413 (1954) (concluding that the McCarran-Ferguson Act did not protect state law from preemption by a provision of federal admiralty law) (plurality opinion).

When the United States deposited its instrument of ratification for the Convention, it declared that it would apply the treaty "only

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treaty obligations but it would not support the view that the Convention itself is directly enforceable by United States courts.

to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States." 21 U.S.T. 2566. Chapter 2 of the FAA confirms that limitation, see 9 U.S.C. 202, and further provides that "[a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states," *ibid*. The Convention was thus understood to regulate an area—foreign commerce—which is "preeminently a matter of national concern." *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979); see also, *e.g.*, *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285–286 (1976) (describing "the Federal Government's exclusive regulation of foreign commerce"). Thus, not only does Chapter 2 arguably preempt contrary state law, but reading the earlier-enacted McCarran-Ferguson Act as authorizing the several States to limit the enforceability of international arbitration agreements pursuant to Article II of the Convention would undermine the careful efforts of Congress and the Executive to clarify the United States' understanding of the Convention's scope.

In addition, application of state law to preclude arbitration of insurance-related disputes could be construed as impacting the United States' treaty obligations. In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538–539 (1995), this Court instructed courts to "be most cautious before interpreting * * * domestic legislation in such manner as to violate" the Convention, and it rejected an interpretation of the Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207, that would have barred enforcement of an arbitration provision in an international commercial agreement. The courts of appeals have likewise recognized that the "United States obligated itself [in the Convention] to enforce arbitration agreements between foreign and domestic contracting parties," and that "[a]ny law or decision prior in time to this express undertaking must be construed as consistent with the Convention or set aside by it." *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1148 (5th Cir. 1985);

see *Bautista v. Star Cruises*, 396 F.3d 1289, 1297 (11th Cir.), cert. dismissed, 545 U.S. 1136 (2005).

The courts of appeals also have rejected application of the McCarran-Ferguson Act to "reverse preempt" other federal laws in contexts in which such reverse preemption would be inconsistent with comprehensive federal law or policy. The Second Circuit, for example, has held that the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*—neither of which specifically relates to the business of insurance or expressly preempts state insurance laws—are not subject to reverse preemption under the McCarran-Ferguson Act. See *Stephens* v. *National Distillers & Chem. Corp.*, 69 F.3d 1226, 1230–1234 (2d Cir. 1996) (FSIA); *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1065–1066 (2d Cir. 1982) (Title VII), reinstated as modified by 735 F.2d 23, cert. denied, 469 U.S. 881 (1984). Other courts have reached the same result with respect to other federal statutes. See, *e.g., Dudek v. Prudential Sec., Inc.*, 295 F.3d 875, 878 (8th Cir. 2002) (holding that the McCarran-Ferguson Act does not preclude application of federal law barring certain state-law challenges relating to purchase or sale of covered securities) (following *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 120 (2d Cir. 2001)); *Patenaude v. Equitable Life Assurance Soc'y of the United States*, 290 F.3d 1020, 1026–1028 (9th Cir. 2002) (same); cf. *Humana Inc. v. Forsyth*, 525 U.S. 299, 308 (1999) (rejecting contention that "Congress intended to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise").

The foregoing principles reinforce the conclusion that the McCarran-Ferguson Act does not authorize States to preclude enforcement of arbitration agreements encompassed by the Convention and Chapter 2 of the FAA. The Convention was intended "to unify the standards by which agreements to arbitrate are observed." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). The strong federal policy in favor of enforcing arbitration agreements under uniform standards "applies with special force in the field of international commerce," where "concerns of international comity, respect for the capacities of foreign and

transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" are implicated. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 631 (1985); see *Scherk*, 417 U.S. at 516 (describing international agreement to arbitrate as "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction").

The Court in *Mitsubishi* recognized that Article II(1) of the Convention "contemplates exceptions to arbitrability grounded in domestic law," and that "Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention." 473 U.S. at 639 n.21. The Court "decline[d]," however, "to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so." *Ibid.* Because the McCarran-Ferguson Act predates the Convention and does not specifically address arbitration, and because application of the Act in the manner that petitioner advocates would subvert federal efforts to deal comprehensively and uniformly with enforcement of arbitration agreements in the international commercial context, the Act is inapplicable here.

* * * *

3. *Forum Non Conveniens*

On December 6, 2010, the U.S. Court of Appeals for the Ninth Circuit reversed a district court's dismissal, on *forum non conveniens* grounds, of a lawsuit that 25 members of a Peruvian indigenous group and Amazon Watch, a Montana corporation headquartered in California, brought against Occidental Petroleum Corp. and its indirect subsidiary in Peru, Occidental Peruana ("OxyPeru") (collectively "Occidental"). *Carijano v. Occidental Petroleum Corp.*, 626 F.3d 1137 (9th Cir. 2010). The plaintiffs alleged that Occidental caused environmental and personal injuries through its petroleum and oil exploration activities in northern Peru. *Carijano v. Occidental Petroleum*

Corp., 626 F.3d at 1142. The plaintiffs' claims included common law negligence, battery, wrongful death, and violation of a California law against unfair competition. *Id.* at 1143.

In concluding that the district court had abused its discretion in dismissing the case, the court analyzed: "(1) the adequacy of the alternate forum; (2) the private and public factors and the deference owed a plaintiff's chosen forum; and (3) the district court's decision to dismiss Plaintiffs' case without imposing any conditions on the dismissal." *Id.* at 1145. The court concluded:

> Here the district court erroneously relieved Occidental of its burden of showing that Peru is an adequate alternative forum. It accepted a flawed stipulation to Peruvian jurisdiction and overlooked strong evidence, including evidence from Occidental's own expert, calling into question the ability of the Peruvian courts to satisfactorily handle this case. The district court failed to consider all relevant private and public interest factors, entirely overlooking the enforceability of judgments factor, which weighs heavily against dismissal. It correctly assumed that Amazon Watch was a proper domestic plaintiff, but erroneously afforded reduced deference to its chosen forum and ignored the group entirely in the analysis of numerous factors. These errors led the district court to misconstrue factors that are neutral or weigh against dismissal, and to strike an unreasonable balance between the factors and the deference due a domestic plaintiff's chosen forum. Finally, the district court abused its discretion by failing to impose conditions on its dismissal that were warranted by facts in the record showing justifiable reasons to doubt Occidental's full cooperation in the foreign forum.

Id. at 1157.

The court remanded the case for the district court to consider Amazon Watch's standing but did not reach the plaintiffs' claim that the district court had abused its discretion in denying their discovery request before dismissing the case. *Id.* at 1157–58. Excerpts follow from the court's analysis

of the issue of Peru's adequacy as an alternative forum for the litigation.

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* * * *

A. Adequacy of the Forum

The district court abused its discretion in finding that under the unique circumstances of this case Peru provides an adequate alternative forum for Plaintiffs to pursue their claims against Occidental arising from business operations in Peru that ended 7 years previously. An alternative forum is deemed adequate if: (1) the defendant is amenable to process there; and (2) the other jurisdiction offers a satisfactory remedy. *See Piper* [*Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981)]; *Leetsch v. Freedman*, 260 F.3d 1100, 1103 (9th Cir. 2001) ("The foreign court's jurisdiction over the case and competency to decide the legal questions involved will also be considered. We make the determination of adequacy on a case by case basis, with the party moving for dismissal bearing the burden of proof.") (citation omitted).

1. Whether Occidental is Amenable to Process in Peru

The district court abused its discretion by accepting at face value Occidental's "stipulation and consent to jurisdiction in Peru" without considering the glaring absence of a waiver of the statute of limitations, which Occidental's own expert suggests may have run. Dismissal on the basis of *forum non conveniens* is improper when a lawsuit would be time-barred in the alternative jurisdiction. Moreover, where there is reason to believe that a defendant will seek immediate dismissal based on the foreign forum's statute of limitations, dismissal should be conditioned on waiving any statute of limitations defenses that would not be available in the domestic forum. *See Chang v. Baxter Healthcare Corp.,* 599 F.3d 728, 736 (7th Cir. 2010) . . .; *Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV*, 569 F.3d 189, 202 (4th Cir. 2009) . . .; *Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir. 2001) . . . .[1]

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[1] The district court could have cured this problem by imposing appropriate conditions. We have affirmed *forum non conveniens* dismissals that

Occidental itself emphasizes that the Peruvian statute of limitations is tolled pending this appeal, but coyly adds "to the extent it had not already run." This caveat, together with Occidental's failure to waive the Peruvian statute of limitations, suggests that when Plaintiffs do file in Peru, Occidental intends to argue that the Peruvian statute ran before this lawsuit was filed in 2007. [Occidental's expert's] declaration notes that the Peruvian statute of limitations begins to run "as of the day on which the action could have been brought." "The danger that the statute of limitations might serve to bar an action is one of the primary reasons for the limitation on the court's discretion with respect to the application of the doctrine of *forum non conveniens*." *Paper Operations* [*Consultants Int'l, Ltd. v. S.S. Hong Kong Amber*, 513 F.2d 667, 672–73 (9th Cir. 1975)]. Therefore the district court erred by determining that Occidental was amenable to process in Peru based on its qualified stipulation.

2. Whether Peru Offers a Satisfactory Remedy

The district court also abused its discretion in concluding on this record that Occidental met its burden of proving that Peru could offer Plaintiffs a satisfactory remedy. A "dismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery," but an alternate forum offering a "clearly unsatisfactory" remedy is inadequate. *Piper*, 454 U.S. at 250, 254 n.22; *see also Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1144 (9th Cir. 2001) ("The effect of *Piper Aircraft* is that a foreign forum will be deemed adequate unless it offers no practical remedy for the plaintiff's complained of wrong."). The parties offered conflicting expert affidavits that focused on two remedial issues: (a) Peruvian law itself, both substantive and procedural; and (b) special barriers confronting indigenous plaintiffs and general corruption

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addressed statute of limitations concerns by requiring waiver in the foreign forum. *See, e.g.*, *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 664 (9th Cir. 2009) (finding no abuse of discretion where the district court conditioned dismissal on the defendant's agreement to accept service "and waive any statute of limitations defenses"); *Paper Operations*, 513 F.2d at 673 (holding that the district court's "conditional dismissal obviously resolves this problem").

in the Peruvian judicial system. In assessing whether Peru afforded Plaintiffs a satisfactory remedy, the district court erroneously failed to weigh Plaintiffs' expert testimony, which unequivocally asserts that Peru provides no practical remedy at all for Plaintiffs.

* * * *

4. Cross-border Insolvency

Since 1990, the increase in corporate activities spanning multiple countries and the globalization of markets and credit finance have lent increasing significance to the legal issues associated with cross-border insolvency. U.S. bankruptcy reform efforts have played an important role in shaping and responding to developments within this global context. Through changes in U.S. bankruptcy law, the United States began to promote options for refinancing, rather than liquidating, corporations facing insolvency. The United States also began to encourage "universalism," allowing creditors and other interested parties from foreign countries equal access to bankruptcy proceedings and opportunities for equitable sharing of assets, as opposed to the traditional "territorial" approach that provides benefits first for local interests in a given country. Insolvency reform since the mid-1990's involving the United Nations Commission on International Trade Law ("UNCITRAL"), the World Bank, and the International Monetary Fund ("IMF") has generally been compatible with such developments in U.S. bankruptcy law. Effective in 2006 the United States adopted the 1997 UNCITRAL Model Law on Cross-Border Insolvency as Chapter 15 of the U.S. Bankruptcy Code.

In 2010, litigation before the U.S. Court of Appeals for the Fifth Circuit addressed the complex legal issues associated with cross-border insolvency, particularly those concerning the determination of the appropriate center of main interest for a bankruptcy proceeding involving creditors across different jurisdictions. On May 27, 2010, the Fifth Circuit affirmed the district court's denial of a petition for recognition of a pending

bankruptcy proceeding in Israel. The petitioner, an Israeli bankruptcy receiver, sought recognition of the Israeli proceeding as "a foreign main or nonmain proceeding" under Chapter 15 of the U.S. Bankruptcy Code, 11 U.S.C. § 1501(a). *In Re Ran*, 607 F.3d 1017 (5th Cir. 2010). Excerpts below from the court's opinion discuss Chapter 15 of the U.S. Bankruptcy Code, which addresses cross-border insolvency and is intended to conform U.S. law with international law on that issue. The excerpts below also provide the court's analysis in concluding that the Israeli proceeding was neither a foreign main nor a nonmain proceeding under Chapter 15 and, as a result, that the Israeli proceeding was ineligible for recognition under Chapter 15.

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* * * *

B. Chapter 15's Framework

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") enacted Chapter 15 of the Bankruptcy Code, "so as to provide effective mechanisms for dealing with cases of cross-border insolvency." 11 U.S.C. § 1501(a). It replaced former Section 304 of the Bankruptcy Code and "incorporate[s] the Model Law on Cross-Border Insolvency" drafted by UNCITRAL, the United Nations Commission on International Trade Law . . . . *See* 11 U.S.C. § 1501(a) *et seq.*; *see also In re Tri-Continental Exch. Ltd.*, 349 B.R. 627, 633–34 (Bankr. E.D. Cal. 2006). The statutory intent to conform American law with international law is explicit in the text of Section 1501(a), and also is expressed in Section 1508, which states that "[i]n interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." 11 U.S.C. § 1508; *see also* House Report on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R. Rep. No. 109-31, pt. I, at 105 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 169 ("[Chapter 15] incorporates the Model Law on Cross-Border Insolvency to encourage cooperation

between the United States and foreign countries with respect to transnational insolvency cases . . . . [hereinafter "House Report"]; 8 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY § 1501.01 (15th ed. rev. 2008) (explaining the basis for Chapter 15).

. . . In order for a foreign proceeding to gain recognition within the framework of Chapter 15, the following prerequisites must be met:

(1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
(2) the foreign representative applying for recognition is a person or body; and
(3) the petition meets the requirements of section 1515.

11 U.S.C. § 1517(a); *see also In re Betcorp Ltd.*, 400 B.R. 266, 285 (Bankr. D. Nev. 2009).

This statutory mandate is subject to a narrow public policy exception which permits a court to refuse recognition "if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. But, the exception is intended to be invoked only under exceptional circumstances concerning matters of fundamental importance for the United States. . . . Even in the absence of an objection, courts must undertake their own jurisdictional analysis and grant or deny recognition under Chapter 15 as the facts of each case warrant. *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 335 (S.D.N.Y. 2008). The ultimate burden of proof on the requirements of recognition is on the foreign representative. *See id.* at 334.

* * * *

C. Determining Status as a Foreign Main Proceeding

A foreign main proceeding is "a foreign proceeding pending in the country where the debtor has the center of its main interest." 11 U.S.C. § 1502(4) (emphasis added). The phrase "center of main interest" ("COMI") is a term of art, which the Bankruptcy Code

does not define explicitly. Chapter 15, however, does provide that "[i]n the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests." *Id.* § 1516(c). This presumption can be rebutted by evidence to the contrary. *See In re Tri-Continental Exch. Ltd.*, 349 B.R. at 634. Thus, to determine where [the debtor's] presumptive COMI lies, we must determine the location of his habitual residence and then determine if any evidence to the contrary was presented by [the petitioner] to rebut the presumption that [the debtor's] habitual residence is his COMI. If so, our inquiry does not end and we must consider all evidence to determine the location of [the debtor's] COMI.

The Code does not define "habitual residence," but it has been analyzed recently by foreign courts as virtually identical to the more commonly used, at least in the United States, concept of domicile. Under our law, domicile is established by physical presence in a location coupled with an intent to remain there indefinitely. *Texas v. Florida*, 306 U.S. 398 (1939). . . .

Similarly, according to foreign courts, the existence of a habitual residence largely depends on whether the debtor intends to stay in the location permanently. *See, e.g.*, *Pinna v. Caisse d'Allocations Familiales de la Savoie*, [1986] E.C.R. 1 (ECJ 1986) (France). . . .

Here . . . [t]he totality of the circumstances before us indicates that the United States is [the debtor]'s habitual residence and thus his presumptive COMI.

Before the district court, [the petitioner] introduced evidence to rebut the presumption that [the debtor]'s COMI is located in the United States. Because of this, we cannot rely solely upon Section 1516(c)'s presumption. Instead, in order to determine [the debtor]'s COMI we must consider all evidence, while keeping in mind that it is [the petitioner]'s burden to persuade the court by a preponderance of the evidence that [the debtor]'s COMI is in Israel. *See In re Bear Stearns*, 389 B.R. at 335–36; *see also* FED. R. EVID. 301 . . .; *In re Tri-Continental Exch. Ltd.*, 349 B.R. at 635 . . .; *Schaflein v. Comm'n of the European Cmtys.*, (Case 284/87) [1988] ECR 4475 (ECJ 2d Chamber 1988) . . .; *see also* Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency § 122 (noting that the presumption does

"not prevent, in accordance with applicable procedural law, calling for or assessing other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party").

Neither Chapter 15 nor the Model Law on Cross-Border Insolvency describes the factors that may be relevant to a determination of the debtor's COMI in a case where it is disputed. . . . *

. . . [I]n *In re Loy*, 380 B.R. 154. 162 (Bankr. E.D. Va. 2007), the only case to address the concept of COMI with respect to an individual debtor, the court noted that factors such as (1) the location of a debtor's primary assets; (2) the location of the majority of the debtor's creditors; and (3) the jurisdiction whose law would apply to most disputes, may be used to determine an individual debtor's COMI when there exists a serious dispute. . . .

. . . [O]ur review of the record reveals that [the petitioner]'s evidence, while sufficient to rebut the presumption that [the debtor]'s COMI was in the United States, was nevertheless insufficient to prove by a preponderance of the evidence that Israel is the location of [the debtor]'s center of main interests.

[The petitioner] proffered the following evidence before the district court to establish that [the debtor]'s center of main interests lies in Israel: (1) [his] creditors are located in Israel; (2) [his] principal assets are being administered in bankruptcy pending in Israel; and (3) [his] bankruptcy proceedings initiated in Israel and would be governed by Israeli law. These factors, however, when

* Editor's note: Since UNCITRAL adopted its Model Law, courts in the United States and the European Union have adopted different interpretations of the term "center of main interest," which the Model Law adopted from the EU's bankruptcy regulation. U.S. courts have determined that a factual analysis is required to determine a bankruptcy proceeding's center of main interest, whereas EU courts generally have determined the center of main interest to be the first EU country where a court asserts jurisdiction over a bankruptcy proceeding. In view of the discontinuity in the U.S. and EU approaches, UNCITRAL's Working Group V (cross-border insolvency law) has begun working to seek common ground on the meaning of the term "center of main interest" and to define the criteria necessary to resolve issues pertaining to determining the center of main interest, particularly with regard to complex issues involving the presence of corporations in multiple countries.

weighed against the following: (1) [the debtor] along with his family left Israel nearly a decade prior to the filing of the petition; (2) [he] has no intent to return to Israel; (3) [he]has established employment and a residence in Houston, Texas; (4) [he] is a permanent legal resident of the United States and his children are United States citizens; and (5) [he] maintains his finances exclusively in Texas, are insufficient to prove by a preponderance of the evidence that Israel is [his] COMI. *See Pennzoil Co. v. F.E.R.C.*, 789 F.2d 1128, 1136 (5th Cir. 1986) . . . .

* * * *

Although our review of the objective factors establishes that [the debtor]'s COMI is in the United States, [the petitioner] has another argument. He contends that the COMI determination should be made with reference to [the debtor]'s operational history, and not merely by focusing upon where [the debtor]'s COMI lies on the date the petition for recognition was filed. In other words, [the petitioner] argues that because [the debtor]'s COMI was located in Israel at some point in time before he filed the petition for recognition, we should look back at [the debtor]'s operational history in Israel to conclude that his COMI lies in Israel. We disagree.

An analysis of the proper COMI timeframe starts with, as it must, the text of Section 1502 of the Code. *See* Mark Lightner, *Determining the Center of Main Interest Under Chapter 15*, 17 J. BANKR. L. & PRAC. 5, art. 2 (2009). In the bankruptcy context, the analysis must end with the text if the language is clear and does not lead to an absurd result. *See, e.g.*, *United States v. Ron Pair Enters., Inc. (In re Ron Pair Enters.)*, 489 U.S. 235, 298 (1989). While Section 1502 does not expressly discuss a temporal framework for determining COMI, the grammatical tense in which it is written provides guidance to the court. Every operative verb is written in the present or present progressive tense. More specifically, Section 1502 defines foreign main proceeding as a "foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502(4). Congress's choice to use the present tense requires courts to view the COMI determination in the present, i.e. at the time the petition for recognition was filed.

If Congress had, in fact, intended bankruptcy courts to view the COMI determination through a lookback period or on a specific past date, it could have easily said so. This is particularly significant because Congress is clearly capable of creating lookback periods in the Bankruptcy Code. *See, e.g.*, *id.* § 522 (b)(3)(A) (creating a lookback provision for property exemptions).**

Moreover, examining a debtor's COMI at the time the petition for recognition is filed fulfills Congress's purpose for implementing Chapter 15. As noted above, Chapter 15 was implemented by Congress in an attempt to harmonize transnational insolvency proceedings. If we were to assess COMI by focusing upon [the debtor]'s operational history, there would be an increased likelihood of conflicting COMI determinations, as courts may tend to attach greater importance to activities in their own countries, or may simply weigh the evidence differently which may lead to the possibility of competing main proceedings, thus defeating the purpose of using the COMI construct. *See In re Betcorp Ltd.*, 400 B.R. at 290. In fact, a meandering and never-ending inquiry into the debtor's past interests could lead to a denial of recognition in a country where a debtor's interests are truly centered, merely because he conducted past activities in a country at some point well before the petition for recognition was sought. *See* Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 1019, 1020 (2007).

Additionally, it is important that the debtor's COMI be ascertainable by third parties. If the debtor's main interests are in a particular country and third parties observe this situation, it should be irrelevant that the debtor's interests were previously centered in a different country almost a decade prior to the receiver attempting to have the foreign bankruptcy proceeding recognized. *See In re Betcorp Ltd.*, 400 B.R. at 290. The presumption is that creditors will look to the law of the jurisdiction in which they perceive the debtor to be operating to resolve any difficulties they have with

** Editor's note: As discussed below, the court's discussion here on the issue of the appropriate timeframe for determining a debtor's center of main interest does not reflect settled law, and U.S. courts are divided on this issue.

that debtor, regardless of whether such resolution is informal, administrative or judicial. This is consistent with English cases interpreting the European Union Regulation, which seem to select a time linked to the commencement or service of the relevant insolvency proceeding. *Shierson v. Vlieland-Boddy*, [2005] EWCA (Civ) 974, §§ 39, 55, 2005 WL 1860177 (Eng); *Re Collins & Aikman Corp. Group*, [2005] EWHC (Ch) 1754, § 39, 2005 WL 4829623 (Eng.).

[The petitioner] urges the court to recognize the Israeli proceeding to effect the principles of comity and deference encompassed in Chapter 15 by deferring to the jurisdictional choice of the Israeli creditors. This argument has no merit. The plain language of Chapter 15 requires a factual determination with respect to recognition before principles of comity come into play. *See* 11 U.S.C. § 1507. . . .

* * * *

D. Determining Status as a Foreign Nonmain Proceeding

Although the Israeli bankruptcy proceeding is not a foreign main proceeding, our inquiry does not end there. We must next determine whether it may be recognized as a foreign nonmain proceeding. While recognition of a foreign proceeding as a foreign nonmain proceeding may provide the same relief as recognition as a foreign main proceeding, the relief is not automatic; rather, whether any such relief is appropriate is determined by the bankruptcy court after notice and a hearing, at the court's discretion, and subject to the requirement that all creditors be sufficiently protected. *See* 11 U.S.C. § 1521.

[The petitioner] argues that the administration of [the debtor]'s bankruptcy estate in Israel is itself an establishment within the meaning of Chapter 15 and that it therefore should be recognized as a foreign nonmain proceeding. Notably, no United States court has decided whether an individual's bankruptcy proceeding pending in another country and related debts alone are sufficient to constitute an establishment under Chapter 15. A foreign nonmain proceeding is "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment." 11 U.S.C. § 1502(5) (emphasis added). Section 1502(2)

defines an establishment as "any place of operations where the debtor carries out a nontransitory economic activity." *Id.* § 1502(2) (emphasis added). In contrast to COMI, "[t]he existence of an establishment is essentially a factual question, with no presumption in its favor." *In re Bear Stearns*, 389 B.R. at 338. As one court noted, "the bar is rather high" to prove that a debtor has an establishment in a particular location. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2007).

Similar to a determination of [the debtor]'s COMI, the relevant time period to determine whether [he] has an establishment in Israel is at the time [the petitioner] filed his petition for recognition.*** Our conclusion is again supported by a plain language reading of Chapter 15, which notes that a foreign nonmain proceeding can exist where a debtor "has an establishment." 11 U.S.C. § 1502(5) (emphasis added). Likewise, Section 1502(2) refers to an establishment as "any place of operations where the debtor carries out a nontransitory activity." *Id.* § 1502(2) (emphasis added). The use of the present tense implies that the court's establishment analysis should focus on whether the debtor has an establishment in the foreign country where the bankruptcy is pending at the time the foreign representative files the petition for recognition under Chapter 15. *See* Mark Lightner, *Determining the Center of Main Interest Under Chapter 15*, 17 J. BANKR. L. & PRAC. 5, art. 2 (2009).

So in order for [the debtor] to have an establishment in Israel, [he] must have (1) had a place of operations in Israel and (2) been carrying on nontransitory economic activity in Israel at the time that [the petitioner] brought the petition for recognition in the United States. Neither Chapter 15 nor its legislative history explain what it means for a debtor to have "any place of operations" or to have "been carrying on nontransitory economic activity" in a location. *See* H.R. Rep. No. 109-31(I), at 107, *reprinted in* 2005 U.S.C.C.A.N. at 170 (mentioning only that the definition was taken from Model Law for Cross-Border Insolvency Article 2).

*** Editor's note: As discussed in ** supra, the court's comments here concerning the relevant time period do not reflect settled case law, and U.S. courts remain divided over that issue.

However, the Model Law for Cross-Border Insolvency and the sources from which it emanates provide guidance concerning what it means for a debtor to have an establishment in a location.

The drafters of the Model Law for Cross-Border Insolvency relied on the EU Convention to define an establishment. *See* Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency § 75 (1997). Per the EU Convention's legislative history, in order to have a "place of operations" in Israel [the debtor] must have had "a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional" at the time that [the petitioner] filed the petition for recognition. Council Report on the Convention on Insolvency Proceedings, at 49, No. 6500/96. The mere presence of assets in a given location does not, by itself, constitute a place of operation. *Id.* at 48. In the context of corporate debtors, there must be a place of business for there to be an establishment. *In re Bear Stearns*, 374 B.R. at 131 . . . . Equating a corporation's principal place of business to an individual debtor's primary or habitual residence, a place of business could conceivably align with the debtor having a secondary residence or possibly a place of employment in the country where the receiver claims that he has an establishment. *See* 11 U.S.C. § 1516(c) (equating a corporate debtor's registered office with the habitual residence in the case of an individual). At the time [the petitioner] filed his petition for recognition, [the debtor] possessed neither a secondary residence nor place of employment in Israel.

Even if the court were to conclude that [the debtor] possessed a place of operations in Israel at the time the petition was filed, [he] did not carry out any nontransitory economic activity in Israel and as a result the second part of the establishment requirement is not met. Since [his] departure from Israel in 1997, he has engaged in almost no economic activity in that country; rather, the evidence suggests that almost all of his economic activities are centered in Houston and Harris County, Texas. At the time [the petitioner] brought his suit for recognition of the foreign bankruptcy proceeding[,] the Israeli insolvency proceedings, brought involuntarily and in [the debtor]'s absence, and corresponding debts were the only evidence of [the debtor]'s purported establishment in Israel.

These debts, however, only represent evidence of previous economic activity and are insufficient to show that [the debtor] carried on transitory activity in Israel at the time the petition for recognition was filed. Nevertheless, [the petitioner] argues that as trustee of [the debtor]'s estate there exists a principal-agent relationship between himself and [the debtor] and that he has carried out economic activity in Israel on behalf of [the debtor], his principal. The law is clear—[the petitioner] as the trustee of [the debtor]'s estate is not [the debtor]'s agent and cannot act on behalf of [him]. *See* 11 U.S.C. § 323.

Further, as the district court noted, recognition based on the existence of the bankruptcy proceeding and debts alone poses problems. First, a bankruptcy proceeding is by definition a transitory action, but recognition as a nonmain proceeding requires that the debtor carry out nontransitory activity in a location. WEBSTER'S NEW INTERNATIONAL DICTIONARY 2692 (2d ed. 1939) (defining "transitory action" as "[a]n action which may be brought in any country, [such] as actions for debts, etc."). To permit a transitory action, i.e., the existence of the Israeli bankruptcy proceeding and corresponding debts alone to constitute the basis for finding nontransitory economic activity, would be inappropriate because it would go against the plain meaning of the statute. Second, if [the debtor]'s bankruptcy proceeding and associated debts, alone, could suffice to demonstrate an establishment, this would render the framework of Chapter 15 meaningless. There would be no reason to define establishment as engaging in a nontransitory economic activity. The petition for recognition would simply require evidence of the existence of the foreign proceeding. But the statute requires more than that—it requires evidence of a foreign proceeding and that the proceeding meet the definition of foreign nonmain proceeding. [The petitioner]'s argument that Chapter 15 would not apply to any individuals if the Israeli bankruptcy is not an establishment, making Chapter 15 a nullity, is unconvincing. Debtors with ongoing business operations located in the country where the foreign proceeding is pending would be subject to Chapter 15. Finding that a foreign proceeding itself is not an establishment does not make Chapter 15 a nullity.

* * * *

On July 22, 2010, the U.S. Bankruptcy Court for the Southern District of New York issued a decision in another case involving a request for recognition of foreign bankruptcy proceedings under Chapter 15 of the Bankruptcy Code. *In re Fairfield Sentry Ltd.*, 44 B.R. 60 (Bankr. S.D.N.Y. 2010). In this case, the liquidators of several investment funds, along with the funds themselves, petitioned the court to recognize the liquidation proceedings pending in the British Virgin Islands. They also sought specific relief under § 1521 of the Bankruptcy Code from a related adversary proceeding. In its Bench Memorandum and Order, the court determined that the liquidation proceedings are foreign main proceedings and, with one limited exception, granted the specific relief the petitioners sought. Notably, the court took a different approach than the one the Fifth Circuit took in the *In re Ran* decision in determining the relevant time period for determining the existence of a foreign nonmain proceeding. Excerpts below from the court's Bench Memorandum provide key aspects of its analysis in determining that the proceedings in the British Virgin Islands represent foreign main proceedings.

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* * * *

The petitioners seek recognition of the BVI Liquidation Proceedings as foreign main proceedings under section 1517(b)(1) of the Bankruptcy Code (the "Code"), or in the alternative, as foreign nonmain proceedings under section 1517(b)(2) of the Code. . . . At bottom, the main point of contention between the parties seems to be whether, as the Petitioners argue, citing *Lavie v. Ran* . . . the Debtors' center of main interests ("COMI") should be measured as of the date of the Petition and the Court should consider the liquidation proceeding as ongoing business activities, or, as the Objectors argue, COMI should include the period prior to and leading up to the filing of the Petition and the Court should focus only on the Debtors' business activities prior to the liquidation, as those were the economic and business functions contemplated by their charters. The contentions of both parties are misplaced, as

a review of the relevant factors places the COMI focus in the BVI for the pre- and post-liquidation periods.

DISCUSSION

* * * *

As a preliminary matter, and based upon the relevant evidence, the Court finds that the BVI Liquidation Proceedings are foreign proceedings under section 101(23) of the Code, as they are "collective judicial or administrative proceeding[s] in a foreign country . . . under a law relating to insolvency . . . in which . . . the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of . . . liquidation." 11 U.S.C. 101(2).

Section 1517(a) of the Code requires recognition of the BVI Liquidation Proceedings if (1) they are main or nonmain proceedings within the meaning of section 1502 . . . .

a. Recognition of the BVI Liquidation Proceedings as Foreign Main Proceedings

* * * *

In this case, it is apparent from all of the relevant evidence that the Debtors effectively ceased doing business more than 18 months before their Petition and 7 months before the BVI Liquidation Proceedings commenced. . . . As a result, the Debtors have no place of business, no management, and no tangible assets located in the United States. Rather, the Debtors' activities for an extended period of time have been conducted only in connection with winding up the Debtors' business. Under these circumstances, it is appropriate for the Court to consider this extended period in determining COMI. The Court finds that the facts now extant provide a sufficient basis for finding that the Debtors' COMI for the purpose of recognition as a main proceeding is in the BVI and not elsewhere.

Although the Debtors' assets and investors are international, the facts before the Court suggest that the Debtors' most feasible administrative "nerve center" has existed for some time in the BVI. . . . It has been held that where, by necessity and in good faith, a foreign representative "relocates all of the primary business activities of the debtor to his location (or brings business to a halt), thereby causing other parties to look to the judicial manager

as the location of [the] debtor's business," the debtor's COMI may "become lodged with the foreign representative." . . . There being no showing of bad faith on the part of the BVI Liquidators, and given that the Debtors are incorporated in and maintain their registered offices in the BVI, the Court finds it more compelling that the Debtors' COMI lies in the BVI than in New York, or in any of the Debtors' other various international contacts.

* * * *

In any proceeding for foreign recognition, of great concern to the Court is the potential for mischief and COMI manipulation, as recently expressed by the Fifth Circuit Court in *In re Ran* . . . The Court is mindful that some consolidated BVI-focused activity occurred during the 11-month period between the Liquidators' appointment and the Petition, and that the Debtors are no longer doing business in accordance with the original Sentry charter. However, the record as to the relevant time period beginning December 2008, which straddles the Liquidators' appointment dates, does not support a finding of an opportunistic shift of the Debtors' COMI or any biased activity or motivation to distort factors to establish a COMI in the BVI. Indeed, during this key period between December 2008 and the BVI Liquidation Proceedings, the Debtors administrative nerve center existed in the BVI.

Accordingly, and bearing in mind that "non-recognition where recognition is due may forestall needed inter-national cooperation," the Petition for recognition of the BVI Liquidation Proceedings as a foreign main proceeding is hereby granted, subject to a further review under section 1517(d) and 1522(c) of the Code should other contrary factors come to light to indicate that a different holding is warranted. . . .

* * * *

5. Service of Process Abroad

In a decision issued on appeal on November 11, 2010, the Federal Circuit addressed the issue of service abroad by

personal delivery rather than under the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 ("Hague Service Convention" or "Hague Convention"). The court also considered when a U.S. court may exercise personal jurisdiction over foreign corporations outside the United States.

In *Nuance Communications v. Abbyy Software*, 626 F.3d 1222 (Fed. Cir. 2010), the plaintiff sued four companies for patent infringement. The three defendants at issue were a U.S. software company and its related entities in Cyprus ("Abbyy Software") and in Russia ("Abbyy Production"). The plaintiff used a Russian process server to serve documents on the manager of Abbyy Production in Moscow. The non-U.S. defendants moved to dismiss for lack of personal jurisdiction and sought Abbyy Production's dismissal for improper service of process. The district court dismissed both non-U.S. defendants, holding that the court lacked personal jurisdiction over them and that service was improper with respect to Abbyy Production because the plaintiff did not follow the Hague Convention procedures. The court also *sua sponte* determined that the plaintiff's service of process on Abbyy Software was improper.

On appeal, the Federal Circuit reversed the lower court's dismissal of the claims against Abbyy Production for lack of personal jurisdiction "[b]ecause Abbyy Production purposefully directed activities at residents of California, because [the plaintiff's] claims for patent infringement arise out of those activities, and because the assertion of personal jurisdiction is reasonable and fair." *Nuance Communications v. Abbyy Software*, 626 F.3d at 1222, 1236. The court also vacated the district court's dismissal of the claims against Abbyy Software for lack of personal jurisdiction. *See* C.6. below for discussion of issues relating to personal jurisdiction in other litigation. As to service of process, the Federal Circuit held that the lower court had "erred by dismissing the case for improper service of process" and that "[t]he Federal Rules of Civil

Procedure authorize the service of process made in this case." *Id.* at 1228, 1236.

The appeals court vacated the lower court's judgment and remanded for further proceedings consistent with its opinion, with instructions that the district court should "allow alternate service as it deems appropriate, including at least substitute service, pursuant to Rule 4(f)(3), of Abbyy Production by substitute service" on the U.S. defendant. *Id.* at 1240. Excerpts below provide the Federal Circuit's analysis in holding "that the district court erred in requiring service of [defendant] Abbyy Production under the Hague Service Convention." *Id.* For discussion of the service of process requirements of the Foreign Sovereign Immunities Act and related issues, see Chapter 10.A.1.d.

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* * * *

III

* * * *

. . . While Appellees argue that service must have been attempted under the Hague Convention before alternative service methods can be employed, this court disagrees. Rule 4 "was not intended to burden plaintiffs with the [S]isyphean task of attempting service through the Hague Convention procedures when a member state has categorically refused" to effect service. *See Arista Records LLC v. Media Servs. LLC*, No. 06-15319, 2008 WL 563470, at *1 (S.D.N.Y. Feb. 25, 2008). Indeed, numerous courts have found alternate service methods appropriate without a prior attempt to serve through the Hague Convention. *See, e.g.*, *In re LDK Solar Sec. Litig.*, No. 07-05182, 2008 WL 2415186, at *2 (N.D. Cal. June 12, 2008); *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 931 (N.D. Ill. 2009); *Arista Records*, 2008 WL 563470, at *1–2. . . .

. . . Appellees contend that Rule 4 broadly prohibits personal service on a foreign corporation outside the United States, since Rule 4(h)(2) states that service may be made on a corporation outside the United States "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)."

Nuance counters that personal service is appropriate if made under Rule 4(f)(2)(A), which provides for service "as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction."

The Ninth Circuit has observed that "courts have applied Rule 4(f)(2)(A) to approve personal service carried out in accordance with foreign law." *Brockmeyer v. May*, 383 F.3d 798, 806 (9th Cir. 2004). Indeed, numerous courts have upheld personal service on a foreign corporation under Rule 4(f)(2)(A). . . . Thus, a corporation can be served by personal delivery under Rules 4(h)(2) and 4(f)(2)(A), provided that personal delivery is prescribed by the foreign country's laws for service in that country in an action in its courts of general jurisdiction.

Although contested by the parties, this court does not opine on whether the laws of the Russian Federation permit Nuance to personally serve Abbyy Production in its courts of general jurisdiction. Nor do we opine on the effect of the Russian Federation's objection to service of documents by methods listed in Articles 8 and 10 of the Hague Service Convention, which generally covers service by postal channels and through judicial officers or diplomatic and consular agents. *See* 20 U.S.T. 361, T.I.A.S. No. 6638, Art. 10.

Under Rule 4(f)(3), federal courts have discretionary authority to direct service "by other means not prohibited by international agreements." Fed. R. Civ. P. 4(f)(3); *Brockmeyer*, 383 F.3d at 805 (emphasis omitted). "Rule 4(f)(3) is not subsumed within or in any way dominated by Rule 4(f)'s other subsections; it stands independently, on equal footing." *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002). The Advisory Committee Note to Rule 4 explains that Rule 4(f)(3) is particularly appropriate where a signatory to the Hague Service Convention has "refused to cooperate for substantive reasons." Fed. R. Civ. P. 4, Advisory Committee Note to Subdivision (f) (1993). The Advisory Committee Note further explains that service under 4(f)(3) might be justified when the foreign country's central authority "refuses to serve a complaint seeking punitive damages or to enforce the antitrust laws of the United States." *Id.*

Courts have authorized a wide variety of alternative methods of service under Rule 4(f)(3). *See Rio Props.*, 284 F.3d at 1016–19. One of these, substituted service, was expressly requested by Nuance in opposing the Abbyy defendants' motion to dismiss. Federal courts in California have authorized substituted service under Rule 4(f)(3) on California entities for foreign defendants, including foreign corporations. . . .

Substituted service under Rule 4(f)(3) has also been specifically used to serve litigants from the Russian Federation in multiple U.S. courts. *See*, *e.g.*, *In re Potash*, 667 F. Supp. 2d at 931–32 (directing substitute service of Russian defendants by four alternative methods including service on U.S. affiliate); *Arista Records*, 2008 WL 563470, at *1 (directing substitute service of process on Russian corporation's attorneys in New York City under Rule 4(f)(3)); *RSM Prod. Corp. v. Fridman*, No. 06-11512, 2007 WL 2295907, at *3 (S.D.N.Y. Aug. 10, 2007) (directing substitute service of process on Russian defendant's attorneys in New York City).

* * * *

6. Personal Jurisdiction Over Foreign Entities in U.S. Courts

On September 28, 2010, the U.S. Supreme Court granted certiorari in two cases raising the issue of the extent of a state court's authority to exercise personal jurisdiction over a nonresident overseas entity in a products-liability lawsuit brought by a resident of that state. *Goodyear Lux. Tires, S.A. v. Brown*, No. 20-76, 131 S. Ct. 63 (2010); *J. McIntyre Machinery v. Nicastro*, No. 09-1343, 131 S. Ct. 62 (2010). The Court decided that the two cases would be argued in tandem.

On November 19, 2010, the United States submitted a brief as *amicus curiae* to the Court, expressing support for the petitioners in *Goodyear Lux. Tires, S.A. v. Brown*. The respondents in the case sued indirect subsidiaries of The Goodyear Tire and Rubber Company ("Goodyear U.S.A.") incorporated in Luxembourg, Turkey, and France in a North Carolina court. The respondents alleged that the failure of a tire that Goodyear U.S.A.'s Turkish subsidiary had manufactured and that all of

the petitioners had designed and distributed had caused a bus accident in France that killed two visiting North Carolina youths. On February 10, 2009, the North Carolina court of appeals affirmed the state trial court's order denying the foreign subsidiaries' motion to dismiss for lack of personal jurisdiction. The court of appeals reasoned that it could assert general personal jurisdiction over those defendants—that is, jurisdiction over the defendants in a suit based on events occurring anywhere in the world, irrespective of those events' connection to the state—because the defendants had placed their products into a "stream of commerce" through which some tires (although not the particular tires involved in the French accident) had reached the state.

In its *amicus* brief in the Supreme Court, the government argued that the Court should reverse the North Carolina appeals court's judgment. The government's brief made three points. First, the government argued that the North Carolina courts could not exercise specific jurisdiction over the foreign subsidiaries (petitioners in the Supreme Court) because the suit "does not arise out of or relate to petitioners' contacts with North Carolina because all of petitioners' alleged acts and omissions in connection with the deaths of respondents' decedents occurred outside that State." Second, and more extensively, the government argued that the respondents had failed to demonstrate that the petitioners had engaged in the "continuous and systematic contacts" with North Carolina necessary to meet the Supreme Court's test for determining when a court may exercise general jurisdiction. In that context, the government underscored its view that the appeals court "fundamentally erred" by using the "stream of commerce" concept "in determining whether the petitioners were subject to *general* jurisdiction in North Carolina" because the "stream of commerce" concept is part of the "test for the permissible exercise of *specific* jurisdiction." Third, the government emphasized to the Court that "[t]he state appellate court's reasoning and result here potentially threaten the United States' foreign trade and diplomatic interests."

Excerpts below from the government's brief describe the Supreme Court's tests for determining when a court may exercise specific or general jurisdiction. Additional excerpts below summarize the U.S. argument that neither specific nor general jurisdiction is available in this case and detail U.S. concerns about the negative implications for U.S. trade and foreign affairs interests of a state court's exercising general jurisdiction in situations like the one at issue. (Footnotes and citations to the petition are omitted.) The full text of the government's brief is available at *www.justice.gov/osg/briefs/2010/3mer/1ami/2010-0076.mer.ami.pdf*. The Court's decision was pending as of the end of 2010.*

* * * *

STATEMENT

1. "The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108 (1987) (opinion of O'Connor, J.). . . .

In delineating the types of contacts that may permit a forum to exercise personal jurisdiction over a defendant, this Court has distinguished between "specific jurisdiction" and "general jurisdiction." See *Helicopteros* [*Nacionales de Colombia, S.A., v. Hall*, 466 U.S. 404, 414 & nn.8–9 (1974)]; see also *Calder v. Jones*, 465 U.S. 783, 786–787 (1984). Specific jurisdiction is the exercise of "personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros*, 466 U.S. at 414 n.8. By contrast, a State's assertion of general jurisdiction over a defendant potentially subjects the defendant to

* Editor's note: The Court heard oral arguments on January 11, 2011. On June 27, 2011, the Supreme Court issued a unanimous opinion reversing the judgment of the North Carolina Court of Appeals. *Goodyear Lux. Tires, S.A. v. Brown*, 131 S. Ct. 2946 (2011). The Court held that, under the Due Process Clause of the Fourteenth Amendment, in this case the state court could not exercise personal jurisdiction over the foreign subsidiaries of Goodyear USA. The Court's decision was consistent with the brief submitted by the United States.

a broader range of suits because general jurisdiction extends to cases "not arising out of or related to the defendant's contacts with the forum." *Id.* at 414 n.9; see generally 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1067.5, at 499 n.5 (3d ed. 2003) (Wright & Miller).

This Court has specified different prerequisites for the exercise of specific and general jurisdiction. The determination whether a state court may exercise specific jurisdiction in a particular case turns on the "relationship among the defendant, the forum, and the litigation." *Helicopteros*, 466 U.S. at 414 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). Thus, a forum may assert specific jurisdiction over a defendant "if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King* [*v. Rudzewicz,* 471 U.S. 462, 471, 472–473 (1985)] (quoting *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984), and *Helicopteros*, 466 U.S. at 414). That test is ordinarily satisfied if a corporation "'delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State' and those products subsequently injure forum consumers." *Id.* at 473 (quoting *World-Wide Volkswagen* [*Corp. v. Woodson*, 444 U.S. 286, 298 (1980)].

Establishing general jurisdiction is in one respect easier, and in another respect more difficult, than establishing specific jurisdiction. To establish general jurisdiction, the plaintiff need not demonstrate any link between the forum State and the events that gave rise to the suit. For purposes of general jurisdiction, however, it is not sufficient that the defendant directed its goods into the stream of commerce with the expectation that they would be purchased in the forum State. Rather, a defendant can be subjected to general jurisdiction only in a State with which it has "the kind of continuous and systematic general business contacts" that satisfy due process concerns. *Helicopteros*, 466 U.S. at 416.

* * * *

SUMMARY OF ARGUMENT

A. The North Carolina courts cannot properly exercise specific jurisdiction in this case because respondents' suit does not "arise[]

out of or relate[] to [petitioners'] contacts with [North Carolina]." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). Nothing about the bus accident or the tire at issue relates to petitioners' contacts with North Carolina. And neither North Carolina's interest in providing a forum for the suit, nor the fact that other tires unrelated to the accident have entered North Carolina, provides a legally sufficient basis for the exercise of specific jurisdiction here.

B. A State may assert general personal jurisdiction over a defendant consistent with the Due Process Clause of the Fourteenth Amendment when "the foreign corporation, through its [agent] 'ha[s] been carrying on in [the forum State] a continuous and systematic * * * part of its general business.'" *Helicopteros*, 466 U.S. at 415 (quoting *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952)). The North Carolina Court of Appeals held that defendants establish "continuous and systematic contacts" with a forum when they "engage in acts by which they purposefully avail themselves of the privilege of conducting activities within the forum State." That was error. This Court has consistently used the latter standard only when evaluating a State's exercise of specific jurisdiction, while the "continuous and systematic" contacts test has long been associated with a State court's exercise of general jurisdiction. The distinction between the two tests is essential because the concept of specific jurisdiction would serve no practical purpose if the test for personal jurisdiction in *all* suits against a defendant (general jurisdiction) were the same as the test in suits based on forum-directed conduct (specific jurisdiction).

Under the "continuous and systematic" contacts test, North Carolina's courts may not permissibly exercise general jurisdiction over petitioners. Petitioners appear to have established no physical presence in North Carolina, and the facts on which the state courts relied do not amount to "continuous and systematic" contacts. The distribution of petitioners' goods into North Carolina was not petitioners' own undertaking; the DOT markings on the tire are not themselves contacts with the State; and petitioners' status as subsidiaries of a United States corporation reveals little about their contacts with North Carolina. Even taken together, those facts merely reflect petitioners' participation in the ordinary channels of

interstate and foreign commerce; they are not systematic corporate activity of the kind this Court has found to support a State's exercise of general jurisdiction.

* * * *

ARGUMENT

* * * *

C. A State Court's Exercise Of General Jurisdiction Over Non-United States Corporations In Circumstances Like Those Presented Here Would Undermine The United States' Foreign Trade And Foreign Affairs Interests

1. With respect to certain questions of personal jurisdiction that are largely not presented here, the interests of the United States are served by permitting suits against foreign entities to go forward in domestic courts. . . .

* * * *

2. The state courts' assertions of general jurisdiction over petitioners here present quite different considerations, particularly with regard to the United States' foreign trade and foreign relations interests. If broadly construed and adopted by other States, the North Carolina courts' reasoning in this case would significantly increase the exposure of non-United States businesses to lawsuits not arising out of or related to those businesses' contacts with the forum State. At the extreme, state courts could entertain a broad range of litigation wholly unconnected to the United States.

Although the plaintiffs in this case are North Carolina residents, and the North Carolina Court of Appeals noted the State's "interest in providing a forum in which its citizens are able to seek redress," the residence of the plaintiffs is irrelevant to a proper general-jurisdiction analysis, and the state appellate court did not suggest that this factor was essential to its holding. If this suit had been brought instead by a French citizen injured in the bus accident, the state appellate court might have ordered the case dismissed based on generalized fairness concerns, or perhaps on forum non conveniens principles. Nothing in the "purposeful

availment" standard would require that result, however, and the possibility that some suits might be dismissed on more amorphous rationales would provide little predictability to non-United States businesses seeking to ascertain the jurisdictional consequences that particular commercial activities would entail.

The North Carolina courts' exercise of jurisdiction here exceeds what many nations would recognize as reasonable. For example, the Restatement (Third) of the Foreign Relations Law of the United States (1986) (Restatement) identifies as "reasonable" certain "exercise[s] of jurisdiction to adjudicate." Restatement § 421(2), at 305. When the defendant is an artificial entity, an exercise of general jurisdiction is reasonable under the Restatement view if the "juridical person[] is organized pursuant to the law of the state" or "regularly carries on business in the state." *Id.* § 421(2)(e) and (h) at 305–306; see *id.* § 421 reporter's note 3, at 310 (discussing general and specific jurisdiction). By contrast, the *Restatement* recognizes only specific jurisdiction as reasonable if "the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state." *Id.* § 421(2)(j) at 306. Insofar as other nations apply similar jurisdictional principles, they might object to the state courts' exercise of general jurisdiction in this case.

With respect to both imports and exports, the repercussions of such objections could be particularly damaging to the United States' foreign trade relations. The state court's decision creates an obvious disincentive for foreign manufacturers to allow their goods to be distributed in the United States. Any resulting diminution in import traffic would harm United States residents, who would otherwise benefit from a broader range of available goods. If the situation were reversed, a United States corporation concerned about potentially having to answer abroad for its conduct anywhere in the world might be dissuaded from exporting its products. Any resulting diminution of export traffic would be especially undesirable in light of the importance of increased exports to the Nation's long-term economic health. See, *e.g.,* Exec. Order No. 13,534, § 1, 75 Fed. Reg. 12,433 (2010) ("A critical component of stimulating economic growth in the United States is ensuring that U.S. businesses can actively participate in international markets by increasing their

exports of goods, services, and agricultural products. Improved export performance will, in turn, create good high-paying jobs.").

The state courts' identification of the DOT-approved markings on the tire at issue as a factor supporting jurisdiction could pose an additional threat to United States interests. The United States has sought to encourage its trading partners to accept United States standards-related measures—which include United States technical measures and results of United States testing and inspection processes known formally as "conformity assessment procedures"—as sufficient to meet their own requirements. For example, the United States seeks to negotiate agreements providing for other governments to accept as equivalent United States standards-related measures for certain goods. See U.S. Trade Rep., *2010 Report on Technical Barriers to Trade* 28–30. Indeed, several of the United States' trade agreements recognize the benefits of encouraging equivalence. [Editor's note: For discussion of trade-related developments in 2010, see Chapter 11.B.–D.]

More specifically, in determining whether particular motor vehicle parts, including tires, can permissibly be imported, a number of countries treat compliance with DOT standards, including through use of DOT markings, as evidence that the products are safely manufactured. The adoption of United States standards-related measures by our trading partners lowers trade barriers for United States manufacturers wishing to export their products, since those manufacturers are often already compliant with those standards-related measures. Decisions like the state court's rulings here, however, could reduce the willingness of foreign manufacturers to certify their products as complying with standards and procedures in use in the United States, out of fear that such markings could subject them to general jurisdiction in state courts in the United States. That reluctance could in turn deter other countries from adopting United States standards-related measures, thereby potentially creating barriers to the export of goods manufactured in the United States.

Finally, foreign governments' objections to our state courts' expansive views of general personal jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments. See, *e.g.*, Friedrich

K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 161–162 ("[T]he broad sweep of American general jurisdiction became problematic when this country began to negotiate with other nations for an international judgments recognition convention under the auspices of the Hague Conference on Private International Law."). The conclusion of such international compacts is an important foreign policy objective of the United States because such agreements serve the United States' interest in providing its residents a fair, predictable, and stable system for the resolution of disputes that cross national boundaries. Reversal of the state court's judgment, in accordance with this Court's precedents, would thus serve the diplomatic interests of the United States.

7. International Comity

On July 9, 2010, the U.S. District Court for the Southern District of New York issued a decision and order granting the plaintiffs' renewed motion for summary judgment on a common-law fraud claim, denying the defendants' renewed cross-motion for summary judgment, and granting the plaintiffs' motion to amend the complaint. *Maersk, Inc. v. Neewra, Inc.*, 05 Civ. 4356 (CM), 2010 U.S. Dist. LEXIS 69863 (2010). The court explained that on December 17, 2009, it had issued its first summary judgment opinion, concluding

> that the undisputed facts establish that [the defendants, Joginder Singh Sahni and Dawood Tajuddin Parker] knowingly participated in the "Neewra Fraud"—an international scheme to defraud [the plaintiffs, A.P. Moller-Maersk and Maersk, Inc.] in connection with a cargo shipment from New Jersey to Kuwait. However, the Court declined to grant summary judgment for Maersk on its common-law fraud claim arising out of the Neewra shipment because of the potential preclusive effects of a judgment obtained by Neewra, Inc. in Kuwaiti court holding Maersk responsible for the value of the lost Neewra cargo."

Maersk, Inc. v. Neewra, Inc., 2010 U.S. Dist. LEXIS 69863, at *2–3. The parties had not addressed the Kuwaiti proceedings

in their initial filings. In its July 2010 decision, the court determined that comity should not be granted to proceedings in Kuwait because of various deficiencies in those proceedings. Excerpts follow from the court's discussion of the principles of international comity.

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* * * *

B. Principles of International Comity

"The decision to grant comity is a matter within a court's discretion and the burden of proof to establish its appropriateness is on the moving party." *In re Perry H. Koplik & Sons, Inc.*, 377 B.R. 69, 75 (S.D.N.Y. 2007) (citing *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993)). Here, Moving Defendants Joginder and Parkar bear the burden of demonstrating that comity should be extended to the Kuwaiti proceedings.

In *Hilton v. Guyot*, 159 U.S. 113 (1895), the seminal case in this area, the Supreme Court defined comity as "the recognition which one nation allows within its Territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* at 164. The *Hilton* Court held that it is appropriate to recognize and enforce a foreign judgment when

> 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.

Id. at 202; see *Apostolou v. Merrill Lynch & Co.*, No. 06 Civ. 4944, 2007 U.S. Dist. LEXIS 74682, at *12 (E.D.N.Y. Sept. 28, 2007); *Alesayi Beverage Corp. v. Canada Dry Corp.*, 947 F. Supp. 658, 663 (S.D.N.Y. 1996).

Thus, in accordance with the principles set forth in *Hilton*, deciding whether deference as a matter of comity is appropriate "often entails consideration of the fairness of a foreign adjudicating system," although "a case-specific inquiry is sometimes appropriate." *Diorinou v. Mezitis*, 237 F.3d 133, 143 (2d Cir. 2001) (citing *Hilton*, 159 U.S. at 202)). "[A] particular case may disclose such defect as to make the particular judgment not entitled to recognition." *Id.* ("quoting *Restatement (Third) of Foreign Relations* 482 ct. b. (1987)). Comity should only be extended if "the foreign court abide[d] by 'fundamental standards of procedural fairness.'" See *In re Parmalat Sec Litig.*, 493 F. Supp. 2d 723, 737 n.74 (S.D.N.Y. 20007) (Kaplan, J.) (quoting *Cunard S.S. Co. v. Salen Reefer Serv. AB*, 773 F.2d 452, 457 (2d Cir. 1985)); accord 30 *Am. Jur. 2d Executions* 671 ("In order for comity to be extended to a foreign judgment, the foreign court must have abided by fundamental standards of procedural fairness.").

The Second Circuit has stated that the "internationalization of commerce requires 'that American courts recognize and respect the judgments entered by foreign courts to the greatest extent consistent with our own ideals of justice and fair play.'" *Ackermann v. Levine*, 788 F.2d 830, 845 (2d Cir. 1986)(quoting *Tahan v. Hodgson*, 662 F.2d 862, 868, 213 U.S. App. D.C. 306 (D.C. Cir. 1981)). Accordingly, "American courts will normally accord considerable deference to foreign adjudications as a matter of comity." *Diorinou*, 237 F.3d at 142. "In some cases, this deference leads a domestic court to adopt a foreign tribunal's previous resolution of a particular legal or factual issue thus precluding parties to a foreign litigation from rearguing, in United States courts, matters previously resolved in the foreign forum." *Films by Jove, Inc. v. Berov*, 250 F. Supp. 2d 156, 191 (E.D.N.Y. 2003).

However, "deference to a foreign adjudication as a matter of comity is by no means automatic." *Id.* "Although more than mere courtesy and accommodation, comity does not achieve the force of

an imperative or obligation." *Cunard*, 773 F.2d at 457 (quoting *Somportex Ltd. v. Phila. Chewing Gum Corp.,* 453 F.2d 435, 440 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972). Ultimately, "it is primarily principles of fairness and reasonableness that should guide domestic courts in their preclusion determinations." *Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 905 F. Supp. 169, 179 (S.D.NY. 1995) (Sand, J.); accord *Films by Jove*, 250 F. Supp. 2d at 17677; *Alesayi Beverage Corp.*, 947 F. Supp. at 663.

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Cross References

International adoption and child abduction, **Chapter 2.B.**
Foreign Sovereign Immunities Act, **Chapter 10.A.1.**

Chapter 16

Sanctions, Export Controls, and Certain Other Restrictions

A. IMPOSITION, IMPLEMENTATION, AND MODIFICATION OF SANCTIONS, EXPORT CONTROLS, AND CERTAIN OTHER RESTRICTIONS

This chapter discusses selected developments during 2010 relating to sanctions, export controls, and certain other restrictions relating to travel or U.S. government assistance. It does not cover developments in many of the United States' longstanding financial sanctions regimes, which are discussed in detail at *www.treasury.gov/resource-center/sanctions/Pages/default.aspx*. It also does not cover comprehensively developments relating to the export control programs administered by the Commerce Department or the defense trade control programs administered by the State Department. Detailed information on the Commerce Department's activities relating to export controls is provided in the U.S. Department of Commerce, Bureau of Industry and Security's Annual Report to the Congress for Fiscal Year 2010, available at *www.bis.doc.gov/news/2011/bis_annual_report_2010.pdf*. Details on the State Department's defense trade control programs are available at *www.pmddtc.state.gov*.

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1. Democratic People's Republic of Korea ("DPRK" or "North Korea")

a. Executive Order 13551

On August 30, 2010, President Barack H. Obama issued Executive Order 13551, "Blocking Property of Certain Persons With Respect to North Korea." Acting under the authority of the Constitution and U.S. laws including the International Emergency Economic Powers Act ("IEEPA"), the National Emergencies Act, § 5 of the United Nations Participation Act of 1945, as amended ("UNPA"), 22 U.S.C. § 287c, and 3 U.S.C. § 301, and in view of UN Security Council Resolutions 1718 (2006) and 1874 (2009), the President expanded the scope of the national emergency declared in Executive Order 13466 of June 26, 2008, based on his determination that

> the continued actions and policies of the Government of North Korea, manifested most recently by its unprovoked attack that resulted in the sinking of the Republic of Korea Navy ship *Cheonan* and the deaths of 46 sailors in March 2010; its announced test of a nuclear device and its missile launches in 2009; its actions in violation of UNSCRs 1718 and 1874, including the procurement of luxury goods; and its illicit and deceptive activities in international markets through which it obtains financial and other support, including money laundering, the counterfeiting of goods and currency, bulk cash smuggling, and narcotics trafficking, destabilize the Korean peninsula and imperil U.S. Armed Forces, allies, and trading partners in the region, and thereby constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.

Section one of the executive order blocks property and interests in property of certain individuals and entities, as set forth below. The annex to the executive order listed three North

Korean entities and one North Korean national, who are subject to the sanctions set forth in section one of the order.

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* * * *

Section 1. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any overseas branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) the persons listed in the Annex to this order; and
(ii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:
  (A) to have, directly or indirectly, imported, exported, or reexported to, into, or from North Korea any arms or related materiel;
  (B) to have, directly or indirectly, provided training, advice, or other services or assistance, or engaged in financial transactions, related to the manufacture, maintenance, or use of any arms or related materiel to be imported, exported, or reexported to, into, or from North Korea, or following their importation, exportation, or reexportation to, into, or from North Korea;
  (C) to have, directly or indirectly, imported, exported, or reexported luxury goods to or into North Korea;
  (D) to have, directly or indirectly, engaged in money laundering, the counterfeiting of goods or currency, bulk cash smuggling, narcotics trafficking, or other illicit economic activity that involves or supports the Government of North Korea or any senior official thereof;
  (E) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the activities described in subsections (a)(ii)(A)–(D) of this section or

any person whose property and interests in property are blocked pursuant to this order;

(F) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order; or

(G) to have attempted to engage in any of the activities described in subsections (a)(ii)(A)–(F) of this section.

(b) I hereby determine that, to the extent section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) may apply, the making of donations of the types of articles specified in such section by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order would seriously impair my ability to deal with the national emergency declared in Executive Order 13466 and expanded in scope in this order, and I hereby prohibit such donations as provided by subsection (a) of this section.

(c) The prohibitions in subsection (a) of this section include, but are not limited to:

(i) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and

(ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

(d) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

* * * *

On August 30, 2010, Stuart Levey, then Under Secretary of the Treasury for Terrorism and Financial Intelligence, issued a statement providing additional context on the new

order and discussing the entities and individuals listed in the annex. Mr. Levey's remarks, excerpted below, are available in full at *www.treasury.gov/press-center/press-releases/Pages/tg841.aspx*. *See also* the Treasury Department's fact sheet on the new order, available at *www.treasury.gov/press-center/press-releases/Pages/tg839.aspx*.

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The world by now is well aware of the North Korean government's record of illicit activity and its belligerent behavior. . . .

The destructive course that the North Korean government is charting is facilitated by a lifeline of cash generated through a range of illicit activities. North Korea's government helps maintain its authority by placating privileged elites with money and perks, such as luxury goods like jewelry, luxury cars, and yachts. Not only do these transactions contravene UNSCR 1718, they are unconscionable in light of the fact that many of North Korea's people live in dire poverty. The North Korean government receives millions of dollars every year from arms sales also outlawed by UN Security Council Resolutions. North Korea has been caught several times making these illicit arms sales, including to Iran and Syria. The North Korean government also benefits from illicit activities, such as drug trafficking, counterfeiting U.S. currency, and selling counterfeit cigarettes. All of this activity makes up a crucial portion of the North Korean government's revenues.

These activities are carried out by a global financial network that generates this income and procures the luxury goods for the government of North Korea. That network is addressed directly by the President's actions today. The President has identified for sanctions a key piece of this network, Office 39, a secretive branch of the North Korean government that manages slush funds and raises money for the leadership, including by trafficking drugs.

Also targeted for sanctions today by the President are key elements of North Korea's infrastructure for importing and exporting conventional arms: Green Pine Associated Corporation, and its parent, the Reconnaissance General Bureau, and the Bureau's

commander, Lt. Gen. Kim Yong Chol. Green Pine is responsible for approximately half of the arms and related materiel North Korea exports, and has taken over many of the activities of another North Korean entity, KOMID, which was sanctioned by the U.S. for its involvement in proliferation-related activities in 2005 and listed for sanctions by the United Nations in 2009.

These measures are not directed at the people of North Korea, who, as Secretary Clinton has said, have suffered too long due to the misguided priorities of their government. Instead, the financial measures the President took today, as well as additional actions we will take in the weeks and months to come, are aimed at disrupting North Korea's efforts to engage in illicit activities and its ability to surreptitiously move its money by deceiving banks and smuggling cash worldwide.

The activities we are targeting in this new sanctions program are violations of UN Security Council Resolutions or other international norms. . . .

* * * *

On November 4, 2010, OFAC issued the "North Korea Sanctions Regulations," 31 C.F.R. Part 510, to implement the new order and Executive Order 13466 of June 26, 2008. 75 Fed. Reg. 67,912 (Nov. 4, 2010). On November 18, 2010, OFAC designated two additional North Korean entities, Korea Daesong Bank and Korea Daesong General Trading Corporation, pursuant to the new order. 75 Fed. Reg. 71,794 (Nov. 24, 2010). The Department of the Treasury issued a press release on the same day, which explained that the two entities were designated for being owned or controlled by Office 39 of the Korean Workers' Party, an entity listed in the annex to the new order. The press release is available at *www.treasury.gov/press-center/press-releases/Pages/tg962.aspx*.

b. Sanctions under Executive Order 13382

During 2010, the United States imposed sanctions on North Korean entities, including ones with links 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.

The order authorizes both the Secretary of State and the Secretary of the Treasury, based on different standards, to designate persons as subject to the order's financial sanctions. Section 1(a)(ii) of the order authorizes the Secretary of State to designate foreign persons that she determines, in consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies,

> to have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer or use such items, by any person or foreign country of proliferation concern.

Subsections (a)(iii) and (iv) of § 1 of the order authorize the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to designate any person that he determines

> (iii) . . . to have provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, any activity or transaction described in paragraph (a)(ii) of this section, or any person whose property and interests in property are blocked pursuant to this order; [and]
>
> (iv) . . . to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

70 Fed. Reg. 38,567 (July 1, 2005); *see also Digest 2005* at 1125–31.

On August 30, 2010, the Department of State designated three North Korean entities, the Second Academy of Natural Sciences ("SANS"), the Second Economic Committee ("SEC"), and the Munitions Industry Department ("MID"), for their role in supporting North Korea's weapons of mass destruction program. 75 Fed. Reg. 54,689 (Sept. 8, 2010). On August 30, 2010, the Treasury Department's Office of Foreign Assets Control ("OFAC") designated two other North Korean entities, Korea Taesong Trading Company and Korea Heungjin Trading Company, and three North Korean individuals, Ri Je-son, Ri Hong-sop, and Yun Ho-jin. A Treasury Department press release issued on August 30, available at *www.treasury.gov/press-center/press-releases/Pages/tg840.aspx*, described the newly designated entities and individuals, including their links to entities and individuals previously designated for sanctions by the United States or the Security Council's 1718 Committee or both.

2. Iran

a. Overview

In 2010, the United States continued to pursue its dual-track approach to preventing Iran from gaining a nuclear weapons capability. *See Digest 2009* at 585–90 and 773–74. Together with its international partners, the United States reaffirmed its commitment to engaging Iran diplomatically while imposing extensive new sanctions to respond to Iran's continued inflexibility. On December 1, 2010, William J. Burns, Under Secretary for Political Affairs, Department of State, and Stuart A. Levey, then Under Secretary for Terrorism and Financial Intelligence, Department of the Treasury, testified before the House Foreign Affairs Committee at a hearing concerning "Implementing Tougher Sanctions on Iran: A Progress Report." Excerpts below from Mr. Levey's written testimony provide an overview

of the U.S. strategy in imposing sanctions on Iran in 2010. The full texts of the officials' written statements are available at *www.state.gov/p/us/rm/2010/152222.htm* and *www.treasury.gov/press-center/press-releases/Pages/TG985.aspx*. Additional details on the United States' imposition of sanctions against Iran in 2010 are provided in this section.

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A little more than a year ago, I explained in testimony before Congress that we had developed a strategy to impose substantial costs on the government of Iran if and when the President determined that such pressure was needed to affect Iranian policies. The plan we developed took into account that no single sanction is a "silver bullet" and that we would need to impose a variety of measures simultaneously in order to increase their effectiveness. We also knew that we would need to target several of Iran's vulnerabilities simultaneously, and that we would need to secure the support of the largest possible international coalition of governments and private actors. Finally, because conduct-based financial measures that target illicit actors have proven to be an effective way to build such a broad coalition, we set out to focus our measures, to the extent possible, on Iran's illicit conduct, such as its proliferation of weapons of mass destruction (WMD) and support for terrorism.

By concentrating our sanctions programs on Iran's illicit conduct and its perpetrators—for example, the Islamic Revolutionary Guard Corps (IRGC) and Iran's national maritime carrier, the Islamic Republic of Iran Shipping Lines (IRISL)—we sought to maximize the chances of achieving a truly multinational coalition, because it is difficult for any government, whether an ally or not, to oppose taking action targeted against these types of activities. Equally as important, recognizing the commercial risks associated with doing business with Iran and to protect themselves from being unwitting participants in Iran's illicit conduct, private sector actors willingly implement the financial measures and, in fact, often take steps that go beyond the strict legal requirements. As more banks

and businesses cut off their dealings with risky individuals and entities, the reputational risk increases for those that have not. This encourages additional firms to join in creating a ripple effect that amplifies the effect of sanctions. Moreover, when private sector consensus gels around taking certain actions, governments find it easier to require additional measures. The result is a mutually-reinforcing cycle of governmental and private sector action that isolates bad actors from the legitimate financial system. The effect of this on our targets is significant. When an individual or entity is cut off from access to international financial institutions, their ability to access the commercial sector is significantly affected.

As we designed our strategy, we also knew that Iran would seek to evade the measures we put in place. We therefore sought to create a sanctions program that is specifically adaptive and responsive to Iranian evasion attempts. . . .

* * * *

b. Security Council

(1) Security Council Resolution 1929

On June 9, 2010, the UN Security Council adopted Resolution 1929, which imposed additional sanctions to address Iran's nuclear program, under Article 41 of Chapter VII of the UN Charter. U.N. Doc. S/RES/1929. In a statement to the Security Council after the resolution's adoption, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, described its significance:

> With the passage today of 1929, the Iran sanctions regime now becomes the strongest, most comprehensive sanctions regime in the world today. It imposes binding new bans on Iranian investment abroad in nuclear facilities and activities. It bans whole new categories of weapons to be imported into Iran. It bans Iran's ability to engage in any activities related to ballistic missiles that could be capable of launching nuclear weapons. It imposes asset

> freezes on 40 new entities—more than triple the number of any previous resolution and one individual. It imposes sweeping new restrictions on financial activities, banking activities, including correspondent banking, including insurance and reinsurance that could contribute to Iran's nuclear or proliferation activities. It imposes a comprehensive cargo inspection regime to prevent Iran from continuing to smuggle contraband cargo.

The full text of Ambassador Rice's statement is available at *http://usun.state.gov/briefing/statements/2010/142887.htm*.

A White House fact sheet provided additional details on the important new elements of Resolution 1929, as excerpted below. The full text of the fact sheet is available at *www.whitehouse.gov/the-press-office/fact-sheet-new-un-security-council-sanctions-iran*.*

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1. Ban on Iranian certain nuclear and missile investment abroad. Iran is prohibited from investing in sensitive nuclear activities abroad, like uranium enrichment and reprocessing activities, where it could acquire nuclear technology and know-how, as well as activities involving ballistic missiles capable of delivering nuclear weapons. The ban also applies to investment in uranium mining.

2. Conventional arms ban. States are prohibited from selling or in any way transferring to Iran eight broad categories of heavy weapons (battle tanks, armored combat vehicles, large caliber artillery systems, combat aircraft, attack helicopters, warships, missiles or missile systems). States are similarly prohibited from providing technical or financial assistance for such systems, or spare parts. States are also to exercise vigilance and restraint in supplying any other arms or related materiel to Iran.

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* Editor's note: *See Digest 2006* at 1280–84, *Digest 2007* at 1031–36, and *Digest 2008* at 969–75 for discussion of the Security Council's previous resolutions on Iran (1737 (2006), 1747 (2007), and 1803 (2008)). U.N. Docs. S/RES/1737, S/RES/1747, and S/RES/1803.

3. Ban on ballistic missile activities. Iran is prohibited from undertaking any activity related to ballistic missiles capable of carrying nuclear weapons and States are required to take all necessary measure[s] to prevent the transfer of related technology or technical assistance.

4. Additional items banned for transfer. The resolution updates and adds to the list of technical items related to nuclear and missile proliferation that are banned for transfer to and from Iran.

5. New cargo inspection framework. Iran is subject to a new regime for inspection of suspicious cargo to detect and stop Iran's smuggling. States should inspect any vessel on their territory suspected of carrying prohibited cargo, including banned conventional arms or sensitive nuclear or missile items. States are also expected to cooperate in such inspections on the high seas.

6. New procedures to deal with contraband items. Once prohibited items are found, States are now obligated to seize and dispose of the items.

7. Ban on bunkering services. States are required not to provide critical support services (e.g., fuel, water) to ships suspected of carrying prohibited cargo.

8. Measures to restrict the Islamic Republic of Iran Shipping Lines (IRISL) and Iran Air's cargo division. States must require their nationals to exercise vigilance over IRISL, a known sanctions violator. Three IRISL-related companies will have their assets frozen. States are requested to report any information on activities by IRISL and Iran's Air's cargo division to evade sanctions, including by renaming vessels.

9. New tools to block proliferation finance. States are called upon to prevent any financial service—including insurance or reinsurance—and freeze any asset that could contribute to Iran's proliferation. This broad language will help states take action when there are suspected financial links to Iran's banned nuclear activities.

10. Vigilance over all Iran's companies. States are required to ensure their nationals exercise vigilance when doing business with any Iranian firm, including IRGC and IRISL, to make sure such business does not contribute to Iran's proliferation.

11. New banking measures. States are called upon to prohibit on their territories new banking relationships with Iran, including the opening of any new branches of Iranian banks, joint ventures and correspondent banking relationships, if there is a suspected link to proliferation. States also should prohibit their own financial institutions from opening branches in Iran if there is a suspected link to proliferation.

12. New measures to limit the role of the Islamic Revolutionary Guard Corps (IRGC). The resolution highlights the IRGC's role in proliferation and requires states to mandate that businesses exercise vigilance over all transactions involving the IRGC. Fifteen IRGC-related companies linked to proliferation will have their assets frozen.

13. Targeted sanctions on specific individuals and entities. Forty Iranian companies and one individual will be subject to an asset freeze. The individual—the head of a critical nuclear research program—will also be subject to a travel ban. Thirty-five additional individuals previously subject to "travel vigilance" will now be subject to a travel ban.

14. Appointment of a UN sanctions monitoring panel. A UN "Panel of Experts" will be established to monitor states' implementation of the sanctions, report on sanctions violations and recommend ways to continually improve enforcement.

In addition to imposing these sanctions, the resolution highlights the potential linkage between Iran's energy sector revenues and procurement and its nuclear activities and proliferation. It also stresses the need to exercise vigilance over all Iranian banks—specifically including the Central Bank of Iran—to prevent proliferation-related transactions.

In her statement to the Security Council on June 9, 2010, discussed *supra*, Ambassador Rice provided context for the Security Council's action, as excerpted below. The full text of Ambassador Rice's statement is available at *http://usun.state.gov/briefing/statements/2010/142887.htm*.

. . . Today the Security Council has responded decisively to the grave threat to international peace and security posed by Iran's failure to live up to its obligations under the Nuclear Non-Proliferation Treaty. . . .

As President Obama has said, "Rules must be binding. Violations must be punished. Words must mean something."

The issue is straightforward. We are at this point because the Government of Iran has chosen clearly and willfully to violate its commitments to the IAEA and the resolutions of this Council. Despite consistent and longstanding demands by the international community, Iran has not suspended its uranium enrichment and other proliferation-related activities.

The Security Council has passed a resolution today aimed at reinforcing the need for Iran to take these steps and comply with its obligations. These sanctions are not directed at the Iranian people. Nor do the sanctions seek to stop Iran from the legitimate exercise of its rights under the NPT, in conformity with its obligations. Rather, the sanctions aim squarely at the nuclear ambitions of a government that has chosen a path that will lead to increased isolation.

* * * *

The United States strongly supports the peaceful use of the atom for energy and innovation. Like every nation, Iran has rights, but it also has responsibilities—and the two are inextricably linked.

Iran has shunned opportunity after opportunity to verify the peaceful nature of its nuclear program. In recent months, Iran has given us all more reason—not less—to suspect that its goal is to develop the ability to assemble a nuclear weapon. Last September, the world learned that Iran had secretly built another uranium-enrichment facility at Qom, in clear violation of Security Council resolutions and Iran's IAEA obligations. Last November, Iran announced that it would build 10 more such facilities. In February, Iran said that it would begin to enrich uranium to nearly 20 percent—moving closer to weapons-grade material. In May, the IAEA affirmed yet again that Iran is continuing its banned uranium enrichment and warned that Iran has amassed more than 2,400 kilograms of low-enriched uranium.

The resolution we passed today offers Iran a clear path toward the immediate suspension of these sanctions. The best way is also the easiest one: Iran must fulfill its international obligations, suspend its enrichment-related, reprocessing, and heavy-water-related activities, and cooperate fully with the IAEA. The United States reaffirms our commitment to engage in robust, principled, and creative diplomacy. We will remain ready to continue diplomacy with Iran and its leaders to make it clear how much they have to gain from acting responsibly and how much more they stand to lose from continued recklessness. Today's resolution does not replace those efforts. But it does support them.

* * * *

Last month, 189 countries came together to strengthen the Nuclear Non-Proliferation Treaty as a cornerstone of global security. Today's resolution is an important part of that work. The NPT must remain at the center of our global effort to stop nuclear proliferation even as we pursue the ultimate goal of a world without nuclear weapons.

* * * *

On December 10, 2010, Ambassador Rice addressed the Security Council after the Chairman of the 1737 Committee briefed the Council. Ambassador Rice expressed concern about Iran's continuing noncompliance with its international nonproliferation obligations since the adoption of Resolution 1929. Ambassador Rice also stressed the need for other states to comply with their obligations under the Security Council's resolutions concerning Iran, welcomed the formation of the Panel of Experts to assist in monitoring and improving enforcement of the Council's Iran sanctions regime, and reiterated the U.S. commitment to a dual-track approach to Iran that combines sanctions with diplomatic engagement. Ambassador Rice's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/152638.htm*.

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. . . [U]nfortunately, when it comes to Iran's actions, not much has changed since we last met. Iran continues to violate its obligations to the IAEA and the Security Council. The IAEA Director-General's latest report on Iran, released just a few weeks ago, again underscores Iran's continued refusal to comply with its international nuclear obligations and to cooperate fully with the IAEA. Most notably, the report underscores Iran's ongoing uranium enrichment at 3.5 percent and near-20 percent levels. The report also details Iran's continued construction of a heavy-water research reactor, its refusal to permit the IAEA the access it needs to answer longstanding questions about the Qom enrichment facility, and its non-response to the questions around a possible military dimension to Iran's nuclear program. In sum, the IAEA's latest report records Iran's continued defiance of its international obligations and shows that Iran has yet to take meaningful steps required by this Council and called for by the IAEA Board of Governors.

. . . [W]e must continue to maintain the pressure on Iran to change course. All member states have an obligation to fully implement Security Council obligations. We urge those that have not yet done so to report to the Committee on their national implementation efforts as soon as possible. These Security Council resolutions affirm obligations on Iran with a clear objective: to resolve the international community's concerns about Iran's nuclear activities.

The 1737 Committee and the recently constituted Panel of Experts will help maintain the pressure on Iran by monitoring and improving the implementation and enforcement of the Iran sanctions regime. In particular, we urge the Committee, with the Panel's support, to investigate thoroughly all reported sanctions violations. We commend Nigeria for having seized Iranian arms exported in violation of UN sanctions. We also commend Italy for seizing items that Syria was attempting to procure illicitly from Iran. Investigations into these incidents can help us better understand and to halt Iran's arms smuggling and proliferation networks in violation of this Council's resolutions.

We are pleased that the Panel of Experts is now operational. The Panel is an exceptionally well-qualified team, and we expect

that it will significantly improve our ability to monitor and tighten enforcement.

* * * *

(2) Implementation of Resolution 1929: U.S. report to Security Council

On August 6, 2010, the United States submitted its report on U.S. implementation of Resolution 1929 to the Chairman of the Security Council Committee established pursuant to Resolution 1737 ("1737 Committee"). Excerpts follow from the report's discussion of U.S. measures to fulfill its obligations under paragraphs 7–13, 16, 19, and 22 of Resolution 1929. The U.S. report is available in full at *www.un.org/sc/committees/1737/memberstatesreports.shtml* (U.N. Doc. S/AC.50/2010/7). *See also* A.2.c. below.

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Paragraph 7

The United States trade embargo on Iran is implemented under authorities enacted by Congress, including the Arms Export Control Act, the International Emergency Economic Powers Act, as amended, and the International Security and Development Cooperation Act. With limited exceptions, United States sanctions prohibit United States persons from importing goods or services from Iran or the Government of Iran; from exporting goods, services, or technology to Iran or the Government of Iran; and from investing in Iran. The sanctions also prohibit United States persons from facilitating such transactions by third parties who are not United States persons. In addition, non-United States persons are generally prohibited from exporting goods, technology, or services from the United States to Iran or the Government of Iran and from re-exporting to Iran or the Government of Iran certain sensitive United States-origin goods, technology, and services.

The United States also continues to work with its international partners to urge full implementation of this provision and

to prevent Iran from gaining access to uranium supplies around the world. This includes close bilateral consultations with our foreign counterparts on this particular provision of resolution 1929 (2010), as well as other provisions, such as paragraph 3 of resolution 1737 (2006).

For example, the United States works with multilateral export control regimes, such as the Nuclear Suppliers Group and the Missile Technology Control Regime to prevent transfers to Iran of technical training, advice, services or assistance related to the provision, manufacture, maintenance or use of the equipment and materials in paragraph 7 of this resolution. By building national interdiction capacities and increasing national legal authorities, we see activities such as the Proliferation Security Initiative as critical tools that support the international effort aimed at preventing and disrupting shipments of weapons of mass destruction and their means of delivery.

The United States also takes note of the 17th preambular paragraph regarding the common equipment between nuclear and petrochemical industries. In this respect, the United States also uses relevant United States authorities, including the Arms Export Control Act and the International Emergency Economic Powers Act, to prohibit the transfer of both dual use items listed in INFCIRC/254/Rev.7/Part 2, as well as other equipment that could potentially be used in Iran's nuclear program.

* * * *

Paragraph 8

The Iranian Transactions Regulations implement a series of Executive Orders issued pursuant to the authorities of the International Emergency Economic Powers Act and the International Security and Development Cooperation Act. These Executive Orders impose comprehensive trade and financial sanctions on Iran . . . . With limited exceptions, the Iranian Transactions Regulations prohibit United States persons from importing goods or services from Iran or the Government of Iran; from exporting goods, services, or technology to Iran or the Government of Iran; and from investing in Iran. The Iranian Transactions Regulations also prohibit United States persons from facilitating such transactions by third parties

who are not United States persons. In addition, non-United States persons are generally prohibited from exporting goods, technology, or services from the United States to Iran or the Government of Iran and from re-exporting to Iran or the Government of Iran certain sensitive United States-origin goods, technology, and services. Executive Order 13382 (E.O. 13382, "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters") . . . allows the United States to block or "freeze" the property and interests in property within the United States, or in the possession or control of United States persons, of persons determined to be weapons of mass destruction proliferators and their supporters. As a result of these laws, the United States does not permit the export to Iran of any items that could contribute to Iran's conventional arms or missile programs, including those covered by resolution 1929 (2010) and its predecessors.

In addition, under the Iran, North Korea and Syria Nonproliferation Act, "credible information indicating" a transfer of items covered under the multilateral control regimes either to or from Iran, North Korea, or Syria by non-United States entities triggers a report to Congress and possible sanctions on those entities. The United States also works with like-minded countries, including through such means as the Wassenaar Arrangement, to develop best practices to prevent the transfer of technical training, advice, services or assistance related to the provision, manufacture, and maintenance of conventional arms. The United States also works with the Missile Technology Control Regime to prevent the transfer of missile-related equipment, materials, software, and related technology to or from Iran that could contribute to the development or production of missiles.

Paragraph 9

The United States does not permit the export or re-export of any items that could contribute to Iran's missile programs. Relevant United States authorities include the Arms Export Control Act and the International Emergency Economic Powers Act. . . . [T]he United States also works with like-minded countries, including through the Missile Technology Control Regime, to prevent the transfer of missile-related equipment, materials, software, and

related technology to Iran that could contribute to the development or production of missiles.

Paragraph 10

The implementation of the travel ban for persons listed in annex II to resolution 1929 (2010), as well as the relevant annexes and provisions of resolutions 1737 (2006), 1747 (2007), and 1803 (2008) noted above, is addressed through the United States Department of State's targeted visa review process under the Immigration and Nationality Act, which focuses on individuals reasonably believed to be seeking entry into the United States to engage in an activity to violate or evade United States export control laws. Under these provisions, any requests by relevant individuals designated in accordance with the resolution for visas to travel to or through the United States would be denied. . . . Furthermore, under United States law, aliens reasonably believed to be seeking entry into the United States to engage in an activity in violation of United States law or to evade United States export controls or other laws are inadmissible.

In addition, under the Controlled Port Access and Special Interest Program (annex I) of the Maritime Operational Threat Response for the National Strategy for Maritime Security (June 2006), Iran is listed as a non-entrant country. The program denies vessels access to the internal waters and ports of the United States if they are flying the flag of a non-entrant country or have a member of their crew who is a citizen of a non-entrant country, unless such person possesses a valid United States visa. In addition, vessels with any other person on board who is a citizen or resident of a non-entrant country and denied entry through the Maritime Operational Threat Response process in a specific case, will also be considered a non-entrant under the program.

Paragraph 11

The national authority carried out under Executive Order 13382 allows the United States to implement this provision. . . . [Editor's note: The section of the report under the heading "Paragraph 8," *supra*, provides details on Executive Order 13382.]

. . . [T]he United States had already frozen the assets of 12 of the 22 entities in annex I of resolution 1929 (2010) prior to its adoption. . . .*

* * * *

The United States will continue to take measures to fully implement its obligations under the resolution and work to designate the remaining individuals and entities identified in the annexes of resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1929 (2010).

Paragraph 12

Under the authorities of Executive Order 13382 and the International Emergency Economic Powers Act, the United States designated the Islamic Revolutionary Guard Corps on 25 October 2007. . . . This national authority also allows the United States to implement effectively the provisions set forth in operative paragraph 12 of resolution 1929 (2010). . . .**

With respect to this provision, the United States also takes note of the 6th preambular paragraph of resolution 1929 (2010) and the Islamic Revolutionary Guard Corps' role in the development of Iran's sensitive nuclear activities and the development of nuclear weapon delivery systems. The United States will continue to monitor the Islamic Revolutionary Guard Corps, as well as other entities related to Iran's nuclear and missile programs, and will make designations as warranted under the authorities noted above.

Paragraph 13

The United States does not permit the export or re-export of any items that could contribute to Iran's nuclear programs. This includes all of the items specifically listed in documents INFCIRC/254/Rev.9/Part 1, INFCIRC/254/Rev.7/Part 2, and S/2010/263. The United States also works with like-minded countries, including through the Nuclear Suppliers Group, the Zangger Committee, the Proliferation Security Initiative, and through outreach programs to non-member countries. The goal is to prevent the transfer

* Editor's note: *See* A.2.c.(2) for discussion of U.S. designations of entities and individuals pursuant to Executive Order 13382 in 2010.

** Editor's note: *See* Editor's note * *supra*.

of nuclear and nuclear-related equipment, materials, software and related technology to or from Iran that could contribute to the development, production or delivery of nuclear weapons. Relevant United States authorities include the Arms Export Control Act and the International Emergency Economic Powers Act.

* * * *

Paragraph 16

As an integral part of the efforts described in previous paragraphs, the United States cooperates closely with partner States to seize and dispose of any prohibited cargoes that are discovered during inspections conducted under the provisions of resolution 1929 (2010).

* * * *

Paragraph 19

Under the authorities of Executive Order 13382 and the International Emergency Economic Powers Act, the United States designated IRISL and 17 other entities controlled by or acting or purporting to act on behalf of IRISL on 10 September 2008. Other IRISL-related entities have been designated subsequently under Executive Order 13382. All three entities included in annex III of resolution 1929 (2010) were so designated on 10 September 2008, prior to the adoption of the resolution. . . . This national authority also allows the United States to implement effectively the provisions set forth in operative paragraph 19 of the resolution. . . .[***]

* * * *

In accordance with domestic law and international legal frameworks, . . . the United States cooperates closely with partner States to scrutinize the activities of IRISL as well as Iranian cargo shipping companies.

* * * *

Paragraph 22

Under the authorities of Executive Order 13382 and the International Emergency Economic Powers Act, the United States

[***] *Id.*

designated IRISL and 17 other entities controlled by or acting or purporting to act on behalf of IRISL on 10 September 2008. Under the same authorities, the United States designated the Islamic Revolutionary Guard Corps on 25 October 2007. . . . This national authority also allows the United States to implement effectively the provisions set forth in operative paragraph 22 of the resolution.

* * * *

c. U.S. sanctions and other controls

(1) Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010

(i) Overview

Paragraph 21 of the U.S. report to the 1737 Committee on U.S. implementation of Resolution 1929 cited the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA"), Pub. L. No. 111-195, as another tool the United States used to implement the new resolution in 2010. In his statement on signing the CISADA into law on July 1, 2010, President Obama described the new legislation and its significance:

> . . . This Act builds upon the recently passed United Nations Security Council Resolution and its strong foundation for new multilateral sanctions. It is designed to pressure Iran by requiring sanctions on those persons investing in Iran's development of petroleum resources and exporting to Iran refined petroleum and items needed to strengthen Iran's refined petroleum production capability. Further, it requires sanctions on financial institutions facilitating certain activities involving Iran, the Islamic Revolutionary Guard Corps, or other sanctioned persons. The Act also puts in place new authorities to demonstrate the strong and sustained commitment of the United States to advancing the universal rights of all

> Iranians, and to sanction those who have abused their rights.
>
> The Act provides a powerful tool against Iran's development of nuclear weapons and support of terrorism, while at the same time preserving flexibility to time and calibrate sanctions. . . . The Act permits the President to exercise this authority flexibly, as warranted, and when vital to the national security interests of the United States.

The full text of President Obama's statement is available at Daily Comp. Pres. Docs., 2010 DCPD No. 00569. This section provides additional details on the CISADA and its implementation during 2010.

(ii) Energy-related sanctions

Following the CISADA's enactment, the State Department issued a fact sheet providing details on the new law and its objectives. The fact sheet contained the following summary of the energy-related requirements of the CISADA:

> The Act amends the Iran Sanctions Act of 1996 (ISA), which requires that sanctions be imposed or waived for companies that make certain investments in Iran's energy sector. The CISADA expands significantly the energy-related activities that are sanctionable and adds new types of sanctions that can be imposed. These new authorities address the connections between Iran's energy sector and its nuclear program that were highlighted in UNSCR 1929. They support an effort to increase pressure on Iran to return constructively to diplomatic negotiations to address the international community's concerns about Iran's non-compliance with its international obligations (including those under the relevant UNSCRs, the NPT, and IAEA Safeguards Agreement). . . .

Further excerpts below from the fact sheet provide details on the energy-related sanctions in the new law. The full text of

the fact sheet is available at *www.state.gov/e/eeb/esc/iran-sanctions/docs/160710.htm.*

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* * * *

Sanctionable Activities under the Iran Sanctions Act, as Amended by CISADA

ISA requires the President to impose sanctions on a wide variety of activities in Iran's energy sector. Activities that can trigger sanctions include:

- Making an investment, including entering into a contract that includes responsibility for the exploration for or extraction, refinement, or transportation by pipeline of petroleum or natural gas located in Iran, that directly and significantly contributes to the enhancement of Iran's ability to develop its petroleum resources, of
  - $20 million or more; or
  - $5 million per investment, totaling $20 million or more in a 12-month period.
- Selling, leasing or providing goods or services[1] that could directly and significantly facilitate the maintenance or expansion of Iran's domestic production of refined petroleum products[2], with
  - Fair market value of $1 million or more; or
  - Aggregate fair market value of $5 million or more in a 12-month period.
- Selling or providing Iran with refined petroleum products, with
  - Fair market value of $1 million or more; or
  - Aggregate fair market value of $5 million or more in a 12-month period.

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[1] Goods or services include goods, services, technology, information, or support.

[2] Refined petroleum products include diesel, gasoline, jet fuel (naphtha and kerosene-types) and aviation gasoline.

- Providing goods or services that could directly and significantly contribute to the enhancement of Iran's ability to import refined petroleum products, including
  - Insurance or reinsurance services;
  - Financing or brokering services; or
  - Ships and shipping services, with
    - Fair market value of $1 million or more; or
    - Aggregate fair market value of $5 million or more in a 12-month period.

Sanction Provisions

Three or more out of nine possible sanctions shall be imposed on any person determined to have engaged in sanctionable activities. The nine sanctions would prohibit:

1. Export assistance from the Export-Import Bank of the United States;[3]
2. Licenses for exports;
3. Private U.S. bank loans exceeding $10 million in any 12-month period;
4. If the sanctioned person is a financial institution, designation as a primary dealer in USG debt instruments or services as a repository of USG funds;
5. Procurement contracts with the United States Government;
6. Foreign exchange transactions subject to U.S. jurisdiction;
7. Financial transactions subject to U.S. jurisdiction;
8. Transactions with respect to property subject to U.S. jurisdiction;
9. Imports to the United States from the sanctioned entity.

[3] Export-Import Bank assistance: guarantees, insurances, and extensions of credit.

Waivers

ISA does provide for certain waivers. These waivers may be applied on a case-by-case basis with respect to a person depending on the facts and U.S. interests in each case. . . .

* * * *

The President delegated most of these authorities under the amended ISA to the Secretary of State, in consultation with certain other agencies. At the State Department's daily press briefing on September 30, 2010, then Deputy Secretary of State James B. Steinberg announced that the Department of State was imposing sanctions on Naftiran Intertrade Company ("NICO"), in accordance with the ISA, as amended by the CISADA. then Deputy Secretary Steinberg explained:

> NICO, based in Switzerland, is an international trading company and a wholly-owned subsidiary of the National Iranian Oil Company (NIOC). NICO has provided hundreds of millions of dollars of financing for development projects in Iran's petroleum sector. Sanctioning NICO today will further isolate the company from the international business community.

See www.state.gov/s/d/2010/148479.htm for the full text of the briefing.

The sanctions on NICO took effect October 13, 2010. 75 Fed. Reg. 62,916 (Oct. 13, 2010). Excerpts below from the Federal Register notice explain the legal basis and effect of the sanctions.

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* * * *

. . . Pursuant to the authority delegated to the Secretary of State in the Presidential Memorandum of November 21, 1996, 61 FR 64249 (the "Delegation Memorandum"), the Secretary has determined that NICO has engaged in a sanctionable investment described in section 5(a) of the ISA, as in effect on the day before the date of enactment of the . . . CISADA . . . . Pursuant to

section 5(a) of the ISA and the Delegation Memorandum, and consistent with section 102(h)(2) of CISADA, the Secretary has determined to impose on NICO the following sanctions described in section 6 of the ISA:

1. Export-Import Bank assistance for exports to sanctioned persons. The Export-Import Bank of the United States shall not give approval to the issuance of any guarantee, insurance, extension of credit, or participation in the extension of credit in connection with the export of any goods or services to NICO.
2. Export sanction. The United States Government shall not issue any specific license and shall not grant any other specific permission or authority to export any goods or technology to NICO under—

   a. The Export Administration Act of 1979 (50 U.S.C. Appx. §§ 2401 *et seq.*);
   b. The Arms Export Control Act (22 U.S.C. 2751 *et seq.*);
   c. The Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*); or
   d. Any other statute that requires the prior review and approval of the United States Government as a condition for the export or reexport of goods or services.

3. Loans from United States financial institutions. United States financial institutions shall be prohibited from making loans or providing credits to NICO totaling more than $10,000,000 in any 12-month period unless NICO is engaged in activities to relieve human suffering and the loans or credits are provided for such activities.
4. Procurement sanction. The United States Government shall not procure, or enter into any contract for the procurement of, any goods or services from NICO.

During the September 30 press briefing, then Deputy Secretary Steinberg also announced that four international energy companies had committed to ending their investments in Iran's energy sector and therefore, under the "special rule"

provision of the ISA, the United States would not make a determination on those companies' eligibility for sanctions. Then Deputy Secretary Steinberg explained:

> . . . Total of France, Statoil of Norway, ENI of Italy, and Royal Dutch Shell of the United Kingdom and the Netherlands have pledged to end their investments in Iran's energy sector. By making this pledge, companies are eligible to avoid sanctions under a "Special Rule" in CISADA that is designed to encourage companies with activity in Iran to withdraw. These companies have provided assurances that they have stopped or are taking significant verifiable steps to stop their activity in Iran, and have provided assurances not to undertake new energy-related activity in Iran that may be sanctionable. We welcome and applaud the decision by these companies, and as a result the Secretary has decided to use the special rule to avoid making a determination of sanctionability for these companies. As long as the companies continue to act in accordance with their assurances, the Secretary does not regard them as companies of concern for their past Iran-related activities.

The "special rule" to which then Deputy Secretary Steinberg referred is contained in § 4(e) of ISA, as amended. Section 4(e) provides:

> INVESTIGATIONS.—
>
> (1) IN GENERAL.—The President shall initiate an investigation into the possible imposition of sanctions under section 5(a) against a person upon receipt by the United States of credible information indicating that such person is engaged in an activity described in such section.
>
> (2) DETERMINATION AND NOTIFICATION.—Not later than 180 days after an investigation is initiated in accordance with paragraph (1), the President shall (unless paragraph (3) applies) determine, pursuant to section 5(a), if a person has engaged in an activity described in such section and shall notify the appropriate

congressional committees of the basis for any such determination.

(3) SPECIAL RULE.—The President need not initiate an investigation, and may terminate an investigation, under this subsection if the President certifies in writing to the appropriate congressional committees that—

(A) the person whose activity was the basis for the investigation is no longer engaging in the activity or has taken significant verifiable steps toward stopping the activity; and

(B) the President has received reliable assurances that the person will not knowingly engage in an activity described in section 5(a) in the future.

On November 17, 2010, the State Department announced that the Secretary of State had applied the "special rule" to the activities of a fifth company, INPEX Corporation, and would not be imposing sanctions on the company as a result. A State Department media note explained:

> INPEX's withdrawal is another meaningful step in increasing the cost of Iran's noncompliance to its international nuclear obligations. As recognized in UNSCR 1929, Iran potentially uses revenues derived from its energy sector to fund its proliferation-sensitive activities. The U.S. sanctions, together with measures taken by Japan, the EU, Norway, South Korea, Canada, Australia, and others to further implement UNSCR 1929, have been an effective tool to encourage companies to withdraw from Iran. Responsible companies continue to reach the conclusion that until Iran complies with its international obligations and returns to serious negotiations on its nuclear program, the risks of doing business there are too high.
>
> We welcome the commitments made by INPEX and we hope that other firms will follow their lead. The United States will continue to pursue sanctions to the fullest extent possible to encourage Iran to address the international community's concerns regarding its nuclear program.

The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2010/11/151099.htm*.

(iii) Other sanctions

As President Obama explained in his signing statement, discussed *supra*, the CISADA contains additional provisions designed to target Iran's activities relating to proliferation of weapons of mass destruction and advanced conventional weapons, as well as its support for terrorism. Excerpts below from a fact sheet the Department of State issued concerning the CISADA provide details on the provisions of the new law concerning diversion of certain goods, services, or technology to Iran. The full text of the fact sheet is available at *www.state.gov/e/eeb/esc/iransanctions/docs/160710.htm*.

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* * * *

Diversion Concerns:
CISADA also requires the President to designate a country as a "Destination of Diversion Concern" if he determines that the government of the country allows substantial diversion to Iran of certain goods, services or technology. If a country is named a "Destination of Diversion Concern," a U.S. export license will be required to export to that country the types of items being diverted, with the presumption that the license application would be denied. The President may waive the licensing requirement if he determines that a waiver is in the national interest.

* * * *

(iv) Financial sanctions

The CISADA requires the Treasury Department to issue regulations to prohibit or strictly limit certain foreign financial institutions from directly accessing the U.S. financial system. In his December 1 congressional testimony, discussed *supra*,

then Under Secretary of the Treasury for Terrorism and Financial Intelligence Stuart Levey explained that the

> law requires Treasury to issue regulations to prohibit or impose strict conditions on access to the U.S. financial system by any foreign financial institution that Treasury determines knowingly engages in one of the following activities: (1) facilitating the efforts of the Government of Iran (including the IRGC) to acquire or develop WMD or delivery systems for WMD, or to support terrorism; (2) facilitating the activities of a person subject to financial sanctions pursuant to UNSCRs with respect to Iran; (3) engaging in money laundering to carry out certain illicit conduct; (4) facilitating the efforts by the Central Bank of Iran or any other Iranian financial institution to engage in certain illicit conduct; or (5) facilitating significant business for U.S.-designated IRGC individuals or entities, or for financial institutions designated by the U.S. Government in connection with Iran's WMD program or support for international terrorism.

Mr. Levey also elaborated on the implications of the CISADA's financial provisions for foreign financial institutions:

> CISADA's financial provisions are quite powerful as they force a stark choice: If you conduct certain business with Iran, you risk losing access to the U.S. financial system. In this way, CISADA creates a multiplier effect for certain U.S. designations. Most notably, any significant business by a foreign financial institution with any U.S.-designated IRGC individual or entity or with any one of the 17 Iran-related financial institutions designated by the U.S. for terrorism or proliferation carries with it the possibility of that foreign financial institution being cut off from the U.S. financial system.

A State Department fact sheet, excerpted below, provided additional details on the CISADA's financial sanctions. The full text of the fact sheet is available at *www.state.gov/e/eeb/esc/iransanctions/docs/160710.htm*. On August 16, 2010,

OFAC issued the Iranian Financial Sanctions Regulations, 31 C.F.R. Part 561, to implement subsections 104(c) and 104(d) of the CISADA. 75 Fed. Reg. 49,836 (Aug. 16, 2010).

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* * * *

Financial Sector Provisions

The law includes mandatory banking sanctions targeted at foreign banks that knowingly facilitate: Iranian WMD transactions; transactions related to Iran's support for terrorism; the activities of persons sanctioned under Iran-related UNSCRs; significant transactions with the IRGC or its affiliates; or significant transactions with Iranian-linked banks designated by the United States.

- Treasury must issue regulations within 90 days to prohibit or impose strict conditions upon U.S. banks' maintenance of correspondent accounts for foreign financial institutions that knowingly:
  - facilitate a significant transaction or transactions or provide significant financial services for:
    - **the IRGC or any of its agents or affiliates** (e.g., Khattam al Anbiya, Sepanir, and Ghorb Nooh) that are blocked under the International Emergency Economic Powers Act ("IEEPA"); or
    - **any financial institution that is blocked under IEEPA** in connection with Iran's proliferation of WMD or in connection with Iran's support for international terrorism (includes the following banks: Bank Sepah, Bank Melli, Arian Bank, Kargoshaee Bank, Bank Mellat, Persia International Bank PLC, Future Bank (Bahrain), Export Development Bank of Iran, Banco Internacional de Desarollo (Venezuela), First East Export Bank, Post Bank, Bank Saderat, [and] Europäisch-Iranische Handelsbank (EIH));
  - facilitate the activities of an individual or entity designated under UNSCRs 1737, 1747, 1803, 1929, or successor resolutions;

  - facilitate Iran's pursuit of WMD or Iran's support for terrorism; or
  - facilitate the efforts of the Central Bank of Iran or any other Iranian bank to carry out the above.
- Treasury must also issue regulations within 90 days to prohibit any entity owned or controlled by a U.S. financial institution (i.e., foreign subsidiaries of U.S. banks) from knowingly engaging in transactions with or benefitting the IRGC or any of its sanctioned agents or affiliates.

* * * *

(v) Human rights sanctions

Section 105(b) of the CISADA requires the President to submit to Congress "a list of persons who are officials of the Government of Iran or persons acting on behalf of that Government . . . that the President determines, based on credible evidence, are responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, the commission of serious human rights abuses against citizens of Iran or their family members on or after June 12, 2009, regardless of whether such abuses occurred in Iran." Section 105(c) requires the President to impose visa sanctions and economic sanctions on listed persons, including the blocking of their property subject to U.S. jurisdiction.

On September 28, 2010, President Obama signed Executive Order 13553, "Blocking Property of Certain Persons With Respect to Serious Human Rights Abuses by the Government of Iran and Taking Certain Other Actions." 75 Fed. Reg. 60,567 (Oct. 1, 2010). The order represented the United States' first use of targeted sanctions (as opposed to prohibitions on assistance and other restrictions) against Iran based on the government's serious abuses of human rights. In doing so, the President acted under the authority of the Constitution and U.S. laws including the International Emergency Economic Powers Act ("IEEPA"), the National Emergencies Act, the CISADA, and 3 U.S.C. § 301. A fact sheet

issued by the State Department's Office of the Spokesman on September 29 described the order and its significance:

> . . . President Obama signed an Executive Order that imposes sanctions on Iranian officials determined to be responsible for or complicit in serious human rights abuses involving Iran. In signing today's Order, the President identified eight individuals for sanctions who share responsibility for the sustained and severe violation of human rights in Iran since the June 2009 disputed presidential election by listing them in the Annex to the Order.
>
> * * * *
>
> This Order provides the United States with new tools to target human rights abuses engaged in by officials of the Government of Iran. As a result of this action, any property in the United States or in the possession or control of U.S. persons in which the individuals listed in the Annex have an interest is blocked, and U.S. persons are prohibited from engaging in transactions with them. The individuals listed in the Annex to the Executive Order are also subject to visa sanctions.

The full text of the State Department's fact sheet is available at *www.state.gov/r/pa/prs/ps/2010/09/148345.htm.* Section one of the executive order, which blocks property and interests in property of certain individuals and entities, and section seven of the order, which implements the CISADA's provisions relating to visa sanctions, are set forth below.*

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* * * *

Section 1. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any

* Editor's note: In February 2011, OFAC issued the Iranian Human Rights Abuses Sanctions Regulations in 31 C.F.R. Part 562, to implement Executive Order 13553. 76 Fed. Reg. 7695 (Feb. 11, 2011).

United States person, including any overseas branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) the persons listed in the Annex to this order; and
(ii) any person determined by the Secretary of the Treasury, in consultation with or at the recommendation of the Secretary of State:
  (A) to be an official of the Government of Iran or a person acting on behalf of the Government of Iran (including members of paramilitary organizations) who is responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in Iran or Iranian citizens or residents, or the family members of the foregoing, on or after June 12, 2009, regardless of whether such abuses occurred in Iran;
  (B) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the activities described in subsection (a)(ii)(A) of this section or any person whose property and interests in property are blocked pursuant to this order; or
  (C) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

(b) I hereby determine that the making of donations of the type of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to subsection (a) of this section would seriously impair my ability to deal with the national emergency declared in Executive Order 12957, and I hereby prohibit such donations as provided by subsection (a) of this section.

(c) The prohibitions in subsection (a) of this section include but are not limited to:

(i) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and
(ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

(d) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

* * * *

Sec. 7. The Secretary of State, in consultation with the Secretary of the Treasury, is hereby authorized to submit the initial and updated lists of persons who are subject to visa sanctions and whose property and interests in property are blocked pursuant to this order to the appropriate congressional committees as required by section 105(b) of CISADA (22 U.S.C. 8514(b)) and to redelegate these functions consistent with applicable law. The Secretary of State, in consultation with the Secretary of the Treasury, is hereby further authorized to exercise the functions and waiver authorities conferred upon the President by section 401(b) of CISADA (22 U.S.C. 8551(b)) with respect to the requirement to include a person on the list required by section 105(b) of CISADA (22 U.S.C. 8514(b)) and to redelegate these functions and waiver authorities consistent with applicable law.

* * * *

Secretary of State Hillary Rodham Clinton and Secretary of the Treasury Timothy Geithner discussed the context for and purpose of the new sanctions during a press conference on September 29. Secretary Clinton's remarks are excerpted below; both officials' remarks are available in full at *www.state.gov/secretary/rm/2010/09/148380.htm*.

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* * * *

Yesterday, President Obama signed an Executive Order targeting eight Iranian officials . . . . On these officials' watch or under their command, Iranian citizens have been arbitrarily arrested, beaten, tortured, raped, blackmailed, and killed. Yet the Iranian Government has ignored repeated calls from the international community to end these abuses, to hold to account those responsible and respect the rights and fundamental freedoms of its citizens. And Iran has failed to meet its obligations under the International Covenant on Civil and Political Rights.

The steady deterioration in human rights conditions in Iran has obliged the United States to speak out time and time again. And today, we are announcing specific actions that correspond to our deep concern. . . .

* * * *

(vi) Sensitive technology

Section 106 of the CISADA prohibits the head of an executive agency from entering into or renewing procurement contracts with any person that exports sensitive technology to Iran "that the President determines is to be used specifically—(A) to restrict the free flow of unbiased information in Iran; or (B) to disrupt, monitor, or otherwise restrict speech of the people of Iran." The statute authorizes the President to waive the sanctions and to exempt products consistent with trade agreements.

The President delegated these authorities to the Secretary of State, in consultation with the Secretary of Commerce.

(vii) Ban on imports and exports; importation of certain Iranian-origin carpets and foodstuffs

Sections 103(b)(1) and (2) of the CISADA provide that, with certain exceptions, and in addition to any other sanction in effect, no goods or services of Iranian origin may be imported directly or indirectly into the United States, and no good, service, or technology of United States origin may be exported to

Iran from the United States or by a United States person, wherever located.

Section 103(d) of the CISADA authorizes the President to create regulatory exceptions to these prohibitions. Section 103(d)(2) of the CISADA provides, however, that no exception to the CISADA's prohibition on imports may be made for the commercial importation of an Iranian-origin good described in § 560.534 of the Iranian Transactions Regulations ("ITR"), 31 C.F.R. Part 560, as in effect prior to the enactment of the CISADA, unless the President prescribes a new regulation to authorize the commercial importation of such goods and certifies to appropriate congressional committees that the authorization is in the national interest of the United States. At the time of the CISADA's enactment, § 560.534 of the ITR authorized the importation into the United States of certain Iranian-origin carpets and foodstuffs, and also authorized related services.

To implement § 103(d)(2) of the CISADA, OFAC issued a final rule on September 28, 2010, amending the ITR to remove general licenses relating to imports of and transactions relating to certain Iranian-origin carpets and foodstuffs and related services. 75 Fed. Reg. 59,611 (Sept. 28, 2010).

(2) Sanctions under Executive Order 13382

During 2010, the United States imposed targeted financial sanctions on Iranian entities, Iranian and other 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." *See* 70 Fed. Reg. 38,567 (July 1, 2005); *see also Digest 2005* at 1125–31. As discussed in A.2.b.(2) *supra*, the United States relies in part on the authorities in Executive Order 13382 to implement its obligations under the Security Council's resolutions concerning Iran.

On February 10, 2010, the Department of the Treasury, Office of Foreign Assets Control ("OFAC") designated four Iranian entities (Fater Engineering Institute, Imensazen

Consultant Engineers Institute, Makin Institute, and Rahab Institute, along with their aliases) and one Iranian national (Rostam Qasemi and his alias). 75 Fed. Reg. 10,345 (Mar. 5, 2010). *See* Department of State media note, available at *www.state.gov/r/pa/prs/ps/2010/02/136595.htm*. Subsequently, the four entities and one individual were listed in Annex I to Resolution 1929.

In its first such action after Resolution 1929's adoption, OFAC designated four individuals and 12 entities, including Post Bank, four entities and two individuals associated with the Islamic Revolutionary Guard Corps ("IRGC"), and two entities and two individuals linked to Iran's nuclear and missile programs, on June 16, 2010. One of the two individuals designated for his role in the IRGC, Mohammed Reza Naqdi, is listed in Annex I to Resolution 1803 (U.N. Doc. S/RES/1803 (2008)). Two of the four entities designated for their associations with the IRGC, Rah Sahel Institute and Sepanir, are listed in Annex II to Resolution 1929 (U.N. Doc. S/RES/1929 (2009)). On June 16, 2010, OFAC also designated five front companies of the Islamic Republic of Iran Shipping Lines ("IRISL"), "identified 27 new vessels as blocked property due to their connection to IRISL, and update[ed] the entries for 71 already-blocked IRISL vessels to identify new names given to them in order to evade sanctions." 75 Fed. Reg. 61,836 (Oct. 6, 2010). For details on the bases for the designations, see the Treasury Department's press statement, available at *www.treasury.gov/press-center/press-releases/Pages/tg747.aspx*. Treasury Secretary Timothy Geithner's remarks in connection with the designations are available at *www.treasury.gov/press-center/press-releases/Pages/tg745.aspx*.

On August 13, 2010, OFAC designated three Malta-based shipping companies, Bushehr Shipping Company Limited, ISI Maritime Limited, and Marble Shipping Limited. 75 Fed. Reg. 51,876 (Aug. 23, 2010). *See also www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20100813b.shtml.aspx* for discussion of the links between the three newly designated entities and IRISL.

On September 7, 2010, OFAC designated Europäisch-Iranische Handeslbank ("EIH"). A Treasury Department press release issued September 7 explained that the bank provided services to four Iranian banks that OFAC had designated previously pursuant to E.O. 13382, including Bank Mellat. *See www.treasury.gov/press-center-press-releases/Pages-tg847.aspx*.

On October 27, 2010, OFAC designated 37 entities based in Germany, Cyprus, and Malta and five Iranian nationals. 75 Fed. Reg. 70,352 (Nov. 17, 2010). On November 30, 2010, OFAC designated ten entities and five individuals. 75 Fed. Reg. 81,715 (Dec. 28, 2010). A Treasury Department press release issued November 30 explained that the designations targeted entities, including one Malaysian-based entity and eight entities based in the Isle of Man, and individuals linked to IRISL or Bank Mellat, both of which had been designated previously under E.O. 13382. *See treasury.gov/press-center/press-releases/Pages/TG981.aspx*.

On December 21, 2010, OFAC designated four entities (Bonyad Taavon Sepah, Ansar Bank, Mehr Bank, and Moallem Insurance Company) and one individual (Parviz Fattah). 76 Fed. Reg. 7241 (Feb. 9, 2011). A Treasury Department press release issued December 21 explained that the designations targeted the financial networks of the IRGC and IRISL. *See www.treasury.gov/press-center/press-releases/Pages/tg1010.aspx*.

(3) Executive Order 13224 designations

On December 21, 2010, OFAC also designated another Iranian entity, Liner Transport Kish, pursuant to Executive Order 13224, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism." In a press release dated December 21, 2010, the Treasury Department explained that OFAC designated the entity "for providing material support, including weapons to

Hizballah on behalf of the IRGC." *See www.treasury.gov/press-center/press-releases/Pages/tg1010.aspx*. For additional discussion of Executive Order 13224, see A.4.b.(1) below.

(4) Iranian Transactions Regulations

As discussed in A.2.b.(2) *supra*, the United States also implemented Resolution 1929 in 2010 through the Iranian Transactions Regulations ("ITR"), 31 C.F.R. Part 560. In his December 1 congressional testimony, discussed *supra*, Stuart Levey, then Under Secretary for Terrorism and Financial Intelligence, U.S. Department of the Treasury, explained:

> Since June, we have also identified, pursuant to the ITR, 43 entities in the banking, investment, mining, engineering, insurance, energy, petroleum, and petrochemical industries determined to be the Government of Iran. Many of these entities are located outside of Iran and have names that make it difficult to recognize them as Iranian government entities. By listing these entities pursuant to the ITR, we both help U.S. persons comply with U.S. law prohibiting business with Iranian government entities and also assist private sector actors around the world that are increasingly deciding to shun business with the government of Iran.

See also 75 Fed. Reg. 34,630 (June 18, 2010) (final rule amending the ITR to "expand the scope of Appendix A to Part 560 to encompass any person determined by OFAC to be the *Government of Iran*, as that term is defined in those regulations," to add 22 entities to Appendix A of the regulations, and to remove one entity, update the listing for another entity, and consolidate the listing for other entities identified in Appendix A of the regulations; 75 Fed. Reg. 48,562 (Aug. 11, 2010) (publishing the names of 21 additional entities determined to be the Government of Iran under the ITR). On December 21, 2010, the Treasury Department identified an additional entity, Pars Oil & Gas Company, as the Government of Iran within the ITR's definition of that term. *See www.treasury.gov/press-center/press-releases/Pages/tg1010.aspx*.

As discussed in A.2.c.(1)(vii) *supra*, on September 28, 2010, OFAC issued a final rule amending the ITR to remove general licenses relating to imports of and transactions relating to certain Iranian-origin carpets and foodstuffs and related services and to implement § 103 of the CISADA. 75 Fed. Reg. 59,611 (Sept. 28, 2010).

3. Nonproliferation

a. Democratic People's Republic of Korea

See A.1. *supra*.

b. Iran

See A.2. *supra*.

c. Iran, North Korea, and Syria Nonproliferation Act

Effective July 14, 2010, the Department of State imposed sanctions on seven entities and one individual under the Iran, North Korea, and Syria Nonproliferation Act, Pub. L. No. 106-178 (2000), as amended. 75 Fed. Reg. 40,862 (July 14, 2010). The sanctions affected entities from Belarus (one), China (three), Iran (two), and North Korea (one), as well as one Chinese national. The Federal Register notice explained:

> A determination has been made that a number of foreign entities and one foreign person have engaged in activities that warrant the imposition of measures pursuant to Section 3 of the Iran, North Korea, and Syria Nonproliferation Act. The Act provides for penalties on entities and individuals for the transfer to or acquisition from Iran since January 1, 1999, the transfer to or acquisition from Syria since January 1, 2005, or the transfer to or acquisition from North Korea since January 1, 2006, of equipment and technology controlled under multilateral

control lists (Missile Technology Control Regime, Australia Group, Chemical Weapons Convention, Nuclear Suppliers Group, Wassenaar Arrangement) or otherwise having the potential to make a material contribution to the development of weapons of mass destruction (WMD) or cruise or ballistic missile systems. The latter category includes (a) items of the same kind as those on multilateral lists but falling below the control list parameters, when it is determined that such items have the potential of making a material contribution to WMD or cruise or ballistic missile systems, (b) other items with the potential of making such a material contribution, when added through case-by-case decisions, and (c) items on U.S. national control lists for WMD/missile reasons that are not on multilateral lists.

The notice also set forth the sanctions, which were imposed for a period of two years:

1. No department or agency of the United States Government may procure, or enter into any contract for the procurement of any goods, technology, or services from these foreign persons, except to the extent that the Secretary of State otherwise may have determined;
2. No department or agency of the United States Government may provide any assistance to the foreign persons, and these persons shall not be eligible to participate in any assistance program of the United States Government, except to the extent that the Secretary of State otherwise may have determined;
3. No United States Government sales to the foreign persons of any item on the United States Munitions List are permitted, and all sales to these persons of any defense articles, defense services, or design and construction services under the Arms Export Control Act are terminated; and
4. No new individual licenses shall be granted for the transfer to these foreign persons of items the export of

which is controlled under the Export Administration Act of 1979 or the Export Administration Regulations, and any existing such licenses are suspended.

d. Modification of sanctions and assistance restrictions

In 2010, the Department of State removed sanctions imposed on four Russian entities in the late 1990s pursuant to Executive Order 12938, as amended by Executive Order 13094, for engaging in missile proliferation activities. 75 Fed. Reg. 5836 (Feb. 4, 2010) (Baltic State Technical University); 75 Fed. Reg. 11,223 (Mar. 10, 2010) (Glavkosmos); 75 Fed. Reg. 28,672 (May 21, 2010) (D. Mendeleyev University of Chemical Technology of Russia and the Moscow Aviation Institute).

Effective May 21, 2010, the Department of State removed the restrictions barring the Tula Instrument Design Bureau (KBP), a Russian entity, from receiving U.S. government assistance. The Federal Register notice explained that the Department of State acted based on a May 12, 2010 determination "that it is in the foreign policy or national security interests of the United States to remove the restrictions . . . ." 75 Fed. Reg. 28,672 (May 21, 2010). The Department of State had imposed the assistance restrictions on KBP on April 30, 1999, under the Foreign Assistance Act and the Department of State, Foreign Operations, and Related Programs Appropriations Act, based on a determination that "the Government of Russia [had] transferred lethal military equipment to a country determined by the Secretary of State to be a state sponsor of terrorism."

On May 21, 2010, the State Department also terminated the sanctions it imposed in 1998 on Rosoboronexport (ROE), a Russian entity, pursuant to § 3 of the Iran, North Korea, and Syria Nonproliferation Act, Pub. L. No. 106-178. 75 Fed. Reg. 28,673 (May 21, 2010).

4. Terrorism

a. Security Council 1267 (al-Qaeda/Taliban) sanctions

In 2010, the Security Council's 1267 (al-Qaeda/Taliban Sanctions) Committee completed the review of its Consolidated List, which names the individuals and entities that are subject to the 1267 sanctions regime. In so doing, the Committee responded to the Security Council's direction in paragraph 25 of Security Council Resolution 1822. The Committee also continued to update its list by adding new names of individuals and entities subject to the sanctions regime and removing others pursuant to the procedures and criteria established by the Security Council.

In 2010, the United States continued to express its strong support for the 1267 sanctions regime and the Committee's efforts to monitor states' compliance with it. For example, in a statement at a Security Council meeting on threats to international peace and security posed by terrorism, Secretary of State Clinton stated:

> I want to speak briefly about the progress made with one critical counterterrorism tool, the 1267 al-Qaida Taliban Sanctions List. This list must evolve as the threat posed by these groups evolves, so we are pleased that the 1267 Committee actively updates the list. So far this year, 45 names have been removed and 17 have been added. And we commend the committee for creating an ombudsperson* . . . to receive petitions from individuals and entities that want to be de-listed. We applaud the inclusion of al-Qaida in the Arabian Peninsula and its leaders on the list, and we encourage member-states to

* Editor's note: In paragraph 20 of Resolution 1904, which the Security Council adopted on December 17, 2009, the Council established an Office of the Ombudsperson to assist the 1267 Committee in considering requests to remove individuals and entities from the Committee's Consolidated List. The resolution also provided the Ombudperson's mandate. *See* U.N. Doc. S/RES/1904; *see also Digest 2009* at 609.

> provide regular updates to the committee to ensure that the list remains accurate.
>
> This regime, as with all of our joint efforts, is only as strong as our shared commitment.

See http://usun.state.gov/briefing/statements/2010/148070.htm for the full text of Secretary Clinton's statement. Similarly, at a Security Council debate on Afghanistan and the UN Assistance Mission in Afghanistan ("UNAMA") on September 29, 2010, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, stated:

> We commend the 1267 Committee for its recent delisting of ten Taliban individuals who are either deceased or reconciled, as well as the Committee's designation of three individuals who possessed strong links to the Taliban. We continue to believe that individuals who have ceased violence against the Afghan state, cut ties to al-Qaeda, and accepted the Afghan Constitution should be considered reconciled and removed from the 1267 sanctions list. We must ensure that the 1267 list keeps pace with the evolving threat, and we encourage the Government of Afghanistan and all member states to provide updates to the 1267 Committee, as well as well-documented listing and delisting requests, to ensure the list's accuracy. Recent improvements to the Committee's listing and delisting procedures will make the 1267 regime a stronger, more credible tool in our overall efforts to combat terrorism and bolster peace and security in Afghanistan.

The full text of Ambassador Rice's statement is available at *http://usun.state.gov/briefing/statements/2010/148354.htm*.

b. U.S. targeted financial sanctions implementing Resolution 1267 and other Security Council resolutions on terrorism

(1) Overview

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. Executive Order 13224 imposes financial 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. *See* 66 Fed. Reg. 49,079 (Sept. 25, 2001); *see also Digest 2001* at 881–93 or *Digest 2007* at 155–58.

(2) Department of State

In 2010, the Department of State announced the Secretary of State's designation of five entities and 11 individuals (including their known aliases) pursuant to E.O. 13224, as follows: (1) Al-Qa'ida in the Arabian Peninsula (75 Fed. Reg. 2920) (Jan. 19, 2010)); (2) Said Ali al-Shihri (75 Fed. Reg. 2921) (Jan. 19, 2010)); (3) Nasir al-Wahishi (75 Fed. Reg. 2920) (Jan. 19, 2010)); (4) Eric Breininger (75 Fed. Reg. 26,316 (May 11, 2010)); (5) Nayif Bin-Muhammad al-Qahtani (75 Fed. Reg. 26,315 (May 11, 2010)); (6) Qasim al-Rimi (75 Fed. Reg. 26,316 (May 11, 2010)); (7) Mohamed Belkalem (75 Fed. Reg. 29,600 (May 26, 2010)); (8) Taleb Nail (75 Fed. Reg. 29,601 (May 26, 2010)); (9) Doku Umarov (75 Fed. Reg. 35,872 (June 23, 2010)); (10) Harakat-ul Jihad Islami (75 Fed. Reg. 47,674 (Aug. 6, 2010)); (11) Hakimullah Mehsud (75 Fed. Reg. 53,732 (Sept. 1, 2010)); (12) Wali Ur Rehman (75 Fed. Reg. 53,732 (Sept. 1, 2010)); (13) Tehrik-e Taliban Pakistan (TTP) (75 Fed. Reg. 53,732 (Sept. 1, 2010)); (14) Jundallah (75 Fed. Reg. 68,017 (Nov. 4, 2010)); (15) Falah-i-Insaniat (75 Fed. Reg. 73,157 (Nov. 29, 2010)); and (16) Fahd Mohammed Ahmed al-Quso (75 Fed. Reg. 76,771 (Dec. 9, 2010)).*

* Editor's note: The Secretary of State made her determinations to designate Nasir al-Wahishi, al-Qa'ida in the Arabian Peninsula ("AQAP"), and Said Ali al-Shihri (including their other known aliases) pursuant to

During 2010, the Security Council's 1267 Committee added nine of these individuals and two of these entities to its Consolidated List (Al-Qa'ida in the Arabian Peninsula, Said Ali al-Shihri, Nasi al-Wahishi, Mohamed Belkalem, Tayeb Nail, Qasim Yahya Mahdi Al-Rimi, Naif Bin-Muhammad Al-Qahtani, Harakat-ul Jihad Islami, Wali Ur Rehman, Hakimullah Mehsud, and Fahd Mohammed Ahmed Al-Quso). *See www.un.org/sc/committees/1267/index.shtml.*

(3) Office of Foreign Assets Control ("OFAC")

(i) OFAC designations

OFAC designated 32 individuals and 13 entities (including their known aliases) pursuant to Executive Order 13224 during 2010. The designated individuals and entities typically are owned or controlled by, act for or on behalf of, or provide support for or services to individuals or entities the United States has designated pursuant to the order. *See* 75 Fed. Reg. 14,257 (Mar. 24, 2010) (two entities); 75 Fed. Reg. 16,909 (Apr. 2, 2010) (one individual); 75 Fed. Reg. 18,015 (Apr. 8, 2010) (two individuals); 75 Fed. Reg. 21,151 (Apr. 22, 2010) (two individuals); 75 Fed. Reg. 43,233 (July 23, 2010) (one individual); 75 Fed. Reg. 44,312 (July 28, 2010) (three individuals); 75 Fed. Reg. 47,899 (Aug. 9, 2010) (two entities and seven individuals); 75 Fed. Reg. 50,040 (Aug. 16, 2010) (one individual); 75 Fed. Reg. 53,377 (Aug. 31, 2010) (one individual); 75 Fed. Reg. 65,556 (Oct. 25, 2010), as corrected 75 Fed. Reg. 67,166 (Nov. 1, 2010) (two individuals); 75 Fed. Reg. 69,742 (Nov. 15, 2010) (one entity and three individuals); 75 Fed. Reg. 74,769 (Dec. 1, 2010) (three individuals); 75 Fed. Reg. 76,520 (Dec. 8, 2010) (three individuals); 75 Fed. Reg. 80,112 (Dec. 21, 2010) (seven entities and three individuals); 75 Fed. Reg. 81,717 (Dec. 28, 2010) (one entity).

E.O. 13224 on December 19, 2009, as discussed in *Digest 2009* at 610–11, but the Department announced the designations on January 19, 2010. 75 Fed. Reg. 2920 (Jan. 19, 2010); 75 Fed. Reg. 2921 (Jan. 19, 2010).

During 2010, the Security Council's 1267 Committee added nine of these individuals to its Consolidated List (Muthanna Harith al-Dari, Amir Abdullah, Nasiruddin Haqqani, Gul Agha Ishakzai, Anwar Nasser Abdulla Al-Aulaqi, Mohammad Ilyas Kashmiri, Muhammad Abdallah Hasan Abu-Al-Khayr, Agha Jan Alizai, and Saleh Mohammad Kakar). *See www.un.org/sc/committees/1267/index.shtml*.

(ii) OFAC de-listings

In 2010, OFAC determined that ten entities and 11 individuals, 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. *See* 75 Fed. Reg. 2593 (Jan. 15, 2010) (one individual); 75 Fed. Reg. 14,258 (Mar. 24, 2010) (one individual); 75 Fed. Reg. 26,846 (May 12, 2010) (three individuals); 75 Fed. Reg. 67,166 (Nov. 1, 2010) (two individuals); 75 Fed. Reg. 54,697 (Sept. 8, 2010) (ten entities and three individuals); 75 Fed. Reg. 80,113 (Dec. 28, 2010) (one individual). *See also* A.2.b. *supra*. The 1267 Committee previously removed all of the individuals and entities from its Consolidated List.

c. Countries not cooperating fully with antiterrorism efforts

On May 5, 2010, James B. Steinberg, then 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, the Democratic People's Republic of Korea ("DPRK" or "North Korea"), Eritrea, Iran, Syria, and Venezuela were not cooperating fully with U.S. counterterrorism efforts. 75 Fed. Reg. 28,848 (May 24, 2010). For information concerning the prohibition on U.S. assistance and the export controls that these designations trigger, see *Cumulative Digest 1991–1999* at 508 or *Digest 2003* at 167.

d. Foreign Terrorist Organizations

In 2010, the Secretary of State continued to designate additional entities as Foreign Terrorist Organizations ("FTOs") under § 219 of the Immigration and Nationality Act, as amended. *See* Chapter 3.B.1.e.(2) for a detailed discussion of the designations and other related developments in 2010. Many of the organizations the Secretary of State has designated as FTOs also have been designated pursuant to Executive Order 13224. Designated FTOs and their agents are subject to a variety of measures, including financial sanctions. *See www.state.gov/s/ct/rls/other/des/123085.htm* for background on the applicable sanctions and other legal consequences of designation as an FTO.

e. Regulatory changes

On December 7, 2010, the Treasury Department's Office of Foreign Assets Control ("OFAC") issued a final rule amending the Global Terrorism Sanctions Regulations ("GTSR"), the Terrorism Sanctions Regulations ("TSR"), and the Foreign Terrorist Organizations Sanctions Regulations ("FTOSR"), 31 C.F.R. Parts 594, 595, and 597. 75 Fed. Reg. 75,904 (Dec. 7, 2010).

As OFAC explained, the amendments to the GTSR and the TSR "expand the scope of authorizations in each of these programs for the provision of certain legal services." The amendments expanded the authorizations in § 594.506 of the GTSR and § 594.506 of the TSR to permit "the initiation and conduct of legal, arbitration, or administrative proceedings before any U.S. federal, state, or local court or agency for or on behalf of persons whose property and interests in property are blocked under the GTSR or TSR."

OFAC also added new general licenses under the GTSR, TSR, and the FTOSR "to authorize U.S. persons to receive specified types of payment for certain authorized legal services" provided to a designated foreign terrorist organization

or its agent. Specifically, new sections 594.517 of the GTSR, 595.515 to the TSR, and 597.513 to the FTOSR "authorize payments from funds originating outside the United States in connection with certain authorized legal services rendered to or on behalf of designated persons, as well as the formation of legal defense funds to gather donations and dispense funds in connection with payments for such legal services."

5. Armed Conflict: Restoration of Peace and Security

a. Democratic Republic of the Congo

(1) OFAC designations

On April 28, 2010, OFAC designated five individuals 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." 75 Fed. Reg. 23,847 (May 4, 2010); *see also* 71 Fed. Reg. 64,105 (Oct. 31, 2006); *Digest 2006* at 996–98. The five individuals were Germain Katanga, Thomas Lubanga, Jules Mutebutsi, Matthieu Cul Ngudjolo, and Bosco Ntaganda. On June 24, 2010, OFAC designated another individual, Kakwavu Bukande, under Executive Order 13413. The Security Council's DRC Sanctions Committee previously had added Bukande to its list of individuals and entities that are subject to the UN Security Council's asset freeze and travel ban. On December 1, 2010, the DRC Sanctions Committee added four names to the UN's asset freeze and travel ban list, and on December 2, 2010, OFAC implemented the asset freeze domestically by designating these four individuals under E.O. 13413. The individuals were Gaston Iyamuremye, Leodomir Mugaragu, Felicien Nsanzubukire, and Innocent Zimurinda.

(2) Security Council sanctions renewal

On November 29, 2010, the Security Council adopted Resolution 1952, which renewed the arms embargo on

non-state actors, asset freeze, and travel ban relating to the Democratic Republic of the Congo. For background on the sanctions regime, see *Digest 2009* at 615–17. Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, issued a statement on the same day that welcomed the Security Council's action. Excerpts from Ambassador Rice's statement below explain the significance of the new resolution, including its important new provisions concerning due diligence to prevent the exploitation of the DRC's mineral resources. The Group of Experts that supports the DRC Sanctions Committee recommended due diligence guidelines to the Committee in 2010, consistent with Resolution 1896. The new resolution included language supporting the guidelines and deciding that the DRC Sanctions Committee should take into account whether an individual or entity has done due diligence when it assesses whether to designate that individual or entity for sanctions under paragraph 4(g) of resolution 1857 (2008) (targeting individuals and entities for trading in conflict minerals).* The complete statement is available at *http://usun.state.gov/briefing/statements/2010/152048.htm.*

. . . The new sanctions resolution maintains the existing arms embargo on non-state actors operating in the DRC, as well as the travel ban and asset freeze for individuals linked to illegal armed groups, to the obstruction of humanitarian assistance, to the illicit

* Editor's note: *See www.oecd.org/document/36/0,3746,en_2649_34889_44307940_1_1_1_1,00.html* for discussion of the due diligence guidelines relating to conflict minerals that the Organization of Economic Co-operation and Development's Investment Committee and Development Assistance Committee approved in 2010. On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376. Section 1502 of the new legislation, codified at 15 U.S.C. § 78m, requires the Securities and Exchange Commission ("SEC") to issue regulations applicable to any entity obligated to file annual disclosures with the SEC that manufactures a product for which "conflict minerals [from the DRC] are necessary to . . . functionality or production." The SEC had not issued its regulations as of June 2011.

trade of natural resources and to violations of human rights including sexual and gender based violence. These sanctions can play an important role in bringing stability to the DRC and holding accountable those who direct the massacre of civilians, recruit child soldiers, or use rape as a weapon of war.

I also welcome the Security Council's unprecedented decision to support new due diligence guidelines for individuals and companies who import, process, or consume Congolese mineral products. If implemented, these guidelines could significantly limit the illicit minerals trade, which has for many years fueled violence in the DRC.

The United States appreciates the work of the DRC Sanctions Committee and the UN's DRC Group of Experts, and we will continue to support targeted sanctions designations against actors whose behavior undermines progress toward peace and stability in Congo and the region.

* * * *

b. Sierra Leone

On September 29, 2010, the UN Security Council adopted Resolution 1940, which lifted the Council's 13-year sanctions regime on Sierra Leone. The Council's action ended the embargo on transfers of weapons and weapons-related material to Sierra Leone (apart from the government or for the use of the United Nations or the Military Observer Group of the Economic Community of West African States ("ECOMOG")) that the Security Council imposed under Resolution 1171 of 1998. The Council also ended the requirement for Sierra Leone's government and member states to notify the Security Council Sanctions Committee established by Resolution 1132 (1997) of transfers of weapons and weapons-related material to the government, along with the travel ban the Council had imposed on members of the Revolutionary United Front, individuals designated by the Security Council's Sanctions Committee, and on members of the former military junta.

On the same day, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, issued a statement welcoming the Council's action. "UN sanctions can be an effective tool, and for the past 13 years they have helped limit the conflict in Sierra Leone and aid its post-conflict recovery," she said. Ambassador Rice then explained that the Council's remaining sanctions relating to Sierra Leone could be lifted as a result of "the much-improved situation in Sierra Leone, including the work of its special courts and the demobilization of armed groups." The full text of Ambassador Rice's statement is available at *http://usun.state.gov/briefing/statements/2010/148353.htm*.

c. Iraq

(1) Security Council

On December 15, 2010, at a special session of the Security Council chaired by Vice President Joseph Biden, the Council, acting under Chapter VII of the UN Charter, adopted Resolutions 1956, 1957, and 1958 concerning Iraq. A fact sheet issued by the Vice President's office, excerpted below, explained the three new resolutions, which addressed the Development Fund for Iraq, the restrictions on weapons of mass destruction, missiles, and civilian nuclear cooperation imposed in 1991, and the Oil for Food Program, respectively. Vice President Biden also urged "Iraq's neighbors and the international community to work closely with Iraq to resolve remaining outstanding Chapter VII issues, particularly outstanding issues between Iraq and Kuwait." The full text of the fact sheet is available at *http://usun.state.gov/documents/organization/153129.pdf*. For background on the Development Fund for Iraq, see *Digest 2003* at 914–23 and *Digest 2004* at 883–84. For background on Resolution 687 (1991), see *II Cumulative Digest 1991–1999* at 2110–11 and 2125–26. For discussion of nonproliferation issues generally, see Chapter 18.B. For background on the Oil-for-Food Program,

see *II Cumulative Digest 1991–1999* at 1928–36; *Digest 2001* at 815–16; *Digest 2002* at 894–97; *Digest 2003* at 974–75, 984, and 991–92; *Digest 2004* at 884 and 893–900; and *Digest 2005* at 870–73.

Today marks an important milestone in the restoration of Iraq's normalized ties to the international community.

* * * *

With today's action by the Security Council the United States and the international community are keeping their commitments to the Government and the people of Iraq. The resolutions adopted today by the Security Council will lift several longstanding Chapter VII restrictions on Iraqi trade and activity.

The three Security Council resolutions passed today are Resolution 1956, which terminates the UN supervised arrangements for the Development Fund for Iraq on June 30, 2011; Resolution 1957 which ends restrictions related to civilian nuclear cooperation placed on Iraq after the first Gulf War; and Resolution 1958, which ends the residual activities of the Oil for Food program.

* * * *

Resolution 1956—Development Fund for Iraq Resolution

- Resolution 1956 formally terminates the arrangements established in 2003 for the Development Fund for Iraq on June 30, 2011, as a result of Iraq's progress towards resolving debts and claims inherited from the previous regime and establishing accountable successor arrangements for the transition of the Fund.
- Arrangements for the DFI were originally established in UNSCR 1483 to accumulate all proceeds from the export sales of petroleum, petroleum products and natural gas in Iraq until such time as an internationally recognized, representative government of Iraq had been properly constituted.

- The passage of this resolution indicates that the Council believes that significant progress has been made in establishing post-DFI, Iraqi-managed successor arrangements and the strengthening of Iraqi institutions, and that in light of this progress, the DFI arrangements will end on June 30, 2011.

Resolution 1957—Weapons of Mass Destruction Resolution

- Resolution 1957 lifts the restrictions imposed by UNSCRs 687 and 707 relating to weapons of mass destruction and civilian nuclear activities. The Security Council has taken this step in recognition of Iraq's commitment to the international non-proliferation regime, its compliance with relevant treaties, its adherence to the highest non-proliferation standards, and its provisional application of the Additional Protocol to its Comprehensive Safeguards Agreement with the International Atomic Energy Agency (IAEA), pending its entry into force.
- Iraq affirmed in January 2010 to the UNSC by letter that it will support the international non-proliferation regime and comply with relevant disarmament treaties and other international instruments. The IAEA expressed in a March 2010 letter from IAEA Director General Amano to the UN Security Council President that it has received excellent cooperation from Iraq.
- In 2009 and 2010, Iraq also acceded to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, and subscribed to the Hague Code of Conduct against Ballistic Missile Proliferation. The resolution lifting Iraq's civilian nuclear restrictions reflects this record of progress.
- Iraq will remain under certain restrictions as a result of their commitments under the NPT and the CWC, however, the most significant result of lifting these restrictions will be the removal of the international stigma associated [with] Iraq being subject to these Security Council Resolutions.

- However, Iraq will also now have the freedom to pursue a wider array of civil nuclear activities.

Resolution 1958—Oil-for-Food Resolution

- Resolution 1958 terminates the residual activities of the Oil-For-Food program in recognition of Iraq's success in closing out remaining contracts under the program.
- In recent months, the UN Controller's Office has worked with the Central Bank of Iraq and BNP Paribas to pay remaining contracts. With the closure of the OFF program, approximately $650 million in remaining funds will be returned to the Government of Iraq.

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(2) Iraq Stabilization and Insurgency Sanctions Regulations

On September 13, 2010, the Department of the Treasury's Office of Foreign Assets Control ("OFAC") issued the "Iraq Stabilization and Insurgency Sanctions Regulations," implementing five executive orders relating to Iraq (13303, 13315, 13350, 13364, and 13438). 75 Fed. Reg. 55,463 (Sept. 13, 2010). The preamble to the final rule described the five executive orders; *see also Digest 2003* at 916–23 (E.O. 13303 and E.O. 13315); *Digest 2004* at 886–90 (E.O. 13364); and *Digest 2007* at 818–20 (E.O. 13438).

Also on September 13, 2010, OFAC issued a final rule removing the Iraqi Sanctions Regulations in 31 C.F.R. Part 575. 75 Fed. Reg. 55,462 (Sept. 13, 2010). As the preamble to the final rule explained, OFAC acted to implement Executive Order 13350 of July 29, 2004, which terminated the national emergency with respect to Iraq that the President declared in Executive Order 12722 of August 2, 1990, and revoked Executive Orders 12722 and four subsequent Executive Orders issued in 1990, 1991, and 1992 (Executive Orders 12724, 12743, 12751, and 12817). The preamble noted, among other things, "that certain transactions relating to Iraq remain

subject to the Iraq Stabilization and Insurgency Regulations, 31 CFR part 576 . . . ."

d. Sudan

(1) Security Council

(i) Report of the Sudan Panel of Experts

On March 4, 2010, Ambassador Susan Rice spoke with reporters about the report of the Sanctions Committee on Sudan. In her remarks, excerpted below, Ambassador Rice expressed concern about continuing violations of UN sanctions on Sudan and disappointment at the Sanctions Committee's inability to reach consensus on any of the recommendations that the Sudan Panel of Experts, the independent group of experts that reports to the Committee on sanctions violations, proposed in the fall of 2009 for improving enforcement of the sanctions regime. The full text of Ambassador Rice's remarks to the press is available at *http://usun.state.gov/briefing/statements/2010/137810.htm.*

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We heard that there have been, and continue to be, major and frequent violations of UN sanctions on Sudan that were imposed in 2005. We know that weapons continue to flow into Darfur, acts of sexual and gender-based violence continue unabated and with impunity, military over-flights and offensive actions continue. And though there has been the recent signing of the framework agreement, the fact is we continue to receive reports of offensive military actions by the Government of Sudan in Darfur.

If these reports are true, this behavior does not suggest a new willingness on the part of Sudan to fully engage in the peace process. At the same time, all of the rebel groups need to cease military activity and be part of the framework agreement if it is to be effective. In light of this fragile situation, the lack of compliance to

UN sanctions on Darfur is particularly troubling. And the blatant disregard of the will of the Council is undermining stability rather than fostering it, which was the aim of the regime in the first place.

Last fall the Sudan Panel of Experts, an independent UN team, as you know, documented in great detail these serial violations and proposed some very concrete recommendations for the Committee to take to improve enforcement. And we're disappointed, deeply disappointed, that the Committee has failed to reach consensus on even a single one of these recommendations. So today in the Council I praised Ambassador Mayr-Harting and his leadership of this Committee, which has truly been energetic and stellar. But I also frankly criticized the Committee as a whole, which means all of us Council members, who have a collective responsibility for dealing with this situation. We expect, the United States expects, the Committee to find points of consensus and work together to improve implementation of the sanctions regime.

We want this Committee to be active and engaged and to shine a spotlight on sanctions violations. And we want the Committee also to work with the Government of Sudan, parties in Sudan, and countries in the region to end what have been cavalier violations of this sanctions regime. In our view, better enforcement of the sanctions regime will improve conditions on the ground in support of peace and security. It would limit the flow of arms into Darfur, and do much to protect civilians who remain at grave risk. And this is going to remain a top priority for the United States.

(ii) Renewal of Mandate of the Sudan Panel of Experts

On October 14, 2010, the Security Council adopted Resolution 1945, which renewed the mandate of the Sudan Panel of Experts for another year and included provisions concerning the Security Council's arms embargo concerning Darfur. U.N. Doc. S/RES/1945. Ambassador Rice issued a statement on the same day welcoming the Security Council's action and explaining its significance. Ambassador Rice also underscored U.S. concerns about the need for those who conduct

business in conflict areas to act responsibly so their activities do not fuel conflict and human rights violations. Ambassador Rice's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/149507.htm*.

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The Panel, established in 2005 under Security Council Resolution 1591, plays a critical role in monitoring existing sanctions in the Darfur region, including compliance with the arms embargo and targeted sanctions measures.

As stated in the September 24th High Level Communiqué, ceasing the flow of arms to the region is critical to peace and security. Today's resolution includes measures to help tighten enforcement of the arms embargo, including language to make clear the scope of the current embargo and clarify obligations of the Government of Sudan and other Member States' under the sanctions regime. [Editor's note: See paragraph 9 of Resolution 1945.] It also demands that states supplying military assistance comply with end user requirements so that additional arms do not end up in Darfur. [Editor's note: See paragraph 10 of Resolution 1945.]

Additionally, we look forward to continued discussions between the Security Council's Sudan Sanctions Committee and private sector actors about the responsibilities of those who conduct business in conflict areas.

Although the Panel has faced setbacks in Sudan and restrictions on mobility, their presence and reporting reaffirms the Council's commitment to the safety and protection of the people of Darfur, including our continued concern with the unacceptable crime of sexual and gender based violence.

We call on all states to cooperate fully with the Panel.

(2) Statement of licensing policy

On October 20, 2010, OFAC issued a "Statement of Licensing Policy Regarding Agricultural Exports to Sudan." OFAC explained that, "[c]onsistent with current U.S. foreign policy,"

the Statement "establishes a favorable licensing regime through which U.S. persons can request from OFAC specific authorization for the commercial exportation or reexportation of U.S.-origin agricultural equipment and services to an area of Sudan other than the Specified Areas of Sudan. U.S. persons are already authorized to export and reexport such equipment to the Specified Areas of Sudan, which include Southern Sudan, Southern Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur, and marginalized areas in and around Khartoum." The full text of the Statement is available at *www.treasury.gov/resource-center/sanctions/Programs/Documents/sudan_license_ag.pdf*.

(3) Presidential Determination

On November 19, 2010, President Obama issued Presidential Determination No. 2011-05 on Sudan, which determined that "it is in the national security interest of the United States to waive the application of section 908(a)(1) of TSRA [the Trade Sanctions Reform and Export Enhancement Act of 2000, Title IX, Pub. L. No. 106-298, as amended, 22 U.S.C. § 7207(a)(1)] to allow export assistance to be made available for the export of computers and related equipment that enables the United Nations to facilitate the referendum in Southern Sudan pursuant to the Comprehensive Peace Agreement." 75 Fed. Reg. 75,865 (2010); Daily Comp. Pres. Docs., 2010 DCPD No. 01006.

e. Eritrea

On May 19, 2010, during a Security Council meeting convened at the request of Djibouti, Ambassador Brooke Anderson, then U.S. Alternate Representative for Special Political Affairs, U.S. Mission to the United Nations, expressed concern about Eritrea's failure to comply with its obligations under Resolutions 1844 and 1862. U.N. Docs. S/RES/1844 (2008) and S/RES/1862 (2009). Ambassador Anderson's

remarks, excerpted below, are available in full at *http://usun.state.gov/briefing/statements/2010/142012.htm*.

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Mr. President, Eritrea has failed to comply with this Council's Resolution 1862. It has not withdrawn its troops from the contested area. Nor has it engaged in dialogue with Djibouti or initiated discussions with the United Nations.

Moreover, the Monitoring Group of the Security Council's Somalia/Eritrea Sanctions Committee has noted in past reports that Eritrea has provided funding, weapons, and training to armed insurgent groups that perpetuate war in Somalia and thereby violate Resolution 1844. This threatens international peace and security by destabilizing the region, including Djibouti. This is one of the reasons the United States supported Resolution 1907, creating a robust sanctions regime that includes an arms embargo, cargo inspections and seizure in certain situations and targeted measures for individuals and entities listed by the Council's Somalia/Eritrea Sanctions Committee.

* * * *

The United States is working with the Somalia/Eritrea Sanctions Committee to ensure that regional spoilers and violators of the sanctions are held accountable. All member states have obligations under the sanctions regime to enforce the arms embargoes, and we ask member states to share information on designated groups and individuals with the Committee.

* * * *

f. Somalia

(i) Security Council

On March 19, 2010, acting under Chapter VII of the UN Charter, the Security Council adopted Resolution 1916. The resolution, which concerned the Security Council's Somalia

arms embargo sanctions regime, renewed the mandate of the sanctions Monitoring Group established by resolution 1558 (2004) for 12 months and expanded that mandate. The resolution also included significant provisions concerning humanitarian assistance for Somalia and the need to assure its delivery consistent with effective implementation of UN sanctions. For example, in paragraph 5 of the resolution, the Security Council decided:

> that for a period of twelve months from the date of this resolution, and without prejudice to humanitarian assistance programmes conducted elsewhere, the obligations imposed on Member States in paragraph 3 of resolution 1844 (2008) shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners, and decides to review the effects of this paragraph every 120 days based on all available information . . . .

The inclusion of paragraph 5 in the resolution was consistent with U.S. concerns about the humanitarian situation in Somalia. During a Security Council debate on Somalia on March 10, 2010, for example, Ambassador David Dunn, U.S. Alternate Representative to the United Nations stated:

> We are gravely concerned about the approximately 2.4 million Somalis in urgent need of humanitarian assistance—most of them living in areas held by al-Shabaab, areas where humanitarian space is shrinking. More than a year ago, the World Food Program was forced to suspend its programs in Shabaab-held territory due to threats and demands against WFP staff, and al-Shabaab has expelled several NGOs and other United Nations agencies. . . .

The full text of Ambassador Dunn's statement is available at *http://usun.state.gov/briefing/statements/2011/158010.htm*. *See also* Ambassador Rice's statement during the Security Council's September 16, 2010 debate on Somalia, available at *http://usun.state.gov/briefing/statements/2010/147246.htm*.

(ii) Executive Order 13536

On April 12, 2010, President Obama issued Executive Order 13536, "Blocking Property of Certain Persons Contributing to the Conflict in Somalia." 75 Fed. Reg. 19,869 (Apr. 15, 2010). Acting under authority of the Constitution and U.S. laws including the International Emergency Economic Powers Act ("IEEPA"), the National Emergencies Act, § 5 of the United Nations Participation Act, as amended ("UNPA"), and 3 U.S.C. § 301, the President declared a national emergency to deal with a threat to the national security and foreign policy of the United States, based on his determination that

> the deterioration of the security situation and the persistence of violence in Somalia, and acts of piracy and armed robbery at sea off the coast of Somalia, which have repeatedly been the subject of United Nations Security Council resolutions (including Resolution 1844 of November 20, 2008; Resolution 1846 of December 2, 2008; Resolution 1851 of December 16, 2008; and Resolution 1897 of November 30, 2009), and violations of the arms embargo imposed by the United Nations Security Council in Resolution 733 of January 23, 1992, and elaborated upon and amended by subsequent resolutions (including Resolution 1356 of June 19, 2001; Resolution 1725 of December 6, 2006; Resolution 1744 of February 20, 2007; Resolution 1772 of August 20, 2007; Resolution 1816 of June 2, 2008; and Resolution 1872 of May 26, 2009), constitute an unusual and extraordinary threat to the national security and foreign policy of the United States . . . .

Section one of the executive order blocks property and interests in property of certain persons, as set forth below.

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* * * *

(a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any overseas branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) the persons listed in the Annex to this order; and
(ii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:
  (A) to have engaged in acts that directly or indirectly threaten the peace, security, or stability of Somalia, including but not limited to:
    (1) acts that threaten the Djibouti Agreement of August 18, 2008, or the political process; or
    (2) acts that threaten the Transitional Federal Institutions, the African Union Mission in Somalia (AMISOM), or other international peacekeeping operations related to Somalia;
  (B) to have obstructed the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia;
  (C) to have directly or indirectly supplied, sold, or transferred to Somalia, or to have been the recipient in the territory of Somalia of, arms or any related materiel, or any technical advice, training, or assistance, including financing and financial assistance, related to military activities;
  (D) to have materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of, the activities described in subsections (a)(ii)(A), (a)(ii)(B), or (a)(ii)(C)

of this section or any person whose property and interests in property are blocked pursuant to this order; or (E) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

(b) I hereby determine that, among other threats to the peace, security, or stability of Somalia, acts of piracy or armed robbery at sea off the coast of Somalia threaten the peace, security, or stability of Somalia.

(c) I hereby determine that, to the extent section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) may apply, the making of donations of the type of articles specified in such section by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to subsection (a) of this section would seriously impair my ability to deal with the national emergency declared in this order, and I hereby prohibit such donations as provided by subsection (a) of this section.

(d) The prohibitions in subsection (a) of this section include but are not limited to:

(i) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and (ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

(e) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

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The annex to the order listed 11 individuals and one entity that are subject to the sanctions the order imposes. The Secretary of State had previously designated the one entity

listed in the annex, al-Shabaab, as a Foreign Terrorist Organization in 2008 pursuant to § 219(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1189, and pursuant to Executive Order 13224. *See* 73 Fed. Reg. 14,550 (Mar. 18, 2008); *Digest 2008* at 101. The Secretary of the Treasury had also previously designated one of the individuals listed in the annex to the order, Hassan Dahir Aweys, as a Specially Designated Global Terrorist in 2001 pursuant to Executive Order 13224. *See www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20011107.aspx*. OFAC had also previously designated two other individuals listed in the annex to the order—Hassan Abdullah Hersi al-Turki and Ahmed Abdi Aw-Mohamed—as Specially Designated Global Terrorists in 2004 and 2008, respectively, pursuant to Executive Order 13224. *See www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20040603.aspx* and *www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20081120.aspx*. *See also* OFAC's fact sheet on persons listed in the annex to the order, available at *www.treasury.gov/resource-center/sanctions/Programs/pages/somalia.aspx*.

On May 5, 2010, OFAC issued regulations to implement the order. 75 Fed. Reg. 24,394 (May 5, 2010). On September 22, 2010, OFAC issued additional information on the individuals and entity listed in the annex to the order, available at *www.treasury.gov/resource-center/sanctions/Programs/pages/somalia.aspx*.

6. Threats to Democratic Processes

a. Lebanon

On July 30, 2010, OFAC issued a final rule implementing Executive Order 13441 of August 1, 2007, "Blocking Property of Persons Undermining the Sovereignty of Lebanon or Its Democratic Processes and Institutions." 75 Fed. Reg. 44,907

(July 30, 2010). For a discussion of the order, see *Digest 2007* at 805–7.

b. Belarus sanctions

On February 3, 2010, OFAC issued the Belarus Sanctions Regulations, 31 C.F.R. Part 548, to implement Executive Order 13405 of June 19, 2006, concerning Belarus. The preamble to the final rule explained in part that

> [t]he Regulations implement targeted sanctions that are directed at certain persons who meet the criteria set forth [in E.O. 13405]. The sanctions generally do not prohibit trade or the provision of banking or other financial services to the country of Belarus, unless the transaction or service in question involves a person whose property and interests in property are blocked pursuant to these sanctions.

75 Fed. Reg. 5502 (Feb. 3, 2010); for discussion of Executive Order 13405, see *Digest 2006* at 983–84 and 71 Fed. Reg. 35,485 (June 20, 2006).

On November 30, 2010, OFAC amended the Belarus Sanctions Regulations "to authorize U.S. persons to engage in otherwise prohibited transactions with two blocked entities, Lakokraska OAO and/or Polotsk Steklovolokno OAO, until May 31, 2011." 75 Fed. Reg. 73,958 (Nov. 30, 2010). OFAC's action extended the general license OFAC granted initially on September 4, 2008, and extended subsequently. *See* the Department of State's media note, available at *www.state.gov/r/pa/prs/ps/2010/11/152151.htm*; *see also Digest 2009* at 647–48.*

* Editor's note: On February 1, 2011, OFAC issued a final rule amending the Belarus Sanctions Regulations to revoke the general license. The rule took effect on February 11, 2011. 76 Fed. Reg. 5482 (Feb. 1, 2011).

c. Cote d'Ivoire: Travel restrictions

On November 28, 2010, Cote d'Ivoire held a democratic run-off election for president. Although international election observers judged the elections to be fair and free, outgoing president Laurent Gbagbo refused to cede power. On December 21, 2010, the Department of State's Office of the Spokesman announced that the Secretary of State had imposed travel restrictions to the United States on "members of Laurent Gbagbo's regime, as well as other individuals who support policies or actions that undermine the democratic process and reconciliation efforts in Cote d'Ivoire." The Department further explained that "Gbagbo's efforts to remain in power despite the expressed will of the Ivoirian people for Alassane Ouattara to be president threaten to compromise years of reconciliation and peace-building efforts on behalf of the Ivoirian people." *See www.state.gov/r/pa/prs/ps/2010/12/153427.htm. See also* Chapter 6.K.3. for discussion of the Human Rights Council's Special Session on Cote d'Ivoire on December 23, 2010.**

B. OTHER ISSUES

1. Litigation

a. Licensing requirement for Cuban company's application to renew trademark

On March 15, 2010, the United States filed its brief as appellee in *Empresa Cubana Exportadora de Alimentos y Productos Varios d/b/a Cubaexport v. United States Dep't of Treasury, Office of Foreign Assets Control*, 09-5196, before the U.S. Court

** Editor's note: On January 6, 2011, OFAC imposed sanctions on Gbagbo, his wife, and two other individuals pursuant to Executive Order 13396. 76 Fed. Reg. 2193 (Jan. 12, 2011). On April 11, 2011, Gbagbo was arrested after several weeks of violent conflict between his supporters and those of elected President Ouattara.

of Appeals for the District of Columbia Circuit. OFAC had determined that § 211 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 211(a)(1), 112 Stat. 2681, 2681–88 (1988) ("Section 211"), rendered a general license for the registration and renewal of trademarks unavailable for Cubaexport's HAVANA CLUB mark, and it denied Cubaexport a specific license to pay fees for the trademark renewal. Cubaexport challenged both the application of Section 211 and OFAC's denial of a specific license. The lower court's opinion granting summary judgment to OFAC is discussed in *Digest 2009* at 648–49; for earlier developments in the case, see *Digest 2007* at 828–30 and *Digest 2006* at 1006–15. The U.S. brief is available at *www.state.gov/s/l/c8183.htm*.*

b. Designation of Foreign Terrorist Organizations and related issues

See Chapter 3.B.1.e.(2)(iii).

2. Iran, Sudan, and Cuba: Personal Communications on the Internet

On March 8, 2010, the Department of the Treasury announced that the Office of Foreign Assets Control ("OFAC") had amended the Sudanese Sanctions Regulations ("SSR") (31 C.F.R. Part 538), the Iranian Transactions Regulations ("ITR") (31 C.F.R. Part 560), and the Cuban Assets Control Regulations ("CACR") (31 C.F.R. Part 515) to "add general licenses authorizing the exportation of certain personal Internet-based communications services—such as instant messaging, chat and email, and social networking—to Iran, Sudan and Cuba."

* Editor's note: On March 29, 2011, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court's judgment. *Empresa Cubana Exportadora de Alimentos y Productos Varios d/b/a Cubaexport v. United States Dep't of Treasury, Office of Foreign Assets Control*, 638 F.3d 794 (D.C. Cir. 2011). *Digest 2011* will discuss relevant aspects of the opinion.

The Department also announced that the amendments authorized exports to Iran and Sudan of related software. The amendments did not authorize exports of related software to Cuba because the Commerce Department separately licenses or otherwise authorizes such exports under the Export Administration Regulations. Deputy Treasury Secretary Neal Wolin explained that

> [c]onsistent with the Administration's deep commitment to the universal rights of all the world's citizens, the issuance of these general licenses will make it easier for individuals in Iran, Sudan and Cuba to use the Internet to communicate with each other and with the outside world. Today's actions will enable Iranian, Sudanese and Cuban citizens to exercise their most basic rights.

The full text of the Treasury Department's press release is available at *www.treasury.gov/press-center/press-releases/Pages/tg577.aspx*.

Excerpts below from the Federal Register publication provide additional details on the amendments. 75 Fed. Reg. 10,997 (Mar. 10, 2010).

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. . . The Iran-Iraq Arms Non-Proliferation Act of 1992 (Pub. L. 102-484) (50 U.S.C. 1701 note) ("IIANPA") and section 6 of Executive Order 13059 of August 19, 1997 ("Prohibiting Certain Transactions With Respect to Iran") (62 FR 44531, August 21, 1997), generally preclude OFAC from authorizing—whether by general or specific license—the exportation to Iran of any goods or technology listed on the Commerce Control List ("CCL") in the Export Administration Regulations, 15 CFR parts 730 through 774 (the "EAR"), unless the President exercises the waiver authority provided in section 1606 of IIANPA. On September 27, 1994, the President delegated his authorities under IIANPA to the Secretary of State. Since much of the software necessary for the exchange of personal communications or the sharing of information over the Internet is listed on the

CCL, the exercise of this waiver authority is necessary before OFAC may generally or specifically license the exportation of such software to Iran.

On December 10, 2009, the Department of State determined that it is essential to the national interest of the United States to exercise the waiver authority in section 1606 of IIANPA with respect to the exportation to Iran of certain dual-use software classified as mass market software by the Department of Commerce ("Commerce") and essential for the exchange of personal communications and/or sharing of information over the Internet. In reporting this determination to Congress on December 15, 2009, the Department of State explained that this software is necessary to foster and support the free flow of information to individual Iranian citizens and, therefore, is essential to the national interest of the United States.

As events in Iran since last June's Presidential election there have shown, personal Internet-based communications are a vital tool for change. Similar considerations apply in Sudan. Accordingly, to ensure that the sanctions on Sudan and Iran do not have an unintended chilling effect on the ability of companies to provide personal communications tools to individuals in those countries, OFAC is adding new § 538.533 to the SSR and new § 560.540 to the ITR. These new sections authorize the exportation from the United States or by U.S. persons, wherever located, to persons in Sudan and Iran, respectively, of certain services and software incident to the exchange of personal communications over the Internet, such as instant messaging, chat and e-mail, social networking, sharing of photos and movies, web browsing, and blogging. To qualify for this authorization, such services and software must be publicly available at no cost to the user. In addition, such software qualifies for this authorization only if it is (1) Classified as "EAR99" under the EAR; (2) not subject to the EAR; or (3) classified by Commerce as mass market software under export control classification number ("ECCN") 5D992 of the EAR. These new sections of the SSR and the ITR, however, do not authorize the direct or indirect exportation of services or software with knowledge or reason to know that such services or software are intended for the Government of Sudan or the Government of Iran.

New § 538.533 of the SSR and new § 560.540 of the ITR each contain[s] a statement of licensing policy in addition to the general licenses authorizing the exportation of certain Internet-based personal communications services and software. Paragraph (c) of each of these two sections provides that specific licenses may be issued on a case-by-case basis for the exportation of services and software not covered by the general license that are incident to the sharing of information over the Internet. To be eligible for consideration under this policy, software must be classified as "EAR99," not subject to the EAR, or classified by Commerce as mass market software under ECCN 5D992 of the EAR.

OFAC also is amending the Cuban Assets Control Regulations, 31 CFR part 515 (the "CACR"), to add a similar general license authorizing the exportation to persons in Cuba of certain services incident to the exchange of personal communications over the Internet. . . .

On April 13, 2009, the President stated that the promotion of democracy and human rights in Cuba is in the national interest of the United States and is a key component of U.S. foreign policy in the Americas. The President announced an initiative to pursue these goals by, among other things, increasing the flow of information to the Cuban people. Consistent with that initiative, OFAC is adding new § 515.578 to the CACR to authorize the exportation from the United States or by persons subject to U.S. jurisdiction to persons in Cuba of certain services incident to the exchange of personal communications over the Internet, such as instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, and blogging. To qualify for this authorization, the services must be publicly available at no cost to the user. New § 515.578 does not authorize the direct or indirect exportation of services with knowledge or reason to know that such services are intended for a prohibited official of the Government of Cuba, as defined in § 515.337 of the CACR, or a prohibited member of the Cuban Communist Party, as defined in § 515.338.

Like the new authorization sections added to the SSR and ITR, new § 515.578 contains a statement of licensing policy in addition to the general license authorizing the exportation of certain Internet-based personal communications services. Paragraph (c) of

§ 515.578 provides that specific licenses may be issued on a case-by-case basis for the exportation of services not covered by the general license that are incident to the sharing of information over the Internet.

The new general license for Cuba, unlike those for Sudan and Iran, does not include an authorization for the exportation of software, because the exportation of goods and technology, including software, to Cuba is separately licensed or otherwise authorized by Commerce under the EAR. Section 515.533 of the CACR generally licenses all transactions ordinarily incident to the exportation of items from the United States, or the reexportation of 100% U.S.-origin items from a third country, to any person in Cuba, provided the exportation or reexportation is licensed or otherwise authorized by Commerce under the EAR, and provided further that only certain specified payment and financing terms may be used.

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C. EXPORT CONTROLS

1. Commerce Department Entity List

During 2010, the Department of Commerce, Bureau of Industry and Security ("BIS"), amended the Export Administration Regulations ("EAR") to add 49 persons located in Armenia, China, Hong Kong, Malaysia, Singapore, and on Taiwan to the Entity List. 75 Fed. Reg. 1699 (Jan. 13, 2010) (15 persons in Armenia, China, Hong Kong, Malaysia, and Singapore under 16 entries); 75 Fed. Reg. 7358 (Feb. 19, 2010) (ten persons in Hong Kong and on Taiwan); and 75 Fed. Reg. 36,516 (June 28, 2010) (24 persons in Belarus, China, Hong Kong, Iran, Malaysia, New Zealand, Norway, South Africa, and the United Kingdom under 25 entries). As BIS explained in the preambles to the final rules, the "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." Once a person is placed on the Entity List, BIS explained that

"[a] BIS license is required for the export or reexport of any item subject to the EAR" to that person.

BIS also removed seven persons located in Hong Kong and Russia from the Entity List. 75 Fed. Reg. 29,884 (May 28, 2010); 75 Fed. Reg. 36,516 (June 28, 2010); 75 Fed. Reg. 78,883 (Dec. 17, 2010). Moreover, BIS amended 31 entries on the Entity List for persons in Iran, Egypt, Israel, China, and Russia. 75 Fed. Reg. 1699 (Jan. 13, 2010); 75 Fed. Reg. 29,884 (May 28, 2010); 75 Fed. Reg. 78,883 (Dec. 17, 2010).

2. Nonproliferation-related Changes

a. Australia Group

On March 23, 2010, the Department of Commerce, Bureau of Industry and Security ("BIS"), issued a final rule revising the EAR to implement changes the Australia Group adopted in 2009 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." 75 Fed. Reg. 13,672 (Mar. 23, 2010).

b. MTCR

On April 20, 2010, the Department of Commerce, Bureau of Industry and Security ("BIS"), issued a final rule amending the EAR to implement the changes to the Missile Technology Control Regime ("MTCR") Annex that the MTCR member countries agreed to in November 2009. 75 Fed. Reg. 20,520 (Apr. 20, 2010).

c. Wassenaar Arrangement

In 2010, the Department of Commerce, Bureau of Industry and Security ("BIS"), issued two final rules amending the EAR

to implement certain changes that governments participating in the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies agreed in 2009 to make to the Wassenaar Arrangement's List of Dual Use Goods and Technologies ("Wassenaar List"). 75 Fed. Reg. 13,674 (Mar. 23, 2010) (correcting previous rule at 74 Fed. Reg. 66,000 (Dec. 11, 2009)); 75 Fed. Reg. 54,271 (Sept. 7, 2010), corrected 75 Fed. Reg. 62,675 (Oct. 13, 2010). For background on the Wassenaar Arrangement, see *II Cumulative Digest 1991–1999* at 2265–66.

Cross References

Human rights, **Chapter 6.**
Sudan peace process, **Chapter 17.B.**

Chapter 17

International Conflict Resolution and Avoidance

PEACE PROCESS AND RELATED ISSUES

A. ISRAELI-PALESTINIAN CONFLICT

On September 2, 2010, the United States re-launched direct peace talks between the Israelis and Palestinians at the State Department in Washington, D.C. Senator George Mitchell, then Special Envoy for Middle East Peace, briefed the press that day on the key issues discussed in the parties' meetings. Senator Mitchell's remarks, excerpted below, are available at *www.state.gov/p/nea/rls/rm/146750.htm*.

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Both Prime Minister Netanyahu and President Abbas condemned all forms of violence that target innocent civilians and pledged to work together to maintain security. They reiterated their common goal of two states for two peoples and to a solution to the conflict that resolves all issues, ends all claims, and establishes a viable state of Palestine alongside a secure state of Israel. President Abbas and Prime Minister Netanyahu agreed that these negotiations can be completed within one year and that the aim of the negotiations is to resolve all core issues.

The parties agreed that a logical next step would be to begin working on achieving a framework agreement for permanent status. The purpose of a framework agreement will be to establish the

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fundamental compromises necessary to enable them to flesh out and complete a comprehensive treaty that will end the conflict and establish a lasting peace between Israel and the Palestinians. The parties agreed that in their actions and statements they will work to create an atmosphere of trust that will be conducive to reaching a final agreement.

* * * *

As both President Obama and Secretary of State Clinton have said, the United States pledges its full support to the parties in these talks. We will be an active and sustained partner throughout. We will put our full weight behind these negotiations and will stand by the parties as they make the difficult decisions necessary to secure a better future for their citizens.

As we saw this week, there are those who will use violence to try to derail these talks. There are going to be difficult days and many obstacles along the way. We recognize that this is not an easy task. But as the President told the leaders, we expect to continue until our job is complete and successful.

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In response to a reporter's question about the framework agreement the parties agreed to negotiate, Senator Mitchell clarified:

> Our goal is to resolve . . . all of the core issues within one year. And the parties themselves have suggested and agreed that the logical way to proceed, to tackle them is to try to reach a framework agreement first. And as I said—and I think this ought to be made clear because there has been a good bit of misunderstanding or not a full meeting of minds publicly regarding a framework agreement—a framework agreement is not an interim agreement. It's more detailed than a declaration of principles, but is less than a full-fledged treaty. Its purpose is to establish the fundamental compromises necessary to enable the parties to then flesh out and complete a comprehensive agreement that will end the conflict and establish a lasting peace.

On September 21, 2010, representatives of the United Nations, the European Union, the Russian Federation, and the United States, referred to as the Quartet, affirmed their support for the resumed peace talks. The Quartet's statement, excerpted below, is available in full at *www.state.gov/r/pa/prs/ps/2010/09/147514.htm. See also* President Barack Obama's address to the General Assembly, September 23, 2010, Daily Comp. Pres. Docs., 2010 DCPD No. 00786, pp. 1–8.

The Quartet expressed its strong support for the resumption of Israeli-Palestinian negotiations, which can resolve all final status issues within one year. The Quartet reaffirmed its full commitment to its previous statements, which provide that negotiations should lead to an agreement that ends the occupation that began in 1967 and results in the emergence of an independent, democratic, contiguous, and viable Palestinian state living side-by-side in peace and security with Israel and its other neighbors. The Quartet also confirmed its determination to support the parties throughout the negotiations and in the implementation of an agreement.

Noting that mutual trust and confidence are critical to successful negotiations, the Quartet reiterated its call on Israel and the Palestinians to promote an environment conducive to progress, including by refraining from provocative actions and inflammatory rhetoric. The Quartet noted that the commendable Israeli settlement moratorium instituted last November has had a positive impact and urged its continuation. The Quartet recalled that unilateral actions by either party, including settlement activity, cannot prejudge the outcome of negotiations and will not be recognized by the international community. The Quartet called upon both sides to fulfill their obligations under the Road Map. The Quartet encouraged the parties to work together to find a way to ensure that negotiations continue in a constructive manner and urged the international community to support their efforts.

The Quartet underscored its commitment to a just, lasting, and comprehensive Middle East peace, including Israeli-Syrian and Israeli-Lebanese agreements. In the spirit of the Arab Peace Initiative, the Quartet called on Arab states to support Israeli-Palestinian

negotiations and progress on the other tracks by taking bolder steps to foster positive relations throughout the region and to combat violence and extremism.

Recalling that change on the ground is integral to peace, the Quartet reaffirmed its support for the Palestinian Authority's August 2009 plan for building the institutions of a Palestinian state within two years. . . .

The Quartet called for Israel to take further steps to facilitate Palestinian state-building and economic growth. The Quartet welcomed measures Israel has already taken to improve day-to-day life for Palestinians, including the easing of restrictions on movement in the West Bank and improved Gaza access, and commended the work of the Quartet Representative in helping to achieve that change. The Quartet further called upon Arab states and the international community to provide immediate and sustained support for the Palestinian Authority.

The Quartet reaffirmed that the current situation in Gaza is not in the interests of Palestinians or Israelis and restated its desire to see progress on the implementation of all aspects of Security Council resolution 1860. Reconfirming its statement of 21 June 2010 the Quartet welcomed the significant shift in Israel's Gaza policy since June 2010 and called for further efforts by all concerned to ensure the unimpeded flow of humanitarian aid, commercial goods, and persons to and from Gaza and to address Israel's legitimate security concerns. The Quartet also took positive note of approvals of UN and other international projects in Gaza and expressed its desire to see further progress in the near future. The Quartet reiterated its support for efforts to restore Palestinian unity based on the commitments of the Palestine Liberation Organization.

The Quartet condemned in the strongest possible terms continuing violence against Israeli and Palestinian civilians, in particular the 31 August 2010 attack near Hebron, for which Hamas claimed responsibility while threatening additional attacks. The Quartet urged a complete halt to all violence and reiterated its call on all parties to ensure the protection of civilians and to respect international humanitarian and human rights law. The Quartet reiterated its call for the immediate release of Israeli soldier Gilad Shalit.

The Quartet committed to remain actively involved on all tracks and to encourage and review progress. . . .

Direct talks between the Israelis and Palestinians faltered in October 2010. During the rest of the year, the United States continued to meet with representatives of both parties and representatives of the Arab League and other interested states to stress the need to resume the talks and work toward a comprehensive peace settlement. On December 10, 2010, in an address at the Brookings Institution's Saban Center for Middle East Policy's Seventh Annual Forum, Secretary Clinton stressed the United States' commitment to continue its efforts to promote a comprehensive peace settlement, as excerpted below. The full text of Secretary Clinton's remarks is available at *www.state.gov/secretary/rm/2010/12/152664.htm*.

. . . [F]or both Israelis and Palestinians and, indeed, for all the people of the region, it is in their interest to end this conflict and bring a just, lasting, and comprehensive peace to the Middle East based on two states for two peoples.

For two years, you have heard me and others emphasize again and again that negotiations between the parties is the only path that will succeed in securing their respective aspirations; for the Israelis, security and recognition; for the Palestinians, an independent, viable sovereign state of their own. This remains true today. There is no alternative other than reaching mutual agreement. The stakes are too high, the pain too deep, and the issues [too] complex for any other approach.

Now, it is no secret that the parties have a long way to go and that they have not yet made the difficult decisions that peace requires. And like many of you, I regret that we have not gotten farther faster in our recent efforts. That is why yesterday and today I met with Israeli and Palestinian negotiators and underscored our seriousness about moving forward with refocused goals and expectations.

It is time to grapple with the core issues of the conflict on borders and security; settlements, water and refugees; and on Jerusalem itself. And starting with my meetings this week, that is exactly what we are

doing. We will also deepen our strong commitment to supporting the state-building work of the Palestinian Authority and continue to urge the states of the region to develop the content of the Arab Peace Initiative and to work toward implementing its vision.

Over recent months, Prime Minister Netanyahu and President Abbas have met face to face multiple times. I have been privileged to be present during their meetings in Sharm el-Sheikh, in Jerusalem, and in Washington. I have also had the chance to talk with each leader privately. These were meaningful talks that yielded new clarity about the gaps that must be bridged.

Significantly, both sides decided together to pursue a framework agreement that would establish the fundamental compromises on all permanent status issues and pave the way for a final peace treaty.

Reaching this goal will not be easy by any means. The differences between the two sides are real and they are persistent. But the way to get there is by engaging, in good faith, with the full complexities of the core issues and by working to narrow the gaps between the two sides.

By doing this, the parties can begin to rebuild confidence, demonstrate their seriousness, and hopefully find enough common ground on which to eventually re-launch direct negotiations and achieve that framework.

The parties have indicated that they want the United States to continue its efforts. And in the days ahead, our discussions with both sides will be substantive two-way conversations with an eye toward making real progress in the next few months on the key questions of an eventual framework agreement. The United States will not be a passive participant. We will push the parties to lay out their positions on the core issues without delay and with real specificity. We will work to narrow the gaps asking the tough questions and expecting substantive answers. And in the context of our private conversations with the parties, we will offer our own ideas and bridging proposals when appropriate.

We enter this phase with clear expectations of both parties. Their seriousness about achieving an agreement will be measured by their engagement on these core issues. . . .

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In the end, no matter how much the United States and other nations around the region and the world work to see a resolution to this conflict, only the parties themselves will be able to achieve it. The United States and the international community cannot impose a solution. Sometimes I think both parties seem to think we can. We cannot. And even if we could, we would not, because it is only a negotiated agreement between the parties that will be sustainable. The parties themselves have to want it. The people of the region must decide to move beyond a past that cannot change and embrace a future they can shape together.

* * * *

America is serious about peace. We know the road forward will not be easy. But we are convinced that peace is both necessary and possible. So we will be persistent and press forward. We will push the parties to grapple with the core issues. We will work with them on the ground to continue laying the foundations for a future Palestinian state. And we will redouble our regional diplomacy. When one way is blocked, we will seek another. We will not lose hope and neither should the people of the region.

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B. SUDAN

During 2010, the United States continued its bilateral and multilateral initiatives to support full implementation of the Comprehensive Peace Agreement of 2005 ("CPA") and to end the conflict in Darfur. As part of these efforts, the United States worked intensively with the parties and coordinated with others in the region and internationally to prepare for the referendum on independence for southern Sudan scheduled for January 9, 2011, and called for by the CPA. In particular, the United States focused on efforts to ensure that the referendum took place on time and without violence. In October 2010 in Addis Ababa, Ethiopia, the United States also played an active role in negotiations that attempted to resolve the dispute over the borders of Abyei. Those talks ended inconclusively. The United States has supported the African Union-led efforts to

assist the parties with the negotiation of outstanding political and legal issues between them that the CPA did not specifically address but should be resolved prior to the conclusion of the CPA. Finally, the United States worked with the African Union and the United Nations to renew the Darfur peace talks in Doha, Qatar. *Digest 2011* will discuss the relevant aspects of the referendum and other significant 2011 developments.

Secretary Clinton discussed U.S. initiatives toward Sudan and Darfur in 2010 and U.S. objectives concerning the CPA, the 2011 referendum, and Darfur during the Security Council's ministerial meeting on Sudan on November 16, 2010. Secretary Clinton's statement, excerpted below, is available at *www.state.gov/secretary/rm/2010/11/151001.htm*.

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Yesterday marked a milestone in the history of Sudan. Voters from Southern Sudan began lining up to register for the referendum by which they will decide their own future. Holding this referendum, resolving the status of Abyei, and all of the conditions of the CPA represent the promise of self-determination made to the Sudanese people under the Comprehensive Peace Agreement of 2005. The United States believes that these are promises that must be kept. It is critical to peace and stability, not only for Sudan but also for the neighbors, some of whom are here today, and the rest of Africa represented by others, that the referendum for Southern Sudan be held peacefully and on time on January 9th. And regardless of the outcome, the will of the people must be respected by all parties in Sudan and around the world.

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In the next 55 days, the Government of Sudan can ensure a brighter future, one that does offer peace, opportunity, and hope. But there is a huge amount of work to be done in these next 55 days. And I agree completely with Minister Karti and with Mr. Amum; each member state must do its utmost to help. None of us should look back and wish we had done more. As President Obama has said, although no outsider can dictate events on the

ground in Sudan, it is up to the political leaders and the people of Sudan whether they will choose peace or confrontation. But it is up to all of us to help them not only make the right choice but then to implement it to the benefit of all their people.

* * * *

But to fulfill that promise, the North and South must promptly forge agreements on the crucial issues that will arise in 2011: oil revenue distribution, border demarcation, international treaties, security arrangements, citizenship rights, and the protection of vulnerable civilians, including Southerners in the North and Northerners in the South. The fate of 44 million Sudanese depends on their leaders' willingness to work together to resolve these issues.

Most urgently, the parties must make the tough compromises necessary to settle the status of Abyei. They must find a way forward that both upholds the rights of the Ngok Dinka and the other residents of Abyei as well as the nomadic peoples like the Misseriya who regularly pass through the area. And they must do so promptly because preparations for the referendum on Abyei have fallen behind schedule and tensions will continue to rise.

The Comprehensive Peace Agreement agreed to by both parties calls for this referendum. It also states that the parties themselves can agree to change it. However, unless the parties reach a mutual agreement that is acceptable to all the people of Abyei, the United States and the international community will continue to hold them to their commitment to an on-time referendum, as promised in the CPA.

But even as we focus on the future of Southern Sudan, Abyei, and all of Sudan, we remain deeply concerned about Darfur. Violence is intensifying, human rights violations continue, arms flow despite the embargo, journalists and activists are arrested—some merely for speaking to members of this Security Council—UN peacekeepers are kidnapped. This is all unacceptable.

The United States stands ready to work with the Council to support peace efforts in Darfur and we call on all parties to participate in the Doha talks without delay or preconditions. We urge the government not to target civilians or use proxy militia or support the Janjaweed and other irregular forces, or prevent freedom of

movement of UN personnel and aid workers. In Darfur and elsewhere, the Government of Sudan must live up to its international obligations to respect human rights; to allow humanitarian assistance; to protect civilians, including victims of sexual violence; to ensure that refugees and internally displaced people can return in safety and with dignity; and to bring those responsible for atrocities to justice.

As President Obama said here in New York, accountability sends a powerful message that certain behavior, including genocide, is not acceptable. Because in the 21st century, we must uphold universal rules and values. . . .

The voting must take place on time, without violence, and in an atmosphere of calm. I commend the Sudanese people, North and South, and the international community for working hard to make that possible. And we are beginning to see results. . . .

But more must be done, and so we urge all UN member states to support the UN mission in Sudan, and we hope that the Government of Sudan will continue to fund, with help from others, the South Sudan Referendum Commission going forward.

Now, as we plan this effort, it is essential to include women. It's unusual that I'm the only woman at the table for the Security Council, so speaking on behalf of all women, let me just say that women are critical to every step of building, negotiating, and keeping the peace in Sudan. Lasting peace and prosperity will not be achieved if half the population is excluded from that process. In country after country, as we discussed with the implementation of Resolution 1325, we have seen that the underlying issues that cause conflicts are more likely to recur and less likely to be resolved if women are not involved at the peace table. In both the North and the South, we certainly hope that women will be brought in to the highest levels of government.

The Sudanese people want peace and the United States wants to help them achieve it. We have engaged in intensive diplomacy to help accomplish that. We have spent more than $200 million to help mitigate conflict, provide election security, create economic opportunities, and fund voter registration, education, and observation. We have sent Special Envoy Scott Gration, Ambassador Princeton Lyman, Ambassador Barrie Walkley, and a whole raft of people to

try to increase our presence in Southern Sudan as well as to work with both the government in Khartoum and the SPLM in Juba.

And this month, the Chairman of our Senate Foreign Relations Committee, Senator John Kerry, traveled to Khartoum with a special message on behalf of President Obama. The message was this: If Sudan chooses the path of peace, the Government of Sudan can have a dramatically improved relationship with the United States, including normalization of relations between our two countries.

To demonstrate our commitment to improving U.S.-Sudanese relations, the United States has already taken two steps. First, we have changed our policies to ease the sale of agricultural and irrigation equipment to Sudan, which will boost food production and decrease the need for international food aid. Second, to help Sudan's economy grow, the United States has supported the creation of a group to work on ways to ease Sudan's national debt, consistent with international debt relief practices.

Now, these are steps we've already taken, but we are prepared to do much more. If the Government of Sudan fulfills the CPA, if it resolves the future of Abyei, if it holds Southern Sudan's referendum on January 9th and then recognizes the will of the Sudanese people in the South, then the United States is prepared to begin the process of withdrawing Sudan from our list of state sponsors of terrorism. This would be done in accordance with our laws on terrorism. If the Government of Sudan commits to a peaceful resolution of the conflict in Darfur and takes other steps toward peace and accountability, the Obama Administration is prepared to offer Sudan a path to the ending of U.S. sanctions, working toward international debt relief, increasing trade and investment, and forging a mutually beneficial relationship.

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C. UGANDA

On May 24, 2010, President Obama signed into law the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009 ("Act"), Pub. L. No. 111-172, 124 Stat. 1209. The Act includes congressional findings about the

Lord's Resistance Army ("LRA"), the conflict in northern Uganda, and post-conflict reconstruction efforts in that region, as well as a statement of policy concerning conflict resolution in northern Uganda and other areas affected by the LRA. Section 4 of the Act requests that the President, not later than 180 days after the Act's enactment, to "develop and submit to the appropriate committees of Congress a strategy to guide future United States support across the region for viable multilateral efforts to mitigate and eliminate the threat to civilians and regional stability posed by the Lord's Resistance Army." While not an appropriation, the Act also authorizes the President to provide "additional assistance to the Democratic Republic of Congo, southern Sudan, and Central African Republic to respond to the humanitarian needs of populations directly affected by the activity of the Lord's Resistance Army" (§ 5) and "to support efforts by the people of northern Uganda and the Government of Uganda to advance efforts to promote transitional justice and reconciliation on both local and national levels" (§ 6). In signing the legislation, President Obama made a statement that described the statute and its significance, as excerpted below. For the full text of President Obama's statement, see Daily Comp. Pres. Docs., 2010 DCPD No. 00416, pp. 1–2.

. . . The legislation crystallizes the commitment of the United States to help bring an end to the brutality and destruction that have been a hallmark of the LRA across several countries for two decades and to pursue a future of greater security and hope for the people of central Africa.

The Lord's Resistance Army preys on civilians, killing, raping, and mutilating the people of central Africa, stealing and brutalizing their children, and displacing hundreds of thousands of people. Its leadership, indicted by the International Criminal Court for crimes against humanity, has no agenda and no purpose other than its own survival. It fills its ranks of fighters with the young boys and girls it abducts. By any measure, its actions are an affront to human dignity.

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I signed this bill today recognizing that we must all renew our commitments and strengthen our capabilities to protect and assist civilians caught in the LRA's wake, to receive those that surrender, and to support efforts to bring the LRA leadership to justice. The bill reiterates U.S. policy and our commitment to work toward a comprehensive and lasting resolution to the conflict in northern Uganda and other affected areas, including northeastern Democratic Republic of Congo, southern Sudan, and the Central African Republic. We will do so in partnership with regional governments and multilateral efforts.

I commend the Government of Uganda for its efforts to stabilize the northern part of the country, for actively supporting transitional and development assistance, and for pursuing reintegration programs for those who surrender and escape from the LRA ranks.

. . . For over a decade, the United States has worked with others to respond to the LRA crisis. We have supported peace process and reconciliation, humanitarian assistance and regional recovery, protection of civilians and reintegration for former combatants, and have supported regional governments as they worked to provide for their people's security. . . .

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Cross References

International Criminal Tribunals for the Former Yugoslavia and Rwanda, **Chapter 3.C.3.**
Women and situations of armed conflict, **Chapter 6.B.2.c.**
U.S. legislation addressing issues concerning child soldiers, **Chapter 6.C.2.**
Sanctions to restore peace and security, **Chapter 16.A.5.**
Gaza, **Chapter 18.A.1.b.**(1)
Russia/Georgia, **Chapter 18.A.1.b.**(2)
Protection of civilians in armed conflict, **Chapter 18.A.1.d.**(2)

Chapter 18

Use of Force, Arms Control and Disarmament, and Nonproliferation

A. USE OF FORCE

1. General

a. Overview

On March 24, 2010, State Department Legal Adviser Harold Hongju Koh delivered the keynote address at the 104th Annual Meeting of the American Society of International Law in Washington, D.C. In his remarks, Mr. Koh included a discussion of how the United States' use of force to counter terrorism and other threats to national security is consistent with all applicable law. Mr. Koh's remarks on the use of force in general and his specific discussion of how U.S. targeting practices comply with all applicable law, including the laws of war, are excerpted below. Mr. Koh's comments on U.S. detention practices and prosecutions of suspected terrorists are discussed in 3.a. and 3.c.(1) of this chapter. The full text of Mr. Koh's speech is available at *www.state.gov/s/l/c8183.htm*.

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B. The Law of 9/11

Let me focus the balance of my remarks on that aspect of my job that I call "The Law of 9/11." In this area, as in the other areas of

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our work, we believe, in the President's words, that "living our values doesn't make us weaker, it makes us safer and it makes us stronger."

We live in a time, when, as you know, the United States finds itself engaged in several armed conflicts. As the President has noted, one conflict, in Iraq, is winding down. He also reminded us that the conflict in Afghanistan is a "conflict that America did not seek, one in which we are joined by forty-three other countries . . . in an effort to defend ourselves and all nations from further attacks." In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harbored al-Qaeda).

Everyone here at this meeting is committed to international law. But as President Obama reminded us, "the world must remember that it was not simply international institutions—not just treaties and declarations—that brought stability to a post-World War II world. . . . [T]he instruments of war do have a role to play in preserving the peace."

With this background, let me address a question on many of your minds: how has this Administration determined to conduct these armed conflicts and to defend our national security, consistent with its abiding commitment to international law? *Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts.* As the President reaffirmed in his Nobel Prize Lecture, "Where 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 by no rules . . . 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 the source of our strength." We in the Obama Administration have worked hard since we entered office to ensure that we conduct all aspects of these armed conflicts—in particular, detention operations, targeting, and prosecution of terrorist suspects—in a manner consistent not just with the applicable laws of war, but also with the Constitution and laws of the United States.

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B. Use of Force

In the same way, in all of our operations involving the use of force, including those in the armed conflict with al-Qaeda, the Taliban and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law. With respect to the subject of targeting, which has been much commented upon in the media and international legal circles, there are obviously limits to what I can say publicly. What I can say *is that it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war*.

The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.

As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks. As you know, this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more critical for the protection of innocent civilians. Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress

the threat the target poses. In particular, this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

- First, the principle of *distinction*, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and
- Second, the principle of *proportionality*, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.

In U.S. operations against al-Qaeda and its associated forces—including lethal operations conducted with the use of unmanned aerial vehicles—great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.

Recently, a number of legal objections have been raised against U.S. targeting practices. While today is obviously not the occasion for a detailed legal opinion responding to each of these objections, let me briefly address four:

First, some have suggested that the *very act of targeting* a particular leader of an enemy force in an armed conflict must violate the laws of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. During World War II, for example, American aviators tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, who was also the leader of enemy forces in the Battle of Midway. This was a lawful operation then, and would be if conducted today. Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects.

Second, some have challenged the *very use of advanced weapons systems*, such as unmanned aerial vehicles, for lethal operations. But the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on

the use of technologically advanced weapons systems in armed conflict—such as pilotless aircraft or so-called smart bombs—so long as they are employed in conformity with applicable laws of war. Indeed, using such advanced technologies can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations.

Third, some have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes *unlawful extrajudicial killing*. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.

Fourth and finally, some have argued that our targeting practices violate *domestic law*, in particular, the long-standing *domestic ban on assassinations*. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute "assassination."

In sum, let me repeat: . . . this Administration is committed to ensuring that the targeting practices that I have described are lawful.

* * * *

b. Use of force issues related to specific conflicts

(1) Gaza

(i) May 31, 2010 flotilla incident

On May 31, 2010, a confrontation involving the Israeli navy and a flotilla of ships heading for the Gaza Strip led to several

deaths and additional injuries. In a statement at an emergency session of the Security Council on May 31, 2010, Ambassador Alejandro D. Wolff, then Deputy Permanent U.S. Representative to the United Nations, expressed U.S. concerns about the violence, loss of life, and injuries; urged the Israeli government to investigate the incident; and stressed the need for the parties to resume negotiations to achieve a permanent solution to the Israeli-Palestinian conflict. Ambassador Wolff's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/142381.htm*. Ambassador Eileen Chamberlain Donahoe, U.S. Permanent Representative to the Human Rights Council, reiterated the same views during the Human Rights Council's general debate on the incident on June 1; see *http://geneva.usmission.gov/2010/06/01/human-rights-council-us-statement-on-the-may-31-incident-aboard-the-gaza-bound-ships*.

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* * * *

The United States is deeply disturbed by the recent violence and regrets the tragic loss of life and injuries suffered among those involved in the incident last night aboard the Gaza-bound ships. We are working to ascertain the facts. We expect a credible and transparent investigation and strongly urge the Israeli government to investigate the incident fully.

As I stated in the Chamber in December 2008, when we were confronted by a similar situation, mechanisms exist for the transfer of humanitarian assistance to Gaza by member states and groups that want to do so. These non-provocative and non-confrontational mechanisms should be the ones used for the benefit of all those in Gaza. Direct delivery by sea is neither appropriate nor responsible, and certainly not effective, under the circumstances.

The United States remains deeply concerned by the suffering of civilians in Gaza, and the deterioration of the situation there, including the humanitarian and human rights situation. We continue to believe the situation is unsustainable and is not in the interests of any of those concerned. We will continue to engage the Israelis on a daily basis to expand the scope and type of goods allowed

into Gaza to address the full range of the population's humanitarian and recovery needs. Hamas' interference with international assistance shipments and the work of nongovernmental organizations complicates efforts in Gaza. Its continued arms smuggling and commitment to terrorism undermines security and prosperity for Palestinians and Israelis alike.

We will continue to work closely with the Government of Israel and the Palestinian Authority, along with international NGOs and the UN, to provide adequate access for humanitarian goods, including reconstruction materials, through the border crossings, while bearing in mind the Government of Israel's legitimate security concerns.

Ultimately, this incident underscores the need to move ahead quickly with negotiations that can lead to a comprehensive peace in the region. . . .

* * * *

The Security Council and the Human Rights Council subsequently considered the incident and appropriate follow up. On June 1, 2010, the Security Council issued a Presidential Statement calling for a full and impartial investigation into the incident, and on June 2, 2010, the United States called a vote and voted against a Human Rights Council resolution that established a fact-finding mission to investigate the incident. U.N. Doc. A/HRC/RES/14/1. Ambassador Eileen Chamberlain Donahoe delivered a statement, excerpted below, explaining U.S. concerns about the resolution. The full text of the U.S. statement is available at *http://geneva.usmission.gov/2010/06/02/hrc-resolution*. The Human Rights Council adopted the resolution (U.N. Doc. A/HRC/RES/14/1) by a vote of 32 states in favor and three against, with nine states abstaining.

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We call attention to the Security Council statement adopted on June 1. It is important to ensure a prompt, credible, impartial, and transparent investigation. Israel has a very strong interest in conducting such an investigation that meets international standards

and exposes all the facts. There are, of course, a number of ways to ensure such an outcome.

* * * *

Unfortunately, the resolution before us rushes to judgment on a set of facts that, as our debate over the last day makes clear, are only beginning to be discovered and understood. It creates an international mechanism before giving the responsible government an opportunity to investigate this incident itself and thereby risks further politicizing a sensitive and volatile situation. We understand the impetus to respond quickly to a troubling set of events. But we have an obligation to determine facts and make considered judgments on how to best address what is a complex and difficult situation.

* * * *

On August 2, 2010, the Secretary-General informed the President of the Security Council that he had decided to establish a Panel of Inquiry on the incident. On the same day, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, welcomed the Secretary-General's announcement, stating in part:

> The Panel, which has the support of both Israel and Turkey, will receive and review the reports of each government's national investigation into the incident and make recommendations as to how to avoid such incidents in the future. This Panel is not a substitute for those national investigations. It complements them, affording Israel and Turkey the opportunity to present the conclusions of their investigations to the international community. The focus of the Panel is appropriately on the future and on preventing such incidents from recurring. The United States also hopes that the Panel can serve as a vehicle to enable Israel and Turkey to move beyond the recent strains in their relationship and repair their strong historic ties.
>
> The United States expects that the Panel will operate in a transparent and credible manner and that its work will be the primary method for the international community

> to review the incident, obviating the need for any overlapping international inquiries. . . .

See http://usun.state.gov/briefing/statements/2010/145549.htm for the full text of Ambassador Rice's remarks. On October 1, 2010, Ambassador Eileen Chamberlain Donahoe, U.S. Permanent Representative to the Human Rights Council, reiterated the U.S. view that the Secretary-General's panel should remain "the primary method for the international community to review the incident" in voting against a Human Rights Council resolution that decided to endorse the conclusions of the Council's fact-finding mission (U.N. Doc. A/HRC/15/21), task the UN High Commissioner for Human Rights to report to the Council on the relevant parties' implementation of the fact-finding mission's conclusions, and recommend that the General Assembly consider the fact-finding mission's report. *See http://geneva.usmission.gov/2010/10/01/explanation-resolution-141-2*. The Human Rights Council adopted the resolution by a vote of 30 states in favor and one against, with 15 states abstaining. U.N. Doc. A/HRC/RES/15/1.

(ii) UN Fact-Finding Mission on the Gaza Conflict

In 2009, in both the General Assembly and the Human Rights Council, the United States expressed its concerns about the September 29, 2009 Report of the UN Fact-Finding Mission on the Gaza Conflict, headed by Justice Richard L. Goldstone ("Goldstone Report"). *See Digest 2009* at 164–70 and 685–89 for background. In 2010, the United States reiterated those concerns when the General Assembly and the Human Rights Council considered follow up to the fact-finding mission's report. In a Special Session of the General Assembly on February 26, 2010, for example, the United States called for a vote and voted against a second General Assembly resolution concerning follow up to the Goldstone Report. The General Assembly adopted the resolution by 98 votes in favor and seven opposed, with 31 abstentions. U.N. Doc. A/RES/64/254. Among other things the resolution took note of the Secretary-General's

February 4 follow-up report and tasked the Secretary-General to report to the General Assembly within five months on implementation of the resolution.

After the vote, Ambassador Alejandro D. Wolff, then U.S. Deputy Permanent Representative to the United Nations, delivered a statement explaining the U.S. vote based on the view that thorough, independent, and credible domestic investigations and follow up represent the most appropriate means to provide accountability for any human rights and humanitarian law violations in relation to the Gaza conflict. Ambassador Wolff's statement is available in full at *http://usun.state.gov/briefing/statements/2010/137331.htm*.

Similarly, on March 25, 2010, the United States called for a vote and voted against a Human Rights Council resolution on follow up to the Goldstone Report. The Council adopted the resolution by a vote of 29 states in favor and six opposing, with 11 states abstaining. U.N. Doc. A/HRC/RES/13/9. Before the vote, Ambassador Eileen Chamberlain Donahoe made a statement explaining the U.S. vote on the resolution. Ambassador Donahoe explained that

> . . . we object, in particular, to the following elements: (1) the recommendation to convene the High Contracting Parties to the Fourth Geneva Convention in what is bound to be a highly politicized and counterproductive session; (2) the one-sided call for the High Commissioner to take the unprecedented step of determining the "appropriate modalities for the establishment of an escrow fund" for the provision of reparations to Palestinians who suffered loss and damage as a result of unlawful acts attributable to the State of Israel during the Gaza conflict; (3) the call for the General Assembly, working with the ICRC, to promote a discussion on the legality of the use of certain munitions, which risks a politically-motivated outcome; and (4) the establishment of a Committee of Independent Experts to "monitor and assess" the parties' ongoing domestic accountability processes. This last element would set a deeply troubling precedent that we firmly reject.

> We cannot support such international oversight of these domestic legal processes absent any indication that they are manifestly failing to deal seriously with alleged abuses. The parties' ongoing domestic processes should be left to play out of their own accord.

The full text of the statement is available at *http://geneva.usmission.gov/2010/03/25/ambassador-donahoe-goldstone-report*.

On September 23, 2010, the committee of experts appointed pursuant to Human Rights Council Resolution 13/9, discussed *supra*, submitted its report to the Council. The report, known as the "Tomuschat Committee Report," discussed the Israeli and Palestinian proceedings to investigate the violations of international humanitarian law during the Gaza conflict that the Goldstone Report identified. On September 27, 2010, Ambassador Donahoe addressed the Human Rights Council during its discussion of the report. The U.S. statement, excerpted below, is available in full at *http://geneva.usmission.gov/2010/09/27/tomuschat*.

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* * * *

We appreciate that the Tomuschat Committee did not jump to conclusions on Israeli motives or recommend follow up in the UN, however we remind the HRC that the United States opposed the creation and mandate of this committee, which stems from the deeply flawed Goldstone report. . . .

We have consistently expressed our belief that allegations of violations of international law that took place during the Gaza conflict warrant effective domestic follow-up action. The primary responsibility for investigations and follow-up rests with the parties. In this context, we urge members of the Human Rights Council to keep in mind that the "Tomuschat Committee" report did not recommend any further UN action.

Israel has the mechanisms to investigate such questions, as the "Tomuschat Committee" report affirms. Israel is a democracy with a robust judiciary and a strong record of independent review of

military operations. We welcome Israel's steps to investigate, establish accountability, adapt combat doctrine aimed to enhance civilian protections during conflict, and punish those who may have violated the law. Not all of these investigations are complete, and the results are subject to judicial review. These investigations should be given the opportunity to conclude.

Beyond responding to specific violations, the Israeli government has also significantly changed its military operational guidelines to better protect civilians during conflict. The "Tomuschat Committee" report praises these changes, including new procedures regarding the protection of civilians and the destruction of private property, the integration of Humanitarian Affairs Officers into Israeli army battalions, and new orders on the use of certain munitions. The Committee stated that it was unable to determine whether Israel's investigations fulfilled the mandate of their mission—but these reforms, as well as Israel's investigations, prosecutions, and public reports, are all evidence of ongoing credible and serious domestic inquiries. Israel, like any other UN member state, should be given the opportunity to complete its work. Because Israel has the right and the demonstrated ability to conduct credible investigations and serious self-scrutiny, further follow-up of the Goldstone Report by UN bodies is unnecessary and unwarranted.

We note that the "Tomuschat Committee" also reported on the Palestinian Independent Investigation Commission. We welcome the efforts of the Palestinian Authority to establish an investigation into the allegations of human rights violations in the Palestinian Territories, as well as the efforts of the Palestinian Authority to follow-up on the recommendations of the Palestinian Independent Investigation Commission report, and hope that they will continue.

The report states that Hamas has made no serious effort to address the allegations in the Goldstone Report. Hamas is a terrorist organization that is not willing to examine—let alone credibly—its deliberate repeated violations of international law and impairments on the enjoyment of human rights of Israelis and Palestinians. We appreciate that the Committee reaffirmed that all parties, including non-state actors, are bound by customary international law.

Direct talks between Israelis and Palestinians have been resumed, and all parties should help create an environment conducive

to progress in these talks. Direct talks between the part[ie]s are the best vehicle to end this tragic conflict and end the human rights abuses that stem from it. We should all be working to advance the cause of peace—not to hinder it.

* * * *

On September 29, 2010, the United States called for a vote and voted against a Human Rights Council resolution concerning follow up to the Tomuschat Committee's report. Before the vote, Ambassador Donahoe delivered a statement explaining the U.S. vote against the resolution, which summarized the views she presented during the Council's September 27 consideration of the Tomuschat Committee's report. Ambassador Donahoe's explanation of the U.S. vote is available at *http://geneva.usmission.gov/2010/10/01/0929-eov-2*. The resolution was adopted by a vote of 30 states in favor and one against, with 15 abstentions. A/HRC/RES/15/1.

(2) Russia/Georgia

In 2010, the United States continued to participate actively in the Geneva Discussions concerning Georgia and to stress the need for full implementation of the August 12, 2008 ceasefire agreement between Georgia and the Russian Federation. *See Digest 2008* at 864–70 for background. During 2010, the Russian Federation and the de facto authorities in the Georgian separatist regions of Abkhazia and South Ossetia reiterated their request for Georgia to provide additional commitments on the "non-use of force." On June 8, 2010, the State Department released a press statement by the U.S. delegation to the Geneva Discussions, which stated:

> Proposals on a possible non-use of force agreement and associated international security arrangements were among the topics discussed at the session. We note that the August 12, 2008 ceasefire agreement between President Saakashvili of Georgia and President Medvedev of the Russian Federation, mediated by President Sarkozy of France, already establishes the sides' commitment

> to the non-use of force. Full implementation of that agreement—which we still await from the Russian Federation—would render an additional agreement unnecessary. The United States believes another non-use of force agreement among the relevant parties, including the Russian Federation, could improve the situation on the ground provided it meets the concerns of all parties, includes meaningful implementation measures, and avoids unnecessary politicization of the status issue.

The full text of the press statement is available at *www.state.gov/r/pa/prs/ps/2010/06/142855.htm*.

In an address to the European Parliament on November 23, 2010, President Mikheil Saakashvili of Georgia unilaterally announced that Georgia would not use force in the areas of Georgia occupied by Russian and separatist forces since August 2008, while reserving its right to use force in self defense against new attacks. *See www.president.gov.ge/index.php?lang_id=ENG&sec_id=228&info_id=5857*. President Saakashvili then sent a letter to President Obama on November 30, 2010, which informed President Obama of Georgia's unilateral pledge and stated its commitment to formalize that commitment with the letter. President Saakashvili stated, "Our unilateral commitment to non-use of force immediately becomes our legal obligation under international law." The text of President Saakashvili's letter is available at *www.state.gov/s/l/c8183.htm*.

On December 16, 2010, Philip H. Gordon, Assistant Secretary of State for European and Eurasian Affairs, briefed the press following the fourteenth round of the Geneva Discussions. In his remarks, Mr. Gordon "welcomed [Georgia's recent] unilateral declaration on the non-use of force." He stated:

> This is a commitment that reinforces the commitments already made by Presidents Medvedev and Saakashvili under their 2008 ceasefire. It underscores Georgia's position that there is no military solution to the conflict, which is something the United States has always believed and said before, and we hope this gesture will contribute to

> confidence-building and mutual trust, enabling us to improve stability, address humanitarian and human rights concerns, and bring us closer to a permanent resolution of the conflict.
>
> We also at the talks today welcomed the Russian Federation's withdrawal from the village of Perevi as a step towards eventual full compliance with its ceasefire obligations. We invite the Russian Federation to demonstrate its commitment to the peaceful resolution of the conflict by making its own formal pledge to the non-use of force.
>
> Russian deployments in the Abkhazia and South Ossetia regions by the Russian Federation are inconsistent with its ceasefire commitments and threaten stability in the region. Such actions also demonstrate the continued need for additional transparency, including an international security presence inside Abkhazia and South Ossetia. . . .

The full text of Mr. Gordon's press briefing is available at *www.state.gov/p/eur/rls/rm/2010/153111.htm*.

(3) Democratic People's Republic of Korea ("DPRK" or "North Korea")

On March 26, 2010, North Korea attacked a South Korean naval vessel, the *Cheonan*, leading to the deaths of 46 South Korean sailors. On July 9, 2010, the UN Security Council issued a formal Presidential Statement condemning the attack (U.N. Doc. S/PRST/2010/13), and the White House Office of the Press Secretary welcomed the Council's action that day. The White House Office of the Press Secretary stated:

> Today's UN Security Council Presidential statement condemns the attack by North Korea on the *Cheonan* and warns North Korea that the international community will not tolerate such aggressive behavior against the Republic of Korea. The unanimous statement, reflecting the shared view of the 5 members of the Six-Party Talks, constitutes an endorsement of the findings of the Joint Investigative Group that established North Korea's responsibility for the attack. We commend the Republic of Korea's restraint

> in the face of North Korean belligerence and reiterate our unwavering commitment to the defense of South Korea. This statement increases North Korea's international isolation, which includes the strongest sanctions that it has ever faced through UNSC Resolution 1874, as the international community continues to make clear the cost that comes with North Korea's provocative behavior.

The press statement is also available at *www.whitehouse.gov/the-press-office/statement-un-security-council-presidential-statement-cheonan*. On August 30, 2010, President Obama issued Executive Order 13551, "Blocking Property of Certain Persons With Respect to North Korea," in which, among other things, he determined that "the continued actions and policies of the Government of North Korea, manifested most recently by its unprovoked attack that resulted in the sinking of the Republic of Korea Navy ship *Cheonan* and the deaths of 46 sailors in March 2010 . . . destabilize the Korean peninsula and imperil U.S. Armed Forces, allies, and trading partners in the region, and thereby constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." Chapter 16.A.1. discusses the new executive order.

On November 23, 2010, North Korea carried out an artillery attack against South Korean facilities on Yeonpyeong island, which the 1953 Armistice Agreement places under the military control of the United Nations Command ("UNC"). The White House Press Secretary issued a statement on the same day, announcing, "The United States strongly condemns this attack and calls on North Korea to halt its belligerent action and to fully abide by the terms of the Armistice Agreement." The full text of the statement is available at *www.whitehouse.gov/the-press-office/2010/11/23/statement-press-secretary-north-korean-shelling-south-korean-island*.

At a Security Council meeting on the situation on the Korean peninsula on December 19, 2010, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, condemned North Korea's actions and called South Korea's response a justified act of self defense. Ambassador Rice's

statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/153128.htm*.

. . . [I]t is important that we keep in mind that this tense situation springs from one source and one source alone: the consistently provocative behavior of North Korea. In July, this Council issued a statement after the North Korean sinking of the South Korean vessel, the *Cheonan*. The statement condemned the attack and underscored the importance of preventing further such attacks or hostilities against the Republic of Korea. It also called for full adherence to the Armistice Agreement. Nonetheless, North Korea has continued to defy the Council. The regime recently disclosed a uranium enrichment program-activity that directly contravenes Resolutions 1718 and 1874, as well as the 2005 Joint Declaration's clear demand for an end to North Korea's existing nuclear programs.

On November 23, North Korea launched a premeditated and unprovoked attack on the island of Yeonpyong. North Korea's deliberate and premeditated armed attack resulted in the death of two Republic of Korea Marine Corps personnel and two South Korean civilians. The attack injured sixteen Republic of Korea Marine Corps personnel and twenty-nine South Korean civilians. It also caused considerable damage to military facilities and destruction of civilian homes and property. A UN Command report, which included participants from nine UN Command-sending states and observers from the Swedish, Polish and Swiss delegations, concluded that this attack constitutes a violation of the Armistice Agreement.

The Republic of Korea Marine Corps' response firing on Mu-Do and Gaemeori is justified under the right of self-defense given the necessary, proportional, and timely nature of the response. The Republic of Korea Marine Corps' action in self-defense to the Korean People's Army's armed attack and in response to the Korean People's Army's serious violation of the Armistice Agreement is not a violation of the letter or the spirit of any provision of the Armistice Agreement. The Neutral Nations Supervisory Commission report also confirmed the UN Command finding that the North Korean attack violated the Armistice Agreement and that the Republic of South Korea response was an inherent right of self defense.

This Council's responsibility to ensure peace and stability weighs heaviest at moments such as these. Yet there has been no statement from this body to clearly condemn the North Korean shelling of Yeonpyong island—an important step to identify and respond to this outrageous act. I would also like to address the concerns that some have expressed regarding plans by South Korea to hold a defensive live fire exercise in the coming days. As a starting point, it is important to recognize that that there is nothing unusual about these planned drills. They are exclusively defensive in nature, and they have been regularly conducted for years-oftentimes on the order of every three months. The conduct of defensive exercises is nothing less than prudent given that North Korean belligerence has cost 50 South Korean lives in the last nine months alone.

Despite this litany of provocations, the international community has yet to sufficiently and effectively condemn these acts to the extent that they deserve. South Korea's planned exercises have been widely notified, and the South Koreans have been unceasingly transparent in providing information to airmen and mariners through all of the proper channels. Moreover, the area where the exercises will occur is well south of the Northern Limit Line and south of the five islands which, in accordance with the terms of the Armistice Agreement, are controlled by the UN Commander and have been administered by South Korea since 1953. So, let us be very clear: These defensive exercises pose no danger to North Korea and threaten no North Korean lives. Despite all of this, North Korea has made extensive public threats to undertake massive military action against South Korea if these routine exercises proceed. It is important for this Council to send a strong message that it is not acceptable to threaten military action against a UN member state for conducting a legitimate exercise to provide for its self-defense.

The U.S. takes its responsibilities to support peace and stability in the Korean peninsula with the utmost seriousness. We are a treaty ally of South Korea, and we will stand with our ally in the face of threat or attack. At the same time, we have consistently urged calm and restraint to avoid breaches of the Armistice Agreement or UN Security Council resolutions 1718 and 1874. We have enthusiastically supported confidence building measures and direct talks between north and south. We have, and will continue

to support all efforts to ensure a nuclear weapons free peninsula. And, we have engaged in vigorous diplomacy in an effort to reduce the tensions caused by these latest North Korean provocations. . . .

We continue to work closely with our Six Party partners to find a diplomatic path that protects peace and stability on the peninsula and fulfills the goals of the 2005 Six Party Joint Statement. . . .

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c. Bilateral agreements and arrangements

(1) Defense cooperation with Brazil

On April 12, 2010, U.S. Secretary of Defense Robert Gates and Brazilian Minister of Defense Nelson Jobim signed an agreement on defense cooperation between the Brazilian and U.S. governments. Excerpts below from a State Department media note describe the agreement and its significance. The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2010/04/140059.htm*. As of the end of 2010, the agreement had not entered into force.

As the two most populous democracies in the Western Hemisphere, the United States and Brazil enjoy an increasingly close bilateral relationship, including in the area of defense. The DCA will enable U.S.–Brazil defense cooperation to deepen and expand into new areas of mutual interest.

Examples of cooperation promoted in the DCA include:

- Cooperation in the fields of research and development, logistics support, technology security, and the acquisition of defense products and services.
- Information exchanges on topics such as operational experiences, defense technology, and international peacekeeping operations.
- Combined military training and education, and joint military exercises.

- Collaboration relating to military systems and equipment.
- Exchanges of instructors and students from defense institutions.
- Naval ship visits.
- Commercial initiatives related to defense matters.

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(2) Military air transit agreement with Kazakhstan

On November 12, 2010, Andrew J. Shapiro, Assistant Secretary of State for Political-Military Affairs, and Erlan A. Idrissov, Ambassador of Kazakhstan to the United States, signed the Agreement between the Government of the United States of America and the Government of the Republic of Kazakhstan on the Air Transit of Cargo and Personnel through the Territory of the Republic of Kazakhstan in Connection with the Participation of the United States of America in Efforts for Ensuring the Security, Stabilization, and Reconstruction of the Islamic Republic of Afghanistan. The Department of State and the Kazakhstan Ministry of Foreign Affairs issued a joint statement, excerpted below and available at *www.state.gov/r/pa/prs/ps/2010/11/150867.htm*, providing details on the agreement and its significance. As of the end of 2010, the agreement had not entered into force.

. . . [The] agreement . . . will enable the United States to transport by air its personnel and equipment across Kazakhstan's airspace to support American and Coalition forces in Afghanistan. The signing of this text brings to fruition the commitment made by President Nazarbayev and President Obama when they met in Washington on April 11th and furthers both countries' endeavors toward regional security in accordance with the spirit of their strategic partnership.

The agreement enhances a United States–Kazakhstan arrangement, under which the United States began transit flights to Afghanistan across Kazakhstan's airspace in 2001.

It will enable the United States and International Security Assistance Force partners to further enhance crucial transportation routes and decrease the amount of time needed to move personnel and equipment, and needed supplies in support of Coalition forces and the Government and people of Afghanistan. . . .

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(3) Rail transit agreement with Kazakhstan

On June 20, 2010, representatives of the United States and Kazakhstan signed the Agreement between the Government of the United States of America and the Government of the Republic of Kazakhstan on Support for Commercial Rail Transit of Special Cargo through the Territory of the Republic of Kazakhstan in Connection with the Participation of the United States of America in Efforts for the Stabilization and Reconstruction of the Islamic Republic of Afghanistan. This bilateral agreement defines procedures for commercial rail transit of motorized, non-weaponized, wheeled armored vehicles and escort personnel, including reverse shipment of such vehicles and personnel, by the United States through the territory of the Republic of Kazakhstan. The agreement is available at *www.state.gov/documents/organization/146428.pdf*.

d. International humanitarian law

(1) 60th anniversary of Geneva Conventions

On October 18, 2010, Gregory Nickels, U.S. Senior Adviser to the 65th General Assembly, addressed the General Assembly's Sixth (Legal) Committee during its debate on Agenda Item 82: Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts. In his statement, Mr. Nickels stressed the U.S. commitment to the advancement of international humanitarian law. As excerpted below, Mr. Nickels also discussed a number of the recent steps the United States had taken to further its

commitment to the Geneva Conventions and their underlying principles. The full text of the U.S. statement is available at *http://usun.state.gov/briefing/statements/2010/149784.htm.*

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The United States Government has recently taken an array of concrete actions to further our commitment to the Geneva Conventions and the principles underlying them, including to minimize unnecessary suffering during armed conflict.* For example:

- The President directed that all interrogations of detainees by anyone in the U.S. Government be conducted in accordance with our Army Field Manual in order to ensure compliance with humane treatment standards.
- The Administration has worked with the U.S. Congress to reform the law governing our military commissions, including barring the admissibility of statements obtained through the use of cruel, inhuman, and degrading treatment.
- The U.S. Government has worked to provide more robust review procedures for detainees held by the United States in Afghanistan, including permitting them greater opportunity to challenge the accuracy of information that is the basis for their detention and having the assistance of personal representatives to help them navigate the detention review process.
- The U.S. Government has reaffirmed its commitment to the development and implementation of international humanitarian law by becoming a party to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. A long-time party to the Convention on Conventional Weapons (CCW), the United States is now also Party to all its protocols upon the ratifications of Protocols III, IV, V and the amendment to Article I of the CCW.

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* Editor's note: On March 7, 2011, the Obama administration announced its support for Additional Protocol II and Article 75 of Additional Protocol I to the 1949 Geneva Conventions. *See www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy.*

> The United States remains committed to negotiating a legally binding protocol on Cluster Munitions in the CCW.

We know that we have more work to do, but we consider these to be significant accomplishments and a sign of our deep national commitment to fulfilling our duties as a State Party to the Geneva Conventions, to improving the effectiveness of those Conventions, and to furthering the goals that the Conventions were intended to advance. We very much look forward to working with the International Committee of the Red Cross, the United Nations, and other partners around the world in that endeavor.

* * * *

(2) Protection of civilians in armed conflict

On November 22, 2010, Ambassador Rosemary A. DiCarlo, U.S. Deputy Permanent Representative to the United Nations, addressed the Security Council during a debate on the protection of civilians. In her statement, Ambassador DiCarlo identified four areas for improving efforts to protect civilians in situations of armed conflict. Ambassador DiCarlo's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2010/151752.htm*.

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* * * *

First, we must continue our efforts to better tailor peacekeeping mandates to adequately address situation-specific challenges on the ground. This includes laying out a clear hierarchy of tasks so that peacekeepers can understand the priorities. The Secretary-General's report notes the progress the Council has made in mandating civilian protection in peacekeeping missions. Nevertheless, better planning, preparedness and policies are needed to support the missions' efforts to reduce the vulnerabilities of innocents in conflict zones.

Second, we should increase our ability to provide peacekeepers and humanitarian organizations with the knowledge, training and resources needed to fulfill their protection mandates, including protection against sexual and gender-based violence. Many peacekeeping

missions and humanitarian organizations struggle due to inadequate resources and insufficient communication with local communities. The United States is proud to play a leading role in developing peacekeeping capacity, particularly with regard to military and police programs.

Third, we must ensure that the Council is not being selective in its application of protection principles. . . .

Fourth, we must hold accountable groups and individuals that flagrantly violate the laws of war, including those who use rape and sexual violence as a weapon of war. The primary responsibility for ensuring accountability lies with states, but the international community must be prepared to take action against those who violate international humanitarian law, including through imposition of sanctions such as freezing of assets, banning of international travel, or restricting the flow of goods and arms. We must help governments create, maintain, and operate credible national courts where possible and support international and hybrid tribunals when necessary to end impunity. The International Criminal Court plays a key role in bringing perpetrators of the worst atrocities to justice.

Mr. President, we understand far better than we did a decade ago what protecting civilians in armed conflict truly entails. We are developing more tools and mechanisms to implement lessons that have been painfully learned. We must remain vigilant, and we must address future challenges together more consistently. We still have far more to do to save the lives of civilians in conflict zones. The situations differ from conflict to conflict, but civilian victims are all innocent, and they should all be sheltered by the rule of law and the rules of war.

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(3) Private military security companies, military contractors, and their accountability

(i) Open-ended intergovernmental working group

On October 1, 2010, the United States called for a vote and voted against a resolution in the Human Rights Council to establish an "open-ended intergovernmental working group on the elaboration of a legally binding instrument on the regulation,

monitoring, and oversight of the impact of the activities of private military and security companies on the enjoyment of human rights." Ambassador Eileen Chamberlain Donahoe, U.S. Permanent Representative to the Human Rights Council, explained the U.S. vote on the resolution, emphasizing the U.S. view that improving implementation of existing laws, rather than elaborating a new legally binding instrument, represents the best way to ensure accountability for private military and security companies. The U.S. statement, excerpted below, is available in full at *http://geneva.usmission.gov/2010/10/01/u-s-statement-on-issues-regarding-private-security-companies-military-contractors-and-their-accountability*. The Human Rights Council adopted the resolution by a vote of 32 states in favor, three abstaining, and 12 opposing. U.N. Doc. A/HRC/RES/15/26.

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The United States takes very seriously issues regarding private security companies, military contractors, and their accountability. The United States believes that the most effective and immediate way of addressing these concerns is through better implementation of existing laws. . . .

Unfortunately, the resolution ill-advisedly prioritizes consideration of a legally binding instrument when additional law is not what is most needed at this time. We are disappointed that our suggestions—as well as similar suggestions of other members—to adequately address these concerns, were not fully reflected in the final resolution.

I want to reiterate, the United States does acknowledge the importance of the issues regarding PMSCs. We cannot support this resolution for two reasons. First, it takes us down a path that will not produce an effective resolution to those issues, and in so doing diverts valuable time, effort, and resources from a more practical approach. Second, though well-intentioned, the resolution risks creating new issues that have not adequately been appreciated and considered. It could, for example, have an impact on the training and professionalization of national militaries and law enforcement agencies, and on UN peacekeeping efforts.

We remain committed to the principles outlined in the Montreux Document and to pursuing effective, practical approaches to expeditiously address issues related to PMSCs.

* * * *

(ii) International Code of Conduct for Private Security Service Providers

On November 9, 2010, State Department Legal Adviser Harold Hongju Koh attended the signing ceremony for the International Code of Conduct for Private Security Service Providers ("Code of Conduct") in Geneva, Switzerland. Other senior State Department officials and Deputy Assistant Secretary of Defense Gary Motsek also attended the ceremony. The Code of Conduct grew out of a Swiss government-facilitated initiative that brought together representatives of the U.S. and other governments, civil society, and private security companies, as well as private experts and other stakeholders to consider ways to enhance the accountability of private security contractors. The process followed on an earlier initiative of the Swiss government and the International Committee of the Red Cross, which produced the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict ("Montreux Document") on September 17, 2008. *See www.eda.admin.ch/psc* for background on the Montreux Document.

In a statement during the signing ceremony, as excerpted below, Mr. Koh welcomed the Code of Conduct and outlined U.S. views on how best to realize the principles that the Code reflects. The full text of Mr. Koh's statement is available at *www.state.gov/s/l/c8183.htm*; additional background and the text of the Code of Conduct are available at *www.state.gov/documents/organization/150711.pdf*.

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The USG particularly welcomes the commitments made by companies in signing the Code of Conduct today. This initiative implicates many U.S. policy concerns, not just the rule of law, but also human rights, security, and defense acquisitions policy. . . . Along with other stakeholders, we appreciate the tremendous efforts of the Swiss Government in facilitating this important process.

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The U.S. Government strongly supports effective oversight of, and accountability for, private security contractors through the principles expressed in the Montreux Document. Indeed, the Code of Conduct represents an important follow on to the Montreux Document. For by bringing together all of the key stakeholders—states, civil society organizations, relevant experts, clients, and the private security companies themselves—this initiative has the potential to address gaps in oversight and accountability left by traditional regimes. To be clear, the Code may help complement State regulation, but we fully recognize that it is not and cannot be a substitute for effective accountability under the law. Nonetheless, particularly in high-risk environments, where the rule of law is often weakened, the Code of Conduct would fill a gap by providing a means for facilitating the responsible provision of security services.

We note that U.S. Government oversight of private security contractors has been strengthened significantly over the past several years, and many of the principles encompassed in the Code have already been adopted into U.S. Government contractual oversight. The initiative is especially promising in the area of raising the standards of companies when they contract with clients who have less experience in providing effective oversight, and in providing important guidance for contractors who provide security services in areas where the rule of law has been substantially undermined. As a result, this initiative not only has the potential to raise the standards of the private security industry, but also to benefit those clients who contract with Private Security Service Providers, States that host these companies on their territory, the civilian populations where they operate, as well as the private security providers themselves.

But to achieve the full potential of this initiative, it must go beyond the endorsement of principles and complete the next steps to establish effective governance and oversight mechanisms for the Code. The endorsement of the Code is only the first step of an initiative to adopt (1) "objective and measurable standards" and (2) "external independent mechanisms for effective governance and oversight." To remain credible, the initiative must stay on track to develop these critical next steps.

Signatory companies should recognize that it is in their own interest to participate fully in the initiative regardless of whether it is used by their clients. By demonstrating a commitment to high standards and an effective compliance mechanism, signatory companies will be more attractive to all potential clients and address the negative perceptions that have followed this industry.

The U.S. Government will continue to engage in this process to work towards making the Code of Conduct initiative both credible as a tool for raising the standards of the industry, and consistent with good security practices. The relevant agencies of the U.S. Government are carefully considering how this initiative could be integrated into their contracting practices. The precise nature of how it could be utilized depends in large part on how the standards and mechanisms are developed.

Let me close by emphasizing that above all, this is a collaborative effort, and will crucially depend upon building consensus through open communication. These initiatives fail when differences are ignored and expectations are not shared. For this initiative to be successful, all stakeholders must approach the next steps with . . . a spirit of trust. Developed in that spirit, the innovative public-private partnership that takes root here today can play an enormously important role in addressing a most important and challenging global problem.

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2. Convention on Certain Conventional Weapons: Negotiation of CCW Protocol on Cluster Munitions

During 2010, 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. The GGE met April 12–16 and August 30–September 3, 2010. The United States also participated in the group's informal consultations June 28–July 1, 2010. At the meeting of States Parties in November 2010, the parties extended the negotiating mandate on the new protocol for 2011.

In her opening statement to the GGE on August 30, 2010, Melanie Khanna, head of the U.S. delegation, reiterated U.S. views on the benefit of concluding the draft protocol. Ms. Khanna also underscored the continuing need for the protocol notwithstanding the entry into force of the Convention on Cluster Munitions ("Oslo Convention"). The United States is not a party to the Oslo Convention. Ms. Khanna's statement, excerpted below, is available in full at *http://geneva.usmission.gov/2010/08/30/gge-meeting-us-stmt*. *See also Digest 2007* at 899–905, *Digest 2008* at 885–88, and *Digest 2009* at 701–6.

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Mr. Chairman, the United States remains committed to reaching an agreement on a legally binding protocol on Cluster Munitions in the CCW to address their humanitarian impact on civilian populations. . . .

We recognize, especially with the entry into force of the Convention on Cluster Munitions, that some delegations and NGOs may view these negotiations as having no value or even as counterproductive. Some have argued that an agreement on cluster munitions in the CCW that is different from the standard set by the Oslo Convention is not worthwhile. We strongly disagree. A CCW Protocol that imposes meaningful requirements on the countries that are the major users and producers of cluster munitions would be a very important step forward from a humanitarian standpoint.

* * * *

On November 25, 2010, in an opening statement to the Meeting of the High Contracting Parties to the Convention on Certain Conventional Weapons, Ms. Khanna discussed the

immediate humanitarian benefits the draft cluster munitions protocol would provide and urged States to support a continuation of the GGE's negotiating mandate. She also expressed hope that States Parties could reach agreement on a text within the year. Ms. Khanna's statement, excerpted below, is available in full at *http://geneva.usmission.gov/2010/11/29/ccw-opening-statement*.

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The current Chairman's text incorporates an immediate ban on a specific group of cluster munitions, namely those that have been produced before 1980 that do not incorporate any safeguards. This ban would include a large portion of those weapons that have been cited as being the most likely to have unacceptable humanitarian effects. For the United States, accepting a protocol with this provision would require us to permanently set aside from use, and to ultimately destroy, approximately 50% of our cluster munitions stocks. Other provisions of the Protocol that become effective after optional deferral periods would cover an even higher percentage of the U.S. arsenal.

I am not suggesting that the current text constitutes our final document. There are still difficult discussions ahead. But we now have a text that genuinely reflects some of the persistent concerns of both sides, and provides an immediate and significant humanitarian impact. The standards incorporated in the current text would be subject to evolution over time by agreement. The current text also includes exemptions deemed critical by various states—some by Oslo states and some by major users and producers.

We have truly reached an important juncture. We have the possibility of agreement within our grasp. Both sides have been presented with a draft which may be difficult for them to accept. For the Oslo States who want to see a complete ban on most types of cluster munitions (namely those defined as cluster munitions in the CCM), this agreement will not fully satisfy. For the major "users and producers," many provisions in the current draft are very far reaching indeed. We must move ahead deliberately, taking into account each other's genuine efforts and concerns.

We are convinced that an agreement is possible in the next year. With continued cooperation and political will, these negotiations can come to a conclusion that will change the reality on the ground in a meaningful way. . . .

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3. Detainees

a. Overview

In his keynote address to the 104th Annual Meeting of the American Society of International Law, discussed in A.1.a. *supra*, State Department Legal Adviser Harold Hongju Koh discussed the changes the Obama administration had made to U.S. detention practices to ensure their full compliance with domestic and international law. Mr. Koh's remarks on that issue are provided below; the full text of his speech is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

1. Detention

. . . [T]he last Administration's detention practices were widely criticized around the world, and as a private citizen, I was among the vocal critics of those practices. This Administration and I personally have spent much of the last year seeking to revise those practices to ensure their full compliance with domestic and international law, first, by unequivocally guaranteeing humane treatment for all individuals in U.S. custody as a result of armed conflict and second, by *ensuring that all detained individuals are being held pursuant to lawful authorities*.

a. Treatment

To ensure humane treatment, on his second full day in office, the President unequivocally banned the use of torture as an instrument of U.S. policy, a commitment that he has repeatedly reaffirmed in the months since. He directed that executive officials

could no longer rely upon the Justice Department OLC [Office of Legal Counsel] opinions that had permitted practices that I consider to be torture and cruel treatment—many of which he later disclosed publicly—and he instructed that henceforth, all interrogations of detainees must be conducted in accordance with Common Article 3 of the Geneva Conventions and with the revised Army Field Manual. An interagency review of U.S. interrogation practices later advised—and the President agreed—that no techniques beyond those in the Army Field Manual (and traditional noncoercive FBI [Federal Bureau of Investigation] techniques) are necessary to conduct effective interrogations. That Interrogation and Transfer Task Force also issued a set of recommendations to help ensure that the United States will not transfer individuals to face torture. The President also revoked Executive Order 13440, which had interpreted particular provisions of Common Article 3, and restored the meaning of those provisions to the way they have traditionally been understood in international law. The President ordered CIA "black sites" closed and directed the Secretary of Defense to conduct an immediate review—with two follow-up visits by a blue ribbon task force of former government officials—to ensure that the conditions of detention at Guantanamo fully comply with Common Article 3 of the Geneva Conventions. Last December, I visited Guantanamo, a place I had visited several times over the last two decades, and I believe that the conditions I observed are humane and meet Geneva Conventions standards.

As you all know, also on his second full day in office, the President ordered Guantanamo closed, and his commitment to doing so has not wavered, even as closing Guantanamo has proven to be an arduous and painstaking process. Since the beginning of the Administration, through the work of my colleague Ambassador Dan Fried, we have transferred approximately 57 detainees to 22 different countries, of whom 33 were resettled in countries that are not the detainees' countries of origin. Our efforts continue on a daily basis. Just this week, five more detainees were transferred out of Guantanamo for resettlement. We are very grateful to those countries who have contributed to our efforts to close Guantanamo by resettling detainees; that list continues to grow as more and more countries see the positive changes we are making and wish to offer their support.

During the past year, we completed an exhaustive, rigorous, and collaborative interagency review of the status of the roughly 240 individuals detained at Guantanamo Bay when President Obama took office. The President's Executive Order placed responsibility for review of each Guantanamo detainee with six entities—the Departments of Justice, State, Defense, and Homeland Security, the Office of the Director of National Intelligence (ODNI), and the Joint Chiefs of Staff—to collect and consolidate from across the government all information concerning the detainees and to ensure that diplomatic, military, intelligence, homeland security, and law enforcement viewpoints would all be fully considered in the review process. This interagency task force, on which several State Department attorneys participated, painstakingly considered each and every Guantanamo detainee's case to assess whether the detainee could be transferred or repatriated consistently with national security, the interests of justice, and our policy not to transfer individuals to countries where they would likely face torture or persecution. The six entities ultimately reached unanimous agreement on the proper disposition of all detainees subject to review. As the President has made clear, this is not a one-time review; there will be "a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified." Similarly, the Department of Defense has created new review procedures for individuals held at the detention facility in Parwan at Bagram airfield, Afghanistan, with increased representation for detainees, greater opportunities to present evidence, and more transparent proceedings. Outside organizations have begun to monitor these proceedings, and even some of the toughest critics have acknowledged the positive changes that have been made.

b. Legal Authority to Detain

Some have asked what legal basis we have for continuing to detain those held on Guantanamo and at Bagram. But as a matter of both international and domestic law, the legal framework is well-established. As a matter of international law, our detention operations rest on three legal foundations. First, we continue to fight a war of self-defense against an enemy that attacked us on September 11, 2001, and before, and that continues to undertake

armed attacks against the United States. Second, in Afghanistan, we work as partners with a consenting host government. And third, the United Nations Security Council has, through a series of successive resolutions, authorized the use of "all necessary measures" by the NATO countries constituting the International Security Assistance Force (ISAF) to fulfill their mandate in Afghanistan. As a nation at war, we must comply with the laws of war, but detention of enemy belligerents to prevent them from returning to hostilities is a well-recognized feature of the conduct of armed conflict, as the drafters of Common Article 3 and Additional Protocol II recognized and as our own Supreme Court recognized in *Hamdi v. Rumsfeld*.

The federal courts have confirmed our legal authority to detain in the Guantanamo habeas cases, but the Administration is not asserting an unlimited detention authority. For example, with regard to individuals detained at Guantanamo, we explained in a March 13, 2009 habeas filing before the DC federal court—and repeatedly in habeas cases since—that we are resting our detention authority on a domestic statute—the 2001 Authorization for Use of Military Force (AUMF)—as informed by the principles of the laws of war. Our detention authority in Afghanistan comes from the same source.

In explaining this approach, let me note two important differences from the legal approach of the last Administration. First, as a matter of *domestic law*, the Obama Administration has not based its claim of authority to detain those at GITMO and Bagram on the President's Article II authority as Commander-in-Chief. Instead, we have relied on legislative authority expressly granted to the President by Congress in the 2001 AUMF.

Second, unlike the last administration, as a matter of *international law*, this Administration has expressly acknowledged that international law *informs the scope of our* detention authority. Both in our internal decisions about specific Guantanamo detainees, and before the courts in habeas cases, we have interpreted the scope of detention authority authorized by Congress in the AUMF *as informed by the laws of war*. Those laws of war were designed primarily for traditional armed conflicts among states, not conflicts against a diffuse, difficult-to-identify terrorist enemy, therefore construing what is "necessary and appropriate" under the AUMF

requires some "translation," or analogizing principles from the laws of war governing traditional international conflicts.

Some commentators have criticized our decision to detain certain individuals based on their membership in a non-state armed group. But as those of you who follow the Guantanamo habeas litigation know, we have defended this position based on the AUMF, as informed by the text, structure, and history of the Geneva Conventions and other sources of the laws of war. Moreover, while the various judges who have considered these arguments have taken issue with certain points, they have accepted the overall proposition that individuals who are part of an organized armed group like al-Qaeda can be subject to law of war detention for the duration of the current conflict. In sum, we have based our authority to detain not on conclusory labels, like "enemy combatant," but on whether the factual record in the particular case meets the legal standard. This includes, but is not limited to, whether an individual joined with or became part of al-Qaeda or Taliban forces or associated forces, which can be demonstrated by relevant evidence of formal or functional membership, which may include an oath of loyalty, training with al-Qaeda, or taking positions with enemy forces. Often these factors operate in combination. While we disagree with the International Committee of the Red Cross on some of the particulars, our general approach of looking at "functional" membership in an armed group has been endorsed not only by the federal courts, but also is consistent with the approach taken in the targeting context by the ICRC in its recent study on Direct Participation in Hostilities (DPH).

A final point: the Obama Administration has made clear both its goal not only of closing Guantanamo, but also of moving to shift detention responsibilities to the local governments in Iraq and Afghanistan. Last July, I visited the detention facilities in Afghanistan at Bagram, as well as Afghan detention facilities near Kabul, and I discussed the conditions at those facilities with both Afghan and U.S. military officials and representatives of the International Committee of the Red Cross. I was impressed by the efforts that the Department of Defense is making both to improve our ongoing operations and to prepare the Afghans for the day when we turn over responsibility for detention operations. This Fall, DOD

created a joint task force led by a three-star admiral, Robert Harward, to bring new energy and focus to these efforts, and you can see evidence of his work in the rigorous implementation of our new detainee review procedures at Bagram, the increased transparency of these proceedings, and closer coordination with our Afghan partners in our detention operations.

In sum, with respect to both treatment and detainability, we believe that our detention practices comport with both domestic and international law.

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b. Final Report: Guantanamo Review Task Force

In January 2010, the Guantanamo Review Task Force established pursuant to Executive Order 13492 of January 22, 2009, issued its final report on the U.S. government's interagency review of the status of the individuals detained at Guantanamo Bay as of the date of the order. The task force, comprising representatives of six federal agencies, considered each and every Guantanamo detainee's case to assess whether the detainee could be transferred or repatriated consistently with national security, the interests of justice, and U.S. policy not to transfer individuals to countries where they would more likely than not face torture or persecution. Excerpts below from the executive summary to the task force's final report provide an overview of the review process and the results of the review. The full text of the report is available at *www.justice.gov/ag/guantanamo-review-final-report.pdf*. Background on Executive Order 13492 is available in *Digest 2009* at 719–22.

On January 22, 2009, the President issued Executive Order 13492, calling for a prompt and comprehensive interagency review of the status of all individuals currently detained at the Guantanamo Bay Naval Base and requiring the closure of the detention facilities there. The Executive Order was based on the finding that the appropriate disposition of all individuals detained at Guantanamo

would further the national security and foreign policy interests of the United States and the interests of justice.

One year after the issuance of the Executive Order, the review ordered by the President is now complete. After evaluating all of the detainees, the review participants have decided on the proper disposition—transfer, prosecution, or continued detention—of all 240 detainees subject to the review.

Each of these decisions was reached by the unanimous agreement of the agencies responsible for the review: the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff.

Review Process

To implement the President's order, the Attorney General, as the coordinator of the review, established the Guantanamo Review Task Force and a senior-level Review Panel. The Task Force was responsible for assembling and examining relevant information on the Guantanamo detainees and making recommendations on their proper dispositions. The Review Panel, consisting of officials with delegated authority from their respective agencies to decide the disposition of each detainee, reviewed the Task Force's recommendations and made disposition decisions on a rolling basis. Where the Review Panel did not reach consensus, or where higher-level review was appropriate, the agency heads ("Principals") named in the Executive Order determined the proper disposition of the detainee.

Key features of the review process included:

- **Comprehensive Interagency Review**. The Task Force consisted of more than 60 career professionals, including intelligence analysts, law enforcement agents, and attorneys, drawn from the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Central Intelligence Agency, Federal Bureau of Investigation, and other agencies within the intelligence community.
- **Rigorous Examination of Information**. The Task Force assembled large volumes of information from across the

government relevant to determining the proper disposition of each detainee. Task Force members examined this information critically, giving careful consideration to the threat posed by the detainee, the reliability of the underlying information, and the interests of national security.

- **Unanimous Decision-Making by Senior Officials.** Based on the Task Force's evaluations and recommendations, senior officials representing each agency responsible for the review reached unanimous determinations on the appropriate disposition for all detainees. In the large majority of cases, the Review Panel was able to reach a consensus. Where the Review Panel was not able to reach a unanimous decision—or when additional review was appropriate—the Principals met to determine the proper disposition.

Results of the Review

The decisions reached on the 240 detainees subject to the review are as follows:

- **126 detainees** were approved for transfer. To date, 44 of these detainees have been transferred from Guantanamo to countries outside the United States.
- **44 detainees** over the course of the review were referred for prosecution either in federal court or a military commission, and **36 of these detainees** remain the subject of active cases or investigations. . . .
- **48 detainees** were determined to be too dangerous to transfer but not feasible for prosecution. They will remain in detention pursuant to the government's authority under the Authorization for Use of Military Force passed by Congress in response to the attacks of September 11, 2001. Detainees may challenge the legality of their detention in federal court and will periodically receive further review within the Executive Branch.
- **30 detainees** from Yemen were designated for "conditional" detention based on the current security environment in that country. They are not approved for repatriation to Yemen at this time, but may be transferred to third countries, or repatriated

to Yemen in the future if the current moratorium on transfers to Yemen is lifted and other security conditions are met.

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c. U.S. court decisions and proceedings

(1) Detainees at Guantanamo: Habeas litigation

(i) Overview

In 2010, habeas litigation relating to the Defense Department's detention of individuals at Guantanamo Bay continued before the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit. In this litigation, the United States continued to assert the basis for the President's detention authority it articulated on March 13, 2009. The government had explained:

> . . . 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). . . .
>
> * * * *
>
> 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.

U.S. Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Litig.*, Misc. No. 08-442 (TFH) (D.D.C.), at 1–2 (available at *www.justice.gov/opa/documents/memo-re-det-auth.pdf*). *See also Digest 2009* at 732–40 and State Department Legal Adviser Harold Hongju Koh's remarks at the 104th Annual Meeting of the International Society of International Law, discussed in 3.a. *supra*. The courts' ensuing opinions assessed and refined the standard the government proposed. Some of the D.C. Circuit's decisions, reflecting noteworthy developments in its considerations of the President's detention authority, are discussed in this section.

(ii) Al-Bihani v. Obama

On January 10, 2010, the D.C. Circuit affirmed a lower court's denial of a petition for a writ of habeas corpus brought by a Yemeni national detained at Guantanamo. *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010). The court looked to "the text of relevant statutes and controlling domestic caselaw" in holding that Al-Bihani is lawfully detained. *Al-Bihani v.* Obama, 590 F.3d at 871. The court held:

> . . . Al-Bihani is lawfully detained whether the definition of a detainable person is, as the district court articulated it, "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners," or the modified definition offered by the government that requires that an individual "substantially support" enemy forces. The statutes authorizing the use of force and detention not only grant the government the power to craft a workable legal standard to identify individuals it can detain, but also cabin the application of

> these definitions. The AUMF authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF § 2(a). The Supreme Court in *Hamdi* [*v. Rumsfeld*] ruled that "necessary and appropriate force" includes the power to detain combatants subject to such force. . . .

Al-Bihani v. Obama, 590 F.3d at 872. The court also looked to the text of other statutes, in particular the Military Commission Acts of 2006 and 2009, for guidance on interpreting the scope of the U.S. government's detention authority. *See* Pub. L. No. 109-366, 120 Stat. 2600; Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2575–76.

After it considered the scope of the government's detention authority, the court analyzed and rejected the petitioner's argument that he must be released because the conflict with the Taliban allegedly had ended. The court stated:

> . . . The determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war. *See Ludecke v. Watkins*, 335 U.S. 160, 168–70 & n.13 (1948) ("[T]ermination [of a state of war] is a political act."). Al-Bihani urges the court to ignore *Ludecke*'s controlling precedent because the President in that case had pronounced that a war was ongoing, whereas in this case the President has made no such pronouncement. We reject Al-Bihani's entreaty. A clear statement requirement is at odds with the wide deference the judiciary is obliged to give to the democratic branches with regard to questions concerning national security. In the absence of a determination by the political branches that hostilities in Afghanistan have ceased, Al-Bihani's continued detention is justified.

Id. at 874–75.

The court also stated that "while the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, *see Hamdi* [*v. Rumsfeld*, 542 U.S. 507, 520 (2004)], their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers." *Id.* at 871. The petitioner sought rehearing en banc, and on May 13, 2010, the government filed its brief in opposition. The government's brief stated that the court's "broad statement" that the laws of war do not limit the power granted in the AUMF "does not properly reflect the state of the law. As [the Government] announced on March 13, 2009, the Government interprets its detention authority under the AUMF to be informed by the laws of war." Rehearing Response, at 6–7 (footnote omitted). The U.S. brief is available at *www.state.gov/s/l/c8183.htm*. On August 31, 2010, the D.C. Circuit denied the petitioner's request for rehearing. *Al-Bihani v. Obam*a, 619 F.3d 1 (D.C. Cir. 2010). Seven members of the court joined a statement accompanying the order denying rehearing, explaining: "We decline to en banc this case 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." *Id.* at 2. The petitioner filed a petition for writ of certiorari on November 29, 2010, which was pending at the end of 2010.*

(iii) Awad v. Obama

On June 2, 2010, the D.C. Circuit affirmed a lower court's denial of the writ of habeas corpus to a Yemeni national detained at Guantanamo. *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010). The appeals court concluded that the petitioner,

* Editor's note: The United States filed its brief in opposition to certiorari on March 4, 2011, and the Supreme Court denied certiorari on April 4, 2011. *Al-Bihani v. Obama*, 131 S. Ct. 1814 (2011).

who traveled to Afghanistan with the stated intent to fight against U.S. and allied forces and was captured during a December 2001 siege of a hospital in Afghanistan, was "part of" al-Qaeda. The court also determined, as it had in *Al-Bihani v. Obama*, discussed *supra*, that the government's authority to detain individuals continues until the conclusion of hostilities and therefore the government does not need to show that a detainee would pose a threat to the United States if he is released. The court also rejected the petitioner's claim that the court must determine not only that he was a "part of" al-Qaeda but also must make "a specific factual finding that he was part of the 'command structure' of al[-]Qaeda." *Id.* at 11. The court held:

> . . . There is no such requirement under the AUMF. . . .
>
> The distinction here is between defining what is necessary and what is sufficient. If the government can establish by a preponderance of the evidence that a detainee was part of the "command structure" of al Qaeda, this satisfies the requirement to show that he was "part of" al Qaeda. But there are ways other than making a "command structure" showing to prove that a detainee is "part of" al Qaeda. For example, if a group of individuals were captured who were shooting at U.S. forces in Afghanistan, and they identified themselves as being members of al Qaeda, it would be immaterial to the government's authority to detain these people whether they were part of the "command structure" of al Qaeda. Once Awad was "part of" al Qaeda by joining the al Qaeda fighters behind the barricade at the hospital, the requirements of the AUMF were satisfied. . . .

Id. at 11–12. The petitioner filed a petition for writ of certiorari on November 30, 2010, and the petition was pending at the end of 2010.** The publicly filed version of the government's

** Editor's note: The United States filed its brief in opposition to the petition on March 4, 2011, available at *www.justice.gov/osg/briefs/2010/*

brief to the D.C. Circuit is available at *www.state.gov/s/l/c8183.htm*.

(iv) Bensayah v. Obama

On June 28, 2010, the D.C. Circuit elaborated on its previous analysis of how to determine whether an individual is "part of" al-Qaeda, the Taliban, or an associated force. *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010). This case involved an Algerian national apprehended in Bosnia-Herzegovina in October 2001, whom the government detained on the grounds that he was a member of al-Qaeda and facilitated the movement of al-Qaeda recruits to Afghanistan in late 2001. *Bensayah v. Obama*, 610 F.3d at 721. The publicly filed version of the government's July 2009 brief to the D.C. Circuit is available at *www.state.gov/s/l/c8183.htm*.

The D.C. Circuit remanded the case to the district court for further proceedings to determine if the petitioner was "part of" al-Qaeda. In reaching that decision, the court stated that it is "impossible to provide an exhaustive list of criteria for determining whether an individual is 'part of' al[-]Qaeda." *Id.* at 725. As a result, the court concluded that the determination whether a petitioner is "part of" al-Qaeda "must be made on a case-by-case basis using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization." *Id.* The court also stated that evidence showing "[t]hat an individual operates within al[-]Qaeda's formal command structure is surely sufficient but is not necessary to show he is 'part of' the organization; there may be other indicia that a particular individual is sufficiently involved with the organization to be deemed part of it . . . but the purely independent conduct of a freelancer is not enough." *Id.*

0responses/2010-0736.resp.pdf. The Supreme Court denied certiorari on March 4, 2011. *Awad v. Obama*, 131 S. Ct. 1814 (2011).

(v) Salahi v. Obama

In a decision issued November 5, 2010, the D.C. Circuit considered the habeas petition of a Mauritanian national, whom the government detained at Guantanamo "on the grounds that he was 'part of' al-Qaida not because he fought with al-Qaida or its allies against the United States, but rather because he swore an oath of allegiance to the organization, associated with its members, and helped it in various ways, including hosting its leaders and referring aspiring jihadists to a known al-Qaida operative." *Salahi v. Obama*, 625 F.3d 745, 746 (D.C. Cir. 2010). The court vacated the district court's judgment granting a writ of habeas corpus to the petitioner and remanded the case to the lower court "for further proceedings consistent with this opinion." *Id.* at 747. The court remanded because "additional fact-finding is required" to resolve the question whether Salahi was "part of" al-Qaida when he was captured. *Id.* at 753. Excerpts follow from the court's opinion (citations to the hearing transcript and other submissions in the litigation omitted). The publicly filed versions of the government's initial brief and its reply brief to the D.C. Circuit are available at *www.state.gov/s/l/c8183.htm*.

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. . . [T]he government contends that Salahi should bear the burden of proving that he disassociated from al-Qaida after swearing *bayat* to the organization in 1991. In support, the government cites the plurality's statement in *Hamdi v. Rumsfeld* that "once the Government puts forth credible evidence that [a] habeas petitioner meets the [AUMF's detention] criteria, the onus [may] shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria." 542 U.S. 507, 534 (2004).

Here, as noted, the relevant inquiry is whether Salahi was "part of" al-Qaida when captured. Therefore, in order to shift the burden of proof to Salahi, we would have to presume that having once sworn *bayat* to al-Qaida, Salahi remained a member of the organization until seized in November 2001. Although such a

presumption may be warranted in some cases, such as where an individual swore allegiance to al-Qaida on September 12, 2001, and was captured soon thereafter, the unique circumstances of Salahi's case make the government's proposed presumption inappropriate here.

When Salahi took his oath of allegiance in March 1991, al-Qaida and the United States shared a common objective: they both sought to topple Afghanistan's Communist government. *See* [John Rollins, Cong. Research Serv., R41070, *Al-Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy*, at 4 (2010)]. Not until later did al-Qaida begin publicly calling for attacks against the United States. *See id.* at 4–5; *see also* [Nat'l Comm'n on Terrorist Attacks Upon the U.S., *The 9/11 Commission Report*, 59 (2004)]. . . . Bin Laden . . . did not issue his first *fatwa* against U.S. forces until 1992—the very year in which, according to Salahi's sworn declaration, Salahi severed all ties with al-Qaida. *See* 9/11 Commission Report, *supra*, at 59; Salahi Am. Decl. ¶ 12. In light of all this, Salahi's March 1991 oath of *bayat* is insufficiently probative of his relationship with al-Qaida at the time of his capture in November 2001 to justify shifting the burden to him to prove that he disassociated from the organization. In so concluding, we have no doubt about the relevance of Salahi's oath to the ultimate question of whether he was "part of" al-Qaida at the time of his capture. We conclude only that given the facts of this particular case, Salahi's oath does not warrant shifting the burden of proof.

The government next challenges the district court's use of the "command structure" test—a standard that district judges in this circuit, operating without any meaningful guidance from Congress, developed to determine whether a Guantanamo habeas petitioner was "part of" al-Qaida. *See Hamlily v. Obama*, 616 F. Supp. 2d 63, 75 (D.D.C. 2009); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68–69 (D.D.C. 2009). As applied by the district court in this case, the command structure test required the government to prove that Salahi "'receive[d] and execute[d] orders or directions'" from al-Qaida operatives after 1992 when, according to Salahi, he severed ties with the organization. *Salahi*, 710 F. Supp. 2d at 5 (quoting *Hamlily*, 616 F. Supp. 2d at 75). Having found no such evidence,

the court concluded that Salahi was not "part of" al-Qaida at the time of his capture. *Id.* at 15–16.

As the government points out, the district court's approach is inconsistent with our recent decisions in *Awad* and *Bensayah*, which were issued after the district court granted Salahi's habeas petition. . . . [Editor's note: *See* 3.c.(1)(iii) and (iv) *supra*.]

. . . Unlike petitioner in *Awad*, who affiliated with al-Qaida fighters engaged in active hostilities against U.S. allies in Afghanistan, Salahi is not accused of participating in military action against the United States. Instead, the government claims that Salahi was "part of" al-Qaida because he swore *bayat* and thereafter provided various services to the organization, including recruiting, hosting leaders, transferring money, etc. Under these circumstances, whether Salahi performed such services pursuant to al-Qaida orders may well be relevant to determining if he was "part of" al-Qaida or was instead engaged in the "purely independent conduct of a freelancer." *Bensayah*, 610 F.3d at 725. The problem with the district court's decision is that it treats the absence of evidence that Salahi received and executed orders as dispositive. *See Salahi*, 710 F. Supp. 2d at 5–6, 11–12, 15–16. The decision therefore cannot survive *Awad* and *Bensayah*.

* * * *

(vi) Al-Adahi v. Obama

On July 13, 2010, the D.C. Circuit reversed the lower court's grant of a writ of habeas corpus to a Yemeni national detained at Guantanamo, and remanded with instructions that the writ be denied. *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010). The court held that the district court had erred by requiring each piece of the government's evidence be sufficient, by itself, to prove whether the petitioner was "part of" al-Qaida, without considering it more broadly together with the other evidence in the case. The court's analysis in concluding that the district court's consideration of the evidence was clearly erroneous is excerpted below (citations to the district court's memorandum opinion and other submissions in the case omitted).

On October 8, 2010, the petitioner filed a petition for a writ of certiorari in the U.S. Supreme Court. The United States filed its brief in opposition on December 13, 2010, available at *www.justice.gov/osg/briefs/2010/0responses/2010-0487.pdf*.*** The publicly filed version of the government's November 2009 brief to the D.C. Circuit is also available at *www.state.gov/s/l/c8183.htm*.

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The district court divided the government's evidence into five categories in rough chronological order: Al-Adahi's trip to Afghanistan; his meetings with bin Laden; his stay in an al-Qaida guesthouse; his military training at Al Farouq; and his other, later activities in Afghanistan. We will generally follow the court's organization, but before we get to the specifics we need to mention an error that affects much of the district court's evaluation of the evidence. The error stems from the court's failure to appreciate conditional probability analysis. *United States v. Prandy-Binett*, 5 F.3d 558, 558–60 (D.C. Cir. 1993) (denying rehearing).

"Many mundane mistakes in reasoning can be traced to a shaky grasp of the notion of conditional probability." John Allen Paulos, Innumeracy: Mathematical Illiteracy and its Consequences 63 (1988). The key consideration is that although some events are independent (coin flips, for example), other events are dependent: "the occurrence of one of them makes the occurrence of the other more or less likely . . . ." John Allen Paulos, Beyond Numeracy: Ruminations of a Numbers Man 189 (1991). Dr. Paulos gives this example: "the probability that a person chosen at random from the phone book is over 250 pounds is quite small. However, if it's known that the person chosen is over six feet four inches tall, then the conditional probability that he or she also weighs more than 250 pounds is considerably higher." Innumeracy 63.

Those who do not take into account conditional probability are prone to making mistakes in judging evidence. They may think that

*** Editor's note: The Supreme Court denied certiorari on January 18, 2011. *Al-Adahi v. Obama*, 131 S. Ct. 1001 (2011).

if a particular fact does not itself prove the ultimate proposition (*e.g.*, whether the detainee was part of al-Qaida), the fact may be tossed aside and the next fact may be evaluated as if the first did not exist. [*United States v. Prandy-Binett*, 5 F.3d 558, 559–60 (D.C. Cir. 1993) (denying rehearing)]. This is precisely how the district court proceeded in this case: Al-Adahi's ties to bin Laden "cannot prove" he was part of Al-Qaida and this evidence therefore "must not distract the Court." The fact that Al-Adahi stayed in an al-Qaida guesthouse "is not in itself sufficient to justify detention." Al-Adahi's attendance at an al-Qaida training camp "is not sufficient to carry the Government's burden of showing that he was a part" of al-Qaida. And so on. The government is right: the district court wrongly "required each piece of the government's evidence to bear weight without regard to all (or indeed any) other evidence in the case. This was a fundamental mistake that infected the court's entire analysis."

Having tossed aside the government's evidence, one piece at a time, the court came to the manifestly incorrect—indeed startling—conclusion that "there is no reliable evidence in the record that Petitioner was a member of al-Qaida and/or the Taliban." When the evidence is properly considered, it becomes clear that Al-Adahi was—at the very least—more likely than not a part of al-Qaida. And that is all the government had to show in order to satisfy the preponderance standard. *Awad*, slip op. at 17–18; *see Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993) (citing *In re Winship*, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring)).

* * * *

(2) Detainees at Guantanamo: Transfer litigation

(i) Uighur detainees

On February 18, 2009, the D.C. Circuit reversed a lower court's decision holding that 17 Uighurs then detained at Guantanamo whose petitions for writs of habeas corpus had been granted must be released into the United States.

Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009). For background on the litigation, see *Digest 2008* at 906–14 and *Digest 2009* at 749–50. In a per curiam opinion issued March 1, 2010, the Supreme Court vacated the D.C. Circuit's judgment and, because the relevant facts in the case had changed since it granted certiorari, remanded the case to the appeals court. *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010). The Court stated:

> We granted certiorari, 558 U.S. __ (2009), on the question whether a federal court exercising habeas jurisdiction has the power to order the release of prisoners held at Guantanamo Bay "where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy." [citation omitted] By now, however, each of the detainees at issue in this case has received at least one offer of resettlement in another country. Most of the detainees have accepted an offer of resettlement; five detainees, however, have rejected two such offers and are still being held at Guantanamo Bay.
>
> This change in the underlying facts may affect the legal issues presented. . . .
>
> Under these circumstances, we vacate the judgment and remand the case to the United States Court of Appeals for the District of Columbia Circuit. It should 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. at 1235.

On May 28, 2010, on remand from the Court, the D.C. Circuit issued a per curiam opinion that reinstated its original opinion, "as modified . . . to take into account new developments." *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010). Excerpts follow from the court's opinion. On September 9, 2010, the court denied the July 2010 petition for rehearing en banc that five of the original petitioners filed. The petitioners

filed a petition for certiorari with the U.S. Supreme Court on December 8, 2010, and the Court's decision remained pending at the end of 2010.****

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. . . The five petitioners who remain in this case have . . . received and rejected three offers [of resettlement from a foreign country]. . . .

We agree with the government that no legally relevant facts are now in dispute. None of petitioners' arguments turn on particular factual considerations. Petitioners want us to remand the case to the district court for an evidentiary hearing on whether any of the resettlement offers were "appropriate." But as our original opinion indicated, even if petitioners had good reason to reject the offers they would have no right to be released into the United States. In addition, an intervening opinion of this court precludes the sort of judicial inquiry petitioners seek; it is for the political branches, not the courts, to determine whether a foreign country is appropriate for resettlement. *Kiyemba v. Obama*, 561 F.3d 509, 514–16 (D.C. Cir. 2009) (*Kiyemba II*) (discussing *Munaf v. Geren*, 128 S. Ct. 2207, 2225–26 (2008)); *see also id.* at 516–17 (Kavanaugh, J., concurring).

* * * *

(ii) Algerian detainees

In 2008, the D.C. District Court granted an injunction that barred the transfer to Algeria of Algerian nationals held at Guantanamo. On February 10, 2010, the district court lifted that injunction, based on the D.C. Circuit's April 7, 2009 decision in *Kiyemba v. Obama* ("*Kiyemba II*"), 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010). In *Kiyemba II*, the D.C. Circuit held, in light of sworn declarations

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**** Editor's note: The government's brief in opposition to certiorari, filed on February 2, 2011, is available at *www.justice.gov/osg/briefs/2010/0responses/2010-0775.resp.pdf*. The Supreme Court denied certiorari on April 18, 2011. *Kiyemba v. Obama*, 131 S. Ct. 1631 (2011).

setting forth the government's policy concerning humane treatment of detainees following their transfer from Guantanamo, that a court may not "bar[] 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." *Kiyemba II*, 561 F.3d at 516. In reaching that conclusion, the D.C. Circuit relied on the Supreme Court's decision in *Munaf v. Geren*, 553 U.S. 674 (2008). For additional discussion of *Kiyemba II* and *Munaf v. Geren*, see *Digest 2009* at 750–51 and *Digest 2008* at 73–78, respectively. *See Digest 2009* at 725–30 for discussion of U.S. measures concerning post-transfer humane treatment.

Three of these detainees again sought injunctions when their cases came before the district court for consideration of the merits of their habeas petitions. All three claimed they would be mistreated if returned to Algeria, either by the Algerian government or by non-state actors. Two different district court judges denied two of the detainees' motions, and another judge granted an injunction to the third detainee. One of those detainees appealed the denial to the D.C. Circuit, which affirmed the district court's decision based on *Kiyemba II* and the government's determination that the transfer could proceed consistent with its humane treatment policies, including longstanding U.S. policy not to transfer any individual to a country where it is more likely than not he would be tortured. The government appealed the third judge's decision to grant an injunction, and the D.C. Circuit reversed the district court.

In its orders, the D.C. Circuit cited the procedures the United States has in place to assess that these detainees can be safely transferred to Algeria, which Ambassador Daniel Fried, Special Envoy for the Closure of the Guantanamo Bay Detention Facility, described in two declarations he submitted in these cases. Publicly filed versions of Ambassador Fried's declarations are available at *www.state.gov/s/l/c8183.htm* under *Digest 2009* and *Digest 2010*, respectively.

In July 2010, each of the two detainees filed an emergency motion in the Supreme Court for an order to temporarily

prevent his transfer. In its opposition brief responding to one of the detainees' motions, the government stated, with respect to one of the detainee's claims that he would be tortured by non-state actors if returned to Algeria:

> That the government's stated policy focuses on treatment by the receiving government does not mean that the government ignores or excludes from consideration the likelihood of serious mistreatment by non-state actors in assessing the appropriateness of transfer . . . .
>
> Here, however, applicant raised no credible allegations of harm from non-government actors that warranted further consideration. . . .

The publicly filed version of the government's brief is available at *www.state.gov/s/l/c8183.htm*. The Court denied both detainees' motions. *Mohammed v. Obama*, 131 S. Ct. 32 (2010); *Naji v. Obama*, 131 S. Ct. 32 (2010). One of the detainees was transferred to Algeria on July 17, 2010. *See* the Department of Defense's press release, available at *www.defense.gov/releases/release.aspx?releaseid=13721*.*****

(3) Detainees held in Afghanistan: Habeas litigation

On May 21, 2010, the D.C. Circuit reversed the order of the district court denying the government's motion to dismiss petitions for writs of habeas corpus brought by three foreign nationals detained by the U.S. executive branch at the Bagram Detention Facility in Afghanistan.* The D.C. Circuit held "that the jurisdiction of the courts to afford the right to habeas relief and the protection of the Suspension Clause [of the

***** Editor's note: The other detainee, Mohammed, was transferred to Algeria on January 5, 2011. *See* the Department of Defense's press release, available at *www.defense.gov/releases/release.aspx?releaseid=14183*.

* Editor's note: In late 2009, the BTIF was replaced by a new theater internment facility, called the Detention Facility in Parwan ("DFIP"), but because the D.C. Circuit referred to "Bagram Detention Facility," this entry also refers to "Bagram Detention Facility."

U.S. Constitution**] does not extend to aliens held in Executive detention in the Bagram detention facility in the Afghan theater of war." *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010). In reaching that conclusion, the court considered the Supreme Court's decisions concerning the availability of the writ of habeas corpus to non-U.S. citizens in *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *Boumediene v. Bush*, 553 U.S. 723 (2008). The court applied the three factors that the Supreme Court in *Boumediene* had identified as relevant in "'determining the reach of the Suspension Clause.' . . . (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.* at 93–94 (citation omitted).

At the outset, the court concluded that the factor concerning citizenship, status, and adequacy of process supported the petitioners' argument that they should receive the right to habeas relief. The court determined that the petitioners did not differ from the *Boumediene* petitioners with respect to citizenship and status. It also concluded that the "Unlawful Enemy Combatant Review Boards" that determined the status of the Bagram petitioners provided them less protection than the *Boumediene* petitioners received at Guantanamo. *Id.* at 96.***

The court then concluded that the second and third factors weighed heavily in favor of the government's argument. *Id.* at 96–97. Excerpts from the court's analysis of the second and third factors are provided below. The government's brief

** Editor's note: Article I, § 9, cl. 2 of the U.S. Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

*** Editor's note: The court did not assess the revised procedures for reviewing the status of aliens detained in Afghanistan that the executive branch put into place in 2009 after the litigation had begun. The new procedures are discussed in *Digest 2009* at 730–32.

to the D.C. Circuit is available as document 89 for *Digest 2009* at *www.state.gov/s/l/2009/list/index.htm*.

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The second factor, "the nature of the sites where apprehension and then detention took place," weighs heavily in favor of the United States. Like all petitioners in both *Eisentrager* and *Boumediene*, the petitioners here were apprehended abroad. While this in itself would appear to weigh against the extension of the writ, it obviously would not be sufficient, otherwise *Boumediene* would not have been decided as it was. However, the nature of the place where the detention takes place weighs more strongly in favor of the position argued by the United States and against the extension of habeas jurisdiction than was the case in either *Boumediene* or *Eisentrager*. In the first place, while *de facto* sovereignty is not determinative, . . . the very fact that it was the subject of much discussion in *Boumediene* makes it obvious that it is not without relevance. As the Supreme Court set forth, Guantanamo Bay is "a territory that, while technically not part of the United States, is under the complete and total control of our Government." [*Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008)]. While it is true that the United States holds a leasehold interest in Bagram, and held a leasehold interest in Guantanamo, the surrounding circumstances are hardly the same. The United States has maintained its total control of Guantanamo Bay for over a century, even in the face of a hostile government maintaining *de jure* sovereignty over the property. In Bagram, while the United States has options as to duration of the lease agreement, there is no indication of any intent to occupy the base with permanence, nor is there hostility on the part of the "host" country. Therefore, the notion that *de facto* sovereignty extends to Bagram is no more real than would have been the same claim with respect to Landsberg in the *Eisentrager* case. While it is certainly realistic to assert that the United States has *de facto* sovereignty over Guantanamo, the same simply is not true with respect to Bagram. Though the site of detention analysis weighs in favor of the United States and against the petitioners, it is not determinative.

But we hold that the third factor, that is "the practical obstacles inherent in resolving the prisoner's entitlement to the writ," particularly when considered along with the second factor, weighs overwhelmingly in favor of the position of the United States. It is undisputed that Bagram, indeed the entire nation of Afghanistan, remains a theater of war. Not only does this suggest that the detention at Bagram is more like the detention at Landsberg than Guantanamo, the position of the United States is even stronger in this case than it was in *Eisentrager*. As the Supreme Court recognized in *Boumediene*, even though the active hostilities in the European theater had "c[o]me to an end at the time of the Eisentrager decision, many of the problems of a theater of war remained:

> In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy. In retrospect the post-War occupation may seem uneventful. But at the time *Eisentrager* was decided, the Court was right to be concerned about judicial interference with the military's efforts to contain "enemy elements, guerilla fighters, and 'were-wolves.'"

128 S. Ct. at 2261 (quoting *Eisentrager*, 339 U.S. at 784).

In ruling for the extension of the writ to Guantanamo, the Supreme Court expressly noted that "[s]imilar threats are not apparent here." 128 S. Ct. at 2261. In the case before us, similar, if not greater, threats are indeed apparent. The United States asserts, and petitioners cannot credibly dispute, that all of the attributes of a facility exposed to the vagaries of war are present in Bagram. The Supreme Court expressly stated in *Boumediene* that at Guantanamo, "[w]hile obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, *or if the detention facility were located in an active theater of war*, arguments that issuing the writ would be 'impractical or anomalous' would have more weight." *Id.* at 2261–62 (emphasis added). Indeed, the Supreme Court supported this proposition with reference to the separate opinion of Justice Harlan in *Reid*, where the Justice

expressed his doubts that "every provision of the Constitution must always be deemed automatically applicable to United States citizens in every part of the world." *See* [*Reid v. Covert*, 354 U.S. 1, 74 (1957)] (Harlan, J., concurring in the result). We therefore conclude that under both *Eisentrager* and *Boumediene*, the writ does not extend to the Bagram confinement in an active theater of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign.

* * * *

(4) Former detainees in Iraq: Civil suit against U.S. official

On August 13, 2010, the United States filed a brief in the U.S. Court of Appeals for the Seventh Circuit in a case brought by two U.S. citizens against former Secretary of Defense Donald Rumsfeld, alleging that former Secretary Rumsfeld promulgated or approved policies that led to their being subjected to abusive interrogation and harsh conditions of confinement in Iraq, in violation of their rights under the U.S. Constitution. *Vance v. Rumsfeld*, Nos. 10-1687 and 10-2442 (7th Cir. 2010). The plaintiffs sought damages for the alleged constitutional violations under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The plaintiffs also brought a claim against the United States under the Administrative Procedures Act, seeking the return of property they alleged that U.S. military personnel had taken from them when they were detained. The district court, after dismissing three of the counts against Secretary Rumsfeld, denied the Secretary's motion to dismiss the plaintiffs' substantive due process claim, concluding, among other things, that because the remedy the plaintiffs sought was removed in time from the alleged underlying events and the plaintiffs were U.S. citizens, special factors that might otherwise counsel hesitation about creating a *Bivens* remedy for alleged abuse during wartime did not preclude the action. *Vance v. Rumsfeld*, 694 F. Supp. 2d 957 (N.D. Ill. 2010).

As to the plaintiffs' substantive due process claim, the United States argued on appeal (1) that special factors did preclude creation of a *Bivens* remedy because the claims directly implicate military and national security authorities in an active foreign war zone, and that if such a remedy were to exist it should be created by Congress and not by the court, (2) that the plaintiffs had not adequately pled Secretary Rumsfeld's personal involvement in the alleged abuse (sufficient to satisfy the pleading requirements for suits against government officials set forth by the Supreme Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)), and (3) that Secretary Rumsfeld was also entitled to qualified immunity because the plaintiffs' allegations were too "vague and conclusory" to support the conclusion that Secretary Rumsfeld violated the plaintiffs' clearly established constitutional rights.

Excerpts below from the opening brief the United States filed in August 2010 summarize the government's argument with respect to the plaintiffs' constitutional claims. The full text of the government's opening brief and the reply brief the government filed in December 2010 are available at *www.state.gov/s/l/c8183.htm*. As of the end of 2010, the case remained pending before the Seventh Circuit.

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This case does not concern the propriety of torture. In fact, torture is flatly illegal and the government has repudiated it in the strongest terms. Federal law makes it a criminal offense to engage in torture, to attempt to commit torture, or to conspire to commit torture outside the United States. *See* 18 U.S.C. § 2340A. Rather, this case concerns the question whether the courts should create a cause of action for monetary damages against the former Secretary of Defense, and whether the complaint adequately alleges that Secretary Rumsfeld should be held personally liable for plaintiffs' alleged treatment.

1. A dispositive threshold issue supports dismissal of the *Bivens* claims asserted against Secretary Rumsfeld here. The Supreme Court and the courts of appeals have consistently refused to extend

Bivens remedies to new contexts. Where there are special considerations or sensitivities raised by a particular context, the courts recognize that it is appropriate for the courts to defer to Congress and wait for it to enact a private damage action if it so chooses. That course is clearly appropriate here.

The district court held that it is appropriate to create a common-law damage action in the context of the detention and treatment of citizens by the United State military in a foreign war zone. However, the context of this case presents compelling "special factors" that strongly counsel against judicial creation of a money-damage remedy. Courts consistently hold that is not appropriate for the judiciary to create a *Bivens* common-law damage remedy where claims directly implicate matters of armed conflict or national security. There can be little question that the claims here directly implicate military authority and national security. Plaintiffs' claim stems from their detention in a foreign war zone, and involves an explicit challenge to alleged detention and interrogation policies issued by the Secretary of Defense. As a result, their claim cannot proceed without inquiry into the military's detention and interrogation policies that applied in an active foreign war zone. Given this highly sensitive context, the district court erred in recognizing a damage action, absent congressional authorization.

The district court's reasoning that it may hear evidence and then decide which detention practices are sufficiently related to military needs would require precisely the sort of judicial second-guessing the Supreme Court has held inappropriate. Nor does plaintiffs' citizenship alter the analysis. While citizens detained abroad may have certain constitutional rights that aliens detained abroad do not, that does not negate the fact that a challenge to military detention policies in a war zone would enmesh the judiciary in military and national security matters, interfering with Executive functioning and legislative prerogatives.

2. Even if special factors did not preclude a *Bivens* action here, the district court should have dismissed the case because Secretary Rumsfeld is entitled to qualified immunity. First, the complaint does not sufficiently allege that Secretary Rumsfeld was personally involved in the alleged constitutional violation. The only concrete allegations of detention and interrogation policies in the complaint

concern policies that by their terms did not apply to U.S. citizen detainees in Iraq, and in any event that were, by plaintiffs' own admission, rescinded before plaintiffs were detained. And plaintiffs' allegation that Secretary Rumsfeld secretly added ten pages of classified techniques to the Army Field Manual is both speculative and implausible. Plaintiffs' claim against Secretary Rumsfeld rests upon precisely the sort of "naked assertion[s]" of illegal conduct without any factual enhancement, that are insufficient to state a claim for personal liability against a government official. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947 (2009).

Second, the allegations of the complaint are too vague and conclusory to support a claim that Secretary Rumsfeld violated plaintiffs' clearly established rights. Despite the fact that plaintiffs amended their complaint twice, the complaint contains little more than vague, cursory, and conclusory references to plaintiffs' conditions of confinement, without sufficient factual information from which to evaluate their constitutional claim, let alone to conclude that a Cabinet-rank official violated their clearly established constitutional rights. Plaintiffs' generalized and conclusory allegations therefore do not provide sufficient information about the alleged conduct for the court to apply the murky and fact-based "shocks the conscience" standard.

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d. Criminal prosecutions and other proceedings

(1) Overview

In his keynote address to the 104th Annual Meeting of the American Society of International Law, discussed in A.1.a. *supra*, State Department Legal Adviser Harold Hongju Koh discussed U.S. efforts to prosecute terrorists, either before U.S. federal courts or military commissions. Mr. Koh's remarks on that issue are provided below; the full text of his speech is available at *www.state.gov/s/l/c8183.htm*.

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. . . As the President made clear in his May 2009 National Archives speech, we have a national security interest in trying terrorists, either before Article III courts or military commissions, and in keeping the number of individuals detained under the laws of war low. [Editor's note: President Obama's speech at the National Archives in May 2009 is discussed in *Digest 2009* at 709–16.]

Obviously, the choice between Article III courts and military commissions must be made on a case-by-case basis, depending on the facts of each particular case. Many acts of terrorism committed in the context of an armed conflict can constitute both war crimes and violations of our Federal criminal law, and they can be prosecuted in either federal courts or military commissions. As the last Administration found, those who have violated American criminal laws can be successfully tried in federal courts, for example, Richard Reid, Zacarias Moussaoui, and a number of others.

With respect to the criminal justice system, to reiterate what Attorney General Holder recently explained, Article III prosecutions have proven to be remarkably effective in incapacitating terrorists. In 2009, there were more defendants charged with terrorism violations in federal court than in any year since 9/11. In February 2010, for example, Najibullah Zazi pleaded guilty in the Eastern District of New York to a three-count information charging him with conspiracy to use weapons of mass destruction, specifically explosives, against persons or property in the United States, conspiracy to commit murder in a foreign country, and provision of material support to al-Qaeda. We have also effectively used the criminal justice system to pursue those who have sought to commit terrorist acts overseas. On March 18, 2010, for example, David Headley pleaded guilty to a dozen terrorism charges in U.S. federal court in Chicago, admitting that he participated in planning the November 2008 terrorist attacks in Mumbai, India, as well as later planning to attack a Danish newspaper.

As the President noted in his National Archives speech, lawfully constituted military commissions are also appropriate venues for trying persons for violations of the laws of war. In 2009, with significant input from this Administration, the Military Commissions Act was amended, with important changes to address the defects in the previous Military Commissions Act of 2006, including the addition of a provision that renders inadmissible any

statements taken as a result of cruel, inhuman or degrading treatment. The 2009 legislative reforms also require the government to disclose more potentially exculpatory information, restrict hearsay evidence, and generally require that statements of the accused be admitted only if they were provided voluntarily (with a carefully defined exception for battlefield statements).

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(2) Military commissions

(i) Manual

On April 27, 2010, the Department of Defense transmitted the 2010 Edition of the Manual for Military Commissions to Congress in accordance with chapter 47A of title 10 of the U.S. Code, as amended by the Military Commissions Act of 2009. The full text of the manual is available at *www.defense.gov/news/d2010manual.pdf*.

(ii) Proceedings

Following transmittal of the 2010 Manual, the Department of Defense resumed some trials of detainees at Guantanamo by military commissions, pursuant to 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.* On August 11, 2010, the Department of Defense announced that a military commission had sentenced Ibrahim al Qosi to 14 years in confinement for conspiracy and providing material support to al-Qaeda, but his sentence is limited by the terms of his pre-trial agreement to two years in confinement.

* Editor's note: On March 7, 2011, the Secretary of Defense issued an order rescinding his prior suspension on the swearing and referring of *new* charges in the military commissions.

Al Qosi had pled guilty in July 2010. *See www.defense.gov/releases/release.aspx?releaseid=13792*.

On October 31, 2010, the Department of Defense announced that a military commission had sentenced Omar Khadr to 40 years in detention and that the United States had requested assistance from Canada to implement the U.S. government's plea agreement with Khadr. Khadr had pled guilty on October 25, 2010, to "murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying," the Defense Department stated. The Department explained further that

> Khadr was sentenced to 40 years by a panel of military officers, known as "members"—the equivalent of a jury in civilian courts. Under the rules provided by the Manual for Military Commissions, Khadr will not receive credit for the time (more than eight years) that he spent in law of war detention before his conviction. Khadr's sentence is limited by the terms of his plea agreement to eight years confinement, but he receives the benefit of whichever is less—the adjudged sentence or the eight-year sentence limitation. Consistent with the terms of Khadr's plea agreement, the governments of Canada and the United States exchanged notes reflecting that both would support Khadr's transfer to Canadian custody to serve the remainder of his approved sentence after he serves one year in U.S. custody.

For the full text of the Department's press release, see *www.defense.gov/releases/release.aspx?releaseid=14023*. The diplomatic notes between the United States and Canada that the press release mentions are available at *www.defense.gov/news/commissionsKhadr.html*, along with other documents relating to the trial. For previous developments, see *Digest 2007* at 976–82.

B. NONPROLIFERATION, ARMS CONTROL, AND DISARMAMENT

1. Nuclear Nonproliferation

a. Non-Proliferation Treaty

(1) Nuclear Posture Review

In April 2010 the Defense Department released the 2010 Nuclear Posture Review Report ("NPR report"), which "outline[d] the Administration's approach to promoting the President's agenda for reducing nuclear dangers and pursuing the goal of a world without nuclear weapons, while simultaneously advancing broader U.S. security interests." The Defense Department conducted the Nuclear Posture Review pursuant to § 1070 of Public Law 110-181, which mandates the Secretary of Defense, "in order to clarify United States nuclear deterrence policy and strategy for the near term," to "conduct a comprehensive review of the nuclear posture of the United States for the next 5 to 10 years," in consultation with the Secretaries of Energy and State. The Executive Summary to the NPR report explained that the report "focuses on five key objectives of our nuclear weapons policies and posture:"

1. Preventing nuclear proliferation and nuclear terrorism;
2. Reducing the role of U.S. nuclear weapons in U.S. national security strategy;
3. Maintaining strategic deterrence and stability at reduced nuclear force levels;
4. Strengthening regional deterrence and reassuring U.S. allies and partners; and
5. Sustaining a safe, secure, and effective nuclear arsenal.

NPR report at iii.

The NPR report's section on "Reducing the Role of Nuclear Weapons," included a new version of the longstanding U.S. "negative security assurance" concerning the use of its

nuclear weapons. That section summarized the guiding principles for U.S. nuclear policies as follows:

- The United States will meet its commitment under Article VI of the NPT to pursue nuclear disarmament and will make demonstrable progress over the next five to ten years. We will work to reduce the role and numbers of U.S. nuclear weapons while enhancing security for ourselves, and our allies and partners.
- The United States will continue to strengthen conventional capabilities and reduce the role of nuclear weapons in deterring non-nuclear attacks, with the objective of making deterrence of nuclear attack on the United States or our allies and partners the sole purpose of U.S. nuclear weapons.
- The United States would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners.
- The United States will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the NPT and in compliance with their nuclear nonproliferation obligations.

NPR report at 16–17. Additional excerpts follow from the NPR report's section on "Reducing the Role of Nuclear Weapons." The full text of the NPR report is available at *www.defense.gov/npr*.

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The role of nuclear weapons in U.S. national security and U.S. military strategy has been reduced significantly in recent decades, but further steps can and should be taken at this time.

The fundamental role of U.S. nuclear weapons, which will continue as long as nuclear weapons exist, is to deter nuclear attack on the United States, our allies, and partners.

During the Cold War, the United States also reserved the right to use nuclear weapons in response to a massive conventional attack by the Soviet Union and its Warsaw Pact allies. Moreover, after

the United States gave up its own chemical and biological weapons (CBW) pursuant to international treaties (while some states continued to possess or pursue them) the United States reserved the right to employ nuclear weapons to deter CBW attack on the United States and its allies and partners.

Since the end of the Cold War, the strategic situation has changed in fundamental ways.

First, and foremost, the Soviet Union and the Warsaw Pact are gone. Russia is not an enemy, and is increasingly a partner in confronting proliferation and other emerging threats. And all of the non-Soviet former members of the Warsaw Pact are now members of the North Atlantic Treaty Organization (NATO).

Second, U.S., allied, and partner conventional military capabilities now provide a wide range of effective conventional response options to deter and if necessary defeat conventional threats from regional actors. Major improvements in missile defenses and counter-weapons of mass destruction (WMD) capabilities have strengthened deterrence and defense against CBW attack.

Given these developments, the role of U.S. nuclear weapons to deter and respond to non-nuclear attacks—conventional, biological, or chemical—has declined significantly. The United States will continue to reduce the role of nuclear weapons in deterring non-nuclear attack.

To that end, the United States is now prepared to strengthen its long-standing "negative security assurance" by declaring that the United States will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the Nuclear Non-Proliferation Treaty (NPT) and in compliance with their nuclear non-proliferation obligations.

This revised assurance is intended to underscore the security benefits of adhering to and fully complying with the NPT and persuade non-nuclear weapon states party to the Treaty to work with the United States and other interested parties to adopt effective measures to strengthen the non-proliferation regime.

In making this strengthened assurance, the United States affirms that any state eligible for the assurance that uses CBW against the United States or its allies and partners would face the prospect of a devastating conventional military response—and

that any individuals responsible for the attack, whether national leaders or military commanders, would be held fully accountable. Given the catastrophic potential of biological weapons and the rapid pace of bio-technology development, the United States reserves the right to make any adjustment in the assurance that may be warranted by the evolution and proliferation of the biological weapons threat and U.S. capacities to counter that threat.

In the case of countries not covered by this assurance—states that possess nuclear weapons and states not in compliance with their nuclear non-proliferation obligations—there remains a narrow range of contingencies in which U.S. nuclear weapons may still play a role in deterring a conventional or CBW attack against the United States or its allies and partners. The United States is therefore not prepared at the present time to adopt a universal policy that the "sole purpose" of U.S. nuclear weapons is to deter nuclear attack on the United States and our allies and partners, but will work to establish conditions under which such a policy could be safely adopted.

Yet this does not mean that our willingness to use nuclear weapons against countries not covered by the new assurance has in any way increased. Indeed, the United States wishes to stress that it would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners.

It is in the U.S. interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever. As President Ronald Reagan declared, "A nuclear war cannot be won and must never be fought."

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(2) Review Conference

(i) Opening statement

The States Parties to the Treaty on the Non-proliferation of Nuclear Weapons ("NPT") met for the 2010 NPT Review Conference at UN headquarters in New York, May 3–28, 2010. The States Parties convene every five years to review implementation of the NPT. On May 3, 2010, Secretary of

State Hillary Rodham Clinton delivered the opening statement to the Review Conference on behalf of the U.S. delegation. In her statement, Secretary Clinton underscored the need for the States Parties to recommit themselves to the three pillars of the NPT, nuclear disarmament, access to civilian nuclear energy, and nonproliferation, and discussed U.S. actions to strengthen each pillar.

As part of her remarks concerning disarmament, Secretary Clinton announced that

> we will submit protocols to the United States Senate to ratify our participation in the nuclear-weapon-free zones that have been established in Africa and the South Pacific. Upon ratification, parties to those agreements will have a legally binding assurance that the United States will not use or threaten to use nuclear weapons against them, and will fully respect the nuclear-weapons-free status of the zones. And we are prepared to consult with the parties to the nuclear-weapons-free zones in Central and Southeast Asia, in an effort to reach agreement that would allow us to sign those protocols as well.*

She also stated:

> President Obama has made clear the United States will retain a nuclear deterrent for as long as nuclear weapons exist, one that can protect our country and our allies. But we will continue to seek further reductions and we will pursue concrete steps to improve the transparency of our nuclear arsenal. Beginning today, the United States will make public the number of nuclear weapons in our stockpile and the number of weapons we have dismantled since 1991.

* Editor's note: On May 2, 2011, President Obama transmitted to the Senate for its advice and consent to ratification Protocols 1, 2, and 3 to the South Pacific Nuclear Free Zone Treaty and Protocols I and II to the African Nuclear-Weapon-Free Zone Treaty. *See* S. Treaty Docs. 112-2 and 112-3. *Digest 2011* will discuss relevant aspects of the transmittal.

Additional excerpts follow from Secretary Clinton's statement, which is available in full at *http://usun.state.gov/briefing/statements/2010/141449.htm. See also* the State Department's fact sheet discussing Secretary Clinton's announcements, available at *www.state.gov/r/pa/prs/ps/2010/05/141390.htm.*

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. . . We are also committed to bolstering another pillar: access to civilian nuclear energy. We unequivocally support the rights of states that are in compliance with the treaty to access nuclear technology and energy for peaceful purposes. The IAEA's high-end projection for new nuclear capacity has nearly doubled since the last Review Conference five years ago. And the United States wants to help expand the ability of all states to utilize peaceful nuclear energy. Over the past decade, we've provided nearly $200 million to support the IAEA's Technical Cooperation Fund. We are the largest contributor to that effort. And it has helped more than 100 countries develop or expand the peaceful use of nuclear energy.

Today, the President has asked me to announce that the United States will make an additional commitment of $50 million over the next five years for a new IAEA Peaceful Uses Initiative. We hope other partners will match this contribution with an additional $50 million. We will use these resources to improve health care and nutrition, manage water resources, increase food security, and help countries develop the infrastructure for the safe and secure use of nuclear power.

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But this treaty is weakened when a state flouts the rules and develops illicit nuclear weapons capabilities. So as we pursue progress on these pillars, we must recommit our nations to bolster the nonproliferation regime. When leaders of the IAEA ask for more resources and authority to carry out their mission of verifying compliance with nonproliferation obligations, we must respond. When the IAEA calls on states to sign and ratify an additional protocol to ensure that parties to the NPT are meeting their treaty obligations, we must act.

But improving the IAEA's ability to detect safeguard violations is not enough. Potential violators must know that they will pay a high price if they break the rules, and that is certainly not the case today. The international community's record of enforcing compliance in recent years is unacceptable. So we need to consider automatic penalties for the violation of safeguards agreements such as suspending all international nuclear cooperation or IAEA technical cooperation projects until compliance has been restored. And we must use all of the possible financial and legal tools to disrupt illicit proliferation networks. That means tightening controls on transshipment and enhancing restrictions on transfers of sensitive technology. We should also find ways to dissuade states from utilizing the treaty's withdrawal provision to avoid accountability.

Now, I am not proposing to amend the treaty to limit the rights of states to withdraw. But we cannot stand by when a state committing treaty violations says it will pull out of the NPT in an attempt to escape penalties and even pursue nuclear weapons. Parties to the NPT have invested decades in building a global nonproliferation regime, and that work will be rendered meaningless if the international community continues allowing nations to break the rules of the NPT with impunity.

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(ii) Outcome

The Review Conference concluded with the adoption of comprehensive action plans in the Final Document concerning nonproliferation, disarmament, and peaceful uses of nuclear technology. The Final Document is available at *www.un.org/en/conf/npt/2010*. *See also* the Department of State's fact sheet on the Final Document, available at *www.state.gov/r/pa/prs/ps/2010/05/142374.htm*. In a closing statement to the Review Conference on May 28, 2010, Ellen Tauscher, Under Secretary of State for Arms Control and International Security, stated in part that the Final Document

> reflects our collective commitment to uphold and strengthen this cornerstone of the international nonproliferation regime. It also demonstrates our unified resolve

> to strengthen the Treaty's three pillars—disarmament, nonproliferation and peaceful uses of nuclear energy—with the inclusion of recommendations for follow-on actions.
>
> This forward-looking and balanced action plan establishes benchmarks for future progress and concrete actions.

The full text of Ms. Tauscher's statement is available at *http://usun.state.gov/briefing/statements/2010/142367.htm*.

On May 28, 2010, President Barack H. Obama also issued a statement on the Review Conference's conclusion. The outcome, President Obama stated, "reaffirms many aspects of the agenda that I laid out in Prague,* and which we have pursued together with other nations over the last year, and underscores that those nations that refuse to abide by their international obligations must be held accountable." In that regard, President Obama underscored his concerns about Iran, stating:

> The greatest threat to proliferation in the Middle East, and to the NPT, is Iran's failure to live up to its NPT obligations. Today's efforts will only strengthen the NPT as a critical part of our efforts to ensure that all nations meet their NPT and non-proliferation obligations, or face consequences. Together, we must work for a world where nations benefit from the peaceful power of nuclear energy, while also being secure from the threat posed by nuclear proliferation.

The full text of President Obama's statement is available at Daily Comp. Pres. Docs., 2010 DCPD No. 00434.

In another statement discussing the Review Conference, then National Security Advisor General James L. Jones elaborated on the points President Obama and Ms. Tauscher raised in their statements. In particular, General Jones detailed U.S. concerns about the Final Document's language concerning Israel.

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* Editor's note: *See* Daily Comp. Pres. Docs., 2009 DCPD No. 00228, pp. 1–6, for President Obama's speech in Prague. *See also Digest 2009* at 761–64.

His statement is excerpted below and available in full at *www.whitehouse.gov/the-press-office/statement-national-security-advisor-general-james-l-jones-non-proliferation-treaty-*.

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The final document broadly supports our strategy to strengthen the NPT, which is essential to stopping the spread of nuclear weapons around the world and pursuing the ultimate goal of a world without them. The document includes balanced and practical steps to advance nuclear disarmament, nonproliferation, and peaceful uses of nuclear energy, which are critical pillars of the global nonproliferation regime. In particular, the document calls for measures to strengthen inspections and compliance with the treaty, which will support our efforts to deal with countries like Iran who are seeking a nuclear weapons capability in violation of their international obligations. For this reason, we believe the document serves to strengthen the national security of the United States and our allies, including Israel.

Despite our agreement to the final document, we have serious reservations about one aspect of the Middle East resolution it contains. The final document includes an agreement to hold a regional conference in 2012 to discuss issues relevant to a Middle East zone free of weapons of mass destruction (WMD) and their delivery systems. The United States has long supported such a zone, although our view is that a comprehensive and durable peace in the region and full compliance by all regional states with their arms control and nonproliferation obligations are essential precursors for its establishment. Just as our commitment to seek peace and security of a world without nuclear weapons will not be reached quickly, the U.S. understands that a WMD free zone in the Middle East is a long-term goal.

The proposed regional conference, to be effective, must include all countries of the Middle East and other relevant countries. The United States will insist that this be a conference for discussion aimed at an exchange of views on a broad agenda, to include regional security issues, verification and compliance, and all

categories of weapons of mass destruction and systems for their delivery. The conference would draw its mandate from the countries in the region in recognition of the principle that states in the region have sole authority regarding any WMD free zone in the Middle East.

To ensure the conference takes into account the interests of all regional states, the United States has decided to co-sponsor the conference, along with the UK, Russia, and the UN Secretary General. Together, we will identify a host for this conference and an individual to facilitate its preparation. In addition, we will insist that the conference operate only by consensus by the regional countries, to include agreement on any possible further discussions or follow-up actions, which will only take place with the consent of all the regional countries.

The United States will not permit a conference or actions that could jeopardize Israel's national security. We will not accept any approach that singles out Israel or sets unrealistic expectations. The United States' long-standing position on Middle East peace and security remains unchanged, including its unshakeable commitment to Israel's security.

In this respect, the United States deplores the decision to single out Israel in the Middle East section of the NPT document.

The failure of the resolution to mention Iran, a nation in long-standing violation of the NPT and UN Security Council Resolutions which poses the greatest threat of nuclear proliferation in the region and to the integrity of the NPT, is also deplorable.

As a cosponsor charged with enabling this conference, the United States will ensure that a conference will only take place if and when all countries feel confident that they can attend. Because of [the] gratuitous way that Israel has been singled out, the prospect for a conference in 2012 that involves all key states in the region is now in doubt and will remain so until all are assured that it can operate in a unbiased and constructive way.

(3) Transparency in the U.S. nuclear weapons stockpile

On May 3, 2010, as Secretary Clinton announced to the NPT Review Conference (see (2)(i) *supra*), the United States

released new information concerning its nuclear weapons. A Defense Department fact sheet, dated May 3, 2010, explained, "Increasing the transparency of global nuclear stockpiles is important to non-proliferation efforts, and to pursuing follow-on reductions after the ratification and entry into force of the New START Treaty that cover all nuclear weapons: deployed and non-deployed, strategic and non-strategic." Additional excerpts from the fact sheet are provided below; the link to the fact sheet is available at *www.defense.gov/npr* (see "Fact Sheets and Briefing Slides").

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Stockpile. As of September 30, 2009, the U.S. stockpile of nuclear weapons consisted of 5,113 warheads. This number represents an 84 percent reduction from the stockpile's maximum (31,255) at the end of fiscal year 1967, and over a 75 percent reduction from its level (22,217) when the Berlin Wall fell in late 1989. . . .

Warhead Dismantlement. From fiscal years 1994 through 2009, the United States dismantled 8,748 nuclear warheads. Several thousand additional nuclear weapons are currently retired and awaiting dismantlement.

Non-Strategic Nuclear Weapons. The number of U.S. non-strategic nuclear weapons declined by approximately 90 percent from September 30, 1991 to September 30, 2009.

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(4) Nuclear-weapon-free zones

The United States participated as an observer in the Second Conference for States Parties and Signatories to Treaties that Establish Nuclear-Weapon-Free Zones at UN Headquarters in New York, April 30, 2010. In a statement to the Conference, Ambassador Susan Burk, Special Representative of the President for Nuclear Non-Proliferation, expressed support for "well-crafted nuclear-weapon-free zones and the important role that they have to play in the broader regime of nuclear

nonproliferation and disarmament." Ambassador Burk's statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/2010/141356.htm*.

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The United States believes that nuclear-weapon-free zones can be important regional complements to the global Nuclear Non-Proliferation Treaty (NPT). The establishment of nuclear-weapon-free zones on the basis of arrangements freely arrived at among the States of the region concerned, and in accordance with the 1999 United Nations Disarmament Commission guidelines, enhances global and regional peace and security, strengthens the nuclear nonproliferation regime, and contributes to realizing the objectives of nuclear disarmament.

Some of the provisions of these zone treaties regionally complement obligations under the global NPT, but other provisions provide concrete nonproliferation and disarmament benefits that go beyond the requirements of the NPT. In particular, the zone treaties generally prohibit the stationing of weapons within the zones, reducing the potential role of nuclear weapons within these parts of the world. The zone treaties also prohibit the testing of weapons within the zones, an important barrier to proliferation as we work to bring the Comprehensive Nuclear-Test-Ban Treaty into force. There are provisions in the zone treaties that offer other concrete benefits, such as: prohibiting the dumping of radioactive wastes; in one case requiring parties to adopt the Additional Protocol; restricting nuclear material transfers unless the recipient state maintains full-scope safeguards; and requiring the highest standards of security and physical protection of nuclear material. These kinds of measures concretely advance our nonproliferation and disarmament goals, further strengthening the NPT regime.

The United States recognizes the important role that we and other NPT nuclear weapon states can play by ratifying the relevant treaty protocols requiring that we respect such zones and offering their States Parties legally binding negative security assurances. Our decision to ratify the protocols to these treaties is made on a

case-by-case basis and in consideration of the relevant nonproliferation and security factors in relation to the region in question.

After such consideration, we signed and ratified the relevant protocols to the Treaty of Tlatelolco in 1981, thus underlining our support for the Treaty's goals. We continue to finally support the important role this Treaty plays in the security of the Western Hemisphere. We also have signed protocols to the Treaties of Pelindaba and Rarotonga. We look forward to future consultation with the States party to the Treaties of Semipalatinsk and Bangkok to address concerns that we have with the protocols to those treaties. . . .

We also believe that Mongolia's status as a nuclear-weapon-free state represents a concrete step in support of nuclear nonproliferation, and we will continue to coordinate with Mongolia regarding its efforts to institutionalize this status.

Mr. Chairman, the United States supports the efforts of this conference to encourage cooperation among nuclear-weapon-free zones. We are committed to work with the governments represented here and with other NPT partners to strengthen the NPT and the global nonproliferation regime, which includes these important initiatives to promote treaty-based nuclear weapon free zones.

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As discussed in (2)(i) *supra*, on May 3, 2010, Secretary Clinton announced to the NPT Review Conference that the United States would seek the Senate's advice and consent to ratification of protocols to the Africa Nuclear-Weapon-Free-Zone Treaty (Treaty of Pelindaba) and the South Pacific Nuclear-Weapons-Free-Zone Treaty (Treaty of Rarotonga). The United States signed both protocols in 1996. Excerpts below from a fact sheet the Department of State issued on May 3, 2010, provide details on the U.S. initiative. The full text of the fact sheet is available at *www.state.gov/r/pa/prs/ps/2010/05/141390.htm*.

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. . . These treaties complement the NPT and enhance the international nonproliferation regime by prohibiting the development or testing of nuclear weapons within their respective geographic zones. Zone parties are also prohibited from stationing nuclear weapons within their territories. The United States is not eligible to be a Party to either of these treaties, but it is eligible to join treaty Protocols open for signature by the nuclear weapons states. These protocols include a pledge not to test nuclear weapons within the zones and legally-binding assurances not to use or threaten to use nuclear weapons against treaty Parties. The United States understands that such negative security assurances are important to states which have foresworn nuclear weapons and abide by their nuclear non-proliferation obligations.

Following a review of U.S. policy towards the nuclear-weapon-free zones currently in force, the Administration is satisfied that the African and South Pacific treaties are consistent with U.S. and international criteria for such zones. The United States believes that such zones, when fully and rigorously implemented, contribute to the President's nonproliferation and disarmament goals and to international peace and security. The United States has concluded that the Treaties of Pelindaba and Rarotonga and their Protocols will not disturb existing security arrangements or U.S. military operations, installations, or activities. The Treaties and Protocols will also promote regional cooperation, security and stability and provide a vehicle for the extension of legally-binding negative security assurances, consistent with the strengthened negative security assurance announced in the recent U.S. Nuclear Posture Review.

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b. Country-specific issues

(1) Democratic People's Republic of Korea ("DPRK" or "North Korea")

See Chapter 16.A.1. and Section A.1.b.(3) of this chapter.

(2) Iran

See Chapter 16.A.2. and A.3.b.–c.

(3) Agreements for cooperation on peaceful uses of nuclear energy

The bilateral agreements for cooperation on peaceful uses of nuclear energy that the United States negotiates are frequently referred to as "123 agreements" because the United States enters into them pursuant to § 123 of the Atomic Energy Act, 42 U.S.C. § 2153. Developments in 2010 relating to these agreements are discussed in this section.

(i) India

During 2010, the United States and India took steps to implement the United States-India Agreement for Cooperation on Peaceful Uses of Nuclear Energy ("Agreement"), signed on October 10, 2008, which entered into force on December 6, 2008. *See Digest 2008* at 987–93 for background. For example, on February 3, 2010, pursuant to § 104 of the United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act ("Act"), Pub. L. 110-369 (2008), 122 Stat. 4028, President Obama determined and certified that:

1. The Agreement between the Government of India and the International Atomic Energy Agency for the Application of Safeguards to Civilian Nuclear Facilities, as approved by the Board of Governors of the International Atomic Energy Agency on August 1, 2008 (the "Safeguards Agreement"), has entered into force; and

2. The Government of India has filed a declaration of facilities pursuant to paragraph 13 of the Safeguards Agreement that is not materially inconsistent with the facilities and schedule described in paragraph 14 of the Separation Plan presented in the national parliament of India on May 11, 2006, taking into account the later initiation of safeguards than was anticipated in the Separation Plan.

Presidential Determination No. 2010-04, 75 Fed. Reg. 7337 (Feb. 19, 2010). The Nuclear Regulatory Commission was precluded by the Act from issuing licenses for transfers of

nuclear equipment, materials, and technology to India pursuant to the Agreement until after the President made this determination and certification.

On May 18, 2010, the Department of Energy announced that Secretary of Energy Stephen Chu had determined, in accordance with § 131a(1) of the Atomic Energy Act of 1954, as amended, that a proposed subsequent arrangement under the Agreement, the Arrangements and Procedures Agreed Between the Government of the United States of America and the Government of India Pursuant to Article 6(iii) of the Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy ("Arrangements and Procedures"), "is not inimical to the common defense and security." 75 Fed. Reg. 27,768 (May 18, 2010). Excerpts below from the Federal Register notice explain the Arrangements and Procedures and their significance.

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This subsequent arrangement concerns the Arrangements and Procedures Agreed Between the Government of the United States of America and the Government of India Pursuant to Article 6(iii) of the Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy ("the Arrangements and Procedures"). The Arrangements and Procedures are proposed as part of the requirements for bringing into effect the rights conveyed by Article 6(iii) of the 123 Agreement regarding reprocessing or other alteration in form or content of nuclear material transferred pursuant to the 123 Agreement and nuclear material and byproduct material used in or produced through the use of nuclear material, non-nuclear material, or equipment so transferred. These Arrangements and Procedures establish the conditions under which the Government of India may reprocess U.S.-obligated nuclear material within India at "a new national reprocessing facility dedicated to reprocessing safeguarded material under International Atomic Energy Agency Safeguards" to be established by India. The Arrangements and Procedures will apply to the reprocessing of U.S.-obligated nuclear material at two such facilities within India. (Subject to the

processing of additional subsequent arrangements, they may also apply to additional reprocessing facilities in the future.) The Arrangements and Procedures specify minimum requirements for reprocessing facility design, safeguards system design and installation, and implementation of IAEA safeguards at such facilities. The Arrangements and Procedures also specify an approach to implementation of the obligations in the 123 Agreement with respect to physical protection and storage of U.S.-obligated nuclear material at the new reprocessing facilities where U.S.-obligated nuclear material may be reprocessed. Finally, the Arrangements and Procedures establish a process under which the United States may suspend the reprocessing of U.S.-obligated nuclear material in India in exceptional circumstances, the circumstances of which are described in the Arrangements and Procedures. In accordance with section 131a(1) of the Atomic Energy Act of 1954, as amended, I have determined that this subsequent arrangement is not inimical to the common defense and security.

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On July 30, 2010, then Under Secretary of State for Political Affairs William J. Burns and Indian Ambassador to the United States H.E. Meera Shankar signed the Arrangements and Procedures. A Department of State media note explained that "[t]his arrangement, negotiated and concluded under President Obama, reflects the Administration's strong commitment to building successfully on the landmark U.S.–India Civil Nuclear Cooperation Initiative and is a prerequisite for U.S. nuclear fuel suppliers to conduct business with India. Previously, the United States had extended such reprocessing consent only to the European Union (EURATOM) and Japan." The media note is available at *www.state.gov/r/pa/prs/ps/2010/07/145469.htm*.

(ii) Australia

On May 5, 2010, President Obama transmitted to Congress a proposed agreement for cooperation on peaceful uses of nuclear energy with Australia, pursuant to §§ 123 b. and 123 d. of the Atomic Energy Act of 1954, as amended (42 U.S.C.

§ 2153(b), (d)). President Obama's transmittal to Congress included his written approval of the agreement, authorization, and determination pursuant to § 123 b. of the Atomic Energy Act that the agreement "will not constitute an unreasonable risk to the common defense and security." *See* Presidential Determination No. 2010-07, 75 Fed. Reg. 27,161 (May 14, 2010). Excerpts below from the President's transmittal letter describe the agreement and its significance. Daily Comp. Pres. Docs., 2010 DCPD No. 00348, pp. 1–2. The agreement is available at *www.state.gov/documents/organization/159447.pdf*. The agreement entered into force on December 22, 2010.

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The proposed Agreement has been negotiated in accordance with the Act and other applicable law. In my judgment, it meets all applicable statutory requirements and will advance the nonproliferation and other foreign policy interests of the United States.

The proposed Agreement provides a comprehensive framework for peaceful nuclear cooperation with Australia based on a mutual commitment to nuclear nonproliferation. The Agreement has an initial term of 30 years from the date of its entry into force, and will continue in force thereafter for additional periods of 5 years each, unless terminated by either party on 6 months' advance written notice at the end of the initial 30 year term or at the conclusion of any of the additional 5 year periods. The proposed Agreement permits the transfer of information, material, equipment (including reactors), and components for nuclear research and nuclear power production. It does not permit transfers of Restricted Data, sensitive nuclear technology, sensitive nuclear facilities, or major critical components of such facilities. In the event of termination of the proposed Agreement, key nonproliferation conditions and controls continue with respect to material, equipment, and components subject to the proposed Agreement.

Australia is a non-nuclear weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Australia has

concluded a Safeguards Agreement and Additional Protocol with the International Atomic Energy Agency. Australia is a party to the Convention on the Physical Protection of Nuclear Material, which establishes international standards of physical protection for the use, storage, and transport of nuclear material. It is also a member of the Nuclear Suppliers Group, whose non-legally binding guidelines set forth standards for the responsible export of nuclear commodities for peaceful use. . . .

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(iii) Russia

On May 10, 2010, President Obama transmitted to Congress a proposed agreement for cooperation in the field of peaceful uses of nuclear energy with the Russian Federation, pursuant to §§ 123 b. and 123 d. of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2153(b), (d)). President Obama's transmittal to Congress included his written approval of the agreement and his determination pursuant to § 123 b. of the Atomic Energy Act that the agreement "will not constitute an unreasonable risk to the common defense and security." *See* Presidential Determination No. 2010-08, 75 Fed. Reg. 27,163 (May 14, 2010).

President George W. Bush initially made the determination required by § 123 b. on May 5, 2008, and transmitted the agreement to Congress on May 19, 2008. *See* 73 Fed. Reg. 27,719 (May 14, 2008); 44 Weekly Comp. Pres. Doc. 699 (May 19, 2008). On September 8, 2008, after Russia's invasion of Georgia and its recognition of the Georgian regions of South Ossetia and Abkhazia as independent states, President Bush informed Congress that his May 5 determination regarding the agreement with Russia was no longer effective. He also advised Congress that "[i]f circumstances should permit future reconsideration of the proposed Agreement, a new determination will be made and the proposed Agreement will be submitted for congressional review pursuant to section 123 of the Act." 44 Weekly Comp. Pres. Doc. 1186 (Sept. 15, 2008). For additional background, see *Digest 2008* at 986–87.

President Obama's letter to Congress explained the reasons for his decision to transmit the agreement to Congress, as excerpted below. Daily Comp. Pres. Docs., 2010 DCPD No. 00364, pp. 1–3.*

* * * *

The United States and Russia have significantly increased cooperation on nuclear nonproliferation and civil nuclear energy in the last 12 months, starting with the establishment of the Bilateral Presidential Commission Working Group on Nuclear Energy and Security. In our July 2009 Joint Statement on Nuclear Cooperation, Russian President Medvedev and I acknowledged the shared vision between the United States and Russia of the growth of clean, safe, and secure nuclear energy for peaceful purposes and committed to work together to bring into force the agreement for nuclear cooperation to achieve this end. The Russian government has indicated its support for a new United Nations Security Council Resolution on Iran and has begun to engage on specific resolution elements with P5 members in New York. On April 8, 2010, the United States and Russia signed an historic New START Treaty significantly reducing the number of strategic nuclear weapons both countries may deploy. On April 13, both sides signed the Protocol to amend the 2000 U.S.–Russian Plutonium Management and Disposition Agreement, which is an essential step toward fulfilling each country's commitment to effectively and transparently dispose of at least 34 metric tons of excess weapon-grade plutonium, enough for about 17,000 nuclear weapons, with more envisioned to be disposed in the future. Russia recently established an international nuclear fuel reserve in Angarsk to provide an incentive to other nations not to acquire sensitive uranium enrichment technologies. Joint U.S. and Russian leadership continue to successfully guide the Global Initiative to Combat Nuclear Terrorism as it becomes a durable international institution. The United States believes these events demonstrate significant progress in the U.S.–Russia nuclear nonproliferation relationship and that it is now

* Editor's note: The agreement entered into force on January 11, 2011.

appropriate to move forward with this Agreement for cooperation in the peaceful uses of nuclear energy.

The proposed Agreement has been negotiated in accordance with the Act and other applicable laws. In my judgment, it meets all applicable statutory requirements and will advance the nonproliferation and other foreign policy interests of the United States.

The proposed Agreement provides a comprehensive framework for peaceful nuclear cooperation with Russia based on a mutual commitment to nuclear nonproliferation. It has a term of 30 years, and permits the transfer, subject to subsequent U.S. licensing decisions, of technology, material, equipment (including reactors), and components for nuclear research and nuclear power production. It does not permit transfers of Restricted Data. Transfers of sensitive nuclear technology, sensitive nuclear facilities, and major critical components of such facilities may only occur if the Agreement is amended to cover such transfers. In the event of termination, key nonproliferation conditions and controls continue with respect to material, equipment, and components subject to the Agreement.

The Russian Federation is a nuclear weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Like the United States, it has a "voluntary offer" safeguards agreement with the International Atomic Energy Agency (IAEA). That agreement gives the IAEA the right to apply safeguards on all source or special fissionable material at peaceful-use nuclear facilities on a list provided by Russia. The Russian Federation is also a party to the Convention on the Physical Protection of Nuclear Material, which establishes international standards of physical protection for the use, storage, and transport of nuclear material. It is also a member of the Nuclear Suppliers Group, whose non-legally binding guidelines set forth standards for the responsible export of nuclear commodities for peaceful use. . . .

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(4) Plutonium Disposition Protocol

On April 13, 2010, Secretary Clinton and Russian Foreign Minister Sergey Lavrov signed the Plutonium Disposition

Protocol, which amended and updated the 2000 Plutonium Management and Disposition Agreement ("PMDA") between the United States and the Russian Federation. A State Department fact sheet explained that the Protocol "makes arms reductions irreversible by ensuring that United States and Russia will transparently dispose weapon-grade plutonium from their respective defense programs, thereby preventing the plutonium from ever being reused for weapons or any other military purpose." Further excerpts below from the State Department's April 13 fact sheet provide details on the Protocol. The full text of the fact sheet is available at *www.state.gov/r/pa/prs/ps/2010/04/140097.htm*.

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- The Protocol . . . exemplifies the Parties' obligations under Article VI of the Non-Proliferation Treaty and their goals for nuclear disarmament and nuclear security.
- By updating the 2000 Plutonium Management and Disposition Agreement (PMDA), each country will proceed to complete and operate facilities that will dispose of at least 34 metric tons of [weapon-grade] plutonium by using it as fuel in civil power reactors to produce electricity.
- Combined, this represents enough material for approximately 17,000 nuclear weapons.
- The PMDA also provides that additional weapon-grade plutonium declared excess, as arms reductions go forward, should be disposed under the same or comparable transparency and other terms.
- Disposition activities on both sides will be subject to monitoring and inspections, to provide confidence that the Parties are disposing of weapon-grade plutonium in accordance with the terms and conditions of the Agreement.
- U.S. cooperation with the Russian program will be limited to the $400 million pledged in 1999–2000 subject to future appropriations, 25 percent of which will now be spread out over the decades of verified disposition.

- Russia's implementation of its disposition will no longer be contingent on additional U.S. and other donor funding.

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2. Nuclear Terrorism: Nuclear Security Summit

On April 13, 2010, President Obama convened heads of states from 47 countries for a summit in Washington, D.C., on nuclear security. President Obama had announced his intention to convene the summit in April 2009 in Prague. *See Digest 2009* at 761–64. A White House fact sheet explained that the summit

> highlight[ed] the global threat posed by nuclear terrorism and the need to work together to secure nuclear material and prevent illicit nuclear trafficking and nuclear terrorism. . . . Leaders in attendance have renewed their commitment to ensure that nuclear materials under their control are not stolen or diverted for use by terrorists, and pledged to continue to evaluate the threat and improve the security as changing conditions may require, and to exchange best practices and practical solutions for doing so. The Summit reinforced the principle that all states are responsible for ensuring the best security of their materials, for seeking assistance if necessary, and providing assistance if asked. It promoted the international treaties that address nuclear security and nuclear terrorism and led to specific national actions that advanced global security.

Further excerpts below from the fact sheet summarize the communiqué and related work plan adopted at the summit. The fact sheet is available at *www.whitehouse.gov/the-press-office/key-facts-about-nuclear-security-summit*. The communiqué and the work plan are available at *www.whitehouse.gov/the-press-office/communiqu-washington-nuclear-security-summit* and *www.whitehouse.gov/the-press-office/work-plan-washington-nuclear-security-summit*, respectively.

Many of the participants in the summit also made commitments to support the summit, either through national actions or through bilateral or multilateral efforts.

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The Communiqué

The Summit Communiqué is a high-level political statement by the leaders of all 47 countries to strengthen nuclear security and reduce the threat of nuclear terrorism and:

- Endorses President Obama's call to secure all vulnerable nuclear material in four years, and pledges to work together toward this end;
- Calls for focused national efforts to improve security and accounting of nuclear materials and strengthen regulations—with a special focus on plutonium and highly enriched uranium;
- Seeks consolidation of stocks of highly enriched uranium and plutonium and reduction in the use of highly enriched uranium;
- Promotes universality of key international treaties on nuclear security and nuclear terrorism;
- Notes the positive contributions of mechanisms like the Global Initiative to Combat Nuclear Terrorism, to build capacity among law enforcement, industry, and technical personnel;
- Calls for the International Atomic Energy Agency to receive the resources it needs to develop nuclear security guidelines and provide advice to its members on how to implement them;
- Seeks to ensure that bilateral and multilateral security assistance would be applied where it can do the most good; and
- Encourages nuclear industry to share best practices for nuclear security, at the same time making sure that security measures do not prevent countries from enjoying the benefits of peaceful nuclear energy.

The Work Plan

The Summit Work Plan represents guidance for national and international actions to carry out the pledges of the Communiqué. This detailed document lays out the specific steps that will need to be taken to bring the vision of the Communiqué into reality. These steps include:

- Ratifying and implementing treaties on nuclear security and nuclear terrorism;
- Cooperating through the United Nations to implement and assist others in connection with Security Council resolutions;
- Working with the International Atomic Energy Agency to update and implement security guidance and carry out advisory services;
- Reviewing national regulatory and legal requirements relating to nuclear security and nuclear trafficking;
- Converting civilian facilities that use highly enriched uranium to non-weapons-usable materials;
- Research on new nuclear fuels, detection methods, and forensics techniques;
- Development of corporate and institutional cultures that prioritize nuclear security;
- Education and training to ensure that countries and facilities have the people they need to protect their materials; and
- Joint exercises among law enforcement and customs officials to enhance nuclear detection approaches.

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3. Proliferation Security Initiative

Since he assumed office, President Obama has expressed strong support for and worked to strengthen the Proliferation Security Initiative ("PSI"), a collaborative international effort to "stop trafficking of weapons of mass destruction, their delivery systems, and related materials to and from states and non-state actors of proliferation concern." *See www.state.gov/t/isn/c10390.htm.*

Ninety-seven countries on six continents participate in the PSI.

The United States enters into bilateral shipboarding agreements as part of PSI and concluded two such agreements in 2010. On May 11, 2010, the United States and Saint Vincent and the Grenadines signed the Agreement Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea. The agreement entered into force the same day. *See* the State Department's media note, issued June 8, 2010, and available at *www.state.gov/r/pa/prs/ps/2010/06/142823.htm*. On April 26, 2010, representatives of the United States and Antigua and Barbuda signed the Agreement between the Government of the United States of America and the Government of Antigua and Barbuda Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea. *See* the April 26 press statement issued by the Department of State's Bureau of International Security and Nonproliferation, available at *www.state.gov/t/isn/147038.htm*. The agreement entered into force on September 27, 2010.

The two agreements are substantially similar to the nine other PSI shipboarding agreements the United States concluded between 2004 and 2008. These agreements

> provid[e] authority on a bilateral basis to board sea vessels suspected of carrying illicit shipments of weapons of mass destruction, their delivery systems, or related materials. These agreements will facilitate bilateral cooperation to prevent such shipments by establishing procedures to board and search such vessels in international waters. Under the agreements, if a vessel registered in the U.S. or the partner country is suspected of carrying proliferation-related cargo, either one of the Parties to this agreement can request of the other to confirm the nationality of the ship in question and, if needed, authorize the boarding, search, and possible detention of the vessel and its cargo. . . .

State Department, "PSI Ship Boarding Agreements," available at *www.state.gov/t/isn/c27733.htm*.

Notably, the two 2010 agreements each include a substantially similarly savings clause concerning consent for shipboarding provided in accordance with international law. That provision of the agreement with Antigua and Barbuda states, "This Agreement does not limit the right of either Party to conduct boardings of vessels or other activities consistent with international law whether based, *inter alia*, on the right of visit, the rendering of assistance to persons, vessels, and property in distress or peril, the consent of the vessel's master, or an authorization from the flag or coastal State." Art. 4(7). The texts of both agreements and the other PSI shipboarding agreements the United States has concluded are available at *www.state.gov/t/isn/c27733.htm*.

4. Chemical and Biological Weapons

a. Chemical weapons

On September 12, 2010, U.S. Ambassador to the Conference on Disarmament Laura Kennedy addressed the Eighth ISS Global Strategic Review in Geneva, Switzerland, "Global Security Governance and the Emergency Distribution of Power." In her remarks at the Fourth Plenary Session, "Strengthening the Global Arms Control and Non-Proliferation Regime," Ambassador Kennedy discussed the significant role that the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction ("CWC") and the Biological and Toxin Weapons Convention ("BWC") play in U.S. efforts to strengthen the global arms control and nonproliferation regime. Excerpts follow from Ambassador Kennedy's remarks on U.S. priorities for the CWC and U.S. steps to destroy its chemical weapons stockpile. The full text of Ambassador Kennedy's remarks is available at *http://geneva.usmission.gov/2010/09/12/remarks-by-ambassador-kennedy-at-the-iiss-meeting*.

See 4.b. below for excerpts from Ambassador Kennedy's comments on the BWC.

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. . . [O]ur key priorities under the CWC . . . include: the complete and verifiable destruction of our chemical weapons stockpile, universal adherence and implementation, maintaining an effective verification regime and identifying how best to address new and emerging chemical weapons challenges that derive from advances in science and technology.

Frankly put—we must keep pace with developments in the chemical industry if the CWC is to remain viable. As the world's chemical industry evolves, verification must evolve with it. We have to make sound recommendations that will ensure that verification keeps pace with changes in both industry and the chemical weapons threat.

To achieve this challenging endeavor, States must recognize that the chemical weapons threat goes beyond the chemicals noted in the Schedule of Chemicals listed in the Convention. To counter technological advances, as well as the risk posed by the use of toxic chemicals by non-State actors and terrorists, full implementation of Article I and VII provisions must be enforced against emerging threats.

To this end, the United States also continues to promote and encourage all States Parties to adhere to their General Obligations as Member states.

The United States strongly believes that verification facilitates both deterrence and detection of noncompliance, and is an essential component of the Convention, and part of what we consider the compliance process, which includes compliance assessments.

The United States further believes that individual State Parties can and should make compliance judgments of other individual States Parties and are urged to take seriously their role in this effort.

CWC: U.S. Destruction 2012 Deadline

One of the core obligations of the Convention is the complete destruction of chemical weapons stocks by Possessor States Parties.

The United States continues to be fully committed to its obligations under the Chemical Weapons Convention. We have made and continue to make substantial progress toward the complete destruction of our chemical weapons stockpile.

As part of our continuing efforts to be transparent, the U.S. hosted earlier this month the Director-General of the OPCW at one of our chemical weapons destruction facilities. The U.S. has also hosted a number of visits by members of the OPCW Executive Council as part of its ongoing efforts to keep States Parties informed.

The United States recently completed destruction of 78 percent of its CW stockpile and is examining all options to safely accelerate destruction. We are proud of this accomplishment and continue to work hard to complete the total elimination of our stockpile as soon as possible in a manner that is safe and environmentally sound.

While 78 percent of the U.S. stockpile has been destroyed, over 40 percent of the total quantity of chemical weapons declared globally under the Convention remains. This work is difficult, dangerous and much more technically complex and time-consuming than previously envisioned but we are committed to doing our part to ensure complete destruction.

The United States is on pace to have 90 percent of its declared CW stockpile verifiably destroyed by April 2012 and continues to look for ways to accelerate destruction of the remaining 10 percent.

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b. Biological weapons

As discussed in 4.a. *supra*, Ambassador Laura Kennedy discussed the U.S. priorities for the CWC and the BWC in strengthening the global arms control and nonproliferation regime at the Eighth ISS Global Strategic Review in Geneva, Switzerland. Excerpts follow from Ambassador Kennedy's remarks concerning the BWC. The full text of her statement is available at *http://geneva.usmission.gov/2010/09/12/remarks-by-ambassador-kennedy-at-the-iiss-meeting*.

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* * * *

The Obama Administration is committed to the Biological Weapons Convention. It views the forum provided by BWC meetings as the primary venue for international discussion and coordination of real-world efforts to counter bio-threats. . . . Our strategy for countering biological threats rests upon the main principle of the BWC: that the use of biological weapons is "repugnant to the conscience of mankind." Our approach seeks to protect against the misuse of science to develop or use biological agents to cause harm.

* * * *

In our view, the future work under the BWC should address three critical issues:

1) Building global capacity to combat infectious disease, regardless of its cause. Although infectious disease is first and foremost a health issue, it can also have security implications. As such, the ability to respond to disease outbreaks is fundamental to preparedness for a deliberate biological attack, and may also have deterrent value. The World Health Organization plays, and should continue to play, the leading role in this arena, but the BWC can be used to complement and support other international efforts to build international surveillance, reporting, and response capabilities, particularly with respect to the 2005 International Health Regulations. . . .
2) Addressing the full range of today's—and tomorrow's—biological threats, including bioterrorism. The BWC can play an important role in supporting responsible national and international actions that help address the threat posed by non-state actors and mitigate the dual-use risks of important new developments in science and technology. Inter-sessional work to date on pathogen security, national implementation measures, and scientific professional responsibility has been an important step in this direction, but there is more to be done.
3) Building confidence in effective treaty implementation and compliance with BWC obligations. This is important to the

> credibility of the Convention, and to the accomplishment of its basic objectives. States Parties need to grapple with pragmatic solutions to the questions of how we promote effective implementation, how we increase confidence in each other's actions, and how we address concerns when they occur.

The question of compliance—how to encourage it, monitor it and respond to noncompliant behavior—is a key responsibility of the bureau that A/S Gottemoeller leads at the State Department—the Bureau of Verification, Compliance and Implementation. Regrettably, we are faced with compliance concerns. The United States, together with other States Parties, wishes to identify more effective ways to increase transparency, improve confidence building measures and engage in more robust bilateral compliance discussions. A traditional verification protocol would not have achieved meaningful verification or greater security and we hope to work with other States Parties to improve our compliance "toolkit" through other means. We want to be forward-looking and build on the successes of the past.

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On December 6, 2010, Ambassador Kennedy addressed the Annual Meeting of States Parties to the BWC in Geneva, Switzerland. Ambassador Kennedy's statement, excerpted below, is available in full at *http://geneva.usmission.gov/2010/12/06/1206-bwc*.

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* * * *

Mr. Chairman, colleagues, it is a pleasure to be with you today as we work to promote common understanding and effective action in the areas of assistance and coordination in the event of alleged use of biological or toxin weapons. This important effort is at the heart of what is sometimes called the "health-security interface." Parties to the BWC have committed to assist one another in the event of a biological weapons attack. This commitment is complemented by the commitments under the World Health Organization's

International Health Regulations to collaborate in the detection, assessment of, and response to public health emergencies of international concern, because a biological weapons attack may not always be immediately recognized as a deliberate event. Similarly, the provisions of BWC Article X reinforce those of IHR Article 44, which calls for collaboration in the development, strengthening, and maintenance of required public health capacities.

There has been debate about whether this forum should be engaged in discussions of capacity-building for disease surveillance and response. The U.S. believes that these simple truths—that biological weapons attacks are not always readily identified as attacks, and that effective detection and response to an attack are only possible if there is an effective public health response—make it abundantly clear that this IS our business. We should not seek to replace the WHO or the World Organization for Animal Health, but we do need to ensure that their efforts are supported, and that they are integrated seamlessly into a larger response framework that includes the scientific, law enforcement and national security communities. . . .

* * * *

Last December, Under Secretary of State Ellen Tauscher addressed this body, and described President Obama's new National Strategy for Countering Biological Threats. I would like to report on the results of some of the plans and commitments she outlined:

- Under Secretary Tauscher pledged that the United States would work toward posting future CBM submissions on the public access side of the BWC website. Our 2010 CBM submission is publicly available. [Editor's note: *See www.unog.ch/80256EDD006B8954/(httpAssets)/C7AA564CE8F53811C12577840045848D/$file/BWC_CBM_2010_United+States+-+Public.pdf*.]
- We did this without compromising our high standard of transparency: the United States submission remains the most extensive of all national submissions. We urge others to consider making their submissions public as well. . . .

- As announced last December, the U.S. Centers for Disease Control and Prevention have established the first WHO Collaborating Center for IHR implementation. CDC's global health resources support at least one core IHR capacity area in over 90 countries through a network of laboratories, surveillance systems, training programs, and support for pandemic preparedness.
- Under Secretary Tauscher also announced our plans to host two international workshops on disease surveillance and IHR implementation and the relationship to the BWC. Those conferences were held with wide international participation, and demonstrated again the usefulness of bringing the security and public health communities together to address areas of common concern. . . .

* * * *

State development and possession of biological weapons, which drove the negotiation of the BWC nearly forty years ago, still represents a challenge today. However, the nature of the biological risk is far more complex than it was in 1975. Advances in the life sciences have expanded both states' ability to covertly pursue a broader range of biological weapons and sub-national actors' capability for serious BW attacks. At the same time, the risk of severe, rapidly spreading natural outbreaks of infectious disease has increased due to expanded travel across national borders. These increased risks have triggered intensive efforts to prevent and respond to large-scale outbreaks of infectious disease of natural or deliberate origin.

The BWC is sufficiently broad and flexible to address this full spectrum of biological risks; we should work together to do so. . . .

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Strengthening [implementation of the Convention] requires addressing the right issues, including enhancing efforts to strengthen national implementation and measures to counter the threat of bioterrorism, as well as efforts to increase confidence in States Parties' compliance with their Article I obligations. . . . We also need to stay abreast of developments in science and technology. And we need to build capacity and practical arrangements at the

health-security interface: this is a critical area of common concern, and one of the most vivid examples we have of Article X in action on a daily basis.

Having raised the issue of Article X, let me affirm that the United States is deeply committed to implementing the Biological Weapons Convention in its entirety, and that includes Article X. We do a great deal to facilitate the international exchange of equipment, materials, and scientific and technological information for peaceful purposes, and to support the further development and application of scientific discoveries in the life sciences for peaceful purposes. Article X is being vigorously implemented through many different channels and activities around the world. There is value in exploring ways to build awareness of the cooperation that is taking place, and to objectively identify needs that should be addressed.

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5. Ballistic Missile Defense

In 2010, the United States continued its efforts to strengthen international cooperation to address the threat posed by ballistic missiles. *See, e.g.,* the Defense Department's fact sheet concerning the Ballistic Missile Defense Review, issued March 3, 2010, available at *www.defense.gov/bmdr*. As part of those efforts, on July 3, 2010, representatives of the United States and Poland signed the Protocol Amending the Agreement between the Government of the United States of America and the Government of the Republic of Poland Concerning the Deployment of Ground-Based Ballistic Missile Defense Interceptors in the Territory of the Republic of Poland in Krakow, Poland. Secretary Clinton witnessed the signing of the Protocol. The original agreement is discussed in *Digest 2008* at 1009–11. A State Department media note issued on July 3 explained:

> This agreement begins implementation of the U.S. European-based Phased Adaptive Approach (EPAA) for ballistic missile defense and enables the stationing of a U.S. land-based missile defense interceptor system in the

> Republic of Poland. The agreed ballistic missile defense site in Poland is scheduled to become operational in the 2018 timeframe and constitutes a key element of Phase 3 of the EPAA. Upon entry into force, this agreement marks an important step in our countries' efforts to protect our NATO Allies from the threat posed by the proliferation of ballistic missiles and weapons of mass destruction.

The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2010/07/143945.htm*. *See also* Secretary Clinton's July 3, 2010 statement before the signing, available at *www.state.gov/secretary/rm/2010/07/143948.htm*. Information concerning the EPAA, which President Obama announced on September 17, 2009, is available at *www.whitehouse.gov/the_press_office/FACT-SHEET-US-Missile-Defense-Policy-A-Phased-Adaptive-Approach-for-Missile-Defense-in-Europe*.

6. New START Treaty

On May 13, 2010, President Obama transmitted to the Senate for its advice and consent to ratification the Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, signed in Prague on April 8, 2010, with Protocol ("New START"). S. Treaty Doc. 111-5 (2010). The Protocol, containing three Annexes, forms an integral part of the treaty. President Obama also transmitted, for the information of the Senate, three unilateral statements associated with the treaty, which are not legally binding and are not integral parts of the treaty. The transmittal package also included the Secretary of State's report on the treaty and an Article-by-Article analysis of the treaty.

In his letter transmitting the treaty to the Senate, as excerpted below, President Obama described its significance. For background on the treaty, see *Digest 2009* at 786–90.

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The Treaty will enhance the national security of the United States. It mandates mutual reductions and limitations on the world's two largest nuclear arsenals. The Treaty will promote transparency and predictability in the strategic relationship between the United States and the Russian Federation and will enable each Party to verify that the other Party is complying with its obligations through a regime that includes on-site inspections, notifications, a comprehensive and continuing exchange of data regarding strategic offensive arms, and provisions for the use of national technical means of verification. The Treaty further includes detailed procedures for the conversion or elimination of Treaty-accountable items, and provides for the exchange of certain telemetric information on selected ballistic missile launches for increased transparency.

Additionally, the Treaty creates a Bilateral Consultative Commission that will meet regularly to promote effective implementation of the Treaty regime. This Commission will provide an important channel for communication between the United States and the Russian Federation regarding the Treaty's implementation.

The United States will continue to maintain a strong nuclear deterrent under this Treaty, as validated by the Department of Defense through rigorous analysis in the Nuclear Posture Review. The Treaty preserves our ability to determine for ourselves the composition and structure of our strategic forces within the Treaty's overall limits, and to modernize those forces. The Treaty does not contain any constraints on testing, development, or deployment of current or planned U.S. missile defense programs or current or planned U.S. long-range conventional strike capabilities.

The treaty, upon its entry into force, will supersede the Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions, signed in Moscow on May 24, 2002.

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The Senate subsequently held 18 hearings on the treaty, and the executive branch answered more than 900 questions for the record for the Senate. On May 18, 2010, for example, Secretary of State Clinton, Secretary of Defense Robert Gates,

and Chairman of the Joint Chiefs of Staff Admiral Michael Mullen testified before the Senate Committee on Foreign Relations in support of early advice and consent to ratification of the treaty. Excerpts follow from Secretary Clinton's testimony. The full text of her oral testimony is available at *www.state.gov/secretary/rm/2010/05/141960.htm*.

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Today, I'd like to discuss what the new START treaty is and what it isn't. It is a treaty that, if ratified, will provide stability, transparency, and predictability for the two countries with more than 90 percent of the world's nuclear weapons. It is a treaty that will reduce the permissible number of Russian and U.S.-deployed strategic warheads to 1,550. This is a level we have not reached since the 1950s. In addition, each country will be limited to 700 deployed strategic delivery vehicles and 800 deployed and non-deployed strategic missile launchers and heavy bombers. These targets will help the United States and Russia bring our deployed strategic arsenals, which were sized for the Cold War, to levels that are appropriate for today's threats.

This is a treaty that will help us track remaining weapons with an extensive verification regime. This regime draws upon our experience over the last 15 years in implementing the original START treaty which expired in December. The verification measures reflect today's realities, including the fewer number of facilities in Russia compared with the former Soviet Union. And for the first time ever, we will be monitoring the actual numbers of warheads on deployed strategic missiles. Moreover, by bringing the new START treaty into force, we will strengthen our national security more broadly, including by creating greater leverage to tackle a core national security challenge—nuclear proliferation.

Now, I am not suggesting that this treaty alone will convince Iran or North Korea to change their behavior. But it does demonstrate our leadership and strengthens our hand as we seek to hold these and other governments accountable, whether that means further isolating Iran and enforcing the rules against violators or

convincing other countries to get a better handle on their own nuclear materials. And it conveys to other nations that we are committed to real reductions and to holding up our end of the bargain under the Nonproliferation Treaty.

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A ratified new START treaty would also continue our progress toward broader U.S.-Russia cooperation. We believe this is critical to other foreign policy priorities, including dealing with Iran's nuclear program, cooperating on Afghanistan, and pursuing trade and investment. . . .

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Now, there are also things that this new treaty will not do. . . . [T]he new START treaty does not compromise the nuclear force levels we need to protect ourselves and our allies. The treaty does not infringe upon the flexibility we need to maintain our forces, including the bombers, submarines, and missiles, in a way that best serve[s] our national security interest. . . .

. . . I want to make this point very clearly: Nothing in the new START treaty constrains our missile defense efforts. Russia has issued a unilateral statement on missile defense expressing its views. We have not agreed to this view, and we are not bound by this unilateral statement. In fact, we've issued our own unilateral statement making it clear that the United States intends to continue improving and deploying our missile defense systems, and nothing in this treaty prevents us from doing so.

The treaty's preamble does include language acknowledging the relationship between strategic offensive and defensive forces, but this is simply a statement of fact. It does not constrain our missile defense programs in any way. In fact, a similar provision was part of the original START treaty and did not prevent us from developing our missile defenses. The treaty does contain language prohibiting the conversion or use of offensive missile launchers for missile defense interceptors and vice versa, but we never planned to do that anyway. As General O'Reilly, our missile defense director, has said, it is actually cheaper to build smaller, tailor-made missile defense silos than to convert offensive launchers. And the

treaty does not restrict us from building new missile defense launchers, 14 of which we are currently constructing in Alaska.

This Administration has requested 9.9 billion for missile defense in FY 2011, almost 700 million more than Congress provided in FY 2010. This request reflects our commitment to missile defense and our conviction that we have done nothing and there is no interpretation to the contrary that in any way undermines that commitment.

Finally, the new START treaty does not restrict our ability to modernize our nuclear weapons complex to sustain a safe, secure, and effective deterrent. This Administration has called for a 10 percent increase in the FY 2011 budget for overall weapons and infrastructure activities and a 25 percent increase in direct stockpile work. This was not in previous budgets. And during the next 10 years, this Administration proposes investing $80 billion into our nuclear weapons complex.

So let's take a step back and put the new START treaty into a larger context. This treaty is only one part of our country's broader efforts to reduce the threat posed by the deadliest weapons the world has ever known. And we owe special gratitude to Senator Lugar for his leadership and commitment through all the years on this issue. This Administration is facing head-on the problems of nuclear proliferation and terrorism. We have several coordinated efforts, including the Nuclear Posture Review, the recently concluded Nuclear Security Summit, and the ongoing Nonproliferation Treaty Review Conference. While a ratified new START treaty stands on its own terms in the reflection of the benefits in national security for our country, it is also a part of our broader efforts.

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During the hearing, Senator Jim DeMint (R-SC) expressed his concern that the New START Treaty would inhibit the United States' missile defense program, particularly in view of language in the preamble to the treaty concerning missile defense. Senator DeMint requested the full negotiating record for the treaty so he could satisfy his concerns, stating his understanding that the Senate had received the full negotiating record for the START Treaty. In response, Secretary Clinton noted that the START Treaty included similar language to the

preambular language Senator DeMint cited, explained that the executive branch had provided a detailed article-by-article analysis of the treaty that the negotiators had prepared based on the treaty's negotiating history, and said she believed the executive branch had not provided negotiating records for the START Treaty, consistent with longstanding practice. During the discussion, Senator John F. Kerry (D-MA), Chairman of the Committee, confirmed that the Senate did not receive the full negotiating record for the START Treaty and referred to the negotiating records for the INF Treaty, which the executive branch had provided to the Senate. Senator Kerry then quoted from the executive report of the Senate Committee on Foreign Relations on the INF Treaty on that issue:

> With the INF Treaty negotiations having been provided under these circumstances, both the administration and the Senate now face the task of ensuring the Senate review of negotiating records does not become an institutionalized procedure. The overall effect of fully exposed negotiations, followed by a far more complicated Senate review, would be to weaken the treatymaking process and thereby damage American diplomacy. A systemic expectation of Senate perusal of every key treaty's negotiating record could be expected to inhibit candor during future negotiations, and induce posturing on the part of U.S. negotiators and their counterparts during sensitive discussions.

S. Hrg. 111-738, at 73. The full transcript of the hearing, S. Hrg. 111-738, is available at *www.gpo.gov/fdsys/pkg/CHRG-111shrg62467/pdf/CHRG-111shrg62467.pdf*.

On December 22, 2010, the Senate gave its advice and consent to the New START Treaty. The Senate's approval of the treaty was subject to conditions, understandings, and declarations that are set forth in the Senate resolution of advice and consent. The conditions, as denoted in the resolution, relate to "general compliance;" "presidential certifications and reports on national technical means;" "reductions;" "timely warning of breakout;" "United States missile defense test telemetry;" "conventional prompt global strike;" "United States

telemetric information;" "Bilateral Consultative Commission;" "United States commitments ensuring the safety, reliability, and performance of its nuclear forces;" "annual report;" "strategic nuclear delivery vehicles;" "tactical nuclear weapons;" "design and funding of certain facilities;" and "effectiveness and viability of New START Treaty and U.S. missile defenses." The understandings, which were to be included in the instrument of ratification and are provided below, concern missile defense, rail-mobile ICBMs, and strategic range, non-nuclear weapon systems. The declarations, as denoted in the resolution, relate to "missile defense;" "defending the United States and allies against strategic attack;" "conventionally armed, strategic-range weapon systems;" "Nunn-Lugar Cooperative Threat Reduction;" "asymmetry in reductions;" "compliance;" "expansion of strategic arsenals in countries other than Russia;" "treaty interpretation;" "treaty modification or reinterpretation;" "consultations;" "further strategic arms reductions;" and "modernization and replacement of United States strategic delivery vehicles."

The understandings are set forth below. The full text of the Senate's resolution of advice and consent, containing all of the conditions, understandings, and declarations, is available at 156 Cong. Rec. S10982 (Dec. 22, 2010). The website of the Senate Committee on Foreign Relations, *http://foreign.senate.gov/treaties/details/?id=1668ace8-5056-a032-526a-29c8fc32e1dc*, also contains documents relating to the treaty, including the Senate's resolution and the texts of the hearings relating to the treaty.

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(b) UNDERSTANDINGS.—. . . .

(1) MISSILE DEFENSE.—It is the understanding of the United States that—

(A) the New START Treaty does not impose any limitations on the deployment of missile defenses other than the requirements of paragraph 3 of Article V of the New START Treaty, which states, "Each Party shall not convert and shall not use ICBM launchers and SLBM launchers for placement of missile defense

interceptors therein. Each Party further shall not convert and shall not use launchers of missile defense interceptors for placement of ICBMs and SLBMs therein. This provision shall not apply to ICBM launchers that were converted prior to signature of this Treaty for placement of missile defense interceptors therein.";

(B) any additional New START Treaty limitations on the deployment of missile defenses beyond those contained in paragraph 3 of Article V, including any limitations agreed under the auspices of the Bilateral Consultative Commission, would require an amendment to the New START Treaty which may enter into force for the United States only with the advice and consent of the Senate, as set forth in Article II, section 2, clause 2 of the Constitution of the United States;

(C) the April 7, 2010, unilateral statement by the Russian Federation on missile defense does not impose a legal obligation on the United States; and

(D) the preamble of the New START Treaty does not impose a legal obligation on the Parties.

(2) RAIL-MOBILE ICBMS.—It is the understanding of the United States that—

(A) any rail-mobile-launched ballistic missile with a range in excess of 5,500 kilometers would be an ICBM, as the term is defined in paragraph 37 of Part One of the Protocol (in the English-language numbering), for the purposes of the New START Treaty, specifically including the limits in Article II of the New START Treaty;

(B) an erector-launcher mechanism for launching an ICBM and the railcar or flatcar on which it is mounted would be an ICBM launcher, as the term is defined in paragraph 28 of Part One of the Protocol (in the English-language numbering), for the purposes of the New START Treaty, specifically including the limits in Article II of the New START Treaty;

(C) if either Party should produce a rail-mobile ICBM system, the Bilateral Consultative Commission would address the application of other parts of the New START Treaty to that system, including Articles III, IV, VI, VII, and XI of the New START Treaty and relevant portions of the Protocol and the Annexes to the Protocol; and

(D) an agreement reached pursuant to subparagraph (C) is subject to the requirements of Article XV of the New START Treaty and, specifically, if an agreement pursuant to subparagraph (C) creates substantive rights or obligations that differ significantly from those in the New START Treaty regarding a "mobile launcher of ICBMs" as defined in Part One of the Protocol to the New START Treaty, such agreement will be considered an amendment to the New START Treaty pursuant to Paragraph 1 of Article XV of the New START Treaty and will be submitted to the Senate for its advice and consent to ratification.

(3) STRATEGIC-RANGE, NON-NUCLEAR WEAPON SYSTEMS.—It is the understanding of the United States that—(A) future, strategic-range non-nuclear weapon systems that do not otherwise meet the definitions of the New START Treaty will not be "new kinds of strategic offensive arms" subject to the New START Treaty;

(B) nothing in the New START Treaty restricts United States research, development, testing, and evaluation of strategic-range, non-nuclear weapons, including any weapon that is capable of boosted aerodynamic flight;

(C) nothing in the New START Treaty prohibits deployments of strategic-range nonnuclear weapon systems; and

(D) the addition to the New START Treaty of—

(i) any limitations on United States research, development, testing, and evaluation of strategic-range, non-nuclear weapon systems, including any weapon that is capable of boosted aerodynamic flight; or

(ii) any prohibition on the deployment of such systems, including any such limitations or prohibitions agreed under the auspices of the Bilateral Consultative Commission, would require an amendment to the New START Treaty which may enter into force for the United States only with the advice and consent of the Senate, as set forth in Article II, section 2, clause 2 of the Constitution of the United States.

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On December 22, 2010, Secretary Clinton made a statement welcoming the Senate's action. Secretary Clinton stated in part:

> Once this Treaty enters into force, on-site inspections of Russia's strategic nuclear weapons facilities can resume, providing us with an on-the-ground view of Russia's nuclear forces. The information and insight from these inspections forms the core of our ability to "trust but verify" compliance with New START. A responsible partnership between the world's two largest nuclear powers that limits our nuclear arsenals while maintaining strategic stability is imperative to promoting global security. With New START, the United States and Russia will have another important element supporting our "reset" relationship and expanding our bilateral cooperation on a range of issues.

See www.state.gov/secretary/rm/2010/12/153646.htm for the full text of Secretary Clinton's statement.*

7. Treaty on Open Skies: Review Conference

On June 7–9, 2010, in Vienna, Austria, the United States chaired the second review conference of the States Parties to the Treaty on Open Skies. The 34 States Parties met to review implementation of the treaty, as Article XVI(3) of the treaty requires, and to discuss challenges confronting the treaty regime and goals for its future. A Department of State media note announcing the review conference explained the treaty and its significance as follows:

> The Treaty on Open Skies is one of the most wide-ranging international arms control efforts to date to promote

* Editor's note: On February 5, 2011, Secretary Clinton and Russian Foreign Minister Sergei Lavrov exchanged instruments of ratification for the New START Treaty, bringing it into force. *See www.state.gov/r/pa/prs/ps/2011/02/156037.htm*. The first session of the Bilateral Consultative Commission established by the treaty met March 28–April 8, 2011, in Geneva, Switzerland, and the parties signed two joint statements, which are available at *www.state.gov/t/avc/newstart/c39903.htm*.

> openness and transparency in military forces and activities. . . . The Treaty on Open Skies established a regime for unarmed aerial observation flights over the territories of its signatories. The Treaty is designed to enhance mutual understanding and confidence by giving all participants, regardless of size, a direct role in gathering and sharing information through aerial imaging of military forces and activities of concern to them.

The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2010/06/142683.htm*; additional background on the treaty and its implementation is available at *www.state.gov/t/avc/cca/os/index.htm*.

On June 9, 2010, Rose Gottemoeller, Assistant Secretary, Bureau of Arms Control, Verification and Compliance, Department of State, delivered the closing statement for the U.S. delegation. In her statement, Ms. Gottemoeller stressed U.S. support for the treaty, outlined the results of a U.S. study examining ways to achieve the treaty regime's objectives, and proposed collective steps for the States Parties to take to enhance the treaty regime. Ms. Gottemoeller underscored two of the main topics discussed during the review conference: the need to move to digital sensors for observation aircraft flown in connection with the treaty regime and the need for innovative approaches and multinational cooperation to overcome a shortage of resources. Ms. Gottemoeller's statement, excerpted below, is available at *www.state.gov/t/avc/rls/142916.htm*.

On June 9, 2010, the States Parties adopted a Final Document, which summarized the States Parties' discussions during the conference and identified future actions for promoting the treaty regime's success. The Final Document is available at available at *www.osce.org/secretariat/69797?view=conference_documents&display=page_4&arg=69797&session=69796*.

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Today, I would like to take the opportunity to reaffirm to all States Parties, the commitment of the United States toward continued robust implementation of the Treaty. The United States believes that it is essential for the Open Skies Treaty to remain a vital instrument in our Euro-Atlantic conventional arms control toolbox.

As U.S. Vice President Biden said on May 6 regarding advancing Europe's security, "First, we need to work together to broaden our commitments to reciprocal transparency about all our military forces, including both conventional and nuclear forces, and other defense assets in Europe, including missile defenses." The Open Skies Treaty is one of our most successful and valuable regimes to fulfill this task. In this regard, Open Skies serves not only its members, but the security of all OSCE participating States as well.

The United States is aware that there are significant challenges ahead in navigating decisions affecting the future of our Open Skies programs, the practical decisions related to the transition from film cameras to digital sensors and the fiscal decisions associated with the improvement of our assets and resources. We understand the financial constraints that many of our partners are facing with respect to funding future sensor replacements and flight operations. Indeed, the United States faces many of those same constraints as we consider our own operations under the Treaty.

We have heard clearly in the last few days that there is a strong will among the States Parties to robustly implement this Treaty. . . .

Political will to make changes is not enough, however. Actions and leadership are necessary to put that will into practice, and will require careful analysis to ensure efficient use of resources. The United States has recently launched a study to examine options for how to put these aspirations into action. Let me outline our focus for the study:

- Relying on old film cameras is no longer adequate. As you saw this week, using all Treaty sensors provides results that can be used for many security issues of interest to our governments. We are examining options on moving to digital sensors in all Treaty categories;

- We are studying options for future Open Skies aircraft. We want to maintain a fleet of aircraft and the supporting infrastructure that will enable us to modernize our implementation of the Open Skies treaty in the most cost effective way possible. The Open Skies "fleet" if you will, must be refreshed in the coming decade or flights will no longer be possible;
- We want to work with partners to make sure all have an opportunity to participate in observation flights—one of the key sources of confidence-building among the Parties. Options for more shared flights and broader utilization of active quotas available under the Treaty will also be considered;
- We support expanding the membership of the Treaty within the OSCE community. We firmly believe that the security and stability of the entire OSCE area could be enhanced by broader participation in the Treaty;
- We will examine the benefits derived from the Treaty with a broad variety of government agencies to ensure that the imagery and other sensor data collected serves our evolving security needs. We will encourage new thinking about applying Open Skies toward emerging challenges and threats, including those transnational threats under discussion in the OSCE.

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- We want to talk to States Parties about the possibilities for sharing resources in the future, and options for collaboration on aircraft, sensors and data systems . . . .

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8. Arms Trade Treaty

On February 18, 2010, Special Negotiator Donald A. Mahley discussed U.S. views on the UN arms trade treaty in a speech he delivered on behalf of Ellen Tauscher, Under Secretary of State for Arms Control and International Security, at the Carnegie Endowment for International Peace. Ms. Tauscher's

remarks addressed the reasons for the U.S. decision, announced in 2009, to support negotiations of a legally binding international treaty concerning the international transfer of conventional weapons, as well as U.S. objectives for the negotiations. Ms. Tauscher's remarks, excerpted below, are available in full at *www.state.gov/t/us/136849.htm*. For additional background, see *Digest 2009* at 790–91.

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. . . We need a treaty that looks at regulating all conventional weapons, from small arms and light weapons to aircraft carriers.

Unlike chemical or biological weapons, an Arms Trade Treaty cannot be a ban on conventional weapons. When conducted responsibly, arms transfers are a legitimate commercial enterprise and support global stability.

The international arms trade provides nations with material necessary to fulfill the most basic functions of a government—protecting its citizens and enforcing its national sovereignty.

What we are after is a means to have all nations do what the United States already does: examine each conventional weapons transfer before it is authorized to be certain that it will enhance . . . not undermine . . . security and stability.

We all know that there is a dark side to arms transfers that can have devastating consequences for people and regions.

Irresponsible transfers can support terrorists, enable genocidal [warlords], and create, sustain, and compound proliferation nightmares.

The Arms Trade Treaty discussions have gained momentum by a shared recognition of the disruptive and oppressive impact of illicit or ill-advised arms transfers by a number of countries and organizations.

That is why we need to explore a legally binding measure to better control transfers across international borders.

For the Arms Trade Treaty to be effective at thwarting irresponsible transfers, it must ensure that members effectively implement national laws that criminalize such transfers and allow for the

monitoring of commerce. Without this, it won't necessarily deter or stop terrorism.

So-called "legally-binding instruments" are absolutely meaningless to such terrorists. They are criminals who don't and won't abide by any reasonable agreements.

This means that the most . . . effective way to inhibit their activity is indirectly.

All states must recognize the obligation to enact and enforce laws within their territory that criminalize, isolate, and punish those terrorist groups operating within their territory or profiting from transactions that originate in or transit through their territory.

And, if the state claiming sovereign jurisdiction does not have the capability for such enforcement, then the international community must make available the resources to create such capability, both in the short and long run.

This means that any international instrument hoping to make real impact on "illicit" arms transfers must focus on requiring each party to put in place those necessary means to eliminate such rogue non-state actors both from within their territory and on the receiving end of their international commerce.

It means that weak states, where terrorists operate with relative freedom, must adapt to the very real and very difficult requirements any effective instrument will lay out for them.

They must take all necessary steps to become an effective, law-abiding state.

At the same time, conventional arms transfers are a crucial national security concern for the United States.

Our government has always supported effective action to control and ensure responsibility in the international transfer of arms. That's because we believe that stable societies and secure environments are the best places for the growth of freedom and prosperity.

So we are a leading advocate of ensuring that arms transfers are done only for legitimate purposes. . . .

The United States has one of the most comprehensive sets of requirements in the world that must be satisfied before a U.S. manufacturer is authorized to transfer arms internationally.

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. . . The transfer of arms [is] approved only when there is realistic and reasonable evidence the intended recipient has shown that they have a legitimate need and sufficient safeguards are there to preclude either deliberate or unintended re-transfers to unapproved end uses. We also consider the effect of the transfer on regional stability.

This process requires enormous effort. It is expensive. And it results in denying exports in questionable circumstances.

Although this can work to the commercial disadvantage of U.S. firms, it is the price we have to pay to try to stem the flow of conventional arms to terrorist groups, rogue states, and others who would undermine the rule of law.

It is also why the United States believes that it is the responsibility of the entire international community to settle for no less than the highest possible standards in international agreements and reporting activities.

We believe that robust and vigorous regulation and enforcement would make it much more difficult for terrorist groups or rogue nations to destabilize regions or support terrorist activity.

This is why, after careful consideration, the Obama administration has decided to actively support international efforts to achieve an effective global framework and to set high the bar that everyone must meet.

The United States will seek a result that establishes high standards of expected conduct in international activity and in national enforcement.

The Arms trade treaty negotiations will likely be long and difficult. Some participants will be tempted to take the easy road of seeking the lowest common denominator just to get a quick agreement from those states who would like to continue to support . . . directly or indirectly . . . terrorists, pirates, and genocidal warlords for a quick profit or short-term advantage.

Let me be clear, we will not rush to judgment by approving a weak or loophole-laden agreement.

The United States is not interested in a vague or weak outcome just to feel good. That would not do anything to address the real issues in arms transfers.

The United States believes an Arms Trade Treaty is sufficiently important to national security and international stability that the

deliberations need to produce consensus decisions in order to command the widest possible participation.

A document that failed to gain support from important international players capable of acting outside their reach will undercut the objectives and purposes [and] would be worse than having no document at all.

Consensus is needed to ensure the high standards necessary for an effective ATT.

It is not, nor should others hope it to be, an excuse for avoiding hard choices or real, deliberative controls. . . .

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And, there are, as you know, a handful of states who make up the backbone of the worldwide arms trade. Excluding them or not getting a universal agreement would make any agreement less than useless. In political terms, this requires a big tent policy even if bringing some into the tent is time consuming and painful.

But it is the only way to address this issue and bring about an enduring and meaningful agreement that enhances our national security and international stability.

The treaty is worth doing because it can have, unlike many things we do, a more immediate impact. Lessening the arms trade, can lead to less killing and maiming.

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9. Defense Trade Cooperation Treaties

On September 29, 2010, the Senate provided its advice and consent to ratification of the Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation, done at Washington and London on June 21 and 26, 2007, and the similar Treaty with Australia Concerning Defense Trade Cooperation, done at Sydney, September 5, 2007. President George W. Bush transmitted the treaties to the Senate for advice and consent in 2007. For details on the treaties and their significance, see

S. Treaty Doc. Nos. 110-7 and 110-10 (2007) and *Digest 2007* at 996–1000. *See also* the fact sheet the State Department issued on September 30, 2010, available at *www.state.gov/r/pa/prs/ps/2010/09/148478.htm*, and Secretary Clinton's statement welcoming the Senate's action, available at *www.state.gov/secretary/rm/2010/09/148476.htm*.

The Senate provided its advice and consent to the treaty with the United Kingdom subject to nine conditions; seven understandings, which were to be included in the instrument of ratification; and three declarations. *See* 156 Cong. Rec. S7720–22 (Sept. 29, 2010) or S. Exec. Rept. 111-5, available at *http://foreign.senate.gov/treaties/details/?id=7eda8b10-5056-a032-52d3-7c5658377dc1*. The Senate provided its advice and consent to the treaty with Australia subject to eight conditions; six understandings, which were to be included in the instrument of ratification; and three declarations. *See* 156 Cong. Rec. S7722–24 (Sept. 29, 2010) or S. Exec. Rept. 111-5, available at *http://foreign.senate.gov/treaties/details/?id=4b2f23b8-5056-a032-5232-0a782fcd9dc6*. The conditions, understandings, and declarations for the treaty with Australia were substantially similar to the ones for the treaty with the United Kingdom.

On October 8, 2010, President Obama signed into law the Defense Trade Cooperation Treaties Implementation Act of 2010, Title I, Pub. L. No. 111-266, 124 Stat. 2797. The legislation amended various provisions of the Arms Export Control Act to allow for proper implementation of the two treaties. Notably, § 105 bars any amendments to an implementing arrangement concluded pursuant to either one of the treaties, other than one addressing a technical or administrative matter, from taking effect for the United States unless U.S. legislation is enacted to approve the amendment's entry into effect. In the case of any amendment of a technical or administrative nature, § 105(c) requires the President to provide the Senate Committee on Foreign Relations and the House of Representatives Committee on Foreign Affairs, no later than 15 days before it takes effect, a report containing the text of that amendment and an analysis of the amendment's effect

that includes discussion of why that amendment is not covered by the general restriction concerning amendments to implementing arrangements.

10. Arms Embargoes

See Chapter 16.A.5.a., 5.d., 5.e., and 5.f.

Cross References

Outer space: U.S. defense of its space systems and those of its allies, **Chapter 12.B.**
Nonproliferation-related sanctions and export controls, **Chapter 16.A.1.–3. and C.2.**

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**An asterisk denotes cases in fora, including the International Court of Justice, other than U.S. Federal and state courts. Alphabetization is letter-by-letter (e.g., "Lin" precedes "Li Weixum")*

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