

**DIGEST OF
UNITED STATES PRACTICE
IN INTERNATIONAL LAW**

2012

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Editor

Office of the Legal Adviser
United States Department of State

Introduction

I am delighted to introduce the annual edition of the *Digest of United States Practice in International Law* for 2012. This volume provides a historical record of developments occurring during calendar year 2012, the last full year of Hillary Rodham Clinton's service as Secretary of State and Harold Hongju Koh's service as Legal Adviser. The State Department is once again publishing the official version of the *Digest* exclusively on-line. By publishing the *Digest* on-line, we seek to make U.S. views on international law more readily accessible to our counterparts in other governments, to international organizations, and to scholars, students, and other users, both within the United States and around the world.

Included in this volume of the *Digest* are excerpts from several noteworthy speeches delivered by Legal Adviser Harold Koh in 2012, including: his remarks on Syria at the annual meeting of the American Society of International Law in March; his address on international law in cyberspace in September at the USCYBERCOM legal conference; his talk at Georgetown in October on treaties and international lawmaking; and remarks he delivered in November in both New York and The Hague on international criminal justice. The *Digest* also discusses other key speeches on U.S. counterterrorism efforts by Obama administration officials.

Significant legal issues arose in 2012 relating to ongoing United States efforts to address the crisis in Syria. The *Digest* discusses the U.S. designation of Syria for temporary protected status, actions at the Human Rights Council on Syria, U.S. and international acceptance of the National Coalition of Syrian Revolution and Opposition Forces as the legitimate representative of the Syrian people, U.S. sanctions relating to Syria, and UN General Assembly and Security Council actions on Syria.

In 2012, the United States remained engaged in the development of international law by negotiating and concluding treaties. The administration worked to support ratification of the Disabilities Convention, which the Senate considered in 2012 but declined to give its advice and consent to by a vote of 61-38. Secretary Clinton testified before the Senate in support of U.S. ratification of the UN Convention on the Law of the Sea ("UNCLOS"). The United States signed the Beijing Treaty on Audiovisual Performances and the UN Food Assistance Convention. The United States also became a party to the International Convention on the Control of Harmful Anti-Fouling Systems on Ships and transmitted to the Senate for advice and consent to ratification the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary. In addition, the United States participated actively in the negotiation of the new UN Arms Trade Treaty.

U.S. government involvement in litigation and arbitration also contributed to the development of international law in 2012. In U.S. courts, the United States filed *amicus* briefs in two Hague Abduction Convention cases; opposed petitions for certiorari in two extradition cases; participated in litigation challenging the constitutionality of statutes implementing treaty obligations; and filed statements of interest and suggestions of immunity in several cases involving foreign sovereigns and heads of state. State and federal courts issued important decisions with international law implications, including: the Nevada Supreme Court's remand of the death penalty case of Carlos Gutierrez due to the lack of consular assistance; the Fourth Circuit's opinion that the definition of piracy under the law of nations is the definition contained in Article 15 of UNCLOS; and U.S. Supreme Court decisions that most of Arizona's state

immigration law provisions are preempted by federal law, and that only individuals—not corporations—can be liable under the Torture Victim Protection Act. The United States also made submissions to arbitral bodies, including a voluminous submission to the Iran-U.S. Claims Tribunal in Case B/1, several submissions to NAFTA and CAFTA tribunals, and submissions in arbitral proceedings initiated by the Republic of Ecuador against the United States which resulted in dismissal of Ecuador’s claims for lack of jurisdiction.

This edition of the *Digest* also discusses activities in the UN and other multilateral organizations, domestic legislative and regulatory efforts with respect to international relations, and the conclusion of bilateral agreements. Among other things, the United States supported UN General Assembly resolutions condemning human rights abuses in Iran, North Korea, and Syria, and supported UN Security Council resolutions to address emerging and ongoing threats to international peace and security in a number of states around the world. The United States was instrumental in the launch of the Climate and Clean Air Coalition in 2012. Domestically, the Uniform Law Commission began work on a uniform state law on consular notification requirements, Congress passed the Intercountry Adoption Universal Accreditation Act of 2012, and the Securities and Exchange Commission implemented provisions of the Dodd-Frank Act regarding disclosures of conflict minerals and payments to governments by extractive industries. The United States also concluded several important bilateral agreements in 2012, including, among others, a Strategic Partnership Agreement with Afghanistan, an immigration information sharing agreement with Canada, and a bilateral maritime law enforcement agreement with Samoa. Finally, the U.S. government also exhibited leadership in the world in initiatives with international scope. For example, the Obama administration launched the Atrocities Prevention Board and began implementation of the National Action Plan on Women, Peace, and Security.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2012 volume, attorney advisers whose voluntary contributions to the *Digest* were particularly significant include Kevin Baumert, Violanda Botet, Tess Bridgeman, Michael Coffee, Paul Dean, Jonas Lerman, Keith Loken, Kathy Milton, Holly Moore, Lorie Nierenberg, Judith Osborne, Phillip Riblett, and Tim Schnabel. I express very special thanks to Joan Sherer, the Department’s Senior Reference Librarian, Legal, and to Jerry Drake, our bureau’s records manager, for their technical assistance in transforming drafts into the final published version of the *Digest*. Finally, I thank CarrieLyn Guymon for her continuing, outstanding work as editor of the *Digest*.

Mary E. McLeod
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Note from the Editor

Once again this year, the official version of the *Digest of United States Practice in International Law* for calendar year 2012 is being published exclusively on-line on the State Department's website. I would like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible and aided in the timely release of this year's *Digest*.

The 2012 volume follows the general organization and approach adopted in 2000. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Some of the litigation related entries do not include excerpts from the court opinions because most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through the end of May 2013) are provided in footnotes. For example, we note the release of U.S. Supreme Court and other court decisions, as well as other noteworthy developments occurring during the first several months of 2013 where they relate to the discussion of developments in 2012.

Updates on most other 2012 developments, such as the release of annual reports and sanctions-related designations of individuals or entities under U.S. executive orders are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross references to related entries within the volume and to prior volumes of the *Digest*.

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

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

The U.S. Government Printing Office ("GPO") provides electronic access to government publications, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports; the U.S. Code, Public and Private Laws, and Statutes at Large; Public Papers of the President; and the Daily Compilation of Presidential Documents. The Federal Digital System, available at www.gpo.gov/fdsys, is GPO's online site for U.S. government materials.

On treaty issues, this site offers Senate Treaty Documents (for the President's transmittal of treaties to the Senate for advice and consent, with related materials), available at www.gpo.gov/fdsys/browse/collection.action?collectionCode=CDOC, and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at www.gpo.gov/fdsys/browse/collection.action?collectionCode=CRPT. In addition, the Office of the Legal Adviser provides a wide range of current treaty information at www.state.gov/s/l/treaty, and the Library of Congress provides extensive treaty and other legislative resources at <http://thomas.loc.gov>.

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

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

U.S. Court of Appeals for the District of Columbia Circuit:

www.cadc.uscourts.gov/bin/opinions/allopinions.asp;

U.S. Court of Appeals for the First Circuit:

www.ca1.uscourts.gov/opinions;

U.S. Court of Appeals for the Second Circuit:

www.ca2.uscourts.gov/opinions.htm;

U.S. Court of Appeals for the Third Circuit:

www.ca3.uscourts.gov/indexsearch/archives.asp;

U.S. Court of Appeals for the Fourth Circuit:

<http://pacer.ca4.uscourts.gov/opinions/opinion.htm>;

U.S. Court of Appeals for the Fifth Circuit:

www.ca5.uscourts.gov/Opinions.aspx;

U.S. Court of Appeals for the Sixth Circuit:

www.ca6.uscourts.gov/opinions/opinion.php;

U.S. Court of Appeals for the Seventh Circuit:

www.ca7.uscourts.gov/opinions.html;

U.S. Court of Appeals for the Eighth Circuit:

www.ca8.uscourts.gov/all-opinions;

U.S. Court of Appeals for the Ninth Circuit:

www.ca9.uscourts.gov/opinions/ (opinions) and

www.ca9.uscourts.gov/memoranda/ (memoranda and orders—unpublished dispositions);

U.S. Court of Appeals for the Tenth Circuit:

www.ca10.uscourts.gov/clerk/opinions.php;

U.S. Court of Appeals for the Eleventh Circuit:

www.ca11.uscourts.gov/opinions/index.php;

U.S. Court of Appeals for the Federal Circuit:

www.cafc.uscourts.gov/opinions-orders/search/report.html.

The official U.S. Supreme Court website is maintained at www.supremecourtus.gov. The Office of the Solicitor General in the Department of Justice makes its briefs filed in the Supreme Court available at www.justice.gov/osg.

Many federal district courts also post their opinions on their websites, and users can access these opinions by subscribing to the Public Access to Electronic Records (“PACER”) service.

Some district courts post all of their opinions or certain notable opinions without requiring users to register for PACER first. For example, the U.S. District Court for the District of Columbia posts its opinions on its website at www.dcd.uscourts.gov/dcd.

Other links to individual federal court websites are available at www.uscourts.gov/links.html.

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

As always, we welcome suggestions from those who use the *Digest*.

CarrieLyn D. Guymon