

TRANSCRIPT

DOING BUSINESS IN THE MIDDLE EAST: A GUIDE FOR U.S. COMPANIES

[Despite recent military action in Iraq and Afghanistan, and tensions in U.S.-Arab relations following the September 11, 2001 terrorist attacks, there remains an abundance of business opportunities for U.S. companies interested in doing business with Middle Eastern countries. With the current political landscape, businesses interested in doing business in the Middle East need proper guidance, now more than ever.

This seminar provided a background to the current political and economic climates in the Middle East. The seminar also provided valuable information and insight into the current legal issues that must be considered prior to doing business in this part of the world, with special attention to the legal issues pertaining to the U.S. sanctions program and export controls governing trade between the U.S. and the Middle East since September 11th.

The seminar was presented by Gordon & Rees LLP, Fisher Thurber LLP, California Western School of Law, and The Center for Creative Problem Solving. The moderator was Shahriar Afshar.¹ The panel included William Aceves,² John Hooman Donboli,³ Ali Gheissari,⁴ and Alidad Vakili.⁵⁶

MR. AFSHAR: Everyone, welcome. My name is Shahriar Afshar. I am with the Iranian Trade Association, one of the conspirators in this event, principally organized by my friends Alidad Vakili, John Donboli, and contribution from Mr. Aceves and Dr. Gheissari. We wanted to organize an event to discuss doing business with the Middle East, not necessarily because of all the interest in the Middle East and all the activities going on, all the negative press that you hear, but mostly to try to concentrate on the facts, the opportunities, the challenges, and to try and shed some light on what can

1. President, Iranian Trade Association; M.A., San Diego State University.

2. Professor, California Western School of Law; LL.M., University of California, Los Angeles; Ford Foundation Fellow; M.A., Harvard University; J.D., M.A., University of Southern California; B.A., Claremont McKenna College.

3. Attorney, Gordon & Rees, LLP; J.D., The George Washington University Law Center, 1999.

4. Visiting Associate Professor, University of San Diego; B.A., Tehran University; D.Phil Oxford University.

5. Associate, Fisher Thurber LLP; J.D., California Western School of Law, 1994.

6. This introduction was not part of the conference. Parts of this transcript have been edited for grammar and readability. The substance of the transcript remains unchanged.

be done with Middle Eastern countries. We want to define the region a bit, talk in generalities, and then get to specifics on legal issues, business opportunities, and any challenges that you, either as business people or as counselors, will need to know in advising your future clients.

Many of you are students. I am glad to see so many young faces here. This is not my first time speaking at the law school. A couple of years ago, I was invited to speak to the Middle Eastern and Persian Law Students Association. I had a great time. I now see a lot more young, eager faces wanting to learn about that region and how to possibly focus their future legal practices in that market.

So we are back with more information, more up-to-date knowledge, and some really top-notch experts to shed some light on what I think everybody is interested in knowing.

Before we get into the speakers, I wanted to give you some general trivia about the Middle East. Many people either call it the Near East or the Middle East. There are parts of North Africa that are involved in part of that community. Many Islamic countries are not in the Middle East. They are spread out in the world. Principally, though, when people think about the Middle East, they think about oil. They think about a lot of the things that you see in the press. I am going to concentrate more on the business and the practicalities of it, not so much on the political angles.

A relatively recent report from Tony Cordesman of the Center for Strategic and International Study from Washington, D.C., cites that the Middle East still controls some 70 percent of the world's oil reserves, whereas the United States only has about 2.9 percent.⁷ In his opinion, any which way you look at it, no matter how many models and predictions they do, the U.S. is going to be dependent on Middle Eastern oil for decades to come.⁸

Why is that important for us here? Because I think it will be a driving force in the level of interest in the Middle East. Principally, it may be oil-related products or business activities, but there are other trades and services and manufacturing goods that are coming and going between the U.S. and the Middle Eastern countries.

The U.S. now imports about \$1.2 trillion worth of goods and services a year.⁹ Many are manufactured goods from Europe and Asia that are critically dependent on imported oil. The level of globalism that we are experiencing has a lot of impact on how the U.S. deals with the Middle East.

7. See Anthony Cordesman, *The US and the Middle East: Energy Dependence and Demographics* (Dec. 09, 2002) at http://www.csis.org/features/us_me_energy_demo.pdf

8. *Id.*

9. See *Homeland Security Subcommittee Hearing*, (May 6, 2003) (statement of Under Secretary Asa Hutchinson) available at <http://appropriations.senate.gov/hearings/markups>; Press Release, U.S. Customs & Border Protection, U.S. Dept. of Homeland Security, \$24 Billion in Federal Revenue Collected by Customs and Border Protection (Jan. 14, 2004) at http://www.customs.gov/xp/cgov/newsroom/press_releases/01142004.xml.

The oil prices, as many of us probably know when we go to the gas pump, are critically dependent on social political issues that happen in the Middle East.

In the past two decades or so, as the chart that I am looking at that I am going to try to put on our website www.iraniantrade.org indicates, every time there has been a critical issue in the Middle East, prices kind of go up and down: The oil embargo, as everybody remembers; the Irani revolution; the Iran/Iraq War; the U.S. price decontrol that happened around 1982; OPEC's decision to control the market; the end of the Iran/Iraq War; the Gulf War; and, of course, most recently what you have seen on TV. A lot of the oil production in these Middle Eastern countries is nationalized, so there is a great disparity between gross domestic product or oil production and the per capita income of individuals in these countries. So there is a separation, and it does not necessarily go up as the oil prices go up or as a country makes more oil.

There are—I think several definitions of where the boundaries in the Middle East are. But in my list, I have fifteen or sixteen countries, not including those in North Africa. I will give you just some quick trivia as to the population figures just so you know.

How many do you think—what is the population of Kuwait, if somebody had to guess? Can anyone give me a guess?

SPECTATOR: 300,000.

MR. AFSHAR: 300,000. Okay. There is no gift here. There is no prize. If you can guess, you can guess.

SPECTATOR: A million.

MR. AFSHAR: A million? You are getting closer.

SPECTATOR: Three million.

MR. AFSHAR: No. It is 1.7. So, technically, I guess, San Diego County is bigger than the country of Kuwait population wise. The past twenty years has seen tremendous growth in the youth population in the Middle East.

Iran's youth population has just exploded, driving everything as far as political change, social change, Internet use, people seeking—some 800,000 people a year seeking jobs in Iran every year, being added to the labor pool.

Iran's population, for your reference, apart from all the things going on in Iran, is about twenty-one million. The highest per capita income—actually, that is Kuwait out \$25,000 per individual. That is almost the highest per capita income in the Middle East, Kuwait, the tiny country of Kuwait.

The highest Internet usage in the Middle East is in the United Arab Emirates. The Emirates are about seven kingdoms or provinces connected to each other. Saudi Arabia is one of the U.S.'s most important trading partners in the Middle East. It continues to be. So is Israel. There is a lot of import and export going back and forth with the Middle East.

Strictly speaking, in 2002, the U.S. exported about \$19 billion in goods and imported about \$34 billion in goods with Middle Eastern countries alone. Of course, this is not much compared to the business we do with Can-

ada or Mexico. Canada is closer to 160 billion. Canada has always been the highest trading partner with the U.S. over the past 50 years or so. Mexico is a very close second.

I wanted to give you some of that trivia just to get you in the mood as we are talking about the Middle East. Why are we considering the Middle East? Why would anyone go over there? Why should we consider business? What should we know?

The populations are growing, tremendous growth in the youth community. Businesses are still interested, and it is not just oil. It is a lot of different goods and services that are in demand between these two regions, the U.S. and the Middle East. Having said some of those preliminary generalities, I want to get to our first speaker. I think we are starting with Dr. Gheissari from USD. He is a professor of history and has published broadly in both English and Persian. Apart from being just a wonderful person to know, his knowledge has always enlightened me personally. I would like to ask Dr. Gheissari to the podium, and we will listen to his discussions about Middle East culture and history. Please help me welcome Dr. Gheissari.

MR. GHEISSARI: Thank you very much. I am grateful for such a kind introduction, and I feel a little bit out of place here. I initially told my friends when they kindly invited me that my basic take on the whole issue of the Middle East is fairly historical, and contemporary history for historians oftentimes stops around the 1960s or so! Nevertheless, I can offer some general observations on certain concepts and boundaries. I will try to be very brief, and I will be more than happy to follow up at the question-and-answer session.

The Middle East itself does not have very set boundaries. Every now and again we get this impression in newspaper articles, in the media, in private conversations, that the issue of boundaries is very loose. It sometimes stretches from Pakistan, Afghanistan, all the way to North Africa, even Morocco on the Atlantic Ocean, so it consists of many countries with diversity.

The Middle East has a rich history, it has been at the crossroad of cultures and civilizations and the birthplace of three major religions. Therefore, in any new conversations about the Middle East, the historical factor becomes a reality, a living reality; this includes the religious factor as well.

Now, the term Middle East itself, as Shahriar hinted, is a fairly recent expression. And it tends to date back to the European and the British Imperial policies in the late eighteenth and nineteenth centuries. It also has some associations with the impact of early archaeology in the Near East, and the Mediterranean regions and the work of Orientalists. But from an economic and political perspective, the areas west of India and south of Russia and all Mesopotamia were called the Middle East in the nineteenth century and, also, the southeast of the Mediterranean Sea region including Lebanon, Syria, Palestine, and Egypt. So it was a concept which was borne out of the so-called geopolitical concerns in the buffer zone between the Russian and British superpower politics in the nineteenth century. In the American public

opinion, the Middle East gained both a presence and an importance since the Second World War. In this regard we can refer to a number of issues, which may all be truisms for the audience here.

First, the active presence of the U.S. and the gradual replacing of the old British international interests and the strategic importance of the region which coincide with the beginning of the Cold War and the forging of several strategic treaties such as NATO in Europe and CENTO in Southwest Asia and the Middle East.

The second point is that a number of political tensions brought the Middle East to the level of public discourse in the U.S. since the Second World War, beginning with the Arab/Israeli conflict from 1948 on; then the rise of the popular nationalist movements, for example, from the campaign to nationalize the oil industry in Iran under Mosaddeq in the 1950s to Egypt's Nasser and nationalization of the Suez Canal and the crisis of 1956.

And, more to the recent periods, the Iranian revolution of 1979 was a major news maker which brought forth concern about the Middle East to the forefront of political conversations, followed by the Iran/Iraq War of the 1980s, followed by Iraq's invasion of Kuwait and the Gulf War, to the present engagement in Iraq.

And the third point which brought the whole Middle East to the forefront, as Shahriar mentioned, is oil. Moreover, several additional factors can also be mentioned. It may be somewhat misleading from an historical perspective to just have a combined talk about Middle Eastern studies. The region is very diverse, and it can mislead us to think that we are talking about one monolithic entity called the Middle East, because we are not. There exist significant geographic diversities from highlands to deserts, and these geographic diversities very often translate to different lifestyles and different social formations.

There are a tremendous amount of ethnic and linguistic diversities from Arabs, Turks, Persians, and so forth, which, needless to say, bring in significant cultural differentiations.

Now, apart from these, there are also some common features, some common traits, and some common characteristics which, in a sense, justify the field of "Middle Eastern Studies." One such factor, and I will just mention a few, has been a natural shortage of water, a scarcity of water, which has been a geographical constant, so to speak. In fact, as we enter the twenty-first century, many people are warning us that a good deal of future crises could be about disputes over water. Apart from some exceptional zones in the Middle East, such as the southern regions of the Caspian Sea or the Anatolian highlands, by and large, we are faced with a shortage of water on the ground. The water exists, but it is mostly subterranean, yet the ground is arid. As a result, historically you have the development of highly elaborate and sophisticated irrigation systems throughout the Middle East which, in turn, influenced how states were formed historically in these societies.

Another factor which has been a continuous factor, and this time not a natural factor but social, is the existence of a kind of tribal or nomadic social structure. This factor also marks the social landscape of twentieth century Middle East.

I mean, we do not just have to be talking about the medieval period, all the way from the eighteenth and nineteenth centuries to the present, we have tribal boundaries in good parts of the Middle East. This perhaps somehow explains the importance and the role of the extended families in the politics and the economics of some of the countries in the region that we are dealing with.

When you look at, for example, the economies of Saudi Arabia or Kuwait, they seem to be run like a family business. Or, another example, the political formation in Lebanon, although it is not predominantly a tribal society, its political formation is very much formed around old families.

In addition there is another reason why we can justify talking about the Middle East, and that is the religious factor. We have a continuous presence of Islam throughout the past fifteen centuries. Indeed we have other communities with other faiths as well, but the overall impact of the Islamic culture, mores and values is paramount.

We can also note that the making of the Islamic civilization was not entirely based on Islamic theology or abstract religious teachings. There were several platforms of meaning and practice, which actually contributed to the making of the Islamic civilization such as law and commerce, not to mention philosophy and literature and the arts. As we come closer to our own times in the case of a good deal of the Arab world, as well as Turkey, another common factor which justifies a discussion of the Middle East, is the Ottoman background. Many regions of the Middle East west of Iran and east of Egypt were, for several centuries, under Ottoman rule. Prior to its end in 1923, the Ottoman state maintained close to six centuries of continued political administration and economic practice; and many of the old Ottoman institutions left their imprint on the societies under their administration. For example, the municipality system in Lebanon or in Greece, seem very much to be remnants of the Ottoman administrative system, which regulated how private transactions and registrations were handled, such as registration of marriage, birth, death, and various contracts. So the Ottoman background is a factor.

Now, in the nineteenth and twentieth centuries we have a new set of factors appearing in the Middle East. The first and foremost is the encounter with the West, which for a variety of reasons and in a variety of fields, is still problematic.

On the one hand, we have sustained measures of reform in the Middle East from, at least, the nineteenth century. Yet, on the other hand, there seems to be a track record of uneven development, if not failure, in most cases. Reforms were initiated from above, such as large reform programs in the Ottoman Empire under the rubric of the Tanzimat. And in the public

opinion, these reforms appeared as reforms from above and very much associated with the state, and secondly in popular view they were being associated with either the religious minorities or with foreign interests. Thus the political opposition to the state gradually began to develop and created a counter-discourse to the whole strategy of reforms. For instance, when you look at the Islamic response in the late nineteenth century to the programs for modern reforms in the Middle East, be it in Egypt, in Turkey, or in Iran, one theme which they had in common was a new language of xenophobia and, blaming all their ills on either their own states or on a kind of unholy alliance between these states and foreign interests.

Hence, what is often missing is a dynamic and genuine political language and analysis offered by Islamic intellectual institutions. Instead, by the end of the nineteenth century, there developed a tendency to automatically reject such efforts. In fact when we examine this situation, we find certain similarities with recent fundamentalist reactions to dealing with the West. Furthermore, it can perhaps be noted that as such fundamentalism, I mean, fundamentalism is not a new idea. You always had fundamentalist voices or trends which wanted to be more religious, adhering to certain kind of intellectual and at times political movements in order to “return” to certain fundamentals. However, what distinguishes the late nineteenth or the twentieth century fundamentalists from their medieval counterparts is the former’s preoccupation with politics and yet their disregard for theoretical, philosophical, theological, or mystical concerns as was often the case with medieval fundamentalisms. Modern day fundamentalisms have been preoccupied by a sense of xenophobia and by certain reactive ideas and language. Now, at the beginning of the twentieth century there was a synthesis which was in its own right remarkable.

Perhaps I should make this argument—especially since I am speaking at a law school, that by the end of nineteenth century in all the Middle East the problem in the way of reform was arbitrary rule. For instance the age of concessions had tremendously disillusioned the private sector in the Middle East.

The problem was not that the middle class was not there or the rich were not there. There were many active merchants in the Middle East who were doing international trade, for example between Lebanon and Europe, or between Iran and India.

A major difference with Europe, however, was that in the Middle East the merchants seldom felt protected by their states. The granting of Concessions was done in an arbitrary manner. The states in the Middle East were not, in a sense, *protectionist* of their own middle classes. Therefore the entrepreneurial classes in the Middle East did not bring themselves to heavily invest in the economy.

For example, no capitalist in the Ottoman Empire was foolish enough to tie down his capital in heavy industry, so the net result was that most of the investments were made in service sector: in import/export, in money lend-

ing, and so forth, and not in heavy industry because of the arbitrary rule. Now, by the beginning of the twentieth century, the constitutional synthesis was understood to be a solution for the problem of arbitrary rule and a new form of legislation. Here a faction from within the Islamic institutions also joined in; the so-called pro Constitutionalist Ulama or the religious high clerics.

But the tradition of modern civil codes that developed in the Middle East, beginning with the late 1920s when modern nation states were formed, there was an interesting synthesis between the new "social contract" style concepts coming from Europe on the one hand and themes which were not exclusively drawn from the *Shar'ia* but also from native traditions and customs (*Urf*) on the other.

For example when you look at the corpus of early legislations in the Middle East from Egypt, Turkey, and Iran, which is my own field of research, we can note an impressive body of early legal texts, which show an interesting synthesis between these two legal traditions. And there was no fear among those people who drafted these laws that since they were borrowing from Europe they were compromising their legal system. The emergence of nation states in the Middle East provided a real opportunity for this kind of synthesis. However, in order to expedite modernization, modern states often resorted to autocratic forms of political practice, and thus violated Constitutional values and procedures.

So, again, the same kind of late nineteenth century style alienation between popular interests and state affairs began to reappear in the political culture of the Middle East: i.e. the practice of opening two separate accounts in political culture and political psychology, one for the affairs of the state, and another for the affairs of the people.

In the post Second World War period these attitudes were continued and intensified—in a sense, because many of the economies in the Arab world, or Iran for that matter, now experienced the influx of petro-Dollar, and so they rushed to expedite modernization projects. These new and well-funded projects attracted some rural population from the countryside to urban centers, and resulted in a sort of cultural gap or alienation, and gradually created concerns about identity. During 1960s and 1970s this trend grew significantly.

In fact many of the political events of the late twentieth century in the Middle East owed much of their aspirations and their language to that kind of uneven development which I just mentioned. The point is not that modernization did not take place; it did take place, but it was uneven. Modernization did not develop through social institutions to the extent that it ought to have, again because of the problems caused by autocracy, uneven development, and political corruption. And all along, the West was a kind of benevolent observer and maintained an unbalanced political relationship to the Middle Eastern emerging economies. Hence the kind of resentment towards the West that one finds in the language of political militancy in the late 20th century, stem from the problematic nature of Western foreign

century, stem from the problematic nature of Western foreign policies rather than from Western technology or commerce as such.

Finally, we can note that presently there is a great deal of interest and potential in the private sector in the Middle East to increase trade and business with the West. But the challenge is how to develop or forge a working agenda in order to overcome political mistrust and frustrations on the one hand, and focus on business, trade, and private interests on the other. And the frustration is not only that the West supports economic dependency or is friendly with governments which are diametrically in opposition to Western political values and principles. Private sector in the Middle East is also equally uncertain and anxious about the economic policies at home. So an average Middle Eastern businessman has got to really diversify his eggs into many baskets, and that is how it has been with regard to the economic psychology of the Middle East.

I think I better leave the rest of the discussion to people who have more current knowledge than I have. Thank you very much I will be happy to take your questions on this.

MR. AFSHAR: Thank you very much, Dr. Gheissari. I insisted that you participate because I was not going to have a whole lot of legal mumbo-jumbo talk for the only nonlawyer speaker types on the panel. I wanted to know more about the cultural history of that country. And everything that Dr. Gheissari said is true. And I think business people need to know it and have that knowledge when they interact with people from that part of the world.

In one conference that I that I participated in in London, an oil service company got up and said, "You know, we're negotiating this contract with the Iranians," of course. "It's taking six months, a year. We've been over, back, forth, and nothing is moving. Why?" Because time means something completely different to people from the Middle East than to Westerners. It really has no value to them. They are just sitting there, you know?

I mean, first they need to trust you. They need to interact with you. They need to understand something about you as a person. They need to understand your culture. They need to feel comfortable. They are not going to just shake hands the first time you walk in on a million dollar deal or even far less. So apart from all the legal issues that you must be familiar with, understanding the culture of the person you are dealing with in the Middle East is probably even more important, because you are not going to get too advanced in the discussions on business transactions if you do not have any respect or trust with the individual you are dealing with.

I completely failed as a moderator to frame a few things in the beginning, and that is my fault. We do have a reception, I think, or some refreshments at 7:00, so we wanted to keep all the speakers to about a 10- to 15-minute time frame, not that, Dr. Gheissari, you could not go longer. Everybody else has to stick to ten to fifteen minutes.

There was—also, I wanted to mention the wonderful handbook that John Donboli and Alidad worked on. I have been looking it over. It is fantastic. A lot of the events that—I wish we had something this good and this comprehensive and detailed. We usually did not. So this is a uniquely valuable tool.¹⁰ I can tell you because I get a lot of calls from attorneys asking me questions. Just today I got a call from some company in Seattle asking me the status of the sanctions on Iran, and this is a great reference tool because there is a lot of potentially misleading information out there. So a lot of work went into this, and I think it is a great resource.

We do want to be able to—if somebody has a burning question, you can ask the speaker. Otherwise, we can take it at the end; just kind of save up any questions you may have. We will have a visual video available online.¹¹ And I know the school is recording this on VHS. Where it will be available I do not know. But if somebody missed it and they want to participate, here is their chance.

The next speaker is Professor Aceves. He is a professor right here at California Western School of Law. He will be speaking about the rule of law as it applies to the Middle East and an overview of transnational law litigation.

Please help me welcome Professor Aceves.

MR. ACEVES: Thank you. First of all, good evening. Thank you all for attending. I want to, first of all, thank in particular the organizers of this panel. I think they did a wonderful job in putting together such an interesting interdisciplinary approach to this issue.

I think there is no question that to do any type of business transaction, to understand the law, one has to understand the history and the culture in a variety of settings, and we are going to see some very different presentations throughout the panel this evening. And so transitioning from a very interesting and important historical and cultural description of the Middle East, I am looking at a very different issue, which is the issue of potential liability issues that certain corporations might face when they do business abroad.

And so I am going to examine two issues of potential liability. First, what happens if a corporation enters into a contract or a joint venture with a foreign government that subsequently commits a violation of international law? Would the U.S. corporation be subject to civil liability even if it did not actively participate in the underlying violations? Second, what happens if an individual is injured abroad while working on behalf of a foreign government? Can a U.S. citizen, for example, sue a foreign government for those violations that occurred in that foreign country here? Can they sue here in the United States?

10. Alidad Vakili & John Hooman Donboli, *Doing Business in the Middle East: A Guide for U.S. Companies*, for more information please contact the authors at avakili@fisherthurber.com or JDonboli@gordonrees.com.

11. For more information, please write to info@iraniantrade.org.

Now, of course, these issues are not unique to the Middle East, but it does seem that there are a couple of good reasons why they may be particularly relevant to our discussion today. One is, unfortunately, the large number of illiteral regimes that exist in the Middle East, and I define an illiteral regime as a government that has an absence of effective democratic institutions, has a lack of transparency within the government, a lack of universal suffrage in terms of elections.

And then there is a second reason I think, unfortunately, why these issues may be relevant to the Middle East, and that is due to the increasing threat of terrorism. In the past six months alone, there have been bombings in Israel, in Turkey, in Pakistan, in Saudi Arabia, and Iraq. There was an article in the *Los Angeles Times* today that actually had a graphic that I was hoping to bring today, but it did not work out.¹² It shows out of the past, I think, six months, six of the twelve bombings that were illustrated there were in the Middle East.

And specifically I am going to talk about the use of transnational law litigation; that is, the opportunity for individuals who have suffered some type of an injury abroad to file a lawsuit in the United States seeking compensation for those injuries. And this is a trend that is increased significantly over the past several years, and we will talk a little bit about that.

In terms of my presentation, what I will first do is talk about four different statutory provisions to provide Federal courts the jurisdiction to hear these types of cases, and then I am going to highlight three different cases, the ground rules of transnational law litigation.

First of all is what some people refer to as the granddaddy of all these statutes, the Alien Tort Claims Act. The Alien Tort Claims Act is codified in 28 U.S.C. § 1350. And it provides that District Courts shall have original jurisdiction for a civil action by an alien for a tort only committed in violation of the Law of Nations or a treaty of the United States. There are a couple of things I wanted to highlight about this particular statute. First off, it was adopted back in 1789, over 200 years ago, as part of the First Judiciary Act. And there is some discussion in terms of what Congress was thinking over 200 years ago, the idea that they would open up U.S. courts to hear cases involving violations of international law that only aliens could bring into U.S. courts. Now, some scholars have argued that the Alien Tort Claims Act provides both subject matter, jurisdiction, and a cause of action in the U.S. courts. Other commentators have argued that it only provides a cause of action—I am sorry—it only provides jurisdictional grant and you have to look for another Federal statute in order to establish the cause of action. I think most courts have accepted the notion that the Alien Tort Claims Act provides both jurisdiction and a cause of action for violations of international law.

12. Sebastian Rotella & Richard C. Paddock, *Experts See Major Shift in Al Qaeda's Strategy*, L.A. TIMES, Nov. 19, 2003, at A1.

So what are the key elements of this statute? First of all, it can only be an alien; that is, a foreign national only has the right to pursue claims under the Alien Tort Claims Act. Second, they have to allege some type of a tort and, third, that tort has to raise a violation of international law. Now, international law can either refer to treaties that the United States has signed and ratified or to customary international law. The seminal decision on the Alien Tort Claims Act is the Second Circuit's 1980 opinion in *Filartiga v. Pena-Irala*.¹³ And it is interesting to note that while the statute was adopted over 220 years ago, it took almost that amount of time before a court finally accepted the notion that Federal courts were accessible to victims of international law violations and they could bring those civil lawsuits here to the United States, even in the absence of any type of a nexus between the underlying violation and the United States.

So there have been a significant number of these lawsuits filed since 1980, and that was when the Second Circuit issued its decision in that particular case. And the lawsuits have come from literally every part of the world, from Argentina to Zimbabwe. And they list a number of international law violations from torture to genocide, war crimes, and crimes against humanity.

Now, while the Alien Tort Claims Act has received most of the notoriety and publicity, there are several other Federal statutes that are also helpful or important in this field. Another statute is the Torture Victim Protection Act. That is also codified at 28 U.S.C. § 1350, and it provides a cause of action for victims of torture or extra judicial killing.

Now, comparing this Torture Victim Protection Act with the Alien Tort Claims Act, there are a couple of differences. To begin with, the Torture Victim Protection Act would allow U.S. citizens to also file civil lawsuits in U.S. courts. So the TVPA, the Torture Victim Protection Act, is not limited to foreign nationals.

In addition, the Torture Victim Protection Act has a statute of limitations. You have to bring the lawsuit within ten years of when the underlying claim began. There are some technical issues in terms of the fact that the Torture Victim Protection Act only provides a cause of action. It is not a jurisdictional grant.

Now, comparing—another point of comparison is the Torture Victim Protection Act was adopted by Congress in 1992. And in the legislative history, it indicates that Congress intended to reaffirm the Alien Tort Claims Act, and this new statute, the Torture Victim Protection Act, was not intended to override or supersede the earlier Alien Tort Claims Act.

The third statute I wanted to talk about is the Foreign Sovereign Immunities Act, which is codified at 28 U.S.C. § 1602. Generally, foreign governments are absolutely immune from civil liability in the United States. That was formed and codified in 1976 in the Foreign Sovereign Immunities

13. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

Act. But in addition to that apparent absolute immunity, there is also an exception—a set of exceptions that were codified in the FSIA. For example, if a foreign government commits a tortuous act in the United States, an individual could sue that foreign government.

If the foreign government is engaged in certain commercial activities abroad, an individual could sue that foreign government. If the foreign government has waived its immunity, again, it could bring a lawsuit under the Foreign Sovereign Immunities Act. And, in fact, if you are suing a foreign government, the FSIA is the only mechanism upon which you can go after them in the United States.

In 1996, Congress adopted an amendment to the Foreign Sovereign Immunities Act in cases of state-sponsored terrorism. That is, Congress felt that there was a need to provide a mechanism for individuals to be able to sue foreign governments when they have sponsored terrorism anywhere in the world. Now, they have activated a number of restrictions to that exemption. One, terrorism is defined as acts of torture, extra judicial killing, high-jacking, hostage taking, or the provision of material support for any of these acts. In order to sue a foreign government, first, that government must have been designated a state sponsor of terrorism by the United States State Department. And there are only a handful of countries that have ever received that designation.

So you are significantly limited. They cannot sue any foreign government. They have to be identified by the State Department previously as a state sponsor of terrorism. The foreign state must be provided with a reasonable opportunity to arbitrate the case. Only U.S. nationals can bring these lawsuits, and the lawsuit must be filed within ten years of the initial claim. Now, while several lawsuits were filed under this exception to the Foreign Sovereign Immunities Act, the problem that many of the individuals are facing is that they were never able to collect on their judgments. As I will talk about in a few minutes, there were lawsuits filed against Cuba, against Iran, and against Libya. But for a variety of reasons having to do with the fact that most of those assets were frozen in the United States, the plaintiffs were unable to collect those judgments.

And in response to that, in 2000, Congress adopted legislation that sought to open up the coffer doors for a certain group of plaintiffs. The Victims of Trafficking and Violence Protection Act allowed victorious plaintiffs in a handful of cases to actually collect.¹⁴

And it is an interesting piece of legislation because it was very explicit in that it indicated only a specific number of individual plaintiffs—that it actually received judgments by a court were able to actively collect damages in those cases. And how did they get them? Actually from the U.S. Treasury where the United States provided those individual plaintiffs with the com-

14. See 22 U.S.C. § 7101; *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir. 2002).

pensatory damages that they were awarded by the court, the idea being that the U.S. Government would then seek to reclaim that money from the government in the future when they reestablished diplomatic relations with Cuba, for example, or with the Iranian government. And so that—since that legislation was adopted, well over \$200 million has actually been distributed by the United States to a handful of those plaintiffs in those cases. There have been significant changes since 2000 in that Congress has adopted additional legislation that has sought to further open up opportunities for victims in these cases to file these types of lawsuits. And then, finally, I will briefly say that there was another statute adopted in 1991. The Anti-terrorism Act of 1991 allowed individuals to file civil lawsuits in the U.S. courts in cases of international terrorism.¹⁵ And we have seen a couple of these cases having been filed.

Now, in terms of cases involving transnational law litigation, as I mentioned, a big case was in 1980, the *Filartiga* case out of the Second Circuit.¹⁶ And since then, we have seen more of these lawsuits being filed. And I think that the increasing number of lawsuits can be explained in several ways. One is simply globalization. More opportunities are being made available for businesses to go abroad and to take advantages of increasing and opening markets in other areas.

Second, the establishment of jurisdictional grants in the U.S. courts. I mentioned the Torture Victim Protection Act of 1992, the amendments to the Foreign Sovereign Immunities Act in 1996, 2000, and 2002. So there have been more opportunities made for individuals to file these lawsuits in the U.S. A third explanation is simply a greater awareness of transnational law litigation. As more of these lawsuits are filed, a greater awareness; people see \$200 million dispersed, they want to file additional lawsuits.

And then finally, unfortunately, terrorism. There has simply been an increasing number of terrorist incidents around the world that has given rise to a new group of plaintiffs, a new group of victims, that have sought some type of either financial compensation or some type of redress. There are oftentimes where they receive justice. Sometimes it has nothing to do with the money but simply the opportunity to file a lawsuit. So I want to talk about three examples of this litigation with respect to the Middle East. The first is *Saudi Arabia v. Nelson* which was a case that was ultimately decided by the U.S. Supreme Court in 1993.¹⁷ In this case, Scott Nelson in 1983 answered an advertisement for a systems engineer to go to Saudi Arabia and work at a hospital in Riyadh. He accepted the position and went to Saudi Arabia and began working there.

During his employment, he raised a number of concerns about safety at the hospital, according to the complaint. And in September of 1984, Nelson

15. See 18 U.S.C. § 2333.

16. *Filartiga*, 630 F.2d 876.

17. *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

was arrested and detained by Saudi police. During his detention, according to Nelson, he was tortured and detained for about three to four weeks. He was ultimately released in November of 1984. He immediately came back to the United States and subsequently filed a civil lawsuit based again on the Foreign Sovereign Immunities Act alleging acts of torture, arbitrary arrest, and arbitrary detention. The District Court originally dismissed the lawsuit holding that there was no exception to the Foreign Sovereign Immunities Act. The 11th Circuit Court of Appeals, though, reversed that decision, finding that while it was initially commercial activity that gave rise to Nelson answering the advertisement in the United States, that there was sufficient acts there to give rise to liability under the Foreign Sovereign Immunities Act.

Now, that one was appealed to the U.S. Supreme Court in 1993. The Supreme Court reversed the 11th Circuit's decision and held that the Foreign Sovereign Immunities Act did not provide jurisdiction in this particular case. Specifically, there was no commercial activity giving rise to an injury there. The actual activities that gave rise to the injuries were the torture and the arbitrary arrest and detention that occurred in Saudi Arabia, and the court held that those were not commercial activities.

The second case I want to talk about is *Flatow v. Islamic Republic of Iran*, and that case has gone through several iterations in the Federal courts. The decision I am going to highlight came out in 1998.¹⁸

The *Flatow* case arose in 15 when Alisa Flatow, who was a U.S. college student, was killed in a terrorist bombing in Israel. Her father subsequently brought a lawsuit in the United States based, in part, on the Foreign Sovereign Immunities Act against the Iranian government. The allegations were that the Iranian government helped fund one of the terrorist groups that had allegedly participated in the terrorist attack. Now, the Iranian government declined to participate in these proceedings, and a default was entered against them. And the Flatows subsequently tried to collect. And this is one of those cases where they had a judgment against the Iranian government for, I think, approximately \$240 million, but they were unable to collect because so many of the Iranian assets were frozen or otherwise unavailable in the United States.

As a result of that, Congress adopted legislation, as I mentioned, which was designed to open up the opportunities for the Flatow plaintiffs and a few other plaintiffs to actually collect on their judgments. And, in fact, the Flatows have been able to collect, I believe, about \$22 million from the U.S. government.

The third case is *Presbyterian Church of Sudan v. Talisman*,¹⁹ and I put that in there because I did want to provide at least one opportunity to talk

18. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. Mar. 11, 1998).

19. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 155 Oil & Gas Rep. 409 (S.D.N.Y. Mar. 19, 2003).

about the corporate liability cases. Recognizing that we do have a very broad definition of the Middle East, perhaps it then can be captured by that.

In 1998, Talisman Energy Corporation began operations in the Sudan. Talisman is the largest Canadian oil producer, and the Talisman Corporation entered into a joint venture with the Sudanese government. The Sudanese government was supposed to provide security for the oil production process. In November of 2001, a group of plaintiffs filed a civil lawsuit in Federal District Court for the Southern District of New York against Talisman alleging a number of violations of international law, including war crimes, genocide, ethnic cleansing, and slavery. And the allegations were based in part on the fact that the Sudanese government officials and the military were engaged in persecution against a group of individuals in the southern part of the country.

Not surprisingly in this case and, I think, in all the corporate liability cases, the defense filed a motion to dismiss claiming there was no subject matter of jurisdiction in Federal court.

In March of this year, the court denied the motion to dismiss holding that it did, in fact, have subject matter of jurisdiction in the case. The court held, first of all, that a corporation can be held liable for violation of international law. Talisman is not the first case or the first corporation that has been subject to this type of intentional liability. Unocal, for example, is currently in a heavily contested lawsuit out in the Central District of California.²⁰ There have been similar lawsuits filed against Royal Dutch,²¹ against Gap,²² against Chevron Texaco,²³ so that was not anything unique. Second, the court held that a corporation can also be held liable for conspiracy and aiding and abetting under international law. And that is really an interesting part of the decision, that no one was alleging in this particular case that Talisman officials had pulled the trigger in any of these cases. Rather, the allegations were that Talisman knew and benefited from the actions that were being perpetrated by the Sudanese government.

And the court held that, looking at international practice, there is a recognized claim under international law for aiding and abetting or conspiracy. And it is a fascinating opinion, because you get a chance to see the court records in the Nuremberg trials, the Xyklon-B cases, for example, in World War II, some of the case law from the international criminal tribunals with the former Yugoslavia or Rwanda, all recognizing notions of corporate liability or aiding and abetting standards for conspiracy.

20. Doe v. Unocal Corp., 248 F.3d 915 (9th Cir.2001), *reh'g en banc granted and opinion vacated by Doe v. Unocal Corp.*, 2003 WL 359787 (9th Cir.2003).

21. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 157 Oil & Gas Rep. 1, 31 Envtl. L. Rep. 20,166 (2d Cir. Sep. 14, 2000).

22. Aguinda v. Texaco, Inc., 303 F.3d 470, 157 Oil & Gas Rep. 33, 33 Envtl. L. Rep. 20,010 (2d Cir. Aug. 16, 2002).

23. Does I v. Gap, Inc., 2002 WL 1000068, RICO Bus. Disp. Guide 10,264 (D.N.Mar.I. May 10, 2002).

Third, the court held the plaintiffs had alleged viable claims under international law, slavery, war crimes, ethnic cleansing. And then, fourth, the court had a number of catch-all decisions. They held a *forum non conveniens*. It was not a viable justification for dismissing the lawsuit; that is, the court did not believe that there was any other jurisdiction that was better suited to hearing this case. Similarly, the court held that the political question doctrine should not be used to dismiss this type of a lawsuit. And those, I think, are consistent rulings, that we have seen a number of other corporate liability cases have declined to dismiss the lawsuits on *forum non-conveniens* grounds or political question grounds or ethnic state doctrine grounds.

I mentioned earlier that transnational law litigation was increasing in the U.S. courts, and I attributed this to a number of factors: Globalization, increasing jurisdictional grounds, a greater awareness of transnational law litigation, and terrorism. And so what is the future for transnational law litigation in general but, also, with respect to the Middle East? I think, on the one hand, there is no indication that globalization is slowing down. If anything, I think it is speeding up.

Similarly, it is unfortunate to say that there is no indication that terrorism is going to diminish in the near future. On the other hand, though, there have been a number of efforts to try to bring back transnational law litigation.

The Bush Administration has filed a number of *habeas* briefs in Federal court seeking to reduce the ability of the U.S. courts to hear Alien Tort Claims Act cases or Torture Victim Protection Act cases. With respect to the Foreign Sovereign Immunities Act, the Executive Branch has been very aggressive in trying to prevent the plaintiffs in those cases from collecting with respect to Iran or Cuba.

Accordingly, I think the companies that are interested in doing business in the Middle East or elsewhere must, at a minimum, be aware of these developments and they must be prepared to recognize the potential liability that they will face when they are engaged in foreign operations abroad. There is a case that is currently under cert review in the Supreme Court, *Alvarez-Machain v. United States*,²⁴ that deals with the Alien Tort Claims Act. And I believe the court is considering whether to grant cert in that case in early December.

I would imagine if the court does grant cert in that case with respect to the Alien Tort Claims Act litigation it is going to be a whole new ball game, because I do not think the court is particularly enamored with that type of litigation. So in a year from now, we are going to have a very different playing group with respect to ATCA litigation, but, again, it remains to be seen how that will implicate Foreign Sovereign Immunities Act cases or Torture Victim Protection Act cases. Thank you.

24. *U.S. v. Alvarez-Machain*, 124 S. Ct. 821 (2003).

MR. AFSHAR: Wow, so much info. My head is still spinning from all of those law sections. I know I would not have made it in law school because there is no way I could remember all those references. All of those points are tremendously important in not only rebuilding relations with Middle Eastern countries that we have lost a connection to, but they need to be addressed at some point, for example, even if U.S./Iran relations are to come back politically, there are these legal barriers that you have to overcome before even really—I know the Iranis are willing to try, and, in fact, they have.

Keep that in your mind, all of these issues, the general culture history things. We had a lot of assessments of the rule of law and the Torture Victims Act.

We are now going into the area of export controls, the Export Control Act and the regulations are really probably one of the most important areas as far as business is concerned.²⁵

You know, because people ask this politely and very diplomatically, well, we would like to send something to Iran, but maybe it could be made in Canada and it could be bought in China and assembled in Russia and it ends up in Iran.

As far as I can tell from a non-legal standpoint when I look at the Irani transaction regulations—and Alidad is going to talk about that—check with an attorney. And I always advise, you know, super simple medical—actually, I used the tongue depressor example. You know, I mean, if it is super basic, yes. If it is a CAT scan, no. I mean, you do not have to go to law school to know that. I mean, it is no.

Actually, Alidad, I think, is going to be talking about the Irani transaction regulations. When the policymakers make a speech and make a decision, it does not mean that all the implementers and the administrators in Washington have caught up.

So when Madeleine Albright makes a speech about an opening or goes back to Iran, by the time the OPEC attorneys have assembled or the Irani transaction regulations have been updated, it takes a period of time. And I kind of feel, you know, for those attorneys getting all those calls every day: “I’m selling something. I’m buying something.” I was speaking to the Senior Commercial Service Officers Forum in L.A. a few months ago, I said if there is one thing I would like to ask the administration to do is to hire more attorneys for OPEC, because you are going to get more people interested in this issue and they are going to need help. And six months to a year turnaround in review time is not going to be enough. Maybe there are a slew of attorneys here that OPEC could eventually hire. I do not know.

MR. AFSHAR: Alidad Vakili is a very good friend of mine from Fisher Thurber. He is actually our organizational counselor. He is not only a tremendous friend and confidant to have but could not be a better legal advisor to our organization.

25. 22 U.S.C. § 2795 *et seq.*

He will be talking about the U.S. Treasury regulations, OFAC, and the Iranian transaction regulations. And we have two more, Alidad and John, and we are going to get out of here promptly at 7:00. So please help me welcome Alidad Vakili.

MR. VAKILI: Thank you, Shahriar, for that nice introduction. Okay. So let us see. What did we learn? Time has no meaning. Negotiations can take forever. There is a sea of regulatory red tape to wade through if you raise concerns, you might be detained and tortured. So what else do you need to know about doing business in the Middle East? Well, two keywords come to mind: awareness and compliance. I am going to be talking briefly about the Office of Foreign Assets Control (“OFAC”) and providing an historical overview and discussing the OFAC regulations as they apply to sanctioned countries.

Your first step in approaching any business opportunity or venture in the Middle East should be OFAC and the Bureau of Industry and Security. If the country you are considering doing business with happens to be a sanctioned country, then these two agencies will be a critical first step. If you cannot get beyond that first step, there is no point going any farther and wasting your time because the penalties are severe and you certainly do not want to end up in a situation where you are violating OFAC or Export Administration Regulations only to have the Department of Justice knocking at your door.

So, what is OFAC? It is the Office of Foreign Assets Control. It is part of the Executive Office for Terrorist Financing and Financial Crimes, and it is an office of the U.S. Department of Treasury. It has quite a long history. The first country sanctioned by the U.S., surprisingly, was Great Britain. Prior to the War of 1812, the U.S. Treasury Department administered sanctions against Great Britain for harassing American soldiers. Since then, the U.S. has imposed economic and trade sanctions against a number of countries and geographic regions. OFAC’s mission is to administer and enforce economic and trade sanctions against targeted foreign countries, terrorism-sponsoring organizations, and international narcotics traffickers based on U.S. foreign policy and national security rules.

OFAC’s authority is derived from a number of sources—and I will mention just a few of them—a number of presidential directives or executive orders that have been issued from time-to-time, Congressional mandates, the Trading With the Enemy Act, the Emergency Economic Powers Act, the United Nations Participation Act, the Anti-Terrorism and Effective Death Penalty Act, the Foreign Narcotics Kingpin Designation Act, and a number of other regulations.

The current list of sanctioned countries in the Middle East includes: Iran, Iraq (still under sanctions which are due to be lifted), Liberia, Libya, Sudan, and Syria.²⁶ The OFAC regulations are not limited to countries but

26. See <http://www.ustreas.gov/offices/eotffc/ofac/sanctions/>.

have also been applied to organizations and individuals. Being designated as a SDN or blocked person makes you a pariah; the regulations forbid doing business with any organization or person designated as such.

So who is subject to the OFAC regulations? Basically U.S. citizens, permanent residents, companies in the U.S., foreign grantors of U.S. companies and individuals and entities located in the U.S. As you can see, the reach of the regulations is very broad. A foreigner traveling in the U.S. falls under the regulations and is required to abide by them. U.S. citizens and residents and certainly companies based here in the U.S. Additionally, U.S. companies that have subsidiaries based in other countries also fall under the regulations.

Many people are surprised to learn that U.S. citizens and permanent residents working abroad also fall under the regulations. This raises an important issue that should be taken into consideration. A question came up for me a few months ago where an individual, who is a U.S. citizen, lives and works in Kuwait where he manages a business there. The business has no presence in the U.S., does no business with the U.S. and is not owned by any U.S. shareholders. The issue was whether the U.S. Citizen is running afoul of the regulations if the Kuwaiti company engages in business with a sanctioned country. It would appear, given the breadth of the regulations that the U.S. Citizen working abroad falls under the regulations. Therefore, if he is going to be involved in any transactions between the company he works for and a sanctioned country, then he runs the risk of violating the regulations. The penalties can be quite severe and can include both criminal and civil claims.

I would now like to focus my discussion about one country in particular, Iran, and how the sanctions program applies to Iran. Before doing so, however, if you draw back for a moment and consider the sanctions program as it applies to the various sanctioned countries, there are a lot of similarities. So in talking about Iran, you can take a lot of what you learn from the various regulations in effect and apply it to a number of the other sanctioned countries. Of course, you will want to go to the specific regulations that govern the particular sanctioned country.²⁷ But the pictures, from the broad-brush strokes, are going to look similar.

The U.S. sanctions against Iran date back to after the Iranian Revolution of 1979. The first executive order (Executive Order 12613)²⁸ was issued by Reagan in 1987 and banned all imports from Iran. There was a subsequent executive order on March 15, 1995 which banned U.S. investment in Iran's energy sector,²⁹ and that continued³⁰ and got progressively more restrictive until, basically, as it currently stands.

27. *See id.*

28. Exec. Order No. 12613, 52 Fed. Reg. 41940 (Oct. 29, 1987).

29. Exec. Order No. 12957, 60 Fed. Reg. 14615 (Mar. 15, 1995).

30. *See* Exec. Order No. 12959, 60 Fed. Reg. 24757 (May 6, 1995); Exec. Order No. 13059, 62 Fed. Reg. 44531 (Aug. 19, 1997).

Currently, all U.S. trade with Iran is restricted unless it falls under a limited category of exceptions for which an OFAC license is required. Once you have settled on your business objective, in other words what type of product you want to export to Iran, then you will need to review the various regulations restricting trade with Iran. In particular, you will need to become familiar with the Iranian Transaction Regulations found at 31 C.F.R. 560. The Iranian Transaction Regulations implement the provisions of the laws and executive orders governing U.S. commerce with Iran.

The threshold question is whether the product or service you want to export to Iran is one that is allowed under the regulations. And then, most likely, you will need to apply for a license from OFAC.

Most of the inquiries I have seen have been from agricultural or medical companies with. OFAC administers an ag/med program that permits trade and exportation of agricultural or medical products provided they meet certain requirements. Even if the products or services fall under the ag/med program, obtaining OFAC approval is a must. You have to go through the whole regulatory process of submitting an application to OFAC. Once submitted, your application will be reviewed by an OFAC licensing officer, who will then make a determination whether or not a license will be issued to allow you to go forward with the transaction you have proposed.

Talking about what is involved in getting an OFAC license or applying for OFAC licenses, as Shahriar had mentioned briefly, it is quite a lengthy and time consuming process. We have had some applications that have taken six months to eight months to be processed. So if you are in your planning stage now, you should anticipate anywhere from four months to twelve months to get the OFAC application process completed.

The process application is relatively straightforward. Basically you need to submit an application for a license to OFAC and provide as much detail as you can regarding the proposed transaction, including an overview of the transaction, a description of the product or services you are planning on exporting, and who the parties to the transaction are, including you and your company, but also any other U.S. affiliates as well the company or companies you are planning on doing business with in Iran. So if you have manufacturers, vendors, distributors, or brokers, you are going to want to provide as much information as you can provide in order for OFAC to do their investigation and due diligence in making their licensing determination.

Right now with the current political landscape vis-à-vis U.S.-Iran trade relations, it is very difficult dealing with OFAC. OFAC is operating under a heightened level of scrutiny. Obviously, because of all of the issues going on recently and post 9-11, they have also ramped up their enforcement procedures.

If we were giving this discussion pre 9-11, it would be quite a different story. Prior to 9-11, a lot of attorneys working in this area were construing or interpreting the regulations much more liberally. Post 9-11 is a different world; there is a pervasive conservatism that is now being embraced. Attor-

neys are now reading those same regulations and interpreting them in a very conservative manner. So you do not want to veer from the rules very much, if at all, because, again, the political landscape being what it is in D.C., the powers that be are putting a lot of pressure on OFAC to make sure that they are up on the regulatory affairs and the enforcement of the regulations. This leads me back to commenting on the two key words of awareness and compliance.

I would like to turn now to a brief discussion of the Middle East. To begin with, you really have to understand the players. You have to understand the culture. You have to understand the history. Overlaying that, obviously, there is a lot of regulatory issues that you need to worry about. And it is critical that companies are aware of all of this before embarking on a business venture in the Middle East. And either as a company or someone interested in doing business here tonight or as an attorney representing a business here, it is critical to be aware of what regulations there are.

William Aceves had mentioned a number of other issues and other regulations and acts that come up as well. Anytime you are engaging in an international transaction, especially if it involves the Middle East, there is a lot of due diligence that needs to be done not only on the regulatory side, but, also due diligence on your prospective business partner. Other issues such as how are you going to communicate in a way that both parties with differing cultures can understand each other is vital to the success of the enterprise.

As Shahriar had mentioned, time is an elastic concept in the Middle East and business deals can take a long, long time. You have to understand the mindset of someone from the Middle East to really appreciate the challenges and differences that mindset raises. Nevertheless, there is a lot of tremendous business opportunity out there. As long as you are aware of the regulations and other legal issues and you are in compliance, there is no reason why you cannot do business with a sanctioned country.

There is a tremendous amount of opportunity out there. I was in Iran a little over a year ago. While I was there, I spent some time talking with a number of people from business owners and merchants to students. It seemed readily apparent that the Iranian people are very much interested in reengaging with the U.S.

If the sanctions are eased or lifted, there will be a tremendous amount of opportunity for U.S. businesses to engage in business in Iran. In the meantime, there are opportunities, but they need to be carefully considered and approached with an eye towards compliance with applicable regulations.

It is just a matter of time. Hopefully, as the relations between the U.S. and Iran improve there will be more opportunities to do business in Iran, as well as with other countries that are currently sanctioned.

Thank you.

MR. AFSHAR: Thank you, Alidad. We are coming to the end of our program with John Donboli. Also, I think there is several different ways you

can get some kind of a feedback from OFAC. You can try calling them. Good luck.

You can try going through—if you are a company, you can try going through your attorney and asking for the attorney to provide you with a legal opinion as to, you know, research the legal points and the attorney's opinion, you can or cannot conduct some business activity. You can do that. It does not mean it is going to, you know, get you all kind of assurances or guarantees.

You can ask for some kind of opinion letter or something from OFAC. It is not a formal request. It is not a formal license, but just some kind of legal assessment and send it over to OFAC and wait a few months for them to come back and say, you know what? We reject your assessment.

MR. VAKILI: It might take a year.

MR. AFSHAR: It might take a year. It is an advisory opinion. That is the word I was looking for, an advisory opinion. You cannot take it to the bank, but it is something. But then, of course, you have the formal request. And there is no OFAC form.

MR. VAKILI: No.

MR. AFSHAR: There is no OFAC form to fill out, just download. There is a BIS form for export.³¹ I would like to mention one thing that—I think it is from the State Department. No. It is from the INS. There is a visa lottery that is currently ongoing for about, I think, a month and a half or so. And I think Iranians here or any, really, persons here in the U.S. that are interested in applying for a visa, they can use the form online to link to it. It is on our website, right on the front page, www.iraniantrade.org. Right on the top corner you will see the link to the INS website. I mention that because, of course, we are interested in our community and how we can help. But following up more on what Alidad said about ties opening up, I personally have always been interested in trying to hire Iranians for, certainly, software design, engineering work in Iran. And some companies do that. Here we do it in India. Even for a website company if you need to have something done, you can hire a firm in India for ten, five bucks, however much it is, and they do all the work. And you can pay online and everything. They are all good.

But for all those Iranians in Iran that are joining the work force and have no place to go, I am personally interested in them. But apparently, from my understanding of the OFAC rules, you cannot hire Iranians at this point—I wish you could—even if the work is some benign software. And probably through a lot of different third, fourth, fifth countries, there are Iranians probably working for Microsoft. And, by the way, the bootleg industry in Iran, because there is no relationship, is tremendous.

31. For more information, visit the Bureau of Industry and Security, U.S. Dept. of Commerce website at <http://www.bxa.doc.gov/Licensing/facts4.htm>.

The way it works, if you go to a shop in Iran and say yeah, I want Windows 2000, they have a cover in the shop, and they go back and they copy it and give you the copy. So that is the business.

And that is the problem we have in China, as far as I can say, as far as intellectual property laws. It does not exist. It is an industry. So if relations are renewed, I do not know what all these young people are going to do. They all have shops across from universities. I have been there, and they all have copies of copies of copies and it will just be getting . . . well, anyway.

MR. AFSHAR: I would like to introduce our final speaker, John Donboli, an attorney with Gordon & Rees. He will be speaking about incorporating in the Middle East, taking advantage of Middle Eastern free trade zones, and the Foreign Corrupt Practices Act. Please help me welcome John Donboli.

MR. DONBOLI: Thank you. Good evening, everyone. Let me start by saying that as a practitioner in the international trade and export compliance areas of the law, my primary job is to make sure that my clients avoid the various landmines that exist out there in the legal field. And unfortunately in dealing in this field of law we often face moving landmines. One of the primary landmines that most people are not aware of is what is known as the Foreign Corrupt Practices Act. It is a Federal statute that is generally codified at 15 U.S.C. § 78. The Foreign Corrupt Practices Act regulates and prohibits corrupt payments to foreign government official in order to obtain or retain business.

Congress enacted the Foreign Corrupt Practices Act ("FCPA") in 1977, largely in response to disclosures in the early 1970s of questionable payments by large companies. In the Middle East, it is common that in order to help facilitate a deal or transaction, a payment may be help to further the business transaction. That is something that is prohibited by current U.S. law.

Being in law school and being in this environment, I cannot resist but to provide a hypothetical scenario to better explain how the Foreign Corrupt Practices operates. Say, for example, you work for a U.S. company and you are trying to get a business transaction facilitated in the Middle East. Now, also imagine that someone comes to you and says, "Well, I know Ali and Ali knows the cousin of a friend of the Royal Prince of Saudi Arabia" and with a quick payment of \$50,000 to Ali's consulting firm, you are guaranteed results because of Ali's relationship with the Prince. Imagine that you then say, "Fine, so long as it helps facilitate the transaction, but please do not inform me of the details because I do not want to get in trouble. I do not care where the money goes." Guess what? You have just stepped into a legal landmine. You have just violated the Foreign Corrupt Practices Act, which has both civil and criminal penalties.

The Foreign Corrupt Practices Act has not only the anti-bribery provision that I just explained, but it also has an accounting provision commonly referred to as the "books and records" provision. This provision requires

companies to keep accurate books and records of all payments that help facilitate business transactions when dealing with foreign entities. Accurate record keeping is a must; especially when doing business in the Middle East. The Foreign Corrupt Practices Act also requires internal audits to ensure that companies have adequate compliance procedures in place so that auditors and other oversight mechanisms are in place to ensure compliance with the Act.

There is one exception, however, that is worth pointing out. The exception is for “grease” or “facilitating” payments, which are defined as basic payments to push along administrative tasks such as obtaining permits in a foreign jurisdiction. Such payments are not prohibited by the Foreign Corrupt Practices Act.

The other topic I wanted to touch on this evening is contracting with the Federal government to provide products and services to the Middle East. A big hot topic now is the reconstruction of Iraq. I have included several materials toward the back of tonight’s handout on this topic. One is entitled “Doing Business in Iraq,” which was compiled by the Commerce Department. This area of the law is changing so rapidly that I actually had to reprint the materials because of late changes by the Coalition Provisional Authority to various Iraqi reconstruction issues. The Coalition Provisional Authority is rapidly making changes in that arena; however, if you are interested in doing business in the Middle East, please examine the Department of Commerce website³² for further guidance and consult with an attorney that is well versed in this area of the law.

Thank you.

MR. AFSHAR: I think since the hour is late, if you have any questions for our panelists, this is a good chance to ask.

SPECTATOR: I guess a lot of us who come from Iraq in some sense would like to know which facets to go through to promote lobbying or any kind of legislative action, whether it be in D.C. or with organizations of policy making. So, you know, what kind of experience do you have from D.C. or with your trade association with OFAC?

MR. AFSHAR: Lots of trench warfare experience. I will not take the whole group’s time talking too much about that. But when I started the association in 1997, I do not think I had to get arrested to get attention on this issue. There was no interest whatsoever in opening up ties with Iran.

Relations were bad. Khatami was the new president. But one thing I learned when I was giving a talk to Conoco, an oil company in Houston, about grassroots lobbying, about how to get organized, is that there is nothing more radical than grassroots lobbying. All the lobbyists in Washington are all friends and there is lots of government interest in Fortune 100 companies in Washington that we used to work with often. Important resources. But an individual going to their congressman asking for some review, some

32. The U.S. Department of Commerce website can be found at www.doc.gov.

opening, if it makes sense in their political best interest, that is something that is going to have a lot of impact. It is the most engaging, compelling, productive lobbying that there is, the grassroots individuals.

Something that I think Mr. Aceves mentioned about the Torture Victims Protection Act, all of those acts were quickly passed because there were individuals that had lost. They had taken pictures of, their lost family members. They go to members of Congress and say, "Look. I've lost my son. Pass this bill." There was nothing you could say to that. It had to go through and it will go through. All of those types of bills are politically driven, but they are driven by grassroots movements, by individuals. They are going to get tremendous political response and there is always going to be a case. And I am happy to talk with you later about that.

SPECTATOR: What about harnessing, I guess, the labor potential out there? Obviously, you cannot send high tech finished products and so on and so on and so forth. Like 70 percent of the population in Iran is under the age of 30. What about building something there and then bringing it back here? We do it in Indochina and all those other places, so why not there?

MR. AFSHAR: Well, I think the politicians—what is happening in Iran, as everyone knows, is that the baby boom generation in Iran is changing the socioeconomic environment in Iran. It is changing the policies. Look at all the city council people being voted in, in Iran, and all the reformed parliament. They are moving forward.

It is a little bubble, just like it is in the U.S. with the baby boom generation, moving through the U.S. time line in Iran. There is this boom going through, and the country is trying to keep up. They are trying to respond to the enormous input and response that they are having in dealing with the young population. As far as what can you do between the U.S. and Iran dealing with that youth market? It is a political question. Right now, the whole world is distracted with Afghanistan and Iraq. Politically, even on a lobbying level, there is very little attention that Iran will get apart from its engagement in nuclear power plant development.

There is no grassroots platform at this point in time until the Iraq question is answered. Until the Iraq reconstruction is at some degree of stability then we can go back and talk to Iran: Okay, how do we build bridges with Iran again?

Right now, all that is going on is a lot of arts and cultural exchange between the U.S. and Iran. It is exciting. And New York is having a series of events on Irani arts and culture. Here, even in San Diego, there are occasional Irani movies by young people. That is a tremendous insight into that world. And the best connection, the best anything young people can do to connect the U.S. and Iran is really building those human bridges, which starts with art, with culture, with academics, with maybe professors going back and forth. I get calls from students all over the world doing studies on Iran. They pick Iran as their topic of some master's or thesis study that they are doing, and they want to study the business environment and they ask

these questions. So I would be happy to talk to the Irani question. I do not want to bias. Most of the panel is Iranian, but we wanted to keep the panel as diverse as we could, but I will be happy to talk with you later about that, too.

SPECTATOR: I assume back around 1980 there was a lot of expropriation of U.S. energy companies. Is that sector ever going to open up again?

MR. AFSHAR: The sector or do you mean with a country?

SPECTATOR: Oil and gas, is that going to be opened up?

MR. AFSHAR: You mean are the oil and gas companies interested in going back to Middle Eastern countries where their assets were nationalized or otherwise taken over?

SPECTATOR: Yeah.

MR. AFSHAR: I will ask a legal question. I do not know if the attorneys have any opinions, but a lot of the people I was working with in Washington were oil and gas companies, Exxon, Mobil, Halliburton, Chevron, Conoco, Phillips, and these guys were very interested in Iran and the Middle East.

And, for example, they had solar turbine engines in Iran that, once they left, basically were not maintained anymore. So there is an interest in going back and maintaining with Iran.

Look, as far as Iran is concerned—I do not know about the rest of the Middle East—they do want them back. And many of the Irani officials that I have spoken with, they do have an interest in using American products or American ingenuity more. Maybe it is their way of building political bridges. That is the way it was played with Conoco, which triggered the sanctions back in 1996 or 5 or something.

The Iranis gave an oil contract to Conoco, and that triggered President Clinton passing the executive order that banned all trade with Iran. And that \$500 million contract was nixed, and that was the end of it. So there is interest in going back.

SPECTATOR: Has the Iranian government said anything about compensating the government for that?

MR. AFSHAR: I certainly cannot speak for them. But from all the contact that I have had, they have always been open to discussing the issue. What gets on the table as far as negotiations, who knows.

Things like Professor Aceves talked about, the Torture Victims judgments and the \$200 million judgments against the government in Iran. Well, I do not think the government in Iran will come back to the U.S. and open an embassy, when there are all these judgments. I mean, those are issues.

Frozen assets, I read an Iranian article in Iran where it said most of those issues were balanced. There is not some big bank account sitting in a U.S. bank with a hundred billion dollars in Iranian assets. There were other give and takes that were reconciled, according to the Irani officials. So anymore questions?

Thank you so much for coming. Please stay for the reception.

