

## Preface

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

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

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

Don Wallace, Jr.  
Chairman  
*International Law Institute*

## Introduction

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

In 2009, as this volume reflects, a new United States administration, under the Presidency of Barack Obama, took office and pursued important initiatives demonstrating its respect for the rule of law. For instance, the United States has sought to ensure its detention operations, detainee prosecutions, and uses of force are all consistent with the laws of war. In one of his first actions after taking office, President Barack Obama unequivocally banned the use of torture as an instrument of U.S. policy and instructed that all interrogations of detainees be conducted in accordance with Common Article 3 of the Geneva Conventions and with the revised Army Field Manual. The executive branch also articulated a revised, narrower legal basis for its authority to detain individuals, based on the 2001 statutory Authorization for the Use of Military Force ("AUMF"), and made clear that its interpretation of the AUMF would be informed by the law of war. The administration also worked with Congress to improve the legal framework governing military commissions. Finally, as the President made clear in his Nobel lecture, "[w]here force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. . . . [E]ven as we confront a vicious adversary that abides by no rules . . . the United States of America must remain a standard bearer in the conduct of war."

The United States also resumed our multilateral engagement in many different diplomatic fora, while remaining fully engaged in others. With the International Criminal Court, the United States participated for the first time as an observer in the Eighth Session of the Assembly of States Parties to the Rome Statute. With the Human Rights Council, the United States became a member of the Council for the first time. With the climate change negotiations, the United States engaged at the highest level, and President Obama and the leaders of key major economies reached consensus on the

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\* Editor's note: The Department of State has posted this pre-publication version of the 2009 *Digest* on its website for the convenience of users. The print edition of the 2009 *Digest* will be published early in 2011.

Copenhagen Accord in December 2009. The United States submitted a written statement and written comments to the International Court of Justice concerning the UN General Assembly's request for an advisory opinion on the question "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" and I was privileged to deliver an oral statement of the U.S. views to the Court in December.

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

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

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

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

Department announced two significant decisions relating to privileges and immunities of foreign diplomatic or consular missions and their personnel: (1) the Department began accepting the accreditation of same-sex domestic partners of foreign diplomatic or consular personnel assigned to official duty in the United States, meaning that accredited same-sex domestic partners now have the same privileges and immunities as other accredited family members whom the Department recognizes as forming part of a diplomat's household; and (2) the Department also extended exemptions from real property taxes to residences owned by foreign governments and used to house staff of diplomatic missions to the United Nations and the Organization of American States and consular posts.

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

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

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

*Harold Hongju Koh  
The Legal Adviser  
Department of State*

## Note from the Editor

This year, for the first time, the Department of State is posting this pre-publication version of *Digest of United States Practice in International Law* for calendar year 2009 on the State Department's website. The print edition will be published in early 2011. Publication of the 2009 Digest, both in print and on the State Department's website, will bring the new *Digest* series current for the period 1989–2009. I would like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible. I also would like to express appreciation to the International Law Institute and Oxford University Press for their valuable contributions in publishing the *Digest*.

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

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

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

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

Other documents are available from multiple public sources, both in hard copy and from various online services. The United Nations Official Document System makes

UN documents available to the public without charge at <http://documents.un.org>. Resolutions of the UN Human Rights Council can be retrieved most readily by using the search function on the Human Rights Council's website, at [www2.ohchr.org/english/bodies/hrcouncil](http://www2.ohchr.org/english/bodies/hrcouncil). Resolutions of the International Atomic Energy Agency ("IAEA") can be accessed by using the search function on the IAEA's website, at [www.iaea.org](http://www.iaea.org). Legal texts of the World Trade Organization ("WTO") may be accessed through the WTO's website, at [www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm). For UN-related information generally, the UN's home page at [www.un.org](http://www.un.org) also remains a valuable source.

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

On treaty issues, this site offers Senate Treaty Documents (for the President's transmittal of treaties to the Senate for advice and consent, with related materials), available at [www.gpoaccess.gov/serialset/cdocuments/index.html](http://www.gpoaccess.gov/serialset/cdocuments/index.html), and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at [www.gpoaccess.gov/serialset/creports/index.html](http://www.gpoaccess.gov/serialset/creports/index.html). In addition, the Office of the Legal Adviser now provides a wide range of current treaty information at [www.state.gov/s//treaty](http://www.state.gov/s//treaty), and the Library of Congress provides extensive treaty and other legislative resources at <http://thomas.loc.gov>.

The U.S. government's official web portal is [www.firstgov.gov](http://www.firstgov.gov), with links to government agencies and other sites; the State Department's home page is [www.state.gov](http://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](http://www.cadc.uscourts.gov/bin/opinions/allopinions.asp);
- U.S. Court of Appeals for the First Circuit:  
[www.ca1.uscourts.gov/opinions/main.php](http://www.ca1.uscourts.gov/opinions/main.php);
- U.S. Court of Appeals for the Second Circuit:  
[www.ca2.uscourts.gov/opinions.htm](http://www.ca2.uscourts.gov/opinions.htm);

- U.S. Court of Appeals for the Third Circuit:  
[www.ca3.uscourts.gov/indexsearch/archives.asp](http://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](http://www.ca5.uscourts.gov/Opinions.aspx);
- U.S. Court of Appeals for the Sixth Circuit:  
[www.ca6.uscourts.gov/opinions/opinion.php](http://www.ca6.uscourts.gov/opinions/opinion.php);
- U.S. Court of Appeals for the Seventh Circuit:  
[www.ca7.uscourts.gov/fdocs/docs.fwx?dname=opinion](http://www.ca7.uscourts.gov/fdocs/docs.fwx?dname=opinion) (opinions) and  
[www.ca7.uscourts.gov/fdocs/docs.fwx?dname=disp](http://www.ca7.uscourts.gov/fdocs/docs.fwx?dname=disp) (nonprecedential dispositions);
- U.S. Court of Appeals for the Eighth Circuit:  
[www.ca8.uscourts.gov/opns/opFrame.html](http://www.ca8.uscourts.gov/opns/opFrame.html);
- U.S. Court of Appeals for the Ninth Circuit: [www.ca9.uscourts.gov/opinions](http://www.ca9.uscourts.gov/opinions) (opinions) and [www.ca9.uscourts.gov/memoranda/](http://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](http://www.ca10.uscourts.gov/clerk/opinions.php);
- U.S. Court of Appeals for the Eleventh Circuit:  
[www.ca11.uscourts.gov/opinions/index.php](http://www.ca11.uscourts.gov/opinions/index.php);
- U.S. Court of Appeals for the Federal Circuit:  
[www.cafc.uscourts.gov/index.php?option=com\\_reports&view=report&layout=search&Itemid=12](http://www.cafc.uscourts.gov/index.php?option=com_reports&view=report&layout=search&Itemid=12).

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

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

Selections of material in this volume were made based on judgments as to the significance of the issues, their possible relevance for future situations, and



their likely interest to government lawyers, especially our foreign counterparts; scholars and other academics; and private practitioners.

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

*Elizabeth R. Wilcox*