

National Security Law

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This article surveys relevant 2012 developments in national security law for international lawyers.¹

I. Foreign Investment—CFIUS Practice in 2012

The Committee on Foreign Investment in the United States (CFIUS) is an inter-agency committee of the U.S. Government that reviews certain transactions involving inbound foreign investment.² CFIUS is required to consider the effect that such transactions might have on the national security of the United States.³ CFIUS advises the President.⁴ The President has the authority to suspend or prohibit a transaction where there is credible evidence that control of a U.S. business by a foreign person could threaten U.S. national security.⁵ The term “national security” is not defined in the governing statute or

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1. For developments during 2011, see James Henry Bergeron et al., *National Security Law*, 46 INT’L LAW 435 (2012).

2. The governing statute is the Defense Production Act of 1950, as amended, 50 U.S.C. app. § 2170. The regulations governing CFIUS review are found at 31 C.F.R. pt. 800. CFIUS is chaired by the Department of the Treasury and includes the Departments of State, Defense, Commerce, Homeland Security, Energy, and Labor, as well as the Director of National Intelligence and the Attorney General. 50 U.S.C. app. § 2170(k)(2) (1988).

3. *Id.* § 2170(k)(5).

4. *Id.* § 2170(k)(1).

5. *Id.* § 2170(d)(1).

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regulations, and there is no specific test for determining the national security risk posed by a transaction. Rather, CFIUS takes into account several general considerations and related factors. These considerations include the capacity of U.S. domestic industries to meet national defense requirements, U.S. technological leadership, and the possibility of weapons proliferation.⁶

The CFIUS review process most often starts with a voluntary filing by the parties to the transaction.⁷ The review process proceeds in three phases, starting with a thirty-day national security review.⁸ When the transaction presents a threat to national security that has not been mitigated, when a foreign government controls the acquiring party, or when the transaction would result in control of critical infrastructure by a foreign entity, CFIUS will undertake an additional forty-five-day national security investigation.⁹ Often, during the investigation phase, the parties will agree to implement certain measures to mitigate any national security concerns identified by CFIUS. If there is no national security issue, CFIUS will conclude all action. Finally, if CFIUS has concerns that are not resolved through mitigation agreements, the President has fifteen days to announce whether he will suspend or prohibit the transaction.¹⁰

Not all voluntary notices filed with CFIUS are truly voluntary. CFIUS staff members review the trade press and canvass newspapers to identify transactions, and CFIUS may self-initiate a review and request the submission of a notice. In 2010, for example, CFIUS requested a notice from parties to a transaction involving telecommunications intellectual property—several months after the deal had closed.¹¹ After conducting a national security investigation, CFIUS recommended that the Chinese acquirer, Huawei Technologies Inc., divest the assets it had acquired from 3Leaf, a U.S. technology company. After weeks of negotiations, Huawei decided to divest.¹²

Even before CFIUS took action in the Huawei deal, it was clear that CFIUS was becoming more active in investigating transactions. Indeed, between 2007 and 2010, the percentage of transactions reviewed by CFIUS that were subject to national security investigations grew nearly ten times—from a meager 4 percent in 2007, to 15 percent in 2008, and to 38 percent in 2009 and 2010.¹³

In 2012, CFIUS's increasing activism met some resistance. Ralls Corporation, a Chinese-owned wind farm developer, had acquired four small wind farm projects in Oregon

6. *Id.*; Office of Investment Security; Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74,567 (Dec. 8, 2008).

7. The required contents of the “voluntary notice” are set out in the regulations; *see* Contents of Voluntary Notice, 31 C.F.R. § 800.402 (2012).

8. 50 U.S.C. app. § 2170(b)(1)(E).

9. *Id.* § 2170(b)(2)(C).

10. *Id.* § 2170(d)(2).

11. Shayndi Raice, *Panel Likely to Recommend Reversing Huawei Deal*, WALL ST. J., Feb. 11, 2011, at B5.

12. Sinead Carew & Jessica Wohl, *Huawei Backs Away from 3Leaf Acquisition*, REUTERS (Feb. 19, 2011, 2:02 PM), <http://www.reuters.com/article/2011/02/19/us-huawei-3leaf-idUSTRE71138920110219>. Submissions to CFIUS and its deliberations are confidential, but as in this case, aspects of CFIUS review are sometimes revealed by the parties.

13. COMM. ON FOREIGN INV. IN THE UNITED STATES [CFIUS], ANNUAL REPORT TO CONGRESS 2-3 (Dec. 2011) (covering reporting period calendar year 2010); CFIUS, ANNUAL REPORT TO CONGRESS 2-3 (Nov. 2010) (covering reporting period calendar year 2009).

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from Terna Energy in early 2012.¹⁴ The parties did not file a voluntary notice with CFIUS.¹⁵ In June 2012, CFIUS requested a notice of the transaction. CFIUS then identified what it considered to be unmitigated national security concerns stemming from the project and issued an order unilaterally imposing severe interim mitigation measures on Ralls.¹⁶ The order required Ralls to cease all construction and operations immediately, to remove stockpiled or stored items from the properties, and to cease all access to the properties.¹⁷ In an effort to address CFIUS's apparent concerns, Ralls arranged to sell the projects to a U.S. company. CFIUS then issued an amended order that also prohibited Ralls from transferring any item manufactured by Sany Group, an affiliated Chinese manufacturer, to a purchaser.¹⁸

In September 2012, Ralls sued CFIUS to challenge its orders.¹⁹ Two weeks later, President Barack Obama issued an executive order directing Ralls to divest its interest in the Oregon wind farms within ninety days.²⁰ Such Presidential orders are highly unusual, and no President had exercised his statutory authority to prohibit a transaction for national security concerns since 1990. The sole reported concern about the Ralls transaction was that the project sites were within or near restricted air space for a Naval Weapons Systems Training Facility.²¹ Ralls amended its complaint to add the President as a defendant and to challenge his order.²² CFIUS has moved to dismiss Ralls's case. A hearing on that motion was held on November 28, 2012. As of December 2012, the court was considering the motion to dismiss.

Other transactions involving Chinese acquirers are currently being reviewed by CFIUS. For instance, in another energy transaction, China National Offshore Oil Corp. Ltd. (CNOOC) plans to acquire Nexen, a Canadian upstream oil and gas company. Notably, several of the mineral leases to be transferred are in the United States, and the parties filed notice with CFIUS.²³ In late November 2012, the parties withdrew and resubmitted their

14. John Villasenor, *If You Want to Buy an American Company, Ask Permission, Not Forgiveness*, FORBES (Nov. 14, 2012, 1:19 PM), <http://www.forbes.com/sites/johnvillasenor/2012/11/14/if-you-want-to-buy-an-american-company-ask-permission-not-forgiveness/>.

15. *Id.*

16. Complaint at Exhibit A (Order Establishing Interim Mitigation Measures), Ralls Corp. v. Comm. on Foreign Inv. in the U.S. (D.D.C. filed Sept. 12, 2012) (No. 1:12-cv-01513), *available at* http://www.iflr.com/pdfs/IFLRNY/RALLS_CORPORATION_v_COMMITTEE_%20COMPLAINT.pdf.

17. *Id.*

18. *Id.* at Ex. B (Amended Order Establishing Interim Mitigation Measures). The Amended Order also prohibited Ralls from completing a sale or transfer of the project companies until after it removed “[a]ll items deposited, installed, or affixed (including concrete foundations).” *Id.* at 2.

19. Complaint, Ralls Corp. v. Comm. on Foreign Invest. in the U.S., Case No. 1:12-cv-01513 (D.D.C. Sept. 12, 2012), *available at* http://www.iflr.com/pdfs/IFLRNY/RALLS_CORPORATION_v_COMMITTEE_%20COMPLAINT.pdf.

20. Presidential Statement, Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281 (Sept. 28, 2012) (Among other things, President Obama's order also required removal of “installations of any kind (including concrete foundations.)”).

21. Villasenor, *supra* note 14, at 2.

22. Amended Complaint, Ralls Corp. v. Comm. on Foreign Invest. in the U.S., Case No. 1:12-cv-01513 (D.D.C. Oct. 1, 2012).

23. *Id.*

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notice.²⁴ This maneuver gives the parties and CFIUS more time to negotiate mitigation measures and may be a signal that they are working to resolve concerns.

Ralls's case against CFIUS may be dismissed on the ground that the President's actions are not subject to judicial review under the governing statute.²⁵ Nevertheless, CFIUS practitioners will remember 2012 as the year when, on a course of increasing activism, CFIUS and the President used their extraordinary powers to block an alternative energy project in the name of national security. Further, a foreign investor brought a rare lawsuit against CFIUS and put the Committee on notice that foreign investors and the U.S. companies seeking their investment are willing to challenge this increased activism. Whether CFIUS alters its course will be demonstrated in its review of future transactions like CNOOC's proposed acquisition of Nexen.

II. Iran

The pressure on Iran to be more forthcoming with its nuclear ambitions continued through 2012. The tension between Iran and the international community stems from disagreement over Iran's obligations to implement nuclear safeguards under the so-called Safeguards Agreement,²⁶ six UN Security Council Resolutions,²⁷ and eleven International Atomic Energy Agency (IAEA) resolutions.²⁸

On November 18, 2011, the IAEA Board of Governors adopted a resolution which, *inter alia*, stressed it was essential for Iran and the IAEA to "intensify their dialogue aiming at the urgent resolution of all outstanding substantive issues."²⁹ The Board also called on Iran "to engage seriously and without preconditions in talks aimed at restoring international confidence in the exclusively peaceful nature of Iran's nuclear programme."³⁰ IAEA

24. News Release, Nexen, Nexen Provides Update on CFIUS Review with Respect to Arrangement with CNOOC Limited (Nov. 27, 2012), http://www.nexeninc.com/en/AboutUs/MediaCentre/NewsReleases/News/Release.aspx?year=2012&release_id=135174.

25. 50 U.S.C. app. § 2170(e) (2006).

26. Int'l Atomic Energy Agency [IAEA], *Agreement Between Iran and the IAEA for the Application of Safeguards in Connection with the Treaty on Non-Proliferation of Nuclear Weapons*, IAEA Doc. INFCIRC/214 (May 15, 1974) available at <http://www.iaea.org/Publications/Documents/Infircs/Others/infirc214.pdf> [hereinafter *Safeguard Agreement*].

27. The United Nations Security Council has adopted the following resolutions on Iran: S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1835, U.N. Doc. S/RES/1835 (Sept. 27, 2008); and S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010). S.C. Res. 1929 affirmed that Iran shall take steps required by the IAEA Board in IAEA Doc. GOV/2006/14 and IAEA Doc. GOV/2009/82, reaffirmed Iran's obligation to cooperate fully with the IAEA on outstanding issues, particularly those that give rise to concerns about military dimensions of the Iranian nuclear program, and decided that Iran shall comply without qualification with the Safeguard Agreement.

28. The IAEA Board of Governors has adopted eleven resolutions in connection with the implementation of safeguards in Iran: IAEA, Doc. GOV/2003/69 (Sept. 12, 2003); IAEA Doc. GOV/2003/81 (Nov. 26, 2003); IAEA Doc. GOV/2004/21 (Mar. 13, 2004); IAEA Doc. GOV/2004/49 (June 18, 2004); IAEA Doc. GOV/2004/79 (Sept. 18, 2004); IAEA Doc. GOV/2004/90 (Nov. 29, 2004); IAEA Doc. GOV/2005/64 (Aug. 11, 2005); IAEA Doc. GOV/2005/77 (Sept. 24, 2005); IAEA Doc. GOV/2006/14 (Feb. 4, 2006); IAEA Doc. GOV/2009/82 (Nov. 27, 2009); and IAEA Doc. GOV/2011/69 (Nov. 18, 2011). See IAEA, *IAEA and Iran: IAEA Resolutions*, http://www.iaea.org/newscenter/focus/iaearan/iaea_resolutions.shtml (last visited Jan. 29, 2013).

29. IAEA, IAEA Doc. GOV/2011/69, *supra* note 28.

30. *Id.*

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and Iranian officials met five times in 2012 to bridge differences and discuss a structured approach in resolving these differences, in particular for gaining access to the Parchin installation and addressing the apparent military dimensions of Iran's nuclear program.³¹ The meetings failed to achieve agreement on these issues. In September, the IAEA noted that Iran was not providing the necessary cooperation to enable the IAEA "to provide credible assurance about the absence of undeclared nuclear materials and activities . . . and therefore to conclude that all nuclear material in Iran is in peaceful activities."³²

As a result of these and previous failures of Iran to cooperate with the international community, the United States and the European Union enacted additional sanctions this year.

President Obama signed two pieces of legislation affecting Iran: the National Defense Authorization Act for Fiscal Year 2012 (NDAA)³³ and the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRSHRA).³⁴ Section 1245 of the NDAA gives the President power to freeze all assets of Iranian financial institutions that have a nexus to the United States.³⁵ Furthermore under the NDAA, foreign financial institutions that knowingly facilitate a "significant financial transaction with the Central Bank of Iran or with another [sanctioned] Iranian financial institution" risk being cut off from direct access to the U.S. financial system.³⁶ A condition precedent to these provisions is a presidential determination that there was a sufficient supply of petroleum and petroleum products from countries other than Iran to permit a sufficient reduction in the volume of petroleum and petroleum products purchased from Iran by or through foreign financial institutions; President Obama issued a determination to that effect on June 11, 2012.³⁷ ITRSHRA expands the Iran Sanctions Act of 1996,³⁸ sanctions Iran's Revolutionary Guard Corps,³⁹ and prohibits provision of insurance services to the National Iranian Oil Company.⁴⁰

Similarly, the European Union passed a formidable set of sanctions focused on Iran's crude oil, petroleum, and petrochemical industry and product-related transactions, heavy water-related activities, energy sector revenues, the Central Bank of Iran, the Iranian Revolutionary Guard Corps, and precious metal transactions.⁴¹ Additionally, the Society for

31. Press Release, IAEA, IAEA Expert Team Returns from Tehran (Feb. 22, 2012), <http://www.iaea.org/newscenter/pressreleases/2012/prn201205.html>. See also IAEA, *IAEA and Iran: Chronology of Events*, http://www.iaea.org/newscenter/focus/iaeairan/iran_timeline9.shtml (last visited Feb. 15, 2013).

32. IAEA, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of United Nations Security Council resolutions in the Islamic Republic of Iran*, IAEA Doc. GOV/2012/50 (Sept. 13, 2012).

33. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1245, 125 Stat. 1298 (2011).

34. Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214 (2012) [hereinafter ITRSHA].

35. *Id.* § 1245(c).

36. National Defense Authorization Act for Fiscal Year 2012, 125 Stat. at 1647.

37. Memorandum on Presidential Determination Pursuant to Section 1245(d)(4)(B) and (C) of the National Defense Authorization Act for Fiscal Year 2012, 77 Fed. Reg. 36,387 (June 19, 2012), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201200465/pdf/DCPD-201200465.pdf>. President Obama used Executive Order Nos. 13,599 and 13,622 in part to effectuate the 2012 NDAA. Exec. Order No. 13,599, 77 Fed. Reg. 6,659 (2012); Exec. Order No. 13,622, 77 Fed. Reg. 6,659 (2012).

38. ITRSHA, *supra* note 34, §§ 201-08.

39. *Id.* at tit. III.

40. *Id.* § 212.

41. Council Decision 2012/35/CFSP, 2012 O.J. (L 19) 22.

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Worldwide Interbank Financial Telecommunication, in response to the EU sanctions, announced it would “discontinue its communications services to Iranian financial institutions” subject to the EU sanctions.⁴² This action impacts as many as thirty Iranian financial institutions.⁴³

The effect of the international sanctions is the subject of debate. IAEA Director General Yukiya Amano stated on November 20, “Iran is enriching uranium at a constant pace and international sanctions aimed at making Tehran suspend the activity are having no visible impact.”⁴⁴ While Iran’s nuclear ambitions may not be impacted by sanctions, its economy apparently is. Iranian President Mahmoud Ahmadinejad blamed the Western sanctions for the tumble of the Iranian rial against the dollar: the rial hit a new low in October, triggering riots in the streets of Tehran.⁴⁵ Also, Iran’s oil output declined for seven straight months until rebounding strongly in October in response to increased oil purchases by China and South Korea.⁴⁶

III. The Export Enforcement Coordination Center

On March 7, 2012, the Obama administration announced the formal opening of the Export Enforcement Coordination Center (E2C2).⁴⁷ Given the crucial role that the E2C2 will play in the protection of U.S. national security, it is important to understand the background, composition, functions, and operations of this new multi-agency entity.

In August 2009, President Obama instituted a wide ranging review of the U.S. export control system, with the goal of strengthening national security, and the competitiveness, of key U.S. manufacturing and technology sectors by focusing on current threats and adapting to “the changing economic and technological landscape.”⁴⁸ Conducted by an interagency task force, which included all U.S. Government departments and agencies with roles in the various U.S. export control regimes, the review found that the existing U.S. export control system did not “sufficiently reduce national security risk” because “its structure [was] overly complicated, contain[ed] too many redundancies, and trie[d] to protect too much.”⁴⁹ Consequently, the Obama administration determined that fundamental

42. Press Release, Soc’y for Worldwide Interbank Fin. Telecomm., SWIFT Instructed to Disconnect Sanctioned Iranian Banks following EU Council Decision (Mar. 15, 2012), http://www.swift.com/news/press_releases/SWIFT_disconnect_iranian_banks.

43. Rick Gladstone & Stephen Castle, *Global Network Expels as Many as 30 of Iran’s Banks in Move to Isolate Its Economy*, N.Y. TIMES, Mar. 16, 2012, at A6.

44. Alexandria Sage & Fredrik Dahl, *Iran Nuclear Work at Constant Pace Despite Sanctions – IAEA*, REUTERS (Nov. 20, 2012, 9:02 AM), <http://in.reuters.com/article/2012/11/20/nuclear-iran-idINDEE8AJ0BX20121120>.

45. *Iran Police Clash with Protesters*, BBC NEWS (Oct. 3, 2012, 2:48 PM), <http://www.bbc.co.uk/news/world-middle-east-19812482>.

46. *IAEA: Iranian Sanctions Might Hurt Its Economy but Not Its Oil Industry*, ALBAWABA BUS. (Nov. 19, 2012, 8:40 AM), <http://www.albawaba.com/business/iea-iran-oil-451566>.

47. Press Release, The White House, Fact Sheet: Latest Steps to Implement the President’s Export Control Initiative (Mar. 7, 2012), <http://www.whitehouse.gov/the-press-office/2012/03/07/fact-sheet-latest-steps-implement-presidents-export-control-reform-initi>.

48. Press Release, The White House, Statement of the Press Secretary (Aug. 13, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-the-Pres-Secretary/.

49. Press Release, The White House, Fact Sheet on the President’s Export Control Initiative (Apr. 20, 2010), <http://www.whitehouse.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative>.

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reform of the U.S. export control system was needed in order “to build high walls around a smaller yard” by focusing enforcement efforts on our “crown jewels,” and that, ultimately, it would be beneficial to establish a system that had four fundamental elements: (1) a single control list, (2) a single information technology system, (3) a single licensing agency, and (4) a single primary enforcement coordination agency.⁵⁰

Toward the goal of establishing a single primary enforcement coordination agency, President Obama created the E2C2 through Executive Order (E.O.) 13558.⁵¹ At the outset, the President declared that the primary objectives of the E2C2 were “to advance United States foreign policy and protect the national and economic security of the United States through strengthened and coordinated enforcement of United States export control laws and enhanced intelligence exchange in support of such enforcement efforts.”⁵²

Pursuant to E.O. 13558, the Secretary of Homeland Security was directed to establish within the Department of Homeland Security (DHS), for administrative purposes, an interagency Export Enforcement Coordination Center that would comprise representatives from the following U.S. Government departments and agencies: (1) DHS; (2) the Department of Commerce (DOC); (3) the Department of Defense (DOD); (4) the Department of Energy (DOE); (5) the Department of Justice (DOJ); (6) the Department of State (State Department); (7) the Department of the Treasury (Treasury Department); and (8) the Office of the Director of National Intelligence (ODNI).⁵³ In addition, it was noted in E.O. 13558 that the President could designate additional departments, agencies, or offices to participate in the activities of the E2C2.⁵⁴ The U.S. Postal Service (USPS) was designated a participating entity in mid-2012.⁵⁵

Since the E2C2 was formally opened in March 2012, numerous agencies within the participating departments have become actively involved in the E2C2’s operations, including: (1) the U.S. Immigration and Customs Enforcement and the U.S. Customs and Border Protection within DHS; (2) the Office of Export Enforcement within the DOC; (3) the Defense Criminal Investigative Service, the Defense Intelligence Agency, the Defense Security Service, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations within the DOD; (4) the National Nuclear Security Administration within the DOE; (5) the National Security Division, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and the Federal Bureau of Investigation within the DOJ; (6) the Directorate of Defense Trade Controls within the State Department; (7) the Office of Foreign Assets Control (OFAC) within the Treasury Department; (8) the Office of the National Counterintelligence Executive within the ODNI; and (9) the U.S. Postal Inspection Service within the USPS.⁵⁶

Pursuant to E.O. 13558, the E2C2 is led by a director who is a full-time DHS senior officer designated by the Secretary of Homeland Security.⁵⁷ Two deputy directors report

50. *Id.*

51. Exec. Order No. 13,558, 75 Fed. Reg. 69,573 (Nov. 15, 2010) [hereinafter EO 13,558].

52. *Id.*

53. *Id.* § 2(b).

54. *Id.* § 2(b)(ix).

55. See *Export Enforcement Coordination Center (E2C2)*, EXPORT.GOV, <http://export.gov/e2c2/index.asp> (last updated Nov. 14, 2012).

56. *Id.*

57. EO 13,558, *supra* note 51, § 2(c).

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to the director; one is a full-time DOC senior officer designated by the Secretary of Commerce, and the other is a full-time DOJ senior officer designated by the Attorney General.⁵⁸ In addition, the E2C2 is required to have an Intelligence Community liaison, a full-time senior officer of the U.S. Government designated by the Director of National Intelligence.⁵⁹

The E2C2 exists to perform five main functions. First, it is to “serve as the primary forum within the federal government for executive departments and agencies to coordinate and enhance their export control enforcement efforts and identify and resolve conflicts that have not been otherwise resolved in criminal and administrative investigations and actions involving violations of U.S. export control laws.”⁶⁰ A second function is to “serve as a conduit between Federal law enforcement agencies and the U.S. Intelligence Community for the exchange of information related to potential U.S. export control violations.”⁶¹ Its other functions are: (3) “serv[ing] as a primary point of contact between enforcement authorities and agencies engaged in export licensing;”⁶² (4) “coordinat[ing] law enforcement public outreach activities related to U.S. export controls;”⁶³ (5) and performing “government wide statistical tracking capabilities for U.S. criminal and administrative export control enforcement activities [based on] . . . information provided by and shared with all relevant departments and agencies participating in the Center.”⁶⁴

It is important to note that there are limits on the powers of the E2C2. Specifically, E.O. 13558 specifies: “Nothing in this order shall be construed to impair or otherwise affect: [the] authority granted by law, regulation, Executive Order, or Presidential Directive to an executive department, agency, or head thereof.”⁶⁵ It also provides: “Nothing in this order shall be construed to provide exclusive or primary investigative authority to any agency. Agencies shall continue to investigate criminal and administrative export violations consistent with their existing authorities, jointly or separately, with coordination through the Center to enhance enforcement efforts and minimize potential for conflict.”⁶⁶

Conversely, the E2C2’s director possesses significant powers. To begin, the director has the power to determine the E2C2’s agenda, convene and preside at E2C2 meetings, direct its work, and coordinate the efforts of E2C2 subgroups.⁶⁷ Moreover, the director has the ability to “identify and resolve conflicts that have not been otherwise resolved in criminal and administrative investigations and actions involving violations of U.S. export control laws.”⁶⁸ Taken together, these powers make clear that the E2C2 is intended to play a dual role, both coordinating efforts among participating agencies and initiating new enforcement actions. The E2C2’s powers to coordinate, prioritize, and initiate export control investigations and enforcement initiatives are critical to the ability of the U.S. Government to achieve its export control and national security objectives.

58. *Id.*

59. *Id.*

60. *Id.* § 3(a).

61. *Id.* § 3(b).

62. *Id.* § 3(c).

63. *Id.* § 3(d).

64. *Id.* § 3(e).

65. *Id.* § 5(b)(i).

66. *Id.* § 5(c).

67. *Id.* § 4(b).

68. *Id.* § 3(a).

IV. Nuclear Arms Control

On December 3, 2012, the U.N. General Assembly voted, 147 to 4, to establish “an open-ended working group to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons.”⁶⁹ The resolution directed the working group to meet in Geneva in 2013 for up to three weeks and report back to the General Assembly, which placed the issue of multilateral disarmament negotiations on the provisional agenda for its next session.⁷⁰

The vote was a more-or-less automatic affirmation of an October resolution of the General Assembly’s First Committee.⁷¹ The lead sponsors were Austria, Mexico, and Norway. The four negative votes were cast by the United States, the United Kingdom, France, and Russia.⁷² In a joint statement, the United States, the United Kingdom, and France acknowledged the existence of a current “impasse” in nuclear disarmament negotiations through established channels, but they declared themselves “unable to accept” the establishment of the working group or “any outcome it may produce.”⁷³

In another significant First Committee development, a group of thirty-five nations led by Switzerland, submitted a joint declaration on “the grave humanitarian concerns resulting from the unique destructive capacity and unlimited effects in time and space of nuclear weapons,” noting prior statements by the International Committee of the Red Cross that “it is difficult to envision how any use of nuclear weapons could be compatible with the rules of international humanitarian law,” and citing recent scientific studies indicating that even a limited nuclear exchange “would cause a global climate change with such a serious and long-lasting impact on the environment and food production that it could cause a global famine affecting over a billion people.”⁷⁴

The First Committee’s establishment of the working group followed decades of increasing tension between the five original nuclear powers⁷⁵ and non-nuclear weapons states over the implementation of the Nuclear Nonproliferation Treaty (NPT), which was signed in 1968 and entered into force in 1970.⁷⁶ Under Article II of the NPT, the non-nuclear states agreed “not to manufacture or otherwise acquire nuclear weapons or other

69. G.A. Res. 67/56, ¶ 1, U.N. Doc. A/RES/67/56 (Jan. 4, 2013).

70. First Comm. on Gen. & Complete Disarmament Draft Res., Taking Forward Multilateral Nuclear Disarmament Negotiations, U.N. Doc. A/C.1/67/L.46 (Oct. 19, 2012).

71. See *id.* (decreasing the operational readiness of nuclear weapons systems). The First Committee, consisting of all member states, “considers all disarmament and international security matters within the scope of the [U.N.] Charter.” *Disarmament and International Security, First Committee*, GEN. ASSEMBLY UNITED NATIONS, www.un.org/en/ga/first/ (last visited Feb. 15, 2013). First Committee resolutions are normally adopted as a matter of course by the General Assembly when it meets in plenary session. *Id.*

72. John Burroughs, *UN Votes to Establish Working Group on Nuclear Disarmament*, US PEACE COUNCIL, <http://uspeacecouncil.org/?p=2212> (last visited Feb. 15, 2012).

73. *Id.*

74. Ambassador Benno Laggner, Switz., Joint Statement on the Humanitarian Dimension of Nuclear Disarmament to the 67th Sess. of the United Nations General Assembly (Oct. 22, 2012), http://www.reaching-criticalwill.org/images/documents/Disarmament-fora/1com/1com12/statements/22Oct_Switzerland.pdf.

75. The five original nuclear states are: the United States, Russia, the United Kingdom, France, and China. *Nuclear Weapons: Who Has What at a Glance*, ARMS CONTROL ASS’N, <http://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat> (last updated Nov. 2012).

76. *Id.*

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nuclear explosive devices.”⁷⁷ Under Article VI, all parties, including the nuclear powers, agreed “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament.”⁷⁸ As noted in the U.S. State Department’s official history of the NPT, with the passage of time it became increasingly clear that the parties had significantly different priorities.⁷⁹ While the nuclear powers appeared to have achieved their primary goal of checking the spread of nuclear weapons, the non-nuclear states became increasingly vocal in asserting that “the ultimate goal of the NPT is nuclear disarmament.”⁸⁰ In 1995, the non-nuclear states agreed to extend the NPT indefinitely after renewed assurances by the nuclear powers that further disarmament negotiations would be pursued. In 1996 the International Court of Justice declared that under Article VI of the NPT, the nuclear powers had a binding obligation not only to negotiate, but also to “bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”⁸¹

Although the U.S. and Russian nuclear arsenals have been substantially reduced from Cold War levels,⁸² each still maintains thousands of nuclear warheads, a significant but undisclosed fraction of which are maintained on “launch on warning” alert.⁸³ In the Action Plan formulated as part of the Final Statement from the 2010 Review Conference under the NPT, the nuclear states reaffirmed their “unequivocal undertaking to accomplish . . . the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI of the Treaty,” but they rejected requests by the non-nuclear states to set a definite timeline.⁸⁴ In May 2012, at the preparatory meeting for the 2015 NPT Review Conference, “the United States reaffirmed its commitment to implement the 2010 NPT Action Plan as well as its obligations under Article VI of the NPT,” but again without mention of any definite time frame.⁸⁵

V. Regulating Telecommunications—ITU and the WCIT-12

The International Telecommunications Union (ITU) convened the World Conference on International Telecommunications (WCIT-12) in Dubai, United Arab Emirates, from

77. Treaty on the Non-Proliferation of Nuclear Weapons, Jul. 1, 1968, art. II, 21 U.S.T. 483, 729 U.N.T.S. 161.

78. *Id.* art. VI.

79. *Id.* at 6.

80. Steven E. Miller, *Reform & the Nuclear Nonproliferation Regime*, in *NUCLEAR COLLISIONS: DISCORD, REFORM & THE NUCLEAR NONPROLIFERATION REGIME* 1, 6 (Am. Acad. Arts & Sci. 2012).

81. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 42 (July 8) (emphasis added).

82. Under the 2010 New START Treaty, the United States and Russia agreed to reduce deployed strategic nuclear warheads to 1,550 each. *The New START Treaty*, U.S. DEP’T OF STATE (Oct. 20, 2011), <http://www.state.gov/t/avc/rls/175945.htm>. These limits do not apply to strategic warheads held in reserve, or to tactical nuclear weapons. *Id.*

83. Bruce Blair et al., *Smaller and Safer: A New Plan for Nuclear Postures*, FOREIGN AFFS., Sept.-Oct. 2010, at 9.

84. United Nations Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, May 3-28, 2010, *2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, ¶ 79, U.N. Doc. NPT/CONF.2010/50 (Vol. I), Part I.

85. Press Release, United States Mission to the Int’l Orgs. in Vienna, NPT Preparatory Comm. Meeting of Parties to the Nuclear Non-Proliferation Treaty (NPT) (May 11, 2012), <http://vienna.usmission.gov/npt-2012.html>.

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December 3–14, 2012.⁸⁶ Representatives from the ITU's 193 member states gathered at WCIT-12 to discuss revisions to the International Telecommunications Regulations (ITRs), which govern telecommunications traffic between nations. Because the ITRs remain largely unchanged since they were promulgated twenty-five years ago, the WCIT's proceedings present potentially significant changes to the management of the Internet. As of this writing, WCIT-12 is halfway completed. Thus, lawyers and policy watchers involved in telecommunications, technology, national security, cybersecurity, and human rights law should visit the references listed in this Article to follow the results of WCIT-12's proceedings and conduct further research on its specific legal and policy impacts.

The ITU "is the United Nations specialized agency for information and communication technologies" (ICTs).⁸⁷ It is involved in three main areas of activity, called "sectors."⁸⁸ Within the Radio Communications Sector, which includes wireless and broadband communications, the ITU allocates global radio spectrum and satellite orbits.⁸⁹ Within its Standardization Sector, the ITU develops technical standards for connectivity, such as Internet access and voice and video compression.⁹⁰ Within the Development Sector, the ITU works to increase ICT access worldwide, particularly in developing areas and emerging markets.⁹¹ ITU's membership is a public-private partnership that includes 193 countries and 700 members from private industry, regional associations, and academic institutions.⁹²

The ITRs are a treaty "designed to facilitate international interconnection and interoperability of information and communication services, as well as ensuring their efficiency and widespread public usefulness and availability."⁹³ The ITU created the ITRs in 1988, well before the growth and presence of the modern World Wide Web and Internet. The purpose of the ITRs is to "establish general principles which relate to the provision and operation of international telecommunication services offered to the public as well as the underlying international telecommunication transport means used to provide such services. They also set rules applicable to administrations, [which include] private operating agenc[ies]."⁹⁴

As the ITU states on the WCIT's official website, "there is broad consensus that the text now needs to be updated to reflect the dramatically different information and communication technology (ICT) landscape of the 21st century."⁹⁵

Given this interest, many ITU members submitted proposals to amend the ITRs. Regarding issues of cybersecurity, these proposals fall into two camps: those designed to

86. *World Conference on International Telecommunications (WCIT-12)*, ITU, <http://www.itu.int/en/wcit-12/Pages/default.aspx> (last visited Feb. 15, 2013) [hereinafter *WCIT-12*].

87. *About ITU*, ITU, <http://www.itu.int/en/about/Pages/default.aspx> (last updated Feb. 27, 2012).

88. *What Does ITU Do?*, ITU, <http://www.itu.int/en/about/Pages/whatwedo.aspx> (last updated July 11, 2012).

89. *Id.*

90. *Id.*

91. *Id.*

92. *About ITU*, *supra* note 87.

93. *WCIT-12*, *supra* note 86.

94. INT'L TELECOMM. UNION [ITU], INTERNATIONAL TELECOMMUNICATION REGULATIONS 3 (1989).

95. *WCIT-12 Conference Overview*, ITU, <http://www.itu.int/en/wcit-12/Pages/overview.aspx> (last visited Feb. 15, 2013).

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preserve the traditional, multi-stakeholder model of Internet governance, and those designed to increase individual countries' ability to control internet access and monitoring.

The United States is among those members supporting the multi-stakeholder model of Internet governance that has existed since the Internet's creation. In this model, public and private actors share in managing the underlying infrastructure for the Internet and engage in distributed decision-making regarding policies for Internet access and monitoring. Supporters of this model, which include the United States House of Representatives,⁹⁶ Google,⁹⁷ and the Electronic Frontier Foundation,⁹⁸ are concerned that the ITU will amend the ITRs to allow individual countries to have greater ability to monitor and control Internet access, inviting the potential for some countries, particularly autocratic ones, to use this control to limit free expression and access to information resources.

There are others who think the United States has too much power over the Internet and that an individual country has the right to regulate Internet access in times of emergency. For example, some critics think the private Internet Corporation for Assigned Names and Numbers (ICANN), which is licensed by the U.S. Department of Commerce, has too much authority over the Domain Name System and Internet Protocol (IP) addresses.⁹⁹ These critics want the ITU or another international body to take a more proactive role in Internet regulation¹⁰⁰ and propose that ITU member states have equal authority over domain names, IP addresses, Internet access, and Internet monitoring.¹⁰¹ Additionally, proponents of this model argue that having this authority allows them to control cyber or real-world threats to security.

Another factor causing some controversy was that much of the ITU's agenda and proceedings were unknown to the public. Some individuals obtained draft proposals to the ITU and leaked them on sites such as www.wcitleaks.org. The ITU reacted by posting proposals, briefing packets, and a "myth-busting" PowerPoint presentation.¹⁰² This issue, combined with the geopolitical concerns of countries such as the United States, China, and Russia on other international affairs issues, highlights the importance of the results of the WCIT-12 proceedings.

As of the time of this writing, the WCIT-12 conferees had finished their eighth day. The United States submitted a proposal, supported by Canada and other European, Latin American, and Asian-Pacific countries, for the amended ITR to be applied only to traditional telecommunications operators while excluding Internet companies and government

96. H.R. Con. Res. 127, 112th Cong. (2012).

97. See Vint Cerf, *Keep the Internet Free and Open*, GOOGLE OFFICIAL BLOG, <http://googleblog.blogspot.com/2012/12/keep-internet-free-and-open.html> (last updated Dec. 15, 2012).

98. See Parker Higgins, *Congressional Witnesses Agree: Multistakeholder Processes Are Right for Internet Regulation*, ELEC. FRONTIER FOUND (June 1, 2012), <https://www.eff.org/deeplinks/2012/05/congressional-witnesses-agree-multistakeholderism-right-way-regulate-internet>.

99. Andrew Couts, *The Not-Boring Guide to the United Nations' Non-Takeover of the Internet*, DIGITAL TRENDS (Nov. 30, 2012), <http://www.digitaltrends.com/web/united-nations-wcit-itu-internet-takeover-thing>.

100. See, e.g., *id.*; Ron Synovitz, *Dubai Meeting On Internet Governance*, RADIO FREE EUR. RADIO LIBERTY (Dec. 8, 2012), <http://www.rferl.org/content/dubai-meeting-on-internet-governance/24787392.html>.

101. See Int'l Telecomm. Union [ITU], *Proposals Received from ITU Member States for the Work of the Conference*, para. 31B, at 99, WCIT12/DT/1-E (Nov. 30, 2012).

102. *WCIT-12: Background Briefs and FAQs*, ITU, <http://www.itu.int/en/wcit-12/Pages/WCIT-background-briefs.aspx> (last visited Feb. 15, 2013).

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and private networks.¹⁰³ But Russia and some African and Middle Eastern nations resisted, arguing for a broader definition of telecommunications that includes the Internet.¹⁰⁴ Regardless of the resolution of this and other issues, the WCIT-12 proceedings will be of great importance to policymakers and stakeholders concerned about the development of Internet and cybersecurity policy.

VI. Developments in U.S. Policy on Cuba

The prospects for oil off Cuba's north coast, about sixty miles from Florida's coast, came up empty again this year.¹⁰⁵ The matter generated several oversight processes in Congress, including an exchange of letters with the Obama administration. It was a continuation of a process that started in 2011, resulting in U.S. officials visiting a deep-sea oilrig off Cuba's coast this year to conduct safety and export-control checks. Cuba's attempt to find oil was scrapped late in 2012, but Cuba is expected to continue exploration in 2013.¹⁰⁶

A. PEOPLE-TO-PEOPLE TRAVEL

In March, the Treasury Department OFAC published a regulatory guidance on advertising services that are being provided for people-to-people travel, setting off a debate about the regulatory scope of licensed travel.¹⁰⁷ Travel restrictions to Cuba were eased by the U.S. Government in 2011, and opponents have argued that it has allowed what amounts to unauthorized tourism travel to the island. The OFAC statement clarified that unlicensed advertisers and providers are not permitted to perform advertising services for holders of licenses without some form of OFAC authorization.¹⁰⁸

During a congressional hearing, Representative Mario Diaz-Balart, Republican of Florida, questioned Treasury Secretary Timothy Geithner about the enforcement of the travel regulations.¹⁰⁹ Diaz-Balart raised numerous issues including whether the people-to-people travel regulations were allowing, in violation of U.S. law and policy, leisure travel that constitutes a new source of revenue for the Cuban government. Geithner responded that he was "very confident. . . we're carefully following the law and the policy set out, and we're going to continue to do that."¹¹⁰

103. Eric Pfanner, *Drafters of Communications Treaty Are Split on Issue of Internet Governance*, N.Y. TIMES, Dec. 8, 2012, at B5.

104. *Id.*

105. MARK P. SULLIVAN, CONG. RESEARCH SERV., R41617, CUBA: ISSUES FOR THE 112TH CONGRESS 51 (Nov. 6, 2012).

106. *See id.*; David LaGesse, *Cuba's Oil Quest to Continue, Despite Deepwater Disappointment*, NAT. GEOGRAPHIC, Nov. 19, 2012, available at <http://news.nationalgeographic.com/news/energy/2012/11/121119-cuba-oil-quest/>.

107. *Advertising Educational Exchange Travel to Cuba for People-to-People Contact*, U.S. DEP'T OF THE TREASURY (Mar. 9, 2012, 1:36 PM), http://www.treasury.gov/resource-center/sanctions/Programs/Pages/cuba_ppl_notice.aspx.

108. *Id.*

109. House Committee on Appropriations, *USHR16 Appropriations Committee*, LIBR. CONGRESS (Mar. 20, 2012), <http://thomas.loc.gov/video/house-committee/hsap/21401786> (statement of Timothy Geithner, Treasury Sec.).

110. *Id.*

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Two months later, the Treasury Department tightened regulations, requiring applicants to explain how the proposed travel “would enhance contact with the Cuban people, and/or support civil society in Cuba, and/or promote the Cuban people’s independence from Cuban authorities.”¹¹¹ The tightened regulations now require applicants to certify that a “predominant portion of the activities” do not involve “individuals or entities acting for or on behalf of a prohibited official(s) of the Government of Cuba . . . or a prohibited member(s) of the Cuban Communist Party.”¹¹²

What oil is to Iran, tourism travel is to Cuba, which is one reason that opponents and proponents of Cuban sanctions focus a great deal of attention on travel issues. Efforts are under way by both sides to amend the regulations in 2013.

B. TERRORISM AND ESPIONAGE

The State Department’s designation of Cuba as a state sponsor of terrorism drew attention from policymakers this year. Pursuant to three U.S. statutes,¹¹³ Cuba has been listed as a state sponsor of terrorism since 1982. The designation remains an issue of contention in the intelligence community as well as for policy advocates for and against its application to Cuba. In May, the House Foreign Affairs Committee’s Subcommittee on the Western Hemisphere held a hearing entitled “Cuba’s Global Network of Terrorism, Intelligence, and Warfare.”¹¹⁴ Members of Congress from both political parties voiced concerns that the State Department was granting visas to numerous Cuban officials suspected of espionage and of having links to global terrorist organizations. Representative Albio Sires, Democrat of New Jersey, said, “People still think that this is a government that is not a dangerous government. There’s romanticism with this revolution. This is a dictator. Make no questions about it. This is a dictator that has over the years put spies in this country.”¹¹⁵

At the hearing, the Honorable Michelle Van Cleave, a former director of the National Counterintelligence Executive, and Christopher Simmons, a Defense Intelligence Agency supervisory counterintelligence officer and a Cuba expert, called Cuba a security threat, saying that it is a global broker of U.S. intelligence, selling U.S. secrets and other information to rogue regimes, terrorist groups, and commercial competitors of the United States.¹¹⁶ The panel also heard that Cuba uses tourism revenues to fund the military and intelligence services. The subcommittee chairman, Representative Connie Mack, Republican of Florida, drew attention to Cuba’s relationship with Iran and China, adding, “we have so much more to learn . . . on what we should be looking at from policy position on

111. U.S. TREASURY DEP’T, OFFICE OF FOREIGN ASSETS CTRL., COMPREHENSIVE GUIDELINES FOR LICENSE APPLICATIONS TO ENGAGE IN TRAVEL-RELATED TRANSACTIONS TO INVOLVING CUBA 23 (2012).

112. *Id.* at 24.

113. See Export Administration Act of 1979 § 6(j), 50 U.S.C. app. § 2405(j) (2012); International Security Assistance and Arms Export Control Act of 1976, 22 U.S.C. § 215 (2012); Foreign Assistance Act of 1961, § 40A, 22 U.S.C. § 2304.

114. *Cuba’s Global Network of Terrorism, Intelligence, and Warfare Hearing Before the S. Comm. on the Western Hemisphere of the Comm. on Foreign Affairs*, 112th Cong. (2012).

115. *Id.* at 7.

116. *Id.* at 10-24.

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espionage and counterintelligence in Cuba. And frankly, it sounds like not just in Cuba, but many other places.”¹¹⁷

In addition to its designation by the Secretary of State as a state sponsor of terrorism, Cuba also appeared, as in prior years, in the 2012 International Narcotics Control Strategy Report¹¹⁸ and the 2011 Country Report on Human Rights Practices for 2011.¹¹⁹ These reports are required by statute and are a source of significant legislative oversight. When it comes to Cuba, there is disagreement between Congress and the Obama administration as to whether these designations go far enough or are outdated.

C. ECONOMIC SANCTIONS ENFORCEMENT

The United States brought several enforcement actions against companies alleged to have violated its sanctions against Cuba. One of the most significant led to a US \$619 million settlement with ING, a European financial services company.¹²⁰ Most of the penalty appears to have stemmed from Cuban transactions. ING allegedly processed unauthorized financial transactions valued at more than US \$1.6 billion.¹²¹

D. FLORIDA TRADE SANCTIONS

The Florida legislature approved, and Governor Rick Scott signed, a new law that will prohibit state and local governments from signing contracts with companies that do business with Cuba or Syria.¹²² Opponents of the law criticized the measure as unconstitutional because it infringes on the power of the federal government to conduct foreign policy. The statement issued by the Governor when he signed the law says that the “restrictions will not go into effect unless and until Congress passes, and President Obama signs, a law permitting states to independently impose such sanctions against Cuba and Syria.”¹²³ Senator Marco Rubio says that the measure is constitutional and should be enforced notwithstanding the signing statement.¹²⁴ This matter will likely end up in the courts in 2013.

117. *Id.* at 33.

118. 1 U.S. DEP’T OF STATE, INT’L NARCOTICS CONTROL STRATEGY REPORT 185 (Mar. 2012) [hereinafter INCSR]. The INCSR notes Cuba’s effectiveness in its efforts to reduce the supply and demand of illicit drugs. *Id.* at 185-87.

119. *Human Rights and Labor, Country Reports on Human Rights Practices for 2011: Cuba*, U.S. DEP’T STATE (2011), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186505#wrapper>.

120. Annie Lowrey, *ING Bank to Pay \$619 million to Settle Inquiry into Sanctions Violation*, N.Y. TIMES, Jun. 13, 2012, at B3.

121. *Id.*

122. 2012 Fla. Laws Ch. 2012-196; H.B. 959, 2012 Leg., 114th Sess. (Fl. 2012).

123. Letter from Rick Scott, Governor, Florida, on the Signing of House Bill 959, to Ken Detzner, Sec. of State, Fla. (May 1, 2012), available at <http://www.flgov.com/wp-content/uploads/2012/05/5.1.12-HB-959-Transmittal-Letter1.pdf>.

124. Mark Caputo, *Sen. Marco Rubio Refutes Gov. Rick Scott on Cuba Crackdown Law*, MIAMI HERALD (May 3, 2012, 4:38 PM), <http://miamiherald.typepad.com/nakedpolitics/2012/05/sen-marco-rubio-refutes-gov-rick-scott-on-cuba-crackdown-law.html>.

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