that she expected U.S. military trainers to operate as part of the (greatly expanded) U.S. embassy in Iraq.[12]

> [W]e are now going to have a security relationship with Iraq for training and support of their military, similar to what we have around the world from Jordan to Colombia. We will have military trainers and support personnel on the ground at Embassy Baghdad. We will be training Iraqis on using the military equipment that they are buying from the United States. And we think that this is the kind of mature relationship that is very common.[13]

According to press reports, the Office of Security Cooperation, part of the U.S. embassy in Iraq, is projected to have several hundred military personnel and at least as many contractors engaged in training and support tasks.[14]

U.S. Senate Approves Investment Treaty with Rwanda and Mutual Legal Assistance Treaty with Bermuda, Addressing Both Treaties' Domestic Implementation

In September 2011, the U.S. Senate gave advice and consent to two treaties: a bilateral investment treaty (BIT) with Rwanda,[1] and a treaty on mutual legal assistance in criminal matters (MLAT) with Bermuda.[2] These treaties are the only ones approved by the Senate during the current Congress. In both treaties, the Senate Foreign Relations Committee (SFRC) took care to specify whether the treaties' provisions are or are not self-executing.

The Rwanda BIT. The U.S. Department of State issued a statement welcoming Senate approval of the BIT.

> The United States Senate approved the United States–Rwanda Bilateral Investment Treaty (BIT) on September 26 by unanimous consent. The Department of State applauds the Senate's approval of the treaty and is pleased that the Senate's longstanding tradition of bipartisan support for these treaties has been upheld. This treaty demonstrates Rwanda's commitment to the economic reforms that will help enable sustainable economic development and opportunity.
>
> Since the 1994 genocide, Rwanda has made remarkable progress in implementing economic reforms that have helped rebuild the Rwandan economy and society. Rwanda has opened its economy, improved its business climate, and embraced open trade and investment policies as a means to boost economic development, job creation, and poverty alleviation.
>
> BITs establish rules that protect the rights of U.S. investors abroad and provide market access for future U.S. investment. They also support market-based policies and best practices that treat investment in an open, transparent, and non-discriminatory way.

[12] See section below (in *Brief Notes*): *Thousands of Contract Security Personnel to Protect U.S. Diplomatic Operations in Iraq.*

[13] U.S. Dep't of State Press Release No. 2011/54-38, Interview with David Gregory of NBC's Meet the Press (Oct. 23, 2011), *at* http://www.state.gov/secretary/rm/2011/10/175993.htm.

[14] Walter Pincus, *How Iraq's Domestic Situation Drove Its Foreign Policy on U.S. Troop Withdrawal*, WASH. POST, Nov. 22, 2011, at A17.

[1] Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, Feb. 19, 2008, S. TREATY DOC. NO. 110-23 (2008).

[2] Treaty Between the Government of the United States of America and the Government of Bermuda Relating to Mutual Legal Assistance in Criminal Matters, Jan. 12, 2009, S. TREATY DOC. NO. 111-6 (2010).

> The Administration is also working to complete an update of the U.S. "model" BIT, which will serve as a framework for future BITs. In the meantime, the State Department and the Office of the U.S. Trade Representative, which co-lead the U.S. BIT program, continue technical talks with current negotiating partners, including key countries such as China and India. When concluded, these and other BITs can play a significant role in building strategically-important economic relationships that will support U.S. job creation, development, economic growth and competitiveness.[3]

The SFRC's report on the BIT includes a substantial discussion of the status of various treaty provisions in domestic U.S. law. The report addresses in detail the means by which awards stemming from the treaty's dispute settlement procedures (involving both claims by individual investors and inter-state disputes) can be given domestic effect.

> Following the Supreme Court's decision *in Medellin* v. *Texas,* 552 U.S. 491 (2008), the committee has taken special care to reflect in its record of consideration of treaties its understanding of how each treaty will be implemented, including whether the treaty is self-executing. As noted in Executive Report 110-25,[4] the committee believes it is of great importance that the United States complies with the treaty obligations it undertakes. In accordance with the Constitution, all treaties—whether self-executing or not—are the supreme law of the land, and the President shall take care that they be faithfully executed. In general, the committee does not recommend that the Senate give advice and consent to treaties unless it is satisfied that the United States will be able to implement them, either through implementing legislation, the exercise of relevant constitutional authorities, or through the direct application of the treaty itself in U.S. law.
>
> The resolution of advice and consent contains a statement reflecting the committee's understanding of the extent to which this Treaty will be self-executing. This provides that Articles 3–10 of the Treaty are self-executing and do not confer private rights of action enforceable in United States courts. The remaining provisions of the Treaty are not self-executing and do not confer private rights of action enforceable in United States courts.
>
> Among the provisions of the treaty that are not self-executing are those related to two separate procedures for resolving disputes under the Treaty.
>
> The first of these procedures allows investors of one party to the Treaty to bring to binding arbitration claims that the government of the other party has breached specified provisions of the Treaty. In the event that such an arbitration resulted in an award against the United States, the legal authority exists to enforce the award. Such authorities include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (TIAS 6697) and related provisions of the Federal Arbitration Act (9 U.S.C. §201 *et seq.*), as well as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (TIAS 6090) and related provisions of the Convention on the Settlement of Investment Disputes Act of 1966 (22 U.S.C. §1650a).
>
> The second of these procedures allows the two states parties to the Treaty (i.e. the United States and Rwanda) to submit disputes regarding the interpretation or application of the treaty to binding arbitration. No comparable treaty or statutory scheme governs the implementation in the United States of state-to-state arbitration awards. In response to a

[3] U.S. Dep't of State Press Release No. 2011/1609, United States Senate Approves U.S.-Rwanda Bilateral Investment Treaty (Sept. 27, 2011), *at* http://www.state.gov/r/pa/prs/ps/2011/09/174101.htm.

[4] [Editor's note: *see* John R. Crook, Contemporary Practice of the United States, 104 AJIL 100, 100 (2010), 105 AJIL 122, 124 (2011).]

question for the record on the authorities available to enforce such awards, Wesley Scholz, the Director of the State Department's Office of Investment Affairs, provided the following answer:

> State-to-State arbitrations are extremely rare. In fact, no State-to-State arbitrations have taken place to date under U.S. bilateral investment treaties. Nevertheless, there are various tools at our disposal for implementing a State-to-State award should the situation arise.
>
> Articles 3 through 10 of the BIT and other provisions that qualify or create exceptions to these Articles, such as Article 15, are self-executing but do not confer a private right of action. All remaining articles of the BIT are non-self-executing. As a result, should an arbitral decision conclude that U.S. state law is inconsistent with the BIT, the U.S government could, if necessary, choose to initiate a legal action against the state to ensure compliance with a self-executing provision of the BIT. To the extent an arbitral decision determines that federal law is inconsistent with the BIT and an award addresses a self-executing provision of the BIT, then as long as the statute in question pre-dated the entry into force of the treaty, the later-in-time self-executing BIT provision would prevail over the earlier inconsistent statute.
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> To the extent an award addresses Article 11 of the BIT, which is a non-self-executing provision of the BIT establishing investment protections and subject to State-to-State arbitration, the U.S. government could seek legislation where no other existing authority permitted it to comply with the award or take other appropriate steps, such as seeking to interpret the statute in a manner in a manner that is consistent with the arbitral decision. Under current U.S. law, however, existing federal authorities, for example, the Administrative Procedures Act, 5 U.S.C. §551 *et seq.*, along with comparable state-level authorities, adequately ensure compliance with the transparency standards established in Article 11 of the BIT.
>
> Finally, were a State-to-State tribunal to award money damages against the United States, funds to satisfy such an award could be sought from appropriated funds, if any, or from the Judgment Fund (31 U.S.C. §1304) to the extent appropriate.
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> In brief, should a dispute between the parties lead to arbitration pursuant to the mechanism provided for in Article 37, there are a number of options available for implementing State-to-State arbitral decisions.

Under the approach outlined by the administration, state-to-state arbitral awards against the United States will not be directly enforceable in U.S. courts by private parties. Rather, in most cases (i.e., those involving awards that interpret Articles 3–10 of the treaty), the executive branch will rely on the self-executing character of substantive provisions of the treaty to give effect to arbitral awards that interpret those provisions. This approach will require U.S. courts to give substantial weight to the interpretations of such treaty provisions rendered by arbitral tribunals in cases brought by the U.S. Government to give effect to such awards. U.S. courts have not invariably agreed with treaty interpretations rendered by international courts and tribunals in cases to which the United States has been a party (*See, e.g.*, *Sanchez-Llamas* v. *Oregon*, 548 U.S.C. 331 (2006)). However, in order to give effect to the shared intent of the Senate and the executive branch that the United States comply with its obligations in connection with the dispute settlement provisions of this Treaty and other bilateral investment treaties to which the United States is already a party, the committee expects that U.S. courts will not interpret the substantive provisions of bilateral investment treaties to preclude the United States giving effect to awards issued in state-to-state arbitrations to which the United States is a party if any other possible interpretation is available. (*cf. Murray* v. *Charming Betsy*, 6 U.S.C. (2 Cranch) 64,

118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.")

> There remains a category of disputes that could be referred to state-to-state arbitration involving provisions of the Treaty that are not self-executing. Such disputes could arise under Article 11 of the treaty, which addresses transparency measures to be taken by the two parties. Because Article 11 is not self-executing, the executive branch would be unable to rely on the authority of the Treaty itself as the basis for giving effect to an arbitral award related to that article. The executive branch has represented to the committee that existing federal and state laws regarding transparency measures governed by the treaty are fully adequate to satisfy U.S. obligations under the treaty, and that the possibility of an arbitral award against the United States relating to these provisions is accordingly extremely remote. In the event of such an adverse award, the executive branch has observed that it could seek legislation after the fact to provide the necessary authority to give effect to the award.
>
> The committee has reservations about the soundness of the proposed approach for this category of disputes. Waiting until an actual case arises and an award has been rendered against the United States to secure authority to comply with the award leaves matters on an uncertain footing. Complications posed by the Congressional calendar, competing legislative priorities, and political considerations specific to the case may make it difficult for the executive branch to seek or to secure such authority in a timely manner. In an analogous case—relating to the International Court of Justice's judgment against the United States in the case of Avena and Other Mexican Nationals (*Mexico* v. *United States of America*) (I.C.J. Reports 2004, p. 12)—successive administrations have not formally proposed after the fact legislation to provide authority allowing the United States to comply with an adverse judgment. This has left the ability of the United States to meet its treaty obligations in a state of uncertainty, and caused concerns for our treaty partners, including our neighbor Mexico. The committee is concerned that failure to put the United States' ability to implement awards relating to non-self-executing provisions of this treaty on sounder footing at the time of ratification of the treaty creates the risk of this unfortunate situation repeating itself. The committee's concerns on this issue—which arise only with respect to a single, relatively narrow provision of this Treaty—do not lead it to decline to recommend ratification of the Treaty. However, the committee urges the executive branch to review its approach to ensuring compliance with adverse arbitral awards arising from non-self executing treaties (including as it relates to compliance with the ICJ judgment in the Avena case) and to identify effective means to facilitate U.S. compliance with its treaty obligations.[5]

As indicated in the committee's report, section 2 of the resolution of advice and consent for the BIT contains a declaration that "Articles 3 through 10 and other provisions that qualify or create exceptions to these Articles are self-executing. With the exception of these Articles, the Treaty is not self-executing. None of the provisions in this Treaty confers a private right of action."[6]

The Bermuda MLAT. This treaty is unusual in that Bermuda is not an independent state. In this regard, the U.S. Department of State's report on the treaty states that "prior to signature,

[5] S. EXEC. REP. NO. 111-8, at 10–13 (Dec. 22, 2010); *see also* S. EXEC. REP. NO. 112-2, at 10–13 (Aug. 30, 2011). Reports of the Senate Foreign Relations Committee are available online at http://www.foreign.senate.gov/treaties/.

[6] S. EXEC. REP. NO. 111-8, *supra* note 5, at 13–14.

the United States obtained from the United Kingdom, under cover of a diplomatic note, a copy of the entrustment letter to Bermuda, through which the United Kingdom granted Bermuda the authority to sign and conclude the Treaty."[7]

As with the Rwanda BIT, the SFRC's report and the resolution of advice and consent explicitly address the treaty's status in domestic law.

> The committee has included one declaration in the recommended resolution of advice and consent. The declaration states that the Treaty is self-executing, as is the case generally with Mutual Legal Assistance Treaties. Prior to the 110th Congress, the committee generally included such statements in the committee's report, but in light of the Supreme Court decision in *Medellin* v. *Texas,* 128 S.Ct. 1346 (2008), the committee determined that a clear statement in the Resolution is warranted. A further discussion of the committee's views on this matter can be found in Section VIII of Executive Report 110-12.[8]

Section 2 of the resolution of advice and consent then includes a declaration affirming that the "advice and consent of the Senate under section 1 is subject to the following declaration: The Treaty is self-executing."[9]

Alleged Syrian Agent Indicted for Gathering Information on U.S. Opponents of Syrian Government for Syrian Intelligence

In October 2011, the U.S. Department of Justice announced that a Syrian-born naturalized U.S. citizen living in Virginia was indicted on charges involving his alleged role in collecting and passing to Syrian intelligence information about persons involved in protests against the Syrian government.[1] A substantial excerpt from the Department's announcement follows:

> Mohamad Anas Haitham Soueid, 47, a resident of Leesburg, Va., has been charged for his alleged role in a conspiracy to collect video and audio recordings and other information about individuals in the United States and Syria who were protesting the government of Syria and to provide these materials to Syrian intelligence agencies in order to silence, intimidate and potentially harm the protestors.
>
> . . . .
>
> Soueid, aka "Alex Soueid" or "Anas Alswaid," a Syrian-born naturalized U.S. citizen, was charged by a federal grand jury on Oct. 5, 2011, in a six-count indictment in the Eastern District of Virginia. Soueid is charged with conspiring to act and acting as an agent of the Syrian government in the United States without notifying the Attorney General as required by law; two counts of providing false statements on a firearms purchase form; and two counts of providing false statements to federal law enforcement.
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> . . . .

[7] Message from the President of the United States Transmitting Treaty Between the Government of the United States of America and the Government of Bermuda Relating to Mutual Legal Assistance in Criminal Matters, Signed at Hamilton on January 12, 2009, S. TREATY DOC. NO. 111-6, at vi (June 29, 2010).

[8] S. EXEC. REP. NO. 112-3, at 5 (Aug. 30, 2011).

[9] *Id.* at 6.

[1] Del Quentin Wilber, *N. Va. Man Accused of Aiding Syrian Regime by Surveilling Anti-Assad Protests,* WASH. POST, Oct. 13, 2011, at A6.