



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 21, 2011

The Honorable Ileana Ros-Lehtinen
Chairman
Committee on Foreign Affairs
United States House of Representatives
Washington, D.C. 20515

Dear Madam Chairman:

This letter presents the views of the Department of Justice on H.R. 2829, the “United Nations Transparency, Accountability, and Reform Act of 2011.” We have numerous constitutional concerns, set forth below.

1. Conduct of diplomacy: Directing the “policy” or the “voice”/“vote” of the United States in international negotiations

Numerous provisions in H.R. 2829 would interfere with the President’s conduct of diplomacy by purporting to declare the “policy” of the United States, or by purporting to direct United States diplomats to use their “voice” or “vote” to advance certain positions, in international negotiations. The Constitution commits to the President the responsibility for formulating the position of the United States with respect to international bodies. *See* Memorandum for Joan E. Donoghue, Acting Legal Adviser, Department of State, from David J. Barron, Acting AAG/OLC, *Re: Constitutionality of Section 7054 of the Fiscal Year 2009 Department of State, Foreign Operations, and Related Programs Appropriations Act* at 8 (June 1, 2009) (“Constitutionality of Section 7054”) (“this Office has repeatedly objected on constitutional grounds to Congressional attempts to mandate the time, manner and content of diplomatic negotiations, including in the context of potential engagement with international fora” (internal quotation marks omitted)) (available at <http://www.justice.gov/olc/2009/section7054.pdf>). Accordingly, we have objected repeatedly to congressional attempts to dictate policy or to direct the votes of United States representatives to international bodies. The following provisions of the bill are objectionable upon these grounds:

- Subsection 102(a): “It is the policy of the United States to seek to shift the funding mechanism for the regular budget of the United Nations from an assessed to a voluntary basis.”¹
- Subsection 102(b): “The President shall direct the United States Permanent Representative to the United Nations to use the voice, vote, and influence of the United States at the United Nations to shift the funding mechanism for the regular budget of the United Nations to a voluntary basis, and to make it a priority to build support for such a transformational change among Member States, particularly key United Nations donors.”¹
- Subsection 206(b): “It is the policy of the United States — (1) to annually instruct the United Nations to return to the United States any surplus assessed contributions or other overpayments by the United States to any United Nations Entity; and (2) to use the voice and vote of the United States to press the United Nations to reform its [Tax Equalization Fund or “TEF”] assessment procedures to reduce the repeated discrepancies between TEF income and expenditures.”
- Section 301: “The President shall direct the United States Permanent Representative to the United Nations to use the voice, vote, and influence of the United States at the United Nations to ensure the United Nations publishes annually, including on a publicly searchable internet Web site, a list of all United Nations subsidiary bodies and their functions, budgets, staff, and contributions, both voluntary and assessed, sorted by donor.”
- Section 302: “The President shall direct the United States Permanent Representative to the United Nations to use the voice, vote, and influence of the

¹Both of the mandates in subsections 102(a) and 102(b) are amplified by the reporting requirements in section 104:

SEC. 104. REPORT ON UNITED NATIONS REFORM.

(a) IN GENERAL. — Not later than 180 days after the date of the enactment of this Act, and annually thereafter, the Secretary shall submit to the appropriate congressional committees a report on United Nations reform.

(b) CONTENTS. — The report required under subsection (a) shall describe — (1) progress toward the goal of shifting the funding for the United Nations Regular Budget to a voluntary basis as identified in section 102, and a detailed description of efforts and activities by United States diplomats and officials toward that end; (2) progress toward each of the policy goals identified in the prior sections of this title, and a detailed, goal-specific description of efforts and activities by United States diplomats and officials toward those ends

United States at the United Nations to implement a system for the required filing of individual annual financial disclosure forms by each employee of the United Nations and its specialized agencies, programs, and funds at the P-5 level and above, which shall be made available to the Office of Internal Oversight Services, to Member States, and to the public.”

- Section 303: “It is the policy of the United States to use the voice, vote, and influence of the United States at the United Nations to oppose any proposals on expansion of the Security Council if such expansion would — (1) diminish the influence of the United States on the Security Council; or (2) include veto rights for any new members of the Security Council.”
- Section 304: “The President shall direct the United States Permanent Representative to the United Nations to use the voice, vote, and influence of the United States at the United Nations to ensure that Member States may, upon request, have access to all reports and audits completed by the Board of External Auditors.”
- Section 305: “The President shall direct the United States Permanent Representative to the United Nations to use the voice, vote, and influence of the United States at the United Nations to ensure that the Secretary General exercises the right and duty of the Secretary General under section 20 of the Convention on the Privileges and Immunities of the United Nations to waive the immunity of any United Nations official in any case in which such immunity would impede the course of justice.”
- Section 306: “The President shall direct the United States Permanent Representative to the United Nations to use the voice, vote, and influence of the United States at the United Nations to work toward adoption by the General Assembly of — (1) a definition of terrorism that — (A) builds upon the recommendations of the December 2004 report of the High-Level Panel on Threats, Challenges, and Change; (B) includes as an essential component of such definition any action that is intended to cause death or serious bodily harm to civilians with the purpose of intimidating a population or compelling a government or an international organization to do, or abstain from doing, any act; and (C) does not propose a legal or moral equivalence between an action described in paragraph (1)(B) and measures taken by a government or international organization in self-defense against an action described in paragraph (1)(B); and (2) a comprehensive convention on terrorism that includes the definition described in paragraph (1).”
- Paragraph 309(b)(1): “The President shall direct the United States Permanent Representative to the United Nations to use the voice, vote, and influence of the

United States at the United Nations to seek the implementation of the recommendations contained in the report required under subsection (a)(1)(B).”

- Section 310: “The President shall direct the United States permanent representative to the United Nations to use the voice, vote, and influence of the United States at the United Nations to make every effort to — (1) ensure the issuance and implementation of a directive by the Secretary General or the Secretariat, as appropriate, that — (A) requires all employees of the United Nations and its specialized agencies to officially and publicly condemn anti-Semitic statements made at any session of the United Nations or its specialized agencies, or at any other session sponsored by the United Nations; (B) requires employees of the United Nations and its specialized agencies, programs, and funds to be subject to punitive action, including immediate dismissal, for making anti-Semitic statements or references; (C) proposes specific recommendations to the General Assembly for the establishment of mechanisms to hold accountable employees and officials of the United Nations and its specialized agencies, programs, and funds, or Member States, that make such anti-Semitic statements or references in any forum of the United Nations or of its specialized agencies; (D) continues to develop and implements education awareness programs about the Holocaust and anti-Semitism throughout the world, as part of an effort to combat intolerance and hatred; and (E) requires the Office of the United Nations High Commissioner for Human Rights (OHCHR) to develop programming and other measures that address anti-Semitism; (2) secure the adoption of a resolution by the General Assembly that establishes the mechanisms described in paragraph (1)(C); and (3) continue working toward further reduction of anti-Semitic language and anti-Israel resolutions in the United Nations and its specialized agencies, programs, and funds.”
- Section 311: “The President shall direct the United States Permanent Representative to the United Nations to use the voice, vote, and influence of the United States at the United Nations to expand the Western European and Others Group (WEOG) in the United Nations in Geneva to include Israel as a permanent member with full rights and privileges.”
- Section 402: “It is the policy of the United States to oppose the recognition of a Palestinian state by any United Nations Entity, or any upgrade, including but not limited to full membership or non-member-state observer status, in the status of the Palestinian observer mission at the United Nations, the Palestine Liberation Organization, the Palestinian Authority, or any other Palestinian administrative organization or governing entity, at any United Nations Entity, prior to the achievement of a final peace agreement negotiated between and agreed to by Israel and the Palestinians.”

- Subsection 403(a): “The President shall direct the United States Permanent Representative to the United Nations to use the voice, vote, and influence of the United States at the United Nations to advance the policy stated in section 402.”
- Section 602: “It is the policy of the United States to — (1) consider the Goldstone Report irredeemably biased and unworthy of further consideration or legitimacy; (2) strongly and unequivocally oppose any consideration, legitimization, or endorsement of the Goldstone Report, or any other measures stemming from this report, in multilateral fora; (3) lead a high-level diplomatic campaign in support of the revocation and repudiation, by the United Nations General Assembly, of the Goldstone Report and any United Nations resolutions stemming from the report, including: (A) United Nations General Assembly resolutions A/RES/64/10 and A/RES/64/254; and (B) United Nations Human Rights Council resolutions A-HRC-S-12-1, A/HRC/13/L.30, and A/HRC/16/L.31; and (4) lead a high-level diplomatic effort to encourage other responsible countries not to endorse, support, or legitimize the Goldstone Report or any other measures stemming from the report.”
- Subsection 702(b): “It shall be the policy of the United States to — (1) lead a high-level diplomatic effort to encourage other responsible countries — (A) not to participate in, support, legitimize, or fund any portion of the Durban III meeting, its preparatory or follow-on activities, or any other part of the Durban process, and (B) to withhold from their respective contributions to the regularly assessed biennial budget of the United Nations an amount that is equal to the percentage of such respective contributions that they determine would be or has been allocated by the United Nations for any part of the Durban III meeting or its preparatory or follow-on activities, or for any other part of the Durban process; (2) lead a high-level diplomatic effort to explore credible, alternative forums for combating racism, racial discrimination, xenophobia, and related intolerance.”
- Subsection 901(f): “The President shall direct the United States Permanent Representative to the IAEA to use the voice, vote, and influence of the United States at the IAEA to block the allocation of funds for any assistance provided by the IAEA through its Technical Cooperation Program to any country described in subsection (b).”
- Subparagraph 902(a)(1)(A): “The President shall direct the United States Permanent Representative to International Atomic Energy Agency (IAEA) to use the voice, vote, and influence of the United States at the IAEA to establish an Office of Compliance in the Secretariat of the IAEA.”
- Paragraph 902(a)(2): “The President shall direct the United States Permanent Representative to the IAEA to use the voice, vote, and influence of the United

States at the IAEA to ensure that the Committee on Safeguards and Verification established in 2005 shall develop and seek to put into force a workplan of concrete measures that will — (A) improve the ability of the IAEA to monitor and enforce compliance by Member States of the IAEA with the Nuclear Nonproliferation Treaty and the Statute of the International Atomic Energy Agency; and (B) enhance the ability of the IAEA, beyond the verification mechanisms and authorities contained in the Additional Protocol to the Safeguards Agreements between the IAEA and Member States of the IAEA, to detect with a high degree of confidence undeclared nuclear activities by a Member State.”

- Paragraph 902(a)(3): “(A) The President shall direct the United States Permanent Representative to the IAEA to use the voice, vote, and influence of the United States at the IAEA to ensure that a Member State of the IAEA that is under investigation for a breach of or noncompliance with its IAEA obligations or the purposes and principles of the Charter of the United Nations has its privileges suspended, including — (i) limiting its ability to vote on its case; (ii) being prevented from receiving any technical assistance; and (iii) being prevented from hosting meetings. (B) TERMINATION OF PENALTIES. — The penalties specified under subparagraph (A) shall be terminated when such investigation is concluded and such Member State is no longer in such breach or noncompliance.”
- Paragraph 902(a)(4): “The President shall direct the United States Permanent Representative to the IAEA to use the voice, vote, and influence of the United States at the IAEA to ensure that a Member State of the IAEA that is to be in breach of, in noncompliance with, or has withdrawn from the Nuclear Nonproliferation Treaty shall return to the IAEA all nuclear materials and technology received from the IAEA, any Member State of the IAEA, or any Member State of the Nuclear Nonproliferation Treaty.”
- Paragraph 902(b)(2): “The President shall direct the United States Permanent Representative to the IAEA to use the voice, vote, and influence of the United States at the IAEA to — (A) ensure that funds for safeguards inspections are prioritized for countries that have newly established nuclear programs or are initiating nuclear programs; and (B) block the allocation of funds for any other IAEA development, environmental, or nuclear science assistance or activity to a country — (i) the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979, section 620A of the Foreign Assistance Act of 1961, section 40 of the Arms Export Control Act, or other provision of law, is a government that has repeatedly provided support for acts of international terrorism and the government of which the Secretary has determined has not dismantled and surrendered its weapons of mass destruction programs under international verification; (ii) that is under

investigation for a breach of or noncompliance with its IAEA obligations or the purposes and principles of the Charter of the United Nations; or (iii) that is in violation of its IAEA obligations or the purposes and principles of the Charter of the United Nations.”

- Paragraph 902(b)(3): “The President shall direct the United States Permanent Representative to the IAEA to use the voice, vote, and influence of the United States at the IAEA to secure, as part of the regular budget presentation of the IAEA to Member States of the IAEA, a detailed breakdown by country of expenditures of the IAEA for safeguards inspections and nuclear security activities.”
- Paragraph 902(c)(1): “The President shall direct the United States Permanent Representative to the IAEA to use the voice, vote, and influence of the United States at the IAEA to block the membership on the Board of Governors of the IAEA for a Member State of the IAEA that has not signed and ratified the Additional Protocol and — (A) is under investigation for a breach of or noncompliance with its IAEA obligations or the purposes and principles of the Charter of the United Nations; or (B) that is in violation of its IAEA obligations or the purposes and principles of the Charter of the United Nations.”
- Subsection 902(d): “The President shall direct the United States Permanent to the IAEA to use the voice, vote, and influence of the United States at the IAEA to make every effort to ensure that the IAEA changes the policy regarding the Small Quantities Protocol in order to — (1) rescind and eliminate the Small Quantities Protocol; (2) require that any IAEA Member State that has previously signed a Small Quantities Protocol to sign, ratify, and implement the Additional Protocol, provide immediate access for IAEA inspectors to its nuclear-related facilities, and agree to the strongest inspections regime of its nuclear efforts; and (3) require that any IAEA Member State that does not comply with paragraph (2) to be ineligible to receive nuclear material, technology, equipment, or assistance from any IAEA Member State and subject to the penalties described in subsection (a)(3).”
- Paragraph 902(e)(1): “The President shall direct the United States Permanent Representative to the IAEA to use the voice, vote, and influence of the United States at the IAEA to make every effort to ensure the adoption of a resolution by the IAEA Board of Governors that, in addition to the restrictions already imposed, makes Iran ineligible to receive any nuclear material, technology, equipment, or assistance from any IAEA Member State and ineligible for any IAEA assistance not related to safeguards inspections or nuclear security until the IAEA Board of Governors determines that Iran — (A) is providing full access to IAEA inspectors to its nuclear-related facilities; (B) has fully implemented and is in compliance

with the Additional Protocol; and (C) has permanently ceased and dismantled all activities and programs related to nuclear-enrichment and reprocessing.”

- Paragraph 902(e)(2) provides that if an IAEA Member State is determined to have violated the prohibition on assistance to Iran described in paragraph (1) before the IAEA Board of Governors determines that Iran has satisfied other conditions described in paragraph (1)(A)-(C), “such Member State shall be subject to the penalties described in subsection (a)(3).” Paragraph 902(a)(3), in turn, is one of the provisions listed above, requiring the President is required to direct the United States Permanent Representative to the IAEA “to use the voice, vote, and influence” of the United States to ensure that particular penalties are imposed on breaching or noncompliant Member States.
- Section 1002 purports to set forth the “policy” of the United States to pursue various reforms of United Nations peacekeeping operations.
- Subparagraph 1003(a)(1)(A): “Except as provided in subparagraph (B), until the Secretary of State certifies that the requirements described in paragraph (2) have been satisfied, the President shall direct the United States Permanent Representative to the United Nations to use the voice, vote, and influence of the United States at the United Nations to oppose the creation of new, or expansion of existing, United Nations peacekeeping operations.”

To address these concerns, the provisions listed above should be made precatory, *e.g.*, by changing them to state the sense of Congress, or by changing “shall” to “should.”

2. Conduct of diplomacy: Defunding United States delegations to international bodies

Other provisions in H.R. 2829 would interfere with the President’s conduct of diplomacy by defunding United States delegations to international bodies or by not permitting certain kinds of participation in those bodies. While the Congress may refuse to fund an international body as a whole, it may not selectively defund a United States emissary and thereby prevent the President from making diplomatic contact with that body. We have raised similar objections in the past to provisions that would deny funding for a United States delegation to an international body. *See Constitutionality of Section 7054*, at 8 (objecting to provision that would provide that “[n]one of the funds made available under . . . this Act may be used to pay expenses for any United States delegation to any specialized agency, body, or commission of the United Nations if such commission is chaired or presided over by a country, the government of which the Secretary of State has determined, for purposes of section 6(j)(1) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)), supports international terrorism.”). The following provisions of the bill are objectionable upon these grounds:

- Paragraph 502(a)(3): “For each and every fiscal year subsequent to the effective date of this Act, until the Secretary of State submits to Congress a certification that the requirements described in subsection (b) have been satisfied . . . the United States shall not run for a seat on the United Nations Human Rights Council.”
- Section 703: “None of the funds made available in any provision of law may be used for United States participation in the Durban III meeting, its preparatory or follow-on activities, or any further part of the Durban process.”

We recommend changing the “shall” in paragraph 502(a)(3) to “should” and changing the “[none] . . . may” in section 703 to “[none] . . . should.”

3. Aggrandizements

Sections 202, 203, and 204 of the bill would condition United States assistance to the United Nations upon certain determinations by the Comptroller General. These provisions violate the anti-aggrandizement principle by empowering a legislative branch officer to direct the execution of an enacted law. “Once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly ‘by passing new legislation’ that complies with the bicameralism and presentment requirements of Article I of the Constitution.” *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) (noting the impermissible “executive nature” of certain budget-cutting authority conferred on the Comptroller General); *cf. INS v. Chadha*, 462 U.S. 919, 951-52 (1983) (explaining bicameralism and presentment restrictions on legislative power). Accordingly, we recommend deleting these provisions or revising them to provide for the performance of these functions by an executive branch officer instead of the Comptroller General.

Section 204 of the bill would contravene the anti-aggrandizement principle similarly by providing that “no funds made available for use as a United States Contribution to a United Nations Entity may be obligated or expended” unless the entity has provided the Comptroller General with a “Transparency Certification” and “Accountability Certification.” As defined by the bill, the “Transparency Certification” would be “an annual written affirmation by the head or authorized designee of a United Nations Entity to the Comptroller General and the Congress, including by providing the Comptroller General and the Congress, including by providing the Comptroller General, the Government Accountability Office, and the Congress, upon request, with full, complete and unfettered access to Oversight Information as defined in this title.” H.R. 2829, § 202(1). “Oversight Information” would be defined to include a wide range of documents, including “internally and externally commissioned audits, investigatory reports, program reviews, performance reports, and evaluations,” “financial statements, records, and billing systems,” and “other documentation relevant to the audit and investigative work of the Comptroller General of the United States with respect to United States contributions to the United Nations system.” H.R. 2829, § 202(2). The “Accountability Certification” would be

defined as “an annual, written affirmation by the head or authorized designee of a United Nations Entity to the Comptroller General of the United States that the Entity,” among other things, “provides the public with full, complete, and unfettered access to all relevant documentation relating to operations and activities, including budget and procurement activities,” “implements and upholds policies and procedures to protect whistleblowers,” requires certain financial disclosures from certain employees, “has established an effective ethics office,” and “has established a fully independent, autonomous, and effective internal oversight body.” H.R. 2829, § 202(3).

Section 204 would provide further that no funds made available for a United States contribution to a U.N. entity could be obligated or expended if the entity was “noncompliant with its Transparency Certification as described in section 203(b)(4)(C)” or with its “Accountability Certification as described in section 203(b)(5)(C).” The first cross-referenced provision, subparagraph 203(b)(4)(C), would provide that a U.N. entity “is deemed to be noncompliant with its Transparency Certification” if (1) the Comptroller General notifies certain congressional committees and U.N. officials that “information or assistance requested from a United Nations Entity by the Comptroller General pursuant to a Transparency Certification [has been], in the opinion of the Comptroller General, unreasonably refused or not provided in a timely manner,” and (2) the “information or assistance” sought by the Comptroller General “is not provided to the satisfaction of the Comptroller General within 90 days” of the notification. Similarly, the second cross-referenced provision, subparagraph 203(b)(5)(C), would provide that a U.N. entity “is deemed to be noncompliant with its Accountability Certification” if (1) the Comptroller General notifies certain congressional committees and U.N. officials that “a United Nations Entity that has provided an Accountability Certification is, in the opinion of the Comptroller General, not in full compliance with any or all of the provisions of that certification,” and (2) the entity does not “resume full compliance with its Accountability Certification to the satisfaction of the Comptroller General within 90 days of that notification.”

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration’s program, there is no objection to submission of this letter.

Sincerely,



Ronald Weich
Assistant Attorney General

cc: The Honorable Howard L. Berman
Ranking Minority Member