CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

U.S. Supreme Court Finds Conflict Between Arizona Immigration Statute and Federal Foreign Affairs Powers

In June 2012, the U.S. Supreme Court ruled by five votes to three in *Arizona v. United States*[1] that three provisions of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act,[2] a 2010 statute aimed at discouraging the presence of unlawful aliens in the state, were preempted because they conflicted with the federal government's constitutional power over immigration. The statute's stated purpose is to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."[3]

In earlier proceedings, the U.S. district court preliminarily enjoined four provisions of the law from taking effect: section 3, which makes failure to comply with federal alien-registration requirements a misdemeanor; section 5(C) which makes seeking or engaging in work in Arizona by an unlawful alien a misdemeanor; section 6, which authorizes state and local law enforcement officers to arrest without a warrant any person where they have probable cause to believe that the person has committed an offense that would render him or her removable from the United States; and section 2(B), which requires officers conducting a stop, detention, or arrest to verify the person's immigration status in some cases.[4] The U.S. Court of Appeals for the Ninth Circuit upheld the lower court's injunction.[5]

In the majority opinion by Justice Anthony Kennedy,[6] the Court held that federal law preempts sections 3, 5(C), and 6, but not section 2(B).[7] Part IIA of the opinion addresses the substantial interconnection between immigration policy and federal responsibility for the nation's foreign affairs. An excerpt follows:

> The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. See *Toll v. Moreno*, 458 U.S. 1, 10 (1982); see generally S. Legomsky & C. Rodríguez, Immigration and Refugee Law and Policy 115–132 (5th ed. 2009). This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturalization," U.S. Const., Art. I, §8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations, see *Toll, supra*, at 10 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)).
>
> The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. See, *e.g.*, Brief for Argentina et al. as *Amici Curiae*; see also *Harisiades*

[1] 132 S.Ct. 2492 (2012).

[2] S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

[3] *Id.*, sec. 1; *see also Arizona*, 132 S.Ct. at 2497.

[4] 703 F.Supp.2d 980, 1008 (D. Ariz. 2010).

[5] 641 F.3d 339, 366 (9th Cir. 2011).

[6] Justice Kennedy was joined by Chief Justice John Roberts and by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor. Justices Antonin Scalia, Clarence Thomas, and Samuel Alito filed opinions concurring in part and dissenting in part. Justice Elena Kagan did not participate in the case.

[7] *Arizona*, 132 S.Ct. at 2501–10.

v. Shaughnessy, 342 U.S. 580, 588–589 (1952). Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad. See Brief for Madeleine K. Albright et al. as *Amici Curiae* 24–30.

It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States. See *Chy Lung v. Freeman*, 92 U. S. 275, 279–280 (1876); see also The Federalist No. 3, p. 39 (C. Rossiter ed. 2003) (J. Jay) (observing that federal power would be necessary in part because "bordering States . . . under the impulse of sudden irritation, and a quick sense of apparent interest or injury" might take action that would undermine foreign relations). This Court has reaffirmed that "[o]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941).

. . . .

Congress has specified which aliens may be removed from the United States and the procedures for doing so. Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law. See §1227. Removal is a civil, not criminal, matter. A principal feature of the removal system is the broad discretion exercised by immigration officials. . . .

. . . .

Discretion in the enforcement of immigration law embraces immediate human concerns. . . . Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.[8]

The Court's decision evoked a vigorous dissent from Justice Antonin Scalia, who saw it as intruding on the sovereign powers of the State of Arizona. Scalia's dissent draws on the writings of Vattel, Pufendorf, and other publicists addressing the nature of sovereignty. An excerpt follows:

The United States is an indivisible "Union of sovereign States." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938). Today's opinion, approving virtually all of the Ninth Circuit's injunction against enforcement of the four challenged provisions of Arizona's law, deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there. Neither the Constitution itself nor even any law passed by Congress supports this result. I dissent.

As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress. That power to exclude has long been recognized as inherent in sovereignty. Emer de Vattel's seminal 1758 treatise on the Law of Nations stated:

[8] *Id.* at 2498–99.

> "The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this, that does not flow from the rights of domain and sovereignty: every one is obliged to pay respect to the prohibition; and whoever dares violate it, incurs the penalty decreed to render it effectual." The Law of Nations, bk. II, ch. VII, §94, p. 309 (B. Kapossy & R. Whatmore eds. 2008).

See also I R. Phillimore, Commentaries upon International Law, pt. III, ch. X, p. 233 (1854) ("It is a received maxim of International Law that, the Government of a State may prohibit the entrance of strangers into the country").

There is no doubt that "before the adoption of the constitution of the United States" each State had the authority to "prevent [itself] from being burdened by an influx of persons." *Mayor of New York v. Miln*, 11 U.S. 102, 132–133 (1837). And the Constitution did not strip the States of that authority. To the contrary, two of the Constitution's provisions were designed to enable the States to prevent "the intrusion of obnoxious aliens through other States." Letter from James Madison to Edmund Randolph (Aug. 27, 1782), in 1 The Writings of James Madison 226 (1900); accord, The Federalist No. 42, pp. 269–271 (C. Rossiter ed. 1961) (J. Madison). The Articles of Confederation had provided that "the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States." Articles of Confederation, Art. IV. This meant that an unwelcome alien could obtain all the rights of a citizen of one State simply by first becoming an *inhabitant* of another. To remedy this, the Constitution's Privileges and Immunities Clause provided that "[t]he *Citizens* of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Art. IV, §2, cl. 1 (emphasis added). But if one State had particularly lax citizenship standards, it might still serve as a gateway for the entry of "obnoxious aliens" into other States. This problem was solved "by authorizing the general government to establish a uniform rule of naturalization throughout the United States." The Federalist No. 42, *supra*, at 271; see Art. I, §8, cl. 4. In other words, the naturalization power was given to Congress not to abrogate States' power to exclude those they did not want, but to vindicate it.[9]

First Circuit Finds No Private Right of Action Under U.S.-UK Mutual Legal Assistance Treaty, Rejects Efforts to Quash Subpoenas

Beginning in 2001, Boston College (BC) sponsored a project to gather taped oral histories from members of the Provisional Irish Republican Army, the Provisional Sinn Fein, the Ulster Volunteer Force, and other paramilitary and political organizations involved in "the Troubles" in Northern Ireland. Ed Moloney proposed the project and later became its director. Given the material's sensitivity, BC's contract with Moloney required that the interviewees sign contracts recognizing that confidentiality could be limited under U.S. law. The contracts that they actually signed, however, did not contain such a limitation.

In the spring of 2011, the United States sought subpoenas for some of the materials held by BC potentially bearing on the 1972 kidnapping and murder of Jean McConville, who was suspected of being an informer for the British authorities. The subpoenas were issued pursuant to a request from the United Kingdom under the Mutual Legal Assistance Treaty between the

[9] *Id.* at 2511–12 (Scalia, J., dissenting) (footnote omitted).

two countries.[1] BC sued to quash the subpoenas,[2] and Moloney and his researcher Anthony McIntyre (a former IRA member) sought to intervene in the BC action. The district court denied BC's motion to quash and Moloney's and McIntyre's requests to intervene[3] and later ordered enforcement of certain subpoenas.[4] (BC did not appeal this order but has appealed a second order to compel production of other materials.)

After their request to intervene was denied, Moloney and McIntyre brought a separate suit seeking to bar enforcement of the subpoenas. The district court dismissed their complaint, and they appealed to the First Circuit. On appeal, Moloney and McIntyre unsuccessfully raised First Amendment issues and claimed violations of the Administrative Procedure Act. As relevant here, the court also rejected their claims "that the Attorney General failed to fulfill his obligations under the US-UK MLAT and that they have a private right of action to seek a writ of mandamus compelling him to comply with the treaty or to seek a declaration from a federal court that he has not complied with the treaty."[5] An excerpt from the court's opinion follows:

> B. Appellants Have No Enforceable Rights Derived from the US-UK MLAT
>
> Interpretation of the treaty takes place against "the background presumption . . . that '[i]nternational agreements, even those directly benefitting private persons, generally do not create rights or provide for a private cause of action in domestic courts.'" Medellín v. Texas, 128 S.Ct. 1346, 1357 n.3 (2008) (alteration in original) (quoting 2 Restatement (Third) of Foreign Relations Law of the United States §907 cmt. a, at 395 (1986)). The First Circuit and other courts of appeals have held that "treaties do not generally create rights that are privately enforceable in the federal courts." United States v. Li, 206 F.3d 56, 60 (1st Cir. 2000) (en banc); see also Mora v. New York, 524 F.3d 183, 201 & n.25 (2d Cir. 2008) (collecting cases from ten circuits holding that there is a presumption that treaties do not create privately enforceable rights in the absence of express language to the contrary). Express language in a treaty creating private rights can overcome this presumption. See Mora, 524 F.3d at 188.
>
> The US-UK MLAT contains no express language creating private rights. To the contrary, the treaty expressly states that it does not give rise to any private rights. Article 1, paragraph 3 of the treaty states, in full: "This treaty is intended solely for mutual legal assistance between the Parties. The provisions of this Treaty shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request." US-UK MLAT, art. 1, ¶3. The language of the treaty is clear: a "private person," such as Moloney or McIntyre here, does not have any right under the treaty to "suppress . . . any evidence, or to impede the execution of a request."

[1] Treaty Between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters, Dec. 2, 1996, S. TREATY DOC. NO. 104-2 (1995).

[2] Jim Dwyer, *Secret Archive of Ulster Troubles Faces Subpoena*, N.Y. TIMES, May 13, 2011, at A1; Katie Zezima, *College Fights Subpoena of Interviews Tied to I.R.A.*, N.Y. TIMES, June 10, 2011 at A12.

[3] In re: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Criminal Matters in the Matter of Dolours Price, 831 F.Supp.2d 435 (D. Mass. 2011).

[4] In re: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Criminal Matters in the Matter of Dolours Price, 2012 U.S. Dist. LEXIS 6516 (D. Mass. 2011) (court order).

[5] In re: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Criminal Matters in the Matter of Dolours Price, 685 F.3d 1, 18–19 (1st Cir. 2012) (footnote omitted).

If there were any doubt, and there is none, the report of the Senate Committee on Foreign Relations that accompanied the US-UK MLAT confirms this reading of the treaty's text:

> [T]he Treaty is not intended to create any rights to impede execution of requests or to suppress or exclude evidence obtained thereunder. Thus, a person from whom records are sought may not oppose the execution of the request by claiming that it does not comply with the Treaty's formal requirements set out in article 3.

S. Exec. Rep. No. 104-23, at 14.

Other courts considering MLATs containing terms similar to the US-UK MLAT here have uniformly ruled that no such private right exists. See In re Grand Jury Subpoena, 646 F.3d 159, 165 (4th Cir. 2011) (subject of a subpoena issued pursuant to an MLAT with a clause identical to the US-UK MLAT's article 1, paragraph 3 "failed to show that the MLAT gives rise to a private right of action that can be used to restrict the government's conduct"); United States v. Rommy, 506 F.3d 108, 129 (2d Cir. 2007) (defendant who argued that evidence against him was improperly admitted because it was gathered in violation of US-Netherlands MLAT could not "demonstrate that the treaty creates any judicially enforceable right that could be implicated by the government's conduct" in the case); United States v. $734,578.82 in U.S. Currency, 286 F.3d 641,659 (3d Cir. 2002) (article 1, paragraph 3 of US-UK MLAT barred claimants' argument that seizure and subsequent forfeiture of money violated the treaty); United States v. Chitron Elecs. Co. Ltd., 668 F.Supp.2d 298, 306–07 (D. Mass. 2009) (defendant's argument that service of criminal summons was defective under US-China MLAT, which contained a clause identical to article 1, paragraph 3 of US-UK MLAT, failed because "the MLAT does not create a private right of enforcement of the treaty").

Moloney and McIntyre attempt to get around the prohibition on the creation of private causes of action with three arguments based on the treaty language. Appellants appear to argue that the text of the US-UK MLAT only covers requests for documents in the possession of the Requested Party but not for documents held by third persons who are merely under the jurisdiction of the government which is the Requested Party. This is clearly wrong. Article1, paragraph 2 of the treaty states that a form of assistance provided for under the treaty includes "providing documents, records, and evidence." US-UK MLAT, art. 1, ¶2(b). As the Senate report explains, the treaty "permits a State to compel a person in the Requested State to testify and produce documents there." S. Exec. Rep. No. 104-23, at 7.

Appellants' second argument is that article 1, paragraph 3 applies only to criminal defendants who try to block enforcement. This argument has no support in the text of the treaty. The US-UK MLAT plainly states that the treaty does not "give rise to a right on the part of *any private person* . . . to impede the execution of a request." US-UK MLAT, art. 1, ¶3 (emphasis added). This prohibition by its terms encompasses all private persons, not just criminal defendants.

Appellants finally contend that they do not seek to "obtain, suppress, or exclude any evidence, or to impede the execution of a request," but instead merely to enforce the treaty requirements before there can be compliance with a subpoena. Their own requests for relief make it clear they are attempting to do exactly what they say they are not.

> Because the US-UK MLAT expressly disclaims the existence of any private rights under the treaty, appellants cannot state a claim under the treaty upon which relief can be granted.[6]

Fifth Circuit Dismisses Gasoline Dealers' Antitrust Suit Challenging OPEC

In February 2011, the U.S. Court of Appeals for the Fifth Circuit dismissed on political question and act of state grounds consolidated antitrust actions by several gasoline retailers against several oil producing companies, including Aramco, Lukoil, and Getty.[1] Judge E. Grady Jolly's opinion summarized the earlier proceedings and the panel's unanimous decision.

> This case involves two class actions brought by gasoline retailers against oil production companies (most of which are owned in whole or in part by OPEC member nations), alleging antitrust violations. After consolidation of the suits for disposition of pre-trial matters, the oil production companies moved to dismiss. The district court granted dismissal on the ground that disposing of the case on the merits would require the court to pass judgment on the actions of other sovereign nations, which is proscribed by the act of state doctrine. Alternatively, the district court held that dismissal was also warranted by the political question doctrine. The gasoline retailers appealed.
>
> Because the political question doctrine is jurisdictional, we address it first. When we do so, we discern that the complaints before us effectively challenge the structure of OPEC and its relation to the worldwide production of petroleum. Convinced that these matters deeply implicate concerns of foreign and defense policy, concerns that constitutionally belong in the executive and legislative departments, we conclude that we lack jurisdiction to adjudicate the claims. We hold alternatively that the complaints seek a remedy that is barred by the act of state doctrine, that is, an order and judgment that would interfere with sovereign nations' control over their own natural resources. Accordingly, we affirm the judgment dismissing the complaints.[2]

The court reviewed the allegations made in the plaintiffs' complaints, concluding that

> Appellants allege an overarching conspiracy between sovereign nations to fix prices of crude oil and [refined petroleum products] by limiting the production of crude oil. Although they allege that this primary conspiracy was facilitated through refining decisions, any allegations regarding price-fixing through manipulation of refining capacity are secondary to the overarching production-based conspiracy.[3]

The court then conducted a political question analysis utilizing the U.S. Supreme Court's familiar six factors from *Baker v. Carr*,[4] finding that each factor was present.[5] For example, with respect to the first factor (textual commitment to the political branches), the court held:

> [A]s we have already observed, a trial on Appellants' conspiracy claims requires an inquiry into whether Appellees entered into an agreement with OPEC member nations to fix

[6] *Id.* at 11–13 (footnotes omitted).

[1] Spectrum Stores Inc. v. Citgo Petroleum Corp., 632 F.3d 938 (5th Cir. 2011).

[2] *Id.* at 942–43.

[3] *Id.* at 948.

[4] 369 U.S. 186 (1962).

[5] *Spectrum Stores*, 632 F.3d at 949–54.

> prices. A pronouncement either way on the legality of other sovereigns' actions falls within the realm of delicate foreign policy questions committed to the political branches. By adjudicating this case, the panel would be reexamining critical foreign policy decisions, including the Executive Branch's longstanding approach of managing relations with foreign oil-producing states through diplomacy rather than private litigation, as discussed in the government's amicus brief and in several official statements of administration policy. In accordance with this policy, the Department of Justice has, upon consideration, declined to bring a Sherman Act case on behalf of the United States. Any merits ruling in this case, whether it vindicates or condemns the acts of OPEC member nations, would reflect a value judgment on their decisions and actions—a diplomatic determination textually committed to the political branches.[6]

In a similar vein, the court noted a lack of judicially manageable standards for resolving the claims.

> We are persuaded that deciding the merits of the instant case would require a court to recast what are foreign policy and national security questions of great import in antitrust law terms. We hardly need to pierce the pleadings before us to understand that Appellants seek nothing short of the dismantling of OPEC and the inception of a global market that operates in the absence of agreements between sovereigns as to the supply of a key natural resource. The Sherman and Clayton Acts are decidedly inadequate to provide judicially manageable standards for resolving such momentous foreign policy questions.[7]

The court concluded that the remaining factors also weighed against continued proceedings.

> The remaining four *Baker* factors—the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; the impossibility of a court's undertaking independent resolution without expressing lack of the respect owing to the coordinate branches of government; an unusual need for unquestioning adherence to a political decision already made; and the potential of embarrassment from multifarious pronouncements by various departments on one question—also weigh against an adjudication of this case on the merits.[8]

The court also held alternatively that, under the act of state doctrine, the plaintiffs had failed to state a claim on which relief could be granted.[9]

> The granting of any relief to Appellants would effectively order foreign governments to dismantle their chosen means of exploiting the valuable natural resources within their sovereign territories. Recognizing that the judiciary is neither competent nor authorized to frustrate the longstanding foreign policy of the political branches by wading so brazenly into the sphere of foreign relations, we decline to sit in judgment of the acts of the foreign states that comprise OPEC.[10]

[6] *Id.* at 951.
[7] *Id.* at 952.
[8] *Id.* at 953.
[9] *Id.* at 954.
[10] *Id.* at 955–56 (footnote omitted).

STATE DIPLOMATIC AND CONSULAR RELATIONS

China Protests U.S. Embassy's and Consulates' Dissemination of Local Air Quality Data in China

In June 2012, China's Vice Minister of Environmental Protection Wu Xiaoqing publicly protested the practice of U.S. diplomatic and consular establishments in China of monitoring local air quality and making the hourly results available on Twitter and their publically accessible websites. The U.S. establishments monitor the concentration of extremely fine particles measuring 2.5 micrometers or less (referred to as "PM 2.5"). Such small particles are particularly hazardous to health. Wu alleged that the practice of making such data publicly available is contrary to the Vienna Conventions on Diplomatic Relations and on Consular Relations.[1] Chinese news media reported his remarks.

> A foreign embassy's monitoring and issuing of air quality data in China is technically inaccurate and goes against international conventions and Chinese laws, an environment official said Tuesday in Beijing.
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> Vice Minister of Environmental Protection Wu Xiaoqing said to monitor air quality and release results, which involves the public interest, is the duty of the Chinese government.
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> "Some foreign embassies and consulates in China are monitoring air quality and publishing the results themselves. It is not in accordance with the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, as well as environmental protection regulations of China," Wu told a press conference.
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> Wu's remarks came in response to some foreign embassies and consulates in China, specifically, the U.S. Embassy in Beijing and the U.S. Consulate General in Shanghai, monitoring local air quality and publishing the results online.
>
> The move has resulted in fierce public debate, as results released by Beijing's weather forecasting station and the U.S. Embassy often differ—the U.S. Embassy generally reports worse conditions.
>
> Wu said it is not scientific to evaluate the air quality of an area with results gathered from just only one point inside that area, as the results cannot represent a city's overall air quality.
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> . . . .
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> "Environmental quality standards should tally with economic development and technologic conditions," said Wu, adding that China's new air quality standard for PM2.5 is 75 microgram per cubic meter daily average, while other countries' standards are 35 microgram.
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> "According to international conventions, diplomats are obligated to respect and abide by the laws and regulations in their receiving states. In addition, they cannot interfere with the domestic issues of receiving states," said Wu.[2]

[1] Keith Bradsher, *China Asks Other Nations Not to Release Its Air Data*, N.Y. TIMES, June 6, 2012, at A4; *China Says Only It Has Right to Monitor Air Pollution*, REUTERS, June 6, 2012, *at* http://www.reuters.com/article/2012/06/06/uk-china-environment-idUSLNE85500H20120606.

[2] *China Focus: Foreign Embassies' Air Data Issuing Inaccurate, Unlawful: Official*, CHINA DAILY, June 5, 2012, *at* http://www.chinadaily.com.cn/xinhua/2012-06-05/content_6102799.html.

A U.S. Department of State spokesman did not accept the Chinese protests.

> QUESTION: . . . Have you—has the Embassy heard the—received any formal complaints about its Twitter feed of this—of the air quality, and are you planning to shut it down?
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> MR. [Mark C.] TONER: [W]e are aware at the June 5th press briefing by Chinese spokespersons . . . that they did make a statement about foreign embassies that release environmental information were violating Chinese internal affairs. You know what we do at the U.S. Embassy and other various consulates throughout China. We provide the American community, both our Embassy and consulate personnel, as well as the American community writ large, information it can use to make better daily decisions regarding the safety of outdoor activities. We do this via . . . monitors that look at PM 2.5 pollution. And this is, frankly, something that Americans—or data or information that Americans get in U.S. cities every day.
>
> QUESTION: All right. So you don't think it's a violation of the Chinese internal affairs to—
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> MR. TONER: We do not.
>
> QUESTION: —basically release a weather report?
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> MR. TONER: We do not.
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> QUESTION: No? And you don't think that it's a violation of the Vienna Conventions?
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> MR. TONER: Most certainly, we do not. I mean, again, this is a service that we provide to Americans, both who work in the Embassy community as well as Americans who live in China. And again, this is a service we're all well aware that exists in many U.S. cities.
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> . . . .
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> QUESTION: And so you have no plans to stop?
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> MR. TONER: We do not.
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> . . . .
>
> QUESTION: . . . And do you know in China, other than the Embassy Beijing, are the similar readouts provided for sites from U.S. consulates?
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> MR. TONER: We do. Well, in Shanghai, the Shanghai Environmental Protection Bureau publishes PM 10 data and air quality readings from multiple monitors, while the U.S. Shanghai consulate publishes PM 2.5 data and air quality recordings from one monitor. So these are different—they measure different parameters and indices. In Guangzhou, again, . . . we also publish the same PM 2.5 data.[3]

Air quality measurements taken at the U.S. Embassy compound in Beijing can be viewed at http://beijing.usembassy-china.org.cn/070109air.html.

[3] Mark C. Toner, Deputy Spokesperson, U.S. Dep't of State Daily Press Briefing (June 5, 2012), *at* http://www.state.gov/r/pa/prs/dpb/2012/06/191782.htm#CHINA.

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

Fourth Circuit Draws on UN Convention on the Law of the Sea and Modern Practice in Defining Piracy

In the predawn hours of April 1, 2010, an ill-advised group of Somali brigands opened fire on the USS *Nicholas*, believing the U.S. Navy frigate to be a vulnerable merchant ship. Following an exchange of gunfire with the *Nicholas*'s crew, the attackers abandoned the effort and did not attempt to board. The *Nicholas* pursued and apprehended the attackers and other pirates on a support vessel. The defendants were taken to Virginia for trial, where the U.S. District Court for the Eastern District of Virginia rejected the claim that their actions did not meet the statutory definition of piracy because they did not seize or rob the target vessel.[1] Following an eleven-day trial, the jury found them guilty of piracy and other offenses. The defendants appealed their piracy convictions, which carry a mandatory life sentence.

In a separate case also in the Eastern District of Virginia, another group of Somali pirates who unsuccessfully attacked the USS *Ashland* mounted the same defense, which the second court allowed.[2] Thus two different judges in Virginia's Eastern District adopted conflicting views whether failed attacks on U.S. Navy vessels constitute piracy.

The crime of piracy is established in U.S. law by 18 U.S.C. §1651, which provides that "[w]hoever, 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." On appeal, the *Nicholas* attackers contended that the statutory crime is limited to "robbery at sea, i.e., seizing or otherwise robbing a vessel. Because they boarded the Nicholas only as captives and indisputably took no property, the defendants contest their convictions on [the piracy count], as well as the affixed life sentences."[3]

Judge Robert B. King's fifty-seven-page opinion for a unanimous Fourth Circuit panel rejected the appellants' argument and affirmed their convictions.[4] The opinion includes detailed summaries of the lower courts' conflicting analyses. The district court in *Said* (which accepted the defense) found that the statute must be read as "piracy" was understood at the time of enactment in 1819, which the court thought necessarily included a robbery element. The court in *Hasan* (which rejected the defense) saw the statute as embracing international law as it has evolved and drew heavily on the UN Convention on the Law of the Sea's definition of piracy[5] and other recent state practice.

The Fourth Circuit agreed with the *Hasan* court.

> The crux of the defendants' position is now, as it was in the district court, that the definition of general piracy was fixed in the early Nineteenth Century, when Congress passed the Act of 1819 first authorizing the exercise of universal jurisdiction by United States courts to adjudicate charges of "piracy as defined by the law of nations." Most notably, the

[1] United States v. Hasan, 747 F.Supp.2d 599, 620 (E.D. Va. 2010).

[2] United States v. Said, 757 F.Supp.2d 554, 567 (E.D. Va. 2010).

[3] United States v. Dire, 680 F.3d 446, 451 (4th Cir. 2012).

[4] *Id.* at 477; *see also* Steve Szkotak, *Appeals Court Broadens Definition of Piracy*, WASH. POST, May 24, 2012, at A18.

[5] [Editor's note: Article 101 of the Convention defines piracy to include "any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew . . . of a private ship . . . and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft."]

defendants assert that the "law of nations," as understood in 1819, is not conterminous with the "customary international law" of today. The defendants rely on Chief Justice Marshall's observation that "[t]he law of nations is a law founded on the great and immutable principles of equity and natural justice," *The Venus*, 12 U.S. (8 Cranch) 253, 297 (1814) (Marshall, C.J., dissenting), to support their theory that "[t]he Congress that enacted the [Act of 1819] did not view the universal law of nations as an evolving body of law.". . .

The defendants' view is thoroughly refuted, however, by a bevy of precedent, including the Supreme Court's 2004 decision in Sosa v. Alvarez-Machain. The *Sosa* Court was called upon to determine whether Alvarez could recover under the Alien Tort Statute, 28 U.S.C. §1350 (the "ATS"), for the U.S. Drug Enforcement Administration's instigation of his abduction from Mexico for criminal trial in the United States. *See* 542 U.S. at 697. The ATS provides, in full, that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350. Significantly, the ATS predates the criminalization of general piracy, in that it was passed by "[t]he first Congress . . . as part of the Judiciary Act of 1789." *See Sosa*, 542 U.S. at 712–13 (citing Act of Sept. 24, 1789, ch. 20, §9, 1 Stat. 77 (authorizing federal district court jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States")). Yet the *Sosa* Court did not regard the ATS as incorporating some stagnant notion of the law of nations. Rather, the Court concluded that, while the first Congress probably understood the ATS to confer jurisdiction over only the three paradigmatic law-of-nations torts of the time—including piracy—the door was open to ATS jurisdiction over additional "claim[s] based on the present-day law of nations," albeit in narrow circumstances. See *id.* at 724–25. Those circumstances were lacking in the case of *Alvarez*, whose ATS claim could not withstand being "gauged against the current state of international law." *See id.* at 733.

Although, as the defendants point out, the ATS involves civil claims and the general piracy statute entails criminal prosecutions, there is no reason to believe that the "law of nations" evolves in the civil context but stands immobile in the criminal context. . . .

. . . .

The defendants would have us believe that, since the *Smith*[6] era, the United States' proscription of general piracy has been limited to "robbery upon the sea." But that interpretation of our law would render it incongruous with the modern law of nations and prevent us from exercising universal jurisdiction in piracy cases. *See Sosa*, 542 U.S. at 761 (Breyer, J., concurring in part and concurring in the judgment) (explaining that universal jurisdiction requires, inter alia, "substantive uniformity among the laws of [the exercising] nations"). At bottom, then, the defendants' position is irreconcilable with the noncontroversial notion that Congress intended in §1651 to define piracy as a universal jurisdiction crime. In these circumstances, we are constrained to agree with the district court that §1651 incorporates a definition of piracy that changes with advancements in the law of nations.

We also agree with the district court that the definition of piracy under the law of nations, at the time of the defendants' attack on the USS Nicholas and continuing today, had for decades encompassed their violent conduct. That definition, spelled out in the [UN Convention on the Law of the Sea], as well as the High Seas Convention before it, has only been reaffirmed in recent years as nations around the world have banded together

[6] [Editor's note: United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820). In Smith, the Supreme Court, by Justice Story, had "no hesitation in declaring, that piracy, by the law of nations, is robbery upon the sea." *Id.* at 162.]

> to combat the escalating scourge of piracy. For example, in November 2011, the United Nations Security Council adopted Resolution 2020, recalling a series of prior resolutions approved between 2008 and 2011 "concerning the situation in Somalia"; expressing "grave[] concern[] [about] the ongoing threat that piracy and armed robbery at sea against vessels pose"; and emphasizing "the need for a comprehensive response by the international community to repress piracy and armed robbery at sea and tackle its underlying causes." Of the utmost significance, Resolution 2020 reaffirmed "that international law, as reflected in the [UNCLOS], sets out the legal framework applicable to combating piracy and armed robbery at sea." Because the district court correctly applied the UNCLOS definition of piracy as customary international law, we reject the defendants' challenge to their Count One piracy convictions, as well as their mandatory life sentences.[7]

U.S. Statement Calls for Peaceful Resolution of Competing South China Sea Claims; China Protests

China's increasingly vigorous assertion of its claims to as much as eighty percent of the South China Sea[1] has been a source of concern to the United States and several countries in the region.[2] In August 2012, the U.S. Department of State issued a public statement calling for resolution of competing jurisdictional claims in the area "without coercion, without intimidation, without threats, and without the use of force."[3] The statement expresses concern at China's increased civilian and military presence in the Paracel Islands (scene of a violent military confrontation between Chinese and Vietnamese force in 1975) and China's installation of barriers closing the mouth of Scarborough Shoal lagoon in an area claimed by both China and the Philippines.[4] The U.S. statement follows:

> As a Pacific nation and resident power, the United States has a national interest in the maintenance of peace and stability, respect for international law, freedom of navigation, and unimpeded lawful commerce in the South China Sea. We do not take a position on competing territorial claims over land features and have no territorial ambitions in the South China Sea; however, we believe the nations of the region should work collaboratively and diplomatically to resolve disputes without coercion, without intimidation, without threats, and without the use of force.
>
> We are concerned by the increase in tensions in the South China Sea and are monitoring the situation closely. Recent developments include an uptick in confrontational rhetoric, disagreements over resource exploitation, coercive economic actions, and the incidents around the Scarborough Reef, including the use of barriers to deny access. In particular, China's upgrading of the administrative level of Sansha City and establishment of a new

[7] *Dire*, 680 F.3d at 467–69 (citations and footnote omitted).

[1] Jane Perlez, *Beijing Exhibiting New Assertiveness in South China Sea*, N.Y. TIMES, June 1, 2012, at A10; *In Cities Across China, Protests Erupt Against Japan over Disputed Island*, N.Y. TIMES, Aug. 20, 2012, at A8.

[2] John R. Crook, Contemporary Practice of the United States, 104 AJIL 654, 664 (2010); 105 AJIL 122, 135 (2011); 106 AJIL 138, 158 (2012); *see also* Jane Perlez, *Asian Leaders at Regional Meeting Fail to Resolve Disputes over South China Sea*, N.Y. TIMES, July 13, 2012, at A5; Bradley Klapper, *U.S. Pushes China on Rules for Sea Disputes*, WASH. POST, July 13, 2012, at A8; Chico Harland, *Sea of Trouble Surrounds Tiny Islands amid Asian Land Disputes*, WASH. POST, Aug. 12, 2012; Editorial, *A Sea of Hostility*, WASH. POST, Aug. 16, 2012, at A12.

[3] U.S. Dep't of State Press Release No. 2012/1263, South China Sea (Aug. 3, 2012), *at* http://www.state.gov/r/pa/prs/ps/2012/08/196022.htm; *see also U.S. Issues Warning over South China Sea*, WASH. POST, Aug. 4, 2012, at A6.

[4] Mark Landler, *Obama Expresses Support for Philippines in China Rift*, N.Y. TIMES, June 9, 2012, at A9.

> military garrison there covering disputed areas of the South China Sea run counter to collaborative diplomatic efforts to resolve differences and risk further escalating tensions in the region.
>
> The United States urges all parties to take steps to lower tensions in keeping with the spirit of the 1992 ASEAN Declaration on the South China Sea and the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea. We strongly support ASEAN's efforts to build consensus on a principles-based mechanism for managing and preventing disputes. We encourage ASEAN and China to make meaningful progress toward finalizing a comprehensive Code of Conduct in order to establish rules of the road and clear procedures for peacefully addressing disagreements. In this context, the United States endorses the recent ASEAN Six-Point Principles on the South China Sea.
>
> We continue to urge all parties to clarify and pursue their territorial and maritime claims in accordance with international law, including the Law of the Sea Convention. We believe that claimants should explore every diplomatic or other peaceful avenue for resolution, including the use of arbitration or other international legal mechanisms as needed. We also encourage relevant parties to explore new cooperative arrangements for managing the responsible exploitation of resources in the South China Sea.
>
> As President Obama and Secretary Clinton have made clear, Asia-Pacific nations all have a shared stake in ensuring regional stability through cooperation and dialogue. To that end, the United States actively supports ASEAN unity and leadership in regional forums and is undertaking a series of consultations with ASEAN members and other nations in the region to promote diplomatic solutions and to help reinforce the system of rules, responsibilities and norms that underpins the stability, security and economic dynamism of the Asia-Pacific region.[5]

Past U.S. statements on the South China Sea have angered Chinese officials,[6] and the latest U.S. statement drew harsh protests. A Chinese Foreign Ministry spokesman said that "the so-called statement completely ignored the facts, deliberately confounded right and wrong and sent a seriously wrong signal, which is not conducive to the efforts safeguarding peace and stability of the South China Sea and the Asia Pacific region."[7]

U.S. Department of Justice and Gibson Guitar Corp. Settle Lacey Act Charges

Iowa Congressman John Lacey introduced the Lacey Act[1] in 1900. As originally enacted, it banned interstate transport of illegally taken game and wild birds. The act was amended in 2008 to bar imports of wood exported from another country in violation of that country's laws. In 2009 and 2011, federal agents raided facilities of the Gibson Guitar Corp. and seized wood alleged to have been illegally exported from Madagascar and India. These enforcement actions triggered harsh criticism by conservative critics and led to congressional proposals to amend the Act considered in House hearings in June 2012. Senator Rand Paul of Kentucky offered

[5] U.S. Dep't of State Press Release No. 2012/1263, *supra* note 3.

[6] Edward Wong, *China Hedges over Whether South China Sea Is a 'Core Interest' Worth War,* N.Y. TIMES, Mar. 31, 2011, at A12.

[7] China Ministry of Foreign Affairs, Press Release, Assistant Foreign Minister Zhang Kunsheng Urgently Summons Charge D'affaires of the US Embassy on the US' Statement on the South China Sea (Aug. 4, 2012), *at* http://www.fmprc.gov.cn/eng/zxxx/t958799.htm; *see also Official: U.S. 'Wrong' on South China Sea,* WASH. POST, Aug. 5, 2012, at A12.

[1] 16 U.S.C. §§3371–3378.

legislation to repeal the requirement that U.S. firms comply with foreign laws, deeming it "absurd on its face" and potentially unconstitutional.[2] Gibson's chief executive dismissed the charges as "baloney."[3]

In August 2012, amidst ongoing debate on the matter, Gibson Guitar and the U.S. Department of Justice settled the Lacey Act charges.[4] An excerpt from the Department of Justice's announcement, which suggests its basis for believing that Gibson knowingly imported illegally harvested wood, follows:

> Gibson Guitar Corp. entered into a criminal enforcement agreement with the United States today resolving a criminal investigation into allegations that the company violated the Lacey Act by illegally purchasing and importing ebony wood from Madagascar and rosewood and ebony from India.
>
> . . . .
>
> The criminal enforcement agreement defers prosecution for criminal violations of the Lacey Act and requires Gibson to pay a penalty amount of $300,000. The agreement further provides for a community service payment of $50,000 to the National Fish and Wildlife Foundation. . . . Gibson will also implement a compliance program designed to strengthen its compliance controls and procedures. In related civil forfeiture actions, Gibson will withdraw its claims to the wood seized in the course of the criminal investigation, including Madagascar ebony from shipments with a total invoice value of $261,844.
>
> In light of Gibson's acknowledgement of its conduct, its duties under the Lacey Act and its promised cooperation and remedial actions, the government will decline charging Gibson criminally in connection with Gibson's order, purchase or importation of ebony from Madagascar and ebony and rosewood from India, provided that Gibson fully carries out its obligations under the agreement, and commits no future violations of law, including Lacey Act violations.
>
> . . . .
>
> Since May 2008, it has been illegal under the Lacey Act to import into the United States plants and plant products (including wood) that have been harvested and exported in violation of the laws of another country. Congress extended the protections of the Lacey Act, the nation's oldest resource protection law, to these products in an effort to address the environmental and economic impact of illegal logging around the world.
>
> The criminal enforcement agreement includes a detailed statement of facts describing the conduct for which Gibson accepts and acknowledges responsibility. The facts establish the following:
>
> . . . .
>
> . . . The harvest of ebony in and export of unfinished ebony from, Madagascar has been banned since 2006.

[2] Elizabeth Bewley, *House Panel Considers Lacey Act Changes*, USA TODAY, May 8, 2012, *at* http://www.usatoday.com/news/washington/story/2012-05-08/lacey-act-house/54845078/1.

[3] *Gibson Agrees to Pay Penalty over Imported Ebony Wood*, ROLLING STONE, Aug. 6, 2012, *at* http://www.rollingstone.com/music/news/gibson-agrees-to-pay-penalty-over-imported-ebony-wood-20120806#ixzz27Rh4FvkJ.

[4] Kevin G. Hall, *Feds, Gibson Guitar Settle Environmental Suit*, MCCLATCHY NEWSPAPERS, Aug. 6, 2012, *at* http://www.mcclatchydc.com/2012/08/06/160468/feds-gibson-guitar-settle-environmental.html.

Gibson purchased "fingerboard blanks," consisting of sawn boards of Madagascar ebony, for use in manufacturing guitars. The Madagascar ebony fingerboard blanks were ordered from a supplier who obtained them from an exporter in Madagascar. Gibson's supplier continued to receive Madagascar ebony fingerboard blanks from its Madagascar exporter after the 2006 ban. The Madagascar exporter did not have authority to export ebony fingerboard blanks after the law issued in Madagascar in 2006.

In 2008, an employee of Gibson participated in a trip to Madagascar, sponsored by a nonprofit organization. Participants on the trip, including the Gibson employee, were told that a law passed in 2006 in Madagascar banned the harvest of ebony and the export of any ebony products that were not in finished form. They were further told by trip organizers that instrument parts, such as fingerboard blanks, would be considered unfinished and therefore illegal to export under the 2006 law. Participants also visited the facility of the exporter in Madagascar, from which Gibson's supplier sourced its Madagascar ebony, and were informed that the wood at the facility was under seizure at that time and could not be moved.

After the Gibson employee returned from Madagascar with this information, he conveyed the information to superiors and others at Gibson. The information received by the Gibson employee during the June 2008 trip, and sent to company management by the employee and others following the June 2008 trip, was not further investigated or acted upon prior to Gibson continuing to place orders with its supplier. Gibson received four shipments of Madagascar ebony fingerboard blanks from its supplier between October 2008 and September 2009.[5]

INTERNATIONAL ECONOMIC LAW

United States Marks Improved Relations with Burma by Easing Economic Sanctions

In July 2012, the United States substantially eased its economic sanctions on Burma to encourage continued reforms in the previously isolated country following President U Thein Sein's election in 2011.[1] Secretary of State Hillary Clinton announced U.S. plans to reduce U.S. controls on investment following a meeting with Burma's Foreign Minister U Wunna Maung Lwin in May 2012; the European Union and Australia both reduced their sanctions earlier.[2] A substantial excerpt from a Department of State fact sheet describing the changes follows:

President Obama and Secretary of State Clinton announced in May that the United States would ease certain financial and investment sanctions on Burma in response to the historic reforms that have taken place in that country over the past year. Today, the U.S. Government has implemented these changes to permit the first new U.S. investment in Burma in nearly 15 years, and to broadly authorize the exportation of financial services to Burma. The United States supports the Burmese Government's ongoing reform efforts,

[5] U.S. Dep't of Justice Press Release No. 12-976, Gibson Guitar Corp. Agrees to Resolve Investigation into Lacey Act Violations (Aug. 6, 2012), *at* http://www.justice.gov/opa/pr/2012/August/12-enrd-976.html.

[1] Steven Lee Myers & Thomas Fuller, *U.S. Moves Toward Normalizing Relations with Myanmar*, N.Y. TIMES, Apr. 5, 2012, at A9; William Wan, *After Elections in Burma, U.S. Eases Some Sanctions*, WASH. POST, Apr. 5, 2012, at A9; Karen DeYoung, *U.S. Lifts Ban on Investment in Burma*, WASH. POST, July 12, 2012, at A11; Jane Perlez, *Myanmar's Leader Invites U.S. Businesses to Return*, N.Y. TIMES, July 14, 2012, at A6.

[2] Steven Lee Myers, *White House to Ease Ban on Investment in Myanmar*, N.Y. TIMES, May 18, 2012, at A4; William Wan, *Administration Eases Investment Ban on Burma*, WASH. POST, May 18, 2012, *at* A10.

and believes that the participation of U.S. businesses in the Burmese economy will set a model for responsible investment and business operations as well as encourage further change, promote economic development, and contribute to the welfare of the Burmese people.

As these vital economic and political reform efforts move forward, the United States will continue to support and monitor Burma's progress. We have and will continue to urge the Burmese Government to continue its reform process and we expect the Burmese Government to implement measures that increase socio-economic development and safeguard the human rights of all its people, including political rights and civil liberties.

The United States remains concerned about the protection of human rights, corruption, and the role of the military in the Burmese economy. Consequently, the policy we are announcing today is carefully calibrated and aimed at supporting democratic reform and reconciliation efforts while aiding in the development of an economic and business environment that provides benefits to all Burma's people. A key element of this policy is that we are not authorizing new investment with the Burmese Ministry of Defense. . . .

. . . .

Also today, the President issued a new Executive Order that will allow the U.S. Government to sanction individuals or entities that threaten the peace, security, or stability of Burma, including those who undermine or obstruct the political reform process or the peace process with ethnic minorities, those who are responsible for or complicit in the commission of human rights abuses in Burma, and those who conduct certain arms trade with North Korea. Individual or entities engaging in such activities would be subject to Treasury action that would cut them off from the U.S. financial system.

OFAC [The Treasury Department's Office of Foreign Assets Control] General License No. 16 Authorizes the Exportation of Financial Services to Burma

- OFAC has issued General License No. 16 (GL 16) authorizing the exportation of U.S. financial services to Burma, subject to certain limitations. Reflecting particular human rights risks with the provision of security services, GL 16 does not authorize, in connection with the provision of security services, the exportation of financial services to the Burmese Ministry of Defense, state or non-state armed groups (which includes the military), or entities owned by the foregoing.

. . . .

OFAC General License No. 17 Authorizes New Investment in Burma

- The Secretary of State, pursuant to a delegation of authority from the President, has waived the ban on new U.S. investment in Burma set forth in the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997.
- Consistent with this waiver, OFAC has issued General License No. 17 (GL 17) authorizing new investment in Burma, subject to certain limitations and requirements. . . .

Reporting Requirements on Responsible Investment in Burma

- Any U.S. person (both individuals and entities) engaging in new investment in Burma pursuant to GL 17 whose aggregate new investment exceeds $500,000 must provide to the State Department the information set forth in the State Department's "Reporting Requirements on Responsible Investment in Burma". . . .

. . . .

- . . . Investors will be required to file reports with the State Department on an annual basis, and will include a version that the Department will make publicly available, consistent with relevant U.S. law. . . .

. . . .

New Executive Order Targeting Persons Threatening the Peace, Security, or Stability of Burma

- In signing this Executive Order, the President has provided the United States Government with additional tools to respond to threats to the peace, security, or stability of Burma, and to encourage further reform in Burma. The order provides new authority to impose blocking sanctions on persons determined by the Secretary of the Treasury, in consultation with or at the recommendation of the Secretary of State: to have engaged in acts that directly or indirectly threaten the peace, security, or stability of Burma . . . .

Designation of the Directorate of Defense Industries

- The Directorate of Defense Industries (DDI) carries out missile research and development at its facilities in Burma, where North Korean experts are active. During a trip to Pyongyang in November 2008, Burmese military officials, including the head of the Directorate of Defense Industries, signed a memorandum of understanding with the DPRK to provide assistance to Burma to build medium range, liquid-fueled ballistic missiles. In the past year, North Korean ships have continued to arrive at Burma's ports carrying goods destined for Burma's defense industries.
- DDI has been designated pursuant to [an] Executive Order . . . of July 11, 2012 ("Blocking Property of Persons Threatening the Peace, Stability, or Security of Burma"), which provides the authority to block the property and interests in property of persons determined to have, directly or indirectly, imported, exported, reexported, sold or supplied arms or related material from North Korea or the Government of North Korea to Burma or the Government of Burma . . . .

Designation of Innwa Bank

- Innwa Bank has been designated pursuant to Executive Order 13464 as an entity that is owned or controlled by Myanmar Economic Corporation, a company previously designated by OFAC pursuant to Executive Order 13464. The Myanmar Economic Corporation is a conglomerate owned by the Ministry of Defense that has extensive interests in a variety of Burmese economic sectors.[3]

Record Forfeiture by Dutch Bank for Violating U.S. Sanctions on Cuba and Iran

In June 2012, the U.S. Department of Justice announced that ING Bank N.V., a prominent bank based in Amsterdam, had admitted to serious violations of U.S. and New York law involving $2 billion of prohibited financial transactions on behalf of Cuban and Iranian entities subject to U.S. financial sanctions. An excerpt from the Department's announcement follows:

> ING Bank N.V., a financial institution headquartered in Amsterdam, has agreed to forfeit $619 million to the Justice Department and the New York County District Attorney's Office for conspiring to violate the International Emergency Economic Powers Act

[3] U.S. Dep't of State Press Release No. 2012/1134, Administration Eases Financial and Investment Sanctions on Burma (July 11, 2012), *at* http://www.state.gov/r/pa/prs/ps/2012/07/194868.htm.

(IEEPA) and the Trading with the Enemy Act (TWEA) and for violating New York state laws by illegally moving billions of dollars through the U.S. financial system on behalf of sanctioned Cuban and Iranian entities. The bank has also entered into a parallel settlement agreement with the Treasury Department's Office of Foreign Assets Control (OFAC).

. . . .

A criminal information was filed today [June 12, 2012] in federal court in the District of Columbia charging ING Bank N.V. with one count of knowingly and willfully conspiring to violate the IEEPA and TWEA. ING Bank waived the federal indictment, agreed to the filing of the information and has accepted responsibility for its criminal conduct and that of its employees. ING Bank agreed to forfeit $619 million as part of the deferred prosecution agreements reached with the Justice Department and the New York County District Attorney's Office.

According to court documents, starting in the early 1990s and continuing until 2007, ING Bank violated U.S. and New York state laws by moving more than $2 billion illegally through the U.S. financial system—via more than 20,000 transactions—on behalf of Cuban and Iranian entities subject to U.S. economic sanctions. ING Bank knowingly and willfully engaged in this criminal conduct, which caused unaffiliated U.S. financial institutions to process transactions that otherwise should have been rejected, blocked or stopped for investigation under regulations by OFAC relating to transactions involving sanctioned countries and parties.

"The fine announced today is the largest ever against a bank in connection with an investigation into U.S. sanctions violations and related offenses and underscores the national security implications of ING Bank's criminal conduct. For more than a decade, ING Bank helped provide state sponsors of terror and other sanctioned entities with access to the U.S. financial system, allowing them to move billions of dollars through U.S. banks for illicit purchases and other activities," said Assistant Attorney General [Lisa] Monaco.

. . . .

The Scheme

According to court documents, ING Bank committed its criminal conduct by, among other things, processing payments for ING Bank's Cuban banking operations through its branch in Curaçao on behalf of Cuban customers without reference to the payments' origin, and by providing U.S. dollar trade finance services to sanctioned entities through misleading payment messages, shell companies and the misuse of ING Bank's internal suspense account.

Furthermore, ING Bank eliminated payment data that would have revealed the involvement of sanctioned countries and entities, including Cuba and Iran; advised sanctioned clients on how to conceal their involvement in U.S. dollar transactions; fabricated ING Bank endorsement stamps for two Cuban banks to fraudulently process U.S. dollar travelers' checks; and threatened to punish certain employees if they failed to take specified steps to remove references to sanctioned entities in payment messages.

According to court documents, this conduct occurred in various business units in ING Bank's wholesale banking division and in locations around the world with the knowledge, approval and encouragement of senior corporate managers and legal and compliance

departments. Over the years, several ING Bank employees raised concerns to management about the bank's sanctions violations. However, no action was taken.[1]

INTERNATIONAL HUMAN RIGHTS

U.S. Government's Brief Urges Supreme Court to Reject Claims in Kiobel *Case Involving Nigerian Plaintiffs, Foreign Defendants, and Conduct in Nigeria*

In March 2012, the U.S. Supreme Court requested additional briefing in *Kiobel v. Royal Dutch Petroleum*[1] addressing whether and under what circumstances the Alien Tort Statute (ATS)[2] allows U.S. courts to recognize a cause of action for violations of the law of nations occurring within the territory of a foreign sovereign.[3]

In June 2012, the U.S. solicitor general filed an amicus curiae brief addressing the Court's questions. The brief took a narrow view of U.S. courts' ability to hear ATS claims but cautioned that cases should be assessed in light of various factors so that the Court should not impose a universal prohibition. In this regard, the government contended that in limited circumstances it would be appropriate to sanction a common-law cause of action involving conduct in a foreign place, citing the noted case of *Filártiga v. Peña-Irala*,[4] where torture by a Paraguayan police official occurred in Paraguay and the torturer was later found in the United States so that the United States might have been perceived as harboring him. However the brief urged that in the circumstances of *Kiobel*, U.S. courts should not recognize such a cause of action.

> In *Sosa*,[5] this Court urged "great caution" and called for "vigilant doorkeeping" before exercising a court's federal common lawmaking authority to "adapt[] the law of nations to private rights." 542 U.S. at 728, 729. In this case, foreign plaintiffs are suing foreign corporate defendants for aiding and abetting a foreign sovereign's treatment of its own citizens in its own territory, without any connection to the United States beyond the residence of the named plaintiffs in this putative class action and the corporate defendants' presence for jurisdictional purposes. Creating a federal common-law cause of action in these circumstances would not be consistent with *Sosa*'s requirement of judicial restraint.[6]

The brief emphasized that "where the alleged primary tortfeasor is a foreign sovereign and the defendant is a foreign corporation of a third country—the United States cannot be thought responsible in the eyes of the international community for affording a remedy for the company's actions, while the nations directly concerned could."[7]

[1] U.S. Dep't of Justice Press Release No. 12-742, ING Bank N.V. Agrees to Forfeit $619 Million for Illegal Transactions with Cuban and Iranian Entities (June 12, 2012), *at* http://www.justice.gov/opa/pr/2012/June/12-nsd-742.html.

[1] *See Agora: Kiobel*, 106 AJIL 509 (2012).

[2] 28 U.S.C. §1350.

[3] John R. Crook, Contemporary Practice of the United States, 106 AJIL 360, 382 (2012).

[4] 630 F.2d 876 (2d Cir. 1980).

[5] [Editor's note: *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).]

[6] Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 13–14, Kiobel v. Royal Dutch Petroleum Co., 132 S.Ct. 472 (2012) (No. 10-1491) (footnote omitted), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_affirmanceamcusa.authcheckdam.pdf.

[7] *Id.* at 5.

Department of State Legal Adviser Harold Koh and Department of Commerce General Counsel Cameron Kerry, who appeared on the U.S. government's previous brief in *Kiobel* urging that corporations could be sued under the ATS,[8] did not appear on the recent brief. The brief's statement of the interest of the United States and its "Introduction and Summary of Argument" follow:

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN PARTIAL SUPPORT OF AFFIRMANCE

INTEREST OF THE UNITED STATES

This Court directed the parties to file supplemental briefs addressing whether and under what circumstances the Alien Tort Statute (ATS), 28 U.S.C. 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States. The United States has an interest in the proper application of the ATS because such actions can have implications for the Nation's foreign relations, including the exposure of U.S. officials and nationals to exercises of jurisdiction by foreign states, for the Nation's commercial interests, and for the enforcement of international law.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court explained in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712, 724 (2004), that the ATS "is in terms only jurisdictional" and does not create a statutory cause of action. The ATS does permit courts to create a federal common-law cause of action for violations of international law in certain limited circumstances. But any such cause of action is not created or prescribed by international law. Rather, a private right of action fashioned by a court exercising jurisdiction under the ATS constitutes application of the substantive and remedial law of the United States, under federal common law, to the conduct in question—albeit based on an alleged violation of an international law norm. See *id.* at 712, 720, 721, 724, 725–726, 729–730, 731 & n.19, 732, 738.

In *Sosa*, the Court made clear that, at a minimum, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than [the three] historical paradigms"—violation of safe conducts, infringement of the rights of ambassadors, and piracy. 542 U.S. at 724, 732. In setting forth that threshold requirement, the Court did not purport to define a full set of "criteria for accepting a cause of action subject to jurisdiction under [Section] 1350." *Id.* at 732; see *id.* at 733 n.21 ("This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law."); *id.* at 738 n.30 (noting that the "demanding standard of definition" must first "be met to raise even the possibility of a private cause of action").

The relevant question is whether a court should create a federal common-law cause of action *today* to redress an alleged international law violation, in light of present-day criteria for recognizing private rights of action and fashioning federal common law. The text of the ATS, a jurisdictional statute, does not answer that question. Courts, however, should be guided at least in general terms by the legislative purpose to permit a tort remedy in federal court for law-of-nations violations for which the aggrieved foreign nation could hold the

[8] Crook, *supra* note 3, at 382.

United States accountable, which is an important touchstone for determining whether U.S. courts should be deemed responsible for affording a remedy under U.S. law. See *Sosa*, 542 U.S. at 714–718, 722–724 & n.15. And while canons of statutory construction, such as the presumption against extraterritorial application of an Act of Congress, see *Morrison v. National Austl. Bank Ltd.*, 130 S.Ct. 2869, 2877–2878 (2010), are not directly applicable to the fashioning of federal common law, the underlying principles counsel similar restraint in the judicial lawmaking endeavor.

Although the Court in *Sosa* did not attempt to delineate all of the factors courts exercising jurisdiction under the ATS should consider in deciding whether to "recognize private claims under federal common law," 542 U.S. at 732, it did provide some guidance. The relevant considerations include the modern conception of the common law; evolution in the understanding of the proper role of federal courts in making that law; the general assumption that the creation of private rights of action is "better left to legislative judgment," including the decision whether "to permit enforcement without the check imposed by prosecutorial discretion"; "the potential implications for the foreign relations of the United States"; concerns about "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"; and the absence of a congressional mandate. *Id.* at 725–728. Courts should also consider "the practical consequences" of making a "cause [of action] available to litigants in the federal courts," *id.* at 732–733; exercise "great caution in adapting the law of nations to private rights," *id.* at 728; and operate under a "restrained conception" of their "discretion" to consider "a new cause of action of this kind," *id.* at 725.

There is no need in this case to resolve across the board the circumstances under which a federal common-law cause of action might be created by a court exercising jurisdiction under the ATS for conduct occurring in a foreign country. In particular, the Court should not articulate a categorical rule foreclosing any such application of the ATS. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), for example, involved a suit by Paraguayan plaintiffs against a Paraguayan defendant based on alleged torture committed in Paraguay. The individual torturer was found residing in the United States, circumstances that could give rise to the prospect that this country would be perceived as harboring the perpetrator. And Congress, in the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1350 note), subsequently created an express statutory private right of action for claims of torture and extrajudicial killing under color of foreign law—the conduct at issue in *Filartiga*.

This Office is informed by the Department of State that, in its view, after weighing the various considerations, allowing suits based on conduct occurring in a foreign country in the circumstances presented in *Filartiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights. For this reason, and because Congress has created a statutory cause of action for the conduct at issue in *Filartiga*, there is no reason here to question the result in that case. Other claims based on conduct in a foreign country should be considered in light of the circumstances in which they arise.

In the circumstances of this case, the Court should not fashion a federal common-law cause of action. Here, Nigerian plaintiffs are suing Dutch and British corporations for allegedly aiding and abetting the Nigerian military and police forces in committing torture, extrajudicial killing, crimes against humanity, and arbitrary arrest and detention in Nigeria. Especially in these circumstances—where the alleged primary tortfeasor is a foreign sovereign and the defendant is a foreign corporation of a third country—the United

States cannot be thought responsible in the eyes of the international community for affording a remedy for the company's actions, while the nations directly concerned could. A decision not to create a private right of action under U.S. law in these circumstances would give effect to the Court's admonition in *Sosa* to exercise particular caution in deciding whether, "if at all," to consider suits under rules that would "claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." 542 U.S. at 727–728.[9]

INTERNATIONAL CRIMINAL LAW

U.S. Department of State Summarizes Criteria, Processes, and Consequences of Terrorist Designations Under U.S. Statutes and Executive Orders

In July 2012, the U.S. Department of State circulated a fact sheet summarizing the procedures and criteria for, and consequences of, designating groups or persons as "Foreign Terrorist Organizations" or "Specially Designated Global Terrorists." The document follows:

1. What are the different types of terrorism designations for groups and individuals?

There are two main authorities for terrorism designations of groups and individuals. Groups can be designated as Foreign Terrorist Organizations [(FTOs)] under the Immigration and Nationality Act. Under Executive Order 13224 a wider range of entities, including terrorist groups, individuals acting as part of a terrorist organization, and other entities such as financiers and front companies, can be designated as Specially Designated Global Terrorists (SDGTs).

2. Who can designate FTOs and SDGTs?

The Department of State is authorized to designate FTOs and SDGTs, while the Department of the Treasury designates only SDGTs. Both departments pursue these designations in cooperation with the Department of Justice. All of the Department of State's designations can be found at: http://www.state.gov/j/ct/list/index.htm. All State FTO and [Executive Order] designations can also be found at the Treasury OFAC website.

3. What are the criteria for designation?

The Secretary of State designates *Foreign Terrorist Organizations* in accordance with section 219 of the Immigration and Nationality Act. The legal criteria for designating a group as a Foreign Terrorist Organization are:

- The organization must be a foreign organization;
- The organization engages in terrorist activity or terrorism, or retains the capability and intent to engage in terrorist activity or terrorism; and
- The terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

Under *Executive Order 13224*, the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, may designate foreign individuals or entities that

[9] Supplemental Brief, *supra* note 6, at 1–5.

he determines have committed, or pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the U.S.; or, the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, may designate individuals or entities that are determined:

- To be owned or controlled by, or act for or on behalf of an individual or entity listed in the Annex to the Order or by or for persons determined to be subject to the Order;
- To assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, acts of terrorism or individuals or entities designated in or under the Order; or
- To be otherwise associated with certain individuals or entities designated in or under the Order.

4. What makes you decide to designate or not designate a group or entity?

Within the Department of State, the Bureau of Counterterrorism identifies and evaluates possible individuals or organizations for designation. Other Departments also recommend designation targets.

5. How long does the process take?

For *Foreign Terrorist Organizations*, once an organization is identified, we prepare a detailed "administrative record," which is a compilation of information, typically including both classified and open source information, demonstrating that the statutory criteria for designation have been satisfied.

- If the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, decides to make the designation, Congress is notified of the Secretary's intent to designate the organization seven days before the designation is published in the Federal Register, as section 219 of the Immigration and Nationality Act requires.
- Upon the expiration of the seven-day waiting period and in the absence of Congressional action to block the designation, notice of the designation is published in the Federal Register, at which point the designation takes effect.

For *Specially Designated Global Terrorists*, as with FTO designations, an "administrative record" is prepared for E.O. 13224 designations. Once it is completed and the Secretary of State or the Secretary of the Treasury designates an individual or entity, the Office of Foreign Assets Control (OFAC) of the Department of the Treasury takes appropriate action to block the assets of the individual or entity in the United States or in the possession or control of U.S. persons, including notification of the blocking order to U.S. financial institutions, directing them to block the assets of the designated individual or entity.

- Notice of the designation is also published in the Federal Register. OFAC also adds the individual or entity to its list of Specially Designated Nationals, by identifying such individuals or entities as Specially Designated Global Terrorists (SDGTs), and posts a notice of this addition on the OFAC website.
- Designations remain in effect until the designation is revoked or the Executive Order lapses or is terminated in accordance with U.S. law.

6. What are the consequences of a designation?

Executive Order:

- With limited exceptions set forth in the Order, or as authorized by OFAC, all property and interests in property of designated individuals or entities that are in the United States or that come within the United States, or that come within the possession or control of U.S. persons are blocked.
- With limited exceptions set forth in the Order, or as authorized by OFAC, any transaction or dealing by U.S. persons or within the United States in property or interests in property blocked pursuant to the Order is prohibited, including but not limited to the making or receiving of any contribution of funds, goods, or services to or for the benefit of individuals or entities designated under the Order.
- Any transaction by any U.S. person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions in the Order is prohibited. Any conspiracy formed to violate any of the prohibitions is also prohibited.
- Civil and criminal penalties may be assessed for violations.

Foreign Terrorist Organization:

- It is unlawful for a person in the United States or subject to the jurisdiction of the United States to knowingly provide "material support or resources" to a designated FTO.
- Representatives and members of a designated FTO, if they are aliens, are inadmissible to and, in certain circumstances removable from, the United States.
- The Secretary of the Treasury may require U.S. financial institutions possessing or controlling any assets of a designated FTO to block all transactions involving those assets.[1]

USE OF FORCE AND ARMS CONTROL

Canadian Subsidiary of Major U.S. Company Pleads Guilty to Criminal Charges for Helping China Develop Attack Helicopter

In June 2012, the U.S. Department of Justice announced resolution of criminal charges against Pratt & Whitney Canada Corp. (PWC), its U.S. parent United Technologies Corp., and United Technologies' U.S.-based subsidiary. The charges grow out of PWC's knowing provision of controlled helicopter engines and associated software to China that U.S. authorities believe were used in developing an advanced attack helicopter.[1] A substantial excerpt from the Department's announcement follows:

> Pratt & Whitney Canada Corp. (PWC), a Canadian subsidiary of the Connecticut-based defense contractor United Technologies Corporation (UTC), today pleaded guilty to violating the Arms Export Control Act and making false statements in connection with its

[1] U.S. Dep't of State Press Release No. 2012/1124, Fact Sheet—Terrorism Designations FAQs [Frequently Asked Questions] (July 10, 2012), *at* http://www.state.gov/r/pa/prs/ps/2012/07/194808.htm.

[1] China denies that it used U.S. technology in developing the helicopter, insisting that it utilized only indigenous technology. *China Says It Didn't Use U.S. Technology*, WASH. POST, July 27, 2012, at A15.

illegal export to China of U.S.-origin military software used in the development of China's first modern military attack helicopter, the Z-10.

In addition, UTC, its U.S.-based subsidiary Hamilton Sundstrand Corporation (HSC) and PWC have all agreed to pay more than $75 million as part of a global settlement with the Justice Department and State Department in connection with the China arms export violations and for making false and belated disclosures to the U.S. government about these illegal exports. Roughly $20.7 million of this sum is to be paid to the Justice Department. The remaining $55 million is payable to the State Department as part of a separate consent agreement to resolve outstanding export issues, including those related to the Z-10.[2] Up to $20 million of this penalty can be suspended if applied by UTC to remedial compliance measures. As part of the settlement, the companies admitted conduct set forth in a stipulated and publicly filed statement of facts.

. . . .

The Charges

Today in the District of Connecticut, the Justice Department filed a three-count criminal information charging UTC, PWC and HSC. Count One charges PWC with violating the Arms Export Control Act in connection with the illegal export of defense articles to China for the Z-10 helicopter. Count Two charges PWC, UTC and HSC with making false statements to the U.S. government in their belated disclosures relating to the illegal exports. Count Three charges PWC and HSC with failure to timely inform the U.S. government of exports of defense articles to China.

While PWC has pleaded guilty to Counts One and Two, the Justice Department has recommended that prosecution of UTC and HSC on Count Two, and PWC and HSC on Count Three be deferred for two years, provided the companies abide by the terms of a deferred prosecution agreement with the Justice Department. As part of the agreement, the companies must pay $75 million and retain an Independent Monitor to monitor and assess their compliance with export laws for the next two years.

The Export Scheme

Since 1989, the United States has imposed a prohibition upon the export to China of all U.S. defense articles and associated technical data as a result of the conduct in June 1989 at Tiananmen Square by the military of the People's Republic of China. In February 1990, the U.S. Congress imposed a prohibition upon licenses or approvals for the export of defense articles to the People's Republic of China. In codifying the embargo, Congress specifically named helicopters for inclusion in the ban.

Dating back to the 1980s, China sought to develop a military attack helicopter. Beginning in the 1990s, after Congress had imposed the prohibition on exports to China, China sought to develop its attack helicopter under the guise of a civilian medium helicopter program in order to secure Western assistance. The Z-10, developed with assistance from Western suppliers, is China's first modern military attack helicopter.

During the development phases of China's Z-10 program, each Z-10 helicopter was powered by engines supplied by PWC. PWC delivered 10 of these development engines to

[2] [Editor's note: *see* U.S. Dep't of State Press Release No. 2012/1069, U.S. State Department Announces Resolution of United Technologies Corporation Arms Export Control Enforcement Case (June 28, 2012), *at* http://www.state.gov/r/pa/prs/ps/2012/06/194223.htm.]

China in 2001 and 2002. Despite the military nature of the Z-10 helicopter, PWC determined on its own that these development engines for the Z-10 did not constitute "defense articles," requiring a U.S. export license, because they were identical to those engines PWC was already supplying China for a commercial helicopter.

Because the Electronic Engine Control software, made by HSC in the United States to test and operate the PWC engines, was modified for a military helicopter application, it was a defense article and required a U.S. export license. Still, PWC knowingly and willfully caused this software to be exported to China for the Z-10 without any U.S. export license. . . .

According to court documents, PWC knew from the start of the Z-10 project in 2000 that the Chinese were developing an attack helicopter and that supplying it with U.S.-origin components would be illegal. . . .

. . . .

Belated and False Disclosures to U.S. Government

These companies failed to disclose to the U.S. government the illegal exports to China for several years and only did so after an investor group queried UTC in early 2006 about whether PWC's role in China's Z-10 attack helicopter might violate U.S. laws. The companies then made an initial disclosure to the State Department in July 2006, with follow-up submissions in August and September 2006.

The 2006 disclosures contained numerous false statements. . . .

Today, the Z-10 helicopter is in production and initial batches were delivered to the People's Liberation Army of China in 2009 and 2010. The primary mission of the Z-10 is anti-armor and battlefield interdiction. Weapons of the Z-10 have included 30 mm cannons, anti-tank guided missiles, air-to-air missiles and unguided rockets.[3]

SETTLEMENT OF DISPUTES

United States, Canada Arbitrate Softwood Lumber Disputes at London Court of International Arbitration; Canada Prevails in Most Recent Case

Exports of softwood lumber from Canada to the United States have spawned recurring disputes between the two countries, with the United States contending that some exports have benefited from subsidies or other improper support by the Canadian federal or provincial governments. The two countries accordingly have concluded several agreements aimed at establishing ground rules for such exports, most recently the Softwood Lumber Agreement (SLA) concluded in September 2006.[1] A recent arbitral award describes key aspects of the SLA.

[3] U.S. Dep't of Justice Press Release No. 12-824, United Technologies Subsidiary Pleads Guilty to Criminal Charges for Helping China Develop New Attack Helicopter (June 28, 2012), *at* http://www.justice.gov/opa/pr/2012/June/12-nsd-824.html.

[1] Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America, Sept. 12, 2006, *available at* http://www.ustr.gov/webfm_send/3254. The agreement was recently extended until 2015. *See Softwood Lumber Agreement with U.S. Extended: Trade Minister Ed Fast Says Deal to Run Until 2015*, CBC NEWS, Jan. 23, 2012, *at* http://www.cbc.ca/news/politics/story/2012/01/23/pol-canada-us-trade-softwood-lumber.html.

92. The export of softwood lumber from Canada to the United States of America has long been the subject of trade disputes. After extensive negotiations, the Parties entered into the SLA on 12 September 2006.

93. Under the SLA, Canada agreed to limit exports of softwood lumber to the United States from certain softwood lumber producing regions of Canada when the price of lumber is below US$ 355 per thousand board feet, through a combination of export quotas and taxes for certain regions and export taxes along for other regions (referred to in the SLA as "*Export Measures*"). Article VI of the SLA provides that "*[a]s of the Effective Date, Canada shall apply the Export Measures to exports of Softwood Lumber Products to the United States.*"

94. In return, the United States agreed to refrain from initiating certain trade actions, to revoke its countervailing and antidumping duty orders and to refund US$ 5 billion in cash deposits it had collected from Canadian softwood lumber exporters. The Parties further agreed that Canada would set aside US$ 1 billion of the refunded amount to be split among the U.S. industry, a binational industry council and certain "*meritorious initiatives*" in the United States.

95. As the price of lumber has remained low since October 2006, Export Measures have been in effect almost every month in which the SLA has been in force.[2]

Article XIV(6) of the SLA provides for arbitration of disputes under the administration and rules of the London Court of International Arbitration (LCIA), a private body that administers arbitrations primarily in cases involving commercial disputes between private parties.[3] The article provides that, in case of a dispute under the SLA,

> If the Parties do not resolve the matter within 40 days of delivery of the request for consultation, either Party may refer the matter to arbitration by delivering a written Request for Arbitration to the Registrar of the LCIA Court. The arbitration shall be conducted under the LCIA Arbitration Rules in effect on the date the SLA 2006 was signed, irrespective of any subsequent amendments, as modified by the SLA 2006 or as the Parties may agree, except that Article 21 of the LCIA Rules shall not apply.

Several disputes involving the SLA have been heard by arbitration tribunals administered by the LCIA and conducted using its Rules.[4] In July 2012, an LCIA tribunal rendered its award in the most recent case.[5] The recent award (discussed below) summarizes these earlier proceedings.

104. The first proceeding was brought by the United States in 2007. In *United States v. Canada, LCIA No. 7941*, the tribunal held that Canada breached the SLA by failing to perform a particular calculation as of January 2007, and that Canada must compensate for the breach by collecting an additional 10% export charge on softwood

[2] United States v. Canada, London Court of International Arbitration Case No. 111790, Award (nonconfidential version), paras. 92–95 (July 26, 2012) (footnotes omitted), *available at* http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/111790.pdf.

[3] *See* www.lcia.org.

[4] *See* John R. Crook, Contemporary Practice of the United States, 102 AJIL 155, 192 (2008).

[5] The editor of this section was appointed by the tribunal, with the consent of both parties, to serve as its "confidentiality advisor" and to advise it regarding certain disputes on disclosure of documents. Award, *supra* note 2, paras. 49–55.

lumber shipments from Option B regions until the total amount of C$ 63.9 million plus interest (totaling C$ 68.26 million) was collected.

105. The LCIA 7941 Tribunal also determined that both a cure and compensatory measures under the Agreement share the same goal: to wipe out the consequences of the breach, both past and present. The tribunal relied on both the terms of the SLA and the general principle that a state is to provide full reparation for an injury caused by a wrongful act of that state—referring to the principle as reflected in Article 31 of the [International Law Commission] Articles on State Responsibility.

106. The compensation in *United States v. Canada, LCIA No. 7941* was straightforward—to the extent that Option B regions had paid lower tariffs on a particular volume of lumber exported to the United States, the compensation was an adjustment to the export charges.

107. Shortly after the LCIA 7941 Tribunal issued its award on 23 February 2009, Canada brought a new arbitration. It requested that the LCIA 7941 Tribunal be reconstituted to decide the question of whether Canada had cured its breach when it failed to impose the compensatory export measures required by the tribunal and instead conditionally offered to pay the United States US$ 34 million. The reconstituted tribunal, in its Award of 27 September 2009, held that its previous Award on Remedies did not contemplate that an offer to pay a lump sum, particularly a lump sum that was conditional and not accepted by the United States, could be a "*cure*."

108. The United States also brought a further arbitration in 2008, this time alleging that six Canadian government benefit programs had breached the SLA by providing grants and other benefits to softwood lumber producers in violation of the anti-circumvention article. The LCIA 81010 Tribunal determined, in its Award of 20 January 2011, that a number of programs breached the Agreement. Regarding remedy, the LCIA 81010 Tribunal agreed with the LCIA 7941 Tribunal that "*the remedies system of the SLA covers past effects*," and relied on the terms of the SLA to reach that conclusion.[6]

The latest tribunal ruled against the United States, finding that it failed to prove that British Columbia's pricing of lodgepole pines killed by an infestation of mountain pine beetles and harvested from provincial lands circumvented commitments under the SLA. The tribunal summarized the U.S. claim as follows:

91. This arbitration brought under the SLA of 2006 arises out of a dispute concerning the sale by the Canadian province of British Columbia ("B.C.") to its lumber manufacturers of timber as "*lumber reject*" (Grade 4) at the rate of C$ 0.25 per cubic meter. The SLA prohibits Respondent from providing "*grants or other benefits*" to softwood lumber producers and exporters, subject to certain exceptions. The Parties are in dispute whether Respondent complied with this obligation.

. . . .

110. [The United States alleges that] Respondent [Canada] has taken the action of selling underpriced timber that has been misgraded. Respondent has accomplished this in a variety of ways, but the breaching action is the selling of timber at less than its value. Respondent has changed the timber pricing system grandfathered by the SLA by applying substitute practices and rules which all succeeded in making logs more likely to be misgraded as Grade 4. . . .

[6] *Id.*, paras. 104–08.

111. According to Claimant, this led to the selling of large volumes of lumber-quality timber misgraded as "*lumber reject*" grade ("*Grade 4*") at the low rate of C$ 0.25 per cubic meter rather than at the higher sawlog rate. It is Claimant's case that this selling of timber at stumpage fees below those required under the grandfathered system constitutes a government action in circumvention of the SLA.

112. Claimant supports its case with the undisputed fact that beginning in 2007, the percentage of Grade 4 timber sold by B.C. to lumber producers increased considerably. According to Claimant, B.C.'s own studies demonstrate that this increase is not attributable to changes in timber quality or to the mountain pine beetle (the "*MPB*") infestation affecting the B.C. Interior pine forests.[7]

The panel's 131-page, 439-paragraph opinion analyzes both parties' contentions and evidence in detail. The panel ultimately rejected U.S. claims that various Canadian government actions[8] led to misgrading of logs and their sale by British Colombia at low prices that circumvented the SLA. Following a detailed review of the evidence, the panel concluded that the United States' direct and circumstantial evidence was insufficient to prove its allegation that actions were contrary to the SLA or that the increased volume of Grade 4 timber was the result of incorrect grading.[9]

The Office of the U.S. Trade Representative expressed dissatisfaction with the tribunal's decision.

> "We are disappointed with the outcome of this latest arbitration under the Softwood Lumber Agreement between the Government of the United States and the Government of Canada (SLA). Despite this result, we remain concerned that British Columbia provided publicly-owned timber harvested in its interior to softwood lumber producers for prices far below market value," said Nkenge Harmon, Deputy Assistant United States Trade Representative. "And it is important to note that the tribunal did not sanction the pricing practices in British Columbia. Rather, as a result of a flawed approach to evaluating the evidence before it, the tribunal concluded that it was unable to find a conclusive link to action by the Government of Canada. The fair pricing of timber in British Columbia is in the strong interest of the United States and we will continue to monitor this closely."[10]

Ecuador Initiates Arbitration Against United States, Claims an Interpretative Dispute Under Ecuador-U.S. Bilateral Investment Treaty

In an unusual action, in June 2011 Ecuador initiated arbitration against the United States alleging the existence of a dispute regarding interpretation and application of Article II(7) of the bilateral investment treaty (BIT) between the two countries.[1] The tribunal hearing the case

[7] *Id.*, paras. 91, 110–12.

[8] These actions were "(1) encouraging use of local knowledge; (2) allowing the practice of kiln warming; (3) urging the use of bucking and introducing a new sweep formula; and (4) making changes to the Scaling Manual." *Id.*, para. 257.

[9] *Id.*, para. 430.

[10] Office of the U.S. Trade Representative Press Release, Statement by the Office of the U.S. Trade Representative in Response to Decision in Third Softwood Lumber Arbitration (July 18, 2012), *at* http://www.ustr.gov/about-us/press-office/press-releases/2012/july/ustr-statement-response-softwood-lumber-arbitration.

[1] Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, Aug. 27, 1993, S. TREATY DOC. No. 103-15 (1993), *available at* http://www.state.gov/documents/organization/43558.pdf.

consists of Professor Luiz Olavo Baptista (presiding), Professor Donald McRae (appointed by the United States), and Professor Raúl Emilio Vinuesa (appointed by Ecuador). The Permanent Court of Arbitration (PCA) in The Hague acts as Registry.

The case grows out of a separate BIT arbitration brought by Chevron and Texaco against Ecuador in which the claimants contended, inter alia, that the more than thirteen-year delays by the Ecuadorian courts in adjudicating seven contract claims violated Ecuador's obligations under Article II(7) of the BIT, which requires parties to "provide effective means of asserting claims and enforcing rights with respect to investment, investments agreements, and investment authorizations." In a March 2010 partial award, the arbitration tribunal ruled for the claimants on this issue.[2]

In June 2010, Ecuador's Minister of Foreign Affairs, Trade and Integration Ricardo Patiño Aroca wrote to Secretary of State Hillary Clinton citing the *Chevron* partial award, setting out Ecuador's views regarding interpretation of Article II(7), and requesting confirmation that the United States agreed with those views. The United States did not respond to the substance of that request. After the *Chevron* tribunal ruled against Ecuador in March 2011, Ecuador initiated this arbitration, contending that the U.S. failure to respond positively to Ecuador's request for confirmation of Ecuador's interpretation gave rise to a dispute between the two countries.

The United States is contesting the new tribunal's jurisdiction. Excerpts from the introduction of the April 2012 U.S. brief opposing jurisdiction follow:

> This is an extraordinary case of first impression for dispute settlement under international investment agreements. Ecuador seeks to create a "dispute" under Article VII of the U.S.-Ecuador Bilateral Investment Treaty ("BIT" or "Treaty") where none exists, and to obtain an "authoritative interpretation" to bind the Parties in the absence of their mutual consent.
>
> In a June 8, 2010 letter, Ecuador informed the United States that an investment tribunal had "erroneously" interpreted Article II(7) of the Treaty. Ecuador then provided the United States with the "proper" interpretation of that provision, and demanded "confirmation" of its views from the United States. Ecuador contends that the United States owed Ecuador a response to its demand and that the United States' non-response entitles Ecuador to seek from this Tribunal an "authoritative interpretation" of that "disputed" provision. Ecuador's claim has no foundation in international law and, if accepted, would destabilize the operation of BITs, particularly regarding dispute settlement.
>
> Ecuador's theory of jurisdiction in this case rests on three faulty premises. *First*, Ecuador wrongly implies that its request for an interpretation demanded a positive response from the United States and that by not responding the United States somehow failed to comply with its obligations under the Treaty. In fact, Ecuador has conceded in this arbitration that the United States has done nothing whatsoever to affect Ecuador's rights or obligations under the Treaty. Ecuador expressly acknowledges that it
>
> > has not accused the United States of any wrongdoing. It does not accuse the United States of violating any of its international obligations. It does not seek compensation from the United States. It does not seek an order against the United States.

[2] Chevron Corp. v. Republic of Ecuador, Partial Award (UNCITRAL Mar. 30, 2010), *available at* http://italaw.com/documents/ChevronTexacoEcuadorPartialAward.PDF. A panel of three leading international arbitrators heard the case: Albert Jan van den Berg, Charles N. Brower, and Karl-Heinz Böckstiegel (presiding).

. . . .

Second, Ecuador erroneously implies that the United States' non-response necessarily establishes that the Parties have divergent views on the meaning of Article II(7), thereby putting the Parties in "positive opposition" over the meaning of that provision. But Ecuador admits: "The U.S. never informed Ecuador that it agreed with Ecuador's interpretation of Article II(7), or, for that matter, that it disagreed with Ecuador's interpretation." Ecuador thus concedes that the United States never addressed Ecuador's proposed interpretation of Article II(7), and that the United States "never offered an opinion or commented on Ecuador's interpretation, nor . . . ever provide[d] Ecuador with its own interpretation of Article II(7)." If the United States has not expressed an interpretation of Article II(7), it cannot be in positive opposition with Ecuador with respect to that provision, and there cannot be a "dispute" within the meaning of Article VII.

Third, Ecuador improperly asserts that the United States was legally required to respond to its "request for interpretation." But nothing in the Treaty or in general international law creates an obligation on the United States to have responded to Ecuador's request. Ecuador never sought consultations with the United States under the BIT or actually requested negotiations toward a mutual interpretation. Instead, Ecuador demanded that the United States "confirm" Ecuador's unilateral interpretation of that provision, and warned that "[i]f such a confirming note is not forthcoming or . . . [if] the United States does not agree with . . . Ecuador, an *unresolved dispute* must be considered to exist between" the Parties. By its own terms, then, Ecuador's request was not a good-faith invitation to consultations, but a mere tactic to set up this arbitration. . . .

The ordinary meaning of the text of Article VII, read in context and in light of the object and purpose of the BIT, demonstrates that there is no "dispute" between the Parties. Rather, what Ecuador has submitted is a demand that the Tribunal revisit the interpretation of Article II(7) provided by an investor-State tribunal in exercising its jurisdiction under Article VI of the Treaty. The "points at issue" in Ecuador's Request for Arbitration raise purely abstract questions and do not demonstrate the existence of a concrete dispute between the Parties.

. . . .

Ecuador does not hide that it seeks an "authoritative interpretation" to address issues that do not arise out of a concrete claim of breach of the Treaty by the United States. Indeed, Ecuador has asked this Tribunal: "What precisely are Ecuador's obligations under Article II(7), obligations which it did not understand it was assuming when it signed the BIT with the United States?" Although the Parties might have addressed this question in consultations under Article V, this Tribunal lacks jurisdiction to answer it, as the question arises outside the context of a "dispute" between the Parties within the meaning of Article VII.

This Tribunal does not have advisory jurisdiction and cannot issue "authoritative" decisions binding on other tribunals. Nor can the Tribunal "precisely" guide the Parties, as Ecuador asks, on the implementation of their international legal obligations, so that they can know how many judges should be hired, how to monitor litigation involving foreigners in their courts, or the speed at which domestic trials must be concluded. The Tribunal, moreover, has no appellate jurisdiction. . . .

The Tribunal's acceptance of jurisdiction in this case would be inconsistent with the text of Article VII and nearly a century of unbroken international jurisprudence confirming the meaning of "dispute." To permit Ecuador to proclaim the "proper" meaning of a treaty provision, demand "confirmation" of its unilateral view, and then seek an "authoritative

interpretation" from this Tribunal of the "disputed" provision would have at least four far-reaching and potentially destabilizing consequences for international adjudication and investment treaties.

First, it would constitute inappropriate judicial lawmaking. International arbitral tribunals must restrict their contentious jurisdiction to resolving concrete disputes between the parties concerning violations of their treaty obligations, not to fashioning general rules to address issues of an abstract nature.

Second, taking jurisdiction to pronounce the meaning of Article II(7) would contradict a principal object and purpose of the Treaty, which is to encourage investment by giving assurances that, if disputes arise, investors can obtain final and binding awards in a depoliticized forum. As Professor Reisman discusses in the accompanying expert report, granting Ecuador's request in this case would undermine the system of investment arbitration. . . .

Third, deciding an interpretive issue in the absence of a genuine dispute would impede the discretion of the United States (or any treaty party in a comparable situation) to decide whether and how to interpret the BIT, and would judicialize diplomatic discussions between the Parties over the meaning of the Treaty. . . .

Fourth, hearing Ecuador's claim would create a clear roadmap for manufacturing claims in State-to-State arbitration, thereby disrupting the proper operation of international treaties. . . .

Not a single case on which Ecuador relies involves an international court or tribunal purporting to issue an "authoritative interpretation" of a treaty in a case such as this one, where (1) no concrete case exists, (2) the parties are not in positive opposition, and (3) the treaty did not expressly confer advisory, appellate or referral jurisdiction on the tribunal. . . .

Based on Ecuador's own admissions, this case is unprecedented, improper, and jurisdictionally defective. This case should not proceed to a merits hearing. The United States would be prejudiced, and Ecuador vindicated in its approach, if the Parties were required to complete briefs on the merits and argue the interpretation of Article II(7) prior to the Tribunal's ruling on its jurisdiction. Such a result would unfairly grant Ecuador much of the relief it has requested even before it has proven this Tribunal's jurisdiction. . . .[3, 4]

PRIVATE INTERNATIONAL LAW

Kansas Statute Bars Enforcement of Contracts, Foreign Awards, and Judgments Based on Foreign Laws Not Meeting U.S. Constitutional Requirements

In May 2012, the Kansas legislature approved and Governor Sam Brownback signed a statute that its supporters see as barring application of Sharia law by Kansas courts.[1] While the law does not mention Sharia, it precludes enforcement of contracts, foreign judgments, and arbitral awards based on foreign legal codes that do not assure fundamental rights under the U.S.

[3] Memorial of Respondent United States of America on Objections to Jurisdiction at 1–7, Republic of Ecuador v. United States, PCA Case No. 2012-5 (Apr. 25, 2012) (footnotes omitted), *at* http://www.pca-cpa.org/showpage.asp?pag_id=1455.

[4] Ecuador's counter-memorial supporting jurisdiction dated May 23, 2012, is available online at the PCA website, http://www.pca-cpa.org/showpage.asp?pag_id=1455.

[1] H. Sub. S. 79, 2012 Leg., Reg. Sess. (Kan. 2012) ("AN ACT concerning the protection of rights and privileges granted under the United States or Kansas constitutions."), *at* http://www.kslegislature.org/li/b2011_12/measures/documents/sb79_enrolled.pdf.

and Kansas Constitutions. According to press reports, opponents of the law view it as discriminatory against Muslims and are contemplating litigation.[2] Other states that have adopted anti-Sharia laws include Arizona, Louisiana, Oklahoma, and Tennessee, although proposed laws were not enacted or were withdrawn in other states.[3]

According to Brownback's spokesperson, the law "makes it clear that Kansas courts will rely exclusively on the laws of our state and our nation when deciding cases and will not consider the laws of foreign jurisdictions."[4] The law's provisions bar enforcement of contracts, judgments, or arbitral awards predicated on legal systems that do not assure "fundamental liberties, rights and privileges granted under the United States and Kansas constitutions." If the law withstands any legal challenge,[5] its impact is difficult to predict, and it may have substantial unintended consequences. For example, under section 5 of the Kansas Constitution Bill of Rights, "The right of trial by jury shall be inviolate,"[6] and the right to a jury trial is guaranteed in civil cases.[7] These provisions may mean that any foreign legal system that does not provide for jury trials in civil cases will run afoul of the statute, rendering contracts, judgments, or awards utilizing its substantive law unenforceable in Kansas.

The statute's text follows:

> *Be it enacted by the Legislature of the State of Kansas:*
>
> Section 1. While the legislature fully recognizes the right to contract freely under the laws of this state, it also recognizes that this right may be reasonably and rationally circumscribed pursuant to the state's interest to protect and promote rights and privileges granted under the United States or Kansas constitution, including, but not limited to, equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage.
>
> Sec. 2. As used in this act, "foreign law," "legal code" or "system" means any law, legal code or system of a jurisdiction outside of any state or territory of the United States, including, but not limited to, international organizations and tribunals and applied by that jurisdiction's courts, administrative bodies or other formal or informal tribunals.
>
> Sec. 3. Any court, arbitration, tribunal or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration, tribunal or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on any foreign law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions, including, but not limited to,

[2] *Law Bans the Use of Foreign Legal Codes*, N.Y. TIMES, May 26, 2012, at A11.

[3] Omar Sacirbey, *Anti-Sharia Bills Dying in States*, WASH. POST, Mar. 23, 2012, at A4.

[4] *Kansas Governor Signs 'Shariah Bill' to Ban Islamic Law*, MSNBC, May 26, 2012, *at* http://www.msnbc.msn.com/id/47574780/ns/us_news-crime_and_courts/t/kansas-governor-signs-shariah-bill-ban-islamic-law/#.T_29J45gPHg.

[5] In January 2012, the Tenth Circuit upheld an injunction barring certification of a more bluntly drawn Oklahoma constitutional amendment. Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012); John R. Crook, Contemporary Practice of the United States, 106 AJIL 360, 365 (2012).

[6] KAN. CONST., Bill of Rights §5, *available at* http://www.kslib.info/government-information/kansas-information/kansas-constitution/kansas-bill-of-rights.html.

[7] *See* Third Judicial District, Shawnee County, Kan., Court Overview: About Us, *available at* http://www.shawneecourt.org/index.aspx?NID=8.

equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage.

Sec. 4. A contract or contractual provision, if capable of segregation, which provides for the choice of a foreign law, legal code or system to govern some or all of the disputes between the parties adjudicated by a court of law or by an arbitration panel arising from the contract mutually agreed upon shall violate the public policy of this state and be void and unenforceable if the foreign law, legal code or system chosen includes or incorporates any substantive or procedural law, as applied to the dispute at issue, that would not grant the parties the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions, including, but not limited to, equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage.

Sec. 5. (a) A contract or contractual provision, if capable of segregation, which provides for a jurisdiction for purposes of granting the courts or arbitration panels *in personam* jurisdiction over the parties to adjudicate any disputes between parties arising from the contract mutually agreed upon shall violate the public policy of this state and be void and unenforceable if the jurisdiction chosen includes any foreign law, legal code or system, as applied to the dispute at issue, that would not grant the parties the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions, including, but not limited to, equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage.

(b) If a resident of this state, subject to personal jurisdiction in this state, seeks to maintain litigation, arbitration, agency or similarly binding proceedings in this state and if the courts of this state find that granting a claim of forum *non conveniens* or a related claim violates or would likely violate the fundamental liberties, rights and privileges granted under the United States and Kansas constitutions of the nonclaimant in the foreign forum with respect to the matter in dispute, including, but not limited to, equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage, then it is the public policy of this state that the claim shall be denied.

Sec. 6. Nothing in this act shall be construed to disapprove of or abrogate any appellate decision previously rendered by the supreme court of Kansas.

Sec. 7. Nothing in this act shall be construed to allow a court to: (a) Adjudicate or prohibit any religious organization from deciding upon ecclesiastical matters of a religious organization, including, but not limited to, the selection, appointment, calling, discipline, dismissal, removal or excommunication of a member, member of the clergy, or other person who performs ministerial functions; or (b) determine or interpret the doctrine of a religious organization, including, but not limited to, where adjudication by a court would violate the prohibitions of the religion clauses of the first amendment to the constitution of the United States, or violate the constitution of the state of Kansas.

Sec. 8. Without prejudice to any legal right, this act shall not apply to a corporation, association, partnership, limited liability company, limited liability partnership or other legal entity that contracts to subject itself to foreign law or courts in a jurisdiction other than this state or the United States.

Sec. 9. This act shall take effect and be in force from and after its publication in the statute book.[8]

[8] H. Sub. S. 79, *supra* note 1.

BRIEF NOTES

Supreme Court Grants Certiorari in Hague Child Abduction Case

In August 2012, the U.S. Supreme Court issued a rare summertime order adding a case to its docket for the coming term.[1] *Chafin v. Chafin* addresses whether an appeal in a Hague Abduction Convention[2] case becomes moot once the child has been removed from the United States to her country of habitual residence. The appellant, a U.S. Army sergeant, married a Scotswoman in Germany. The couple then moved to Alabama and later divorced. Mrs. Chafin received a federal court order under U.S. legislation implementing the Convention determining Scotland to be the child's country of habitual residence and allowing her return there. Mother and child then returned to Scotland.[3]

Sergeant Chafin appealed the order, which declared Scotland to be the child's habitual residence, but the Eleventh Circuit dismissed the appeal as moot because the child had returned to Scotland and was beyond the court's jurisdiction. A split exists among circuit courts on the mootness issue. As presented in the petitioner's petition for certiorari, the issue presented is

> Whether an appeal of a District Court's ruling on a Petition for Return of Children pursuant to International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International Child Abduction becomes moot after the child at issue returns to his or her country of habitual residence, as in the Eleventh Circuit's *Bekier* case,[4] leaving the United States Court system lacking any power or jurisdiction to affect any further issue in the matter or should the United States Courts retain power over their own appellate process, as in the Fourth Circuit's *Fawcett* case,[5] and maintain jurisdiction throughout the appellate process giving the concerned party an opportunity for proper redress.[6]

Official Department of State Digest for 2011 Published Online

In July 2012, the U.S. Department of State announced that the official *2011 Digest of U.S. Practice in International Law* has been published and is available online. In a break with past practice, the *Digest* will no longer be published in book form and will be available exclusively online. Online publication has allowed the Department to include links to full texts of many of the documents summarized in the *Digest*. The Department's announcement follows:

> The Department of State is pleased to announce the release of the 2011 Digest of United States Practice in International Law, covering developments during 2011. The

[1] U.S. Supreme Court Order List, Aug. 13, 2012, *at* www.supremecourt.gov/orders/courtorders/081312zra7d0.pdf.

[2] Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 UNTS 98 (implemented in the United States by the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11610 (2006)).

[3] Lyle Denniston, *Court Grants One New Case*, SCOTUSBLOG, Aug. 13, 2012, *at* http://www.scotusblog.com/2012/08/court-grants-one-new-case/.

[4] [Editor's note: Bekier v. Bekier, 248 F.3d 1051 (11th Cir. 2001).]

[5] [Editor's note: Fawcett v. McRoberts, 326 F.3d 491 (4th Cir. 2003).]

[6] Petition for Writ of Certiorari at ii, Chafin v. Chafin, 2012 U.S. LEXIS 5033 (Aug. 13, 2012) (No. 11-1347) (granting *cert.*), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/Petition-for-Writ-of-Certiorari-1.pdf.

> digest provides the public with a record of the views and practice of the Government of the United States in public and private international law. The official edition of the 2011 Digest is available exclusively on the State Department's website at: www.state.gov/s/l/c8183.htm. Past digests covering 1989 through 2010 are also available on the State Department's website. The Digest is edited by the Office of the Legal Adviser.
>
> The Digest traces its history back to an 1877 treatise by John Cadwalader, which was followed by multi-volume encyclopedias covering selected areas of international law. The Digest later came to be known to many as "Whiteman's" after Marjorie Whiteman, the editor from 1963–1971. Beginning in 1973, the Office of the Legal Adviser published the Digest on an annual basis, changing its focus to documentation current to the year. Although publication was temporarily suspended after 1988, the office resumed publication in 2000 and has since produced volumes covering 1989 through 2011. A cumulative index covering 1989–2006 was published in 2007, and an updated edition of that index, covering 1989–2008, was published in 2010.[7]

United States Signs Beijing Treaty on Audiovisual Performances

In June 2012, the United States participated in a diplomatic conference in Beijing convened by the World Intellectual Property Organization (WIPO), which successfully concluded a multilateral treaty[8] that, if brought into force, will provide internationally protected rights for motion picture and television actors. The Department of State applauded completion of the treaty and announced that the United States had signed it. The Department's announcement follows:

> Today in Beijing, the United States joined 47 other countries in signing a treaty to strengthen the rights of audiovisual performers around the world. The Beijing Treaty on Audiovisual Performances, adopted at a diplomatic conference convened by World Intellectual Property Organization (WIPO) members, fills a gap in the system of international copyright protection by extending to actors in motion pictures and television programs the type of protections previously accorded to authors and to performers in sound recordings.
>
> The United States delegation was pleased to work productively with developing and developed countries in finalizing the treaty, which brings to a close negotiations that began more than fifteen years ago. The successful outcome demonstrates how the multilateral system can be harnessed to benefit American workers and businesses. The U.S. audiovisual performances industry employs more than 150,000 professional actors and is a source of strength for American exports.[9]

According to a separate release by WIPO,

> The Beijing Treaty on Audiovisual Performances (BTAP) will strengthen the economic rights of film actors and other performers and could provide extra income from their work.

[7] U.S. Dep't of State Press Release No. 2012/1154, Department of State Announces Online Publication of the 2011 Digest of United States Practice in International Law (July 16, 2012), *at* http://www.state.gov/r/pa/prs/ps/2012/07/195051.htm.

[8] *Available at* http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=208966.

[9] U.S. Dep't of State Press Release No. 2012/1056, Signing of Audiovisual Performances Treaty (June 26, 2012), *at* http://www.state.gov/r/pa/prs/ps/2012/06/194101.htm.

> It will potentially enable performers to share proceeds with producers for revenues generated internationally by audiovisual productions. It will also grant performers moral rights to prevent lack of attribution or distortion of their performances.
>
> Importantly, the new treaty will strengthen the precarious position of performers in the audiovisual industry by providing a clearer international legal framework for their protection. For the first time it will provide performers with protection in the digital environment. The treaty will also contribute to safeguarding the rights of performers against the unauthorized use of their performances in audiovisual media, such as television, film and video.[10]

The treaty will enter into force following ratification by thirty eligible states and intergovernmental organizations.

Alleged Leading Trafficker in Stolen Credit Card Data Extradited to United States from France

In June 2012, the U.S. Department of Justice announced that Vladislav Anatolievich Horohorin of Moscow, also known as "BadB," alleged to be one of the world's foremost traffickers in stolen credit card data, was extradited to the United States from France to face indictments in the District of Columbia and Georgia. Excerpts from the Justice Department announcement follow:

> Vladislav Anatolievich Horohorin, aka "BadB" of Moscow, an alleged international credit card trafficker thought to be one of the most prolific sellers of stolen credit card data, has been extradited from France to the United States to face criminal charges filed in the District of Columbia and in the Northern District of Georgia.
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> . . . .
>
> . . . In August 2010, French law enforcement authorities, working with the U.S. Secret Service, identified Horohorin in Nice, France, and arrested him as he was attempting to board a flight to return to Moscow.
>
> According to the indictment filed in the District of Columbia, Horohorin was the subject of an undercover investigation by [U.S. Secret Service] agents. Horohorin, who is a citizen of Israel, Russia and Ukraine, allegedly used online criminal forums such as "CarderPlanet" and "carder.su" to sell stolen credit card information, known as "dumps," to online purchasers around the world. According to the indictment, Horohorin, using the online name "BadB," advertised the availability of stolen credit card information through these web forums and directed purchasers to create accounts at "dumps.name," a fully-automated dumps vending website operated by Horohorin and hosted outside the United States. The website was designed to assist in the exchange of funds for the stolen credit card information. . . . Using an online undercover identity, [U.S. Secret Service] agents negotiated the sale of numerous stolen credit card dumps.
>
> According to the indictment filed in the Northern District of Georgia, Horohorin was one of the lead cashers in an elaborate scheme in which 44 counterfeit payroll debit cards were used to withdraw more than $9 million from over 2,100 ATMs in at least 280 cities worldwide in a span of less than 12 hours. Computer hackers broke into a credit card processor located in the Atlanta area, stole debit card account numbers, and raised the balances and

[10] WIPO Press Release, WIPO Beijing Treaty on Audiovisual Performances Is Concluded (June 26, 2012), *at* http://www.wipo.int/pressroom/en/articles/2012/article_0013.html.

withdrawal limits on those accounts while distributing the account numbers and PIN codes to lead cashers, like Horohorin, around the world.[11]

United States Deports Bosnian-Serb Police Commander Implicated in Srebrenica Genocide

In May 2012, U.S. Immigration and Customs Enforcement (ICE) announced the deportation of Dejan Radojkovic, a former Bosnian-Serb police commander accused of rounding up Bosnian Muslims who were killed at Srebrenica in July 1995.[12] An excerpt from the ICE announcement follows:

> A former Bosnian-Serb police commander wanted in his native country for genocide and atrocities against thousands of Bosnian Muslims was deported Wednesday, capping a successful effort by U.S. Immigration and Customs Enforcement (ICE) to investigate the case and gain his removal from the United States.
>
> Dejan Radojkovic, 61, arrived in Sarajevo Thursday morning via commercial aircraft under escort by ICE's Enforcement and Removal (ERO) officers. Radojkovic was immediately turned over to Bosnian and Herzegovina law enforcement officials.
>
> The former Las Vegas resident faces criminal charges in Bosnia and Herzegovina for his role in the Srebrenica genocide. The atrocities took place over several days in July 1995 as Bosnian Serb forces overran a contingent of United Nations peacekeepers, driving tens of thousands of Bosnian-Muslim civilians from the Srebrenica "safe area" and executing more than 7,000 Bosnian-Muslim men and boys. Authorities allege Radojkovic used his position as a commander in the Special Police Brigade to aid in carrying out the crimes. Specifically, prosecutors charge that Radojkovic and his platoon rounded up some 200 Bosnian-Muslim men in the Konjevic Polje region and transferred them to locations where they were executed.
>
> . . . .
>
> Radojkovic, a native of Bosnia and Herzegovina, entered the United States in 1999. After a joint investigation by [Homeland Security Investigations (HSI)] and Bosnian authorities linked Radojkovic to possible war crimes, he was arrested by HSI special agents at his Las Vegas residence in January 2009. Ten months later, an immigration judge ordered Radojkovic deported on multiple grounds, including a finding that he "ordered . . . and/or otherwise participated in extrajudicial killing." Radojkovic's removal order was upheld upon appeal.
>
> In seeking to establish Radojkovic's role in the Srebrenica genocide, ICE worked closely with the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (in The Hague) and the Prosecutor's Office of Bosnia-Herzegovina in Sarajevo. . . .
>
> Radojkovic is the second former special police commander linked to the massacre to be targeted by ICE for enforcement action. Nedjo Ikonic, formerly of Milwaukee, Wis., was deported Jan. 19, 2010, to face genocide-related charges in Bosnia and Herzegovina.

[11] U.S. Dep't of Justice Press Release No. 12-767, Alleged International Credit Card Trafficker "Badb" Extradited from France to the United States (June 15, 2012), *at* http://www.justice.gov/opa/pr/2012/June/12-crm-767.html.

[12] *Man Deported over Alleged War Crimes*, WASH. POST, May 25, 2012, at A3.

> The Human Rights Violators and War Crimes Center investigates human rights violators who try to evade justice by seeking shelter in the United States, including those who have participated in war crimes and acts of genocide, torture and extrajudicial killings. These individuals may use fraudulent identities to enter the country and attempt to blend into communities in the United States. . . .
>
> Since fiscal year 2004, ICE has arrested more than 200 individuals for human rights-related violations under various criminal and/or immigration statutes. During that same period, ICE obtained deportation orders and physically removed more than 400 known or suspected human rights violators from the United States. Currently, HSI has more than 180 active investigations and ICE is pursuing more than 1,900 leads and removal cases involving suspected human rights violators from nearly 95 different countries.[13]

U.S. Department of Justice Secures First Forfeiture in Its "Kleptocracy Asset Recovery Initiative"

In June 2012, the U.S. Department of Justice announced the forfeiture to the United States of over $400,000 corruptly acquired by a Nigerian government official and invested in the United States. This forfeiture is the first successful proceeding brought as part of an initiative aimed at recovering funds and property corruptly amassed by foreign officials and sheltered in the United States. A substantial excerpt from the Department's announcement follows:

> The Department of Justice has forfeited $401,931 in assets traceable to Diepreye Solomon Peter Alamieyeseigha, a former Governor of Bayelsa State, Nigeria, Assistant Attorney General Lanny A. Breuer of the Justice Department's Criminal Division and U.S. Immigration and Customs Enforcement (ICE) Director John Morton announced today.
>
> Alamieyeseigha was the elected governor of the oil-producing Bayelsa State in Nigeria from 1999 until his impeachment in 2005. As alleged in the U.S. forfeiture complaint, Alamieyeseigha's official salary for this entire period was approximately $81,000, and his declared income from all sources during the period was approximately $248,000. However, while governor, Alamieyeseigha accumulated millions of dollars worth of property located around the world through corruption and other illegal activities. After his impeachment in Nigeria, Alamieyeseigha pleaded guilty in Nigeria for, among other things, failure to disclose a bank account in Florida and also pleaded guilty on behalf of his shell companies to money laundering violations. As further alleged in the complaint, the funds forfeited were held in an investment account in Boston that was fraudulently opened in the name of Nicholas Aiyegbemi and were traceable to the undisclosed Alamieyeseigha account in Florida.
>
> On June 13, 2012, U.S. District Court Judge Rya W. Zobel of the District of Massachusetts granted a motion for a default judgment and forfeiture order filed by the Criminal Division's Asset Forfeiture and Money Laundering Section. This forfeiture order was executed today and allows the United States to dispose of the forfeited funds in accordance with federal law.
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> . . . .

[13] U.S. Dep't of Homeland Security, Immigration and Customs Enforcement Press Release, ICE Deports Former Bosnian-Serb Police Commander Tied to Srebrenica Genocide; Case Is Among Hundreds Identified by ICE's Human Rights Violators and War Crimes Center (May 24, 2012), *at* http://www.ice.gov/news/releases/1205/120524lasvegas.htm.

> This is the first forfeiture judgment obtained under the Justice Department's Kleptocracy Asset Recovery Initiative. This initiative is carried out by a dedicated team of prosecutors in the Criminal Division's Asset Forfeiture and Money Laundering Section, working in partnership with federal law enforcement agencies to forfeit the proceeds of foreign official corruption and where appropriate return those proceeds to benefit those harmed.
>
> In a separate pending civil forfeiture case filed in the District of Maryland, the Justice Department is seeking forfeiture of additional property traceable to Alamieyeseigha, a private residence worth more than $600,000 in Rockville, Md. The complaint alleges that the property was involved in money laundering.
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> . . . .
>
> Individuals with information about possible proceeds of foreign corruption located in or laundered through institutions in the United States should contact federal law enforcement or send an email to kleptocracy@usdoj.gov.[14]

U.S. Proposals for 2012 World Telecommunications Conference

The World Conference on International Telecommunications (WCIT) in Dubai in December 2012 will consider possible revisions to the International Telecommunications Regulations (ITR) governing the exchange of international telecommunications traffic. Some U.S. technology companies and advocates of Internet freedom have expressed concerns that the WCIT may offer opportunities for Russia, China, and other advocates of increased Internet regulation to advance their agendas, although International Telecommunications Union officials dismiss their concerns.[15] In August 2012, the U.S. Department of State announced plans to submit proposals for consideration at the WCIT. The announcement has been interpreted as a signal of U.S. determination to oppose efforts to increase Internet regulation.[16] An excerpt follows:

> Convened by the International Telecommunication Union (ITU), the United Nations expert agency for telecommunications, the WCIT will review and potentially revise the treaty-level International Telecommunications Regulations (ITRs). The ITRs govern the arrangements for exchanging international telecommunications traffic among countries. They have not been revised since 1988, and in the intervening years, there have been significant changes in the global telecommunications sector, including liberalization of markets, the rise of competition and the advent of new technologies and services, including packet switching and international mobile roaming.
>
> Responding to the ITU's call for proposals for the conference, the U.S. WCIT Head of Delegation, led by Ambassador Terry Kramer, is submitting a first round of proposals. These initial proposals reflect the U.S. belief that the ITRs should remain a high-level treaty that establishes an international framework for market-driven development of telecommunications networks and services.

[14] U.S. Dep't of Justice Press Release No. 12-827, Department of Justice Forfeits More Than $400,000 in Corruption Proceeds Linked to Former Nigerian Governor (June 28, 2012), *at* http://www.justice.gov/opa/pr/2012/June/12-crm-827.html.

[15] Cecelia Kang, *Tech Giants Warn of Threats to Free and Profitable Internet*, WASH. POST, May 31, 2012, at A10.

[16] Leo Kelion, *US Resists Control of Internet Passing to UN Agency*, BBC NEWS, Aug. 3, 2012, *at* http://www.bbc.com/news/technology-19106420.

"The ITRs have served well as a foundation for growth in the international market," Ambassador Kramer said. "We want to preserve the flexibility contained in the current ITRs, which has helped create the conditions for rapid evolution of telecommunications technologies and markets around the world."

The U.S. proposals include:

- Minimal changes to the preamble of the ITRs;
- Alignment of the definitions in the ITRs with those in the ITU Constitution and Convention, including no change to the definitions of *telecommunications* and *international telecommunications service*;
- Maintaining the voluntary nature of compliance with ITU-T Recommendations;
- Continuing to apply the ITRs only to *recognized operating agencies* or RoAs; i.e., the ITRs' scope should not be expanded to address other *operating agencies* that are not involved in the provision of authorized or licensed international telecommunications services to the public; and
- Revisions of Article 6 to affirm the role played by market competition and commercially negotiated agreements for exchanging international telecommunication traffic.

The U.S. will carefully monitor and study the proposals submitted by other countries. The U.S. is concerned that proposals by some other governments could lead to greater regulatory burdens being placed on the international telecom sector, or perhaps even extended to the Internet sector—a result the U.S. would oppose.

"We will not support any effort to broaden the scope of the ITRs to facilitate any censorship of content or blocking the free flow of information and ideas," Ambassador Kramer said. "The United States also believes that the existing multi-stakeholder institutions, incorporating industry and civil society, have functioned effectively and will continue to ensure the health and growth of the Internet and all of its benefits."[17]

[17] U.S. Dep't of State Press Release, Fact Sheet: Fast Facts on United States Submitting Initial Proposals to World Telecom Conference (Aug. 1, 2012), *at* http://www.state.gov/e/eb/rls/fs/2012/195921.htm.