Digest of United States Practice in International Law

2000

DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW

2000

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Editors

Office of the Legal Adviser
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Table of Contents

1. NATIONALITY, CITIZENSHIP AND IMMIGRATION 1

A. Nationality and Citizenship • 1
Naturalization of foreign-born child of unwed parents, only one of whom is an American citizen: *Nguyen v. Immigration and Naturalization Service* • 1

B. Immigration, Passports and Visas • 19
Presidential proclamation: suspension of entry • 19

2. CONSULAR AND JUDICIAL ASSISTANCE AND RELATED ISSUES 23

A. Consular Notification • 23
1. Consular notification and U.S. criminal prosecution: *United States v. Nai Fook Li* and *United States v. Lombera-Camorlinga* • 23
2. Claims by Germany against the United States in the International Court of Justice: *The LaGrand Case* • 43

B. Children • 93
1. Hague Convention on International Child Abduction • 93
   a. Order of return: *Janakakis-Kostun v. Janakakis* • 93
   b. Order of return denied: *Blondin v. Dubois* • 105
2. Custody and asylum: *Gonzalez v. Reno* • 115
3. Intercountry Adoption Convention • 141
   a. Transmittal of Convention to U.S. Senate for advice and consent to ratification • 142
   b. Conditions on advice and consent to ratification • 145
   c. Intercountry Adoption Act of 2000 and additional steps required for U.S. implementation and ratification • 147

C. Judicial Assistance • 150
1. Service of process in foreign countries • 150
2. Taking of civil depositions abroad: *In Re: Air Crash at Agana, Guam* • 152

ILI Front Matter 5 1/8/02, 1:50 PM

3. Judicial assistance in criminal matter in China: *United States v. Jones* • 160

3. INTERNATIONAL CRIMINAL LAW 163

A. Extradition and Mutual Legal Assistance • 163
1. Ratification of new treaties • 163
a. Testimony in support of treaties before Senate Foreign Relations Committee • 163
b. Understandings of the United States concerning cooperation with the International Criminal Court • 172
2. Report to Congress on Extradition Practice • 173
3. Surrender for trial in Hong Kong: *Cheung v. United States* • 190
4. Surrender for trial in International Criminal Tribunal for Rwanda: *Ntakirutimana v. Reno.* • 203

B. Terrorism and Other International Crimes • 216
1. International Convention for the Suppression of the Financing of Terrorism • 216
2. Convention against Transnational Organized Crime, Trafficking Protocol, and Migrant Smuggling Protocol • 221
a. U.S. signing of Convention and Protocols • 221
b. U.S. legislation: Victims of Trafficking and Violence Prevention Act of 2000 • 225
3. Inter-American Convention Against Corruption • 231
4. Human Rights and Terrorism • 238

C. Genocide, War Crimes and Crimes against Humanity • 239
1. Establishing accountability for crimes against humanity • 239
2. Rape as a war crime • 251

D. Ad Hoc Tribunals • 255
1. International Criminal Tribunal for the Former Yugoslavia • 255
2. International Criminal Tribunal for Rwanda • 271

E. International Criminal Court • 272
1. U.S. signing of Rome Treaty • 272
2. U.S. policy on the International Criminal Court • 273

ILI Front Matter 6 1/8/02, 1:50 PM

3. Jurisdictional issues • 279
   a. Non-parties • 279
   b. Cases not referred by Security Council • 285
4. Definition of Aggression • 286

4. TREATIES AND OTHER INTERNATIONAL AGREEMENTS 293
A. Parties • 293
   1. Role of individual states of the United States • 293
   2. Supranational organizations • 296
      a. Madrid Agreement concerning the International Registration of Marks: role of European Union • 297
      b. Allocation of competence between European Union and its member states • 302
      c. Convention on the Establishment of an Inter-American Tropical Tuna Commission: member of European Union representing interests of a territory • 306
   3. U.S.- UNTAET Terms of Reference • 309
B. Technical Issues • 310
   1. U.S.-European Community Education Agreement • 310
   2. Ethiopia-Eritrea Peace Agreement • 311
C. Role in Domestic Litigation • 312
   Effort to create private right of enforcement: *Cardan v. United States of America*

5. FEDERAL FOREIGN AFFAIRS AUTHORITY 319
A. Constitutionality of State Law Regulating Aspects of Trade with Burma: *Crosby v. National Foreign Trade Council* • 319
B. U.S. Legislation Concerning Status of Puerto Rico • 340

6. HUMAN RIGHTS AND HUMANITARIAN LAW 347
A. General Human Rights Reports • 347
B. Discrimination • 347
   1. Race • 347
      a. U.S. Report under Convention on the Elimination of Racial Discrimination • 347

ILI Front Matter 7 1/8/02, 1:50 PM

b. United Nations Commission on Human Rights • 350
2. Gender • 351
Women 2000: Gender Equality, Development and Peace for the Twenty-first Century • 351
3. Religion • 355
Report on International Religious Freedom • 355
C. Children • 355
Optional Protocols to the United Nations Convention on the Rights of the Child • 355
D. Corporate Responsibility • 364
Statement on Voluntary Principles on Security and Human Rights • 364
E. Development • 369
1. World Summit for Social Development and Beyond: Achieving Social Development for All in a Globalizing World • 369
2. Right to Housing, Right to Food • 370
F. Torture • 372
1. Committee against Torture: U.S. remarks on its report • 372
2. Questions and answers • 379
G. Judicial Procedure, Penalties and Related Issues • 389
1. Inter-American Commission on Human Rights: Petition of Juan Garza • 389
2. Capital punishment • 396
3. Extrajudicial, summary, or arbitrary executions • 397
4. Alien Tort Claims Act: *Alvarez-Machain v. Sosa* • 398
5. Impartiality of foreign courts: *Aguinda v. Texaco, Inc.* and *Jota v. Texaco, Inc.* • 412

7. INTERNATIONAL ORGANIZATIONS AND MULTILATERAL INSTITUTIONS 415
A. Definition of "International Organization" • 415
B. Comments on Report of International Law Commission 2000 • 416

8. INTERNATIONAL CLAIMS AND STATE RESPONSIBILITY 421

ILI Front Matter 8 1/8/02, 1:50 PM

A. Government-to-Government Claims • 421
1. Claims relating to bombing of Chinese Embassy in Belgrade • 421
a. U.S. statutory authority to make payment to People's Republic of China • 421
b. U.S. agreement to pay damages • 422
c. U.S. letter concerning requirement for legislation • 423
d. Chinese agreement to pay damages • 424
e. U.S. apology for accidental bombing • 425
f. U.S. briefing to Chinese on errors and compensation issues • 427
g. U.S. voluntary humanitarian payments for deaths and injuries • 428
2. Partial Award in Case No. A-11, Iran-U.S. Claims Tribunal • 429
3. Claims against Iraq • 444
B. Claims of Individuals • 445
1. Claims by victims of the Nazi era and victims' heirs • 445
a. Settlement of claims against Swiss banks: *In re Holocaust Victim Assets Litigation* • 445
b. Claims against German companies arising from Nazi era • 446
1) Claims settlement negotiations • 446
2) Vountary dismissal: Nazi Era Cases against German Defendants Litigation • 450
3) U.S. federal-state relations: *Gerling Global Reinsurance Corp. of America., v. Quakenbush* • 460
4) Sovereign immunity and act of state: *Sampson v. Federal Republic of Germany and Claims Conference Article 2 Fund* • 473
c. Negotiations to settle claims against Austria and Austrian companies arising from Nazi era • 485
2. Private Korean national claims: *Kwan v. United States of America* • 489
3. Claims under California law by World War II soldiers held as prisoners of war by Japan • 500

ILI Front Matter 9 1/8/02, 1:50 PM

a. Testimony before U.S. Senate Judiciary Committee • 501
b. Claims of allied prisoners: *In re World War II Era Japanese Forced Labor Litigation* • 505
c. Claims of non-allied prisoners • 531
4. Legislation to compensate American victims of terrorism • 540
5. U.S. litigation by American victims of terrorism • 542
a. Effort to attach Iran's Foreign Military Sales Fund: *Flatow v. The Islamic Republic of Iran* • 543
b. Effort to attach bank accounts: *Cicippio v. the Islamic Republic of Iran* • 548

9. DIPLOMATIC RELATIONS, CONTINUITY AND SUCCESSION OF STATES 561
A. Status of Federal Republic of Yugoslavia • 561
1. Succession to Socialist Federal Republic of Yugoslavia in the United Nations • 561
2. Establishment of diplomatic relations with FRY • 563
B. Succession of states as political question: *767 Third Avenue Associates v. Consulate General of the Socialist Federal Republic of Yugoslavia* • 565

10. IMMUNITIES AND RELATED ISSUES 577
A. Sovereign Immunity • 577
1. Immunity in case involving employment relationship: *Rajaa al Mukaddam v. Permanent Mission of Saudi Arabia to the United Nations* • 577
2. Immunity as judgment debtor: *Glencore Denrees Paris v. Department of National Store Branch 1 (Vietnam)* • 590
B. Diplomatic and Consular Privileges and Immunities • 594
1. Exemption from state taxes in Hawaii • 594
2. Immunity of employee of Taipei Economic and Cultural Representative Office • 599
C. International Organizations • 602
1. Privileges and immunities of UN diplomat and wife: *Begum v. Saleh* • 602
2. Immunity to attachment of UN escrow account:

ILI Front Matter 10 1/8/02, 1:50 PM

Glencore Denrees Paris v. Department of National Store Branch 1 (Vietnam) • 616
D. Other Issues of State Representation • 626
1. Location of diplomatic and consular buildings • 626
a. Location outside "mixed-use diplomatic" areas • 626
b. Enforceability of agreed conditions on embassy operations • 634
2. Communications with diplomatic and consular missions • 637
a. Employment of foreign domestic employees • 637
b. Voluntary cooperation with 2000 census • 639

11. TRADE, COMMERCIAL RELATIONS, INVESTMENT AND TRANSPORTATION 641
A. Transportation by Air • 641
1. International Civil Aviation Organization: Disagreement between U.S. and EU member countries • 641
a. U.S. application and memorial • 641
b. U.S. response to preliminary objections • 652
2. Convention for the Unification of Certain Rules for International Carriage by Air • 668
B. North American Free Trade Agreement • 674
1. Claim by Canada against American company • 674
2. NAFTA Arbitration Awards • 694

12. TERRITORIAL REGIMES AND RELATED ISSUES 697
A. Law of the Sea and Related Boundary Issues • 697
1. U.S.-Mexico Treaty on Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles • 697
2. Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean • 700
3. Rights and freedoms of international community in navigation • 702
a. Non-compliance of certain straight baselines • 703
b. Legislative infringement on navigation and other

ILI Front Matter 11 1/8/02, 1:50 PM

maritime rights • 706

13. ENVIRONMENT AND OTHER TRANSNATIONAL SCIENTIFIC ISSUES 711
A. Environment • 711
1. Emissions targets: U.S. compliance-related issues • 711
2. United Nations Convention to Combat Desertification in Countries Experiencing Drought, Particularly in Africa • 728
a. Transmittal of the Desertification Convention to the Senate for advice and consent • 728
b. Understandings of the United States • 731

14. PRIVATE INTERNATIONAL LAW 735
Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments • 735

15. SANCTIONS 743
1. Amendment to Iranian Sanctions Regulations • 743
2. Foreign Narcotics Kingpin Sanctions Regulations • 744
3. Amendments to Regulations relating to North Korea • 745
a. Foreign assets control regulations • 745
b. Department of Commerce Bureau of Export Administration Regulations • 746
4. Special treatment of agricultural commodities, medicines and medical devices • 748
5. Office of Foreign Assets Control • 750

16. USE OF FORCE AND ARMS CONTROL 751
1. Convention on Certain Conventional Weapons: Amended Mines Protocol • 751
2. War Powers • 758

TABLE OF CASES 767
INDEX 785

ILI Front Matter 12 1/8/02, 1:50 PM

Preface

We are very pleased to be able to publish the *Digest of United States Practice in International Law*. We expect it will be of great service to governments, the profession here and abroad, and others. I join the Legal Adviser, Will Taft, in thanking all those mentioned by him for their efforts.

Don Wallace, Jr.
Chairman
International Law Institute

November 2001

ILI Front Matter 13 1/8/02, 1:50 PM

Introduction

It is a pleasure to introduce the *Digest of United States Practice in International Law* for the calendar year 2000. This volume represents the renewal of an important effort by the Office of the Legal Adviser of the Department of State to provide practitioners, scholars and other members of the international legal community with timely documentation on significant issues in international law. It is part of a tradition dating back to the publication of the multi-volume encyclopedias by Francis Wharton (1886), John Bassett Moore (1906), Green Hackworth (1940-43) and Marjorie Whiteman (1963-1971).

Beginning in 1973, the *Digest* was published on an annual basis and comprised current documentation rather than comprehensive analyses of selected areas of international law. As the preface to the 1973 volume stated,

> The attempt is to assure the world community of a contemporary record of United States practice. Material has been selected on the basis of its importance in the development of international law, or of its role in confirming international legal precedent, or for purposes of simply noting the record in vital areas of international law.... The annual digest is shaped almost totally by the international legal events of the year under review.

That approach continued in annual volumes through 1980 and in a three-volume set covering the period from 1981-1988. Since then, due to the constraints of time and resources, no additional volumes have been published. The intervening years have seen significant developments in U.S. practice in the field of international law, yet there has been no single record of those developments. For many who have come to rely on the *Digest* as a timely, authoritative and readily available source of information, this was a significant loss.

The Office has received many requests to renew publication of the *Digest*. With this volume covering the year 2000, we are doing that. While the overall focus remains as before, the format has been changed

ILI Front Matter 15 1/8/02, 1:50 PM

to ensure that, to the extent practicable, broad coverage of significant developments is made available to the public within months of the end of the covered year. To accomplish this goal, we have chosen to rely more heavily on the text of relevant documents introduced by short explanatory notes to provide the reader with some background for understanding the significance of the items which have been included. Most of the documents in this volume have previously been made available to the public, and none is now being declassified or released for the first time. In an effort to make the Digest most useful, we have tended, where a choice needed to be made, towards including the text of those documents that may not have been readily available. In addition, while much of the content was generated by the Department of State, we have sought to include documents related to the work of other governmental departments and agencies whose work is relevant to United States practice of international law. In future years, we hope to have an even wider selection of such material.

The current publication also takes full advantage of advances in information management and computer technology, for example by including citations to documents that are available on the Internet. Where documents may not otherwise be readily available, we have placed the full text on a dedicated web site on the Department of State home page where they can be accessed and downloaded (see *www.state.gov/s/l*).

Readers familiar with previous editions of the *Digest* will note that the material has been organized under a revised Table of Contents. While the traditional (and very scholarly) arrangement of earlier volumes was entirely appropriate for its time, evolutions in practice and approach suggest that a simplified organization supplemented by a new system of indexing and cross-referencing will better serve the interests of those who can be expected to use the current volume as a practical resource. We anticipate that there will be further refinements from year to year as new topics arise and are addressed in future volumes.

In some respects, the current volume is a maiden voyage. We hope that you will find it both useful and interesting.

Several words of appreciation are in order. The documents contained in this volume reflect the work of many members of the Office of the Legal Adviser. I am grateful to each of them for the fine work reflected here and in the excellent advice and service they continue to provide to the Department. I would like to thank in particular those who were responsible for making publication of this *Digest* possible. The

ILI Front Matter 16 1/8/02, 1:50 PM

acknowledgments must begin with David R. Andrews, former Legal Adviser, who made the decision that publication of the *Digest* should be resumed, and his special assistant, William Kissinger, who set up the committee of volunteers that assembled the documentation for this volume. A special thanks is due to each of those volunteers: Susan Biniaz, Violanda Botet, David Bowker, Gilda Brancato, Catherine Brown, Ashley Deeks, Carol Epstein, Katherine Gorove, James Hergen, Duncan Hollis, Melanie Khanna, Sovaida Ma'ani, Mary Catherine Malin, Denise Manning-Cabrol, Michael Mattler, Lori Neirenberg, J. Ashley Roach, John Schnittker, Bernie Seward and Joan Sherer. Finally, my deepest appreciation go to the editors of this volume, Sally Cummins and David Stewart, for the many hours they spent collecting, drafting and organizing its contents, and to the Deputy Legal Advisers, Ronald Bettauer, Joan Donoghue, Jonathan Schwartz and James Thessin, for their contributions in both substance and moral support.

We are also grateful to the International Law Institute, which has agreed to publish this volume for the Department. The Institute has been a potent promoter of international law for many years, and we look forward to working with its Chairman, Professor Don Wallace, Jr., and its Director of Publishing, Peter Whitten, on future endeavors.

William H. Taft, IV
Legal Adviser to the
Secretary of State

ILI Front Matter 17 1/8/02, 1:50 PM

Note from the Editors

We are pleased to have participated in the publication of the *Digest of United States Practice in International Law* for the calendar year 2000. This volume continues a time-honored practice dating back to 1886 of providing the public with a ready source of current information on the views and practice of the Government of the United States in the arena of public and private international law.

A number of changes distinguish this volume from its predecessors, as discussed in the Introduction. It reflects the benefits of the publishing role of the International Law Institute, a highly respected organization with which we have established a very productive relationship. We are particularly grateful for the support and guidance of Peter B. Whitten, ILI's director of publishing, and Professor Don Wallace, the chairman of the Institute.

We would also draw your attention to the fact that we have included internet cites for the full texts of most documents excerpted in the volume. Those that were not available elsewhere are included in a newly created database, which can be accessed via the home page of the Department of State, at *www.state.gov/s/l.* In addition, we have attempted to make the materials in this volume more accessible by including a more detailed index than in prior volumes and by providing cross-references where appropriate.

After some deliberation, we have chosen to make this volume current to the end of calendar year 2000 (with only a few exceptions noting events in early 2001). Therefore, the user should take this volume as a resource for that period, keeping in mind, for instance, that there may well be later decisions in cases in U.S. courts in the intervening months. Substantively significant developments of topics discussed in the 2000 volume will, of course, be covered in the 2001 *Digest*.

On a technical note, we should add that in the process of excerpting documents, most footnotes were deleted; when footnotes were retained, we have left them numbered as in the original.

Selections were made based on judgments about the significance

ILI Front Matter 19 1/8/02, 1:50 PM

of the issues, their possible relevance for future situations, and their likely interest to scholars and other academics, government lawyers, and private practitioners. As we continue to work on subsequent volumes, we welcome any comments and suggestions you may have.

Sally J. Cummins
David P. Stewart

November 2001

ILI Front Matter 20 1/8/02, 1:50 PM

CHAPTER 1

Nationality, Citizenship and Immigration

A. NATIONALITY AND CITIZENSHIP

Naturalization of foreign-born child of unwed parents, only one of whom is American citizen: *Nguyen et al. v. Immigration and Naturalization Service*

In December 2000, the United States filed a brief as Respondent in *Nguyen et al. v. Immigration and Naturalization Service,* No. 99-2071, in the Supreme Court on petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The case challenges provisions of the Immigration and Nationality Act (INA) concerning persons born outside the United States to unmarried parents, only one of whom is a U.S. citizen, as a violation of the equal protection component of the Due Process Clause of the Fifth Amendment. The relevant provisions, INA subsections 309(a) and (c) (8 U.S.C. § 1409(a) and (c)) establish different criteria for claims of citizenship depending on whether the U.S. citizen parent is the out-of-wedlock child's father or the child's mother. In this case, Nguyen was born in 1969 in Vietnam to a Vietnamese mother and American father who never married. Although Nguyen was raised by his American father, Joseph Boulais, also a petitioner in the case, after coming to the

ILI US Digest/1 1 1/8/02, 1:44 PM

United States as a refugee in 1975, he never became a citizen and was ordered deported from the United States in 1995 on the basis of convictions for crimes of moral turpitude and an aggravated felony. His American father obtained an order of parentage in 1998 when Nguyen was ten years older than the age established by statute to establish paternity for citizenship eligibility. The excerpts from the United States brief below set forth the argument of the United States in support of the current statute and urging affirmance of the Fifth Circuit decision dismissing petitioners' challenge to the deportation order. The case was still pending at the end of 2000.

See Nguyen et al. v. Immigration and Naturalization Service, 208 F.3d 528 (5th Cir. 2000), *cert. granted,* 530 U.S. 1305 (2000). The full text of the brief is available at *www.usdoj.gov/osg.*

◆

ARGUMENT

I. THE DISTINCTIONS IN SECTION 1409 DO NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE

The naturalization rules set out in Section 1409 serve at least two important interests: first, ensuring that children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States citizen parent – and thus to the United States – to justify the conferral of citizenship upon them; and second, preventing such children from being stateless.[6] Rather than rely-

[6] The United States relied upon those same purposes as respondent in *Miller v. Albright* [523 U.S. 420 (1998)]. *See* 96-1060 Resp. Br. at 24-31 (establishment of formal ties to parent and nation), 33-34 (statelessness).

[Editors' note: Thoughout the *Digest* footnotes have been selectively included in documents. Footnotes are numbered as in the original document.]

ing upon outmoded stereotypes, Congress has revised Section 1409 over the years to accomplish those purposes in light of current law in the United States and abroad and to promote gender equality, without unnecessarily disadvantaging any group of citizens or would be citizens.

A. Congress Tailored The Provisions Of Section 1409 To Reflect The Special Circumstances Of Children Born Out Of Wedlock, And To Address The Problem Of Statelessness

1. Congress has provided "by successive acts," beginning with the Act of March 26, 1790, "for the admission to citizenship of…[f]oreign-born children of American citizens, coming within the definitions prescribed by Congress." *United States v. Wong Kim Ark,* 169 U.S. 649, 672 (1898).

* * * *

2. Before 1940, none of the laws granting citizenship to foreign-born children had addressed the issue of children born out of wedlock.

* * * *

Congress took up that issue as part of its general overhaul of the naturalization laws in 1940. In 1938, President Roosevelt had submitted to Congress a proposed new nationality code ("Proposed Code") that had been prepared by his Secretary of State, Attorney General, and Secretary of Labor. [*To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings Before the House Committee on Immigration and Naturalization, 76th Cong., 1st Sess., 405-515 (printed 1945) ("1940 Hearings").*]

* * * *

Section 205 of the 1940 Act (App., *infra*, 6a) addressed the status of children born abroad out of wedlock.…The first paragraph of Section 205 provided that, in the case of a child born out of wedlock to a United States citizen father, the provisions of Section 201 (governing the status of children born *in* wedlock) would apply "provided the paternity is established during minority, by legitimation, or adjudication of a competent court." 54 Stat. 1139. In the United States and most other nations in 1940, legitimation typically required marriage (or attempted marriage) of the father and mother or, in some jurisdictions, a formal acknowledgment of paternity by the father. *See 1940 Hearings* 431; Harry D. Krause,

Illegitimacy: Law and Social Policy 11-14, 19-20 (1971) (surveying state laws). Adjudication or legitimation by marriage or other authorized method after the child was born supplied, at that later date, the necessary element of a legally recognized relationship between father and child that was present at birth for children born in wedlock. As a result, the first paragraph of Section 205 enabled the father of a child born out of wedlock to acquire the same legal recognition of and protection for his "interest in assuming a responsible role in the future of his child" with respect to citizenship as the father of a child born in wedlock possesses upon the child's birth. *Lehr v. Robertson*, 463 U.S. at 263. Thus, consistent with the principle "that rights of the parents are a counterpart of the responsibilities they have assumed," *id.* at 257, Section 205 equalized the status of married and unmarried citizen fathers if the unmarried fathers entered into a legal relationship with their children born abroad that was comparable to the legal relationship between a married father and his children, and thereby assumed the legal obligations of married fathers to their children. The children of such unwed fathers would be eligible for citizenship if they met the requirements, set out in Section 201, for children of married citizen parents to have "a real American background." S. Rep. No. 2150, 76th Cong., 3d Sess. 4 (1940).

The second paragraph of Section 205 ensured that children born abroad out of wedlock could obtain United States citizenship based upon the United States citizenship of their mother, which would have been in doubt – particularly for children born before 1934 – in the absence of a specific statutory provision giving unwed mothers the right to convey citizenship. *1940 Hearings* 43; *see* 39 Op. Att'y Gen. 290 (1939); 39 Op. Att'y Gen. 397 (1939). The situation of unwed citizens mothers was different than that of unwed citizens fathers, however, and different rules were deemed appropriate.

In the first place, there was no question of the mother's legal right to custody and control of the illegitimate child, as that was established under American law (and the law of most other nations) at the child's birth. *1940 Hearings* 431 (noting domestic laws of United States, Spain, and France, and citizenship laws of 30 nations); *see* Harry D. Krause, *supra*, at 5 ("[W]ith respect to its mother, the illegitimate has long been equal or substantially equal to his legitimate sibling."); *see also*, *e.g., Quilloin v. Wallcott*, 434 U.S. 246, 248-249 (1978) (discussing Georgia law under which "the mother is the only recognized parent" of a child born out of wedlock absent legitimation by the father). It thus was not necessary to

ILI US Digest/1 4 1/8/02, 1:44 PM

have a provision in the second paragraph of Section 205 analogous to the "legitimation, or adjudication" provision of the first paragraph.

Congress also found it appropriate, in the case of children of unwed mothers, to relax the residency requirements of Section 201. The United States has always applied the rule of "*jus soli*, that is, that the place of birth governs citizenship status except as modified by statute." *Bellei*, 401 U.S. at 828. Many other nations, however, apply the civil-law rule of *jus sanguinis*, under which citizenship is acquired principally based upon the blood relationship with a parent. See authorities cited in *Miller*, 523 U.S. at 477 (Breyer, J., dissenting). In connection with the Proposed Code, the Administration surveyed the citizenship laws of other nations and discovered that in approximately 30 nations, a child born out of wedlock was given the citizenship of the mother (subject, in most but not all cases, to taking the citizenship of the father in the event of legitimation). *1940 Hearings* 431; *see Durward v. Sandifer*, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality,* 29 Am. J. Int'l L. 248, 258-259 (1935). Against the background of the American rule of *jus soli*, the result of these *jus sanguinis* laws was to create a risk of statelessness among the foreign-born children of unwed United States citizen mothers. Such children, having been born abroad, would not be citizens of the United States by birth under the Fourteenth Amendment. But, unless the mother had dual citizenship, the children generally would not, due to the United States citizenship of the mother, be citizens of any foreign country. *See* Frederick Van Dyne, *Citizenship of the United States* 49 (1904) ("The nationality of an illegitimate child born to an American mother abroad would, by the law of nations, follow that of the mother."). Thus, unless the law of the United States accommodated the *jus sanguinis* rules of other nations, those children would not be citizens of any nation.[9]

The statelessness issue had been discussed as early as 1933, when Congress considered (but did not adopt as part of the 1934 Act) a provision addressed specifically to the situation of children born abroad out of wedlock. *See Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating*

[9] There would be a parallel problem of statelessness in the case of children who lost their mother's foreign citizenship due to legitimation by their United States citizen father. That problem, however, had been addressed by the first paragraph of Section 205, which provided that such children would become eligible for United States citizenship as a result of the same legitimation that might endanger the child's foreign citizenship.

to Removal of Certain Inequalities in Matters of Nationality: Hearings Before the House Comm. on Immigration and Naturalization, 73d Cong., 1st Sess. 8-9 (1933) (State Department proposed amendment); *see also id.* at 54-55 (discussing statelessness problem in the context of English/American marriages). The issue was raised again during the *1940 Hearings* (at 43). Recognizing that statelessness is "deplored in the international community of democracies" and can have "disastrous consequences" for the individual, *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (opinion of Warren C.J.), Congress took steps in 1940 to reduce the risk. Under the second paragraph of Section 205, the foreign-born child of an unwed United States citizen mother – who might not be eligible for citizenship in any other nation – would be guaranteed United States citizenship if the mother "had previously resided in the United States" for any period of time, unless the child was legitimated by the father and thus became eligible to receive the father's citizenship. *See* App., *infra*, 6a.

3. In 1952, Congress reenacted the first paragraph of Section 205 without material change as Section 309(a) of the new INA, 8 U.S.C. 1409(a) (App. *infra*, 5a). The second paragraph of Section 205 became Section 309(c), 8 U.S.C. 1409(c) (App. *infra*, 5a-6a), with two changes. *First,* the child of an unwed citizen mother could be a citizen regardless of legitimation by the father. *Second*, Congress adopted a somewhat stricter requirement for ensuring a connection between the unwed mother and the United States by providing that, in order to transmit citizenship to her foreign-born child, an unwed United States citizen mother must "ha[ve] previously been physically present in the United States or one of its outlying possessions for a continuous period of one year." *Ibid.* Legislators determined, however, that it remained inappropriate to subject unwed United States citizen mothers who gave birth abroad to the same physical-presence requirements as other citizen parents. As the Senate Report explained, the relatively generous one year period applicable to unwed citizen mothers under Section 1409(c) "insure[d] that the child shall have a nationality at birth." *See* S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952). Both changes made in 1952 survive today in the current version of Section 1409(c).

4. In 1986, Congress revised Section 1409 to make it easier for unwed citizen fathers to secure citizenship for their foreign-born children.[10] *Administration of the Immigration and Nationality Laws: Hear-*

[10] Congress also made non-substantive changes to Section 1409(a) in the Immigration Technical Corrections Act of 1988 (ITCA), Pub. L. No. 100-525, § 8(k), 102 Stat. 2617-2618.

ILI US Digest/1 6 1/8/02, 1:44 PM

ing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 118, 155 (1986) (*1986 Hearing*). Although a father still could obtain formal recognition of his paternal relationship through the traditional means of legitimation or adjudication, the 1986 amendment to Section 1409(a) additionally allowed fathers to secure citizenship for their foreign-born child by "acknowledg[ing]…paternity of the [child] in writing under oath," even if that option was not recognized as a form of legitimation by the relevant jurisdiction. With this change, codified in current Section 1409(a)(4)(B), Congress eliminated the indirect limitation on citizenship that had resulted from the failure of some jurisdictions to recognize legitimation by paternal acknowledgment of the child. *See* Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* 310 & nn.10, 11 (2d ed. 1987) (listing States that required marriage to legitimate the child). Fathers who could not legitimate their child due to the death or marriage of the mother gained the opportunity to have the child become a United States citizen through a process that approximated legitimation. The new acknowledgment option also "simplif[ied] and facilitate[d]" administration of Section 1409(a), "by eliminating the necessity of determining the father's residence or domicile and establishing satisfaction of the legitimation provisions of the jurisdiction." *1986 Hearing* 150.

At the same time, however, the inclusion of a method of formalizing a paternal relationship that might not be recognized by the child's place of residence or domicile created new problems. If a child acknowledged under Section 1409(a), but not legitimated (or adjudicated to be a father) in the appropriate jurisdiction, then a putative father could secure citizenship for the child without assuming the obligation of support that married fathers have, and that unmarried fathers would have assumed as a result of the provisions in the 1940 and 1952 versions of section 1409(a) that conditioned citizenship on legitimation or an adjudication of paternity. The new opportunity to obtain the benefits of legitimation without the attendant responsibilities also would create a risk of fraud, whereby men who were not natural fathers might claim paternity solely for the purpose of securing citizenship for the child. *See 1986 Hearing* 150. To address those concerns, new Section 1409(a)(1) required "clear and convincing evidence" of a blood relationship between the child and the father, while new Section 1409(a)(3) required the father to agree in writing to support the child financially until the age of 18.

ILI US Digest/1 7 1/8/02, 1:44 PM

The 1986 amendments did not change Section 1409(c), which continues to provide that a child born abroad out of wedlock "shall be held to have acquired at birth the nationality status of his mother,…if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year." 8 U.S.C. 1409(c).

B. Section 1409(a) Must Be Upheld If It Reflects A "Facially Legitimate And Bona Fide" Policy Choice By Congress.

Petitioners seeks to have Nguyen declared a naturalized citizen through one more modification of Section 1409(a) – this one accomplished by the Court. *See* Pet. Br. 32-39. The fact that petitioners claim Nguyen is entitled to citizenship under (judicially revised) statutory grant – and concede he has no entitlement to citizenship under the Fourteenth Amendment – is critical, for it dictates a highly deferential standard of equal protection review.

1. The Constitution "contemplates two sources of citizenship, and two only: birth and naturalization." *Wong Kim Ark*, 169 U.S. at 702. Under Section 1 of the Fourteenth Amendment, "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." *Ibid.*[11] Although not expressly guaranteed by the Constitution until after the Civil War, citizenship by place of birth was the fundamental rule of citizenship established by Anglo-American common law (*see id.* at 674-675, 688), and the rule in this country has always been "that the place of birth governs citizenship status except as modified by statute." *Bellei,* 401 U.S. at 828.[12]

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[11] The exception for persons born within the United States but not "subject to the jurisdiction thereof" has been held to cover children born in this country to foreign diplomats, children born on foreign ships, children born to hostile occupying forces, and tribal Indians, who were considered to be subject in the first instance to the sovereign jurisdiction of their respective Tribes. *Wong Kim Ark*, 169 U.S. at 693; *see also* 8 U.S.C. 1401(b) (extending citizenship at birth to members of Indian Tribes).

[12] Enshrining citizenship by birth in the Fourteenth Amendment served to overrule the *Dred Scott* case (*Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)), which rejected the claim that a native-born black man who had been a free man, but was later returned to slavery in a different state, was a citizen of the United States.

ILI US Digest/1 8 1/8/02, 1:44 PM

Before the Fourteenth Amendment formally recognized citizenship by birth within the United States, the Constitution had specifically addressed only Congress's power to grant naturalized citizenship. Article I, Section 8, Clause 4, provides that "[t]he Congress shall have Power…To establish an uniform Rule of Naturalization." As discussed above, Congress first exercised that power in the Act of March 26, 1790. In successive naturalization laws, Congress revised the statutory rules for conferring United States citizenship upon foreign-born children of United States citizens, and also established naturalization rules for non-citizen aliens resident in the United States, and their children. *See* generally *Wong Kim Ark*, 169 U.S. at 672-674 (discussing statutes relating to foreign-born children); *Bellei*, 401 U.S. at 823-824 (same).

During two centuries of congressional lawmaking, this Court has consistently held that Congress's determinations about who should receive the benefits and protections of citizenship are subject only to a particularly deferential form of rationality review. In *Wong Kim Ark*, the Court stressed that "nationality by descent is based wholly upon statutory enactments." 169 U.S. at 670 (internal quotation omitted). The Fourteenth Amendment "left that subject to be regulated, as it has always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization." *Id.* at 688. And later cases confirm that "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with." *United States v. Ginsberg*, 243 U.S. 472, 475 (1917). Accordingly, the question whether the foreign-born child of a United States citizen should be made a citizen is a policy matter committed to Congress. *Bellei*, 401 U.S. at 830.

Courts are particularly ill-suited to second-guess Congress's judgments about what classes of persons should be eligible for statutory citizenship, for several reasons. *First*, admission to citizenship involves a question of who is entitled to share in the benefits, protections, and responsibilities of our constitutional democracy, including the protection of our Nation while abroad. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-266 (1990). The judiciary has an unquestioned role in protecting rights accorded under the Constitution to citizens and to those aliens who have been allowed to become legal residents of this country, but it has no role in adopting the policies for determining which foreign-born persons should be permitted to become members of our society in the first place. *See Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) ("Every society possesses the undoubted right to determine who

shall compose its members" (internal quotation marks omitted)); 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 237 (1966) (remarks of Gouverneur Morris) ("every Society from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be admitted"). In our society, the right to include or exclude is exercised by the Executive and Legislative Branches, not by the Judiciary. *See Fong Yue Ting*, 149 U.S. at 705; *Plyer v. Doe*, 457 U.S. 202, 219 n.19, 225 (1982).

Second, the power to deny citizenship is also the power to keep an alien outside the Nation's borders, and that authority "is an incident of every independent nation." *The Chinese Exclusion Case (Chae Chan Ping v. United States)*, 130 U.S. 581, 603 (1889); *see Fong Yue Ting*, 149 U.S. at 705-713. Accordingly, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953); *see Plyer*, 457 U.S. at 225 ("Congress has developed a complex scheme governing admission to our Nation and status within our borders.…The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field.").

Third, "any policy toward aliens is vitally and intricately interwoven with…the conduct of foreign relations." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952); *see Plyer*, 457 U.S. at 219 n.19 ("alienage classifications may be intimately related to the conduct of foreign policy"). The power to exclude and expel aliens (which, again, necessarily subsumes the power to deny them citizenship) is "a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state." *Harisiades*, 342 U.S. at 587-588. Use of that "weapon" is committed to the political Branches, which are responsible for "the entire control of international relations." *Fong Yue Ting*, 149 U.S. at 705 (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)); *see Diaz*, 426 U.S. at 81 ("Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution.").

For these reasons, the principle of deference to Congress's "broad power over immigration and naturalization" "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo*, 430 U.S. at 792, 793 n.4 (quot-

ILI US Digest/1 10 1/8/02, 1:44 PM

ing *Galvan v. Press*, 347 U.S. 522, 531 (1954)); *see Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *Harisiades*, 342 U.S. at 588-589. When Congress makes a policy choice in those areas, its choice will be upheld if the reviewing court can discern "a facially legitimate and bona fide reason" for Congress's decision. *Fiallo*, 430 U.S. at 794. Indeed, "[t]his Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete.'" *Id.* at 792 (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

Such deference affords Congress the practical latitude it needs to fulfill its responsibilities for national security, foreign affairs, and nation-building. The immigration and naturalization laws routinely include distinctions based upon nationality, parentage, marital status and other family relationships, occupation, age, and education (*see Diaz*, 426 U.S. at 79-80 n.13; *see also* 8 U.S.C. 1153 (immigration preferences)), yet judicial review is highly deferential. As a practical matter, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Diaz*, 426 U.S. at 79-80.

* * * *

C. Section 1409 Effectively Serves Congress's Valid Objectives

1. The issues presented for decision in this case are far narrower than petitioners suggest. In attempting to expand the scope of their as-applied challenge, petitioners ignore both the controlling effect of *Miller* and the limitations placed upon their challenge by the record below and the facts of this case.

a. Petitioner Nguyen relies upon the asserted right of petitioner Boulais, as a citizen of the United States, "to be free of discrimination in transmitting statutory 'citizenship at birth.'" Br. 24. Six Justices in *Miller* rejected an analogous third-party challenge to Section 1409(a) by the child of an unwed United States citizen father. Like the petitioner in *Miller*, Nguyen may not assert the rights of his father because there is no "hindrance to the [father]'s ability to protect his or her own interests." 523 U.S. at 447 (O'Connor, J., concurring in the judgment) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). The father, Boulais, is a petitioner here, and he is actively asserting his own alleged rights. Nguyen's own claim is essentially the same as the claim rejected in the

opinions of Justices Stevens, O'Connor, and Scalia (collectively representing the views of six Justices) in *Miller*, and it should be rejected on that basis. The only remaining claim is that of petitioner Boulais, who asserts that Section 1409(a) discriminates against him as a male citizen.

* * * *

2. Only 8 U.S.C. 1409(a)(4) – the requirement that, before the child reaches age 18, the citizen father legitimate the child, acknowledge the child under oath, or be adjudicated the father – is genuinely at issue in this case. As explained above, that requirement serves to ensure that an unwed citizen father whose child is to be made a citizen under Section 1409(a) has attained the same legal relation to the child, at some point while the child is still a minor, as both a married citizen father and a married citizen mother have *at birth* to a child who is made a citizen under Section 1401, or as an unwed citizen mother has at birth to a child who is made a citizen under Section 1409(c). While an unwed mother need not provide proof of a recognized and formal relationship with her child, that relationship is almost invariably established by the fact of maternity. *See* p. 17, *supra*; *see also Lehr v. Robertson*, 463 U.S. at 260 n.16 ("The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures.") (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting). Moreover, Congress minimized the burdens on unwed mothers who seek citizenship for their children under Section 1409(c) in order to advance its important interest in avoiding statelessness.

Neither of those two bases for treating unwed citizen fathers differently than unwed citizen mothers relies upon outdated "stereotypes about the roles and capacities of mothers and fathers of out-of-wedlock children." National Women's Law Center Amicus Br. 12. To the contrary, Congress sought expressly to eliminate gender-based distinctions from what are now Sections 1401 and 1409, whenever Congress concluded it was practicable to do so. That effort began with the 1934 revision that, as Justice Ginsburg stated in *Miller*, "[t]erminated the discrimination against United States citizen mothers" by conferring United States citizenship on children who are born abroad to a married United States citizen mother. *Miller*, 523 U.S. at 465-466; *see* p. 12, *supra*.

The effort continued in 1940. The Roosevelt Administration recognized that the 1934 Act had "place[d] American fathers and mothers

ILI US Digest/1 12 1/8/02, 1:44 PM

on an equal plane with regard to transmission of citizenship" and intended that its Proposed Code would "carry out the principle of equality between men and women in the matter of nationality." *1940 Hearings* 421, 422. The 1940 Act accordingly established a gender-neutral approach to conferring citizenship on legitimate children (*see* 54 Stat. 1138-1139), which survives today in 8 U.S.C. 1401. Congress also for the first time provided by statute for children born outside of wedlock to obtain United States citizenship on the basis of the citizenship of their mother as well as their father. But the drafters of the 1940 Act recognized that, in the special context of children born out of wedlock, provisions designed to promote parity between men and women should be accompanied by provisions that address the problem of statelessness and by requirements that protect Congress's "patently reasonable" interest in ensuring that children who obtain citizenship have a substantial connection to the United States. *See 1940 Hearings* 421-423.

In 1952, the drafters of the INA again sought to "[e]liminate discrimination between the sexes" (H.R. Rep. No. 1365, 82d Cong., 2d Sess. 28 (1952)) and accordingly deleted the provision of what is now Section 1409(c) that had made conferral of citizenship on an illegitimate child born abroad to a United States citizen mother contingent upon the absence of paternity. Compare App., *infra*, 6a (1940 Act) with *id*. at 5a-6a (INA). And again in 1986, Congress took steps to address a perceived comparative disadvantage to unwed fathers, by loosening requirements for establishing a legally cognizable paternal relationship. *See 1986 Hearing* 118, 150.

Just as it cannot reasonably be argued that each of those Congresses lacked sensitivity to gender discrimination, it cannot be said that Congress's reasons for treating unwed mothers differently from unwed fathers have recently become obsolete. Those reasons arise in part from the treatment of unwed parents and their children under the laws of other nations. And it remains the case that children born out of wedlock generally are recognized to have the citizenship of their mother unless and until legitimated or formally acknowledged by the father.[17] We have been informed by the Department of State that, in connection with this case, it

[17] Analogously, in this country, the States and courts continue to apply the traditional rule that an illegitimate child takes the mother's domicile, at least absent legitimation by the father or adjudicated paternity. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48-49 (1989).

has consulted with consular officers in six nations in which the United States has or has had significant military presence and which account for a large proportion of citizenship claims by children born abroad out of wedlock. The Department reports that all six nations (Germany, Great Britain, the Philippines, South Korea, Thailand, and Vietnam) require that the father's name must appear on the child's birth certificate, or that the father must take some other formal act to acknowledge paternity, in order for the father's citizenship to pass to the child by descent.[18] The danger of statelessness in the event that the father does not acknowledge the child remains a concern under the laws of at least three of those six nations (Germany, South Korea, and Vietnam), and is a practical concern in a fourth (Thailand) due to non-compliance with the legal obligation of unwed Thai fathers to legitimate and support their children.

* * * *

This Court's decisions further confirm the continued permissibility of a requirement in the INA that the father of a child born out of wedlock must, while the child is still a minor, take some affirmative step – not required of an unwed mother – to establish a formally recognized legal relationship with his child in order to have conferred on that child the formally recognized legal status of being a United States citizen. In *Lehr v. Robertson*, *supra*, the putative natural father of a child born out of wedlock challenged the State's failure to give him prior notice of an adoption proceeding, which was not provided because the father failed to take the simple step of registering in a "putative father registry." The Court rejected the father's claim that equal protection guaranteed him prior notice of adoption proceedings, in order to safeguard his "inchoate relationship" with the child. *Id.* at 249-250. The Court quoted with approval Justice Stewart's observation in his dissenting opinion in *Caban*, 441 U.S. at 397, that "[p]arental rights do not spring full-blown from the biological connection between parent and child," but "require relationships more enduring." 463 U.S. at 260. The Court accordingly held that

[18] *See* § 1 para. 4 Staatsangehoerigkeitsgesetz (German citizenship statute); British Nationality Act, 1981, §§ 47, 50(9); Philippine Const. Art. IV, §§ 1-4 (1987) (citizenship) and Philippine Family Code tit. VI (effective Aug. 3, 1998) (establishment of paternity and filiation); New Nationality Law, July 1998 art. 4531 (effective June 14, 1998) (South Korea); Thai Nationality Act of 1992 (as amended), §§ 7(1), 10; Nationality Law of Vietnam, May 20, 1998, art. 17 and 83/1998/ND-CP Decree of the Government on Civil Registration arts. 19, 47 (Oct. 10, 1998).

ILI US Digest/1 14 1/8/02, 1:44 PM

"the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion." *Id.* at 266. In a case in which "one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights." *Id.* at 266-267 (footnote omitted).[19]

Lehr confirms that Congress is not constitutionally required to ignore real differences in the situations of unwed citizen mothers and fathers when it frames rules for the conferral of citizenship at birth. *See also Parham v. Hughes*, 441 U.S. 347, 354-357 (1979) (opinion of Stewart, J.) (state law making father's right to sue for the wrongful death of an illegitimate child contingent upon prior legitimation of the child, but granting mothers the right to sue, "is realistically based upon the differences in [the mother's and father's] situations"). Also in *Lehr*, the scheme Congress enacted here is not "likely to omit many responsible fathers" (463 U.S. at 264), because Section 1409(a) provides the citizen father a full 18 years to take simple steps to substantiate his paternal relationship and, in so doing, to render his child eligible for United States citizenship. Cf. *Clark v. Jeter*, 486 U.S. 456, 462, 465 (1988) (finding a 6-year statute of limitations too short "to present a reasonable opportunity" to assert child-support claims on behalf of illegitimate children, but suggesting that 18 years would satisfy equal protection requirements under heightened scrutiny); 42 U.S.C. 666(a)(5) (Supp. IV 1998), discussed at p. 45, *infra*.

* * * *

It must be stressed that Section 1409(a)(4) places a minimal burden on the father. As noted above, a father who has not already established a formal legal relationship with the child under the law of the child's residence or domicile may take the simple step, independent of

[19] Contrary to Justice Breyer's dissent in *Miller* (523 U.S. at 487-488), the issue is not simply whether the unwed father will in fact be a "Caretaker Parent" following legitimation, an adjudication of paternity, or formal acknowledgment of the child. Any parent, whether an unwed father, an unwed mother, or a married parent, *might* cease to care for his or her child after that child becomes a citizen under Section 1401 or 1409. Section 1409(a)(4) instead serves to ensure that, in the case of an unwed father, there is an approximation of the formal and legal relationship that exists between a married parent or an unwed mother and the child.

the local laws, of making the sworn acknowledgment Congress provided for in 1986 (Section 1409(a)(4)(B)). That minimal burden is all the more justifiable in light of other avenues of citizenship by virtue of a parent's naturalization as a United States citizen. *See* 8 U.S.C. 1431-1432.[20] And a foreign-born child who does not secure citizenship by virtue of ties established by his or her parents during the child's minority, but nevertheless develops substantial connections to the United States through marriage or permanent residence in the United States, may become a naturalized citizen on his or her own account by satisfying Congress's requirements. *See* 8 U.S.C. 1423-1424, 1430; 8 U.S.C. 1427 (1994 & Supp. IV 1998). Those offers of citizenship to foreign-born children who are likely to be "an asset" to the United States (H.R. Rep. No. 2396, 76th Cong., 3d Sess. 2 (1940)) by virtue of their connections to the Nation, further confirm the reasonableness of Congress's comprehensive naturalization scheme.

The factual contrast between this case and *Miller* bears out the fallacy of petitioners' argument (Br. 22) that Section 1409(a)(4) is just another way of "ensuring a blood tie" between American father and foreign-born child. In this case, Boulais raised Nguyen in the United States from 1975 until Nguyen became an adult. *Id.* at 5. Having decided to establish a paternal relationship with his minor son, Boulais readily could have secured United States citizenship for Nguyen under Section 1409(a) at any time until Nguyen became an adult in 1987. Thereafter, Nguyen, as a permanent resident alien since 1975 (*ibid.*), was free to pursue citizenship on his own account under 8 U.S.C. 1427 (1994 & Supp. IV 1998). The record does not explain petitioners' failure to seek citizenship for Nguyen until it was too late, but Congress cannot be faulted if petitioners did not take advantage of the benefit extended. Compare *Lehr*, 463 U.S. at 264 ("The possibility that [the putative father] may have

[20] In addition, in new Section 320 of the INA, Congress recently provided citizenship to foreign-born minor children of citizen parents, if the child is a permanent resident of the United States and is "in the legal and physical custody of the citizen parent." Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000); *see also ibid.* (INA § 322) (eligibility for minor children who reside outside the United States in the custody of a United States citizen parent, but are temporarily present in the United States). Section 320 allows citizen mothers and citizen fathers (including fathers who have legitimated their children) to obtain, on a gender-neutral basis, citizenship for children who settle with them in the United States.

ILI US Digest/1 16 1/8/02, 1:44 PM

failed [to place his name in the putative father registry] because of his ignorance of the law cannot be sufficient reason for criticizing the law itself.”).

* * * *

II. Even if the distinctions drawn by Section 1409 were unconstitutional, Nguyen would not be eligible for citizenship

Even if this Court were to determine that the distinctions between unwed fathers and unwed mothers drawn in Section 1409 are unconstitutional, petitioners still cannot prevail. As Justice Scalia explained in *Miller*, the relief petitioners seek – a judicial declaration that Nguyen is a citizen of the United States – would not be an appropriate exercise of this Court’s remedial powers. *See* 523 U.S. at 452-459 (Scalia, J., concurring in the judgment); *see also id*. at 451 (O’Connor, J., concurring in the judgment) (noting “the potential problems with fashioning a remedy for [Miller’s] injury”); *id*. at 445 n.26 (opinion of Stevens, J.) (not reaching the remedy issue). For that additional and independent reason, the judgment below should be affirmed.

* * * *

To remedy the allegedly unconstitutional preference for unwed citizen mothers, the Court would need to: (1) strike Section 1409 entirely (thus removing the provision that allows children born abroad out of wedlock to claim citizenship at birth and leaving resolution of the issue to Congress, as was the case in 1940); (2) make the children of both unwed citizen mothers and unwed citizen fathers subject to the full requirements of Section 1409(a) (which, like the first option, would not benefit petitioners); or (3) hold the children of both unwed citizen mothers and unwed citizen fathers to the lesser requirements of Section 1409(c). *See Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (court sustaining an equal protection challenge should remove the challenged disparity to extend it to disfavored class). In the context of a statute conferring citizenship, the third remedy (like the remedy proposed by petitioners) would be inappropriate, meaning that petitioners would not be entitled to relief under any circumstances.

First, as we have discussed, the area of statutory citizenship is one in which congressional power is at its peak, and judicial authority severely circumscribed. Because “[n]o alien has the slightest right to natu-

ILI US Digest/1 17 1/8/02, 1:44 PM

ralization unless all statutory requirements are complied with" (*Ginsberg*, 243 U.S. at 475), courts should be particularly reluctant to supply remedial solutions that go beyond what Congress has expressly authorized. Consistent with that principle, *INS v. Pangilinan*, 486 U.S. 875 (1988), established that a federal court has no equitable power to confer citizenship on a litigant as a remedy for a governmental violation of a statute under which he or she might otherwise have qualified for naturalization. *Id.* at 882-885. The Court explained that when Congress has set specific statutory limits on a naturalization provision, "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [those] limitations." *Id.* at 885.

Second, striking "burdens" imposed by Section 1409(a) would confer citizenship (presumably retroactively) on thousands of foreign-born children who have no connection to this country other than blood relationship to a citizen father they have never known or even seen. *See Heckler*, 465 U.S. at 739 n.5 (court should "consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation"). Applying Section 1409(c) to unwed citizen fathers would enable children who have no actual or legally recognized relationship with any United States citizen to obtain citizenship. Nonsensically, those children could obtain citizenship more easily than children who are born in wedlock to citizen fathers and their non-citizen spouses, to whom the requirements of Section 1401(g) apply. Indeed, a child born out of wedlock to a citizen father and non-citizen mother could obtain citizenship under circumstances that would not permit the foreign-born child of two American citizens to be a citizen at birth. Compare 8 U.S.C. 1401(c) (imposing residency requirement on one citizen parent) with 8 U.S.C. 1409(c) (requiring only physical presence in the United States). Such consequences plainly would do violence to congressional intent.[25]

[25] Although it is the more permissible remedy, nullifying the challenged benefits of Section 1409(c) also would be an unsatisfactory result. It would subject the children of unwed citizen mothers to a substantially enhanced parental residency requirement, with a concomitant increase in the risk of statelessness, and would give rise to perplexing administrative questions of what action a citizen mother should have taken by the time her child turns 18 in order to satisfy the legitimation or acknowledgment requirement of Section 1409(a)(4).

ILI US Digest/1 18 1/8/02, 1:44 PM

Finally, a remedial expansion of eligibility for citizenship would be extraordinary because of questions concerning its irreversibility. Congress could at least override, through constitutionally valid legislation, a judicial remedy that equalized unwed citizen fathers and unwed citizen mothers by prospectively eliminating Section 1409 altogether. But a different question would arise concerning the citizenship of persons who might lay claim to it as a result of this Court's decisions. Once properly conferred, citizenship may not normally be rescinded by legislative action. *See Afroyim v. Rusk*, 387 U.S. 253 (1967). The potential inability of Congress to effectuate its intent in the face of inconsistent remedial action by this Court, and particularly remedial action that had retroactive application to persons born under the Act of 1952 or even 1940, is an additional reason to prefer narrowing Section 1409 to expanding it.

B. IMMIGRATION, PASSPORTS AND VISAS

Presidential proclamation: suspension of entry

Section 212(f) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. §1182(f)), authorizes the President to "suspend the entry of all aliens or any class of aliens . . . or impose on the entry of aliens any restrictions he may deem to be appropriate" on a finding that their entry would be "detrimental to the interests of the United States." On October 10, 2000, the President issued Proclamation 7359, "Suspension of Entry as Immigrants and Nonimmigrants of Persons Impeding the Peace Process in Sierra Leone," directed at persons supporting the Revolutionary United Front (RUF). The Department of State spokesman noted that the Proclamation would apply to Liberian officials and their family members because of Liberia's trafficking in weapons and illicit diamonds fueling the war in Sierra Leone.

ILI US Digest/1 19 1/8/02, 1:44 PM

(Daily Press Briefing, October 11, 2000, available at *www.state.gov).*

The full text of the Proclamation is available at 65 Fed. Reg. 60831 (October 13, 2000).

A Proclamation

In light of the longstanding political and humanitarian crisis in Sierra Leone, I have determined that it is in the interests of the United States to restrict the entry into the United States as immigrants and nonimmigrants of certain foreign nationals who plan, engage in, or benefit from activities that support the Revolutionary United Front or that otherwise impede the peace process in Sierra Leone, and the spouses, children of any age, and parents of such persons.

NOW, THEREFORE, I, WILLIAM J. CLINTON, by the power vested in me as President by the Constitution and the laws of the United States of America, including section 212(f) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code, hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of persons described in section 1 of this proclamation would, except as provided for in section 2 or 3 of this proclamation, be detrimental to the interests of the United States. I therefore hereby proclaim that:

Section 1. The entry into the United States as immigrants and nonimmigrants of persons who plan, engage in, or benefit from activities that support the Revolutionary United Front or that otherwise impede the peace process in Sierra Leone, and the spouses, children of any age, and parents of such persons, is hereby suspended.

Sec. 2. Section 1 shall not apply with respect to any person otherwise covered by section 1 where the entry of such person would not be contrary to the interests of the United States.

Sec. 3. Persons covered by sections 1 and 2 shall be identified pursuant to such procedures as the Secretary may establish under section 5 of this proclamation.

ILI US Digest/1 20 1/8/02, 1:44 PM

Sec. 4. Nothing in this proclamation shall be construed to derogate from United States obligations under applicable international agreements.

Sec. 5. The Secretary of State shall have responsibility to implement this proclamation pursuant to such procedures as the Secretary may establish.

Sec. 6. This proclamation is effective immediately and shall remain in effect, in whole or in part, until such time as the Secretary of State determines that it is no longer necessary and should be terminated, in whole or in part. The Secretary of State's determination shall be effective upon publication of such determination in the Federal Register.

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CROSS-REFERENCE:

Citizenship issues in U.S. legislation concerning status of Puerto Rico, in **5.B.**

ILI US Digest/1 21 1/8/02, 1:44 PM

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CHAPTER 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION

1. Consular notification and U.S. criminal prosecution: *United States v. Nai Fook Li* and *United States v. Lombera-Camorlinga*

The United States Court of Appeals for the First Circuit and the United States Court of Appeals for the Ninth Circuit on February 29 and March 6, 2000, respectively, entered *en banc* decisions rejecting efforts to have evidence suppressed in cases involving foreign national defendants as to whom treaty-based consular notification requirements allegedly had been violated: *United States v. Nai Fook Li*, 206 F.3d 56 (1st Cir. 2000)(*en banc*), *cert. denied,* 531 U.S. 956 (2000); *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000)(*en banc*), *cert. denied* 531 U.S. 991 (2000).

The First Circuit rejected defendants' treaty-based challenges under the Vienna Convention on Consular Relations and the Bilateral Convention on Consular Relations between the United States and the People's Republic of China ("U.S.-China bilateral consular convention"), finding that remedies available did not include suppression of evidence

ILI US Digest/2 23 1/8/02, 1:44 PM

or dismissal of defendants' indictments. (In a separate supplementary opinion issued the same day by a three-judge panel, the First Circuit also affirmed smuggling convictions and sentences against the *Nai Fook Li* defendants, *United States v. Nai Fook Li*, 206 F.3d 78 (1st Cir. 2000), *cert. denied* 531 U.S. 956 (2000)). The *Nai Fook Li* case arose from the boarding of the vessel *Xing Da* by the United States Coast Guard in international waters in October 1996, and the subsequent prosecution of the defendants for alien smuggling and related crimes. Three of the defendants had claimed that Chinese consular officials were not notified of their detention as required by the Vienna Convention on Consular Relations or the U.S.-China bilateral consular convention and that they were entitled to a remedy in the context of their criminal prosecution. The claims were rejected by the district court. After oral argument before a three-judge panel on appeal, the First Circuit in an August 6, 1999, order *sua sponte* set the issue for *en banc* hearing and requested the views of the Department of State on a number of specific questions. In response, on October 15, 1999, the Department of State provided a letter to the Department of Justice for submission to the appeals court in which the Department of State both refuted the allegation that consular notification had not been provided in this case (the Department had been in repeated contact with senior Chinese consular officials in Washington and Beijing at the time of the detentions), and set forth its views on the questions posed by the court. Excerpts from the letter from Legal Adviser David R. Andrews to Assistant Attorney General James K. Robinson of the Criminal Division, Department of Justice, are provided below.

A copy of the letter was also attached to a brief filed with the Ninth Circuit, which reached a similar result in its subsequent *en banc* decision in *Lombera-Camorlinga*, in-

ILI US Digest/2 24 1/8/02, 1:44 PM

volving the arrest of a Mexican national on drug charges. The Mexican defendant had made an incriminating statement to law enforcement officials before he was advised, as required by the Vienna Convention on Consular Relations, that he had a right to request that Mexican consular officials be notified of his arrest. The federal district court declined to grant relief based on the Convention claim, but a panel of the Ninth Circuit held that the Convention created an individual right that was enforceable in court and that his statement made prior to consular notification should be suppressed if he could show prejudice from the lack of notification.

United States v. Lombera-Camorlinga, 170 F.3rd 1241, 1242-1243 (9th Cir. 1999)(withdrawn). The *en banc* court withdrew the panel opinion and ruled that the Convention was not intended to create an exclusionary rule in criminal proceedings. *United States v. Lombera-Camorlinga*, 206 F.3d 882, 889 (9th Cir. 2000).

The *Nai Fook Li* letter, with attachments, and the brief filed by the United States in *Lombera-Camorlinga* are available at *www.state.gov/s/l.*

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I am writing to convey the views of the Department of State with respect to the questions posed by the U.S. Court of Appeals for the First Circuit in its August 6, 1999, order in the *Nai Fook Li* case. The case arises from the boarding of the vessel *Xing Da* by the United States Coast Guard in international waters in October 1996, and the subsequent prosecution of the defendants for alien smuggling and related crimes. Three of the defendants (Moa Bing Mu, Sang Li, and Ben Lin) have claimed that Chinese consular offices were not notified of their detention as required by the Vienna Convention on Consular Relations

ILI US Digest/2 25 1/8/02, 1:44 PM

("VCCR") or the US-China bilateral consular convention, and that they are entitled to a remedy in the context of their criminal prosecution.

In fact, Chinese consular officials at the Chinese Embassy in Washington and the Chinese Ministry of Foreign Affairs in Beijing were notified of the detention of the *Xing Da* passengers and crew by the Department of State even before any obligation of consular notification arose. They were also later advised that a number of persons, including members of the *Xing Da* crew, were being held by the United States for prosecution. Thus, as explained more fully below, the Department of State would reject any claim that the United States violated its obligations to China under the two treaties at issue.

The First Circuit nevertheless has indicated that it wishes to examine two broad questions that would be relevant if a violation of consular notification obligations had occurred:

1. Whether the VCCR and/or the US-China bilateral consular convention (a mandatory notification convention) creates individual rights to consular notification and access that are enforceable by such individuals in court proceedings?

2. If so, is there a remedy such as suppression of evidence or dismissal of the "entitlements" for past violations of these rights that can be invoked by a defendant in a criminal prosecution in a federal or state court?

To facilitate its inquiry, the court has asked a number of specific questions directed specifically to the Department of State or otherwise within its purview.

Our answers to the court's questions are attached (Attachment A). They refer to three prior official statements of the Department on behalf of the United States: the oral presentations made to the International Court of Justice (ICJ) in the case *Paraguay v. United States*, and the written submission and oral presentations made to the Inter-American Court of Human Rights (IACtHR) in a case commonly referred to as "OC-16." (We have provided copies of these submissions to Mr. Gormley, one of the defense lawyers, at his request, as well as to the Department of Justice.) The Department expects to speak to these issues again in a submission due to be filed with the ICJ in March 2000, in the case of *Germany v. United States*.

Our comments also refer to the Department's 1998 publication, *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nation-*

ILI US Digest/2 26 1/8/02, 1:44 PM

als in the United States and the Rights of Consular Officials to Assist Them (generally referred to as our consular notification "brochure"). The Department is engaged in a major educational program to improve understanding of and compliance with consular notification obligations, and is distributing this brochure widely for this purpose. The brochure is also available to the general public at *www.state.gov* and may be obtained on request by government officials for official purposes by calling 202-647-4415.

As detailed in Attachment A and in our ICJ and IACtHR submissions, the Department of State generally agrees with the position taken by the Department of Justice on the consular notification issues in this case. That is, we agree that a failure of consular notification is a state-to-state treaty violation that does not, as such, give rise to a right to an individual remedy requiring the reversal of all or part of a criminal proceeding. Rather, the usual procedural and substantive rules should be applied to ensure that the foreign national defendant has been advised of his rights as a criminal defendant in the United States, has understood the charges against him, has received competent legal representation, and has otherwise received a fair trial.

This view should not in any way be taken to detract from the importance of consular notification obligations or the fact that such obligations must be honored by the United States and implemented by responsible federal, state, and local law enforcement and other officials. It simply reflects the fact that violations of consular notification obligations are addressed through diplomatic and political channels (or may be referred to the International Court of Justice, if the states concerned are parties to the VCCR's optional protocol). The Department of State routinely discusses consular notification and access issues with foreign governments and investigates alleged violations. When the Department is satisfied that a violation has occurred, it typically extends an apology on behalf of the United States and seeks to prevent future recurrences by educating the responsible officials about the relevant requirements. To our knowledge, this is how consular notification issues have always been handled by the United States under all of the consular conventions to which it is a party, and in situations governed by customary international law.

The questions posed by the court only arise, however, when a failure of notification has in fact occurred. As indicated, this is not such a case. China has not complained of any failure of consular notification,

ILI US Digest/2 27 1/8/02, 1:44 PM

and the Department of State would reject any such complaint because of the numerous communications between it and senior Chinese consular officials in Washington and Beijing about the detention of the passengers and crew of the *Xing Da* and the subsequent decision to bring an alien smuggling prosecution. We provide the following information about these communications so that the court will understand the basis for our views:

Article 35 of the US-China bilateral consular convention provides as follows:

"If a national of the sending State is arrested or placed under any form of detention *within the consular district*, the competent authorities of the receiving State shall immediately, but no later than within four days from the date of arrest or detention, notify the consulate of the sending State."

(Emphasis added/) Article 36 of the VCCR similarly provides for notification of consular officials when a national of their state is detained *within their consular district*, but such notification is required to be given only if requested by the detainee after informing him of the right to have it given.

A foreign national is not in a consular district in the United States unless he is within the geographic United States. Our understanding is that the *Xing Da* passengers and crew were first in the United States when they disembarked on Wake Island, which is within the consular district of the Chinese Consulate General in Los Angeles. Thus, in the ordinary case their detention should have been notified to that Consulate General. This was not an ordinary case, however. Chinese consular officials were informed by the Department of State as early as October 4, 1996, that the *Xing Da* had been stopped and boarded, and that its crew and passengers were in U.S. custody. This was well before any consular notification obligation arose – *i.e.*, while the ship, its crew and passengers were in international waters, and outside any consular district. Thereafter, Chinese consular officials were kept informed of events with respect to the ship, including the fact that the crew and passengers were taken off the ship to Guantanamo and later to Wake Island. Chinese consular officials were also told that a number of persons from the ship and others had been arrested for alien smuggling and would be prosecuted. Chinese consular officials agreed to the repatriation of the majority of the Chinese nationals knowing that others were being detained, and Chinese consular officials in Beijing were specifically in-

ILI US Digest/2 28 1/8/02, 1:44 PM

formed on November 12, 1966, of the names of those who were not repatriated. The names given to Chinese consular officials on that date included the names of the three defendants who now seek to allege a failure of consular notification. Significantly, the timing and manner of the presentation of their names to the Chinese Government was carefully coordinated by the Department of State. (The relevant details of these communications are set forth in greater detail in Attachment B.)

In short, Chinese consular officials were given information sufficient to put them on notice that Chinese nationals were being detained and prosecuted, and to request additional information for the purposes of providing consular services. Chinese consular officials in Los Angeles (and in New York, which has jurisdiction over Boston) are under the supervision of the Chinese Embassy in Washington, and all consular officials in Washington, Los Angeles, and New York would take direction from the Chinese consular officials who were involved in Beijing. Had those officials wanted to ensure that consular services were provided to the Chinese nationals who were detained, they were in a position to do so.

Whether the Chinese consular officials in Washington and Beijing in fact communicated the information they received to their subordinate Consulate Generals in Los Angeles, and New York is a different question that we cannot address. We would reject, however, any suggestion that the treaty was violated because those Consulate Generals were not also advised directly by the United States. Given the importance of the *Xing Da* interdiction, repatriation, and prosecution to US-China cooperation against alien smuggling, it was inevitable and appropriate that the detention of the *Xing Da* crew and passengers was discussed with senior Chinese officials. Because in this case those officials were responsible for Chinese consular services, the objective of the consular notification provisions of both treaties was clearly met. Conversely, when the Department of State learns directly that an American is detained abroad, it alerts its foreign consulates to take appropriate action. If the Chinese Government timely notified the Department or the US Embassy in Beijing of the detention of an American and did not also notify our consulate with relevant jurisdiction, we would consider it inappropriate to allege a consular notification violation based on the technicality that a subordinate consular office was not notified.

Consistent with this view, our consular notification brochure in some cases lists only an Embassy telephone number for a country that may also have consulates in the United States. (A country may have opened a con-

ILI US Digest/2 29 1/8/02, 1:45 PM

sulate subsequent to publication of the brochure; it may have failed to provide us with consulate telephone numbers when asked; or our records of consulate telephone numbers may have been incorrectly maintained.) When the brochure does list consular offices, it does not provide information about their consular districts. (There are a number of reasons for this, including the fact that foreign embassies do not consistently provide this information to the Department.) Thus, reliance on our own brochure may result in consular notification being made to an embassy or to a consular office that does not serve the place of detention. Moreover, in educating law enforcement officers about consular notification requirements, we advise that notification may be made to a country's embassy if the appropriate local consular office cannot be identified.

In short, our primary concern is that timely notification be provided to consular officials of the country concerned, with the form and manner of notification being less important. Once that has happened, those consular officials decide which officer, if any, should take action. (In contrast, we advise that notification to law enforcement officials of a foreign national's country is not a substitute for notification to consular officials. E.g., our brochure, page 20.) We are satisfied that appropriate notification was provided to Chinese consular officials in this case.

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ATTACHMENT A

DEPARTMENT OF STATE ANSWERS TO THE QUESTIONS POSED BY THE FIRST CIRCUIT IN *UNITED STATES V. NAI FOOK LI*[1]

1. The State Department's exact position on the question whether such treaties may be invoked by defendants in criminal cases, in light of both the State Department documents previously cited by the parties and any other relevant State Department documents, including in particular U.S. Department of State, 7 Foreign Affairs Manual § 411.1 (1984).

The Department of State does not believe that the VCCR or our bilateral consular conventions require that violations of consular notifica-

[1] *United States v. Nai Fook Li,* et al, U.S. Court of Appeals, First Circuit, Nos. 97-2034, 2413, 1229, 1230, 1303, 1447, 1448, Order of August 6, 1999.

ILI US Digest/2 30 1/8/02, 1:45 PM

tion obligations be remedied through the criminal justice process. Nothing in any consular convention, including the VCCR and the US-China bilateral convention, provides for such a remedy. We are unaware of any country party to any consular convention with the United States that remedies failures of notification through the criminal justice process. Criminal justice systems vary throughout the world and in our experience operate independently of consular notification. This is consistent with the facts that consular notification can occur in a variety of ways (*e.g.*, by phone, letter, or diplomatic note); that it is up to the consular officer to decide whether, when, and how to respond when notified that a national is in detention (many consular officers will do little for their nationals, whether for policy reasons or because of resource constraints); and that consular officers do not act as lawyers or have a lawyer-client or fiduciary relationship with their nationals. (For example, a consular officer may forward an extradition request that results in a national of his country being detained, may assist the host country in obtaining evidence for the prosecution, and also provide consular services to the same detainee.)

To our knowledge, the question of providing individual remedies for failures of consular notification in the context of criminal proceedings first received significant attention within the Department of State in the early 1990s, when a small number of foreign governments began raising with the Department concerns about cases in which one of their foreign nationals on death row had not received consular notification. Until that time, the Department had followed a policy of investigating allegations of failures of consular notification brought to our attention and, if they were confirmed, extending formal apologies to the government concerned and undertaking to educate the law enforcement officials involved about consular notification requirements. Department officials had advised criminal defendants that a failure of consular notification was not relevant to their conviction, as evidenced by a September 15, 1989, letter from the Legal Adviser's Office to a prisoner that has been made available to the Department of Justice. U.S. consular officers abroad similarly raised concerns about failures of consular notifications through diplomatic channels or directly with the law enforcement officials concerned.

We have since devoted considerable time to the issue, reviewing our own policies and those of other states as well as the sources available to us for interpreting the Vienna Convention on Consular Relations (VCCR) and other consular conventions as they have been put in issue. The conclusions we reached, summarized in the first paragraph

ILI US Digest/2 31 1/8/02, 1:45 PM

above, were set out in our submissions to the International Court of Justice (ICJ) in *Paraguay v. United States*[2] and to the Inter-American Court of Human Rights (IACtHR) in "OC-16."[3] (The Department has

[2] *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America).* The United States and Paraguay are among the minority of states party to the VCCR's Optional Protocol, which gives the ICJ jurisdiction over disputes arising under the VCCR. (The VCCR itself has no dispute resolution mechanism.) In April 1998, Paraguay sued the United States in the ICJ seeking to stop the execution by Virginia of a Paraguayan national, Angel Breard, because he had not received consular notification as required by Article 36 of the VCCR, and to obtain other remedies for the admitted treaty violation. Oral presentations made by Paraguay and the United States to the ICJ on April 7, 1998, in connection with Paraguay's request that the United States be ordered to stay Mr. Breard's execution pending resolution of the case by the ICJ on the merits, were transcribed verbatim. The ICJ issued a provisional measures order to the effect that Mr. Breard should not be executed while the case was pending, but Governor Gilmore decided not to honor that request. Subsequently, on October 9, 1998, Paraguay filed its opening memorial in the case. Because Paraguay withdrew the case in November 1998, the United States did not file a response and there was no final decision from the ICJ on the merits. The transcript of the United States presentation of April 7, 1998, is thus the only official submission by the United States to the ICJ on the consular notification issues in this case, and has been made available to the Department of Justice and defense counsel. It and Paraguay's submissions are also available to the public on the ICJ's web site.

[3] *Advisory Opinion, OC-16:* The Inter-American Court of Human Rights (lACtHR) is a court established pursuant to the American Convention on Human Rights ("the Convention"), a multilateral human rights treaty negotiated under the auspices of the Organization of American States ("OAS"). The IACtHR has adjudicatory jurisdiction to resolve specific cases relating to the application and interpretation of the American Convention submitted to it by states party to the Convention or by the Inter-American Commission on Human Rights (IACHR). The IACtHR also has advisory jurisdiction, pursuant to which member states of the OAS including states that are not party to the Convention — "may consult the Court regarding the interpretation of [the] Convention or of other treaties concerning the protection of human rights in the American states." (American Convention, Article 64.) Opinions resulting from an advisory proceeding before the IACtHR are not binding. OC-16 was initiated by a request from the Government of Mexico for an advisory opinion on the question of remedies for failures of notification in criminal cases in which the death penalty has been imposed. The United States is not a party to the American Convention and is not bound by the IACtHR's adjudicatory decisions, but may participate in the IACtHR's advisory proceedings as a member of the OAS. The United States took the unusual step of participating in OC-16 in part because Mexico's request was clearly directed against the United States and because we have a strong interest in the proper application of the VCCR. Copies of our written and oral submissions to the IACtHR have been made available to the Department of Justice and defense counsel.

ILI US Digest/2 32 1/8/02, 1:45 PM

not yet made a substantive submission to the ICJ in *Germany v. Untied States.*[4]) Drawing upon those submissions, and the additional consideration we have given to these issues since then, it would be fair to summarize the Department's current views as follows:

1. The VCCR and the US-China bilateral consular convention are treaties that establish state-to-state rights and obligations relevant to the conduct of consular relations and the performance of consular functions. They are not treaties establishing rights of individuals. The right of an individual to communicate with his consular officials is derivative of the sending state's right to extend consular protection to its nationals when consular relations exist between the states concerned. States may or may not choose to exercise all of their rights under such conventions, and may assert or waive the privileges and immunities and other rights granted by such conventions. States may and do seek notification of all detentions of their nationals even when they are not entitled to be so notified under the VCCR or any bilateral agreement, and states may and do seek to provide notification of all detentions of foreign nationals to the nationals' consular representatives even if they are not required to do so.

2. The remedies for failures of consular notification under the VCCR are diplomatic, political, or exist between states under international law. This is consistent with the fact that it is common for rights and obligations to exist under international law without any mechanism for individual enforcement, depending instead upon diplomacy and the exertion of political pressure. It is also consistent with what we understand to be the uniform practice of states party to the convention and, in the case of the US-China bilateral consular convention, with the practice of the United

[4] *LaGrand Case (Germany v. United States of America)*: On March 2, 1999, Germany sued the United States in the ICJ in a suit similar to that of *Paraguay v. United States*. The German case relates to two German brothers executed by the State of Arizona in February and March of this year who had not received consular notification. The case was filed on the eve of the second of the two executions and included a request by Germany that the ICJ direct the United States not to proceed with the execution. The ICJ issued a provisional measures order asking that the execution not proceed on March 3 without receiving any formal oral or written presentation from the United States. The Governor of Arizona authorized the execution to proceed later that day, after all U.S. legal remedies had been exhausted. Germany filed its opening memorial in the case on September 16, 1999. The Department of State will be responding on behalf of the United States in March 2000. Because there was no formal hearing on Germany's provisional measures request, the United States has made no formal statements in this case to date.

ILI US Digest/2 33 1/8/02, 1:45 PM

States and China (leaving aside, of course, the current efforts to establish a remedy in the U.S. criminal justice process). Many, if not most, of the countries with which the United States raises concerns that consular notification obligations have been violated with respect to U.S. citizens will undertake to investigate the alleged violation and, if it is confirmed, to apologize for it and undertake to prevent future recurrences. Conversely, the U.S. Department of State receives complaints of failure of notification in the United States from foreign governments and similarly undertakes to investigate them. When we are satisfied that a violation of an obligation of consular notification has occurred, we typically apologize to the government that made the complaint and work with the law enforcement or other domestic officials involved to prevent future similar violations. We understand that this practice has been followed for decades. Recently, when confronted with death penalty cases involving failures of consular notification, the Department also took the additional step in some cases of asking the state involved to consider the consular notification violation in the context of its clemency proceedings. These requests have varied depending upon the extent to which the Department has been able to investigate a case, the conclusions it has drawn, and the nature of its discussions with the foreign government involved. The Department has considered this approach to be consistent with its view that the basic remedies for failures of consular notification are diplomatic and political.

3. The incidental reference to individual rights in Article 26 of the VCCR ("inform the person concerned without delay of his rights") is not intended to imply the existence of a judicially enforceable individual right that can be raised by the individual as a basis for relief in the context of a country's criminal justice system. Looking at the text of the VCCR, its negotiating history, and the practice of states under the VCCR (*i.e.*, looking at the accepted tools of treaty interpretation), we see no intent to change the criminal justice processes of the member states, much less to create individual rights that would require the suppression of evidence (a remedy that is not common to criminal justice systems outside the United States). The VCCR does not specify remedies for failures of consular notification. It does not specify the form or manner of consular notification and does not specify a time in which notification must occur, other than to say that it must occur "without delay." It in no way addresses the timing of notification in relation to a country's criminal justice process (*i.e.*, nothing in the VCCR requires that it be given before a statement is taken). Nor does it require a consular officer

ILI US Digest/2 34 1/8/02, 1:45 PM

to respond to notification, or to respond in any particular time period, or to offer any particular service. These facts are inconsistent with the notion that an arresting state would have to suspend its criminal justice process while consular notification occurred. Thus, we do not believe that failures of consular notification require that the criminal proceedings be undone or otherwise require remedies in the context of the criminal justice process. We expressed this view to the ICJ in *Paraguay v. United States*, and again in our written and oral submissions to the IACtHR in "OC-16." (In "OC-16," we also said that consular notification is not an individual human right. It does not inhere in the individual, and there is no obligation to provide consular notification in the absence of consular relations. As discussed in response to question 6 below, we understand that the IACtHR has disagreed.)

4. A number of practical difficulties would be raised by attempting to remedy consular notification violations in the criminal justice process. As we advised the ICJ in *Paraguay v. United States*, a *per se* rule of reversing all events subsequent to the violation would lead to absurd results, and a rule requiring a finding of prejudice would be highly problematic. The Department has serious doubts about the ability of courts to conduct informed inquiries into whether or not an individual criminal defendant was prejudiced by a failure of notification. This case—in which no violation could be alleged by China and China assisted the United States in a number of critical respects—illustrates the obvious difficulty of permitting claims of prejudice to be raised by individuals in the absence of any indication of interest by their government. Even where a claim was supported by the government whose treaty rights were violated, however, an inquiry into prejudice would require an after-the-fact attempt to predict what a consular officer would have done if notification had been provided. Such efforts would be highly speculative, particularly given the wide variations in the consular assistance provided by different countries and the lack of any requirement that such assistance be provided at all. The privileges and immunities of consular officers and the inviolability of consular archives would also be obstacles to a full and fair exploration of this issue. Even if a foreign government were prepared to waive such privileges and immunities and/or inviolability, it is doubtful that sufficient relevant information would become available. Judicial inquiry would be especially problematic in cases in which the United States and the foreign government would dispute whether a treaty violation occurred

ILI US Digest/2 35 1/8/02, 1:45 PM

at all. It could also result in courts embarrassing foreign governments by concluding that they would have provided no meaningful consular assistance; in courts requiring the involvement of Executive Branch officials to assess claims; or in courts making findings inconsistent with aspects of consular law and practice that are not readily accessible to the general public.

5. Our position is consistent with the Department's instructions to U.S. consular officers in the Foreign Affairs Manual (FAM). The FAM constitutes the Department's instructions to its employees, including its consular officers abroad. 7 FAM 410, dealing with arrests, sets a very high standard of assistance for U.S. citizens. The FAM encourages U.S. consular officials to be as aggressive as possible in ensuring that they receive timely notification and to raise concerns about failures of consular notification with their host-country governments directly. Nowhere does the FAM suggest that, if consular notification is not given or is given late, the failure should be addressed through the host country's criminal justice system. U. S. consular officers do not seek judicial remedies for failures of consular notification, and we are unaware of any instance in which the United States has asked a foreign court to undo a criminal proceeding based on a failure of consular notification.

U.S. consular officers do, however, continually seek improved host country compliance, and in fact frequently request to be notified of all arrests, even in countries with which the United States does not have a bilateral agreement requiring such notification. Thus the FAM advises that "consular officers are expected to maintain relationships with local authorities and other sources which will secure their cooperation in providing immediate notification, no matter what the language of applicable treaties legally requires." This contemplates that U.S. consular officers will make their own efforts to ensure that host governments officials are aware of their consular notification obligations and of the U.S. interest in hearing of all cases of detention. In our conversations with foreign consular officials in the United States, we encourage them similarly to make contacts with local law enforcement officials in the communities they serve. If a country's consular officers do not make such efforts and do not advise the Department of State of failures of consular notification, this may show that their country attaches relatively low priority to the provision of consular services or is satisfied with the level of compliance it is experiencing.

ILI US Digest/2 36 1/8/02, 1:45 PM

6. That the United States did not expect criminal convictions to be undone if the defendant did not receive consular notification is also reflected in U.S. practice with respect to prisoner transfer treaties. The United States first entered such treaties with Mexico and Canada for the purpose of permitting American citizens imprisoned in those countries to return to the United States to serve their sentences. (US-Mexico Treaty on the Execution of Penal Sentences, 28 UST 7399, signed Nov. 25, 1976, entered into force Nov. 30, 1977; US-Canada Treaty on the Execution of Penal Sentences, 30 UST 6263, signed March 2, 1977; entered into force July 19, 1978.) Congress was aware that a number of American prisoners convicted in Mexico had been mistreated and/or had not received consular notification. Yet the treaty with Mexico, like all subsequent treaties, provided for American citizens to continue to serve their Mexican sentences after transfer to the United States, subject to administration of the sentence by the United States in accordance with the treaty and U.S. implementing legislation. *See* Report to accompany S. 1682, Providing implementation of treaties for transfer of offenders to or from foreign countries, H.R. Rept. 95-720, 95th Congress, 1st Session (Oct. 19, 1977)("in many instances where Americans were arrested, particularly in Mexico, great delay ensued before our consular offices were notified").

7. The question whether an individual could enforce consular notification obligations in some other way, such as through a mandamus action, is not a question the Department has had to address officially. The question has been a matter of some theoretical speculation, but as a practical matter we do not believe it is likely to require resolution.

To bring such a suit, a foreign national detained in the United States necessarily would already be aware that he had not been advised of his right to communicate with a consular official, and thus would also have the knowledge necessary to initiate communication with consular officials himself. The obligation to inform him of his right to communicate with a consular official is not an end in itself; it is a means to an end—making consular officials aware of the detention if the detainee wishes them to know of it. It was spelled out in the VCCR as a mechanism to deal with the possibility that the individual would not already know of his right to communicate with his country's consular representatives. (This potential lack of knowledge became a concern after a proposal for "mandatory notification" of all detentions was rejected and an alternative of informing consular officials of detentions only at the foreign

ILI US Digest/2 37 1/8/02, 1:45 PM

national's request was tabled.) Consular officials frequently become aware of detentions through direct communications from detainees or their family members who knew to seek consular assistance but were not told of the option by the detaining state. (Some countries with a high degree of commitment to the provision of consular services advise their own nationals to seek consular assistance if they are detained abroad.)

Moreover, the Department of State has recognized the need to improve understanding of and compliance with consular notification obligations by federal, state, and local officials and toward this end is engaged in an intensive outreach effort. While we have not ruled out the possibility that the Executive Branch might also use legal tools to mandate compliance, we have found that compliance is improving as a result of our outreach effort. We are confident that it will continue to do so as we expand our efforts.

8. The Department also has not had to address officially the question of judicial remedies in cases in which a detained foreign national has requested but been affirmatively denied the right to communicate with a consular officer, or in which consular access rights have been denied. We have not been confronted with such a case in the United States. When the Department learns from a foreign embassy that one of its consular officers is having difficulty obtaining access to a national in detention in the United States, we resolve such issues directly with the detaining authorities.

2. The appropriate level of deference, if any, to be paid to interpretive pronouncements of the Executive Branch, including the State Department, made subsequent to enactment of treaties that are "self-executing" in the sense that they have the force of law without any implementing legislation.

The views of the Executive Branch are entitled to deference regardless of whether a treaty is "self-executing" or not, and regardless of whether they are formulated or expressed subsequent to the "enactment" of a treaty that is self-executing in the sense that it does not require implementing legislation (which is the sense in which we have said that the VCCR and other consular conventions are self-executing). Deference is due in the first instance because treaties are entered as a result of the Executive Branch's exercise of functions committed to the President under the Constitution – the authority to enter treaties with the advice of

ILI US Digest/2 38 1/8/02, 1:45 PM

consent of the Senate, and the authority to conduct foreign relations. The Executive Branch negotiates treaties on behalf of the United States and hence is uniquely qualified to interpret them.

If there are degrees of deference, the interpretation of consular conventions requires more than the usual deference to the Executive Branch's interpretation. In interpreting treaties, one relevant consideration is the subsequent practice of the states that are party to them. It is the Executive Branch – through the Department of State – that has defined and continues to define the practice of the United States under its consular conventions. Our consular conventions, along with the Vienna Convention on Diplomatic Relations (VCDR) and, less frequently, customary international law, establish the fundamental public international law framework in which the Department conducts consular and diplomatic relations on behalf of the United States. Consular notification and access are part of the day-to-day work of the Department of State and its nearly 1000 consular officers assigned overseas. While Article 36 of the VCCR and similar provisions in bilateral consular conventions have always been the subject of regular discussions between the United States Government through the Department of State and governments of virtually every country in which American citizens are present or whose nationals are present in the United States. (sic) We have provided the Department of Justice with information about cases in which courts have recognized the need for deference to the Executive Branch's views regarding diplomatic and consular relations.

3. Any information that may be publicly available as to whether, in proceedings against foreign nationals including American citizens, Chinese courts recognize individual rights enforceable by such individuals in court proceedings under either of the two treaties and/or treat violation of either of the two treaties as warranting dismissal, suppression of evidence or like remedies in criminal cases.

We are unaware of any case in which a Chinese court has considered providing remedies or relief to any foreign defendant because of a failure by the Chinese Government to provide consular notification or access. There is no indication that Chinese courts would treat any such lapses as warranting remedies in the context of the criminal process. Moreover, during the negotiation of the bilateral agreement, China expressed great reluctance to agree to any particular time frame in which

ILI US Digest/2 39 1/8/02, 1:45 PM

notification would be provided. China explained that it did not want a specific time frame because of communications difficulties in China and the requirement under its laws that requests for consular access go through the Ministry of Foreign Affairs – both factors that would make compliance difficult. Its preference was to use the VCCR formula, "without delay." The United States objected that this standard was too vague and subjective, and pressed for a definite time period. The resulting compromise was a four-day notification period, which is the longest period provided for in any US bilateral consular convention that establishes a specific time frame. It is doubtful that China would have agreed even to this compromise had there been any thought that a failure of notification would have to be remedied in the criminal justice process.

That consular notification and assistance are not integral to the criminal justice process under the bilateral convention is supported by the fact that China follows extremely restrictive consular visitation practices. Consistent with our own policy with respect to consular officers in the United States, the US-China bilateral consular convention expressly provides in Article 33 that "nothing in these Articles shall authorize a consular officer to act as an attorney-at-law." While the US-China bilateral consular convention provides for mandatory notification "immediately, but not later than four days from the date of arrest or detention," in practice notification to US consular officials generally is made within four days (two days in Beijing). An initial consular visit is generally permitted within a few days thereafter, but it can be bureaucratically cumbersome for US consular officials to arrange subsequent visits, which generally are permitted only once a month. Meetings are limited to 30 minutes. Moreover, US consular representatives are never allowed to be alone with the American citizen detainee (their consular visits are monitored by Chinese prison authorities) and there can be no discussion of any case-related topic prior to the official sentencing. Within these constraints, US consular officers nevertheless seek to monitor the health and welfare of a detained American and to ensure that he or she has legal representation, has some understanding of the charges or the reasons for detention, and is not being treated less favorably by virtue of being an American.

4. Whether criminal courts in other countries that are party to the Vienna Convention on Consular Relations recognize such rights and/or provide such remedies at the behest of defendants in criminal cases.

ILI US Digest/2 40 1/8/02, 1:45 PM

We are unaware of any country party to the VCCR that provides remedies for violations of consular notification through its domestic criminal justice system. As described in our presentation to the ICJ, we undertook a survey of state practice in this regard in connection with considering how the United States should respond to failures of consular notification in the context of death penalty cases. We found no indication that other states party have remedied such failures by granting remedies in the context of their criminal justice proceedings. Significantly, our assertions to the ICJ that there is no precedent among states party to the VCCR for such remedies remain unrebutted even by those governments that have supported the creation of such remedies by the courts of the United States. For example, Paraguay failed to identify a single example in its April 1998 oral presentations to the ICJ or in its October 1998 memorial to the ICJ in *Paraguay v. United States*, and Germany has failed to identify a single example in its September 16, 1999, memorial in the similar case of *Germany v. United States*. None of the governments that participated in OC-16 before the IACtHR identified such an example, notwithstanding their advocacy of a special remedy for violations for failures of consular notification in death penalty cases. (The Department took the view that there was no basis for a remedy limited to death penalty cases and noted that, since the states advocating it do not impose the death penalty, such a rule would have a unique impact on the United States.)

Conversely, we are aware of two jurisdictions, Italy and Australia, in which courts have rejected requests by individuals for a remedy in the context of a criminal proceeding of a violation of Article 36 of the VCCR. These are the *Yater* case, decided in Italy in 1973, and the *Abbrederis* case, decided in Australia in 1981. Copies of reports of both decisions have been provided to the Department of Justice.

5. Any publicly available information that may cast light on representations made to, or the understanding of, the Congresses that respectively ratified the two treaties in question with respect to the issue of individual rights and/or private enforcement by defendants in criminal cases.

We understand that this material will be addressed by the Department of Justice in its brief, drawing upon the ratification record. That record shows that Congress was advised that the VCCR would require

ILI US Digest/2 41 1/8/02, 1:45 PM

no significant change in US practice. Consistent with that representation, John R. Stevenson, then the Department of State's Legal Adviser, wrote to the state governors in April 1970 stating that "We do not believe that the Vienna Convention will require significant departures from existing practice within the several states of the United States." We believe that such a statement would not have been made if the Department of State had contemplated that the VCCR might require that failures of consular notification be remedied in the criminal process through prejudice hearings, and possibly the suppression of evidence or the undoing of other aspects of the criminal process.

This record must be viewed in light of the fact that international law in the 1960s was generally understood to govern the relations between and obligations of states, and not the rights of individuals vis-à-vis states. It should also be viewed in light of the Congress's subsequent actions, in the 1970s, with respect to prisoner transfer treaties (discussed above).

6. Relevant authorities that became available after briefing in this case including *United States v. Ademaj …*; *United States v. Lombera-Camorlinga, ...; United States v. Salameh, ...; United States v. Superville, . . . ; United States v. Chaparro-Alcantara . . . ;* and any other new cases of pending petitions for certiorari.

The Department is unaware of any new dispositive international legal authorities that have become available. The bilateral consular treaties to which the United States is a party do not vest dispute resolution authority in any international body. The ICJ is vested with authority with respect to the VCCR by states party to the VCCR's Optional Protocol, but it has not spoken to the merits of these issues. (As noted, Paraguay withdrew its ICJ case and Germany's case is still being briefed.)

The IACtHR has just issued a decision in OC-16, but no official English translation is available and the Department has not had an opportunity to study it. In any event, the IACtHR is not charged with resolving disputes under or interpreting the VCCR, and its decision is in no way binding on the United States.

We defer to the Department of Justice with respect to domestic cases. We would note, however, that the Department of State supported seeking rehearing in the 9th Circuit case, *Lombera-Camorlinga*, and worked closely with the Department of Justice on the petition for re-

ILI US Digest/2 42 1/8/02, 1:45 PM

hearing that was recently granted, to ensure that it was consistent with our views.

2. Claims by Germany against the United States in the International Court of Justice: *The LaGrand Case*

The International Court of Justice ("ICJ") heard oral arguments in *The LaGrand Case* (*Germany v. the United States of America*) from November 13-17, 2000 at The Hague.

Germany filed the case on March 2, 1999, alleging the failure of the United States to inform two German national brothers that they had the right to have a German consular post notified of their arrest and detention following their 1982 arrest for murder, as required by Article 36(1)(b) of the Vienna Convention on Consular Relations. The brothers, residents of the United States since childhood, had been convicted of murder and in 1984 were sentenced to death by the courts of Arizona. The German government learned of the brothers' case in 1992 and sent consular officers to visit them at that time. Germany did not raise the issue of lack of consular notification with the U.S. Department of State, however, until February 22, 1999, two days before the scheduled execution of the first of the two brothers. When it filed its case on March 2, 1999, Germany also requested an indication of provisional measures to stop the execution of the second brother. On March 3, 1999, less than four hours before the scheduled execution, the ICJ issued an order of provisional measures stating that the United States "should take all measures at its disposal" to stop the execution and "should transmit this Order to the Governor of the State of Arizona." On the same day, Germany filed a separate case in the Supreme Court of the United States, seeking to file a bill of complaint

ILI US Digest/2 43 1/8/02, 1:45 PM

and a motion for a preliminary injunction to prevent the execution. The Supreme Court denied Germany's motion, citing the large number of likely jurisdictional obstacles to hearing the case, as well as the "tardiness of the pleas" put forward by Germany. *Germany v. United States*, 526 U.S. 111 (1999). The Solicitor General of the United States, whose views had been solicited by the Supreme Court on an emergency basis, indicated that the United States did not believe that either the Vienna Convention or the Court's provisional measures order, which the United States regarded as non-binding, provided a sufficient basis to grant a stay. The Department of State transmitted the ICJ order to the Governor of Arizona. The execution took place later that day.

Germany requested the Court to declare or order that: (1) the U.S. violated Article 36(1)(b) of the Convention and related legal obligations; (2) certain rules of U.S. domestic law, particularly the doctrine of procedural default (under which a U. S. federal court will not consider a state criminal defendant's claim that has not been presented to a state court, unless an adequate showing of cause and prejudice has been made) violate Article 36(2) of the Convention; (3) the US violated international legal obligations related to the Court's order of 3 March 1999; and (4) the United States was under an obligation to provide Germany assurances of non-repetition.

In its Counter-Memorial, filed with the ICJ on March 27, 2000, and in oral proceedings before the ICJ in November, the United States noted that the arresting officials had reason to believe that the brothers were U.S. citizens at the time of their arrest (*e.g.*, one brother expressly identified himself as a U.S. citizen), but acknowledged that the brothers' true nationality became known eventually to relevant Arizona authorities and that there was a breach of the U.S.

ILI US Digest/2 44 1/8/02, 1:45 PM

obligation under Article 36(1)(b) to inform the LaGrand brothers that they could ask that a German consular post be notified of their arrest and detention. The United States further noted that, consistent with state practice in such instances, the United States had thoroughly investigated the case, had apologized to Germany for this breach, and was taking extensive measures seeking to avoid any recurrence. It also urged the Court to hold the remaining claims to be inadmissible and contested the legal validity of Germany's other claims related to the failure of consular notification. The excerpts from the United States Counter-Memorial below describe the brothers' American cultural identity and lack of connections with Germany and the steps being taken by the United States to improve compliance with the consular notification requirements. They also set forth United States arguments concerning the speculative nature of Germany's claims concerning the impact of consular assistance in this case and the practice of states concerning the relationship between consular notification and criminal proceedings. The oral presentations on these matters to the ICJ by the United States at the November hearing were made principally by Catherine Brown, Assistant Legal Adviser for Consular Affairs, and Stefan Trechsel, Professor of Criminal Law and Procedure, University of Zurich Faculty of Law. Excerpts from these presentations are also included. The U.S. response to Germany's four requests for relief (referred to as "submissions" under Rule 49 of the Rules of the Court) are provided in excerpts from oral presentations by D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, and Michael J. Matheson, Professor of International Law, School of Advanced International Studies, Johns Hopkins University; formerly Acting Legal Adviser, U.S. Department of State. Footnotes have been omitted from the oral presentations.

ILI US Digest/2 45 1/8/02, 1:45 PM

The full text of all oral and written pleadings in LaGrand is available at *www.icj-cij.org*.

INTERNATIONAL COURT OF JUSTICE
LaGRAND CASE (*GERMANY V. UNITED STATES OF AMERICA)*

Counter-Memorial submitted by The United States of America, 27 March 2000

* * * *

PART II: THE FACTS

CHAPTER I: FACTS REGARDING THE LaGRAND BROTHERS

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15. There … does not appear to be dispute regarding the circumstances of the LaGrand brothers' births and their move to the United States, although there are some differences in characterization. The brothers were born out of wedlock in Germany to a mother of German nationality and fathers of U.S. nationality. Walter was born on 26 January 1962 and Karl on 10 October 1963. A third U.S. citizen serviceman stationed in Germany with the U.S. Army, Masie LaGrand, subsequently married their mother and adopted Walter, Karl, and their half-sister. Masie LaGrand brought his German wife and three adopted children to the United States in February 1967. At that time, Walter was five years old and Karl almost three-and-a-half. The brothers never returned to Germany except to live in a U.S. military housing complex associated with the U.S. Army base in Mannheim, Germany, for about five months in 1974. Thus, although the Memorial speaks broadly of "the upbringing of the boys in Germany"[9] in fact they were largely brought up in the United States after living in Germany for five and three years in their early lives.

[9] Memorial, para. 2.03.

ILI US Digest/2 46 1/8/02, 1:45 PM

16. By the time of the January 1982 murder, the brothers appeared in all respects to be native citizens of the United States. Their language was English, not German. Their appearance, mannerisms, and characteristics were those of citizens of the United States, not of Germany. Indeed, it appears that their adoptive father thought that they had in fact become U.S. citizens, and that the brothers at times identified themselves as U.S. citizens. [10]

17. There is also no dispute that, although they were fully American in outlook and characteristics and spoke little or no German, Walter and Karl LaGrand were in fact German citizens and not citizens of the United States. The fact that the brothers' natural fathers were both U.S. servicemen stationed in Germany was not sufficient to make the brothers United States citizens under the relevant citizenship laws of the United States. [11] In addition, the fact that the LaGrand children were adopted by a U.S. citizen father did not automatically confer U.S. citizenship upon them. Their adoptive father, Masie LaGrand, could have arranged for Walter and Karl LaGrand to be naturalized as U.S. citizens by completing the necessary application and process. [12] Masie LaGrand never did this however, apparently because he mistakenly thought that his adopted children had automatically become U.S. citizens. Had Walter and Karl LaGrand acquired U.S. citizenship, they would have lost their German citizenship under the U.S.-German Treaty Establishing Friendly Relations of 25 August 1921.[13] The United States accepts, however, that Walter and Karl LaGrand acquired German nationality through birth in Germany to a German mother and remained German nationals until their deaths in 1999.

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[10] *See* Walter and Karl LaGrand: *Report of Investigation into Consular Notification Issues,* U.S. *Exhibit 1, pp. 2-3*

[11] A child born out of wedlock outside the United States to a non-U.S. citizen mother and a U.S. citizen father in the years 1962 and 1963 would have acquired U.S. citizenship only if, prior to the child's birth, the U.S. citizen father had been physically present in the United States or its outlying possessions for ten years prior to the birth, at least five of which were after the age of 14, and the child's paternity had been established by legitimation before the child's 21st birthday.

[12] Masie LaGrand could have applied for naturalization of his adopted children pursuant to former Section 323 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1434, until its repeal in 1978; after 1978, he could have applied pursuant to what is now Section 320, 8 U.S.C. 1433, provided the child to be naturalized was under the age of 18. (Section 323 was repealed in 1978 by Section 7 of Public Law 95-417.)

[13] Signed Aug. 25, 1921; entered into force Nov. 11, 1921. 42 Stat. 1939; 8 Bevans 145; 12 LNTS 192.

18. There also is no substantial dispute that Walter and Karl LaGrand had difficult and deeply troubled lives. As children, they repeatedly experienced rejection by their mother and their adoptive father. During their early years in Germany, their case was at times turned over to institutions. After they moved to the United States at ages five and three, this pattern continued. Their mother took little or no interest in the brothers and welcomed their placement in foster care. Their adoptive father apparently became abusive and in any event eventually abandoned the brothers and their mother and sister. Arizona State records contain numerous details of how the brothers felt rejected by their mother, angry, and frustrated by their situation. Eventually the brothers drifted into anti-social and ultimately violent criminal behavior, culminating in the murder of 7 January 1982.

* * * *

CHAPTER III: EFFORTS BY THE UNITED STATES TO IMPROVE COMPLIANCE

20. The United States accepts that effective compliance with the consular notification requirements of Article 36 of the Vienna Convention requires constant effort and attention. As described in the attached Declaration of M. Elizabeth Swope, the Department of State's Senior Coordinator for Consular Notification,[17] the Department of State is working intensively to improve understanding of and compliance with consular notification and access requirements throughout the United States, so as to guard against future violations of these requirements.[18] This effort has included the January 1998 publication of a booklet entitled *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them,*[19] *and development of a small reference card designed to be car-*

[17] Declaration of M. Elizabeth Swope of 14 March 2000, U.S. Exhibit 3.

[18] Ibid

[19] Excerpts are reproduced at U.S. Exhibit 4. A copy of this publication is being provided to the Library of the Court. Courtesy copies were provided in 1998 to all Embassies in Washington, D.C. and later to all foreign consulates in the United States.

ILI US Digest/2 48 1/8/02, 1:45 PM

ried by individual arresting officers.[20] As of March 2000, the Department had distributed approximately 44,000 booklets and over 300,000 cards to arresting officers, prosecutors, and judicial authorities in every state and in other jurisdictions such as the District of Columbia. The Department also has made the booklet available through libraries and the Internet, through which it has been accessed thousands of times.[21] The booklet is now widely available to, and used by, criminal defense lawyers, detainees, and members of the public as well as by federal, state, and local officials.

21. Consular notification and access obligations have also been reviewed at numerous training seminars and meetings throughout the United States. Many of these events have been held in states with significant populations of foreign nationals. Department of State officials have traveled for this purpose to Arizona, California, Florida, Illinois, Massachusetts, New Jersey, New Mexico, New York, North Carolina, Texas, Virginia, and Washington State. Department officials have also spoken about consular notification and access issues at a number of regional or national events, such as special conferences of the states that border Mexico, seminars on international prisoner transfer, international and regional police chiefs and sheriffs meetings, and meetings of federal and state prosecutors.

22. Similar educational efforts in other states of the United States are continuing. In coming months, the Department of State will be conducting programs on consular notification in California, Hawaii, Nevada, Pennsylvania, Texas, and Utah.[22]

23. As part of its ongoing efforts in many states, the Department of State has worked closely with the State of Arizona, which has taken a number of specific steps to ensure that consular notification is provided when required. The Attorney General of Arizona sent all Arizona county attorneys a memorandum advising them of the require-

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[20] U.S. Exhibit 5.

[21] The booklet is available at: *http://www.state.gove/www/global/legal_affairs/ca_notification/ca_prelim.html*

[22] So that the full scope of consular notification obligations will be understood and observed, the Department is also working to educate coroners and other officials responsible for reporting deaths (Vienna Convention Article 37(a)) and judges involved in the appointment of guardianships (Article 37(b)). It has also taken steps to ensure the provision of consular notification is cases of ship wrecks and air crashes (Article 37(c)).

ILI US Digest/2 49 1/8/02, 1:45 PM

ments of the Vienna Convention and providing excerpts from and information about the Department of State's booklet, and has also written to the Chief Justice of the Arizona Supreme Court suggesting a change in the rules of the courts of Arizona that would help ensure compliance. The Arizona Department of Corrections has compiled and distributed within the Department of Corrections a list of consular offices in the United States in or nearest to Arizona, and has adopted new consular notification procedures.[23] These and other specific instructions issued by Arizona authorities have been supplemented by wide distribution within Arizona of the Department of State's booklet, and by numerous training sessions. The Arizona Attorney General's Office is continuing to work on these and other initiatives to improve understanding of and compliance with consular notification and access obligations throughout the state.

CHAPTER IV: GERMANY'S SPECULATIVE AND UNJUSTIFIED CLAIMS ABOUT THE IMPACT OF CONSULAR ASSISTANCE

Section I. Introduction

24. Although the parties seem to be in broad agreement about many of the facts, there are some significant differences. The most important relate to Germany's suppositions about what might have occurred had the LaGrand brothers been properly informed of the possibility of consular notification.[24] First, the Memorial presumes that, had the brothers been told in January 1982 that a German consular post could be notified of their arrest, they would have requested such notification. (The notification would have been given to the German Consulate General in Los Angeles, approximately 700 kilometers/415 miles away from Marana, Arizona.) Second, the Memorial argues that German consular officers from Los Ange-

[23] Pursuant to these new procedures, Karl and Walter La Grandwere given formal notification of their right to contact their consular officials on December 21, 1998. Memorial, Annex MG 12, p. 499. Clearly this notice came too late to constitute compliance with Article 36 in this case, but it is concrete evidence that the procedures now in place in Arizona are being followed.

[24] memorial, paras.4.53 et seq.

ILI US Digest/2 50 1/8/02, 1:45 PM

les would have given rapid and extensive assistance to the LaGrands' defense counsel before the LaGrands' December 1984 sentencing, including obtaining from Germany evidence about the LaGrands' early childhoods before they moved to the United States in February 1967. Finally, the Memorial insists that such consular assistance would have fundamentally changed the outcome of the sentencing proceedings, because consular officers would have provided important evidence not otherwise available to the judge that would have persuaded him not to sentence the brothers as he did. All three lines of argument rest on speculation about what might have happened had the LaGrand brothers been told in 1982 that they could have the German Consulate General in Los Angeles notified of their arrest and detention. None withstands analysis.

Section II. The Brothers Had No Ties with Germany

25. First, the evidence undermines rather than supports Germany's belief that the LaGrand brothers would have requested in 1982 that the German Consulate General in Los Angeles be notified. As the Memorial recognizes, the Vienna Convention leaves it entirely to the arrested person to request consular notification.

It is for him or her alone to decide whether he or she wants the consulate to be contacted or not. [25]

However, foreign nationals – particularly those who do not have strong connections with the sending State – do not uniformly request that their consular officials be notified after they are informed that such notification is a possibility. [26]

26. As described in the report of the Department's investigation, [27] the LaGrand brothers were thoroughly American in identity and outlook when arrested in 1982.…

27. At the time of their arrests, the brothers did not identify themselves to the arresting officers as Germans. The evidence indicates that

[25] Memorial, para. 4.11. Germany seems to criticize Arizona authorities for not directly informing the German Consulate General of the LaGrand's arrest, Memorial para. 4.12. However, as the Memorial acknowledges, such "notification of the consulate without or against the will of the person concerned is excluded." Memorial, para. 4.11.

[26] Declaration of Edward Betancourt, U.S. Exhibit 8, p. 5.

[27] U.S. Exhibit 1, p. 3.

ILI US Digest/2 51 1/8/02, 1:45 PM

Walter identified himself to detaining authorities as a U.S. citizen; Karl either made similar identification, refused to state his citizenship, or did not know his citizenship.[29] The family and friends that Walter and Karl identified as points of contact when arrested were all in Arizona. The brothers' cultural identity was American throughout. It is thus implausible that two young men who showed little sense of being German and who were totally disconnected from Germany would have asked the Arizona officials responsible for their arrest or detention to notify the German Consulate General in Los Angeles that they had been arrested.

Section III. The Memorial's Unjustified Claims About Consular Assistance

28. Nor does the Memorial credibly support its contention that a German consul would have immediately assisted the LaGrand brothers or significantly aided their legal defense, had the German Consulate General in Los Angeles been notified earlier.[30] Reference to present-day policies does not prove how German consuls performed their duties eighteen years ago. Part V considers the limited and discretionary nature of a consul's role when a national is detained, and shows how that role is often quite different from the idealized portrait presented in the Memo-

[29] Indeed, Germany's Memorial implies that the brothers may have come to realize their German nationality only after their arrest. Memorial, para. 6.83. ("[A]fter the brothers had become aware of their German nationality, they raised the violation of Article 36 of the Vienna Convention… .")

[30] Perhaps recognizing the speculative character of many of its factual arguments, Germany contends that "the burden of proof for the impact of the violation is to be borne by the United States." Memorial, para. 4.52. Germany cannot so easily evade the basic principle that "[u]ltimately, … it is the litigant seeking to establish a fact who bears the burden of proving it." Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Jurisdiction and Admissibility, I.C.J. Reports 1984, p. 437, para. 101. The ambiguities and unproven assumptions throughout Germany's case involve matters that are or can be known to Germany. The Court "cannot … apply a presumption that evidence which is unavailable would, if produced, have supported a particular party's case; still less a presumption of the existence of evidence which has not yet been produced." Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Judgement of 11 September 1992, I.C.J. Reports 1992, p. 399, para. 63.

ILI US Digest/2 52 1/8/02, 1:45 PM

rial. Most importantly, consular officers cannot act as lawyers. The assistance they provide to a defendant in a criminal proceeding is limited to assisting in obtaining legal counsel and then assisting legal counsel – if requested – within the limits of the consular officer's authorities and resources.

29. Germany has provided little support for its assertions that German consular officers would have retained different defense lawyers, that they would have aided the LaGrands' defense counsel in 1982-84 by seeking additional information about the brothers' early childhoods in Germany, or even that German consular officials would have responded at all.…

30. The actions of the German Consulate General in Los Angeles when it ultimately learned of the LaGrand brothers in June 1992[33] may offer a more realistic indication of consular practice. The Consulate General's response suggests that German authorities had doubts about whether the brothers were German nationals at all, or whether urgent consular assistance to them – or perhaps any assistance – was appropriate. Clearly, the Consulate General did not rush to assist the brothers. Apparently, two other Germans in prison with the LaGrands were receiving consular visits and prompted a contact between the brothers and the Consulate General in June 1992. The Memorial states that the German Consulate General thereafter "immediately … engaged in a careful and comprehensive inquiry into the nationality status of the two brothers."[34] That inquiry was indeed "careful and comprehensive" – indeed, it appears to have been slow, deliberate, and even skeptical. Not until November 1992 did a German consular officer visit the LaGrands.[35] The LaGrands' German nationality was not officially documented by Germany until 15 March 1993.[36]

31. The German Consulate General's slow and cautious response conflicts with Germany's assertions that its consuls would have sprung immediately into action in 1982, had they learned that two native English-speakers long resident in the United States, but who claimed to be German, faced charges for a murder in a small Arizona town. It seems

[33] Memorial, paras. 2.06 and 3.73.
[34] Memorial, para. 3.73.[35] Memorial, para. 2.06.
[35] Memorial, para. 2.06.
[36] Memorial, para. 3.73 and Annex MG 41, p. 801.

ILI US Digest/2 53 1/8/02, 1:45 PM

particularly doubtful that consular officials would have responded quickly because the brothers had no documentation at hand to prove that they were German nationals. They had no German passport or identification card, having been included in their mother's long-since-expired German passport when they first came to the United States as small boys in 1967.

32. It is also important to remember that the LaGrands' defense was at all times the responsibility of their defense attorneys. Just as Germany's compilation of information from Germany about the LaGrands after 1992 was at the behest of the lawyers then assisting them, the LaGrands' defense lawyers in 1982-1984 would have decided what requests for assistance to make to a consular officer. There is no indication that Walter or Karl LaGrand's defense lawyers in 1982-1984 would have asked German consular officials to obtain additional evidence about the brothers' lives in Germany. Both defense lawyers knew that the LaGrands had been born in Germany, but apparently elected not to seek evidence about their early childhoods there.

* * * *

34. It was not unreasonable for the LaGrands' trial counsel not to seek additional information from Germany. Information about the brothers' early years was available from Walter and Karl LaGrand themselves and from their sister, and was reflected in pre-sentence materials prepared for the sentencing judge. Moreover, by 1984, when the brothers were sentenced, their early years in Germany were remote and relatively less significant than the seventeen years since they left Germany. Those seventeen troubled years were well documented. Thus, ample mitigation evidence about the LaGrands' dysfunctional childhoods, including their early years in Germany, was provided to the Court. Defense counsel did not need to reach for additional documentation from Germany relating to the time years before when the brothers were five and three years old.

35. German consular officials' actions after they finally began to assist the LaGrand brothers also conflict with Germany's claims. Germany explains its last-minute filing by arguing that German officials only learned at a clemency hearing on 23 February 1999 that Arizona authorities knew of the LaGrands' German nationality long before. We believe this stems from a reference made by an attorney for Arizona at

ILI US Digest/2 54 1/8/02, 1:45 PM

the clemency hearing to the brothers' 1984 pre-sentence reports,[38] official court documents crucial to understanding the sentences imposed.[39] The 1984 reports were available to German officials and are the second exhibit to Germany's Memorial. If they were not reviewed by German consular officials after they learned of the case in 1992, then those officials clearly did not see their role to include evaluating the evidence considered at sentencing. This directly conflicts with Germany's claims that a German consular officer in 1982-1984 would have worked to evaluate and supplement the evidence presented to the judge regarding the LaGrands' troubled early childhoods.

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PART V THE ISSUE OF PROCEDURAL DEFAULT

* * * *

CHAPTER III

STATE PRACTICE, INCLUDNG GERMANY'S OWN PRACTICE CONFLICTS WITH GERMANY'S CLAIM

91. State practice, which is particularly instructive for such a widely accepted Convention, also conflicts with Germany's claim. The U.S. Department of State has conducted an extensive survey of State practice under the Vienna Convention in response to past expressions of concern regarding U.S. consular notification practices, and has continued to monitor State practice under the Convention carefully. These efforts are described in the Declaration of a senior State Department consular official, Edward Betancourt, on State practice regarding consular notification and

[38] Memorial, Annex MG 2, pp. 253-289. Walter and Carl LaGrand are identified on the first pages of their 1984 pre-sentence reports as citizens of Germany.Ibid., pp. 253 and 268.

[39] The Memorial does not clearly describe Germany's understanding of events at the 23 February 1999 clemency hearing, although it suggests that the hearing somehow revealed that Arizona officials knew of the LaGrands' German nationality as early as 1982. Memorial, para. 1.03. Our understanding is that Counsel for the State of Arizona referred to the 1984 pre-sentence report at the 23 February hearing, in order to show that evidence about the brothers's childhoods was available at sentencing. German representatives apparently viewed this as an indication of bad faith by Arizona.

ILI US Digest/2 55 1/8/02, 1:45 PM

access at U.S. Exhibit 8. As indicated in that declaration, States Party to the Vienna Convention throughout the world operate on the understanding that a criminal proceeding against a foreign national can proceed regardless of whether consular notification or assistance is provided.[96]

92. Indeed, Germany's Memorial does not claim that German courts would invalidate a conviction or sentence when there has been a failure of consular notification. We question whether Germany (or very many other Parties to the Convention) could make such a representation. Germany's claim in this case that the Vienna Convention requires individual remedies in the criminal justice system, including the invalidation of convictions, fundamentally conflicts with the manner in which States, including Germany, actually implement the Convention.

93. As Mr. Betancourt describes, violations of Article 36 are common and States characteristically deal with violations of consular notification obligations through diplomatic means, not through judicial setting aside of convictions. When a consular officer learns of a failure of notification, a diplomatic communication often is sent to protest the failure. Most States accept responsibility to investigate alleged violations and, if necessary, to remind the appropriate "competent authorities" of their responsibilities. If notification procedures are not followed, it is also common for the host government to apologize and to undertake to ensure improved future compliance.

94. This has been precisely the practice followed by Germany. For example, less than a month after Germany commenced this suit, the German Foreign Ministry sent the Untied States Embassy a note responding to the Embassy's complaint about a failure of consular notification in the case of a U.S. citizen arrested in Germany on August 26, 1997, and convicted on December 16, 1997.[97] The Ministry's note is accompanied by a

[96] Germany suggests that a different rule is emerging in the United States. Memorial, paras. 4.116-4.119.) In fact, the current trend is the opposite. The 9th Circuit Court of Appeals decision described in paragraph 4.118 of the Memorial has been withdrawn, and both the 9th and the 1st Circuit Courts have adopted a rule that failures of consular notification are not appropriately remedied by suppressing evidence or other similar measures in the criminal process. *United States v. Nai Fook Li,* 2000 WL 217891 (1st Cir., February 29, 2000); *United States v. Lombera-Camorlinga,* 2000 WL 245374 (9th Cir., March 6, 2000). These decisions are provided to the Court as U.S. Exhibit 9.

ILI US Digest/2 56 1/8/02, 1:45 PM

letter from the Senator for Justice and Constitutional Matters of Bremen, acknowledging the requirements of Article 36 and reporting the results of the official investigation into the failure to notify U.S. consular officers. The letter acknowledges that the U.S. citizen may not have been informed of his right to request notification, that the citizen apparently requested notification nonetheless, but that the competent authorities – in this case, prison officials – forgot to notify U.S. consular officials as requested. The letter apologizes for the error and advises of the steps taken to avoid repetition. Neither the German note nor letter suggests that the conviction would in any way be affected by the breach of Article 36. German officials similarly investigated and apologized in another case involving a protracted failure of notification in 1998. [98]

* * * *

GERMANY VS. UNITED STATES, VERBATIM RECORD, INTERNATIONAL COURT OF JUSTICE, 14 NOVEMBER 2000.

* * * *

Mr. BROWN:

4.1 My focus will be the United States response to the breach in this case and the question whether the Vienna Convention on Consular Relations requires any different response. I will in particular address whether the Convention requires States party to provide remedies in their criminal justice systems to foreign nationals who have not been informed, in accordance with Article 36 of the Convention, that they could request consular notification. Germany has constructed a fanciful theory in an effort to persuade the Court to answer this question "yes". The United States submits that the answer in fact is indisputably "no", and that the court would seriously distort the framework in which consular relations are conducted were it to conclude otherwise.

* * * *

[97] U.S. Exhibit 10.
[98] U.S. Exhibit 11.

ILI US Digest/2 57 1/8/02, 1:45 PM

4.12. … It is wrong to belittle the United States position that Article 36 breaches are appropriately addressed through a process of investigating, apologizing, and undertaking a genuine good-faith effort to do better in the future. In her authoritative commentary on the Vienna Convention on Diplomatic Relations, Eileen Denza has observed that the Diplomatic Convention has been remarkably successful in winning support and obsevance. One reason, in her view,

> "is that reciprocity forms a constant and effective sanction for the observance of nearly all the rules of the Convention. Every State is both a sending and a receiving State. Its own representatives abroad are in some sense always hostages."

The same can be said of the Vienna Convention on Consular Relations. States party know that the rules of conduct they urge upon others are ones that they must be prepared to live by themselves. Conversely, they know that the way in which they treat States party under the Convention may significantly affect the way they are treated. In this context, the response of the United States is anything but meaningless. It is a clear, public, and concerted message directed from the highest levels of the United States Department of State and the United States Department of Justice to the States party to the Convention, designed to assure them that we are indeed serious about Article 36, and that we fully expect to be held to the same standards domestically as we seek to hold them to with respect to American citizens abroad.…

* * * *

Mr. MATHIAS:

5.1 Thank you, Mr. President. It is an honour to appear before this Court as a counsel for the United States in this case.

5.2 Mr. President, Members of the Court, my task this afternoon is to offer observations on the relief sought by Germany in this case. In its Memorial and again yesterday in its oral presentation, Germany has articulated four submissions, although those submissions changed somewhat in yesterday's version.

5.3. My observations will be limited to the first, second and fourth submissions. Professor Matheson will discuss the third submission, relating to the Court's Order on Provisional Measures.

ILI US Digest/2 58 1/8/02, 1:45 PM

Germany's first submission

5.4 Germany's first submission, and these submissions are provided in Tab 7 of the books in front of you, seeks a declaration by the Court

> "that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, subparagraph 1 *(b)*, of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36, paragraph 1, of the said Convention".

This submission includes five distinct elements: first, the allegation that the United States did not inform Karl and Walter LaGrand in a timely manner about their right of consular notification; second, the allegation that the United States deprived Germany of its right to provide consular assistance; third, the factual assertion that the execution of Karl and Walter LaGrand was the result of the foregoing alleged wrongful conduct; fourth, the allegation that the alleged wrongful conduct of the United States constituted a violation of an obligation to Germany in its own right; and finally, the allegation that the alleged wrongful conduct constituted a violation of an obligation to Germany in its right of diplomatic protection of its nationals.

5.5 As is clear from its Counter-Memorial, the United States has indicated that it would not object to a properly worded judgment of the Court with respect to two of these five elements: that the United States has admitted and apologized for a breach of its duty to inform Karl and Walter LaGrand of their right to notification of their consular officials and we do not dispute that this was a breach of an obligation owed to Germany under the Consular Convention.

5.6 But, the other three elements of Germany's first submission should be rejected. First, there was no deprivation of Germany's right to provide consular assistance, under Article 5 or Article 36, to Karl or Walter LaGrand. From such time as Germany began to provide consular assistance to the LaGrands, there was no interference by the United States

ILI US Digest/2 59 1/8/02, 1:45 PM

with such assistance, there has been no allegation by Germany of any such interference. Germany's attempt to transform a breach of one obligation into an additional breach of a wholly separate and distinct obligation should be rejected by the Court. It may be of rhetorical value but it is logically meaningless, for example, to assert that the United States interfered with communications between Germany and the LaGrands when neither sought to make any such communications.

5.7 Note that the communications between Germany and the LaGrands when they did take place were not the result of the United States informing the LaGrands of the possibility of such contact, but of the LaGrands learning independently of that possibility. So these distinct obligations do not walk hand-in-hand, and the violation of one does not constitute a breach of the other. Second, the request that the Court should incorporate into its judgment a factual finding that the execution of Karl and Walter LaGrand "ultimately resulted" from the breach of the duty to inform is not supported by the record before the Court. Attorney-General Napolitano addressed this issue this morning. Despite Germany's assurances to the contrary, the causation issue in this case presents a large hurdle for it to overcome. In his Third Report to the International Law Commission on State Responsibility, Professor James Crawford, the Special Rapporteur, observed with respect to this case and the *Breard* case:

> "the relationship between the breach of the obligation of consular notification and the conviction of the accused person was indirect and contingent. It could well have been the case that the subsequent trial was entirely proper and fair and that the failure of notification had no effect on the conviction. The United States had jurisdiction to try the accused for a capital offence, and was not a party to any instrument precluding the imposition of the death penalty."

Germany's factual allegation on this point remains entirely speculative and should be rejected by the Court.

5.8 Finally, in so far as Germany seeks a determination by the Court that the breach of the duty to inform with respect to Karl and Walter LaGrand was a violation of an obligation to Germany in its right of diplomatic protection, Professor Meron has demonstrated that this issue is not properly before the Court.

ILI US Digest/2 60 1/8/02, 1:45 PM

Germany's Second Submission

5.9. This submission seeks a declaration by the Court

> "that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Consular Relations Convention, and by ultimately executing them, violated its international legal obligation to Germany under Article 36, paragraph 2, of the Convention to give full effect to the purposes for which the rights accorded under Article 36 of the Convention are intended".

5.10 We submit that this submission should be rejected by the Court in its entirety. It is premised on an interpretation of Article 36, paragraph 2, that is, as Ms. Brown observed this morning, without support in the text of the Convention, in the preparatory work leading to the Convention, and in the practice of States that created the law that was codified by the Convention, in the practice of States after the coming into force of the Convention. The deficiency of this submission will be clearer, I think, if we look carefully at the relevant texts.

5.11 Article 36, paragraph 2, — and I think you have this before you in Tab 1 – provides that

> "the rights referred to in paragraph 1 … shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended".

Thus, as counsel noted yesterday this Article has two parts: first, a proposition – concerning the manner in which the rights referred to in paragraph 1 are to be exercised – and, second, a proviso – which conditions the application of that proposition. Note that Germany's submission focuses exclusively on the second part, as if the proviso itself establishes a free-standing obligation, while ignoring the first part, the more fundamental proposition, which has to do with the exercise of rights referred to in paragraph 1.

ILI US Digest/2 61 1/8/02, 1:45 PM

5.12 Let us consider together the application of Article 36, paragraph 2, to Karl and Walter LaGrand. What were the rights referred to in paragraph 1 that the LaGrands were seeking to exercise? There are only three possibilities, all set out in subparagraph 1(b). First, they may be viewed as having had the right, at their request, to have the competent authorities of the United States inform the relevant German consular post without delay of their arrest or detention. Second, they may also be viewed as having had the right to have any communication addressed by them to the consular post forwarded by said authorities without delay. Third, for purposes of this argument, they may be viewed as seeking to exercise Germany's related right that its nations be informed without delay of their right to consular notification.

5.13 Now, which of these rights – the only rights of the LaGrands set forth in paragraph 1, and accordingly, the only rights that are the subject of paragraph 2 – which of these rights did the law of procedural default allegedly interfere with the exercise of? Did it interfere with the right of the LaGrands, at their request, to have German authorities informed of their arrest? No. By the time of the application of procedural default the LaGrands were in contact with German authorities. Similarly, there has been no allegation of any law or regulation that interfered with the exercise by the LaGrands of their right to have communication to the consular post forwarded without delay. Finally there has been no allegation of any law or regulation that interfered with the LaGrands being informed, without delay, of their right to have German consular authorities notified of their detention. The breach of the duty to inform was the result of a mistake by the competent authorities of the State of Arizona, not the application of a law or regulation that limited the exercise of that duty. The explanation has been set out in detail in Exhibit 1 to the Counter-Memorial. Accordingly, with an eye toward the text of Article 36, paragraph 2, I would suggest, provisionally, that this section does not appear to be relevant to the LaGrand's exercise of any of their rights under paragraph 1.

5.14 Let us return now to Germany's submission. What is Germany's allegation on this point? Which of the rights referred to in paragraph 1 does Germany submit that the law of procedural default interfered with the exercise of? The answer is that Germany makes no such allegation with respect to any right referred to in paragraph 1. Germany submits, instead, that the United States, through the doctrine of procedural default, barred Karl and Walter LaGrand "from raising their

ILI US Digest/2 62 1/8/02, 1:45 PM

claims under the Vienna Convention on Consular Relations". That is to say, Germany substitutes the concept of the making of a claim under the Vienna Convention for the concept of the exercise of the specific rights under Article 36, paragraph 1. This is a form of treaty interpretation for which there is no precedent in the Vienna Convention on the Law of Treaties or in international jurisprudence. The doctrine of effectiveness cannot and does not permit the transformation of one obligation into another where a carefully negotiated text clearly requires a different result. Germany has confused the exercise of a right with the remedy for the breach of an obligation.

5.15 There is a second aspect of Germany's second submission that is also difficult to reconcile with the text of Article 36, paragraph 2. Germany submits that the executions themselves violated the Consular Relations Convention. In light of both the Court's discussion of the capital punishment issue in paragraph 25 of the Order on Provisional Measures and the observations concerning the scope of Article 36, paragraph 2, already before the Court, we consider that this submission is clearly without merit. The laws and regulations pursuant to which the LaGrands were lawfully executed by the State of Arizona are not before this Court, because they have no application with respect to the attempted exercise by the LaGrands of any right under Article 36, paragraph 1.

5.16 Germany's argument, articulated for the first time yesterday, appears to be that States party to the Consular Convention undertook an obligation in Article 36, paragraph 2, to refrain from capital punishment with respect to foreign nationals who may have a "claim" under the Consular Relations Convention. The text of Article 36, paragraph 2, obviously does not support this conclusion. Germany implicitly acknowledges this by arguing for a rule of dynamic interpretation, by reference to developments in the human rights area. Professor Meron has already addressed the inadequacy of this argument as a proposed basis for the creation of a new obligation on States parties. For the Court to create such an obligation here would involve it not only in wholesale legislation but also in the inappropriate interference in the domestic law of the States parties

Germany's fourth submission

5.17. Let us turn now to Germany's fourth submission. Germany's final submission – substantially rewritten for yesterday's presentation

ILI US Digest/2 63 1/8/02, 1:45 PM

to include an additional element of relief – seeks the Court's determination

> "that the United States shall provide Germany an assurance that it will not repeat its illegal acts and that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations. In particular in cases involving the death penalty, this requires the United States to provide effective review of remedies for criminal convictions impaired by a violation of the rights under Article 36."

5.18 I propose to discuss this fourth submission under two principal themes: first, the general character of the relief sought – assurances and guarantees of non-repetition – and their undetermined status under international law; and second, the nature of the assurance sought in this case, and the inappropriateness of that assurance in the circumstances of this case. Much of our discussion will be framed in terms of the International Law Commission's draft articles provisionally adopted by the Drafting Committee of the Commission on second reading. We note, however, that the draft articles on State responsibility remain, by their very terms, unfinished and that the Commission's own practice in substantially revising earlier versions of these draft articles should caution against treating the current draft as definitive. We also note that States provided substantial comments during this year's consideration of the Report by the Sixth Committee of the General Assembly. We note further that written comments by member States have been requested by 31 January 2001. The United States intends to provide comments on a variety of provisions, including the provision on assurances and guarantees of non-repetition.

5.19 We suggest that the Court should also bear in mind the dual mandate of the International Law Commission. While it may be entirely appropriate for the International Law Commission, in fulfillment of its mandate for the progressive development of international law, to identify obligations that may not be reflections of current law, it would not be appropriate for this Court to impose such an obligation on a State

ILI US Digest/2 64 1/8/02, 1:45 PM

appearing before it that has not accepted such an obligation. I note in this regard that a number of States in the recent Sixth Committee discussion of the draft articles noted that the draft articles included significant aspects that reflect progressive development and not codification of customary law.

5.20 Germany's fourth submission is clearly of a wholly different nature than its first three submissions. Each of the first three submissions seeks a judgment and declaration by the Court that a violation of a stated international legal obligation has occurred. Such judgments are at the core of the Court's function, as an aspect of reparation.

5.21 These were discussed yesterday as a form of satisfaction. There is ample precedent for this approach, including this Court's important Judgment in the *Corfu Channel* case that "the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction." The 1990 Award of the arbitral tribunal in the *Rainbow Warrior* case is to similar effect:

> "that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand".

The recent decision in the *Saiga No 2.* case, before the International Tribunal for the Law of the Sea provides additional illustration on this point.

5.22 Article 38 of the International Law Commission's draft articles on State responsibility provides in paragraph 2, as was noted yesterday, that "Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or other appropriate modality." Counsel for Germany yesterday mocked these elements of satisfaction, but their contempt does not find support in the law. The acknowledgment of breach and formal apology are at the heart of the law of satisfaction: and we anticipate that this Court, like the International Law Commission, will not be so dismissive.

5.23 In contrast, however, to the character of the relief sought in the first three submissions, the requirement of assurances of non-repetition sought in the fourth submission has no precedent in the jurispru-

ILI US Digest/2 65 1/8/02, 1:45 PM

dence of this Court and would exceed the Court's jurisdiction and authority in this case. It is exceptional even as a non-legal undertaking in State practice, and it would be entirely inappropriate for the Court to require such assurances with respect to the duty to inform undertaken in the Consular Convention in the other circumstances of this case.

5.24 The special status of assurances and guarantees of non-repetition was acknowledged by the Special Rapporteur, Professor Crawford, in his Third Report on State Responsibility, where he notes that

> "the question is not one of reparation but, as it were, a reinforcement of an (*ex hypothesi* continuing) legal relationship. In this sense assurances and guarantees relate to future performance of the obligation, on the footing that it has survived the breach."

An assurance or guarantee requires the creation of a new obligation with independent legal significance; the Commission's Report records the observation that "from a legal standpoint, the fact that such a guarantee had been given would be a new undertaking over and above the initial undertaking that had been breached". Learned counsel yesterday suggested that assurances be regarded both as a form of satisfaction and as a future-oriented obligation unrelated to reparation. With respect, we submit that, while it may fit better conceptually where the Commission has currently placed it, it is not part of customary law in circumstances like those in this case under either conceptual basis.

5.25 As was argued in the Counter-Memorial, the Court should reject Germany's invitation to confer upon Germany new or additional rights beyond those existing under the Consular Convention. The Court's power to decide cases in its role as the principal judicial organ of the United Nations does not extend to the power to order a State to provide a "guarantee" intended to confer additional legal rights; that is, does not extend to legislation. Professor Rosenne has written definitely on this point:

> "The International Court is not a legislative body established to formulate new rules of law. In a sense this is stating the obvious. Nevertheless, confusion persists. The Court, like all courts, applies the exist-

ILI US Digest/2 66 1/8/02, 1:45 PM

> ing law. It does not 'create' new rules of law for the parties to a given dispute or for the international community at large."

5.26 Moreover, the Court has never issued a judgment requiring assurances or guarantees of non-repetition or any other specific action in anticipation of a violation of international law. In fact, in *Haya de la Torre*, the Court did the opposite. In that case, the Court was asked to determine the manner in which effect should be given to its earlier declaratory Judgment in the *Asylum* case. In *Haya de la Torre*, the Court held that it was not in a position to state how Colombia should terminate the asylum it had granted. The Court held:

> "Having thus defined in accordance with the Havana Convention the legal relations between the Parties with regard to the matters referred to it, the Court has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view toward terminating the asylum, since, by doing so, it would depart from its judicial function."

5.27. In addition to the question of the Court's authority, as a general matter, to order such a guarantee, there is the need to consider the basis for the Court's jurisdiction to do so in this particular case. The Optional Protocol provides the Court with jurisdiction to decide disputes arising out of the interpretation or application of the Vienna Convention. The alleged entitlement of Germany to an assurance or guarantee of non-repetition does not arise out of a dispute concerning the interpretation or application of the Vienna Convention. If there is such an entitlement, it arises under general international law, not the Vienna Convention. It is clear in the Court's jurisprudence that, when the Court has jurisdiction under the Optional Protocol, that jurisdiction includes such matters as the cessation of wrongful conduct and the reparation for such conduct. What is unprecedented is the suggestion that such jurisdiction would extend so far as the requirement of a new legal undertaking that would be "over and above" – to return to the language of the International Law Commission's Report – "over and above" the Convention obligation that is the basis for the Court's jurisdiction under the Optional Protocol. Such a requirement is a significant conceptual leap from the application and interpretation of the Consular Convention. By

ILI US Digest/2 67 1/8/02, 1:45 PM

its very nature, it is independent of the application and interpretation of the Convention. We believe that it would undermine the fundamental notion of the consent-based jurisdiction of the Court were the Court, in the context of adjudicating a dispute arising out of the interpretation or application of the Consular Convention, to impose a new, independent legal obligation on the United States allegedly arising from the law of State responsibility.

5.28. The record of the Commission's discussion of assurances and guarantees of non-repetition reveals fundamental skepticism about whether there is any legal obligation to provide them. Thus, it was observed that, while in daily diplomatic practice governments often provided such assurances, it was considered questionable whether such a statement could be regarded as a legal consequence of responsibility. It was remarked that there were no examples of cases in which the courts had required assurances and guarantees of non-repetition. The place of assurances and guarantees of non-repetition was questioned since they seemed directly inherited from nineteenth-century diplomacy. In his Third Report, Special Rapporteur Crawford questioned whether assurances and guarantees:

> "can properly be formulated as an obligation at all. It may be asked what the consequences of a breach of that obligation could be. For example, could a State which had tendered full reparation for a breach be liable for countermeasures because of its failure to give assurances and guarantees against repetition satisfactory to the injured State? It does not seem very likely."

5.29 While the Special Rapporteur noted that a few governments had commented on the subject and had generally been supportive of assurances and guarantees, he added that "this does not mean however that they share the same view as to its scope and purpose". In fact, the comments by governments do not appear to provide any particular support for the requirement of an assurance or a guarantee of non-repetition in the context of this case.

5.30 Most significantly, Germany itself has questioned the status of guarantees of non-repetition as an obligation following from State responsibility. In its comments in 1997 on the draft articles, Germany observed that

ILI US Digest/2 68 1/8/02, 1:45 PM

> "[s]ome doubt exists, however, as to whether the injured State has, under customary international law, the right to 'guarantees of non-repetition' …To impose an obligation to guarantee non-repetition in all cases would certainly go beyond what State practice deems to be appropriate."

We note that in its original submission Germany had requested just such a guarantee. Yesterday, there was a change in the submission. Now Germany seeks an assurance, but an assurance that amounts to an absolute guarantee of non-repetition. There is some question of the appropriateness of Germany asking the Court to require from the United States an undertaking which, it has conceded, is without firm support in customary international law.

5.31 The current version of the draft article on cessation and non-repetition appears at Article 30, which states in relevant part that: "The State responsible for the internationally wrongful act is under an obligation …*(b)* to offer appropriate assurances and guarantees of non repetition, if circumstances so require". Note carefully the calculated imprecision of that draft article: not only is it clear from the draft article that the obligation is to offer "appropriate" assurances and guarantees, not, as Germany would seem to require, an absolute assurance that the United States will not repeat its allegedly wrongful acts, but it is also clear that such an obligation does not exist in all cases, but only "if circumstances so require". The report of the Drafting Committee on Article 30 is replete with cautionary notes. It records that "several members had pointed out that assurances and guarantees of non-repetition were not appropriate in all circumstances". The Report continues: "They were measures for exceptional circumstances. That was what the words 'if circumstances so require' at the end of subparagraph *(b)* were intended to convey."

5.32 With these observations on the exceptional nature of appropriate assurances and guarantees as a backdrop, let us consider more carefully the specific request that Germany is making in this case. First, Germany asks the Court to declare that the United States shall provide Germany with an assurance that it will not repeat its illegal acts. Illegal acts, in the plural. This, presumably, although not expressly, is a reference back to the first three submissions.

5.33 Let us consider the German request for an assurance as to the duty to inform foreign nationals without delay of their right to consular

ILI US Digest/2 69 1/8/02, 1:45 PM

notification. Note that the German request is not phrased in terms of an obligation on the part of the United States to undertake to take steps, for example, to improve its performance of consular notification duty in the future. Such assurances were treated with contempt yesterday in this courtroom. It instead seeks to have the Court require the United States to assure that it will never again fail to inform a German foreign national of his or her right to consular notification. But the Court is aware that the United States is not in a position to provide such an assurance. This observation does not reflect a lack of concern by the United States with respect to its international obligations. It reflects the reality against which the German request for an additional assurance of non-repetition should be evaluated. I would, with respect, ask the distinguished Members of the Court whether they think that their own countries could provide such an assurance.

5.34 It is true, as counsel for Germany has observed, that the likelihood of repetition of a wrongful act has been identified in the reports of the International Law Commission as a factor that may be relevant to the determination of the circumstances, if any, in which the law of the State responsibility would require an offer of appropriate assurances or guarantees of non-repetition.

5.35 It is not necessary for the Court to determine in this case, however, whether the law of State responsibility would require the United States to offer appropriate assurances of some character to Germany with respect to the obligation of consular notification because, as the Court is aware, the United States has already provided appropriate assurances to Germany on this point. The Court has heard a good deal about these very substantial efforts already today.

5.36 The nature of the assurances that the United States has provided is consistent with State practice, which includes a range of undertakings. The International Law Commission has been clear that assurances and guarantees may take a variety of forms. The Commentary on the draft articles as adopted at first reading observed that "international practice is not univocal" with regard to the kind of guarantees that may be requested . The Report of the Commission's 52nd Session records the observation of the Special Rapporteur that "sufficient assurances and guarantees could range from extraordinarily rigorous arrangements to mere promises or undertakings in different cases". The Report of the Drafting Committee suggests that "assurances were normally given verbally, while guarantees of non-repetition involve something else, i.e., certain preventive actions". While the first part of this observation may

ILI US Digest/2 70 1/8/02, 1:45 PM

not apply in the current case, in which assurances were provided in writing, the diplomatic Note that is before the Court, the notion that assurances or guarantees may involve "certain preventive actions" is certainly consistent with the four-and-one-half pages of preventive actions that are described in the Note of 18 February 2000.

5.37 Germany's request for a judgment requiring an absolute assurance of non-repetition, on the other hand, is without precedent and misguided in respect of an obligation like the one at issue in this case. While the Commentary cites, and Germany has cited, certain incidents, mainly from the nineteenth century, in which States have requested such an absolute guarantee from other States, no case has been cited in which any court or tribunal – outside, perhaps, the special circumstances of human rights law – has ever ordered such an assurance. In addition, none of those incidents involved an obligation of the nature of the consular notification obligation, one that is to be performed on a continuing basis, by officials at all different levels of government, throughout the territory of the State, in countless circumstances. It may be one thing for a State to seek an absolute assurance that a particular consular post will be better protected in the future. It is another to seek the sort of assurance that is here sought by Germany. Moreover, the Commentary specifically observed, with respect to some of the incidents it cited, that "these examples would not necessarily all represent what would be 'appropriate' by today's standards". To the same effect is the caution of the Drafting Committee in its discussion of Article 30:

> "The Drafting Committee had been fully aware that, in the past, guarantees of non-repetition had involved demands that were far-reaching, but it had taken the view that guarantees could not be dropped from the articles simply because some demands had been excessive. It might be reasonable, in some exceptional circumstances, to say that verbal assurances were inadequate."

But Germany's request here goes far beyond a "reasonable" request for a written statement of preventive measures.

5.38 It is true that the obligations undertaken by the United States and the other States party to the Consular Convention are themselves stated in absolute terms. Germany argues that all it seeks is a require-

ILI US Digest/2 71 1/8/02, 1:45 PM

ment that the United States honour its international obligations. But Ms. Brown has discussed the practice of States in implementing their obligations under the Convention, she elaborated on the "conversation" among States that informs the implementation of the Convention. A guarantee of the sort sought by Germany is not part of the "conversation" and it is not consistent with the practice of States in implementing the Convention. Moreover, as previously stated, the request for a guarantee is a request for the undertaking of a new obligation, "over and above" – again in the words of the International Law Commission – the existing obligation. There is no basis in international law or practice for such a new undertaking in the circumstances of this case. It might be noted that the record suggests that Germany itself would not be in a position to provide such an assurance.

5.39 The rationale of the US position with respect to assurances is different with respect to the other allegedly wrongful acts, that are the subject of Germany's submissions. Any requirement of assurances or guarantees with respect to the alleged interference of the United States with German provision of consular assistance to its nationals would be entirely inappropriate, because no such interference has taken place in the first instance. There has been no breach and no likelihood of a future breach has been established. Where there has been no breach, of course, the possibility of an aggravated breach, as suggested by counsel yesterday, also does not arise.

5.40 With respect to the alleged breach of Article 36, paragraph 2, Germany's fourth submission is more precise. Germany seeks an assurance that, "in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36".

5.41 Let us look closely at the requested assurance. First, it is again absolute in character. We have already discussed the inappropriateness of such an assurance in circumstances like these. Second, it seeks to create obligations on the United States that exceed those that are contained in the Vienna Convention. For example, the requirement of consular notification under Article 36, paragraph 1 *(b)*, the Convention applies when a foreign national is arrested, committed to prison or to custody pending trial or detained in any other manner. It does not apply, as the submission would have it, to any future criminal proceedings. That is a new obligation, and it does not arise out of the Vienna Convention. A second example is the reference in the submission to the "law and

ILI US Digest/2 72 1/8/02, 1:45 PM

practice" of the United States. With apologies for trying the Court's patience on the precise terms of Article 36, paragraph 2, of the Convention, the relevant phrase in the text is the "laws and regulations" of the receiving State. Again, Germany seeks to have the Court impose a different obligation on the United States than the obligation that it has assumed in acceding to the Consular Convention. Moreover, it seeks the requirement of such an assurance in the context in which no breach of the relevant obligation has been proved.

5.42 More broadly, Germany's fourth submission raises the prospect of the Court's being invited by Germany to go beyond the resolution of the international legal dispute between the United States and Germany that is before it. Even if this Court were to agree that, as a result of the application of procedural default with respect to the claims of the LaGrands, the United States committed a second internationally wrongful act, it should limit that judgment to the application of the law in the particular case of the LaGrands. It should resist the invitation to require an absolute assurance as to the application of the US domestic law in all such future cases. The imposition of such an additional obligation on the United States would, as previously discussed, be unprecedented in international jurisprudence and would exceed the Court's authority and jurisdiction.

5.43 There remains only the new element of relief submitted yesterday for the first time that: "In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36." My comments with respect to the previous section of the fourth submission hold true for there is no obligation in the Consular Convention that is limited to capital cases. To the extent that Germany seeks such relief, it is self-evident that the source of such an obligation must be other than the Consular Convention. But the Court is well aware that its jurisdiction is limited to the Consular Convention in this case. Second, as Attorney-General Napolitano described, there are, in fact, remedies available under United States law where criminal convictions do not meet appropriate standards, which could include cases in which a breach of the duty to inform a foreign national of his or her right to consular notification may have been involved.

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ILI US Digest/2 73 1/8/02, 1:45 PM

M. TRECHSEL:

[Professor Trechsel addressed the Court in French; excerpts from the English translation follow]

6.4. …I propose to discuss with you three aspects of this case. My starting point is the idea that Article 36, paragraph 1(b), of the Vienna Convention on Consular Relations does effectively grant a right, at least a derived right, to the foreign national who is arrested in a country having ratified this Convention, as his country of origin has. The three questions I shall deal with are as follows:

1. Can this right be considered as falling into the category of human rights?

2. Setting aside the characterization of the right to "consular information", is it a matter of a right of defence forming part of the right to a fair trial?

3. If so *(quod non),* what are and are not the possible consequences of a violation of this right?

* * * *

1. Does the right to be informed of the possibility of consular contact form part of human rights?

6.7. In order to determine whether the right of the detained foreign national to be informed of his right to request that the consular post of the sending State be informed of his arrest may be regarded as falling within the category of "human rights", we must first define what human rights are.

6.8. It would be tempting to reply along positivist lines, with the conclusion that no international treaty, no convention, no covenant, no resolution on human rights mentions this right. Indeed, when the lists of human rights sources compiled by the leading researchers in the field are consulted, there is a blank. No mention in the official list drawn up by the United Nations, or in the catalogue of over 72 documents periodically drawn up Jean-Bernard Marie, nothing in the impressive volume by Rebecca Wallace, or in Nigel Rodley's work, in Robertson and Merrills, Steiner and Alston or Zaffaroni. Not only is the Vienna Convention not formally conceived as a text guaranteeing human rights, but the academic world does not regard it as such either.

6.9. It is true that the United Nations General Assembly resolution of 1985 on the rights of foreign nationals mentions the right to consular contact. Yet apart from the fact that this resolution may at the very most

ILI US Digest/2 74 1/8/02, 1:45 PM

be regarded as "soft law", as Germany acknowledges, the resolution does not mention the right to be informed.…

6. 10. But I do not intend to leave the matter there. In fact, and quite rightly so, positivism is not in vogue in the human rights field.

6.11. We must therefore try to find a criterion of substance for distinguishing human rights from other rights. This criterion seems self-evident to me: human rights are fundamental rights, which all human beings should enjoy by virtue of their human existence. "Everyone is bom equal", which is the idea at the root of this category of rights. Although certain instruments refer to well-defined categories of human beings, such as women and children, these are general categories and, if you will, "natural" to the human being. And it is always the primary quality of "human being" which is decisive.

6.12. It is precisely this generality which is lacking in regard to the law of the Vienna Convention. It is not a guarantee formulated in such terms as: "Every person has the right to . . ." or "The right of every person to . . ." It is not, and this seems to me quite significant, a right of "every foreign national". I shall revert to this aspect in a moment.

6.13. Human rights are not conferred on their beneficiaries, they are innate, and are merely "recognized" by international treaties. On the other hand, the sole origin of the rights of a foreign national to information regarding his right to consular contact is either the Vienna Convention, or a bilateral treaty on consular relations. The High Contracting Parties to such a convention mutually confer this right on their respective nationals.

6.14. I am not speaking of the obvious fact that a foreign national arrested in a country which has not ratified the Vienna Convention or a similar treaty will not enjoy this right. The same observation could be made in relation to the instruments protecting human rights. I am speaking of the national of a country which has not acceded to the Convention and who is arrested in a country which is a party to this Vienna Convention. To give a concrete example: let us imagine a national of Belize, a country which has not ratified the Convention, arrested in Mexico at the same time as his Guatemalan friend. Whereas the latter must be informed, no similar obligation exists for the Belizian. On the other hand, the human rights guaranteed by an international treaty will be granted to any person under the jurisdiction of a State which has ratified this Treaty.

6.15. It also goes without saying that the principle of reciprocity is pivotal in the issue of consular law, whereas it is completely alien to hu-

ILI US Digest/2 75 1/8/02, 1:45 PM

man rights, as the European Commission of Human Rights has already clearly stated in the *Austria v. Italy* case.

6.16. An essential characteristic of human rights is that they must be respected without any discrimination, notably on the basis of a person's nationality. The Vienna Convention grants rights exclusively to the nationals of States parties. The nationals of the country making the arrest and the nationals of countries not having ratified the Convention remain automatically excluded.

6.17. Let us take a different approach: is the right to information guaranteed by the Vienna Convention, as Germany asserts, a necessary step to offset the inferior position of a foreign national when arrested? This is how the right in question could effectively acquire the status of a fundamental right. We do not reject the argument that a need of this kind may arise. We simply emphasize first and foremost that, in the case of the LaGrand brothers — and the present proceedings are limited strictly to this case — it is impossible to identify a need of this kind. For these men regarded themselves as Americans. There is no need to recapitulate all that Attorney-General Napolitano has said on this subject

6.18. But the argument is not even convincing in general terms. For the typical and particular difficulties a foreign national may face concern the foreign language and the fact that he knows little or nothing about the legal system of the country in which he has been arrested. The Vienna Convention refers to neither of these conditions. Indeed, this kind of problem may well not arise in a particular case. The Convention applies even when the foreign national comes from a country with the same language as the receiving country and a similar legal system. Let us, for example, consider the case of an Australian arrested in the United Kingdom, a Frenchman in Belgium, a German in Austria, not to mention, obviously, second-generation immigrants who have lived all their lives in the receiving country, but who have perhaps still retained their foreign nationality.

6.19. Yet this is not the end of it, for there are two further aspects: first, in general, the foreign national already has adequate protection, and secondly, I do not see on what basis it could reasonably be asserted that the Vienna Convention actually grants him a right to any assistance whatever.

6.20. First, the existing protection: every person arrested has the right to be informed immediately, and in *a language which he understands,* of the reasons for his arrest under the international instruments — I imagine the wording is very familiar to you you. Should such persons be faced with a criminal charge, they again have the right to

ILI US Digest/2 76 1/8/02, 1:45 PM

be informed of this charge in a language which they understand. Furthermore, such a person has the benefit of the free services of an interpreter. Lastly, such persons will have the right to free legal assistance of their own choosing or, if they do not have the means to pay for it, the right to have legal assistance assigned to them without charge. The lawyer assigned will be familiar with the legal system of the country concerned. We acknowledge that the lawyer assigned will not always be the best. Indeed, this will often also apply to the lawyer of their choosing, and the same problem also arises for all accused nationals of limited means. Furthermore, minor matters apart, the fact that the accused is a foreign national is precisely one of the criteria taken into account in determining whether the interests of justice require legal assistance. The lacuna which Article 36 of the Vienna Convention claims to fill does not therefore exist. If our distinguished colleague, Mr. Kaul, said yesterday that, without consular information there are no rights of defence, that was more than mere exaggeration.

6.21. Furthermore: what is the worth of the right conferred on the foreign national under the Vienna Convention? Is it a right to any form of assistance whatever? The reply must be negative, regardless of what Germany may assert. The right of the person arrested to information on the possibility of contacting the consular authorities of his country of origin is merely subsidiary or incidental. Contact must be facilitated if the person concerned so wishes. This will not always be the case and the Convention even takes account of this eventuality, in that it does not provide for the consulate in question to be informed automatically.

6.22. A whole series of assumptions is interposed between information and actual assistance:

(a) the person arrested must express the desire to contact the consulate;

(b) the consulate must react. The Vienna Convention indeed gives it this right and favours such contacts. But the consulate must be willing and able to grant assistance to the person being held. This will not always be the case;

(c) any assistance provided must actually be useful for the defence.…

6.23. Our examination shows that the right to be informed of the right to contact the consular post is of a purely auxiliary nature. According to the Vienna Convention the consular post is not obliged to lend assistance and, on the other hand, the applicant, the person arrested, is not

ILI US Digest/2 77 1/8/02, 1:45 PM

entitled to assistance from the post. In that respect there is a clear cut distinction between this right and the right to legal aid, which must be effective, and other fundamental rights. It is quite possible that a right may be conferred upon the person in question by his national law but this cannot really be of any concern to the International Court of Justice. We feel that this would be stretching the point somewhat, not to say aberrant, to base a fundamental right on these possibilities, which are entirely optional. Today we are facing a real danger of inflation of human rights. While extending their scope is often a sign of goodwill, the proliferation of instruments and remedies is already confusing and may ultimately undermine the effectiveness of these guaranties.

6.24. To avoid any misunderstanding, I should stress that we have no intention of trivializing the right conferred by Article 36, paragraph 1(b), last sentence, of the Vienna Convention. But we categorically reject the argument that this is a fundamental right that falls into the same category as "human rights". And here I should like to refer to what Sir Gerald Fitzmaurice had to say to the International Law Commission at its 535th meeting, quoting his words, with your permission, in English: "To regard the question as one involving primarily human rights would be to confuse the real issue."

2. Disregarding the fact that this is described as a right to "consular advice", is it a right of the defence that forms part of the right to receive a fair trial?

* * * *

6.28. Let us therefore examine the scope of the right to consular advice from the angle of comparative law. In order to find out what the practice is in a number of States, we have first examined codes of criminal procedure, the codes of a number of countries — Austria, Belgium, France, Germany, Italy, the Netherlands, Portugal and Switzerland. It turns out that none of these codes refers to the right to consular advice. While Article 520, paragraph 2, of Spain's code of criminal procedure does refer to foreigners, this is only to state that foreigners have the right to have certain information communicated to their country's consular post. However, there is no mention of any obligation to inform them of this right. And it is only that obligation which has been brought before the Court today.

6.29. Is this simply an omission on the part of the legislators, remedied by the doctrine? Certainly not. Our study of a number of treaties and

ILI US Digest/2 78 1/8/02, 1:45 PM

commentaries has in fact revealed virtually no trace of the Vienna Convention in the literature on criminal procedure. We have studied a number of treaties and commentaries and found virtually no trace, except for a German commentary, that of Kleinknecht, with which my colleagues will undoubtedly be familiar. This commentary refers to the *"Richtlinienfür den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten"* [Guidelines for relations with foreign countries in criminal matters], points 135 and 136. Although this commentary also contains other *"Richtlinien",* you will search for these particular *"Richtlinien"* in vain, which means that for criminal law experts they are not easily accessible.

6.30. In addition, we have also used another method of verifying whether the right to consular advice could be regarded as a right of the defence in criminal proceedings. We have examined codes of procedure to check whether the absence of consular advice might constitute grounds for having a judgment set aside. However, the result of this investigation is still negative, particularly in respect of German law.

6.31. Infingement of a rule of international law may result in a decision being quashed if it is demonstrated that the decision would perhaps have been different if the fault had not been committed. No example is given, in the "Karlsruhe Commentary" or elsewhere, from the Vienna Convention in this context. For Switzerland, Piquerez, in his recent voluminous treatise on criminal procedure, mentions the Vienna Convention on Diplomatic Relations when dealing with immunity but makes no reference to the Convention on Consular Relations.

6.32. Mr. President, Members of the Court, this brief study shows, I believe, that the advice provided for in Article 36 of the Vienna Convention is not considered, either by the legislator or the doctrine, as a rule of the law of criminal procedure and hence as a right of the defence in criminal procedure. This is particularly evident in the case of Germany.

6.33 [Turning to jurisprudence],…the result is still negative. We have not managed — although I believe this is for Germany to do — to find a single decision quashing a judgment for contravening the Vienna Convention.

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6.40. There is a further argument against the hypothesis that the right to consular advice could be deemed to be a right of the defence. It is clearly evident when an important aspect of comparative law is considered.

ILI US Digest/2 79 1/8/02, 1:45 PM

6.41. Article 36 of the Vienna Convention concerns only foreigners who have been *arrested.* Under the Anglo-American tradition the institution of criminal proceedings is inextricably linked to the arrest of the suspect. While arrest does not necessarily mean, as we shall see later, that criminal proceedings will be brought, an action may only proceed if there is an arrest, except in cases of "citation", which is, however, a recent development for cases of minor importance.

6.42. And yet many criminal procedure systems — in my view the most modem ones — do not operate in this way. In the Continental European countries, to confine myself to this region: in Austria, Belgium, France, Germany, Italy or Switzerland, for instance, arrest must be the exception. On this point there is an almost unanimous consensus. A suspect is arrested only in exceptional circumstances. Admittedly, a foreigner may be considered more likely to abscond, but this is not the case for a foreigner who has become assimilated and habitually resides in the country in which he has been arrested.

6.43. In light of this situation, it is clear that any application of the Vienna Convention in criminal proceedings would be by no means uniform.

6.44. Thus, we can compare the relationship between the scope of the Vienna Convention and that of the rights of the defence in terms of two circles which only partially overlap. The Vienna Convention is applicable to any arrest, including therefore the arrest of a person suspected of having committed an offence; but also to arrest in the context of expulsion or extradition proceedings; to the arrest of a person for reasons of mental illness or infectious disease, drunkenness or vagrancy; to arrest in execution of a criminal sentence or for the purpose of securing the fulfilment of any obligation prescribed by law.

6.45. The interpretation proposed by Germany would thus have as its consequence that the arrested defendant — that is to say any accused person in the common law countries, but only a minority of accused persons in countries applying the continental system — would benefit from "rights of the defence" which are denied to an accused person at liberty. The latter would undoubtedly face no obstacle in contacting "his" consulate. But he would not be informed of that option, and it is unlikely that he would know more about consular rights than an accused person who has been arrested. How can preferential treatment for the latter, in terms of defence rights, be justified?

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ILI US Digest/2 80 1/8/02, 1:45 PM

3. If the answer is affirmative* (quod non), *what may or may not be the consequences of the violation of such a right?

6.50. Germany appears to maintain that such a violation would result in the absolute nullity of the judgment, which would in any case automatically render its enforcement unlawful. But that is certainly not so. It may be recalled that the European Court of Human Rights has consistently stated that only by considering the proceedings as a whole is it possible to state whether they were fair – the lack of consular information would hardly, of itself, even assuming that such information formed part of the rights of the defence, have the effect of making the proceedings unfair.

* * * *

Conclusions

6.65. Allow me to conclude, Mr. President, Members of the Court, by formulating our responses to the three questions with which it was my intention to deal:

1. Do human rights include the right to be informed of the possibility of consular contact?

Our answer is "no": this is not a fundamental right.

2. Leaving aside the question of its characterization, is this a right of the defence forming part of the right to a fair trial?

Here again, our answer is "no". This right has nothing to do with either the law of criminal procedure or with the right of defence as guaranteed under the head of human rights. It is an ancillary right, whose sole purpose is to facilitate the exercise of consular functions.

3. If the answer were affirmative *(quod non),* what might or might not be the consequences of a violation of this right? A violation of the right to consular information constitutes the violation of an obligation deriving from an international treaty, but it can in no case automatically entail the nullity of a criminal conviction, and a claim of this kind cannot halt the enforcement process.

Mr. MATHESON:

7.1 Mr. President and distinguished Members of the Court, it is again my great honour and pleasure to appear before you on behalf of the United States. This afternoon I will address the request of Germany that the Court declare that the United States violated international legal obligations by failing to comply with the Court's Order indicating provisional measures.

ILI US Digest/2 81 1/8/02, 1:45 PM

7.2 As the Court is Aware, the United States takes the view, as a general matter, that the indications of provisional measures by the Court do not give rise to binding legal obligations. The US position is explained in some detail in our Counter-Memorial, which reviews the considerable body of scholarly opinion and State practice suggesting that such measures do not have legally binding effect. This, of course, is an important and difficult issue that has been the subject of considerable debate over the years, and that the Court has not yet found necessary to resolve.

7.3 However, it is our view that it is neither necessary nor appropriate for the Court to attempt to resolve this general issue in the present case, as Germany has proposed; rather, we believe that the relief requested by Germany on this point should be denied for several other reasons without the need to resolve this general issue. First, whether or not the Court as a general matter has the authority to hand down binding provisional measures, in this particular case the measures indicated by the Court were – by their own terms – not binding in character. Second, whatever the character of the Court's Order, the United States did in fact comply with it, in that it took every step reasonably available to it, given the extreme circumstances in which it had to act. Third, the unjustified delay of Germany in bringing its request for provisional measures before the Court until the last possible moment makes it inappropriate to grant Germany's request for relief with respect to this Order. And fourth, the Court can fully and adequately dispose of the merits of this case without any need to resolve this general issue.

The Court's provisional measures in this case were not legally binding

7.4 Let me begin with the first point – that in this particular case the measures indicated by the Court were – by their own terms – not binding in character. The authoritative English text of the Court's Order stated that the United States "should take all measures at its disposal" to ensure that Walter LaGrand was not executed pending a final decision by the Court in these proceedings. It went on to say that the United States "should" transmit the Order to the Governor of Arizona, and "should" inform the Court of all measures which it had taken in implementation of the Order.

7.5 It is immediately apparent from a reading of this text that the language used by the Court is not the language customarily used to create binding legal obligations. The English term "should" is consistently

ILI US Digest/2 82 1/8/02, 1:45 PM

used both in international and domestic practice when the intention is not to create binding obligations, but rather to state expectations or desires about future behaviour. As we have explained in some detail in our Counter-Memorial, this term is deliberately used in various international instruments to indicate that a principle or statement is not intended to be legally binding.

7.6 In contrast, when particular measures handed down by a tribunal are viewed as having the character of legal obligations, that tribunal uses different language of understood mandatory character. For example, in its Provisional Measures order of 1 July of this year in the case concerning *Armed Activities on the Territory of the Congo,* the Court stated that both Parties "must" take all measures necessary to comply with various existing obligations of the Parties under international law; this mandatory language reflected the fact that the Parties were already bound to carry out these international obligations. The International Criminal Tribunal for the Former Yugoslavia, in its arrest warrants and orders of surrender, "directs" United Nations member States to arrest indicted persons and surrender them to the Tribunal; this obligatory language reflects the mandatory effect given to such orders pursuant to the relevant decisions of the Security Council under Chapter VII of the Charter. Other examples are given in the US Counter-Memorial.

7.7 Clearly this difference between mandatory and non-mandatory language is meaningful and well understood. It is entirely reasonable for States to rely upon that difference in determining what their obligations are and in advising their domestic authorities. The Court should not be asked at a later time effectively to reverse the clear import and effect of the language of an Order, and thereby hold a State to be liable for breaching a supposed obligation that was not contained in the Order that was handed down.

7.8 Now it has been argued that the language used in the French version of the Court's Order conveys a greater degree of obligation than the English text. In fact, as is recounted in the US Counter-Memorial, the Court declined, in the *Aegean Sea* case, to hold that such language created a binding agreement. But in any event, the authoritative text of the Court's Order in the present case was the English text, and accordingly the Order must be construed in accordance with the English version. We submit that the English text is clear in this respect and does not create binding obligations.

ILI US Digest/2 83 1/8/02, 1:45 PM

7.9 Germany nonetheless has suggested that provisional measures must be regarded as inherently binding because of what it terms "the principle of institutional effectiveness" – that is, that any provisional measures would be without effect or purpose if they were not binding, and therefore must be construed as binding in all cases. Germany has also argued that such measures are inherently binding because the Court's final decision on the merits in a case is binding.

7.10 We disagree with these arguments. Even if a tribunal is thought to have the power to hand down legally binding provisional measures, there is no inherent reason why provisional measures must be given in mandatory form in any particular instance. For example, Article 290 of the Law of the Sea Convention empowers the International Tribunal for the Law of the Sea to "prescribe" provisional measures, a formula that was evidently designed to authorize that Tribunal to hand down legally binding measures. In its Order on Provisional Measures in the *Southern Bluefin Tuna* case, the Tribunal chose to issue certain measures using binding language and others of a different character using non-binding language. As one commentator observed:

> "The Tribunal's first four measures…are binding, as shown by the Order's use of the mandatory term 'shall'. The fifth and sixth measures…are not binding, as shown by the use, following the I.C.J. practice, of the facultative term 'should'."

7.11 An international tribunal may well choose to express its expectations in a non-binding form in a particular case, as a matter of deference to the sovereignty and prerogatives of States before it, or in light of the complexity of a particular case and the limited time available to deal with it. This would, for example, be particularly appropriate where the measures in question deal with matters uniquely within the core sovereign functions of States – such as the administration of the criminal justice system, which is, of course, the case here.

7.12 The fact that provisional measures are not legally binding in a particular case does not deprive them of meaning and significance. They stand as a clear statement of the Court's expectations and desires. As the Court stated in the *Nicaragua* case: "it is incumbent on each party to take the Court's indications seriously into account…." But it remains the case that provisional measures expressed in non-obligatory language do not create legal obligations.

ILI US Digest/2 84 1/8/02, 1:45 PM

7.13 Nor does the fact that the Court's final decision on the merits in a case is binding mean that provisional measures must necessarily be binding as well. There is no reason why measures indicated at the very outset of a proceeding – in this case, less than a day after the Application was filed – should necessarily assume the same binding character as the final judgment. There is no reason why the Court should not adopt a more deferential mode at this stage of proceedings, particularly where fundamental State prerogatives and interests are involved.

7.14 Now Germany has argued in an apparent attempt to avoid the non-mandatory character of the measures ordered by the Court in this case, that independent of any provisional measures ordered, the United States violated a general obligation to refrain from acts that might interfere with the subject-matter of a dispute while judicial proceedings are pending. We disagree. In proceeding with the execution of Walter LaGrand, the State of Arizona was carrying out the decision of its courts in accordance with Arizona law and judicial process. The execution had been ordered and scheduled long before Germany came to the Court; it was obviously not a measure taken for the purpose of disrupting the Court's proceedings or of depriving any parties before the Court of any rights or remedies. Under these circumstances, it cannot be the case that a State has an obligation to bring its criminal process to a halt in a particular case simply because a complaint demanding such a result is filed in an international tribunal. This would in effect give other States the power to impose a stay of execution or of other criminal process just by filing an application before this Court. This could not have been contemplated by the parties to the Vienna Convention.

7.15 Further, if applied generally, such a rule would radically transform the situation of parties to cases before this Court. For example, States using force in self-defense would be obliged to halt all further armed actions if their opponent filed a complaint alleging that such actions caused unlawful injury to its nationals, whether or not the Court had issued an order calling for such a result. States conducting fishing operations in disputed waters, or mineral exploitation in disputed territory, would be obliged to halt such operations for the duration of a case, whether or not the Court had asked them to do so. Under such a rule, States could use the Court to harass and impede other States, even if their cases were ultimately found to be without merit.

ILI US Digest/2 85 1/8/02, 1:45 PM

The United States complied with the Order, in that it took every step reasonably available to it under the circumstances

7.16 Our second basic point is that, whatever the legal character of the Court's Order, the United States in fact complied with the Order, in that it took every step reasonably available to it, given the extreme circumstances in which it had to act.

7.17 Germany did not raise the question of a failure of consular notification with the United States until 22 February 1999. It did not file its Application and Request for the indication of Provisional Measures until after business hours in the evening of 2 March, the day preceding the scheduled execution. As a result, the Court was unable to act on the German request until the evening of 3 March, and the Court's Order was received in the Office of the Legal Adviser of the State Department in Washington less than three hours before the time set for the execution.

7.18 Under these extreme circumstances, there was very little the United States Government could do in response to the Court's Order. Because of Germany's delay in raising the question of consular notification, United States government authorities had not even had time to carry out a thorough investigation of the facts, which is the normal predicate for any federal action with respect to the conduct of state criminal proceedings.

7.19 At the time the Court's Order was received, the Legal Adviser of the State Department, who was travelling with the Secretary of State in East Asia, was awakened and informed of the Order. The Legal Adviser's office in Washington promptly took the action called for in the second paragraph of the Court's Order, namely to transmit a copy of the Order to the Governor of Arizona. A copy of the Order was also promptly provided to the Department of Justice and to the US Supreme Court, before whom motions concerning the case were then pending.

7.20 These actions constituted the only measures that could be taken by the US Government in the very short time available. Consequently, we maintain that the United States did in fact comply with the Court's Order, which called upon the United States to "take all measures at its disposal" to prevent the execution. Presumably this language did not include actions that were not at the disposal of the United States, such as actions that could not legally be taken within the US federal system or that were simply not feasible in the time available.

7.21 Germany has argued that the United States could have taken other steps to comply with the Court's Order. We disagree. None of the

ILI US Digest/2 86 1/8/02, 1:45 PM

steps suggested by Germany were in fact at the disposal of the United States, given the character of the US federal system, the requirements of US law, and the extremely limited time available.

7.22 In particular, Germany has suggested that the Secretary of State might have written a letter to the Governor of Arizona asking for a stay of execution, as was done in the *Breard* case. With less than three hours available, and the relevant State Department officials in East Asia, this was simply not feasible. The request that was made to the Governor of Virginia in the *Breard* case was the product of days of consultation among the highest officials of the State Department and the Justice Department, since it raised very complex and serious concerns about the allocation of responsibilities between the state and federal governments, the degree to which the United States was in fact obligated or not obligated to act, the competence of the federal and state courts involved at that point, and the facts and history of the case itself. Indeed, in the *Breard* case, the consideration of these matters was much further advanced, because the Government of Paraguay had made timely approaches to the United States Government about the issue of consular notification and had filed with the Court in a much more timely manner.

7.23 Germany has suggested that the United States in fact encouraged the execution by reason of a letter sent to the Clerk of the US Supreme Court on the afternoon of 3 March by the US Solicitor General. That letter responded to a request from the Supreme Court for comment on the legal issues raised by motions filed that day by Germany for a stay of execution. The Solicitor General responded briefly and as best he could, while pointing out that he had not even had sufficient time to read thoroughly the materials filed with the motion. His conclusion was that, as a matter of US law and the prior decisions of the Supreme Court, the Vienna Convention did not form a basis for the requested stay of execution in the Supreme Court. This was based on his understanding of the lack of jurisdiction of US courts to hear the particular cause of action brought by Germany, in light of the previous holding of the Supreme Court in the *Breard* case that such relief was not available. This advice by the Solicitor General was honestly given and, we believe, it was correct. It cannot be a violation of international obligations, or the Order of the Court in this particular case, for the Justice Department to give honest and accurate advice to the US courts concerning the state of US law.

7.24 In the course of his letter, the Solicitor General also briefly stated that the Court's Order was not legally binding. As I have already

ILI US Digest/2 87 1/8/02, 1:45 PM

indicated, we believe this conclusion is correct. But, once again, it cannot be a violation of international obligations, or the Order of the Court in this particular case, for the Justice Department to give honest and accurate advice to US courts concerning the state of US international obligations. In effect, Germany argues that, to comply with the Court's Order, the United States was required to give legal advice to US courts which we did not then and do not now believe to be correct. Of course, we were not able to do so, and we do not believe that the Court's Order could be construed to suggest that we were expected to do so.

7.25 It has been suggested that a variety of other measures were available to the United States Government to prevent state governments like the Government of Arizona from executing foreign nationals who had not received consular notification, including the issuance of Executive Orders by the President, suit by the United States in federal court, and adoption by Congress of new legislation or amendment of existing legislation. Whatever the merits or problems of these various approaches from a constitutional or a policy point of view, it is obvious that none of these was even remotely available in the very brief period between the Court's Order and the scheduled execution of Walter LaGrand.

7.26 By the same token, the authorities of the State of Arizona were well aware that the US Government did not consider the Court's Order to be legally binding and that the US Supreme Court had dismissed the actions brought by Germany in US courts. The State of Arizona therefore had no reason to believe that it had any obligation to stay the execution of Walter LaGrand, which was scheduled to occur in less than three hours.

7.27 Accordingly, we maintain that the United States did act in a manner consistent with the Court's Order, in that it took all measures at its disposal under extremely limited circumstances. Therefore, even if the Court were to take the view that its Order created binding international obligations, we maintain that it would be inappropriate to hold that the United States violated any such obligations.

Given the German delay in bringing its request, it would be inappropriate to grant the relief requested by Germany

7.28 Our third basic point is that the unjustified delay of Germany in bringing its Request for Provisional Measures before the Court until the last possible moment makes it inappropriate to grant Germany's request for relief with respect to that Order.

ILI US Digest/2 88 1/8/02, 1:45 PM

7.29 As my colleagues have explained, Germany was aware since at least June 1992 that a question of compliance with the Vienna Convention existed with respect to Walter LaGrand. Germany was aware since at least 5 February 1999, of the date on which the State of Arizona intended to execute LaGrand.

7.30 Nonetheless, Germany chose not to file its Application and Request for the Indication of Provisional Measures until the evening of 2 March 1999, the day preceding the scheduled execution of Walter LaGrand. As a result, the Court was unable to act on the German request until the following evening. Because of the extraordinary timing of the German filing, the Court felt compelled to take the unprecedented step of acting without a hearing and without giving the United States an appropriate opportunity to present its views regarding the merits of the German request. The Court's Order indicating provisional measures was consequently issued in the evening of 3 March, and was received in Washington less than three hours before the time set for the execution.

7.31 This delay by Germany in raising the issue of consular notification and in filing its Application before the Court was unjustified. Germany now asserts two reasons for its delay. First, it claims that it did not act earlier because it only discovered on 23 February that certain Arizona officials knew at a relatively early point in the proceedings against LaGrand that he was a German national. With respect, this explanation is simply not adequate. As Attorney-General Napolitano confirmed this morning, the presentence reports containing this information were in fact available to Germany since 1992 and were made part of public federal court proceedings in 1993. They were the key documents bearing on the question of mitigation by reason of the circumstances of LaGrand's childhood and whether that issue was properly raised in the Arizona proceedings – a question that is at the heart of Germany's complaint. Germany's statement that it was not familiar with these documents is inconsistent with its claims about the vigour and thoroughness of its consular services. Obviously LaGrand's lawyers were familiar with these documents from the time they were issued.

7.32 Further, if it were true, as Germany argues, that the failure of consular notification constituted a fundamental deprivation of due process and seriously prejudiced the rights of its national, it is inexplicable that Germany delayed for years raising the issue of consular notification with the United States or filing its request before this Court, simply because it assertedly was not aware that certain Arizona offi-

ILI US Digest/2 89 1/8/02, 1:45 PM

cials may have known about the nationality of the individual at a particular stage in the process. If it were only this piece of information that caused Germany to raise the matter of consular notification with the US and to bring the matter to the Court, then surely the failure of timely consular notification could not have been a serious denial of fundamental rights, as Germany claims. Clearly this piece of information did not change the character of the obligations of the United States or the rights of Germany.

7.33 Germany also asserts that it delayed filing its case in this Court because it wanted first to exhaust all possibilities for clemency and for relief in US courts. But this is also not an adequate explanation, since Germany continued to pursue both clemency and US judicial remedies even after filing its Application in this Court. Since these domestic remedies are routinely pursued in capital cases right up to the last moment, this explanation by Germany would suggest that it would always be proper to withhold filing in this Court until the very last moment in such cases. Surely the Court should not accept such a chaotic and prejudicial procedure.

7.34 As Judge Schwebel stated in his separate opinion:

> "Germany could have brought its Application years ago, months ago, weeks ago, or days ago. Had it done so, the Court could have proceeded as it has proceeded since 1922 and held hearings on the request for provisional measures. But Germany waited until the eve of execution and then brought its Application and request for provisional measures, at the same time arguing that no time remained to hear the United States and that the Court should act *proprio motu*."

As a result of the delay by Germany, the United States was seriously prejudiced in being unable to present its views on the substance of the German request, and in having essentially no time to act on the Court's Order. The Court was seriously prejudiced in being put in an impossible situation of choosing between ignoring the urgent situation pleaded by Germany, or in acting with virtually no time for reasonable consideration and in disregard of its consistent past practice in giving States an adequate opportunity to be heard.

ILI US Digest/2 90 1/8/02, 1:45 PM

7.35 This German conduct makes it wholly inappropriate for the Court to respond favourably to the German request for a declaration that the United States violated an international legal obligation by failing to comply with the Court's Order. As the Court said in its Provisional Measures Order, "the sound administration of justice requires that a request for the indication of provisional measures…be submitted in good time…." A party seeking provisional measures should not be rewarded for its own inappropriate conduct in prejudicing the rights of the other party and in impairing both the Court's proceedings and compliance with its Orders.

7.36 In the recent case of *Yugoslavia v. Belgium,* Yugoslavia raised a new basis for jurisdiction for the first time at a late point in the oral proceedings. The Court pointed out that "such action, when not accepted by the other party, seriously jeopardizes the principle of procedural fairness and the sound administration of justice…." As a result, the Court appropriately refused even to consider the Yugoslav argument, even though this meant that no provisional measures were granted in a case where Yugoslavia had alleged they were necessary to prevent serious and immediate loss of life and economic damage.

7.37 In comparison, the effects of the timing of the German Application in the present case were even more prejudicial to the Court and the other party. Belgium at least had the opportunity to respond to the Yugoslav argument in open court later in the same day, with its full legal team present, having had a number of days to prepare on other aspects of the case. In contrast, the timing of the German Application effectively gave the United States no opportunity to address the merits of the German case prior to the Court's Order – no day in court, no time to bring its legal experts to The Hague, and no opportunity to prepare itself on any aspect of the case. Accordingly, as in the Belgian case, the Court should decline to give further relief to Germany on the basis of a request for provisional measures that was unjustifiably delayed, to the serious prejudice of the other party and the sound administration of justice.

The Court can dispose of the merits of this case without any need to resolve this issue

7.38 Our final point is that the Court can fully and adequately dispose of the merits of this case without any need to resolve this issue about the effect of its Order indicating provisional measures.

ILI US Digest/2 91 1/8/02, 1:45 PM

7.39 Indeed, even though there have been many occasions in which States have not carried out various aspects of such Orders, the Court has not found it necessary or appropriate to give relief of the character sought by Germany in this case as a result. For example, as we explained in our Counter-Memorial, in the *Anglo-Iranian Oil Co.* case, the *Nuclear Tests* case, and the *Tehran Diplomatic Staff* case, the Court did not find it necessary or appropriate to grant further relief at the merits phase for the failure of one of the parties to carry out previous provisional measures orders, even though in each case the failure to carry out these measures went to the heart of the dispute and seriously prejudiced the interests of the other party. For reasons we have already indicated, the present case is certainly not an appropriate occasion for making a new precedent on the question of remedies for failure to carry out provisional measures.

7.40 Further, in the present case, there is no substantive need or utility in revisiting the Court's Order. If the Court decides in favour of any of Germany's other requests for relief, it will have given Germany more than ample redress for the execution of Walter LaGrand, and further relief based on the provisional measures Order would be superfluous and without purpose. If, on the other hand, the Court decides against Germany's other requests for relief, it would be anomalous indeed for the Court to make the asserted violation of a provisional measures order the sole result of its decision on the merits.

Conclusion

7.41 Mr. President, in conclusion, we maintain that, whether or not the Court has the authority as a general matter to hand down binding provisional measures, in this particular case the measures indicated by the Court were – by their own terms – not binding in character. We suggest that, whatever the character of the Court's Order, the United States did in fact comply with it, in that it took every step reasonably available to it, given the extreme circumstances in which it had to act. We believe that the unjustified delay of Germany in bringing its request for provisional measures before the Court until the last possible moment make it inappropriate to grant Germany's request for relief with respect to the Order. And we have argued that the Court can fully and adequately dispose of the merits of the case without any need to resolve the general issue about the Court's authority.

ILI US Digest/2 92 1/8/02, 1:45 PM

7.42 If, contrary to these arguments, the Court believes that it must now decide the question of whether provisional measures are inherently binding, as a general matter under its Statute, then the United States reiterates and calls attention to the detailed arguments on this matter that are contained in our Counter-Memorial. However, we believe it is neither necessary nor appropriate for the Court to attempt to resolve this general issue in the present case. We believe that the Court can and should decline to grant the relief sought by Germany on the other grounds we have set forth.

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B. CHILDREN

1. Hague Convention on International Child Abduction

a. Order of return: *Janakakis-Kostun v. Janakakis*

On October 2, 2000, the United States Supreme Court denied a petition for writ of certiorari to the Court of Appeals of Kentucky in a case involving the Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, T.I.A.S. No. 11670 ("Hague Convention"). *Janakakis-Kostun v. Janakakis*, 531 U.S. 811 (2000). In this case, petitioner, a U.S. citizen married to a Greek citizen and living in Greece, took the couple's daughter Bronte to the United States without the father's knowledge in the midst of a custody battle for the child in 1996. In 1997 respondent located petitioner and filed an action in the Circuit Court of Hardin County, Kentucky, invoking the Hague Convention and seeking an order requiring that the child be returned to Greece. The Kentucky courts found that, under the governing statute implementing the Hague

ILI US Digest/2 93 1/8/02, 1:45 PM

Convention, respondent had carried his burden of establishing a right to an order of return and rejected as unconvincing the uncorroborated expert testimony on alleged abuse presented by petitioner. *Janakakis-Kostun v. In re Janakakis,* 6 S.W.3d 843 (Ky. 1998). Following unsuccessful efforts to obtain a stay of the court's order, petitioner delivered Bronte to respondent in June 1998, who took her back to Greece. Excerpts from the United States brief as *amicus curiae* in support of the order of return, filed at the request of the Supreme Court in August 2000, are set forth below.

The full text of the brief is available at *www.usdoj.gov/osg.*

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DISCUSSION

Petitioner seeks to present two questions concerning the Hague Convention's "grave risk" exception: Whether a court evaluating a "grave risk" claim may consider evidence of potential harm that does not involve "direct physical abuse" of the child, and whether the court may find that a "grave risk" exists without first concluding that the child's home country is unable or unwilling to provide the child with adequate protection through its own legal processes. While those questions are potentially important, there is no need for this Court to review them at the present time, and this case would not be a suitable vehicle for their consideration. Accordingly, the petition should be denied.

1. The Hague Convention, to which both the United States and Greece are parties, embodies an agreement that child-custody decisions should almost always be made by the legal system of the contracting State in which the child has habitually resided. That agreement rests on the premises that international abduction of a child in derogation of established custody rights usually harms the child; that one party to a custody dispute should not be allowed to obtain custody, or to change the rules or forum for the custody determination, by abducting the child to a

ILI US Digest/2 94 1/8/02, 1:45 PM

different jurisdiction; and that "only concerted cooperation pursuant to an international agreement can effectively combat" and deter such abductions. 42 U.S.C. 11601(a); *see also* Convention, introductory declaration and Article 1.[3]

The Convention applies to any child under the age of 16 who is "wrongfully removed" from one contracting State to another. Convention Arts. 1(a), 4. Removal is "wrongful" if it is "in breach of rights of custody" enjoyed by another person "under the law of the State in which the child was habitually resident immediately before the removal." *Id.* Art.3(a). Where, as here, an aggrieved party commences proceedings under the Convention within one year of the wrongful removal, authorities in the State where the child is found are generally bound to "order the return of the child forthwith." *Id.* Art. 12. While proceedings under the Convention are pending, authorities in the requested State are not to decide custody issues on the merits; and any custody decision made by that State before the commencement of Convention proceedings, or that would be entitled to recognition in that State but for the Convention, "shall not be a ground for refusing to return a child under the Convention." *Id.* Arts. 16-17. Likewise, any decision made concerning return under the Convention "shall not be taken to be a determination on the merits of any custody issue." *Id.* Arts. 16-17, 19.

The Convention recognizes a few permissible (not mandatory) exceptions to the rule of return, including the one at issue in this case: The requested State is not bound to order the return of a child if the person opposing return establishes that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Convention Art. 13(b).[4] Article 13 provides that in determining the applicability of that

[3] The English language text of the Convention is reprinted at 51 Fed. Reg. 10,498-10,502 (1986), together with an analysis (the State Department Analysis) prepared by the Department of State and submitted to the Senate Committee on Foreign Relations in connection with the Senate's consideration of the Convention. *See id.* at 10,494, 10,503-10,516.

[4] The remaining exceptions apply where the person whose custody rights the removal violated was not actually exercising those rights; where that person consented to, or later acquiesced in, the removal; where the child objects to being returned and "has attained an age and degree of maturity at which it is appropriate to take account of [his or her]

ILI US Digest/2 95 1/8/02, 1:45 PM

exception, "the judicial and administrative authorities [of the requested State] shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."[5]

In the Implementing Act, 42 U.S.C. 11601 *et seq.,* Congress established procedures for requesting return of an abducted child from the United States, authorizing both state and federal courts to hear petitions for return and to decide them "in accordance with the Convention." 42 U.S.C. 11603(d). Children determined to have been wrongfully removed are to be "promptly returned," unless the party opposing return establishes the applicability of one of the Convention's "narrow exceptions." 42 U.S.C. 11601(a)(4), 11603(e)(2). With respect to the "grave risk" exception under Article 13(b), the Act specifies not only that the party opposing return bears the burden of persuasion, but also that the exception must be established by "clear and convincing evidence." 42 U.S.C. 11603(e)(2)(A).[6] The Act also confirms that "[t]he Convention and [the Act] empower courts in the United States to determine only rights under the Convention[,] … not the merits of any underlying child custody claims." 42 U.S.C. 11601(b)(4).

2. Petitioner argues that the Kentucky courts applied the "grave risk" exception too narrowly in this case by limiting their consideration of potential harm to evidence of likely "direct physical or sexual abuse"

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views"; and where return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Convention Arts. 13, 20. If proceedings are commenced more than one year after the removal, the requested State may also decline to order return if "it is demonstrated that the child is now settled in [his or her] new environment." *Id.* Art. 12.

[5] Each State designates a Central Authority to discharge various duties imposed by the Convention. Convention Art. 6. Under the Implementing Act, the President has designated the Office of Children's Issues in the State Department's Bureau of Consular Affairs as the Central Authority for the United States. *See* 42 U.S.C. 11606(a); 22 C.F.R. 94.2. That Office has engaged the National Center for Missing and Exploited Children to process applications for the return of abducted children.

[6] The Act requires "clear and convincing" proof to invoke either the "grave risk" exception under Article 13(b) or the "fundamental principles" exception under Article 20. 42 U.S.C. 11603(e)(2)(A). The remaining exceptions allowed by Article 12 and 13 (*see* note 4, supra) may be established by a preponderance of the evidence. 42 U.S.C. 1603(e)(2)9B).

ILI US Digest/2 96 1/8/02, 1:45 PM

of Bronte (Pet. 11; *see* Pet. 10-15), and by taking some account of the likelihood that appropriate Greek authorities could provide whatever protection might be necessary under their own child-custody and domestic-relations procedures (*see* Pet. 15-17). We see no error in the state courts' application of Article 13(b).

a. The limited power to refuse return under Article 13(b) must be construed in light of the Convention's central premises that custody disputes should be resolved in the State of the child's habitual residence, and that the incentive to abduct children may be sharply reduced by enforcement of an agreement among States to abide by that norm. *See* pp. 6-7, *supra*; Elisa Perez-Vera, *Explanatory Report* ¶ 19, *reprinted in 3 Acts and Documents of the Fourteenth Session on Child Abduction* (Permanent Bur. Of the Hague Conf. On Private Int'l Law ed. (1982) (Explanatory Report) ("[T]he Convention rests implicitly upon the principle that any debate on the merits of …custody rights, should take place before the competent authorities in the State where the child has its habitual residence prior to its removal."); *see also id* ¶¶ 11-18. [7] The Implementing Act reiterates the principle that courts in the United States considering a petition for return are "to determine only rights under the Convention and not the merits of any underlying child custody claims." 42 U.S.C. 11601(b)(4).

Article 13(b) and the Implementing Act do plainly authorize courts in this country to undertake some inquiry into the conditions that will face an abducted child if he or she is sent home under the Convention. *See Nunez-Escudero v. Tice-Menley,* 58 F.3d 374, 377-378 (8th Cir. 1995); *Tahan v. Duquette*, 613 A.2d 486, 489 (N.J. Super. Ct. App. Div. 1992); *Explanatory Report* ¶ 117 (noting that information provided by home-country authorities under the third paragraph of Article 13, which calls for the provision of information "relating to the social background of the child," may be "particularly valuable" in determining "the existence of those circumstance which underlie the exceptions [to return] con-

[7] Elisa Perez-Vera served as official reporter for the Convention. The Explanatory Report is recognized by the Hague Conference on Private International Law, and by the Departmnent of State, as "the official history and commentary on the Convention and…a source of background on the meaning of the provisions of the Convention." State Department Analysis, 51 Fed. Reg. At 10,503; *see also*, e.g., *Blondin v. Dubois,* 189 F.3d 240, 246 n.5 (2d Cir. 1999).

tained in the first two paragraphs"). Proof that return would actually place a child back in the physical custody of a parent who has abused the child in the past is one example of a proper ground for invoking the exception provided by that Article. *See* State Department Analysis § III(I)(2)(c), 51 Red. Reg. At 10,510; but see note 11, *infra*; *see also Friedrich v. Friedrich,* 78 F3d 1060, 1069 (6th Cir. 1996) ("grave risk" might be established by showing that return would expose child to "imminent danger" from war, famine, or disease, without regard to outcome of custody dispute). In principle, moreover, we agree with petitioner (*see* Pet. 11-13) that the evidence she adduced "indicating that [respondent] had a violent temperament with … [a] history of [] abusing his wife" (Pet.9; *see* Pet. 5-6) was potentially relevant to establishing a "grave risk" of "physical or psychological harm" harm to Bronte (Convention Art. 13(b)), and that it would have been error if the state trial court had excluded or refused to consider that evidence.[8]

Nonetheless, the arguments typically raised by abducting parties in opposing return often bear a strong resemblance to the sorts of contentions concerning parental fitness and the best interests of the child that are frequently at the heart of child custody disputes. Courts hearing Convention proceedings must therefore exercise restraint in applying Article 13(b), lest the "grave risk" exception swallow the rule that States who join the Convention will respect each other's respective legal processes for determining custody. As Perez-Vera explains:

> [T]he Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at the international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child's

[8] As we explain below, the state courts did not refuse to consider petitioner's evidence in this case. *See* pp. 12-13, infra.

ILI US Digest/2 98 1/8/02, 1:45 PM

> habitual residence – are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the [Convention] exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

Explanatory Report ¶34; *see also id.* ¶116 ("Each of the terms used in [Article 13(b)] is the result of a fragile compromise reached during" Convention negotiations); 42 U.S.C. 11601(a)(4) (exceptions to mandatory return are "narrow"), 11603(e)(2)(A) (requiring "clear and convincing evidence" to invoke "grave risk" exception); State Department Analysis § III(I)(2)(c), 51 Fed. Reg. at 10,510 ("grave risk" provision "was not intended to be used…to litigate (or relitigate) the child's best interests"); *Walsh v. Walsh,* Nos. 99-1747, 99-1878, 2000 WL 1015863, at *10 (1st Cir. July 25, 2000) (quoting *Explanatory Report* ¶34); *Blondin v. Dubois,* 189 F.3d 240, 246 (2d Cir. 1999); *Friedrich,* 78 F.3d at 1067; *Nunez-Escudero*, 58 F.3d at 376; *Rydder v. Rydder,* 49 F.3d 369, 372 (8th Cir. 1995).[9]

b. Petitioner argues (Pet. 9) that the Kentucky courts improperly "ignored" or "dismissed" evidence that respondent has a "violent temperament" and had abused petitioner. The decisions below, however, indicate that the courts received and considered petitioner's evidence, but ultimately gave it little credence, and found it insufficient to demonstrate the sort of "grave risk" of harm to Bronte that would authorize a court in the United States to depart from the Convention's rule of return. *See* Pet. App. 11a-14a.

As the court of appeals recognized (Pet. App. 12a), the trial court specifically discredited the proffered opinion of petitioner's psycholo-

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[9] Caution is particularly appropriate because allegations of abuse, while they must of course be taken very seriously, are often easy to make and difficult to refute (particularly in distant forum). They therefore offer one obvious way for an abducting parent to "attempt to stave off [a] return order[] in the name of the child's welfare." Linda Silberman, Hague International Child Abduction Convention: A Progress Report, 57 Law & Contemp. Probs. 209, 267 (Summer 1994).

gist that Bronte had been abused in the past and would be exposed to harm if returned to Greece. *Id.* At 31a-33a. Similarly, the courts did not refuse to consider petitioner's claims that respondent had mistreated her and Bronte. *See id.* at 11a-12a, 33a-34a; *see also id.* at 39a (observing, in rejecting motion for reconsideration, that "[t]o the extent that evidence was presented which in the eyes of the presenter was contrary to the Court's findings, it may be assumed that said evidence was considered and rejected as having probative value"). Rather, both courts concluded that petitioner's evidence "[did] not establish that Bronte face[d] a grave risk of harm if she [were] returned to Greece," and could instead be presented to the Greek courts as part of the ordinary custody proceeding that petitioner had improperly pretermitted by smuggling Bronte out of Greece. *Id.* At 12a-14a, 33a-34a. Particularly in light of the "clear and convincing evidence" standard imposed by the Implementing Act on "grave risk" claims under Article 13(b) (*see* 42 U.S.C. 11603(e)(2)(A)), there is no reason to question that conclusion.

Petitioner also argues (Pet. 13-15) that the state courts applied too demanding a standard of proof in this case, because they observed (Pet. App. 13a, 34a) that there was "no competent evidence … that Bronte faces certain danger in Greece." Read in context, the court's phrase "certain danger" probably either refers to the sort of general, unavoidable risk of physical harm that might face a child who was returned to "a zone of war, famine, or disease," rather than to the chance that Bronte might be harmed by being returned to respondent's custody, or else is simply a way of stating that the evidence in this case does not satisfy the *Friedrich* test just articulated by the court. *See id* at 13a, 33a-34a (quoting *Friedrich*, 78 F.3d at 1069). In any event, it is not inconsistent with the Convention's "grave risk" standard. The phrase "certain danger" does not, as petitioner suggests (*see* Pet. 13-14), imply that harm will actually occur. "Danger" is a synonym for "risk," and one can be "in danger" and yet escape unharmed. In that sense, a requirement that "danger" (or "risk") be "certain" would be met *more easily* than the Convention's actual requirement that "risk" not only exist, but also be "grave." Cf. State Department Analysis III(I)(2)(c), 51 Fed. Reg. At 10,510 ("The person opposing the child's return must show that the risk to the child is grave, not merely serious.") There is, however, no reason to believe that the courts' phrase, used in passing, was intended to alter or circumscribe the "grave risk" standard itself.

ILI US Digest/2 100 1/8/02, 1:45 PM

c. Finally, petitioner contends (Pet. 15-17) that the state courts erred by taking into account, in their Article 13(b) analysis, the presumptive competence of the Greek courts to assess and protect Bronte's interests in resolving the question of custody. *See* Pet. App. 13a-14a, 34a. It is questionable whether deference to the Greek courts' ability to protect Bronte made a difference in this case, because the Kentucky courts were not persuaded that respondent had abused or neglected his daughter, or that she would be mistreated if returned to his care. *See id.* at 12a-14a, 34a. Even if the courts had given petitioner's evidence on that score greater credence, however, it would have been appropriate for them to look to their Greek counterparts to "adequately decide the ultimate issue of custody, and protect Bronte's interest in so doing." *Id.* at 34a.

The Convention aims to prevent child abductions by discouraging potential abductors' hopes of escaping from, or finding a more favorable forum for, custody disputes that should be resolved through ordinary legal processes in the jurisdiction where they first arise. *See* pp. 7-8, 11-12, *supra*. Thus, the Convention itself reflects agreement by each signatory State "that the authorities of one of them-those of the child's habitual residence-are in principle best placed to decide upon questions of custody and access." *Explanatory Report* ¶ 34. That agreement presupposes that the authorities in each State are ordinarily able to manage and resolve a custody dispute in a manner that is fully consistent with what the Convention recognizes is the "paramount importance" of protecting the personal safety and other interests of the child. *See* Convention, introductory declarations; *see also* Art. 7(h) (duties of the Central Authorities established under the Convention include "provid[ing] such administrative arrangements as may be necessary and appropriate to secure the safe return of the child"). That is the basis on which we expect our treaty partners to act when they are asked to order the return of a child who has been abducted from the United States. When the situation is reversed, our own courts must be willing to do the same. *See Blondin*, 189 F.3d at 248-249; *Friedrich*, 78 F.3d at 1068.

As the courts below recognized, there may occasionally be cases in which it appears that authorities in the child's home jurisdiction are "incapable or unwilling to give the child adequate protection." Pet. App. 13a, 34a (quoting *Friedrich*, 78 F.3d at 1069). A court is free, under Article 13(b) and the Implementing Act, to consider a claim to that effect, and to refuse an order of return where "clear and convincing evidence" demonstrates that home-country authorities cannot or

ILI US Digest/2 101 1/8/02, 1:45 PM

will not act appropriately to protect a returned child. 42 U.S.C. 11603(e)(2)(A); *see Blondin*, 189 F.3d at 250.[10] *See*, *e.g., Walsh, supra*, 2000 WL 1015863, at *14-15 (invoking Article 13(b) where father in Ireland was very violent and had disobeyed court orders in United States and Ireland, and court concludes that even a potential barring order would not be sufficient to protect children from grave risk). Ordinarily, however, courts in the United States should look to authorities in the child's home country to protect the child and to make other appropriate decisions concerning custody.[11]

3. The need to balance the Convention's general rule of return and its limited exception for situations of "grave risk" *see* pp. 9-12, *supra*, means that decisions in individual cases will often turn on particular factual circumstances. Appellate decisions applying the "grave risk" exception do not, however, presently reveal any conflict on matters of legal principle of the sort that would warrant review by this Court.[12]

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[10] Article 13(b) provides specifically for the consideration of "information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." *See also* Explanatory Report ¶ 117 (that information provision seeks in part "to compensate for the burden of proof placed on the person who opposes the return of the child"). The duties of Central Authorities also include "provid[ing] information of a general character as to the law of their State in connection with the application of the Convention." Convention Art. 7(e).

[11] The same principle qualifies the statement in the State Department Analysis, 51 Fed. Reg. At 10,510, that a court could appropriately deny return if a child was abducted "to safeguard it against further victimization" by a sexually abusive parent. That example assumes that the child would be returned to the physical custody of a parent who is in fact abusive. In an actual case, a court should not ordinarily deny return to the country of habitual residence unless there is reason to believe that authorities in that jurisdiction have failed or would fail to respond appropriately to allegations of abuse. That rule best serves the Convention's central goal of discouraging international child abductions.

[12] Petitioner cites a number of decisions by district courts or state courts of first instance. It is true that the emphasis on prompt return in the Convention (Arts. 1(a), 11) and the Implementing Act (42 U.S.C. 11601(a)(4)) may lead to many cases being finally resolved by courts of first instance. The judgments of such courts are not, however, precedential, and their legal analysis is subject to later revision or disapproval by appellate courts. Any errors in or conflicts with or among existing trial-level decisions provide no basis for review by this Court at the present time.

ILI US Digest/2 102 1/8/02, 1:45 PM

Petitioner argues (Pet. 10-13) that the "grave risk" test articulated by the Sixth Circuit in *Friedrich,* 78 F.3d at 1069, and applied by the Kentucky courts in this case, Pet. App. 12a-14a, excludes consideration of harm that might be inflicted on a child by relatively indirect means-in this case, allegedly, by forcing the child to live in an environment of spousal abuse. That argument misreads *Friedrich,* which states that potential abuse must be "serious" in order to invoke the "grave risk" exception, *see* 78 F.3d at 1069, but no where suggests that evidence of a generally abusive home environment could not demonstrate the grave risk of "physical or psychological harm" contemplated by Article 13(b). Nor does anything in *Friedrich* conflict with decisions like *Tahan v. Duquette* and *Nunez-Escudero v. Tice-Menley*, which acknowledge the need for "some evaluation of the people and circumstances awaiting [the] child in the country of his habitual residence," *Nunez-Escudero,* 58 F.3d at 378, but also properly emphasize that the inquiry must be narrowly focused on potential serious harm to the child, and should not extend to "[p]sychological profiles, detailed evaluations of parental fitness, evidence concerning lifestyle and the nature and quality of relationships," or other evidence that "bear[s] upon the ultimate issue" of who should be granted custody, *Tahan*, 613 A.2d at 489. *See Nunez-Escudero*, 58 F.3d at 377-378 (evidence of abuse was overly "general," "concern[ed] the problems between Tice-Menley, her husband and [her] father-in-law" rather than any problems between the father or grandfather and the child, and hence was "irrelevant to the Article 13b inquiry"); *see also Blondin*, 189 F3d at 246-247 (endorsing finding that children faced risk of physical abuse based in part on evidence of previous abuse of mother, but also citing both *Friedrich* and *Nunez-Escudero* for the proposition that the "grave risk" exception must be narrowly construed). [13]

Petitioner cites (Pet. 16) the statement in *Nunez-Escudero*, 58 F.3d at 377, that "Article 13b requires more than a cursory evaluation of the

[13] One state appellate case cited by petitioner, *In re Coffield,* 644 N.E.2d 662, 665 (Ohio Ct. App. 1994), adopts the unduly narrow rule that a "grave risk" may be found "only when the general environment of the home country poses a risk, not [when the risk involves] the specific environment in which the child will live." That erroneous view has not, however, been reviewed or adopted by the Ohio Supreme Court, or revisited in light of later cases in this developing area, such as *Nunez-Escudero, Friedrich* and *Blondin.*

home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint." That case does not, however, conflict with the recognition by the courts below, and in *Friedrich* and *Blondin*, that a child generally will not face a "grave risk" of harm when returned under the Convention, because the legal system of the home jurisdiction will normally provide appropriate protection. *See* Pet. 15-17. In the statement petitioner cites, the *Nunez-Escudero* court sought only to make clear that the existence of a custody tribunal and other protection mechanisms was not the *only* relevant inquiry. 53 F.3d at 377-378. Nothing in the decisions below, or in *Friedrich* or *Blondin*, is inconsistent with that position. Rather, the decisions uniformly recognize that a court considering a "grave risk" claim under Article 13(b) must consider all available evidence concerning the situation that will actually face a particular child upon return, including *both* "the people and circumstances awaiting that child in [his or her] country,"*Nunez-Escudero*, 58 F.3d at 378, *and* how those "people and circumstances" might be affected, provisionally or permanently, by "any ameliorative measurers (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might *otherwise* be associated with a child's repatriation," *Blondin*, 189 F.3d at 248 (emphasis added). [14]

4. Even if there were conflict among the lower courts on the questions petitioner seeks to present, this case would not be an appropriate vehicle for this Court's consideration of those issues. First, as we have noted (*see* pp. 12-13, *supra*), the state courts in this case did not exclude or refuse to consider any of the evidence proffered by petitioner, and yet they were not persuaded that petitioner's daughter would face *any* substantial risk of harm if she were returned to Greece, presumptively in the custody of respondent. Thus, it is not clear that either of the legal questions presented by the petition was material to the state courts' resolution of this case.

[14] Petitioner seeks to rely (Pet. 16) on the decision of the district court on remand in *Blondin. See Blondin v. Dubois*, 78 F. Supp. 2d 283 (S.D.N.Y. 2000), appeal pending, No. 00-6066 (2d Cir.) (argument scheduled for September 12, 2000). That decision is not, of course, authoritative. *See* note 12, *supra.* Indeed, the United States has filed an amicus curiae brief with the Second Circuit supporting reversal of the district court's decision. We have provided copies of that brief to the parties in this case, and we have lodged a copy with the Clerk of this Court.

ILI US Digest/2 104 1/8/02, 1:45 PM

Second, because petitioner did not succeed in securing a stay pending appeal, Bronte Janakakis was delivered into respondent's custody and returned to Greece in June 1998. She has apparently been living in Greece, and subject to the plenary custody jurisdiction of the Greek courts, since that time Pet. App. 5a. Although the Kentucky Court of Appeals proceeded to decide this case on appeal, and although the parties make no mention of the issue, the case appears to be effectively moot. In any event, nothing in the Convention would require courts or other authorities in Greece to give binding effect to any judgment of this Court purporting to reverse or vacate an order of return that has already been fully executed, and it is at best uncertain what other legal or practical effects, if any, might attend such a judgment. That uncertainty counsels strongly against granting review in this case.

b. Order of return denied: *Blondin v. Dubois*

On May 8, 2000, the United States filed a brief as *amicus curiae* in *Blondin v. Dubois*, No. 00-6-66 (2d Cir.), another case filed pursuant to the Convention on the Civil Aspects of International Child Abduction, October 25, 1980, T.I.A.S. No. 11,670 ("Hague Convention").

At the time the United States brief was filed, the Second Circuit was considering *Blondin* for the second time on appeal from a lower district court decision denying the return to France of two children, brought to the United States in 1997 by their mother, under the grave risk provisions of Article 13(b) of the Hague Convention. 19 F.Supp.2d 123 (S.D.N.Y. 1998). There was clear evidence that the children's father, the left-behind parent, had abused them and their mother in France. Considering this evidence in light of the Hague Convention's objective that custody decisions be made, whenever possible, by the courts of the habitual residence, and its understanding that Article 13(b) should be construed narrowly, in its first review of the same

ILI US Digest/2 105 1/8/02, 1:45 PM

issue, the appeals court held that the lower court had erred in denying return based, among other things, on the father's history of abuse. *See* 189 F.3d 240 (2d Cir. 1999). Instead, the Court of Appeals stated, the lower court should have explored, in consultation with the French Central Authority, whether French officials could take measures that would protect the children from harm from their father upon their return to France.

On remand to the district court, the mother introduced uncontroverted expert testimony that the mere fact of returning to France would be psychologically damaging to the children, notwithstanding the considerable efforts that French authorities were prepared to take to protect them from abuse by their father. The district court again refused to order the children's return. 78 F. Supp.2d 283 (S.D.N.Y. 2000). Excerpts from the United States brief on appeal explain the interest of the United States in the case. On January 4, 2001, the Second Circuit upheld the district court's decision as consistent with Article 13(b), emphasizing that it did so only because of the specific facts of the case, in particular, the abducting mother's uncontested expert testimony that any return, regardless of protective measures, would place the children at grave risk. 238 F.3d 153 (2d Cir. 2001).

The full text of the brief is available at *www.state.gov/s/l.*

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INTEREST OF THE UNITED STATES

* * * *

The Department of State has a strong interest in promoting the proper operation of the [Hague] Convention to ensure that the United

ILI US Digest/2 106 1/8/02, 1:45 PM

States complies with international treaty obligations. (*Id.*). To the extent that other party States consider erroneous the United States courts' application of exceptions to return under the Convention, the United States may find its views on questions of Convention interpretation accorded less weight. *Blondin v. Dubois,* 189 F.3d 240, 248 & n.7 (2d Cir. 1999) ("*Blondin II*"). As succinctly stated by the Hague Convention's official reporter, in language adopted by this Court, any "'systematic invocation of [these] exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.'" *Id.* at 246 (quoting Elisa Perez-Vera, *Explanatory Report: Hague Conference on Private International Law, in* 3 *Acts and Documents of the Fourteenth Session* 426 (1980) ("Perez-Vera Report")). The standards applied in United States courts will thus inevitably influence the standards we can demand from other countries with respect to returning children to the United States.* (A238).

In sum, the United States Department of State has a substantial interest in ensuring that the Convention is interpreted correctly in the courts of this country. Moreover, in light of the Department of State's involvement in the negotiation and operation of the Convention, the Department's interpretation is entitled to substantial deference. *See Sumitomo Shoji Am., Inc. v. Avagliano,* 457 U.S. 176, 184-85 (1982).

* * * *

STATEMENT OF THE CASE

A. The Hague Convention

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[*See* discussion of Convention and U.S. statute in B.1.a. above]

Of the four narrow exceptions to return, the exception relevant to this action permits a court to refuse return where the abductor demon-

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* Indeed, when Congress implemented the Convention in the ICARA, it expressly recognized the Convention's "international character" and the "need for uniform international interpretation" of its provisions. 42 U.S.C. § 11601(b)(2)(B); *see Feder v. Evans-Feder,* 63 F.3d 217, 220 (3d Cir. 1995).

strates by clear and convincing evidence that " 'there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.' " *Blondin II*, 189 F.3d at 245 (quoting Hague Convention, art. 13 (b), and citing 42 U.S.C. § 11603 (e) (2) (A) for "clear and convincing" standard). In addition to the four stated exceptions, the Convention also permits a Court to " 'refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.' " *Id.* at 246 n. 3 (quoting Hague Convention, art. 13).

Each of the four exceptions to return, as well as the provision for taking account of an older child's objection, must be construed narrowly to avoid frustration of the Convention's purpose. *Id.* Thus, even if an action falls within an exception to return, the court may nonetheless order return if return is consistent with the interests represented by that exception, and the court should look for ways to order return. *Id.* at 246 n. 4, 249-50.

* * * *

DISCUSSION

* * * *

B. Article 13(b) Was Not Appropriately Invoked to Deny Return

Article 13(b) of the Convention permits, but does not require, non-return where "there is a grave risk that [a child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Hague Convention, art. 13(b). This exception is to be construed narrowly, and must be harmonized with the Convention's central purpose of, wherever possible, deterring abductions by returning abducted children promptly, and honoring the treaty commitment to allow custodial determinations to be made by the court of the child's habitual residence. *Blondin II,* 189 F.3d at 248. Thus, it is important that a court consider not only whether return would subject the child to a grave risk of harm, but also whether the State to which the child would be returned can and will take steps to ameliorate any potential. *Id.* at 248-49.

Consistent with the above, this Court explicitly directed the district court to consider on remand whether the abducted children could

ILI US Digest/2 108 1/8/02, 1:45 PM

be reasonably protected from the "grave risk" posed by Blondin's abusive behavior "while still honoring the important treaty commitment to allow custodial determinations to be made — if at all possible — by the court of the child's home country." *Blondin II*, 189 F.3d at 248. Because the district court on remand found that the children would not have to stay with their father pending the new determination, that the French system could support Marie-Eline and Francois pending the adjudication of the custody case, and that the French system could protect the children from further abuse, *Blondin III,* 78 F. Supp. 2d at 288-89, 299, the type of "grave risk" contemplated by the Convention was ameliorated, and return to France should have been ordered, *see Blondin II*, 189 F.3d at 249-50.

Instead of following this mandate, the district court refused return on the ground that France could not "protect [the children] from the trauma of being separated from their home and family and returned to a place where they were seriously abused, amidst the uncertainties of court proceedings and being on public assistance." *Id.* at 298. This conclusion was based on testimony from a psychiatrist that any return of the children to France, even for a one-to-three-month period during which a French court would determine custody, would cause them to experience post-traumatic stress disorder due to the prior abuse. *Id.* at 295. The psychiatrist was of the opinion that psychological harm would be caused by "return[ing] them to the scene of their original trauma, and by placing them in an insecure position based on the uncertainties surrounding a custody proceeding in France. *Id.*[*]

As this Court held in *Blondin II*, issues of past abuse should not constitute a grave risk of future harm under Article 13(b) without the additional finding that there is a likelihood of, and no adequate option to prevent, future abuse upon return. *Blondin II*, 189 F.3d at 248-49; *see also Tabacchi v. Harrison,* No. 99 C 4130, 2000 WL 190576, at *12-13 (N.D. Ill. Feb. 10, 2000) (return ordered where Italy can protect child from alleged abuse); *Croll v. Croll,* 66 F. Supp. 2d 554, 561 (S.D.N.Y.

[*] The district court acknowledged that, given his young age at the time of the abuse, Francois would not be expected to remember it, and that there was thus little evidence of potential harm to Francois if returned to France. *See Blondin III,* 78 F. Supp. 2d at 290 n.9. In refusing to return Francois as well as Marie-Eline, the district court decided the issue of whether the children should remain together, which is again a matter for the court determining custody.

ILI US Digest/2 109 1/8/02, 1:45 PM

1999) (same with respect to Hong Kong), *appeal pending,* No. 99-9341 (2d Cir.); *In re Walsh,* 31 F. Supp. 2d 200, 206-07 (D. Mass. 1998) (same with respect to Ireland); *compare Turner v. Frowein,* FA 970084450, 1998 Conn. Super. LEXIS 3781, at *17-21 (Sup. Ct. Conn. June 25, 1998) (refusing return where court found sexual abuse of child by father, and Dutch authorities were not responsive to mother).

The district court criticized this Court's interpretation of Article 13 (b) as "unduly narrow" and "unwarranted." *Blondin III*, 78 F. Supp. 2d at 296. In support of this criticism, the district court analogized this case to a portion of a State Department legal analysis that was published when the Convention was first adopted here. *Id.* at 298 (citing 51 Fed. Reg. 10, 494, 10,510 (1986)). Under that analysis, sexual abuse of a child by one parent is an example of an "intolerable situation" permitting a court to deny a petition for return. This analogy was flawed. The Department of State has confirmed to us that the example assumes (as did the district court in its initial ruling in this case, 19 F. Supp. 2d at 127-29) that the return would be to the custody of the abusive "custodial parent." 51 Fed. Reg. at 10,510. The example did not consider the additional possibility of return in the custody of the non-abusive parent, or of other alternative arrangements to protect the child in that situation.

The district court also erroneously concluded that, even under what it regarded as this Court's "unduly narrow" standard, a grave risk of harm had been established. *Blondin III*, 78 F. Supp. 2d at 299. The district court believed that its findings of past abuse made this case exceptional, and warranted its acceptance of expert testimony regarding the children's emotional ability to adjust to a return to France. *Id.* at 297. Both portions of this conclusion were incorrect. First, while allegations of abuse are not always made, invocation of such allegations is becoming more ordinary as "parents attempt to stave off return orders in the name of the child's welfare." Linda Silberman, *Hague International Child Abduction Convention: A Progress Report,* 57 LAW & CONTEMP. PROBS. 210, 267 (Summer 1994). Moreover, much of the testimony credited by the district court was primarily addressed to the psychological harm that may flow to the children based on the uncertainties of custody proceedings in France. *See* 78 F. Supp. at 295-96. The district court acknowledged that uncertainties are inherent in any custody proceeding, *id.,* but then failed to appreciate that crediting such uncertainties, even those existing against a background of past abuse, as a basis for non-

ILI US Digest/2 110 1/8/02, 1:45 PM

return under the Convention expands the "grave harm" exception to the point where it threatens to undermine the central goal of the Convention, namely, the prompt return of abducted children to their country of habitual residence.

While expert testimony addressing whether grave psychological harm might follow from return to a particular custodian or specific living situation may be relevant under Article 13(b), the type of testimony credited by the district court in this case was addressed to which country the children would fare better in for purposes of their long-term psychological health, even on the assumption that the French courts would protect them from future abuse by their father. Indeed, the psychiatrist giving this testimony described his own view of his role as follows: "We were here to deal with the children's best interests at the Court's request." (A367). Such evidence is addressed to the issue of custody, and is for the courts of the country of the children's habitual residence. It has little relevance to the question of whether children should be returned under the Convention, even where allegations of abuse are present. *See Friedrich II,* 78 F.3d at 1067, 1069; *In re Walsh,* 31 F. Supp. at 206; *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 850-51 (Ky. Ct. App. 1999), *petition for cert. pending,* No. 99-1496 (U.S.); *Tahan v. Duquette,* 259 N.J. Super. 328, 333-35 (N.J. Super. 1992); *compare Rodriguez v. Rodriguez,* 33 F. Supp. 2d 456, 461-62 (D. Md. 1999) (relying on similar type of psychological evidence to find exception to return, but relying on now-vacated opinion in *Blondin I*); *Krishna v. Krishna,* No. C 97-0021, 1997 U.S. Dist. LEXIS 4706, at *9-10 (N.D. Ca. Apr. 11, 1997) (refusing return that would put child back into psychologically damaging environment of prior abuse, but also finding that removal was not "wrongful" where father acquiesced in child's leaving country).

In sum, the district court relied on testimony that the children would suffer grave psychological harm not from return to any specific abusive or otherwise intolerable situation, but merely from return to the country of France, where past abuse had occurred, and from custody proceedings there. 78 F. Supp. 2d at 296-97. Such a finding cannot alone justify relief under the narrow exception to return contemplated by Article 13(b).*

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* The district court also expressed "concern" about what it perceived as "attempted intimidation" by French authorities, who suggested that they might seek to extradite

ILI US Digest/2 111 1/8/02, 1:45 PM

In comparable circumstances, the United States would expect the French courts to return children to our system for an appropriate custody determination in our courts. The district court's failure to return the children to France in this action erodes the system of trust and cooperation essential to the functioning of the Hague Convention and potentially opens the door to unregulated and uncontrollable international abductions in child custody matters.*

C. The District Court Incorrectly Analyzed, as a Legal Matter, Whether Marie-Eline Objected to Return and Whether She Has Attained a Sufficient Age or Degree of Maturity to Have Any Such Objection Given Effect

At the December 20, 1999 hearing, the district court heard evidence to determine whether Marie-Eline had, at age eight, attained an age and degree of maturity such that it would be appropriate to take account of her objection to return. The district court then played with

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Dubois for a criminal prosecution if the children were not returned to France for resolution of the custody case. *Blondin III*, 78 F. Supp. 2d at 299. This was inappropriately considered, as a country's pursuit of criminal justice is a separate matter from civil proceedings under the Hague Convention. Indeed, in this country, since 1993, the Justice Department has indicted 62 parents under the International Parental Kidnapping Crime Act, 18 U.S.C. § 1204, and 13 parents have been convicted. GAO Report to the Chairman, Committee on International Relations, House of Representatives, *Specific Action Plan Needed to Improve Response* to *Parental Child Abductions* 14 (March 2000). While, as with France in this case, United States prosecutors often will not indict abducting parents until and unless civil remedies have been exhausted under the Hague Convention, *id.*, the United States has pursued criminal remedies where Hague proceedings have been unsuccessful. *See, e.g.,* Father *Telling Congress of Quest For* His *Child,* Cincinnati Post, Oct. 14, 1999, at 1B, 1999 WL 21781679.

* *Steffen F. v. Severing P.,* 966 F. Supp. 922 (D. Ariz. 1.997), demonstrates the difficulties that flow from an overly broad application of an exception to return under the Convention. In that case, the district court found an exception to returning a child to Germany under Article 13(b) on the basis of testimony from a psychologist * that the child had bonded with his mother and would suffer detachment and unbonding should he be removed from her. *Id.* at 927., This holding — which is antithetical to the Convention and contrary to, the teaching of both this Court in *Blondin II* and the Sixth Circuit in *Friedrich* II — was supported in part by the court's observation there that, in a "mirror case to the instant matter," a German court had denied return of an American child to the United States on similar grounds. *Id.* at 927.

ILI US Digest/2 112 1/8/02, 1:45 PM

Marie-Eline and Francois in Chambers. Based on that playtime, the district court reported: "Marie-Eline explicitly stated that she does not want to return to France because she does not want to be subjected to further physical and emotional abuse at the hands of her father." *Blondin III*, 78 F. Supp. 2d at 296. The district court considered this an "objection to being returned to France." *Id.* The court then noted that it considered the child's "views" as only one of several reasons why it was invoking Article 13 (b). *Id.* This was an erroneous application of the standard for taking account of an older child's objection to return.

1. Marie-Eline Did Not Express an "Objection to Return" Within the Meaning of the Convention

As this Court stated in its initial opinion, that Marie Eline may have expressed a preference to remain in the United States is not appropriately relied upon by a court when applying the exception to return under Article 13(b) of the Convention. *Blondin II*, 189 F.3d at 247. Rather, "[t]he Convention includes a *separate* provision allowing the court to take into account a child's *objection* to being returned if [the court] finds that the child . . . has obtained an age and degree of maturity at which it is appropriate to take account of its views." *Id.* (quoting Hague Convention, art. 13) (emphases added). This provision does not contemplate a general airing of a child's "views" as part of an Article 13(b) analysis of "grave risk"; rather, it permits, although does not require, a court to refuse return based on the separate ground of an older child's maturely considered objection to return. The district court correctly recognized that Marie-Eline's views were not sufficiently "dispositive" to permit non-return under that provision alone. *Id.* at 296.

Moreover, Marie-Eline did not express an "objection" to return within the meaning of the "age and maturity" provision. The district court concluded that Marie-Eline did not want to return to France "because she does not want to be subjected to further physical and emotional abuse at the hands of her father." *Id.* This is not an objection to returning to France; rather, it is an objection to returning to the custody of her father. Indeed, the record contains ample evidence that Marie-Eline may want to return to France if she is not with her father. For example, the psychiatrist stated that Marie Eline "loved France and if she could go back to France safely someday, she would love to do so

ILI US Digest/2 113 1/8/02, 1:45 PM

(A328). When asked to elaborate on that comment, he stated, "She loves France, but she separates it from the France with her father and the France without her father." (A335). Similarly, when Marie-Eline was herself asked, "And would you mind going back to France if you did not have to live with your daddy," she responded, "Yes, I wouldn't mind." (A383). When asked if she preferred New Jersey or France, she replied New Jersey, but when asked why, she stated, "because I don't want to live with my daddy." (*Id.*) Again, her focus was on avoiding her father, not France. This is simply not the type of "objection" envisioned by the Convention.

2. The District Court Incorrectly Applied the "Age and Maturity" Standard

Even if a child articulates a firm objection to return, a court should nonetheless proceed with extreme caution, and carefully consider whether the child actually has reached the age and maturity threshold required by the Convention. That threshold can be satisfied only where the child has attained sufficient maturity independently to express her own interests in the manner necessary to make a determinative decision for herself. Perez-Vera Report at 433.

In this case, Marie-Eline, now eight years old, was abducted to the United States at the age of six, and has been in the exclusive care of her abducting parent since that time. The Convention applies to children up to sixteen years of age, and Marie-Eline therefore was far below the age of the older children that the drafters of the Convention had principally in mind in drafting this provision. *Id.* (citing fifteen-year-old as example). At the outset, therefore, there is substantial reason to doubt whether any eight-year-old could satisfy the "age and maturity" standard. Indeed, at least one court has found that this standard "does not apply to a 9-year-old child." *Tahan*, 259 N.J. Super. at 335.

This substantial doubt is reinforced in this case by the testifying psychiatrist.

* * * *

In sum, her own expert testified that Marie-Eline is not old enough to testify under oath, or even in a question-and-answer format. A fortiori, the child could not be viewed as having a "sufficient age and maturity" under the Convention.

ILI US Digest/2 114 1/8/02, 1:45 PM

In addition, in weighing the testimony of a younger child, a court should consider carefully whether it reflects the child's views, or an attenuated version of the abducting parent's. 51 Fed. Reg. at 10,510. Applying this standard, courts have found that children aged nine and ten have been sufficiently influenced by their abductors that their views on return should not be taken into account. *See Sheikh v. Cahill*, 546 N.Y.S.2d 517, 521-22 (Sup. Ct. Kings County 1989); *In re Robinson,* 983 F. Supp. 1339, 1343-44 (D. Colo. 1997).

In August 1998, the district court concluded that MarieEline, then seven, had been "prepared, to a degree," for a conversation with the court concerning her views on return. *Blondin I*, 19 F. Supp. 2d at 128. Moreover, in December 1999, the psychiatrist readily admitted that some of Marie-Eline's "spontaneous" expressions of abuse, such as a fear of her father strangling her, or living in a shelter, could have come only from descriptions of abuse given to her by her mother, since such incidents occurred when MarieEline was too young to remember them. (A348-50). Notwithstanding this testimony, the district court summarily concluded that it did not believe Marie-Eline's statements were influenced by her mother. Given the circumstances, it is extremely unlikely that Marie-Eline's views could have been sufficiently free of her abducting parent's influence to amount to an objection properly cognizable under the Convention.

We do not suggest that the testimony of a younger child cannot be considered as evidence that abuse has occurred or that return to the immediate custody of an abusive parent would pose a grave risk of harm. That is different, however, from giving effect to a carefully considered "objection" by an older child to returning to her former country of residence, based on her independent and mature assessment of her own interests.

2. Custody and asylum: *Gonzalez v. Reno*

The rescue of six-year-old Elian Gonzalez, one of thirteen Cuban nationals attempting to flee Cuba for the United States when their boat capsized off the coast of Florida on November 25, 1999, resulted in a complex and highly pub-

ILI US Digest/2 115 1/8/02, 1:45 PM

licized legal battle in the United States until his return to Cuba on June 29, 2000 following decisions by the Eleventh Circuit Court of Appeals. *Gonzalez v. Reno*, *et al*., 212 F.3d 1338 (11th Cir.), *rehearing denied by, rehearing en banc, denied by* 215 F.3d 1243 (11th Cir. 2000), *cert. denied,* 121 S.Ct. 481).

Elian's mother, who had been attempting to bring him to the United States without the knowledge or consent of his father in Cuba, died in the accident. Following his rescue, Elian was paroled into the US in the care of Lazaro Gonzalez, his great uncle in Miami, Florida. The ensuing legal controversy arose from the efforts of the Immigration and Naturalization Service ("INS") to resolve the conflicts between efforts by Lazaro Gonzalez to keep Elian in the United States through asylum applications filed in his own name and in Elian's under section 208 of the Immigration and Nationality Act ("INA") and efforts by Elian's father, Juan Miguel Gonzalez, to have the boy returned to Cuba.

On January 5, 2000, the Executive Associate Commissioner of INS for Field Operations, Michael A. Pearson, informed Lazaro Gonzalez and his attorneys that the Commissioner of the INS had decided that Juan Gonzalez should be permitted to act on his son's behalf, and that the INS had accepted Juan's withdrawal of Elian's application for admission to the United States, as well as his decision not to assert Elian's right to apply for asylum. The Attorney General of the United States denied Lazaro's request that she overturn the Commissioner's decision on January 12, 2000.

On January 19, 2000, Lazaro Gonzalez challenged the Attorney General's decision by filing suit in federal district court in the Southern District of Florida. The Department of State submitted a declaration of Assistant Secretary for

ILI US Digest/2 116 1/8/02, 1:45 PM

Consular Affairs Mary A. Ryan, dated January 24, 2000, addressing the international child custody issues raised by the case, in support of the Justice Department's position. The Declaration explained that the United States would expect a foreign government to make the same decision in similar circumstances and expressed Assistant Secretary Ryan's view that failure to implement the INS decision could have a detrimental impact on the ability of the United States Government to help parents in the Untied States recover their children taken to foreign countries.

DECLARATION OF MARY A. RYAN

I, Mary A. Ryan, hereby declare as follows:

* * * *

3. As Assistant Secretary for Consular Affairs, I am the senior State Department official charged with exercising the Secretary of State's responsibility to protect and provide consular services to United States citizens abroad. These services are provided by the Department of State's Bureau of Consular Affairs, which I head, and by United States consular officers under my general direction who are assigned to United States embassies and consulates throughout the world. Consular services include such activities as issuing passports and assisting citizens involved in emergencies outside the United States, including deaths, arrests, medical emergencies, and evacuations.

4. A substantial and ever-increasing aspect of the Department's consular work involves the provision of services in connection with children. We document children born abroad as U.S. citizens and repatriate destitute and runaway U.S. citizen children. We issue U.S. visas to children adopted abroad by U.S. citizen parents; seek to prevent abuse, abandonment, neglect and exploitation of U.S. citizen children abroad; and issue and validate passports so that U.S. citizen children may travel with their parent(s), among other services. We also seek to prevent and resolve cases involving international parental child abduction. In this connection, the Office of Children's Issues in the Bureau of Consular Affairs serves as the United States Central Authority under Article 6 of the

ILI US Digest/2 117 1/8/02, 1:45 PM

Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"). As such, it is responsible for cooperating with the Central Authorities in other countries to "secure the prompt return of children" to their place of habitual residence under the Hague Convention when they have been "wrongfully removed…or retained" by one parent, and to achieve the other objectives of the Hague Convention. (Generally speaking, a wrongful removal or retention occurs when a child is taken to or kept in another country in violation of custody rights of the left-behind parent.) Our work on behalf of children is generally initiated by a parent's request for assistance, and often occurs in the context of an international child custody dispute involving an American child. As the U.S. Central Authority under the Hague Convention, however, we also assist foreign governments in seeking the return of children brought to the United States in violation of the custody rights of a parent in a foreign country.

5. The role of consular officers in protecting children is recognized in the 1963 Vienna Convention on Consular Relations ("VCCR"), 21 UST 77, which largely codified customary international law and which now, with over 160 countries as parties, sets forth well-established and generally recognized principles. Article 5(h) of the VCCR specifically provides that consular functions include, "safeguarding…the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons." Article 37 (b) of the VCCR generally requires the "competent authorities of the receiving State" (*i.e.*, the country in which a foreign national is found) "to inform the competent consular post without delay of any case where the appointment of guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State."

6. The rights of parents are also recognized internationally and have long been a central premise of our consular work on behalf of Americans. It is a basic precept of our work that the parents of American citizen children, not the Department of State of the United States Government, should decide what is best for their children. For example, although use of United States passports for travel to Libya and Iraq has been restricted under 22 USC 211a because there is an "imminent danger to the public health or the physical safety of United States travellers" in those countries, we validate passports for travel to such countries on a

ILI US Digest/2 118 1/8/02, 1:45 PM

case-by-case basis, pursuant to 22 CFR 51.74. We have validated passports for U.S. citizen children being taken to Libya or Iraq to live with their Libyan or Iraqi national parent(s) (who in some cases are married to American citizens) who are domiciled there. (Recently, for example, we validated the passport of a fourteen-year-old American child residing in Libya with his Iraqi parents.) In such cases, we act on the premise that it is the right of the parent(s) to decide whether to raise their children in Iraq or Libya, rather than in the United States. Moreover, "American citizens residing in Iraq on February 1, 1991, who continue to reside there," are exempt from the Iraq passport restriction. This permits such citizens, including citizen children, to continue to live in Iraq with their families, whether the family is multinational or simply deeply rooted in the country. As a general matter, the issuance of passports to and travel by minor U.S. citizen children is governed, under Department of State regulations and practice, by the wishes of their parents.

7. The United States is at the forefront in the provision of consular services to its citizens abroad and in its advocacy on behalf of parents seeking the return of their children to the United States. Because other countries carefully scrutinize the practices of the United States, our credibility and effectiveness depend upon our ability to adhere to the principles we espouse. If the United States fails to act in accordance with such principles, it jeopardizes its ability to insist on adherence by other countries. Consistency between principles and practice is particularly important in matters of foreign relations, where enforcement of rights so often depends upon reciprocity, diplomatic pressure and negotiations, and cooperation. These considerations are critical to the ability of the United States to obtain the return of children to the United States. Over the years, hundreds of children have been returned to their parents in the United States because other countries have been willing to respect basic principles of international law and custom and, when applicable, relevant treaty obligations.

8. When a young child is found in a foreign country, the accepted international practice is to attempt to identify the child's parent or parent(s), and to return the child to that person whenever possible, often through the assistance of consular officials representing the child's country of origin. Were a U.S. citizen minor child found in a foreign country in the circumstances of Elian Gonzalez Brotons, we would expect the government of that country immediately to seek the child's surviving parent, if any, and to contact U.S. consular officials for assistance in

ILI US Digest/2 119 1/8/02, 1:45 PM

doing so if necessary. We would then expect the government promptly to return the child to the parent, unless the parent expressly asked that other arrangements be made. We would ensure that the foreign government was aware of the parent's wishes and would not expect our representations in that regard to be questioned. Thus, we would expect that the parent's direct participation in proceedings in the foreign country would not be required. We would not expect that the surviving parent would necessarily have to travel to the foreign country to recover the child. Nor would we expect the surviving parent to have to participate in a foreign court's custody proceedings to establish his or her right to assume responsibility for the child. We would not agree that there was any custody issue to be resolved; rather, custody would clearly belong to the surviving parent. We would object strongly if a foreign government declined to return an American child to its only surviving parent because other relatives sought custody of the child or because of a judgment that the child would be better off in the country in which the child was found. We also would take vigorous exception to a foreign government or court that sought to substitute its view of the "best interests of the child" for those expressed by a parent, absent a previous finding that the parent was unfit. Moreover, we would expect any decision about fitness or custody to be made not by a court in the country where the child was found, but by a court in the country of the child's habitual residence. A failure to return Elian Gonzalez Brotons to his father would be fundamentally inconsistent with these principles and with what we would advocate in the case of an American child.

9. The case of Elian Gonzalez Brotons is straightforward because there is no surviving parent in the United States. Cases involving a child with two living parents who is taken to a foreign country by one parent are far more complex and difficult to resolve. The behavior of the United States in the Elian Gonzalez Brotons case has implications for such cases as well, however. Many countries of the world, like Cuba, are not party to the Hague Convention on the Civil Aspects of International Child Abduction. When children are taken from the United States by one parent to such a "non-Hague country," the Department of State typically seeks the cooperation of officials of that country in securing the return of the child to the parent left behind in the United States. These efforts have taken a variety of forms, including in some cases direct requests by senior U.S. Government officials to high level foreign officials. If INS's decision is not upheld, the ability of the United States to make such requests success-

ILI US Digest/2 120 1/8/02, 1:45 PM

fully in the future will surely be impaired. First, such requests appeal to the foreign country involved to respect the rights of the left-behind parent and the importance of the parent-child relationship; the ability of the United States to appeal to these considerations with credibility will be diminished. Second, foreign authorities will have to consider the possibility that their own countrymen will remember the failure of the United States to return Elian Gonzalez Brotons to his father and react negatively if such authorities return a child to a left-behind parent in the United States.

10. Because in recent years consular work has been enormously complicated by the increasing number of multinational families, the Department has made an effort to develop conventions to address the unique problems that arise in such families. The Department led the U.S. delegations that negotiated the 1980 Hague Convention on the Civil Aspects of International Child Abduction; the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption; and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children. These and other private international law agreements, such as those currently being negotiated on reciprocal child support enforcement, seek to provide an agreed legal framework and appropriate legal remedies to assist and protect children and parents in multinational families, particularly when the family breaks apart and becomes transnational.

11. When a child custody dispute involves countries that apply the Hague Convention, the Convention's mechanisms and legal standards can be invoked by the left-behind parent to seek the return of a child taken from his or her "habitual residence." The U.S. subscribes fully to the Convention's core concept that a child should be returned to the child's habitual residence when the child has been wrongfully removed, absent evidence of "grave risk" to the child as defined by the Convention. We do not accept that a "grave risk" can be found under the Convention based on a judgment that the child will have a better life in the country to which he or she has been taken. We also look with extreme caution on suggestions that a decision whether to return a child should be based on the views of the child. The Hague Convention permits consideration of the views of a child only when the child has attained "an age and degree of maturity at which it is appropriate to take account of its views." Because of concerns that this provision could be abused as a

ILI US Digest/2 121 1/8/02, 1:45 PM

basis for not returning a child to his or her habitual residence, the United States originally took the position that the Convention should not permit consideration of the views of the child at all, or at least not if the child was under age twelve. We were concerned that a younger child would not be mature enough, and that the child would inevitably have been influenced by the parent or person with immediate physical custody. Although the negotiators declined to establish an absolute age-limit, there was a general agreement in principle with the United States' views and concerns. Thus, in applying this exception, the courts of most countries have been careful and restrained.

12. Regardless of whether a child is taken to a Hague or a non-Hague country, the United States maintains that a child should be returned to the child's place of habitual residence except in limited circumstances. Such circumstances would include situations in which returning the child to the place of habitual residence would be inconsistent with the U.N. Refugee Convention and Protocol or the Torture Convention. The INS decision that Elain Gonzalez Brotons should be returned to his father in Cuba is consistent with these principles.

13. A failure to enforce the INS decision would, conversely, be inconsistent with the principles we advocate on behalf of the United States and could have potentially lasting negative implications for left-behind parents in the United States and for U.S. citizen children taken to foreign countries. First, not returning Elian Gonzalez Brotons to his father would be perceived as a decision that the fundamental parent-child relationship can be ignored, even where there is no evidence of unfitness. A decision based on the "independent" views of a six-year-old child would also be a dangerous precedent. Finally, not returning Elian Gonzalez Brotons to his father could be perceived as endorsing the right of the country in which a child is found to refuse to return the child to the child's habitual residence based on a judgment that the habitual residence is not a desirable place to raise a child.

14. Hundreds of cases involving children taken from the United States over the past twenty-five years have taught us that it is extremely difficult to obtain the return of a child from a country that acts in whole or in part on the basis of judgments about the environment in which a child will be raised. This is a particular problem when we seek the return of U.S. citizen children from Islamic countries, which generally give custody to the father but which will sometimes give custody of very young children to the mother. For example, an abducting father defend-

ILI US Digest/2 122 1/8/02, 1:45 PM

ing his custody in a Middle Eastern country's courts against a left-behind American mother last year alluded to the "moral decay" invading the United States. We frequently find that a father who has abducted a child to an Islamic country, even if conceding that the left-behind mother in the United States is a good parent, will justify the abduction on the ground that the social environment in the United States is immoral, sexually promiscuous, or otherwise unsuitable for the raising of children. I believe that a decision not to return Elian Gonzales Brotons to Cuba could encourage the making of such arguments by abducting parents and their acceptance by foreign authorities.

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The District Court granted the United States motion to dismiss the count challenging the Attorney General's decision on due process grounds and entered summary judgment for the government on the count alleging a violation of Section 208 of the INA. *Gonzalez v. Reno, et al*., 86 F.Supp.2d 1167 (S.D.Fla.2000). This decision was affirmed on appeal by the Eleventh Circuit Court of Appeals, *supra*. Excerpts from the Brief for Appellees, filed by the United States on April 24, 2000 in the Eleventh Circuit follow. These excerpts summarize the decision of the INS Commissioner and provide the views of the United States on key legal issues in the litigation.

The full text of the United States brief in the Eleventh Circuit and the Declaration of Assistant Secretary Mary Ryan of January 25, 2000, and related documents are available at *www.state.gov/s/l.* The INS decisions cited in the brief are available at *www.ins.usdoj.gov/graphics/publicaffairs/eliang.htm.*

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ILI US Digest/2 123 1/8/02, 1:45 PM

3. On January 5, 2000, the Executive Associate Commissioner of INS for Field' Operations, Michael A. Pearson, wrote Lazaro [Gonzalez] and his attorneys, informing them that the INS had concluded that Juan [Miguel Gonzalez] has the authority to speak for his son in immigration matters, that there is no conflict of interest between Juan and Elian or any other reason that would warrant the INS's declining to recognize the authority of this father to speak on behalf of his son in immigration matters, and that Juan was expressing his true wishes regarding Elian. *Id.* at 3. Mr. Pearson therefore informed Lazaro that the Commissioner of INS had accepted Juan's withdrawal of Elian's application for admission to the United States, as well as his decision not to assert Elian's right to apply for asylum. *Id.*

* * * *

Mr. Pearson sent those letters to Lazaro and the attorneys pursuant to a decision by the Commissioner dated January 3, 2000. *Id.* at 7-23. That decision, an eleven-page, single-spaced analysis by the INS's Office of General Counsel bearing the Commissioner's approval on the final page, analyzed two basic questions. First, who has the legal authority to represent Elian: his father, his great uncle, or the attorneys claiming to represent Elian? *Id.* at 7. Second, given Juan's apparent legal authority to do so, under what circumstances should his interests be considered apart from the father's expressed wishes regarding Elian's admission to the United States and asylum? *Id.*

a. With reference to the question of who has legal authority to speak for Elian, the Commissioner reasoned that under immigration law, relationships are generally assessed under the law of the jurisdiction where the relationship arose. Here, because the relationship between Juan and Elian arose in Cuba, Cuban law applied. The Commissioner concluded that under Cuban law a sole surviving parent is the only person authorized to speak for the child. *Id.* at 8. That being so, the Commissioner concluded, Lazaro had no legal basis to act on Elian's behalf without Juan's consent. *Id.* The fact that the INS had released Elian to Lazaro did not give him that authority. *Id.* "Instead, he has agreed to care for the child and ensure that he appears at all immigration proceedings." *Id.* (citing 8 C.F.R. 236.3(b)(4)). Nor, the Commissioner concluded, did the three attorneys who had entered appearances for Elian have a legal basis for doing so. A minor's ability to retain counsel must be considered against the question of his capacity, and the INS generally assumes that some-

ILI US Digest/2 124 1/8/02, 1:45 PM

one under age fourteen will not make immigration decisions without the assistance of a parent or legal guardian. *Id.* at 9 (citing 8 C.F.R. 103.2 (a)(2)(providing that a parent or legal guardian may sign the application or petition of someone under age fourteen)). In this instance, the Commissioner noted, Juan had expressly stated that he was not authorizing attorneys to represent Elian. *Id.*

b. The Commissioner then considered the circumstances under which Elian's interests regarding admission and asylum should be considered apart from Juan's expressed wishes. *Id.* at 9-17. Those issues, the Commissioner explained, went beyond Juan's legal authority to the question of his ability to represent Elian's interests adequately in immigration matters. The underlying question, the Commissioner continued, was "whether the father's personal interests conflict with his representation of the immigration interests of the child to a degree sufficient to interfere with parental authority." *Id.* at 10. In this case, the possibility of a conflict was raised by (i) allegations that the father is not free to express his wishes, and (ii) the assertion that the child is free to raise an asylum claim regardless of the father's wishes. *Id.*

(i) The Commissioner first concluded that Juan is able adequately to represent his son's immigration interests. *Id.* at 10-13.

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Accordingly, the Commissioner decided to give effect to the father's request for the return of his child by treating it as a request for withdrawal of Elian's application for admission to the United States. *Id. See* 8 U.S.C. 1225(a)(4) (Supp. IV 1998) (providing that an alien may, in the discretion of the Attorney General, be permitted to withdraw his application for admission and depart immediately from the United States).[2]

(ii) Notwithstanding her determination that Juan adequately represents Elian in immigration matters and that the application for admission may be withdrawn, the Commissioner gave separate consideration to the application for asylum that had been submitted in Elian's name. *Id.* at 14-17. On this issue, the Commissioner first stated that a child's right to seek asylum independent of his parents is well-established. *Id.*

[2] An alien, such as Elian, who is present in the United States and has not been admitted, or who arrives in the United States, is deemed to be an applicant for admission. *See* 8 U.S.C. 1225(a)(1) (Supp. IV 1998).

ILI US Digest/2 125 1/8/02, 1:45 PM

She pointed out in this regard that Section 208(a)(1) of the INA, 8 U.S.C. 1158 (a)(1) (Supp. IV 1998), permits any individual who arrives in the United States to apply for asylum, and that although Section 208(a)(2) prescribes certain exceptions to that general rule, none of those exceptions is applicable here and "[t]here are no age-based restrictions on applying for asylum." *Id.*

* * * *

The Commissioner thus first considered whether Elian is "truly seeking asylum" in his own right – *i.e.,* "Elian's capacity to assert a claim for asylum on his own behalf." *Id.* at 15, 16. She noted that the Seventh Circuit in *Polovchak v. Meese,* 774 F.2d 731 (7th Cir. 1985), had concluded that twelve years of age was probably at the low end of maturity necessary to sufficiently distinguish a child's asylum interests from those of his parents. *Id.* The Commissioner noted that Elian is only six years of age, "well below the lower end of necessary maturity described in *Polovchak,"* and that "[t]here is no indication from the information INS has received that Elian possesses or has articulated a subjective fear of persecution on a protected ground, or that he has the ability to do so." *Id.* at 10. The Commissioner also did not believe "that Elian, at age six, is competent to affirm that the contents of his asylum application accurately reflect his fear of returning to Cuba, if any." *Id.* Accordingly, the Commissioner concluded that even though Elian's "signature" appears on the asylum application, he lacked the capacity to raise an asylum claim on his own behalf. *Id.*

The Commissioner then explained that the further inquiry into objective factors was appropriate because in certain analogous cases involving very young children who may be incapable of expressing a fear of persecution to the same extent as an adult, the *INS Children's Guidelines* suggest that it is necessary to evaluate a possible asylum claim based on all the objective evidence. *Id.* at 10.…

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The Commissioner determined that "[n]one of the information provides an objective basis to conclude that any of the experiences of Elian's relatives in Cuba bear upon the possibility that Elian would be persecuted on account of a protected ground." *Id.* at 17. And as for Lazaro's allegations that Elian will suffer political exploitation, the Commissioner found those allegations troubling, but she also found they did not form the basis of a valid asylum claim. *Id.*...

ILI US Digest/2 126 1/8/02, 1:45 PM

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ARGUMENT

1. The Statutory Framework For The Only Issue On Appeal: The Disposition Of The Asylum Applications Lazaro Gonzalez Sought To File On Elian's Behalf

A. ***Only The Attorney General's Threshold Assessment Of The Asylum Applications Is At Issue.*** In the district court, appellant did not challenge the Commissioner's determination that Juan Gonzalez, as Elian's sole surviving parent, is the legal representative of Elian; that Juan has a close and loving relationship with his son; that Juan properly speaks for Elian in immigration matters generally; and that his decision to withdraw the application for admission of Elian to the United States therefore should be given effect so that Elian could return to him in Cuba. *See* 8 U.S.C. 1225(a)(4) (Supp. IV 1998) (providing that an arriving alien "may, in the discretion of the Attorney General, be permitted to withdraw the application for admission and depart immediately from the United States").[5] Those matters therefore are not at issue on this appeal, and indeed appellant does not challenge those determinations in this Court.

This appeal concerns only a distinct issue of asylum procedure. Specifically, it concerns the correctness of the district court's conclusion that the Attorney General reasonably construed and applied Section 208 of the INA in deciding, after a thorough review, not to accept for a full adjudication the asylum applications that were submitted by Lazaro Gonzalez or in Elian's own name. That question must be considered in the context of the carefully drawn statutory provisions, discussed in Point B immediately following, that govern asylum and that furnish grounds

[5] Judicial review of the Attorney General's decision allowing Juan to withdraw the application for admission of Elian is in any event barred by 8 U.S.C. 1252(a)(2)(B)(ii) (Supp. IV 1998), which provides that "no court shall have jurisdiction to review… any other decision of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General…." *See Gonzalez,* 86 F. Supp. 2d at 1178 (finding this jurisdictional point "compelling," but recognizing that the withdrawal of the application for admission was not at issue).

ILI US Digest/2 127 1/8/02, 1:45 PM

for relief only in narrow circumstances involving persecution specifically affecting the individual alien on account of his own political opinion or other protected characteristic. The generalized assertions Lazaro Gonzalez makes at various places in his brief about conditions in Cuba, whether it would be in Elian's best interests to live there, and whether actually Elian wants to live there (*see e.g.,* Appellant's Br. 9, 14-16, 27, 31, 32-34, 35, 49-50, 54) are quite wide of the mark and essentially irrelevant to the narrow issue of asylum procedure presented here.

B. *Substantive Standards For Asylum.* Section 208(a) of the INA provides that "[a]ny alien who is physically present in the United States or who arrives in the United States . . . may apply for asylum in accordance with this section." 8 U.S.C. 1158(a) (Supp. IV 1998). Section 208(b)(1) in turn provides that the Attorney General may grant asylum to an alien "who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section," if the Attorney General determines that the alien is a refugee within the meaning of 8 U.S.C. 1101(a)(42)(A) (Supp. IV 1998). "Both this Court and the Supreme Court have emphasized that an alien who satisfies the applicable standard for asylum does not have a right to remain in the United States; he or she is simply eligible for asylum, if the Attorney General, in her discretion, chooses to grant it." *Lorisme v. INS,* 129 F.3d 1441, 1444 (11th Cir. 1997) (citations and internal brackets omitted). The term "refugee" is statutorily defined as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. 1101 (a)(42)(A) (Supp. IV 1998). The applicant bears the burden of proving "refugee" status. 8 C.F.R. 208.13(a). *See, e.g., Asani v. INS*, 154 F.3d 719, 721-22 (7th Cir. 1998). Thus, even to be eligible for a discretionary grant of asylum, the alien must prove that he has suffered persecution in the past or has a well-founded fear that he will suffer persecu-

ILI US Digest/2 128 1/8/02, 1:45 PM

tion in the future if he is returned, and that such persecution is specifically "on account of" his race, religion, nationality, membership in a particular social group, or political opinion. *INS v. Elias-Zacarias,* 502 U.S. 478 (1992); *Lorisme v. INS,* 129 F.3d 1441, 1444 (11th Cir. 1997); *see also Faddoul v. INS,* 37 F.3d 185, 188 (5th Cir. 1994) (there "must be some particularized connection between the feared persecution and the alien's race, religion, nationality or other listed characteristic. Demonstrating such a connection requires the alien to present 'specific, detailed facts showing a good reason to fear that he or she will be singled out for persecution ...'") (citing *Zulbeari v. INS,* 963 F.2d 999, 1000 (7th Cir. 1992)).

Whether past or future, the applicant must show "persecution." Persecution is "punishment or the infliction of harm which is administered on account of ... race, religion, nationality, group membership, or political opinion." *Asani,* 154 F.3d at 722 (citation omitted); *accord, Fisher v. INS,* 79 F.3d 955, 960 (9th Cir. 1996) *(en banc).* "Persecution is an extreme concept, which ordinarily does not include 'discrimination on the basis of race or religion, as morally reprehensible as it may be.'" *Fisher,* 79 F.3d at 961 (citation omitted). Courts have found persecution, for example, where an alien was arrested three times, severely beaten on several occasions, and directly fired upon. *Desir v. Ilchert,* 840 F.2d 723, 726-27 (9th Cir. 1988); *see also Mikhailevitch v. INS,* 146 F.3d 384, 389 (6th Cir. 1998) (summarizing cases on what constitutes "persecution"). The Board of Immigration Appeals ("Board") has described persecution as

> the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.) in a manner condemned by civilized governments. The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.

Matter of Laipenieks, 18 I. & N. Dec. 433, 456-57 (BIA 1993).

To establish past persecution, an applicant must present specific and objective facts of past persecution. *See INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987); *see also* 8 C.F.R. 208.13(b)(1). Such a showing

ILI US Digest/2 129 1/8/02, 1:45 PM

gives rise to a rebuttable presumption of future persecution. 8 C.F.R. 208.13(b)(1)(i) & (ii).

To establish future persecution, the applicant must satisfy both subjective and objective requirements. *INS v. Cardoza-Fonseca,* 480 U.S. 421, 430-31 (1987); *Mikhael v. INS*, 115 F.3d 299, 304 (5th Cir. 1997); *Ghaly v. INS*, 58 F.3d 1425, 1428-29 (9th Cir. 1995); *Matter of Acosta,* 19 I. & N. Dec. 211, 221 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi,* 19 I. & N. Dec. 439 (BIA 1987); *Mogharrabi,* 19 I. & N. Dec. at 443. The subjective element requires credible testimony that the alien has a genuine fear of persecution on one of the prohibited grounds if returned to his country of nationality. *Chen v. INS,* 195 F.3d 198, 201 (4th Cir. 1999) (subjective prong satisfied by presenting "candid, credible, and sincere testimony demonstrating a genuine fear of persecution"); *Mikhael v. INS,* 115 F.3d 299, 304-05 (5th Cir. 1997) (applicant's "subjective fear of future persecution must also be objectively reasonable"); *Mitev v. INS,* 67 F.3d 1325 (7th Cir. 1995) ("applicant must show ... a genuine, subjective fear of persecution"); *Kamla Prasad v. INS,* 47 F.3d 336, 338 (9th Cir. 1995) (and case cited); *Ganjour v. INS,* 796 F.2d 832, 835 (5th Cir. 1986).

The objective component of an asylum claim based on future persecution requires that the alien show "credible, direct, and specific evidence of facts supporting a reasonable fear of persecution on the relevant ground." *Hartooni v. INS,* 21 F.3d 341 (9th Cir. 1994). "Generally, evidence of widespread violence and human rights violations affecting all citizens is insufficient to establish persecution." *Debab v. INS,* 163 F.3d 21, 27 (1st Cir. 1998) (citing cases). Applicants must present evidence showing that their "predicament is appreciably different from the dangers faced by [their] fellow citizens." *Estrada-Posadas v. INS,* 924 F.2d 916, 920 (9th Cir. 1991); *Zepeda-Melendez v. INS,* 741 F.2d 285, 289-90 (9th Cir. 1984) (holding that "generalized allegations of persecution resulting from the political climate of a nation" do not suffice). "General conditions of unrest alone are insufficient to warrant relief." *Bevc v. INS,* 47 F.3d 907, 909 (7th Cir. 1995); *see also Civil v. INS,* 140 F.3d 52 (1st Cir. 1998); *Huaman-Cornelio v. Board,* 979 F.2d 995, 1000 (4th Cir. 1992); M.A. *v. INS,* 899 F.2d 304, 315 (4th Cir. 1990) *(en banc); Cariolan v. INS,* 559 F.2d 993, 996 (5th Cir. 1977) ("The law regulating persecution claims, although humane in concept, is not generous"); In *Re N-M-A-,* Interim Dec. 3368, 1998 WL 744095, at *12 (BIA 1998) (asylum not

ILI US Digest/2 130 1/8/02, 1:45 PM

proven where applicants face "a variety of dangers arising from internal strife in Afghanistan").

Because the asylum statute "speaks of a well-founded fear of persecution for specific reasons," the Supreme Court has held that a showing of motive for persecution is "critical." *Elias-Zacarias,* 502 U.S. at 483. There must be an inquiry into the alleged persecutor's motives, and the political opinion, religion, or other qualifying characteristic must be that of the victim, not that of the persecutor. *Id.* at 482-83. In *Sangha v. INS,* 103 F.3d 1482, 1487 (9th Cir. 1997), the Ninth Circuit put it this way:

> After the Supreme Court's decision in *INS v. Elias-Zacarias, 502 U.S.* 478 *(1992),* an asylum seeker claiming to be a victim of persecution on account of a political opinion must offer evidence that (1) he has been a victim of persecution; (2) he holds a political opinion; (3) his political opinion is known to his persecutors; and (4) the persecution has been or will be on account of his political opinion. Likewise, an asylum seeker claiming wellfounded fear of persecution must show the second, third and fourth elements, though not necessarily the first.

103 F.3d at 1487.

* * * *

II. An Alien Seeking Admission To The United States Has No Due Process Rights Regarding An Asylum Application

The district court was clearly correct in holding that Elian Gonzalez has no due process rights concerning the manner in which the Attorney General considered the asylum applications submitted on his behalf. The district court relied primarily on *Jean v. Nelson,* 727 F.2d 957 (11th Cir. 1984) *(en banc), aff'd on other grounds,* 472 U.S. 846 (1985), noting that there this Court held that unadmitted aliens cannot challenge INS decisions on their "applications for admission, asylum, or parole on the basis of rights guaranteed by the United States Constitution." 86 F. Supp. 2d at 1188.

ILI US Digest/2 131 1/8/02, 1:45 PM

The holding in *Jean v. Nelson* reflects long-settled law. Unadmitted aliens, although physically present within this country's borders, are not "within the United States," *Leng May Ma v. Barber,* 357 U.S. 185, 186 (1958), but rather are "treated as if stopped at the border" and "on the threshold of initial entry," *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 212, 215 (1953). Such an alien accordingly "has no constitutional rights regarding his application [for admission], for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia,* 459 U.S. 21, 32 (1982); *see also United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 600 (1950) (denial of removal hearing "raises no constitutional conflict if limited to 'excludable' aliens")[8]; *Adras v. Nelson,* 917 F.2d 1552 (11th Cir. 1990) ("Excludable aliens cannot challenge the decisions of executive officials with regard to their applications for admission, asylum, or parole on the basis of the rights guaranteed by the United States Constitution").

This Court's en banc decision in *Jean* specifically rejected the contention that the Refugee Act created a constitutionally protected "liberty" or "property" interest in asylum that is protected by the Due Process Clause. The Court found it "clear that the Refugee Act does not create an entitlement to asylum," but only provides that asylum may be granted in the Attorney General's discretion. *Id.*[9] Accord *Garcia v. INS,* 7 F.3d 1320, 1326 (7th Cir. 1993); *Ramirez-Osorio v. INS,* 745 F.2d 937, 942-43 (5th Cir. 1984). And this Court made clear in *Jean* that the release of an alien on parole does not alter his status or trigger application of the Due Process Clause to the consideration of any claims he might

[8] *See also Knauff*, 338 U.S. at 542: "[A]n alien who seeks admission to this country may not do so under any claim of right.... Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides…. [I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the government to exclude a given alien."

[9] In affirming the *en banc* decision in *Jean,* the Supreme Court stated that the Eleventh Circuit should not have reached constitutional issues because the issues on appeal could have been resolved on statutory and regulatory grounds. *Jean,* 472 U.S. at 854-55. Nevertheless, the Eleventh Circuit later ruled that "our *en banc* holding in *[Jean]* regarding the constitutional issue remains viable as the Supreme Court did not vacate the opinion but affirmed and remanded on alternative grounds." *Cuban American Bar Ass'n v. Christopher,* 43 F.3d 1412, 1428 n.20 (11th Cir. (1995), *cert. denied, 516 U.S.* 913 (1995).

ILI US Digest/2 132 1/8/02, 1:45 PM

make under the immigration laws. 727 F.2d at 969 (citing, *inter alia, Leng May* Ma, 357 U.S. at 188, and *Mezei,* 345 U.S. at 215). "The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted." *Id.* (quoting *Leng May Ma,* 357 U.S. at 190).

But even if we assume, arguendo, that the Due Process Clause afforded some protection in this setting, the Attorney General has, in this case, afforded far more process than would be due in connection with the threshold issue of capacity to file an asylum application. The Attorney General did not simply return the applications unanswered or arbitrarily deny or extinguish any ability to submit them for her consideration. She gave effect to Juan Gonzalez' decision not to pursue asylum for Elian only after the INS conducted two interviews of Juan, afforded Lazaro Gonzalez an opportunity to be heard personally and then again through counsel, examined the applications themselves and, determining that they did not set forth an objective basis for an independent asylum claim, concluded that Juan's interests therefore did not diverge from those of Elian, and offered to consider any further information Lazaro or the attorneys might submit. *See* pp. 11-19, supra.

III. The Commissioner, Ratified By The Attorney General, Reasonably Implemented The Asylum Provision Of The Act In Considering The Asylum Applications Submitted On Elian's Behalf

* * * *

B. The decision of the commissioner rests on a reasonable interpretation and application of the asylum provision of the INA

(1) The commissioner reasonably construed section 208 of the INA to permit a parent to speak for his child regarding a possible asylum application, if the child lacks the capacity to apply and there is no objective basis for an asylum claim

The Commissioner determined that the general rule under the INA, as under the law generally, is that a parent speaks for his young child. Accordingly, the Commissioner further determined that when an asylum application is submitted on behalf of a minor child by a third party

ILI US Digest/2 133 1/8/02, 1:45 PM

against the express wishes of the parent, the child will be deemed to have applied for asylum only if (a) the child has the capacity to seek asylum in his own right or (b) there is an objective basis for an independent asylum claim by the child indicating a divergence of interests between parent and child. *See pp.* 11-19, *supra.* That carefully crafted approach to considering asylum applications submitted by a third party on behalf of a child in these circumstances is supported by the text of Section 208 of the INA, by analogous principles applied in cases involving minors in court, by a weighing of the relevant policies, and by INS and United Nations guidelines used to evaluate children's asylum claims. The Commissioner's thoroughly considered decision, which was ratified by the Attorney General and sustained by the district court, therefore rests on a permissible interpretation of the asylum section of the INA and should be sustained by this Court.

* * * *

The sacred bond between parent and child…is a universally shared principle in the international community. *See, e.g., Universal Declaration Of Human Rights,* Art. 17 ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State"). The United Nations Convention on the Rights of the Child, 28 LL.M 1448 (1989), to which the United States is a signatory but not a party, emphasizes the importance of the parent-child relationship in many of its provisions. Article 3 of the Convention obligates the state parties to protect children, "taking into account the rights and duties of his or her parents . . . ." Similarly, Article 5 calls on parties to "respect the responsibilities, rights and duties of parents ... in a manner consistent with the evolving capacities of the child. . . ." Article 7 states that every child has the right "to know and be cared for by his or her parents." Article 14 requires that parties "respect the rights and duties of the parents ... to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child." And Article 18 calls on states to ensure "recognition of the principle that both parents have common responsibilities for the upbringing and development of the child." "Parents ... have the primary responsibility for the upbringing and development of the child." *Id.*

Article 22 of the Convention requires parties to "take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or do-

ILI US Digest/2 134 1/8/02, 1:45 PM

mestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights." But as the Commissioner noted in her decision, that provision does not address whether a child may assert an asylum claim contrary to the express wishes of a parent, *see* R.E.III-22-14, and an absolute rule to that effect would conflict with the other provisions of the Convention that emphasize parental responsibility.

Respecting the parent-child bond and the right of the parent to speak for the child in a case such as this also furthers the family-reunification principles of the immigration laws and international agreements governing refugees. *See* United Nations High Commissioner for Refugees ("UNHCR'), *Handbook For Emergencies at 161* ("International humanitarian law has as a fundamental objective the unity of the family"); *id.* at 163 ("As soon as unaccompanied children are identified, efforts must start to trace their parents or families and ensure family reunion"), The *UNHCR Guidelines on Refugee Children* summarized the relative rights of the parent and child in this way:

> Although the Convention on the Rights of the Child gives individual rights to children, the CRC also emphasizes relationships. The well-being of children and the enjoyment of their rights are dependent upon their families and their community. *The CRC recognizes that the family is "the fundamental group of society" and places children's rights in the context of parental rights and duties* (arts. 5, 14, 18, etc.).

UNHCR Refugee Children Guidelines at 8 (emphasis supplied).

Moreover, the *UNHCR Guidelines* emphasize the need to reunite unaccompanied children with their families immediately. *Id.* at 13. If asylum is an issue, the *Guidelines* counsel that the question of how to determine whether the child qualifies for that status depends "on the child's degree of mental development and maturity." *Id.* at 20. "Where the child has not reached a sufficient degree of maturity to make it possible to establish a well-founded fear in the same way as for an adult, it is necessary to examine in more detail objective factors, such as the characteristics of the group the child left with the situation prevailing in the country of origin and the circumstances of the family members, in-

ILI US Digest/2 135 1/8/02, 1:45 PM

side or outside the country. *Id.* at 20. That recommendation is fully consistent with the Commissioner's decision in this case, which concluded that Elian lacked the requisite subjective capacity but then went on to discuss whether objective evidence demonstrated an "independent basis for asylum" notwithstanding his father's stated wishes. R.E. III-2216.

Confronted with a six-year-old, a loving father, a universal presumption of parental authority over "life-altering decisions," *Matter of Lazaro Gonzalez, supra,* slip op. at 21, the absence of evidence that Elian will suffer persecution if he returns home, and the prospect of perhaps years of litigation, the Commissioner followed a course designed to return Elian to his father in the shortest time possible. The question here is not whether Elian will be allowed to apply for some minor benefit against his father's wishes. This is a question of whether a six-year-old will live in another country apart from his father's. It would be a substantial intrusion into the realm of parental authority for a distant relative to be able to trigger governmental procedures concerning the parent's six-year-old son that could seriously disrupt the parent-child relationship and family stability—consequences vividly illustrated to the world in this case—without making a substantial threshold showing that the child probably would be entitled to asylum at the end of the day. The Commissioner's decision strikes an appropriate balance by respecting the father's right to speak for his son, unless there is an objective basis for asylum indicating a divergence of interests between father and son.

The Commissioner's determination that cases such as this need not be referred for full adjudication also serves the interest in expeditious resolution of immigration issues affecting arriving aliens and parents and children generally. "In fiscal year 1997, the INS apprehended 1,536,520 aliens." 1997 Statistical Yearbook of the Immigration and Naturalization Service 164. Many of these aliens are small children, unaccompanied or in the company of their parents or other responsible adults. To require that the INS embark upon formal adjudicatory processes each time there arises the question of whether parents are properly speaking for these children would severely impede INS enforcement activities along our borders and would delay the reunification of parent and child. The APA does not require that agency decisions be made in formal hearings. Agencies routinely render informal decisions based on administrative records that are compiled without formal hearings. *Florida Power & Light Company v. Lorion,* 470 U.S. 729, 744 (1985). The Attorney General is given broad discretion to implement

ILI US Digest/2 136 1/8/02, 1:45 PM

the INA, including the authority to establish "procedures" under Section 208(b)(1) in connection with applications for asylum, and this is the procedure that she found to be appropriate for the task. The procedures the Commissioner followed under Section 208(b)(1) to ascertain whether Juan Gonzalez lawfully and properly speaks for Elian regarding whether to file an asylum application are "consistent with [her] authority to tailor administrative procedures to the needs of the particular case." *Atlanta Gas Light Company v. Federal Energy Regulatory Commission,* 140 F.3d 1392, 1400 (11th Cir. 1998) (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 544 (1978)).

Finally, it is essential to consider the interest of reciprocity among nations regarding the reunification of children with their parents. Child abduction across international boundaries is a very significant problem. "International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem." 42 U.S.C. 11601 (Congressional findings on international child abduction remedies). *See generally* Michelle Morgan Kelly, *Taking Liberties: The Third Circuit Defines 'Habitual Residence' Under The Hague Convention On International Child Abduction,* 41 *Vill. L.* Rev. 1069, 1085 n.3 (1996) (citing State Department reports of 4,563 American children being abducted to foreign countries between 1973 and 1993). Adherence to the rule of law in this case is of central importance to the United States to ensure that other nations to which U.S. children are abducted promptly return those children.[15]

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[15] Recognizing that abduction or wrongful retention of children is harmful to their wellbeing, the Federal Government has entered into international agreements, enacted laws, adopted procedures, and funded programs to improve the response of the civil law and criminal Justice system when international abductions occur. The States have likewise developed law and practice regarding parental abductions.

The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), implemented in the United States by the International Child Abduction Remedies Act (42 U.S.C, 11601 *et seq.),* provides the legal basis to seek the prompt return of children wrongfully removed or retained in countries that are parties to the Hague Convention. The Convention provides an immediate right of action to seek a child's prompt return to the country where he or she was habitually resident prior to the abduction. The premise of this Convention is that the abducted child's custody should be determined by a court in the child's country of habitual residence and not by the unilateral actions of one parent. *See Friedrich v. Friedrich,* 983 F.2d 1396 (6th Cir. 1993) (Friedrich 1) ("habitual residence" of child born in

ILI US Digest/2 137 1/8/02, 1:45 PM

d. The Commissioner's application of Section 208 in this case also is consistent with the *INS Children's Guidelines* and Section 219 of the *UNHCR Handbook. Id.* The *INS Children's Guidelines* provide guidance on interviewing children on asylum issues, as do the *INS Asylum Officer Corps Training Guidelines for Children's Asylum Claims.* What sets this case apart is the absence of any indication in the record before the Commissioner that Elian had articulated a subjective fear of persecution on account of political opinion or other protected characteristic *and* the fact that Juan has said that he does not want to assert Elian's right to apply. On the capacity issue, the *INS Children's Guidelines* note that the *UNHCR Handbook* suggests that more weight be given to objective factors since children under 16 "may lack the maturity to form a well-founded fear of persecution." INS *Children's Guidelines* at 19. The Commissioner did this, evaluating the objective evidence she had been provided, including the asylum applications submitted by Lazaro and the one signed by Elian.

With respect to Juan's determination that Elian not apply, the *Children's Guidelines,* adopting language from Section 219 of the *UNHCR Handbook,* note that if "it appears that the will of the parents and that of the child are in conflict, the adjudicator will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all known circumstances, which may call for a liberal application of the benefit of the doubt." *Id.* at 20. The Commissioner's decision is consistent with that advice. She evaluated Lazaro's applications and the other information that had been brought to her attention, and concluded that

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Germany to German father and American mother, and who had lived in Germany exclusively except for brief vacations prior to mother's removing him to United States, was Germany.).

If a child is abducted to or from a country that is not party to the Hague Convention, the parent can petition a court in that country to enforce a custody order made by a court in the home country. Courts apply their own family law. In a case involving a child taken from the United States, foreign courts are not legally bound to enforce custody orders made in the United States, although some may do so voluntarily as a matter of comity. If a parent finds it necessary to file for custody in the foreign court under the laws and customs of that country, that parent may encounter religious laws and customs or biases based on gender or nationality that preclude an award of custody. Because no framework of international law governs cases involving children taken to countries that are not parties to the Hague Convention, transnational cooperation in reuniting children with their parents is very important.

ILI US Digest/2 138 1/8/02, 1:45 PM

none of this information provided an objective basis to conclude that Elian had a well-founded fear of persecution. R.E. III-22-17.

Obviously, these INS and UNHCR guidelines are not enforceable. They "are for the administrative convenience of the INS only," and do not have the force and effect of substantive law." *Pasquini v. Morris,* 700 F.2d 658, 662 (11th Cir. 1983). They do not solve every problem that confronts an agency. They do not tell the reader, as the *UNHCR Guidelines on Refugee Children* put it, "In situation X, you must do Y." They are there to provide *general* guidance. They provide general guidance on interviewing children. They provide guidance on family reunification. They provide guidance on the capacity issue. And they provide guidance on determining whether a child has a well-founded fear by resort to objective evidence. The Commissioner looked to these sources.

e. Appellant argues (Br. 43) that 8 C.F.R. 208.9 supports his plain meaning argument because, he notes, that regulation requires that the INS "adjudicate the claim of each asylum applicant whose application is complete." That argument suffers from the same weakness as his argument based on Section 208(a)(1): It assumes that Elian has applied. He has not, because he lacks the capacity to do so without his father's authorization and assistance, and his father has declined to provide that. Appellant's suggestion (Br. 43 n.8) that, because the INS did not return his asylum applications for incompleteness, it is obliged to adjudicate them, does not follow. The INS returned the applications to Lazaro because Juan had declined to assert Elian's right to apply. R.E. III-4. The cited regulation does not apply unless an alien submits an asylum application.[16]

Appellant also errs in relying (Br. 45) on 8 C.F.R. 236.3(f), which requires that if a juvenile seeks immigration relief that could effectively terminate some interest vis-a-vis a parent and the parent resides in the United States, the parent must be given notice and opportunity to assert

[16] Count 3 of the complaint is based on 8 C.F.R. 208.9. The district court dismissed that Count, as well as Count 4 based on 8 C.F.R. 208.14(b), because "the Attorney General's determination as to [Elian's] capacity to apply for asylum is controlling, and, in light of that conclusion, no asylum applications are pending." 86 F. Supp. 2d at 1194. This Court should affirm that determination as well as the district court's decision on the mandamus count. All three of these counts hinge on the statutory question presented in this section of appellees' brief to the Court.

ILI US Digest/2 139 1/8/02, 1:45 PM

his interests prior to a ruling on the application for relief. That regulation assumes that the juvenile is not so young as to lack the capacity to seek immigration relief. The Attorney General, in her unreviewable discretion, has declined to commence removal proceedings against Elian, and Elian is so young that the person who would have to assert Elian's right to apply for asylum—his father—has not done so.

* * * *

The Commissioner's decision that Juan's request for Elian's return to him expressed his genuine intention rested on her determination that Juan was not being coerced by Cuban authorities into stating that he wants Elian to return when his true wish is to the contrary. R.E. III-9-10. If Juan is being coerced, the Commissioner reasoned, then his representation of Elian's immigration interests may conflict with his interest in his own personal safety, rendering him unable to represent Elian in immigration matters. R.E. III-10.

The Commissioner's conclusion that Juan genuinely wishes Elian to be returned to him is facially legitimate and bona fide or, in the alternative, an appropriate exercise of discretion under the APA. She analyzed the coercion issue at considerable length, beginning with a summary of the INS's first interview of Juan at his home in Cardenas. R.E. III-11. Juan described to the INS interviewer the closeness of his relationship with Elian, and submitted affidavits from neighbors, friends, teachers, and doctors. *Id.* To guard against the possibility of auditory monitoring, the INS asked Juan to express in writing his desire for Elian's return. *Id.* Juan complied with that request, and, the agency decision reflects, the INS interviewer found that "the honesty, concern and truthfulness on the part of [Juan] was palpable. . . ." *Id.* His demeanor on that occasion supports the finding that Juan truly wanted his son returned to him, and the affidavits attesting to his close relationship with Elian lend further credence to this. *Id.*

The INS interviewed Lazaro after its interview with Juan. And, because Lazaro raised further questions regarding the possibility that Juan was not speaking freely, the INS interviewed Juan a second time, on this occasion at the home of a United Nations official. R.E. III-11. As at the first interview, Juan was accompanied only by his parents. *Id.* And on this occasion also, he answered a set of written questions. R.E. III-12. Based

ILI US Digest/2 140 1/8/02, 1:45 PM

on the INS's two interviews of Juan, its interview of Lazaro, Lazaro's daughter and attorneys, its review of other available information, and its analysis of Lazaro's objections, the INS concluded that Juan's demand for Elian's return to him expressed his genuine intention. R.E. III-12-13.

There is a further component to the Commissioner's analysis of whether to accord full weight to Juan's parental authority over Elian. "In order to respect the parental rights of the father," the Commissioner reasoned, "the INS must first determine whether a true divergence of interests exists with respect to Elian's asylum application." R.E. III-15. The Commissioner concluded that Elian lacked the capacity to form a subjective fear of persecution on account of a protected ground, considered Lazaro's asylum applications,[21] and concluded that those applications did not provide an objective basis for a valid asylum claim for Elian. R.E. III-16-17. She therefore found no divergence of interests.

The asylum applications alleged past and future persecution on two grounds. First was past persecution of members of Elian's family, including detention of his stepfather, imprisonment of his great-uncle, and harassment of his mother. R.E. III-16. Second was the potential for Elian's political exploitation by the Castro regime based on an imputed political opinion, resulting in severe mental anguish and torture. *Id.* None of this information, the Commissioner found, provides an objective basis for concluding that Elian would be persecuted on account of a protected ground. R.E. III-17. "There is no objective basis to conclude that the Castro regime would impute to this six-year-old boy a political opinion (or any other protected characteristic), which it seeks to overcome through persecution." *Id.* (citing *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (asylum applicant. alleging political persecution must show his political opinion motivates alleged persecutors)).

◆

3. Intercountry Adoption Convention

On September 20, 2000, the Senate gave its advice and consent to the Convention on Protection of Children and

[21] In his brief to the Court, Lazaro maintains that "the INS erased Elian's independent rights without an assessment of his own injuries or the possibility that those may diverge from his biological father's." Appellant's Brief at 25. The Commissioner's decision clearly reflects this is not correct.

ILI US Digest/2 141 1/8/02, 1:45 PM

Cooperation in Respect of Intercountry Adoption, opened for signature at the conclusion of the Seventeenth Session of The Hague Conference on Private International Law on May 29, 1993 (*See* S. Exec. Rept.106-14, 2000). The United States signed the Convention on March 31, 1994, and the President transmitted it to the Senate for advice and consent on June 11, 1998 (S. Treaty Doc. No. 105-51 (1998).

The full text of the relevant Congressional documents is available at *www.access.gpo.gov/congress/cong006.html*.

a. Transmittal of Convention to U.S. Senate for advice and consent to ratification

Excerpts below from the letter of the President transmitting the Convention to the Senate for advice and consent and the Report of the Department of State to the President attached to that letter, contained in Treaty Doc. 105-51, provide the views of the United States on the Convention.

◆

The White House, *June 11, 1998.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, adopted and opened for signature at the conclusion of the Seventeenth Session of the Hague Conference on Private International Law on May 29, 1993. Thirty-two countries, including the United States, have signed

ILI US Digest/2 142 1/8/02, 1:45 PM

the Convention, 17 countries have ratified it, and one country has acceded to it. The provisions of the Convention are fully explained in the report of the Department of State that accompanies this message.

The Convention sets out norms and procedures to safeguard children involved in intercountry adoptions and to protect the interests of their birth and adoptive parents. These safeguards are designed to discourage trafficking in children and to ensure that intercountry adoptions are made in the best interests of the children involved. Cooperation between Contracting States will be facilitated by the establishment in each Contracting State of a central authority with programmatic and case-specific functions. The Convention also provides for the recognition of adoptions that fall within its scope in all other Contracting States.

The Convention leaves the details of its implementation up to each Contracting State. Implementing legislation prepared by the Administration will soon be transmitted for introduction in the Senate and the House of Representatives. Once implementing legislation is enacted, some further time would be required to put the necessary regulations and institutional mechanisms in place. We would expect to deposit the U.S. instrument of ratification and bring the Convention into force for the United States as soon as we are able to carry out all of the obligations of the Convention.

It is estimated that U.S. citizens annually adopt as many children from abroad as all other countries combined (13,621 children in Fiscal Year 1997). The Convention is intended to ensure that intercountry adoptions take place in the best interest of the children and parents involved, and to establish a system of cooperation among Contracting States to prevent abduction of, and trafficking in children. We have worked closely with U.S. adoption interests and the legal community in negotiating the provisions of the Convention and in preparing the necessary implementing legislation.

* * * *

ILI US Digest/2 143 1/8/02, 1:45 PM

Department of State
Washington, April 29, 1998

The PRESIDENT,
The White House

THE PRESIDENT:

* * * *

The Department of State is hopeful that ratification of the Convention by the United States may encourage additional States to become parties to the Convention.

The Convention endorses the legal institution of intercountry adoption by recognizing in its preamble that children should grow up in a family environment to ensure their full and harmonious development. After recalling that every State should take priority measures to enable children to remain in the care of their family of origin, the signatory States recognize that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in the child's State of origin. The preamble strongly suggests that if a child cannot remain in the care of its family of origin and cannot readily be provided with a permanent family in its country of origin, the provision of a permanent family through intercountry adoption can be more beneficial for the child than foster or institutional care in the child's country of origin.

* * * *

Article 22(1) states that the functions of a Central Authority under Chapter IV may be performed by public authorities or by bodies (agencies) accredited under Chapter III, to the extent permitted by the law of the State in question.

Under Article 22(2) any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under all Articles of Chapter IV except Article 14 and 22, may be performed in that State by bodies (adoption agencies) or persons (e.g., attorneys) who (a) meet the requirements of integrity, professional competence, experience and accountability of that State, and (b) are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption (the same requirement as imposed for accredited bodies under Article 11b). Under Article 22(3) a Contracting

ILI US Digest/2 144 1/8/02, 1:45 PM

State making the declaration permitted under Article 22(2) is to keep the Permanent Bureau of the Hague Conference on Private International Law informed of the names and addresses of these Convention-approved bodies and persons. Article 22(4) states that any Contracting State may declare that adoptions of its children pursuant to the Convention may only take place if Central Authority functions are performed in accordance with Article 22(1), i.e., by Central authorities, public authorities or Convention-accredited bodies (adoption agencies) i.e., not by bodies or persons found only to meet the requirements of Article 22(2).

* * * *

I recommend that the United States ratification be subject to the following declaration:

> The United States declares, pursuant to Article 22(2), that in the United States the Central Authority functions under Articles 15-21 may also be performed by bodies or persons meeting the requirements of Articles 22a and b, and 32. In addition, such bodies or persons will be subject to federal law and regulations implementing the Convention as well as state licensing and other laws and regulations applicable to providers of adoptions services. The performance of Central Authority functions by such approved adoption service providers would be subject to the supervision of the competent federal and state authorities in the United States.

* * * *

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b. Conditions on advice and consent to ratification

In giving its advice and consent to the Convention, the Senate attached certain conditions on ratification. The excerpts below from Exec. Rept. 106-14 explain the declarations included in the resolution of ratification.

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ILI US Digest/2 145 1/8/02, 1:45 PM

* * * *

The resolution of ratification contains several declarations. The resolution requires that the instrument of ratification submitted by the United States declare the Convention to be non-self executing. In the United States, therefore, the implementing legislation (not the Convention) will be the basis for decision-making by U.S. courts. In interpreting obligations, the courts must look to the federal statute implementing the Convention and not the broad language of the Hague Convention itself. Although the Committee understands that the central authority process-particularly with regard to the accreditation of agencies and other persons-has been developed over several years with input from parents and adoption service providers of all types and sizes, it fully expects revisions of the implementing statute will be required once the United States has gained experience under the central authority process.

The second declaration for inclusion in the instrument of ratification is a provision requested by the Executive. Article 22(2) states that Parties to the Convention may declare to the depositary of the Convention that the functions of the central authority under all articles of Chapter IV of the Convention, regarding procedural requirements in intercountry adoption (except Articles 14 and 22, regarding the basic requirements of the central authority), may be performed by bodies (adoption agencies) or persons (attorneys). As stated in the declaration, this delegation of authority does not eliminate the requirement to abide by the standards required by the Convention. This declaration is necessary because the United States will rely both on adoption agencies and attorneys to carry out adoption services.

In addition to the standard declarations relating to treaty interpretation and the Constitution, the resolution of ratification contains several declarations that are binding on the Executive but need not be included in the instrument of ratification. The first prohibits deposit of the instrument of ratification until such time as the United States is able to carry out all the obligations of the Convention, as required by its implementing legislation. The Committee, as noted above, expects the Administration to implement the Convention as soon as practicable. However, the United States should not be bound by the Convention until such time as it is fully able to meet its commitments under the Convention as set out in U.S. law.

Finally, the resolution contains a sense of the Senate declaration opposing the inclusion of an Article forbidding reservations to the Con-

ILI US Digest/2 146 1/8/02, 1:45 PM

vention. The Committee strongly opposes the proliferation of such restrictions in treaties and believes that they undermine the Senate's role in treaty making, as set out in Article II, section 2 of the Constitution. As stated in the declaration, the restriction has the effect of inhibiting the Senate from exercising its constitutional duty to give advice and consent to a treaty, and the Senate's approval of this Convention should not be construed as a precedent for acquiescence to future treaties containing such a provision.

* * * *

c. Intercountry Adoption Act of 2000 and additional steps required for U.S. implementation and ratification

The Intercountry Adoption Act of 2000, Pub. L. 106-279, 114 Stat.825, was signed into law on October 6, 2000. The Act designates the Department of State as the U. S. Central Authority under the Convention, with a number of monitoring and oversight responsibilities for U.S. implementation of the Convention. It provides for a new system of required federal accreditation of non-profit adoption agencies and approval of other adoption service providers wishing to offer and provide services for adoptions covered by the Convention. The State Department is given the oversight responsibility for that system, with qualified private sector accrediting entities performing the actual evaluation of applicant adoption service providers in accordance with the Convention and the standards and criteria in State Department regulations that will elaborate the requirements in the Act. The provision of case-specific adoption services is, as before, left up to these accredited adoption agencies and other approved providers.

The statute also provides for recognition of Hague Convention adoptions, whether they have been made in the

ILI US Digest/2 147 1/8/02, 1:45 PM

United States or abroad. The Immiration and Nationality Act is amended to create a new categorv of children adopted or to be adopted under the Hague Convention who will qualify for immigration to and permanent residence in the United States. In addition, the Act sets forth the Convention requirements and safeguards as they would be implemented, primarily by state courts, for adoption of children who will be emigrating from the United States in connection with their adoption by persons resident in other countries party to the Convention. It provides for the preservation of Convention adoption records and establishes civil and criminal penalties for certain violations of the requirements of the Act.

Excerpts from an information statement prepared for a meeting on the Adoption Convention, held in The Hague from November 28 to December 1, 2000, by Peter Pfund of the State Department's Office of the Legal Adviser explain the remaining steps to be taken at the federal and state level before the Convention can be ratified by the United States.

The statement is available at *www.state.gov/s/l*

I. INTRODUCTION

Family law in the United States is generally established in the laws of the respective U.S. states and other political subdivisions. The U.S. federal government and the courts of the federal court system do not traditionally administer the laws governing adoptions.

The 1993 Hague Convention, once it enters into force for the United States, imposes new requirements at the U.S. federal level with regard to adoptions to and from other Hague Convention party states. Accordingly, U.S. law and practice with regard to such adoptions will become more uniform throughout the United States than it is at present.

ILI US Digest/2 148 1/8/02, 1:45 PM

II. STATUS OF THE CONVENTION AND IMPLEMENTING LEGISLATION IN THE UNITED STATES

During the first years after the final text of the Convention was adopted at The Hague in May 1993 the U.S. federal government and national adoption organizations in the United States disseminated information concerning the purpose, requirements and safeguards of the Convention. Increased understanding of the Convention led to support for U.S. ratification.

In the mid-1990s, the federal government prepared implementing legislation designed to ensure the full and uniform application of the Convention throughout the United States. In mid-1998, President Clinton transmitted the Convention to the U.S. Senate for the advice and consent to U.S. ratification required by the U.S. Constitution before the United States could ratify the Convention. The Department of State transmitted the implementing legislation proposed by the Administration to the U.S. Congress (Senate and House) at about the same time. While the Administration bill was never itself introduced in Congress for consideration and enactment, separate bills largely patterned after the Administration-proposed bill were introduced in the Senate and House. In summer 2000, both houses of Congress had passed bills with relatively minor differences that were finally resolved in the implementing legislation that was passed by both Houses in late September 2000 and approved by the President on October 6, 2000. The Senate has given advice and consent to U.S. ratification of the Convention.

During the next 2-3 years, the U.S. federal government – primarily the U.S. Department of State and the Immigration and Naturalization Service (INS) – will be taking the steps necessary for the United States to implement the Convention when it enters into force for the United States. These steps, necessary for the United States to ratify the Convention, include:

• establishment and staffing the U.S. Central Authority

• establishment of a computerized case-tracking system for U.S. intercountry adoptions

• designation of one or more entities to accredit U.S. adoption agencies for Convention adoptions and to approve other bodies and persons wishing to provide adoption services covered by the Convention

• promulgation of regulations establishing accreditation/approval standards and criteria and procedures for seeking such accreditation/approval

• processing applications received for accreditation or approval

ILI US Digest/2 149 1/8/02, 1:45 PM

• establishment of a program to share information with adoption service providers, State courts and authorities, the U.S. adoption community and future adoptive parents concerning their role in U.S. compliance with the requirements and safeguards of the Convention, its implementing legislation and related federal regulations.

We estimate that these preparatory steps may take 2-3 years. The United States will not be able to ratify the 1993 Convention until these preparations have been completed and we are in a position fully to implement the Convention as of the day it will enter into force for the United States. We hope that other countries will take into account our need to prepare in this way and will feel free to seek information at any time about the status of U.S. preparations from the Office of Children's Issues, Bureau of Consular Affairs, U.S. Department of State.

C. Judicial Assistance

1. Service of process in foreign countries

On November 7, 2000, at the instance of the Department of State, the Administrative Office of the United States Courts provided revised guidance to all clerks of U.S. District Courts concerning service of process in foreign countries. That guidance, which provides the basis for advice to counsel who request the assistance of clerks on such matters, updates information concerning governments that object to service by mail.

MEMORANDUM TO ALL CLERKS, UNITED STATES DISTRICT COURTS

SUBJECT: Service of Process in Foreign Countries

ILI US Digest/2 150 1/8/02, 1:45 PM

(INFORMATION)

The Department of State has informed us that they have received a note of protest from the Russian Federation objecting to service of process by mail. This protest differs from those noted in earlier communications on this subject (memoranda dated May 23, 1990, May 20, 1982, and November 6, 1980) in that it concerns service upon a foreign state, not service upon a private entity located within the foreign state. This memorandum will provide information on foreign service of process in both situations.

Service on Foreign Governments

Rule 4(j)(1) of the Federal Rules of Civil Procedure provides for service of process on a foreign state pursuant to 28 U.S.C. § 1608. That section permits service by mail on foreign states, but section 1608(c) requires that for mail service to be effective, the postal receipt must be signed and returned. The State Department has advised that a number of countries, which are listed below, object to service by mail. If mail service is attempted in these countries, it could not only create diplomatic and foreign relations problems with those countries but also jeopardize the effectiveness of the service. Thus, even when a receipt is executed in a country that has objected to mail service, it is arguably executed without authority.

Accordingly, clerks should advise counsel who request their assistance with service by mail on countries included in the list below that service should instead be attempted under section 1608(a)(4), which is service through diplomatic channels. Normally, for service under this section, the State Department first requires evidence of attempted service by the means authorized in subsections 1608(a)(1), (a)(2), and (a)(3). The Department advises, however, that for countries which have protested service by mail, it will not require a showing that service has been attempted under (a)(3).

Service on Private Parties

With respect to service on private parties, clerks should recall that the 1993 amendments to the Federal Rules of Civil Procedure amended the provisions for service upon an individual in a foreign country. Service by mail, to be addressed and dispatched by the clerk, is permitted

ILI US Digest/2 151 1/8/02, 1:45 PM

by F.R.Civ.P. 4(f)(2)(C) "unless prohibited by the law of the foreign country." Accordingly, clerks should refrain from effecting service by mail addressed to those countries who have protested such service or who have entered reservations to mail service under Article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

The following countries have objected to mail service in accordance with Article 10(a) of the Convm

China	Czech Republic
Egypt	Germany
Greece	Republic of South Korea
Latvia	Luxembourg
Norway	Poland
Slovak Republic	Switzerland
Turkey	Venezuela

The State Department has also received notification from the governments of the following two countries, who are not parties to the Convention, that they object to service by mail:

Kuwait
Russian Federation

The State Department suggests that countries that have objected to mail service on private parties also object to mail service on the state itself, so the same list is applicable to both situations.

Additional information about service of process abroad is available from the Department of State web site at http://travel.state.gov/judicial_assistance.html. This includes Department of State circulars, "Service of Process Abroad," "Service Provisions of the Foreign Sovereign Immunities Act," "Operation of the Hague Service Convention," "Operation of the Inter-American Convention on Service," and "Preparation of Letters Rogatory."

2. Taking of civil depositions abroad: *In Re: Air Crash at Agana, Guam*.

In response to questions from the District Court for the Central District of California in *In Re: Air Crash at Agana,*

ILI US Digest/2 152 1/8/02, 1:45 PM

Guam, CV 97-7023 (M.D.L. No. 1237, 1997), in August 1997, the United States provided the Declaration of Edward A. Betancourt, the Director of the Office of Policy Review and Inter-Agency Liaison, Overseas Citizens Services ("OCS"), Bureau of Consular Affairs, U.S. Department of State. The excerpts from the Declaration below address issues concerning judicial assistance abroad related to civil litigation in the United States, both in general and as specifically related to judicial assistance in Korea in connection with the crash of KAL Flight 801.

The full text is available at *www.state.gov/s/l.*

I, Edward A. Betancourt, hereby depose and say as follows:

* * * *

5. OCS's responsibilities are derived from U.S. consular treaty obligations, 22 USC 4215, 4221, 22 CFR Part 92 et. seq., Rule 28(b), Federal Rules of Civil Procedure, and authority delegated to the Bureau of Consular Affairs by the U.S. Secretary of State. OCS's judicial assistance functions are set forth in Volume 7, Chapter 900 of the FAM, which is available via the internet at the U.S. Department of State, Bureau of Consular Affairs home page link at http://travel.state.gov. When civil litigants involved in a case pending in a court of the United States wish to take discovery abroad, OCS seeks to facilitate those efforts to the extent possible consistent with law. The relevant legal requirements include a requirement that all activities of U.S. consular officers abroad in assisting in the discovery be consistent with the laws of the host country, and that any activities of other U.S. government officials involved in the discovery also be consistent with the laws of the host country. Thus, the Department's regulations contain the following prohibition in 22 CFR section 92.55(c):

> *Procedure where laws of the foreign country do not permit the taking of depositions:* In countries where the right to take depositions is not secured by treaty,

ILI US Digest/2 153 1/8/02, 1:45 PM

> notarizing officers [i.e., consular officers] may take depositions only if the laws or authorities of the national government will permit them to do so. Notarizing officers in countries where the taking of depositions is not permitted who receive notices or commissions for taking depositions should return the documents to the parties from whom they are received explaining why they are returning them, and indicating what other method or methods may be available for obtaining the depositions, whether by letters rogatory or otherwise."

6. It is axiomatic that the laws of the host country must be respected by all persons in that country. Customary international law requires that countries respect each other's sovereign authority within their territory, including the right to make and enforce legal requirements relating to the judicial process. The requirement that the laws of the host country be respected applies to foreign diplomatic and consular officials as well as to persons traveling in a foreign country in a private capacity. Thus, the Vienna Convention on Diplomatic Relations ("VCDR"), in Article 41 provides as follows with respect to diplomatic personnel: "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State." The Vienna Convention on Consular Relations ("VCCR"), in Article 55, similarly provides that consular officials entitled to immunity from prosecution in the host country under the VCCR must respect the laws of the host country. These requirements would expressly pertain to the activities of any consular official assigned to the host country being asked to assist in U.S. civil discovery, since such official would be covered either by the VCDR (if assigned to the U.S. embassy and therefor in diplomatic status) or the VCCR (if assigned to a U.S. consular post). U.S. Government officials traveling abroad on temporary official business must equally respect local law and, unlike a consular official assigned abroad, do not have immunity from prosecution for acts taken in violation of local law even if those activities are taken in their official capacity as a U.S. Government employee. Thus, if a U.S. government official travels abroad and acts contrary to local law, including by engaging in discovery efforts that the host country consid-

ILI US Digest/2 154 1/8/02, 1:45 PM

ers unauthorized, that official may have no protection from prosecution and may be subject to the full scope of potential penalties that the host country might impose for the violation. Moreover, no one may practice law unless appropriately licensed and/or authorized by the jurisdiction in which the practice is undertaken. Thus neither U.S. private counsel nor U. S. Department of Justice lawyers may act as lawyers in Korea except as permitted/authorized by Korea.

8. The Department of State's host country clearance process has been established in part to ensure that, consistent with the above requirements, U.S. government officials do not travel abroad to engage in activities that will violate the laws of the foreign country they travel to. Acting in violation of local law puts the U.S. government official at risk of prosecution and may cause serious foreign policy problems for the United States. Accordingly, all U.S. Government officials are required to obtain the consent of the U.S. Ambassador or other official -- generally referred to as the "Chief of Mission" -- in charge of the U.S. diplomatic or other mission to the country in question. This authority is vested in the Chief of Mission pursuant to the Chief of Mission's authorities under Section 207 of the Foreign Service Act of 1980, 22 USC. Section 3927, which provides in relevant part that, "Under the direction of the President, the chief of mission to a foreign country (1) shall have full responsibility for the direction, coordination, and supervision of all Government executive branch employees in the country (except for employees under the command of a United States area military commander)." In addition, each President issues to his Chiefs of Mission a letter of instruction, the current version of which is reprinted at 1 Foreign Affairs Manual Chapter 013, Exhibit 013.2, and a copy of which is attached as *Exhibit "C".* This letter reinforces the Chief of Mission's authority over and responsibility for all U.S. government civilian personnel in the country in question. Procedures regarding host country clearance for such travel are set forth at 7 Foreign Affairs Manual 941 and instructions are also available on the Bureau of Consular Affairs home page at http:travel.state.gov/host_country.htm1. Copies of these procedural instructions are annexed as *Exhibit "D".* When appropriate, the U.S. Chief of Mission will ensure that the host government has no objection to the proposed U.S. government activity. When the host government advises that the proposed activity is not legally permissible, then the U.S. Chief of Mission is expected to deny country clearance.

ILI US Digest/2 155 1/8/02, 1:45 PM

9. Judicial assistance between the United States and Korea in civil and administrative matters is governed by Article 4 (c) of the U.S.-Korea Consular Convention of 1963 (14 UST 1637) (*See* Exhibit "A"), customary international law and the practice of nations, and applicable U.S. and local Korean law and regulations. Article 4 of the U.S.-Korea Consular Convention provides that consular officers may:

> *(b) prepare, attest, receive the acknowledgements of, certify, authenticate, legalize, and, in general, take such action as may be necessary to perfect or to validate any act, document, or instrument of a legal character, as well as copies thereof, including commercial documents, declarations, registrations, testamentary dispositions, and contracts, whenever such services are required by a national of the sending state for use outside the territory of the receiving state or by any person for use in the territory of the sending state.*
>
> *(c) take evidence, on behalf of the courts of the sending state, voluntarily given by any person in the receiving state, and administer oaths to such persons, in accordance with the laws of the sending state; td [sic] [(ii) take depositions, on behalf of the courts or other judicial tribunals or authorities of the sending state, voluntarily given.*

10. The Government of Korea has advised the United States of procedures it considers acceptable under Korean law and practice, and under its interpretation of the U.S.-Korean Consular Convention concerning obtaining evidence in Korea. These procedures are summarized in general in OCS's information flyer, "Obtaining Evidence in Korea", a copy of which is annexed as *Exhibit "B".* Information regarding judicial assistance in Korea is also available via the Department of State, Bureau of Consular Affairs home page on the internet at http://travel.state.gov under the heading, "judicial assistance". As noted above, the right of a foreign State to determine the conditions for taking evidence in its territory in aid of litigation in another State is a fundamental attribute of sovereignty. It is, for example, recognized in the Restate-

ILI US Digest/2 156 1/8/02, 1:45 PM

ment (Third) of Foreign Relations Law, Sec. 473 (1); 474, Comment c; Reporters' Notes 6 (1987).

11. Pursuant to Article 4 (c) of the U.S.-Korea Consular Convention, as interpreted by the United States and Korea following extensive consultations, depositions of willing witnesses may be conducted in Korea under agreed-upon conditions. Depositions may be taken of willing witnesses at the U.S. Embassy or other location presided over by a U.S. consular officer. The U.S. consular officer administers oaths to the witness(es), interpreter, stenographer or videotape operator.

12. In addition, depositions may be taken pursuant to local law by private Korean local counsel. The deponent and deposing Korean attorney must then go to a local Korean court after the deposition is completed to confirm the validity of the testimony and submit the deposition to the Korean court. Further, testimony may be taken by a Korean court pursuant to a letter rogatory.

13. The Government of Korea has advised the United States that it opposes deviations from these conditions, and that it would consider any action beyond the strictures of the U.S.-Korean understanding to be a violation of its judicial sovereignty. Again, as noted, the United States recognizes the right of judicial sovereignty of foreign governments based on customary international law and practice; *See*, e.g., the Restatement (Third) of Foreign Relations Law (1987).

14. When a proposed procedure for taking a deposition in Korea is not legally permissible, the deposition cannot be taken using that procedure at the U.S. embassy or a U.S. consulate. Contrary to some popular misconceptions, U.S. diplomatic and consular premises are not U.S. territory governed by U.S. law rather than the law of the country in which they are physically located (commonly referred to as "the receiving state" or the "host country" -- in this case, Korea). They are properties in the territory of of the host country and the laws of the host country apply to conduct in the diplomatic and consular premises as well as outside of them. The status of diplomatic and consular premises arises from the rules of law relating to immunity from the prescriptive and enforcement jurisdiction of the receiving state; the premises are not part of the territory of the sending state. *See* Restatement (Third) of Foreign Relations Law, Vol. 1, Sec. 466, Comment a and c (1987). *See also*, *Persinger v. Iran*, 729 F.2d 835 (D.C. Cir. 1984). Thus, if it would violate Korean law for a deposition to be taken in Korea by a U.S. government official other than a consular official, Korean law will be violated regardless of

ILI US Digest/2 157 1/8/02, 1:45 PM

whether the deposition is taken in the U.S. embassy or at a private location such as a hotel in Korea. The same would be true if the deposition were taken on a U.S. military base in Korea, since the U.S.-Korea Status of Forces Agreement makes no different provisions for depositions on such bases.

15. In the present case, when asked to facilitate the taking of depositions in Korea, CA/OCS and the U.S. Embassy in Korea considered it essential, given our understanding of the attitudes of the Government of Korea, to obtain the consent of the Government of Korea prior to scheduling the proposed depositions, given that the depositions would in part be taken directly by U.S. government officials other than consular officials — i.e., by U.S. Department of Justice attorneys. In our experience, foreign host governments may regard travel of U.S. Government officials in judicial assistance matters as a violation of judicial sovereignty unless advance clearance has been obtained through diplomatic channels. The United States has similar requirements with respect to the travel of foreign government officials to the United States in judicial assistance matters (18 USC 951, 28 CFR 73). Travel abroad without prior clearance can result in the arrest, detention, expulsion, or deportation of the U.S. Government official. Thus, the request for host country clearance for the travel of U.S. Government officials to participate in the taking of a deposition in Korea requires the transmittal of a note verbale via diplomatic channels from the U.S. Embassy in Seoul to the Korean Ministry of Foreign Affairs.

16. Absent specific authorization from the Ministry of Foreign Affairs of the foreign State, the U.S. Embassy cannot participate in any way in the deposition. The participation of a U.S. consular officer to swear the witnesses knowing that the questioning would be undertaken by U.S. Justice Department lawyers notwithstanding the Government of Korea's express advice that such questioning is impermissible would be prohibited by 22 CFR 92.55(c), quoted above, and would violate the VCDR requirement, and the customary international law principle, that U.S. diplomatic and consular officials in Korea respect Korea's laws. *See*, Restatement (Third) of Foreign Relations Law, 441-442. *See also*, interpretive notes, Rule 28(b), Federal Rules of Civil Procedure which provides "effectiveness and even availability, of one of the methods Rule 28(b) provides for taking of depositions in foreign countries depends largely upon law of foreign country in which deposition is to be taken." *Zassenhaus v. Evening Star Newspaper Co.,* 404 F2d 1361, (D.C. Cir.

ILI US Digest/2 158 1/8/02, 1:45 PM

(1968), 131 App DC 384. For similar reasons, the U.S. Embassy cannot grant country clearance to the Justice Department lawyers knowing that the Government of Korea has advised that such lawyers' proposed activities in Korea are legally impermissible.

17. The Department and the U.S. Embassy have made repeated efforts to obtain the Government of Korea's consent to the proposal that U.S. Justice Department lawyers be permitted to take the depositions in Korea as proposed. Between May and December 1999, the U.S. Embassy in Seoul, Korea engaged authorities from the Korean Ministries of Justice and Foreign Affairs and Trade in discussions regarding the possibility of officials from the United States Department of Justice and private American legal counsel participating in the voluntary depositions in Korea from Korean national victims and family members regarding the crash of KAL Flight 801. On May 24, the U.S. Embassy transmitted Diplomatic Note No. 225 to the Ministry of Foreign Affairs requesting reconsideration of the Ministry's initial denial of the Republic of Korea Government authorization to allow U.S. Department of Justice Attorneys to take the depositions in Korea. A copy of the Diplomatic Note is annexed at *Exhibit "E".* On May 26, 1999, the Ministry of Justice provided the U.S. Embassy in Seoul with a formal reply explaining that under applicable Korean law, specifically the International Civil Judicial Mutual Assistance Law, there is no legal basis to permit attorneys from the United States to conduct voluntary depositions directly of Korean citizens. A copy of this communication is provided as *Exhibit "F".*

18. Subsequent attempts by the U.S. Embassy to redress the issue with Korean authorities proved unsuccessful. On June 1, 1999, the Ministry responded to the Embassy's Diplomatic Note No. 225 forwarding opinions from the Ministry of Justice and the Korean Supreme Court, Court Administration Office. They suggested that the United States transmit the request in the form of a letter rogatory to be executed by a Korean court in a proceeding in which American counsel, both U.S. Government officials and private American attorneys, would not be permitted to participate. As an alternative, the Ministry suggests that the depositions be conducted directly by the American consular officer at the U.S. Embassy. A copy is provided as *Exhibit "G".* On June 14, the Acting Deputy Chief of Mission of the U.S. Embassy met with the Deputy Foreign Minister and the Director of the Ministry of Foreign Affairs and Trade's Consular Division to further press the United States Government's

ILI US Digest/2 159 1/8/02, 1:45 PM

request. The Deputy Foreign Minister stated that he was aware of the request and that he would again request that the issue be revisited by the Ministry of Justice and by the Court Administration Office of the Supreme Court.

19. On October 26 the U.S. Embassy transmitted a letter rogatory to the Ministry of Foreign Affairs and Trade under cover of Diplomatic Note No. 516, a copy of which is attached as *Exhibit "H".* On December 21, 1999, the U.S. Embassy inquired regarding the status of the letter rogatory. The Ministry of Foreign Affairs and Trade advised that the request is still under review by the apparent equivalent of an Administrative Court judge in the Korean Supreme Court and Ministry of Justice.

20. The U.S. Department of State would advise U.S. citizens, both U.S. Government officials and private citizens, contemplating participation in a deposition in Korea without the concurrence of the host country to consider carefully the impact of such an action, including possible arrest, detention or deportation. With respect to U.S. Government officials contemplating such action, the Department must further advise that the travel cannot be authorized by the Chief of Mission and therefore cannot be undertaken, for the reasons explained above.

3. Judicial assistance in criminal matter in China: *United States v. Jones*

In the case of *United States v. Jones,* No. LR-CR-98-116 (E.D. Ark.), Edward A. Betancourt, Director Office of Policy Review and Inter-Agency Liaison, Overseas Citizens Services ("OCS"), Bureau of Consular Affairs, U.S. Department of State, filed a Declaration dated May 2, 2000, concerning requests for international judicial assistance in criminal matters. The Declaration describes procedures by which defense attorneys are instructed to make such requests to the People's Republic of China ("China").

The full text of the Declaration and a supplemental declaration of June 22, 2000 are available at *www.state.gov/s/l.*

ILI US Digest/2 160 1/8/02, 1:45 PM

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I, Edward A. Betancourt, hereby depose and say as follows:

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3. Judicial assistance between the United States and the People's Republic of China is governed by multilateral conventions to which the U.S. and China are parties: the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 23 UST 2555; the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, 20 UST 361; and the Vienna Convention on Consular Relations ("VCCR"), 21 U.S.T. 77. It is also governed by the U.S. – China Consular Convention, 33 U.S.T. 3048; customary international law; and applicable U.S. and local Chinese law, and regulations.

4. The U.S. Department of State expects criminal defendants, or their defense counsel, who wish to request judicial assistance in obtaining evidence or in effecting service of documents abroad in connection with criminal matters to make such requests pursuant to letters rogatory in accordance with Article 5(j) of the VCCR ("Exhibit "A"). The Government of the People's Republic of China has advised the United States of the procedures it considers acceptable for seeking evidence or effecting service in China pursuant to Article 5(j) of the VCCR. These procedures are summarized in general in OCS's information circular, "Judicial Assistance-China"' (Exhibit "B"). This material directs inquirers to other information, including detailed instructions on preparation of letters rogatory. This information is also available via the Department of State's, Bureau of Consular Affairs' home page on the internet at *http://travel.state.gov* under the heading "judicial assistance."

5. Chinese authorities do *not* recognize the authority or ability of foreign persons, such as American attorneys, to take voluntary depositions of willing witnesses, even before a U.S. consular officer, Article 27(1) of the U.S.-China Consular Convention of 1980 (Exhibit "C") notwithstanding. In view of this position, China has advised it would deem taking depositions in China before a U.S. consular officer as a violation of China's judicial sovereignty. Such action could result in the arrest, detention, expulsion, or deportation of the American attorney. In a few limited cases, the Chinese Government has agreed to interview witnesses on behalf of U.S. prosecutors or investigators or to permit

ILI US Digest/2 161 1/8/02, 1:45 PM

such prosecutors or investigators to directly question witnesses in China. The granting of such permission is totally discretionary with Chinese authorities. Since 1981 we are aware of only one case in which Chinese authorities permitted a sworn statement to be taken by a U.S. government official (this was a statement taken by a U.S. law enforcement official in 1988).

6. In diplomatic note No. 106 dated November 6, 1981 (Exhibit "D"), the Ministry of Foreign Affairs advised the U.S. Embassy that, if a court of the United States requests the depositions of witnesses resident in the People's Republic of China, it is necessary to submit letters rogatory through the diplomatic channel. Such letters rogatory must bear the signature of the judge and the seal of the court. Moreover, letters rogatory should contain the following information: the name of the court making the request, the names of the parties, the subject matter of the litigation, the name and address of the witness, and written interrogatories and cross interrogatories. The letters rogatory and written questions must be accompanied by a Chinese translation.

7. In Diplomatic note No. 88 (Exhibit "E") dated April 4, 1988, the Chinese Ministry of Foreign Affairs reiterated its Government's position that letters rogatory are the only vehicle for U.S. litigants to obtain evidence in China, and that the taking of depositions of witnesses within China by foreign attorneys or consuls is impermissible. The note stated that for a U.S. consular officer to receive or witness statements made under oath or affirmation in China is not authorized by the U.S.-China bilateral Consular Convention. Chinese authorities repeated this position in Circular Diplomatic note No. 77 dated September 11, 1996 (Exhibit "F") directed to all foreign embassies in Beijing.

8. While China's diplomatic notes provide for the exclusive use of letters rogatory, this vehicle, when used by defense counsel in criminal matters, has proven in practice to be unreliable. Such requests for international judicial assistance pursuant to letters rogatory in criminal cases in China have met with mixed success. While requests by federal prosecutors are made in a different manner, Chinese responses to such requests have likewise met with mixed success. To the best of our knowledge, since 1988 (when our records begin), only two requests for legal assistance in criminal matters, out of a total of 17, have been fully executed by Chinese authorities.

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ILI US Digest/2 162 1/8/02, 1:45 PM

CHAPTER 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. Ratification of New Treaties

a. Testimony in support of treaties before Senate Foreign Relations Committee

Samuel Witten, Assistant Legal Adviser for Law Enforcement and Intelligence, U.S. Department of State, appeared before the Senate Foreign Relations Committee on September 12, 2000 to provide testimony in support of 20 treaties concerning or related to international law enforcement cooperation.[1] These included 4 bilateral extradition treaties, 9 bilateral and one multilateral (Organization of American States ("OAS")) mutual legal assistance treaties, an optional protocol to the OAS treaty, five treaties for the return of stolen vehicles and an OAS prisoner transfer treaty. These new treaties are part of an ongoing effort to strengthen international cooperation in fighting international crime. The treaties received advice and consent from the Senate on October 18, 2000, with the exception of the mutual legal assistance treaty with Russia. They were ratified by President

[1] A Protocol amending the 1950 Consular Convention between the United States and Ireland was also heard with the law enforcement treaties.

ILI US Digest/3 163 1/8/02, 1:45 PM

Clinton in January, 2001, and are currently in the process of being brought into force. When the MLATS enter into force, the United States will be party to more than 40 such treaties. The United States is party to more than 110 extradition treaties; the four new ones update existing treaties and do not create new treaty relationships. Excerpts from the testimony on these treaties follow.

The full text is available at *www.state.gov/s/l.* Relevant treaty transmittal documents are available at *www.access.gpo.gov/cong006.html,* with the exception of the mutual legal assistance treaty with Nigeria, S. Treaty Doc. No. 102-26.

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The growth in transborder criminal activity, especially violent crime, terrorism, drug trafficking, arms trafficking, trafficking in persons, the laundering of proceeds of criminal activity, including organized crime and corruption, generally has confirmed the need for increased international law enforcement cooperation. Extradition treaties and MLATs are essential tools in that effort.

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Replacing outdated extradition treaties with modern ones and negotiating extradition treaties with new treaty partners is necessary to create a seamless web of mutual obligations to facilitate the prompt location, arrest and extradition of international fugitives. Similarly, mutual legal assistance treaties are vitally needed to provide witness testimony, records and other evidence in a form admissible in criminal prosecutions. The instruments before you today will be important tools in achieving this goal.

EXTRADITION TREATIES

I will first address the extradition treaties currently before the Committee. As you know, under U.S. law, fugitives can only be extradited from the United States pursuant to authorization granted by statute or treaty. The treaties pending before the Committee will update our existing treaty relationships with four important law enforcement partners.…

ILI US Digest/3 164 1/8/02, 1:45 PM

All four extradition treaties contain several noteworthy provisions that will substantially serve our law enforcement objectives.

First, these treaties define extraditable offenses to include conduct that is punishable by imprisonment or deprivation of liberty for a specified minimum period, typically more than one year, in both states. This is the so-called "dual criminality" approach. Our older treaties, including those in force with Paraguay, South Africa, and Sri Lanka, provide for extradition only for offenses appearing on a list contained in the instrument. As time passes, these lists have grown increasingly out of date. The dual criminality approach obviates the need to renegotiate treaties to cover new offenses in instances in which both states pass laws to address new types of criminal activity.

Second, these four treaties expressly permit extraditions whether the extraditable offense is committed before or after their entry into force. This provision is particularly useful and important, since it will ensure that persons who have already committed crimes can be extradited under the new treaties from each of the new treaty partners after the treaty enters into force.

Third, these treaties all contain a provision not contained in the current treaty relationships that permits the temporary surrender of a fugitive to the Requesting State when that person is facing prosecution for, or serving a sentence on, charges within the Requested State. This provision can be important to the Requesting State so that, for example: 1) charges pending against the person can be resolved earlier while the evidence is fresh; or 2) where the person sought is part of a criminal enterprise, he can be made available for assistance in the investigation and prosecution of other participants in the enterprise.

These treaties also address two of the most difficult issues in our extradition treaty negotiations—extradition of nationals of the Requested State and extraditions where the fugitives may be subject to the death penalty in the Requesting State.

As a matter of longstanding policy, the U.S. Government extradites United States nationals and strongly encourages other countries to extradite their nationals. All four of the treaties before the Committee contemplate the unrestricted extradition of nationals by providing that nationality is not a basis for denying extradition.

The treaty with Paraguay is in this respect particularly significant.… This treaty, and our treaties with Bolivia and Argentina, which also permit extradition of nationals, and to which the Senate gave advice and

ILI US Digest/3 165 1/8/02, 1:45 PM

consent in 1996 and 1998, represent an important breakthrough in our efforts to convince civil law countries in the Western Hemisphere to oblige themselves to extradite their nationals to the United States. We are already using these treaties as precedents in our efforts with other nations in Latin America and elsewhere. In practical terms, these treaties should help the United States to bring to justice narcotics traffickers, regardless of nationality, who reside or are found in these countries.

A second issue that often arises in modern extradition treaties involves extraditions in cases in which the fugitive may be subject to the death penalty in the Requesting State. A number of countries that have prohibited capital punishment domestically, also, as a matter of law or policy, prohibit the extradition of persons to face the death penalty. To deal with this situation, or to address the possibility that in some cases the United States might want to seek such assurances, a number of recent U.S. extradition treaties have contained provisions under which a Requested State may request an assurance from the Requesting State that the fugitive will not face the death penalty. Provisions of this sort appear in the extradition treaties with Paraguay, South Africa and Sri Lanka. In our negotiations with Belize, it was agreed that the possibility of the death penalty would not serve as a basis for the denial of extradition.

MUTUAL LEGAL ASSISTANCE TREATIES

Overview

I will now comment briefly on the mutual legal assistance treaties with Cyprus, Egypt, France, Greece, Nigeria, Romania, the Russian Federation, South Africa, and Ukraine, as well as the Inter-American Convention on Mutual Assistance in Criminal Matters with Related Optional Protocol. The Department of Justice will speak on these treaties at greater length.

These mutual legal assistance treaties before the Committee are similar to thirty-six bilateral MLATs that have entered into force with countries throughout the world. The U.S. Government's mutual legal assistance treaty program is relatively new when compared with extradition, but has fast become a central aspect of our international law enforcement cooperation program. As a general matter, MLATs obligate the Requested State to provide the Requesting State with certain kinds of evidence, such as documents, records, and testimony, provided that treaty requirements are met. Ratification of the MLATs under consider-

ILI US Digest/3 166 1/8/02, 1:45 PM

ation today will enhance our ability to investigate and prosecute a variety of crimes, including violent crime, drug trafficking, terrorism, and money laundering and other financial crimes.

All of the bilateral MLATs require the Contracting Parties to assist each other in proceedings related to the forfeiture of the proceeds and instrumentalities of criminal activity, to the extent such assistance is permitted by their respective laws. Such assistance may prove invaluable insofar as it is used to deprive criminals, including international drug traffickers and members of organized crime, of the benefits of their criminal activity. The bilateral MLATs also provide that forfeited and seized assets or the proceeds of their sale may be transferred to the other Party.

As is the case with all MLATs currently in force, there are exceptions in all of these instruments to the obligation to provide assistance. Although the language varies to a certain extent among the treaties, all of the pending MLATs provide that requests for assistance may be denied if their execution would prejudice the essential interests of the Requested State. All of them also contain a useful provision that ensures that our obligations under the treaty do not interfere with our own domestic law enforcement efforts by providing that the Requested State may postpone assistance if it determines that execution of a request would interfere with an ongoing criminal investigation or proceeding. For all of the treaties, the provisions relating to procedures to be followed in making requests and the type of assistance to be provided are similar to the other MLATs currently in force.

Inter-American Convention and Related Optional Protocol

The Inter-American Convention on Mutual Assistance in Criminal Matters will serve as a legal basis for mutual assistance in criminal matters between the United States and any state that also becomes a party. This Convention was negotiated at the Organization of American States beginning in the mid-1980's, and was adopted and opened for signature by the OAS General Assembly on May 23, 1992. It was signed on behalf of the United States on January 10, 1995. The Convention was shaped largely with the assistance of the United States, and is therefore in essential ways similar to the U.S. Government's typical modern bilateral MLATs. For example, it requires each party to identify a Central Authority for issuing and receiving requests of assistance; details a broad range of assistance that may be provided between the law enforcement authorities of parties, such as taking testimony and serving legal docu-

ILI US Digest/3 167 1/8/02, 1:45 PM

ments; and provides a list of bases for denial of assistance, such as where the public policy or basic public interests of the requested state would be prejudiced by granting the assistance. Unlike our typical modern mutual legal assistance treaties, however, it will not serve as the legal basis for asset sharing, such as the sharing of forfeited assets, which the negotiators determined was best left for bilateral agreements.

We also recommend Senate advice and consent to the Optional Protocol related to the Inter-American Convention on Mutual Assistance in Criminal Matters. This Protocol was negotiated at the Organization of American States in the early 1990's, was adopted and opened for signature by the OAS General Assembly on June 11, 1993, and was signed by the United States on January 10, 1995. While the OAS Convention will be a valuable tool for obtaining assistance in a wide variety of criminal matters, it contains certain limitations regarding assistance in cases involving tax offenses. Most significantly, under Article 9(f) of the Convention, a party may decline assistance in investigations and proceedings involving certain tax offenses. While the United States delegation consistently opposed this provision during the negotiation of the Convention, it ultimately joined consensus on the Article as a whole, but at the same time proposed an additional protocol to enable assistance in tax matters. The United States considers criminal tax investigations to be an important aspect of a State's overall strategy for combating crime, and believes that such investigations are also an increasingly important weapon in the battle against offenses such as drug trafficking and organized crime. The first article of the Protocol removes the discretion of Protocol signatories to refuse assistance on the grounds that a tax offense is involved. The second article clarifies that the limited dual criminality provision in Article 5 of the Convention should be interpreted liberally in cases involving tax offenses,

Recommended Understandings Related to Inter-American Convention and Related Optional Protocol

The Administration recommends that the United States include two Understandings in its instrument of ratification for the Convention, and one Understanding in its instrument of ratification for the Related Optional Protocol. These Understandings, the proposed texts of which were included in the Administration's transmittal of the Convention and Related Optional Protocol to the Senate, would clarify the views of the United States about certain provisions of the Convention and Protocol.

ILI US Digest/3 168 1/8/02, 1:45 PM

First, regarding Article 25 of the Convention (on limitations on the use of information or evidence), we recommend an Understanding be included in the United States instrument of ratification that the disclosure and use limitations stated in Article 25 shall no longer apply if such information or evidence is made public in a manner consistent with the Article. When evidence obtained under the Convention has been revealed publicly, in court records or otherwise, that information effectively becomes part of the public domain and can be obtained by anyone. This principle is explicit in most of our bilateral MLATs, and implicit in the operation of the Convention, but since it was not addressed in the text of the Convention we have determined it would be advisable to include an Understanding to this effect in the U.S. instrument of ratification.

Second, we recommend an Understanding be included in the United States instrument of ratification for the Convention and the Protocol, regarding Article 36 of the Convention and Article 3(5) of the Protocol. These provisions make clear that the assistance and procedures set forth in these instruments shall not prevent any of the Contracting Parties from granting assistance to another Party through the provisions of other international agreements, or bilateral treaties, or through the provisions of national laws. The Parties also may provide assistance pursuant to any bilateral arrangement, agreement, or practice that may be applicable. The Understanding that would be included in each instrument of ratification reaffirms these points.

A key provision of all MLATs is the creation of "Central Authorities" to coordinate requests for assistance. For the United States, the Attorney General or her designee is the Central Authority. Since the Department of Justice implements these treaties, I will defer to Deputy Assistant Attorney General Swartz in describing the other specific provisions of these instruments and issues related to their implementation.

STOLEN VEHICLE TREATIES

Also before the Committee are stolen vehicle treaties with Belize, Costa Rica, the Dominican Republic, Guatemala and Panama.

The U.S. stolen vehicle treaty program seeks to eliminate the difficulties faced by owners of vehicles that have been stolen and transported across international borders. Generally speaking, these treaties establish procedures for the recovery and return of vehicles that are documented in the territory of one party, stolen within its territory or from one of its

ILI US Digest/3 169 1/8/02, 1:45 PM

nationals, and found in the territory of the other party. Many countries lack a sufficient institutional and procedural framework for the repatriation of vehicles that were stolen in other countries, and the stolen vehicle treaties remedy this deficiency.

The United States currently has one such treaty in force, the Convention between the United States of America and the United Mexican States for the Recovery and Return of Stolen or Embezzled Vehicles and Aircraft of 1981. That treaty entered into force between the United States and Mexico in 1983 and according to insurance industry estimates prompts the return to the United States of approximately two thousand vehicles annually. The five treaties currently before the Committee build on the precedent with Mexico, and will create a legal basis for the return of stolen vehicles from several other nearby countries. Like the 1981 treaty with Mexico, the treaties with Costa Rica, Guatemala, and Panama also provide for the return of stolen aircraft.

We relied heavily on our experience under the 1981 Mexico treaty in developing these new treaties with neighboring countries. Thus, all of the new treaties contain provisions similar to those in the Mexico treaty by providing procedures for the country that finds a vehicle covered by the treaty to notify the other country that the vehicle has been located and to provide an opportunity for the vehicle to be returned once the owner has made a request. The treaties set deadlines for action by the party receiving a request for the return of a vehicle and give owners more time to claim vehicles than is provided for under the U.S.-Mexico treaty. The treaties also provide that if the U.S. government learns that the other party may have seized or impounded a stolen vehicle but has failed to provide notification, the U.S. government may seek official confirmation of the seizure or impoundment, and request formal notification under the treaty. The other party is then required to submit such notification or explain why notification is not necessary.

The United States insurance industry strongly supports these treaties, since it is typically subrogated to the ownership interests of U.S. citizens or businesses whose vehicles have been stolen and taken overseas. In fact, insurance industry representatives have informed us that the mere negotiation and signature of several of the treaties now before the Senate has already brought discernible improvements in the cooperation of the foreign authorities abroad. Ratification and full implementation of the treaties should significantly improve the return of U.S. vehicles from the countries concerned.

ILI US Digest/3 170 1/8/02, 1:45 PM

INTER-AMERICAN CONVENTION ON SERVING CRIMINAL SENTENCES ABROAD

The Committee also has before it the Inter-American Convention on Serving Criminal Sentences Abroad. The purpose of this instrument is to facilitate the transfer of persons sentenced in the United States and in other states parties to their own nations to serve their sentences. The Convention achieves this purpose by establishing procedures that can be initiated by sentenced persons who prefer to serve their sentences in their own countries. The means employed to achieve this purpose are similar to those embodied in existing bilateral prisoner transfer treaties in force between the United States and eight other countries and Hong Kong, and the Council of Europe Convention, which now has over 40 parties.

The major advantages of concluding a multilateral convention with the OAS member States are the establishment of uniform procedures and the saving of resources that would be required to negotiate and bring into force bilateral treaties with a large number of countries in the hemisphere. Immediately upon U.S. ratification, this Convention would establish a prisoner transfer relationship between the United States and Venezuela, which has already ratified the Convention. Brazil, Ecuador and Paraguay have all signed the Convention but have not ratified. Once each of them completes its domestic ratification processes and becomes a party, we would have new prisoner transfer relationships with them as well. This would further enhance our ability to seek the return of American citizen prisoners who want to serve their sentences in more familiar surroundings and to return foreign prisoners who are in the custody of U.S. prisons to other countries to serve their sentences, subject to the consent of both parties and the prisoner. As other OAS member States join the Convention, the number of countries with whom we have prisoner transfer relationships will further expand and could include countries such as Colombia, the Dominican Republic, Jamaica, Haiti, El Salvador, and Guatemala.

The United States can become a party to the Convention without any additional legislation. However, to clarify our interpretation of certain provisions of the Convention, and to ensure that documents for the United States are provided in English, we recommend that the U.S. instrument of ratification include one Understanding and one Reservation. The proposed texts of the Understanding and Reservation were included in the Administration's transmittal of the Convention to the Senate.

ILI US Digest/3 171 1/8/02, 1:45 PM

The proposed Understanding, which relates to Articles III, IV, V and VI, would ensure that the Convention may be implemented consistent with existing legislation pertaining to prisoner transfer, by clarifying that the consent of all parties—the prisoner, the sentencing state, the receiving state, and, where applicable, the sub-federal state or province—is required prior to the transfer. Although this requirement is implied by the Convention text, consent by all parties is such a fundamental feature of our prisoner transfer regime that we believe it is appropriate to clarify the text in this manner.

The proposed Reservation relates to Article V(7) and sets forth a requirement that before a U.S. national may be returned, the sentencing state must provide English language versions of a certified copy of the sentence, including information on the amount of time already served and the time off that could be credited, and any other information the receiving state deems necessary. These documents must also be provided in the language of the sentencing state. The reservation further provides that the United States would do the same for the benefit of the requesting state in like circumstances. This Reservation will greatly facilitate U.S. implementation of the Convention.

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b. Understandings of the United States concerning cooperation with the International Criminal Court

In providing advice and consent to the extradition and mutual legal assistance treaties, the Senate included in each of the Resolutions of Ratification an Understanding relating to cooperation with the International Criminal Court. *See* discussion of the Court in III.E. below. The Understandings were included in the Instruments of Ratification signed by President Clinton. The full text of the Resolutions is available at 146 CONG. REC. S10662-67 (daily ed. Oct.18, 2000).

The Understanding for each of the extradition treaties is identical except for the name of the country and the specific reference to the Rule of Specialty in the relevant treaty and provides as follows:

ILI US Digest/3 172 1/8/02, 1:45 PM

(a) Understanding.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification: Prohibition of Extradition to the International Criminal Court.—The United States understands that the protections contained in Article [] concerning the Rule of Specialty would preclude the resurrender of any person extradited to the [other party to the treaty] from the United States to the International Criminal Court contemplated in the Statute adopted in Rome, Italy, on July 17, 1998, unless the United States consents to such resurrender; and the United States shall not consent to the transfer of any person extradited to the [other party] by the United States to said International Criminal Court unless the Statute establishing that Court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

The Understanding for each of the Mutual Legal Assistance treaties is identical in each of the MLATs and provides as follows:

(a) Understanding.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification: Prohibition on Assistance to the International Criminal Court.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court contemplated in the Statute adopted in Rome, Italy, on July 17, 1998, unless the Statute establishing that Court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

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2. Report to Congress on Extradition Practice

On May 26, 2000, the Department of State submitted a report to Congress as required by section 211 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal years 2000 and 2001, Pub. L.

ILI US Digest/3 173 1/8/02, 1:45 PM

106-113, 113 Stat. 1501. The Report provides an overview of United States extradition policy and practice and addresses issues specified in section 211, reflecting concerns that have arisen from time to time in the context of extradition cases in which the United States was involved. The report is available at *www.state.gov./s/l*.

This report is submitted by the Secretary of State to the Senate Committee on Foreign Relations and the House Committee on International Relations…As provided in Section 211 (a), this report is based on a review of extradition treaties and other agreements containing extradition obligations to which the United States is a party. Pursuant to Section 211(a), the discussion herein is limited to those treaties where the United States has diplomatic relations with the treaty partner. This report incorporates input and contributions from the U.S. Department of Justice.

Section 211(b) sets forth five issues that are to be addressed in this report. The issues reflect concerns that have arisen from time to time in cases under the U.S. Government's international extradition practice. This report begins with an overview of United States extradition policy and practice in order to provide context for the answers that follow to the specific questions contained in Section 211(b).

BACKGROUND OVERVIEW OF UNITED STATES INTERNATIONAL EXTRADITION PRACTICE

United States extradition practice is based almost entirely on individually negotiated bilateral treaties, which the United States brings into force following Senate advice and consent to ratification.[1] The United States is currently a party to over 110 such treaties. While most of these

[1] Domestic law relevant to extradition is set forth in 18 U.S.C. §§ 3181-3196. The two exceptions to the requirement for a treaty are set forth in 18 U.S.C. § 3181(b), providing for extradition of non-Americans to stand trial for violent crimes committed against Americans abroad, and 18 U.S.C. § 3181 Note, providing for extradition to the International Criminal Tribunals established by the United Nations Security Council with respect to Rwanda and the former Yugoslavia.

ILI US Digest/3 174 1/8/02, 1:45 PM

treaties currently in force have been negotiated in the last 30-40 years, many of the treaties still in force are quite old, in some cases dating back to the 19th Century.[2]

The United States has embarked on an ambitious program of updating many of our older bilateral extradition treaties, particularly with countries with which we have, or can anticipate, a significant law enforcement need to seek or make extraditions.…

In broad outline, the extradition process in U.S. practice is as follows: U.S. requests for extradition to other countries originate with federal, state or local prosecutors who are seeking the return to the United States of a fugitive sought for trial or punishment. The Justice Department's Criminal Division helps these prosecutors draft outgoing extradition requests and helps ensure that the requests meet the requirements of the particular treaty and foreign law. Once an outgoing U.S. extradition request is finalized, it is forwarded through diplomatic channels to the foreign government for its review and action. Practice varies in countries receiving our requests, but typically the foreign government forwards the request to its courts for a judicial determination on whether a fugitive is extraditable under the treaty and relevant domestic law.[4] Following a judicial determination of extraditability, the final decision for extradition generally rests with the foreign government's executive branch. If it approves extradition, the foreign government will make arrangements to transfer custody of the fugitive to U.S. law enforcement authorities.

Requests by foreign governments for fugitives in the United States are handled along the same general lines. Extradition requests are provided to us via diplomatic channels and are initially reviewed at the Department of State. Where appropriate, the State Department transmits the request to the Department of Justice with a declaration attesting that there is an extradition treaty in force with the state requesting extradition, that a request has been made pursuant to the treaty, and that the offense for which

[2] Some of these treaty relationships result from decolonization, where new nations in the Caribbean, Africa and South Asia) accepted the obligations of existing extradition treaties as successor states upon independence. About 25 of our treaty relationships are with former British dependencies which assumed the UK's treaty obligations upon independence.

[4] Our extradition treaties typically require foreign governments to represent the interests of the United States in connection with U.S. extradition requests.

ILI US Digest/3 175 1/8/02, 1:45 PM

extradition is sought is covered by the treaty. The Department of Justice then reviews the request and, if it is complete and legally sufficient under U.S. domestic law and the relevant treaty, DOJ initiates the extradition proceeding in U.S. District Court on behalf of the foreign government for a determination of whether the person is extraditable. If (and only if) a fugitive has been found extraditable by our courts the Secretary of State ultimately decides whether a fugitive will be surrendered, and has the authority to deny extradition, *e.g.,* if she determines that it is more likely than not that a fugitive sought for extradition will be tortured if extradited.[5] When the Secretary signs a surrender warrant, the fugitive is delivered to law enforcement officials of the requesting country, to be transported to that country for trial or, if already convicted, to serve a sentence.

Response to Sections 211(b)(1) and 211(b)(2) of Public Law 106-113: "Discuss the factors that contribute to failure of foreign nations to comply fully with their obligations under bilateral extradition relations with the United States" and "Discuss the factors that contribute to nations becoming 'safe havens' for individuals fleeing the United States justice system."

Overview

The United States generally enjoys a productive and mutually beneficial extradition relationship with our treaty partners. Fugitives are brought to justice in the United States, and the U.S. Government is able to return fugitives seeking safe haven in the United States to face trial or punishment in the legal and judicial systems of our treaty partners. In recent years, many hundreds of fugitives have been returned to and from the United States based on extradition requests or immigration or other proceedings that ensue following extradition requests. Many of these fugitives were returned to face justice for serious offenses such as narcotics trafficking, terrorism and other violent crimes, and major financial crimes. According to U.S. Justice Department statistics, in the past 5 years over 600 U.S. extradition requests have been granted by foreign

[5] U.S. courts have followed a "rule of non-inquiry" under which issues concerning whether the defendant is likely to be treated fairly and humanely if extradited are not considered as part of the finding of extraditability but are reserved to the Secretary of State. For instance, the obligation of the United States under the Torture Convention not to extradite a person to a country where it is more likely than not that the person will be tortured is implemented through the Secretary of State's review. *See* 22 C.F.R. Part 95.

ILI US Digest/3 176 1/8/02, 1:45 PM

countries, and more than 200 other requests have resulted in the return of fugitives to the U.S. via deportation or expulsion.

For many reasons, however, not every request for extradition results in a fugitive being delivered to the requesting country. Sometimes the requesting state doesn't know where a fugitive is located and makes multiple contingency requests for provisional arrest and extradition. In other cases, fugitives learn they are being sought and flee or go into hiding. For example, over the past several years the U.S. has made requests for the provisional arrest of BCCI defendant Gaith Pharaon to over two dozen countries, but to date he remains a fugitive. Even following a fugitive's arrest, court proceedings and appeals can last a very long time and can be delayed by fugitives' exercising all possible rights to challenge extradition. For example, fugitives in Mexico and elsewhere in Latin America can seek judicial *amparos* (akin to habeas corpus review).[6]

Apart from these general issues of timing, extradition treaties provide specific bases on which extraditions can be delayed or denied. The obligation to extradite under a bilateral extradition treaty is not absolute and protections are built in to accommodate both U.S. and foreign interests. While the exact terms of such treaties result from country-specific negotiations and thus vary somewhat among the treaties, set forth below are the typical types of qualifications on the obligation to extradite. When these limitations are triggered in particular cases, some might say that the U.S. or the foreign country (at least temporarily) becomes a "safe haven" from extradition, even though the reason for non-extradition is consistent with the terms of the applicable treaty and in some cases a prosecution in a country other than the United States might occur.

As the discussion below reflects, there are a number of reasons that international extraditions are delayed or denied, some less problematic than others from a policy perspective.…

Impediments to Extradition

Restrictions on the Extradition of Nationals

Perhaps the highest profile exceptions to the obligation to extradite are bars or limitations in some countries on the extradition of their

[6] In the United States, we note while some extradition cases proceed fairly swiftly, extradition proceedings in U.S. courts, including the initial extradition hearing, petitions for a writ of habeas corpus, and appeals, can also last for years before the matter is referred to the Secretary of State for decision.

ILI US Digest/3 177 1/8/02, 1:45 PM

nationals. The United States makes no distinction between extraditing its own nationals and nationals of other countries. We advocate that all countries adopt the same policy. However, a number of our major treaty partners, such as France, Germany and Brazil, cannot extradite their nationals by virtue of their constitutions or domestic laws. In some cases, such as Mexico and Bolivia, the executive branches have been given discretion under domestic legislation to extradite their nationals, but only under specified circumstances. In Israel, current law allows persons who are nationals and residents of Israel at the time extradition is sought to be extradited so long as the requesting country promises that any sentence imposed on the fugitive as the result of the extradition will be served in Israel. Non-resident Israelis may be extradited for trial without the restriction of having to be returned for service of sentence.[7]

Many countries with restrictions on the extradition of their nationals have jurisdiction under their domestic laws to try their nationals for major crimes regardless of where the offense was committed and sometimes undertake to pursue such prosecutions. This would typically be the case in countries with civil law systems, including the majority of countries in Europe and South America, and not in countries with common law legal systems, including the United States. The U.S. Government's bilateral extradition treaty in such cases often provides that if extradition is refused solely on the basis of nationality, the case must then be submitted by the foreign government to its authorities for prosecution if we so request. Having a fugitive tried in his home country under these circumstances is a far less desirable outcome than having the fugitive returned to the U.S. for trial and punishment, but U.S. law enforcement authorities sometimes view a foreign trial as the best alternative when extradition is not possible.[8]

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[7] At the time of the high-profile Samuel Sheinbein case, in which Maryland authorities sought a fugitive for trial in Montgomery County on murder charges, nationality was an absolute bar to extradition under Israeli law.

[8] Sometimes the foreign government's prosecutorial efforts are not as vigorous as we would like, for reasons including the following: it is difficult and expensive to bring witnesses to the foreign courts to testify; evidentiary and procedural differences in our systems make such prosecutions difficult; foreign prosecutions are far less desirable from the perspective of U.S. victims and the communities where the crimes took place; and the punishment imposed is substantially less than what would have been imposed in the United States.

ILI US Digest/3 178 1/8/02, 1:45 PM

The Departments of Justice and State have been pursuing vigorous, across-the-board efforts to convince individual countries and the world community that refusal of extradition on the ground of nationality is no longer appropriate, given the ease of flight and the increasingly transnational nature of crime. In addition to pursuing this issue vigorously in our treaty negotiations, U.S. diplomats and U.S. law enforcement officials, with the active personal leadership of Attorney General Reno, have made eliminating restrictions on the extradition of nationals a high priority in our bilateral dialogues with other countries. These efforts have already had notable successes, beginning to achieve what we hope will be an overall reversal of a well-entrenched and long-standing tradition in many countries, often enshrined in constitutions and national law.

Recent U.S. treaties with countries in South America, such as Bolivia, Argentina and Paraguay, for example, restrict or eliminate obstacles to the extradition of nationals. We have also had some success in persuading states to rethink their policies on extradition of nationals without revision of the treaty language. Largely as a result of our efforts, the Dominican Republic repealed its law prohibiting the extradition of nationals, leading to the extradition to the United States of a number of Dominican nationals on murder and narcotics charges. Mexico has exercised discretion under its law to extradite some Mexican nationals, and we are encouraging the Mexican Government to extradite more in the future. Colombia has also begun to exercise discretion under its domestic law to extradite nationals.

A number of the U.S. Government's recent treaty relationships outside Latin America also show the influence of this line of thinking. Our new treaties with Antigua and Barbuda, Barbados, Grenada, India, the Philippines, Sri Lanka, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago and Zimbabwe explicitly prohibit denial of extradition on nationality grounds. Treaties with Australia, Malaysia, Hong Kong, and South Korea, like treaties with Japan and Thailand, leave the requested state with discretion whether to grant or deny extradition on nationality grounds, but in each instance, the treaty partner has indicated that it will grant such extradition where possible. Israel, which for over twenty years had an absolute statutory ban on extradition of nationals despite language in the treaty contemplating the extradition of nationals, changed its domestic law in 1999 to permit the extradition of nationals for trials outside of Israel.

ILI US Digest/3 179 1/8/02, 1:45 PM

We have made fewer advances on this issue in Europe, but some progress has been made. Our extradition treaties with Ireland, Italy, and the Netherlands permit the extradition of nationals in some circumstances, and our recent treaty with Switzerland contemplates extradition of nationals whenever the requested state is unable to prosecute in lieu of extradition. However, most recent treaties with European countries such as Austria, Cyprus, France, and Luxembourg permit but do not require extradition of nationals, and those countries currently have no discretion under their internal law to extradite their nationals. These new treaties do recognize that if either treaty partner denies extradition solely on nationality grounds, it is obligated to submit the case to its competent authorities for purposes of prosecution under its domestic laws if requested.

Death Penalty Assurances

Some of our treaties provide that if the offense for which surrender is sought is punishable by death under the laws in the country requesting extradition but not in the country holding the fugitive, extradition may be refused unless the requesting country provides assurances that the death penalty will not be imposed or, if imposed, will not be carried out.[9] Sometimes these provisions are included in the treaty at the insistence of our treaty partner, because many countries in Europe and elsewhere that oppose the death penalty as a fundamental human rights issue, and have abolished the death penalty domestically, routinely refuse to extradite fugitives to countries that impose the death penalty, absent such assurances that the death penalty will not be carried out. Sometimes these provisions are included in the treaties at the United States' request, in order to retain sufficient flexibility to ensure that we are not obliged to surrender persons for execution for relatively less serious crimes.

Statutes of Limitations

Many of our treaties also bar extradition if the relevant statute of limitations of the Requesting State, the Requested State, or both, would

[9] Less frequently, countries seek assurances on the particular length of sentence a fugitive will receive (e.g., no "life sentences"). The United States generally resists including provisions along these lines in our extradition treaties (or granting such assurances in practice), although we note there is such a provision in our 1922 treaty with Venezuela permitting a Party to deny extradition if it seeks but does not obtain such assurances.

ILI US Digest/3 180 1/8/02, 1:45 PM

bar prosecution. Absent a treaty provision, the United States does not have a general policy of refusing extradition if the crime at issue could not be prosecuted in U.S. courts based on statutes of limitation. However, some foreign governments have constitutional or national laws that limit their authority to extradite if the local statute of limitations that would apply to such an offense if committed in that country has expired.

Other Reasons that Extradition is Denied

List v. Dual Criminality Treaties

Extradition treaties are designed to engage the complex and expensive international process only with respect to serious offenses. In older U.S. treaties that were negotiated before the late 1970's, this was accomplished by agreeing to a list of offenses that would be covered. For countries still covered by such "list" treaties, a request for extradition for a crime not included would be rejected. In newer treaties concluded in the last 20-30 years, this list approach has been replaced by the concept of "dual criminality," usually providing that offenses covered by the treaty include all those made punishable under the laws of both Parties by imprisonment or other form of detention for more than one year, or by a more severe penalty (such as capital punishment). Such a formulation obviates the need to renegotiate the treaty to provide coverage for new offenses, strikingly exemplified by the currently evolving area of cyber-crime. Indeed, to avoid having the dual criminality analysis applied too narrowly, most treaties provide further guidance, including that an offense is extraditable whether or not the laws in the two countries place the offense within the same category or describe it by the same terminology. A major goal in our current ambitious treaty negotiating program is to negotiate new, modem treaties that eliminate the "list" approach in favor of dual criminality treaties.

Sufficiency of Evidence

Extradition treaties, as well as relevant domestic law, require that a certain quality and character of evidence be presented before extradition will be ordered for persons not yet convicted. In extradition proceedings in the United States, sufficient evidence must be presented to satisfy a court that there is "probable cause" to believe that the crime for which extradition is requested has been committed, and that the fugitive com-

ILI US Digest/3 181 1/8/02, 1:45 PM

mitted it. The laws of several of our treaty partners have similar thresholds analogous to "probable cause"; a few require what amounts to a higher "prima facie" standard of enough evidence to sustain a judgment of conviction based on the evidence in the extradition request. Some of our other treaty partners do not require evidence sufficient to establish what we would deem probable cause in order to extradite fugitives to the United States.

Additional Exceptions to the Obligation to Extradite

Even where a fugitive might otherwise be extraditable, our treaties and some foreign laws have other exceptions to the obligations to extradite, which sometimes make extradition impossible in particular circumstances.

• An almost universal treaty exception, known in international extradition law as the *"non bis in idem*" doctrine, is similar to the double jeopardy doctrine under U.S. domestic law, and provides that extradition will be denied when the person has already been either acquitted or convicted for the same offense in the country from which extradition is requested, or, in some instances, in a third country.

• A similarly widely adopted exception is that extradition is not required where the crime at issue is a "political offense" (a term which can cover treason, sedition or other crime against the state without the elements of any ordinary crime, or which under U.S. law can cover ordinary crimes committed incidental to or in furtherance of a violent political uprising such as a war, revolution or rebellion, especially when such crimes do not target civilian victims) or a "military offense" (a crime subject to military law that is not criminalized under normal penal law).

• Other limitations on the obligation to extradite, which vary to some extent from treaty to treaty, would relate to requests for extradition for extraterritorial offenses where the two countries' laws differ on the reach of jurisdiction over such crimes. In such cases, the United States seeks the greatest possible flexibility in our treaties to permit extradition for offenses that have taken place in whole or in part outside the territory of the requesting party.

• Finally, our treaties typically provide that extradition may be denied if the request is found to be politically motivated. Some of our trea-

ILI US Digest/3 182 1/8/02, 1:45 PM

ties provide that extradition may be denied if the request was made for the primary purpose of prosecuting or punishing the person sought on account of race, religion, nationality or political opinion.

Additional Factors that Sometimes Impede Extradition

There are several other circumstances that can preclude the return of fugitives to the United States for trial, even where there is an extradition treaty in force and nationality and other barriers discussed above do not constitute a legal bar to extradition.

• Sometimes a country may in effect become a safe haven for one or more fugitives through no fault of the government of the country in question. Even if an extradition treaty is in force, a vast land mass, difficult terrain and inadequate police force or resources may make it possible for fugitives to hide.

• In some cases, a country may have difficulty meeting its obligations under a new extradition treaty until it is able to ensure that its legal and judicial infrastructure is organized and trained to respond to foreign requests for extradition. The United States frequently works closely with its counterpart in addressing such issues. This process begins during the actual negotiation of the treaty and consultations are commonly held on a periodic basis after the treaty enters into force. In some cases, U.S. foreign assistance programs provide guidance and training to foreign police and prosecutors in this area, thereby helping to develop more effective institutions and practices.

• Finally, in some notable cases foreign courts might call into question the validity of treaties entered into by their governments, including extradition treaties, thereby impeding the ability of their governments to rely upon those treaties in cases before their domestic courts. For example, the Supreme Court of Colombia ruled in 1986—four years after the 1979 U.S.-Colombia Extradition Treaty had entered into force—that the relevant Colombian legislation was invalid.[10] Even though it has been

[10] The U.S. Government has never considered that the Colombian domestic court's decision had the effect of terminating the treaty under international law. The United States considers the treaty to be in force, and to remain legally binding on both parties. In a recent case, a U.S. district court accepted the State Department's declaration that the treaty is in force, and could serve as a legal basis to extradite persons to Colombia.

ILI US Digest/3 183 1/8/02, 1:45 PM

unable to rely on the provisions of the treaty to arrest and extradite fugitives at the request of the United States, the Government of Colombia has used its domestic extradition law to extradite persons to the United States.[11] Similarly, a Jordanian court has ruled that the manner in which the 1995 U.S.-Jordan extradition treaty was approved domestically in Jordan did not meet the requirements of Jordanian domestic law, and this matter is under review.

Cases Where There is no Treaty in Force

There are also times when the United States does not have extradition treaty relationships with countries where fugitives might be located. Sometimes not pursuing such relationships is a conscious choice, even where there is a possible law enforcement need. This is because extradition treaties are reciprocal and in addition to obtaining the return of fugitives to the United States, we must be prepared to surrender fugitives, including U.S. nationals, to face the legal, judicial and penal systems of our treaty partners. Where we are not prepared to do so, we do not pursue such a treaty even though that may mean foregoing the possibility of obtaining the extradition of fugitives from that country. In other instances, of course, the absence of a treaty can simply mean that up to that point the need for a treaty with a particular country has not been a sufficiently high priority.

Transfer of Persons for Law Enforcement Purposes Outside the Context of Extradition Treaties

Finally, we note that extradition pursuant to a treaty, while being the most typical way a fugitive is returned for trial or punishment, is not the exclusive means persons are returned across national borders. If the person sought is not a national of the requested country, that country may be able to expel or deport persons to the United States under its immigration law. Similarly, non U.S.-nationals located in the United States and sought by other countries might in some circumstances be removable from U.S. territory under our immigration laws. In some countries, unlike the United States, persons may be expelled by the executive

[11] The Government of Colombia, unlike the United States Government, can extradite fugitives internationally without relying on a treaty before its domestic courts.

ILI US Digest/3 184 1/8/02, 1:45 PM

authority of the foreign government without resort to formal proceedings. Also, in a number of countries, unlike the general rule in United States, extradition proceedings may be initiated under general provisions of domestic law even where there is no treaty relationship in place. Finally, of course, a fugitive may voluntarily choose for his or her own reasons to return to a country for trial or punishment. These possibilities are less certain and predictable than extradition pursuant to treaty, and are discretionary as opposed to being derived from a treaty commitment under international law.

Response to Section 211(b)(3) of Public Law 106-113: "Identify those bilateral extradition treaties to which the United States is a party which do not require the extradition of nationals, and the reason such treaties contain such a provision"

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First, our treaties with a large number of countries are silent on the issue of extradition of nationals.[12] These treaties require the extradition of all persons without regard to nationality if the requirements of the treaty are otherwise met.

A number of the countries in the world do not allow their nationals to be extradited as a result of their constitutions, domestic law or long standing policy, and these countries were not willing to conclude treaties which might appear to require extradition of nationals. U.S. treaties with many such countries state that neither state is bound or obligated to extradite nationals.[13] The U.S. practice under these trea-

[12] These include our treaties with Belize, Burma, Canada, Dominica, Ecuador, Fiji, Gambia, Ghana, Guyana, Kenya, Kiribati, Lesotho, Malawi, Malta, Mauritius, Nauru, Nigeria, Pakistan, Papua New Guinea, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Tuvalu, United Kingdom, and Zambia. The lists of countries in footnotes 12-16 of this report were prepared by the Department of Justice based on its research on the relevant treaties and the nationality laws and policies of the countries mentioned therein.

[13] These include treaties with Albania, Bosnia, Bulgaria, Chile, Congo (Brazzaville), Croatia, Cuba, Czech Republic, Dominican Republic, Egypt, El Salvador, Estonia, Guatemala, Haiti, Honduras, Iceland, Iraq, Latvia, Lithuania, Luxembourg, Macedonia, Monaco, Panama, Peru, Portugal, Romania, San Marino, Serbia-Montenegro, Slovak Republic, Slovenia, Suriname, and Venezuela. Treaties with three countries (Liberia, Liechtenstein, and Greece) say neither state is bound unless the fugitive was naturalized after the crime occurred.

ILI US Digest/3 185 1/8/02, 1:45 PM

ties is to grant extradition of our citizens even if the other nation did not extradite its citizens to us in return. The Supreme Court ruled in *Valentine v. United States ex rel Neidecker,* 299 U.S. 5 (1936), that this "not bound" language failed to provide sufficient legal basis for the U.S. to extradite U.S. citizens, so treaties negotiated after 1936 with States that do not extradite nationals often provide that neither party is bound to extradite nationals but the requested state (or the executive authority of the requested state) may do so if, in its discretion, it deems it appropriate.[14] This language permits the U.S. to continue the pre-*Valentine* policy of extraditing our citizens even if the treaty partner is unwilling or legally unable to reciprocate.

In a third group of treaties, the extradition of nationals is discretionary under the terms of the relevant treaty, but in practice the foreign country involved can and does surrender its nationals.[15]

Finally, in recent years many of our treaties have included language that explicitly bars each party from denying extradition on nationality grounds in some or all circumstances.[16]

Response to Section 211(b)(4) of Public Law 106-113: "Discuss appropriate legislative and diplomatic solutions to existing gaps in United States extradition treaties and practice"

General Observations

The problems discussed above, particularly relating to the extradition of nationals, are not issues that can be resolved as a matter of U.S.

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[14] These include treaties with Argentina, Austria, Belgium, Cyprus, Poland, Finland, Paraguay, Denmark, Germany, Mexico, Spain, Sweden, Turkey, Colombia, Norway, France, Hungary, and Greece. With respect to treaties with a discretionary formulation, we note that Congress amended U.S. domestic extradition law in 1990 to provide that a U.S. national may be extradited even "[i]f the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country," as long as the other obligations of the treaty are met. 18 U.S.C. § 3196.

[15] These include treaties with Australia, Jamaica, Japan, Malaysia, New Zealand, South Korea, and Thailand.

[16] These include treaties with Antigua and Barbuda, Bahamas, Barbados, Bolivia, Grenada, Hong Kong, India, Ireland, Israel, Italy, Jordan, the Netherlands, the Philippines, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and Uruguay. The new treaty with Argentina, signed in June 1997 and pending an exchange of instruments of ratification before it enters into force, contains such a provision, as does the new treaty with Belize, which was signed on April 4, 2000, and will be transmitted to the Senate in the near future for advice and consent to ratification.

ILI US Digest/3 186 1/8/02, 1:45 PM

domestic law. Both the State and Justice Departments have made persuading other countries to extradite their nationals a high priority. This issue is raised consistently and firmly in our international dialogues and our bilateral agendas.…

* * * *

As to countries where we are not yet prepared to make a general commitment to extradite, we are working on developing other types of law enforcement cooperation. With respect to Russia, for instance, this process began with informal arrangements between our law enforcement agencies. It progressed to negotiation of a Mutual Legal Assistance Agreement and most recently the negotiation of a Mutual Legal Assistance Treaty, which was transmitted to the Senate on February 4, 2000, for advice and consent to ratification. By establishing such law enforcement relationships we are then able to exchange evidence that may assist in tracking fugitives to a country from which extradition is possible, and to obtain or provide evidence necessary for effective prosecutions.

In this respect, we do not believe that new sanctions provisions related to foreign government performance under extradition treaties are necessary or desirable as a matter of the sound management of U.S. foreign assistance or international diplomacy. Extradition is one of many issues in our bilateral relations with countries that receive U.S. assistance. Countries which are working with us cooperatively in many ways (e.g., security, trade, migration, other diplomatic cooperation) should not have assistance terminated as a matter of law based on this single issue without consideration of other factors. Even in the context of law enforcement cooperation, there are countries that are cooperating with us in important ways outside of the extradition area and should not be sanctioned based on problems with a single aspect of law enforcement cooperation. For example, countries may be providing us evidence to support other prosecutions or helping us with investigative leads, working with us on counterterrorism or counternarcotics matters, or prosecuting domestically the same persons we are seeking for extradition.

Moreover, sanctions schemes in this context cannot be administered with set legislative formulas given the nature of international extradition. The United States has over 110 diverse individual extradition treaty relationships in force. Each of these relationships presents unique issues and histories, as well as different considerations arising from the

ILI US Digest/3 187 1/8/02, 1:45 PM

way in which the treaties were negotiated and implemented. Some of these treaties are dormant and have not been invoked in many years. Implementation of others is an evolving matter, since many countries are now reconsidering their extradition laws and practices. In some cases, the governments of the countries are operating under constitutions or national laws they themselves would like to change. And as with the United States, extradition from many countries involves decisions by independent judges interpreting the applicable treaty and domestic law, which can sometimes result in the denial of U.S. requests.…

Legislative Efforts

U.S. domestic extradition law is generally quite satisfactory.…The Departments of Justice and State thus *see* no need for major overhauls of the U.S. extradition laws.

There are, however, several amendments to Title 18 of the U.S. Code that the Administration has suggested in crime bills in the past several years relating to international extradition. In 1998, the Administration officially submitted to the Congress the International Crime Control Act, which included several provisions particularly relevant to this discussion.…

• The first of these would permit the United States to extradite fugitives for offenses not contained in our old list treaties.…This gap could be filled by legislation authorizing extradition in instances where a foreign country with which we have an extradition treaty limited to a list of offenses requests extradition of a fugitive for a serious offense not included in the list. Such discretion would be carefully limited by requiring a preliminary review with certification by the Attorney General that the offense is a serious offense (as defined in the statute) and that submission of the extradition request would be important to the law enforcement interests of the United States or otherwise in the interests of justice, and by the Secretary of State that it would be consistent with the foreign policy interests of the United States. The decision to extradite would require the same judicial decision as to extraditability and decision by the Secretary of State to sign the surrender warrant as for offenses listed in the treaty. Under such a law, we would anticipate extraditing fugitives for crimes not covered under our list treaties only if we were confident that U.S. requests to that treaty partner for extradition relating to the same offenses would be granted as a matter of reciprocity.

• The second provision would create authority to extradite a fugitive for a serious offense to a country with which the United States has

ILI US Digest/3 188 1/8/02, 1:45 PM

no extradition treaty. (There is existing authority to extradite from the U.S. in the absence of a treaty (18 USC 3181(b)), but only in very limited circumstances.) In addition to the usual procedures set forth for extradition in the existing statute, the proposed law would also require substantial policy-level review by the executive branch before any action would be taken. The Attorney General would need to certify that the offense is serious (as defined by the statute) and submission of the request is important to the law enforcement interests of the United States or otherwise in the interests of justice. The Secretary of State would need to certify that, based on information then known, submission of the request would be consistent with the foreign policy interests of the United States; and that the facts and circumstances of the request, including humanitarian considerations, do not appear likely to present a significant impediment to the ultimate surrender of the person if found extraditable. Moreover, the Secretary would need to find that the country submitting the request does not appear to be doing so in order to try or punish the person sought based primarily on the person's race, religion, nationality, or political opinions.[17]

Such authority would not be exercised frequently but could be important in specific cases. There are over 60 countries with which we have no extradition treaty relationship at this time. For many of these countries, the absence of a treaty is due only to the fact that negotiating and ratifying new treaties is both time consuming and complex, and the United States cannot always predict when law enforcement needs will call for extradition with a particular country. This inability to surrender even escaped convicts to other countries means that criminals can find safe haven in the U.S. The ability to extradite absent a treaty would also enhance our ability to secure extradition without a treaty from other coun-

[17] Because there would be no applicable treaty provisions, the statute would also set forth such fundamental requirements as the need for a finding by the U.S. judicial officer of probable cause to believe that the person is the person sought, that he or she committed the offense or was duly convicted in the requesting state; and that the conduct would be a serious offense (as defined in the statute) punishable by imprisonment for more than ten years under laws in the U.S.. It would also provide certain defenses to extradition. It would also ensure that the role of the Secretary of State in deciding whether or not a person should be extradited is preserved. The provision would further require that the Secretary demand in every case that the person not be tried or punished for an offense other than that for which extradited, and that the person not be subject to capital punishment unless the offense would be so punishable under the applicable laws in the U.S.

ILI US Digest/3 189 1/8/02, 1:45 PM

tries which may have the authority to do so but would be willing to act only if there exists at least the possibility of reciprocity.[18]

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3. Surrender for Trial in Hong Kong: *Cheung v. United States*

On March 23, 2000, the Court of Appeals for the Second Circuit reversed a district court grant of habeas corpus relief that overturned a magistrate's ruling finding John Cheung extraditable to Hong Kong under the terms of an extradition treaty between the United States and the Government of Hong Kong. *Cheung v. United States*, 213 F.3d 82 (2d Cir. 2000). In so doing, the Court rejected the district court's interpretation of the foreign extradition statute, 18 U.S.C. § 3181 et seq., as conferring jurisdiction for extradition proceedings only where the United States has entered into an extradition treaty directly with the central government of a foreign country. This interpretation precluded reliance on the Agreement between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders, where the United States has entered into a treaty with a sub-sovereign government, the Government of Hong Kong. *In re Extradition of Cheung*, 968 F. Supp. 791 (D.Conn. 1997).

[18] The Administration has also considered and may propose various amendments to Title 18 of the United States Code on relevant or related issues. These include authority, often found in individual modem extradition treaties, to (i) temporarily transfer persons in custody in the U.S. on U.S. charges, who had also been found extraditable to another country, to another country for prosecution (with return to the U.S. before serving any sentence in the other country), (ii) hold persons temporarily transferred here for such purposes and to return the transferred person following completion of judicial proceedings, and (iii) allow transit through the U.S. of fugitives wanted for prosecution in foreign countries and provide authority to hold them in custody during the transit period. Another related provision that may be proposed would authorize the Attorney General to help defray unusual expenses incurred by state and local jurisdictions in international extradition cases.

ILI US Digest/3 190 1/8/02, 1:45 PM

Excerpts below from the brief filed by the United States in the Second Circuit on November 15, 1999, set forth the views of the United States on the interpretation of the term "any foreign government" as used in § 3184 and the relevance of the Hong Kong Policy Act in confirming the applicability of § 3184 in this case. Even assuming that § 3184 required a treaty with a central foreign government, the fact that the treaty was approved by the People's Republic of China would satisfy that requirement.

The full texts of the United States brief of November 15, 1999, and Reply Brief of January 10, 2000, are available at *www.state.gov/s/l.*

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ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THERE WAS NO JURISDICTION UNDER SECTION 3184

This case involves a single, purely legal issue of statutory interpretation, for which the standard of review is *de novo. See United States v. Schreiber,* 191 F.3d 103, 104 (2d Cir. 1999); *Kahn Lucas Lancaster, Inc. v. Lark Int'l, Ltd.,* 186 F.3d 210, 215 (2d Cir. 1999).

A. Legal Procedures Governing Extradition Proceedings

"Extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial and punishment." *Austin v. Healey,* 5 F.3d 598, 600 (2d Cir. 1993) (internal quotations omitted). The extradition process is "primarily a function of the executive branch, and the judiciary has no greater role than that mandated by the Constitution, or

ILI US Digest/3 191 1/8/02, 1:45 PM

granted to the judiciary by Congress." *Id.* Indeed, prior to 1848, "extradition was largely a matter committed to the discretion of the Executive Branch" without the involvement of judicial officers. *Lo Duca v. United States,* 93 F.3d 1100, 1103 & n.2 (2d Cir. 1996) (executive branch may surrender fugitive " 'when no provision has been made by treaty or by statute for an examination of the case by a judge or magistrate' ") (quoting *Fong Yue Ting v. United States,* 149 U.S. 698, 714 (1893)).

In 1848, however, Congress enacted the federal extradition statute, presently codified at 18 U.S.C. § 3184, to prescribe a "legal framework for extradition proceedings involving fugitives found in the United States," in particular to create a regularized procedure for limited judicial review of foreign requests for extradition of fugitives. *Lo Duca,* 93 F.3d at 1103. To that end, Section 3184 authorizes a judge, upon the filing of a sworn complaint setting forth the legal basis for extradition, to issue an arrest warrant for the fugitive and to hear and consider evidence in support of the extradition request. In general, if the evidence is sufficient to establish probable cause to believe that the fugitive has committed an extraditable offense, the judge must issue a certificate of extraditability to the Secretary of State, who may in her discretion decide whether to surrender the fugitive to the requesting government. *See* 18 U.S.C. § 3184 (reproduced in full at page v, *supra*); *Lo Duca*, 93 F.3d at 1103-04; *Austin*, 5 F.3d at 603.

Because the judicial officer does not act as an Article III judge, no direct appeal lies from the order of the extradition magistrate certifying extraditability. *See Austin,* 5 F.3d at 603. Instead, as in this case, the fugitive may seek collateral relief by the filing of a petition for writ of habeas corpus. *See Spatola v. United States,* 925 F.2d 615, 617 (2d Cir. 1991) (internal quotations omitted).

B. The Magistrate Had Jurisdiction Under Section 3184

1. The Plain Language of Section 3184 Extends to the Extradition Treaty With the Government of Hong Kong

This Court has recognized that the words of a statute are of "paramount importance" and "generally dispositive" in the interpretation of a statute. *Greene v. United States,* 79 F.3d 1348, 1356 (2d

ILI US Digest/3 192 1/8/02, 1:45 PM

Cir. 1996). "The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words . . .in search of an intention which the words themselves did not suggest." *United States v. Wiltberger,* 18 U.S. 76, 95-96 (1820) (Marshall, C.J.); *see also Ardestani v. INS,* 502 U.S. 129, 135 (1991) (noting "strong presumption that the plain language of the statute expresses congressional intent"); *Friends of the Earth v. Consolidated Rail Corp.,* 768 F.2d 57, 62 (2d Cir. 1985) (same).

Here the district court concluded that Section 3184 does not confer jurisdiction in cases where an extradition treaty is not with "the government of a foreign country alone". [JA 7] This conclusion cannot be reconciled with the plain language of the statute, which provides for its applicability, among other situations, "(w)henever there is a treaty or convention for extradition between the United States and *any* foreign government." 18 U.S.C. § 3184 (emphasis added). The relevant inquiry, therefore, is whether the Government of Hong Kong constitutes "any foreign government." It [is] not disputable that the Government of Hong Kong is both "foreign" and is a "government". *See* Basic Law (Arts. 59 & 62) (recognizing Government of Hong Kong and specifying its powers) [JA35] It follows that the Government of Hong Kong is within the definition of "any foreign government", and therefore that Section 3184 confers jurisdiction over requests made under the extradition treaty with the Government of Hong Kong.

Conceding that the Government of Hong Kong is a "foreign government", the district court did not discuss the significance of the word "any" in the term "any foreign government". Instead, it replied "[t]hat HKSAR [the Hong Kong Special Administrative Region] is a foreign government begs the question, which really asks, [the] government of *what?"* [JA 8] But such a "question" is not "begged" by the terms of Section 3184. Section 3184 does not further define, much less restrict, the meaning of the term "any foreign government". Congress chose the term *"any"* to modify the term "foreign government". It did not say "national" foreign government. It did not say "central" foreign government. It did not say "fully autonomous" foreign government. Any means any.

Rather than discussing the effect of the term "any", the district court turned to the language of *another* statutory provision, 18 U.S.C. § 3181(a), and, in particular, that statute's use of a similar but different term –*"such* foreign government":

ILI US Digest/3 193 1/8/02, 1:45 PM

> §3181. Scope and limitation of chapter
>
> (a) The provisions of this chapter relating to the surrender of persons who have committed crimes *in foreign countries* shall continue in force only during the existence of any treaty of extradition with *such foreign government.*

(emphasis added). The district court concluded that the term "'such foreign government' refers to the government of the foreign country alone," and that, in light of the Section 3181's title ("Scope and limitation of chapter"), this interpretation of "such foreign government" in Section 3181(a) controls the interpretation of "any foreign government" in Section 3184. [JA 7] This attenuated analysis fails for several reasons.

To begin with, notwithstanding the district court's heavy reliance on the title labeling of Section 3181, it is axiomatic that the headings and titles of statutory code provisions are entitled to little interpretive weight. *See United States v. Dowty Woodville Polymer, Ltd.,* 110 F.3d 861, 866 (2d Cir. 1997) ("[h]eadings and titles are not meant to take the place of the detailed provisions of the [statutory] text[;] [n]or are they necessarily designed to be a reference guide or a synopsis").

Of greater significance is the fact that Congress used different modifiers for the term "foreign government" – "such" in Section 3181(a), and "any" in Section 3184. The fact that Congress chose different language dispels any inference that Congress intended Section 3181(a) to control interpretation of dissimilar language in Section 3184.

In any event, even assuming that the interpretation of the term "such foreign government" in Section 3181(a) should control the interpretation of the term "any foreign government" in Section 3184, the language of Section 3181(a) itself falls well short of restricting the term "foreign government" to only the central or national government of a foreign country. Section 3181(a) has nothing to say about the specific identity or capacity of the foreign government with whom the United States chooses to have a treaty. Its reference to "foreign countries" reflects a concern only with the place where crimes are committed, without further suggesting that the contracting treaty partner must be no less than the central government of a foreign country. Far from purporting to prescribe eligibility requirements for what types of foreign governments with whom

ILI US Digest/3 194 1/8/02, 1:45 PM

the United States may have an extradition treaty, Section 3181(a) is directed to a different purpose of requiring there to be some treaty in place before the United States surrenders fugitives abroad – in other words, that the United States not engage in the *ad hoc* surrender of fugitives in the absence of some formal extradition relationship (or apart from the strictly limited circumstances specified in the next subsection, 18 U.S.C. § 3181(b), when a fugitive may be surrendered "in the exercise of comity . . . without regard to the existence of any treaty of extradition with such foreign government").

Given this independent purpose of the statute, the district court wrongly concluded that "the Government . .. . would render § 3181 meaningless in this case." [JA 7] *See Erlenbaugh v. United States,* 439 U.S. 239, 245 & n. 12 (1972) (declining to apply *in pari materia* construction rule to create statutory exception on basis of wording from different statutory provision not intended to serve same purpose); *Helvering v. Stockholms Enskilda Bank,* 293 U.S. 84, 86 (1934) (in view of different purposes of statutory provisions, term "obligations" does not have same meaning in different sections of Revenue Act of 1926).

It would have been a simple matter for Congress simply to say: "Any extradition treaty must be with the central government of a foreign country." But Congress did not do so.

Ironically, the pivotal consideration of the district court's ruling was its concern for giving some meaning to the word "such" in the term "such foreign government" in Section 3181(a), in deference to the "axiom[] that construction of a statute must give meaning to every word in the statute." [JA 9] Yet "the statute" at issue in this case is Section 3184, not Section 3181(a). Indeed, had the district court declined to embark on an exploration of another statute and applied its axiom to the term "any" in Section 3184, it would necessarily have concluded that Congress meant what it said when it conferred jurisdiction in the case of a treaty with "any" foreign government in Section 3184.

Without citing or discussing any legislative history, the district court expressed its opinion that it was "highly unlikely that Congress intended to grant jurisdiction to extradite foreign nationals to subsovereign regions of foreign countries when it enacted § 3184 more than 150 years ago." [JA 9] But this approach misapprehends the appropriate scope of the interpretive inquiry. A court's duty is not to speculate about what Congress may or may not have intended but, first, to construe the plain language of the statutory provision at issue and only then, in the excep-

ILI US Digest/3 195 1/8/02, 1:45 PM

tional case, to ascertain whether the actual evidence of legislative history clearly defeats a literal reading of the statute's terms. *See, e.g., Ardestani v. INS,* 502 U.S. at 135-36 (language of statute "rebutted only in rare and exceptional circumstances when a contrary legislative intent is *clearly expressed"*) (emphasis added; internal quotations and citations omitted); *Greene v. United States*, 79 F.3d at 1356 (must be strong "evidence" of contrary legislative history).

As rare as it may be for the United States to enter into a treaty with a sub-sovereign foreign government, nothing in the legislative history of Section 3184 suggests that Congress intended to exclude such an arrangement.[1] Moreover, the district court's interpretation of the statute serves no apparent purpose or policy underlying Section 3184. *See Roadway Express, Inc.v. Piper,* 447 U.S. 752, 761 (1980) (rejecting argument to expand meaning of "costs" in litigation award statute where not supported by legislative history and "statutory interpretation proposed by

[1]The text of the initial version of Section 3184 as passed on August 12, 1848, is included in the Joint Appendix. [JA 23-24] The government's research of the scant legislative history of the 1848 enactment has revealed only a single statement by one of its sponsors, which does not reveal any purpose to restrict the capacity of the United States' treaty partners but rather to create a mechanism for regularized review procedures of surrender requests by any treaty partner for fugitives found within the United States:

> Cases were familiar to everybody which showed that it was necessary to enlarge the facilities to comply with our obligations. It often happened that an individual came to this country where the crime was obvious, and the application for the fugitive regular; but there were no such officers in the part of the country where the fugitive was found as were authorized or were willing to take on themselves the burden and weighty responsibility of issuing a warrant to arrest and to take the preliminary proceedings toward handing over the individual to the properly authorized officer. The object of this bill was to appoint officers and to authorize others to carry out the provisions of the treaties with France and England, at all times, without delay and the danger of a denial of justice.

The Congressional Globe at 868 (June 23, 1848) (statement of Rep. J.R. Ingersoll) [JA 25] *See also United States v. Mackin,*668 F.2d 122, 134-35 (2d Cir. 1981) (Friendly, J.) (describing historical practice near time of enactment of § 3184); Jacques Semmelman, Federal Courts, The Constitution, and the Rule of Non-Inquiry in Extradition Proceedings, 76 Corn. L. Rev. 1198, 1206-08 (1991) (discussing history of statute).

ILI US Digest/3 196 1/8/02, 1:45 PM

[party] not only runs counter to the apparent intent of Congress in 1813 and 1853, but also could introduce into the statute distinctions unrelated to its goal"). Where the President and the Senate have independently satisfied themselves that a particular foreign government is a competent extradition treaty partner, there is no reason to suppose that the Congress of 1848 endeavored to disable the United States from complying with its future treaty obligations.

2. The Hong Kong Policy Act Further Confirms The Scope of Section 3184 to Include This Case

Even assuming uncertainty in the language of Section 3184, any ambiguity must be construed in favor of the treaty, in light of the Hong Kong Policy Act, an enactment designed in part to prevent the disruption of the type of legal ruling issued by the district court in this case. "Subsequent legislation which declares the intent of an earlier law is not, of course, conclusive in determining what the previous Congress meant, [b]ut the later law is entitled to weight when it comes to the problem of construction." *Federal Housing Admin. v. Darlington, Inc.,* 358 U.S. 84, 90 (1958); *accord United States v. Stafoff,* 260 U.S. 477, 480 (1923).

The Hong Kong Policy Act bears on this case in two respects. First, in order to encourage Hong Kong's autonomy, it expresses a strong preference for direct bilateral agreements between the United States and the Government of Hong Kong. It not only acknowledges "the ability of the Hong Kong Special Administrative Region to conclude new agreements either *on its own* or with the assistance of the Government of the People's Republic of China," 22 U.S. C. 5701(1)(E) (emphasis added), but also that "[t]he United States should actively seek to establish and expand direct bilateral ties and agreements with Hong Kong in…appropriate areas." 22 U.S.C. § 5711(2). Here, the district court required that the United States have entered into a treaty directly with the PRC or not at all. [JA 11] Such a requirement is diametrically opposed to the purpose of Congress in enacting the Hong Kong Policy Act.

Second, the Act provides that "the laws of the United States *shall continue to apply* with respect to Hong Kong, on and after July 1, 1997, in the same manner as the laws of the United States were applied with respect to Hong Kong before such date." 22 U.S.C. § 5721(a) (emphasis added); *see* 22 U.S.C. § 5702(3) (defining "laws of the United States" to mean domestic statutes). In other words, the Act provides that domestic statutes – such as Section 3184 – must apply in the same manner to

ILI US Digest/3 197 1/8/02, 1:45 PM

Hong Kong as it did prior to reversion and without regard to Hong Kong's new political status. *See United States v. Stafoff,* 260 U.S. at 480 (Holmes, J.) (giving effect to later-enacted statute that provided in relevant part that penalties under an earlier statute "shall be to continue in force", noting that "[t]he form of words is not material when Congress manifests its will that certain rules shall govern henceforth").

Dismissing consideration of the Hong Kong Policy Act, the district court stated that "[t]he Policy Act itself is not a treaty and does not authorize extradition." [JA 10] But this observation, while true, is irrelevant – the Government never argued that the Policy Act was itself a treaty or that it independently conferred power to surrender fugitives to Hong Kong. Next, the district court speculated that "it may be argued that the Policy Act implicitly repealed § 3181," and then the court also rejected this possibility. [JA 10] Again, the Government never argued that the Hong Kong Policy Act "repealed" Section 3181, much less that it appealed the relevant statute at hand, Section 3184. Rather, the Hong Kong Policy Act confirms the authority of the United States to enter into agreements directly with the Government of Hong Kong and makes clear that domestic laws (such as Section 3184) shall continue to apply in the same manner as they did before to post-reversion Hong Kong.

3. Section 3184 Should Be Construed in a Manner that Does Not Impede the Conduct of Foreign Affairs

If upheld, the district court's decision will create a significant negative impact on the foreign relations of the United States in a manner that is at odds with the will of Congress and the Executive Branch. Not only does it effectively nullify the action of the President and Senate in entering into the treaty, but it leaves the United States in violation of its international obligations.

In construing the term of a domestic statute, the Supreme Court has recognized that a statute should be construed, if possible, in a manner that does not inhibit the nation's conduct of its foreign relations. In *Weinberger v. Rossi,* 456 U.S. 25, 31 (1982), the Supreme Court considered the enforceability of certain U.S.-Philippine "executive agreements" that required preferential employment of Philippine nationals at U.S. military bases in the Philippines. By statute, Congress had prohibited employment discrimination against United States citizens at overseas military bases, except in the presence of a contrary "treaty".

ILI US Digest/3 198 1/8/02, 1:45 PM

Thus, in the Supreme Court's words, "[t]he question in this case is whether 'treaty' includes executive agreements concluded by the President with the host country, or whether the term is limited to those international agreements entered into by the President with the advice and consent of the Senate." *Id* at 25. The Court declined to adopt a restrictive interpretation of the statutory term "treaty", reasoning in part the "[i]n the case of a statute … that does touch upon the United States' foreign policy, there is even more reason to construe Congress' use of 'treaty' to include international agreements as well as Art. II treaties." *Id.* at 31.

In a similar manner, the Supreme Court has made clear that any ambiguity in the terms of an extradition treaty should be liberally construed in favor of its enforceability:

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to affect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.

Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933). Although *Factor* concerns the interpretation of an extradition treaty and not an extradition statute, the Court should conclude that this principle has equal application to the interpretation of a statute implementing the enforcement of the United Sates' extradition treaty obligations.

In light of such policy of liberal construction in the foreign affairs context, the courts have repeatedly approved the surrender of fugitives to certain foreign countries despite the fact that the United States did not directly negotiate an extradition treaty with the requesting country. *See, e.g., Terlinden v. Ames,* 184 U.S. 270, 288 (1902) (enforcing

ILI US Digest/3 199 1/8/02, 1:45 PM

extradition to successor German Republic despite fact that treaty was negotiated with Kingdom of Prussia); *U.S. ex rel. Saroop v. Garcia,* 109 F.3d 165, 171-173 (3d Cir. 1997) (enforcing extradition to U.S. from independent Trinidad and Tobago, despite fact that underlying treaty was negotiated with Great Britain that at the time treaty was negotiated controlled Trinidad and Tobago as colony); *Then v. Melendez,* 92 F.3d 851, 853-54 (9th Cir. 1996) (enforcing extradition from U.S. to independent Singapore, despite fact that underlying treaty was negotiated with Great Britain).

Moreover, in a different statutory context, this Court has deemed the former United Kingdom colony of Hong Kong to be no less than a foreign "country" for purposes of the Immigration and Nationality Act, noting that "[t]he word "country" has no fixed meaning, and should be construed in accordance with the purpose of the particular legislation":

> Section 243(a) (7), in authorizing deportation 'to any country which is willing to accept such alien into its territory,' is obviously intended to avoid arbitrary restrictions on the places to which a deportable alien may be sent. In line with the general Congressional policy of facilitating the deportation of deportable aliens,… we think that any place possessing a government with authority to accept an alien deported from the United States can qualify as a 'country' under the statute. *Whatever the distribution of power between Hong Kong's local, partially autonomous government and Great Britain, Hong Kong is a 'country' under the above definition.*

Chuen v. Esperdy, 285 F.2d 353, 354 (2d Cir. 1960) (*per curiam)* (emphasis added). In the same manner, whatever the distribution of power between the Government of Hong Kong and the PRC today, the Government of Hong Kong qualifies as "any foreign government" under the extradition statute. Even assuming that the extradition statute in this case were construed to require a "foreign country" treaty partner, the policy of liberal construction would warrant the conclusion that the treaty with the Government of Hong Kong is with a foreign country.

ILI US Digest/3 200 1/8/02, 1:45 PM

4. Section 3184 Should Be Construed in a Manner that Does Not Raise a Significant Constitutional Question

A statute should be construed "'to avoid constitutional questions where such a construction is reasonably possible.'" *Triestman v. United States,* 124 F.3d 361, 377 (2d Cir. 1997) (quoting *Arnett v. Kennedy,* 416 U.S. 134, 162 (1974)). In construing Section 3184, the Court should not presume that Congress intended to place unstated and unprecedented limitations on the President's constitutional authority to choose a treaty partner.

Finding fault with the choice of a treaty partner in this case, the district court observed that "[f]or whatever reason no treaty regarding extradition has been executed directly with the PRC." [JA 11] But the Constitution does not commit to individual judges the power to select or veto the President's choice of with whom or with what form of foreign government the United States shall deal. "'The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—"the political"—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.'" *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759, 766 (1972) (quoting *Oetjen v. Central Leather Co.,* 246 U.S. 297, 302 (1918)).

More specifically, "[w]ho is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government." *Jones v. United States,* 137 U.S. 202, 212 (1890). *See also Williams v. Insurance Co.,* 38 U.S. (13 Pet.) 415, 420 (1839) ("Can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department"); *Can v. United States,* 14 F.3d 160, 162 (2d Cir. 1994) ("It is firmly established that official recognition of a foreign sovereign is solely for the President to determine, and 'is outside the competence' of courts") (quoting and citing cases).

Because the choice of a treaty partner is intimately connected with the question of recognition of a foreign government, which is a sole Executive Branch function, the choice of treaty partner must be subject

ILI US Digest/3 201 1/8/02, 1:45 PM

to great judicial deference. The reference to "any foreign government" in Section 3184 is, on its face, consistent with this constitutional principle, leaving open to the President and, where appropriate, the Congress, to determine which is the relevant foreign government to deal with and how. In the instant case, this determination was made in the context of complex foreign policy objectives that take into account both the autonomy of Hong Kong and the authority and sovereignty of the PRC. For this reason, in order to avoid a substantial constitutional question in this case, the Court should interpret Congress's reference to "any foreign government" in Section 3184 to have committed to the discretion of the political branches – not the judiciary – the determination of who constitutes the relevant "foreign government" treaty partner.

5. Even assuming that Section 3184 required that the Treaty Be With a Central Foreign government, This Condition Is Satisfied in This Case

Finally, even assuming that Section 3184 were construed to require that an extradition treaty be concluded only with a central foreign government, the PRC's role in the negotiation and conclusion of the treaty is sufficient to satisfy such a requirement in this case. The preamble to the treaty states that Hong Kong enters into it with the authorization of "the sovereign government which is responsible for its foreign affairs." [JA 50] The PRC authorized the treaty negotiations from the beginning, later approved the final text of the agreement, and ultimately confirmed its approval of the agreement through formal diplomatic note.[2] *See* Senate Report at 2 [JA 73].

[2]The express authorization and confirmation of the Treaty by the PRC was important in order to establish that it was entered into with the consent and under the sovereign authority of the PRC, and that not only the Government of Hong Kong, but also the PRC national government, within the limits of its authority, was bound to respect the obligations established under the treaty as well. Indeed, the PRC enjoys certain limited rights under the Treaty. For example, "in recognition of the role of the PRC as the sovereign responsible for Hong Kong's foreign affairs and defense," the U.S. agreed to give Hong Kong the right to refuse extradition when surrender would implicate the "defense, foreign affairs, or essential public interest or policy" of the sovereign. *See* Treaty, Art. 3, ¶ 3[JA 54]; Senate Report at 14, 61 [JA 79,102]. The PRC's role as the ultimate sovereign is reflected in the State Department publication *Treaties in Force,* which lists agreements with Hong Kong under China.

ILI US Digest/3 202 1/8/02, 1:45 PM

Summarily dismissing the PRC's express authorization of the treaty, the district court stated only the "[a]fter the fact approval of the agreement . . . does not convert this Agreement into one directly with the PRC, as the statute requires." [JA 9] Apart from incorrectly characterizing PRC approval as merely "after the fact", this explanation further assumes that a treaty must not only be with the central government of a foreign country but must be no less than "directly" with such government. Such formalistic distinctions find not the remotest support in the statutory language and should be rejected.

* * * *

4. Surrender for Trial in Internatonal Criminal Tribunal for Rwanda: *Ntakirutimana v. Reno*

Elizaphan Ntakirutimana was surrendered by the United States to the International Criminal Tribunal for Rwanda in Arusha, Tanzania on March 24, 2000 to stand trial on charges of genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto, allegedly committed in Rwanda in 1994. With certain exceptions, extradition by the United States is governed by the requirement for a "treaty of extradition with [a] foreign government" contained in 18 U.S.C. § 3181(a). Mr. Ntakarutimana's case was the first surrender by the United States to an international tribunal, rather than to a foreign government, under the authority provided by Pub. L. 104-106, Div. A, Title XIII, § 1342, set out in the note following 18 U.S.C § 3181. Reliance on the newly enacted basis for surrender to international tribunals gave rise in this instance to protracted litigation over a period of three-and-a-half years, requiring two requests for surrender by the Tribunal. The litigation was resolved on January 24, 2000 when the U.S. Supreme Court denied certiorari from a

ILI US Digest/3 203 1/8/02, 1:45 PM

decision by the Court of Appeals for the Fifth Circuit affirming an order of the district court denying Mr. Ntakirutimana's petition for a writ of habeas corpus. *Ntakirutimana v. Reno,* 184 F.3d 419 (5th Cir. 1999), *cert. denied,* 528 U.S. 1135 (2000). The history of the case and the views of the United States are provided in the excerpts that follow from the Brief for the Federal Respondents in Opposition to the writ of certiorari, filed in November 1999.

The full text of the brief is available at *www.state.gov/s/l.*

STATEMENT

The United States seeks to surrender applicant to the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations committed in the Territory of Neighboring States (the International Tribunal for Rwanda). The United States has entered into an executive agreement providing for surrender of persons sought by the Tribunal, *see* Pet. App. A145-A149, and Congress has enacted implementing legislation providing that persons so sought may be surrendered to the Tribunal in accordance with the provisions of 18 U.S.C. 3181 *et seq.,* which prescribes procedures for extradition. *See* Pub. L. No. 104-106, Div. A, Tit. XIII, § 1342, 110 Stat. 486-487.

On April 6, 1994, the President of Rwanda, Juvenal Habyarimana, died in an airplane crash. The crash triggered civil unrest, including attacks primarily by members of the Hutu majority on members of the Tutsi minority, which ultimately led to the deaths of more than 500,000 persons. Pet. App. A2-A3, A76-A77. Acting pursuant to its authority under Chapter VII of the United Nations Charter, the United Nations Security Council adopted Resolution 955, which establighed the International Tribunal for Rwanda. *Id.* at A127. Resolution 955 provides that member states of the United Nations shall "cooperate fully with the International Tribunal and its organs in accordance with the present reso-

ILI US Digest/3 204 1/8/02, 1:45 PM

lution and the Statute of the International Tribunal." *Id.* at A128. The Resolution contains an Annex setting out the Statute of the Tribunal, which specifies the Tribunal's procedures and defines the offenses subject to its jurisdiction. *Id.* at A129-A144. Article 28 of that Statute specifically directs the member states of the United Nations to surrender or transfer accused individuals to the Tribunal. *Id.* at A143.

The United States participated as a member of the Security Council in the formulation of Resolution 955 and supported its adoption. The United States thereafter entered into an executive agreement with the International Tribunal governing the surrender of persons sought by the Tribunal, Pet. App. A145-A149, and Congress enacted legislation to implement the agreement, *id.* at A150-A152. *See* Pub. L. No. 104-106, Div. A, Tit. XIII, § 1342, 110 Stat. 486. Section 1342(a), which is set out in the note following 18 U.S.C. 3181 (Supp. IV 1998), provides:

> (a) SURRENDER OF PERSONS
>
> (1) APPLICATION OF UNITED STATES EXTRADITION LAWS – Except as provided in paragraphs (2) and (3), the provisions of chapter 209 of title 18, United States Code [18 U.S.C. 3181 *et seq.*], relating to the extradition of persons to a foreign country pursuant to a treaty or convention for extradition between the United States and a foreign government, shall apply in the same manner and extent to the surrender of person, including United States citizens, to –
>
> (A) The International Tribunal for Yugoslavia, pursuant to the Agreement Between the United States and the International Tribunal for Yugoslavia; and
>
> (B) The International Tribunal for Rwanda, pursuant to the Agreement Between the United States and the International Tribunal for Rwanda.

Section 1342(a) of Public Law 104-106 thus directs that the United States shall employ the provisions of the United States Code governing extradition to foreign nations, 18 U.S.C. 3181 *et seq.,* when surrendering individuals to the International Tribunal. Section 3184 (Supp. IV 1998) of those laws provides in pertinent part:

> Whenever there is a treaty or convention for extradition …, any justice or judge of the United States, or any magistrate authorized so to do by a court of the

ILI US Digest/3 205 1/8/02, 1:45 PM

> United States, … may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for …, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered.…If, on such hearing, he deems the evidence sufficient … he shall certify the same … to the Secretary of State, that a warrant may issue … for the surrender of such person …

Section 3184 accordingly makes clear that if the International Tribunal submits a request for surrender, the matter is presented to a United States judicial officer. If the judicial officer finds the evidence sufficient to justify surrender, the judicial officer shall so certify that finding to the Secretary of State for her final discretionary determination whether to sign the surrender warrant. *See*, *e.g., United States v. Lui Kin-Hong,* 110 F.3d 103, 109-110 (1st Cir.), stay denied, 520 U.S. 1206 (1997).

2. The International Tribunal's prosecutors have discovered evidence that petitioner, a Hutu who was the President of the Seventh Day Adventist Church in Rwanda, participated in two separate episodes of genocide arising out of events at a church complex in Mugonero, Rwanda (the Mugonero Complex) and in the Bisesero region of Rwanda. The prosecutors have prepared two indictments. The Tribunal has separately confirmed each indictment and issued a warrant for petitioner's arrest. *See* Pet. App. A44-A45.[3]

On June 20, 1996, the Tribunal confirmed the first indictment, which charges petitioner and others (including one of petitioner's sons, who was a doctor at the Complex) with genocide, complicity in genocide, conspiracy, and three separate crimes against humanity (murder of civilians, extermination of civilians, and inhuman acts), in violation of the

[3] Under Tribunal procedures, a prosecutor prepares the indictment and presents it, with supporting materials, to a Tribunal judge. The judge has the responsibility to confirm that the prosecutor established a prima facie case for each count.

ILI US Digest/3 206 1/8/02, 1:45 PM

Statute of the Tribunal. The indictment alleges that, following the death of Rwanda's president, petitioner encouraged fearful Tutsis to take refuge at the Mugonero Complex. There, Hutus were separated out from the assembled persons and encouraged to leave. On April 16, 1994, a convoy of armed attackers, including petitioner, came to the Complex and systematically killed or injured hundreds of Tutsis assembled there. Pet. App. A4-A5.

On September 7, 1996, the Tribunal confirmed a second indictment charging petitioner and his son with genocide, complicity in genocide, conspiracy to commit genocide, and other crimes, all in violation of the Statute of the Tribunal. That indictment describes events that occurred in the Bisesero region of Rwanda. Pet. App. A5. The indictment alleges that, between mid-April and June 1994, petitioner joined convoys of armed soldiers and civilians who repeatedly searched for and attacked Tutsis, including some survivors of the Mugonero massacre, seeking refuge in the Bisesero region.

The International Tribunal's evidence consists of the statements of ten citizen eyewitnesses (summarized by the extradition judge, *see* Pet. App. A77-A79, A104-A112) who saw petitioner and his son participating in or planning the attacks, and two additional witnesses who saw petitioner's car or the car belonging to his son at the locations of the attacks. Gov't C.A. Br. 30-31. The witnesses knew petitioner personally or were familiar with him because of his position with the church. *Id.* at 7, 30. None of the witnesses received money or other consideration for his evidence. *Ibid.* Their statements described petitioner's participation in the April 16 massacre at the Mugonero Complex. According to the witnesses' testimony, petitioner had encouraged Tutsis to seek refuge at the Complex following the onset of violence. After their arrival, petitioner told Tutsis who sought his protection that the response would come by 9am (when the massacre began), that they were "condemned to die," and that he could not save them. Petitioner's son, director of the Mugonero Complex hospital, separated Hutu patients, who left the hospital before the attacks began. On the morning of April 16, armed convoys arrived and attacked the Tutsis throughout the day. Witnesses stated that petitioner planned and actively participated in the attack, and one heard petitioner urge "kill them all." Pet. App. A78, A104-A105, A106, A108, A109, A110-A111; *see also* Gov't C.A. Br. 8, 30-31.

The evidence also established petitioner's role in activities charged in the second indictment, which had resulted in the deaths of hundreds

ILI US Digest/3 207 1/8/02, 1:45 PM

of Tutsis. Witnesses saw petitioner and his son driving armed attackers to the Bisesero region where Tutsis were hiding. Petitioner provided food and drinks to the attackers and instructed them to kill Tutsis. Witnesses saw petitioner carrying a weapon, and one witness reported having seen petitioner personally shooting at Tutsis. Pet. App. A78-A79, A107, A110; Gov't C.A. Br. 8-9, 31. In one incident, petitioner told attacking soldiers to remove the roof of a church in which Tutsis were hiding "so that it cannot be used as a hiding place for the Tutsi 'dogs'." Pet. App. A79; *see id.* at A107, A110.

3. On October 18, 1996, the United States filed a request on behalf of the International Tribunal for petitioner's surrender to the Tribunal. The magistrate judge denied the surrender request on two grounds. Pet. App. A113-A126. First, he concluded that the statute authorizing surrender to the Tribunal was unconstitutional in the absence of a treaty, reasoning that the surrender of individuals to a foreign power requires a treaty ratified by the President and approved by two-thirds of the Senate. *Id.* at A117-A121. He also found that the Tribunal's request did not establish probable cause. *Id.* at A121-A125.

Because decisions granting or denying certification of extraditability are not appealable, *see In re Extradition of Mackin,* 668 F.2d 122 (2d Cir. 1981), the International Tribunal submitted a renewed surrender request and provided additional evidence of probable cause. *See* Pet. App. A46-A49. That request added two new declarations in response to the magistrate judge's concerns about the sufficiency of the evidence. *Id.* at A76. At a surrender hearing conducted by a district judge, petitioner renewed his constitutional objections and again challenged the Tribunal's evidence of probable cause. Petitioner conceded that the evidence on its face was sufficient to establish probable cause to hold him for surrender (June 17, 1998 Tr. 32-33), but he contended that the evidence was not reliable because the witnesses or the translators could have had reasons to fabricate their statements and the translators might not have been competent. *See* Pet. App. A81-A86.

The district judge considered petitioner's objections at length, Pet. App. A43-A102, and ultimately certified that petitioner was subject to surrender, *id.* at A103. The judge concluded that the Constitution does not require that the United States employ a treaty to surrender a person to a foreign tribunal. The United States can also effect a surrender by means of an executive agreement to which Congress has expressed its assent through implementing legislation. *Id.* at A59-A74. The district

ILI US Digest/3 208 1/8/02, 1:45 PM

judge carefully evaluated the Tribunal's evidence of petitioner's involvement in the charged crimes and petitioner's challenges to the evidence. *Id*. at A75-A86. He concluded that the evidence was sufficient to establish probable cause, *id*. A86-A98, and he rejected petitioner's speculative challenges that the witness statements and the translations lacked sufficient indicia of reliability, *id.* at A98-A101.

Petitioner sought review of the decision certifying his surrender through a petition for habeas corpus, which is the normal avenue for seeking relief from an order certifying extraditability. The district court denied the habeas corpus petition. Pet. App. A40-A42. Petitioner appealed, and the court of appeals affirmed. It first rejected petitioner's claim that the Constitution requires that his surrender be effected only by treaty. *Id*. at A7-A13. The court of appeals ruled that the Constitution does not explicitly require a treaty for extradition or require a treaty in lieu of any other form of international agreement. *Id.* at A8, A11-A12. It noted that this Court has stated that the Executive's authority to extradite may derive from a treaty or a statute. *Id.* at A8-A10, A12 (citing, *e.g., Valentine v. United States ex rel. Neidecker,* 299 U.S. 5, 9 (1936)). The court of appeals additionally ruled that historical practice did not demonstrate that an extradition treaty is constitutionally required, and it rejected petitioner's other constitutional arguments. *Id.* at A12-A13.

The court of appeals also rejected petitioner's contention that the Tribunal's evidence was insufficient to establish probable cause to believe that petitioner committed the charged crimes. Pet. App. A14-A17. It declined to revisit the district judge's credibility findings or his rejection of petitioner's argument that the translators could have been biased or incompetent. *Id.* at A18-A20. The court of appeals also declined to reach petitioner's contentions that the United Nations lacked the authority to establish the Tribunal and that the Tribunal cannot guarantee petitioner a fair trail. *Id.* at A20-A21.[4]

[4]A concurring judge expressed his doubts about the persuasiveness of the evidence that the Tribunal had produced to demonstrate petitioner's complicity in the charged crimes and urged the Secretary of State to scrutinize the evidence closely when deciding whether to sign the surrender warrant (Pet. App. A21-A22). The third judge dissented, expressing the view that Pub. L. No. 104-106, Section 1342 (a), is unconstitutional (Pet. App. A22-A39).

ILI US Digest/3 209 1/8/02, 1:45 PM

ARGUMENT

Petitioner seeks this Court's review of four contentions: (1) the Constitution forbids the United States from surrendering an individual to stand trial in a foreign tribunal unless the surrender is accomplished pursuant to a treaty to which the Senate has given its advice and consent (Pet. 4-17); (2) in certifying that petitioner is subject to surrender, the district court employed an incorrect measure of probable cause (Pet. 17-20); (3) the United Nations lacked authority to create the International Tribunal (Pet. 21-26); and (4) the International Tribunal cannot adequately protect petitioner's due process rights (Pet. 26-30). The court of appeals correctly rejected those contentions. Its decision, which is not in conflict with any decision of this Court or another court of appeals, does not present any issue warranting this Court's review.

1. Petitioner contends (Pet. 4-17) that the Constitution bars the United States from surrendering an individual to stand trial in a foreign tribunal unless the United States bases its legal authority to accomplish the surrender on a treaty made by the President with the advice and consent of the Senate. The court of appeals properly rejected that claim. As the court noted, "the power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers." Pet. App. A8 (quoting *Terlinden v. Ames,*184 U.S. 270, 289 (1902)). But as that court further explained (*id.* at A8-A11), the United States may also derive its authority to surrender an individual from legislation authorizing that action. *See Valentine v. United States ex rel. Neideckder,* 299 U.S. 5, 9 (1936); *Grin v. Shine, 187 U.S. 181, 191 (1902); Terlinden,* 184 U.S. at 289.

The Court stated in *Valentine* that the Executive Branch must have legal authorization to exercise the "national power" of extradition, but such authorization can be in the form of a treaty or a statute:

> [T]he constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of

ILI US Digest/3 210 1/8/02, 1:45 PM

> Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

Valentine, 299 U.S. at 9. Accord *Grin,* 187 U.S. at 191 ("Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient."); *Terlinden,* 184 U.S. at 289 ("In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision."); cf.*In re De Giacomo,*7 F. Cas. 366, 370 (S.D.N.Y. 1874) No. 3747 (Blatchford, J.) ("if there be any want of power to deliver [the fugitive] up, it must be found in a constitutional restriction upon the power to make a treaty, or to pass a statute, covering extradition for a crime previously committed"). Although the court's decisions in *Valentine, Grin,* and *Terlinden* did not involve challenges to legislation authorizing extradition, the court's reasoning in those decisions correctly states the controlling legal principle on that subject, and no court of appeals has reached a contrary conclusion. *See* Pet. App. A59-A74 (decision of the district judge comprehensively discussing the issue).

The court of appeals correctly rejected petitioner's argument that historic practice requires the use of a treaty to surrender individuals to stand trial abroad. *See* Pet. App. A12-A13. The United States has traditionally employed treaties as a means of providing for extradition, but that practice does not preclude the government from undertaking an executive agreement to be implemented pursuant to a statute as a mechanism for effecting surrender. This court's decisions in *Valentine, Grin,* and *Terlinden* reflect the historical understanding that Congress may authorize surrender through legislation. Indeed, as early as 1821, the Attorney General had expressed the same view. *See* 1 Op. Att'y Gen. 509, 521 (1821) ("A treaty or an act of Congress might clothe [the President] with the power to arrest and deliver up fugitive criminals from abroad.").

In this case, the President has determined that the United States should assist the International Tribunal in identifying those responsible for committing atrocities in Rwanda, and has authorized an executive agreement setting out the terms under which such assistance shall be provided. *See* Pet.

ILI US Digest/3 211 1/8/02, 1:45 PM

App. A145-A149.[5] Congress has expressly endorsed that course of action through implementing legislation. *See id.* at A150-A152. "When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" *Dames & Moore v. Regan,* 453 U. S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co.v. Sawyer,* U.S. 579, 637 (1952) (Jackson, J., concurring)).

2. Petitioner contends (Pet. 17-20) that the Court should grant review to determine whether judicial officers should evaluate requests for extradition under the same "totality of the circumstances" test for probable cause that judicial officers employ in other law enforcement contexts. *See Illinois v. Gates,* 462 U.S. 213, 238-240 (1983); *see also Gerstein v. Pugh*, 420 U.S. 103, 120-122 (1975). There is no need for such review, as it is settled that the probable cause standard that a judicial officer applies in extradition proceedings is the same probable cause standard that a judicial officer applies in other contexts. *See* Pet. App. A14, A75, A86-A87; *Fernandez v. Phillips,* 268 U.S. 311, 312 (1925) (Holmes, J.); *Charlton v. Kelly,* 229 U.S. 447, 459-460 (1913); *Glucksman v. Henkel,* 221 U.S. 508, 512 (1911); *Benson v. McMahon,* 127 U.S. 457, 462-463 (1888); *Lopez-Smith v. Hood,* 121 F.3d 1322, 1324 (9th Cir. 1997); *Bovio v. United States,* 989 F.2d 255, 258-259 (7th Cir. 1993); *Escobedo v. United States,* 623 F.2d 1098, 1102 n.5 (5th Cir.), cert. denied, 449 U.S. 1036 (1980).[6]

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[5] This Court has long upheld the President's power under the Constitution to enter into executive agreements with foreign powers. *See*, *e.g., United States v. Pink,* 315 U.S. 203, 228-230 (1942); *B. Altman & Co. v. United States,* 224 U.S. 583, 601 (1912); *Field v. Clark,* 143 U.S. 649 (1892).

[6] The district judge noted that, when conducting the probable cause inquiry, judicial officers have not followed a uniform rule respecting the admission of evidence challenging the credibility of the requesting state's witnesses. *See* Pet. App. A89-A93. There is no "uniform rule" because judicial officers have discretion to consider evidence submitted by the defendant "explaining matters referred to by the witnesses for the Government." *Charlton,* 229 U.S. at 461. This Court's recognition that magistrates have discretion to consider such evidence is consistent with the Court's guidance, in other contexts, respecting the probable cause inquiry. *See*, *e.g., Gates,* 462 U.S. at 232 ("proable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules"); *Gerstein,* 420 U.S. at 120 (noting that probable cause "traditionally has been decided by a magistrate in a non-adversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof").

ILI US Digest/3 212 1/8/02, 1:45 PM

The district judge in this case considered the totality of the circumstances in concluding that there was probable cause to believe that petitioner had committed the charged offenses. *See* Pet. App. A75-A86. The district judge not only evaluated the evidence that the government offered, *id.* at A75-A80, but he also considered petitioner's challenges to its reliability, *id.* at A80-A86. The district judge concluded that the statements of the witnesses were reliable, noting in particular that the witnesses were ordinary civilians, they were not informants and had not been rewarded for their evidence, their various accounts were generally consistent, and the Tribunal's investigator was able to corroborate many of their statements. *See id.* at A77-A80, A96-A101.

The district judge found no reason to discount the ability or impartiality of the interpreters. He observed that the Tribunal's investigator used the same interpreters, observed their performance during the interview, and was generally able to converse with witnesses through those interpreters. *See* Pet. App. A99-A100. Moreover, one of the witnesses who strongly incriminated petitioner gave his statement in French without interpretation. *Ibid.* In light of those circumstances, the district judge was entirely justified in rejecting petitioner's suppositions, without any supporting evidence, that the witnesses lied or that the translators could not be trusted. Instead, he properly concluded that the petitioner's "litany of questions and speculations" were issues for cross-examination at the criminal trial. *Id.* at A98-A99. There is no basis for further review of that decision.

3. Petitioner contends (Pet. 21-26) that the United Nations Security Council lacks the authority under the United Nations Charter to establish the International Tribunal. The courts below properly declined to reach that issue. *See* Pet. App. A20-A21, A101-A102. In any event, there is no merit to petitioner's claim.

We note at the outset that the United States, as a member of the United Nations and signatory to the Charter, recognizes the Security Council's authority to create the Tribunal. Indeed, the United States, a permanent member of the Security Council, voted to establish it. The United Nations General Assembly, which includes all member states that ratified the Charter setting out the United Nations' authority, similarly signified its agreement that the Security Council has the authority to create the Tribunal by electing the Tribunal's judges and appropriating funds for the Tribunal's operations. *See* Gov't C.A. Br., Addendum E at 4 & n.14. As this Court has observed, "[t]he practice of

ILI US Digest/3 213 1/8/02, 1:45 PM

treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *United States v. Stuart,* 489 U.S. 353, 369 (1989).

But more fundamentally, the question whether the United Nations properly exercised its authority in creating the Tribunal is not a matter for the courts to decide. The Executive and Legislative Branches of the United States have clearly accepted the United Nations' authority to create the International Tribunal by virtue of their respective decisions to enter into an executive agreement and implementing legislation facilitating the Tribunal's operation. The district judge properly deferred to the political judgment, finding the issue was beyond the reach of the court. He explained (Pet. App. A101-A102):

> [T]he Court will not engage in this inquiry any more than it would engage in an inquiry of whether a foreign sovereign's courts were properly authorized under its own constitution. *See Terlinden,* 184 U.S. at 289 ("It would be impossible for the Executive Department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its Constitution and laws, to make the engagements into which he entered.")

The court of appeals concurred in that judgment. *Id.* at A20-A21. Just as the Executive Branch has authority, to the exclusion of the Judicial Branch, to recognize the territorial and legal sovereignty of a foreign government, the Executive Branch likewise has authority to pass on the legitimacy of a body established by the United Nations.[7] It would be an

[7] *See Baker v. Carr,* 369 U.S. 186, 212 (1962) (recognition of foreign governments so strongly defies judicial treatment that … the judiciary ordinarily follows the executive as to which nation has sovereignty"); *Can v. United States,* 14 F.3d 160, 163 (2d Cir. 1994)("It is firmly established that official recognition of a foreign sovereign is solely for the President to determine, and 'is outside the competence' of courts.") (citing cases).

ILI US Digest/3 214 1/8/02, 1:45 PM

unwarranted departure from the Judicial Branch's traditional restraint if the courts attempted to supervise the decisions of the United Nations or to confine the United Nations to what they believe to be its lawful jurisdiction, for such actions would directly interfere with the Executive Branch's conduct of foreign relations.

4. Finally, petitioner contends (Pet. 26-30) that the courts should not have certified his surrender to the Tribunal because, in petitioner's view, the Tribunal cannot protect his fundamental rights. There is no legal or factual basis for that claim.

It has long been established that even "[w]hen an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people." *Neely v. Henkel,* 180 U.S. 109, 123 (1901). It is also well settled in extradition law that a United States court cannot inquire into the fairness of the requesting state's processes:

> Under the rule of non-inquiry, courts refrain from 'investigating the fairness of a requesting nation's justice system,' and from inquiring 'into the procedures or treatment which await a surrendered fugitive in the requesting country.' The rule of non-inquiry, like extradition procedures generally, is shaped by concerns about institutional competence and by notions of separation of powers. It is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings to whom these questions are more properly addressed

*United States v. Lui Kin-Hong,*110 F.3d at 110-111 (citations omitted). Those principles are fully applicable to the International Tribunal, created by the Security Council with the support of the United States, which has requested petitioner's surrender in this case.

As a factual matter, the rights of the accused before the Tribunal, which are explicitly provided in the Statute of the Tribunal (Pet. App. A140-A141), meet international norms (*see* Gov't C.A. Br., Addendum E at 5) and protect the ability of a person accused by the Tribunal to receive a fair

trail. Petitioner alleges that, in fact, the Tribunal is dysfunctional and, because of the political situation in Africa, unable to guarantee the rights set out in the statute. There is nothing in the record to suggest, however, that the Tribunal would be unable or unwilling to afford him a fair trail.

In any event, petitioner's allegations do not provide grounds for a court to deny certification for surrender. The extradition statute, 18 U.S.C. 3184 (Supp. IV 1998), specifies what may be considered in an extradition proceeding, and it does not include such things as adequacy of the institutions in the requesting forum. As the district court properly found (Pet. App. A102), the issues that the petitioner has raised in the judicial forum, including his allegations respecting whether the Tribunal will follow the law or will protect his rights, are factors to be considered by the Secretary of State as part of her "exclusive power to conduct foreign affairs." *In re Extradition of Manzi,* 888 F.2d 204, 206 (1st Cir. 1989), cert. denied, 494 U.S. 1017 (1990) (citing cases). Following certification that there is sufficient "evidence of criminality" to warrant surrender, the Secretary of State will review whatever humanitarian claims petitioner may raise and will make a final determination whether surrender is warranted.

CROSS-REFERENCE

Judicial assistance in criminal matter in China in **2.C.3.** *United States v. Jones*

B. TERRORISM AND OTHER INTERNATIONAL CRIMES

1. International Convention for the Suppression of the Financing of Terrorism

On January 20, 2000, the President of the United States transmitted to the Senate for its advice and consent to ratification the International Convention for the Suppression of the Financing of Terrorism, adopted by the UN General

ILI US Digest/3 216 1/8/02, 1:45 PM

Assembly on December 9, 1999, and signed on behalf of the United States of America on January 10, 2000.

The excerpts that follow from the Report to the President by the Department of State provide the views of the United States on certain terms of the Convention and explain the need for the understanding (to Art. 2.1(b)), declaration (to Article 2.2) and reservation (to Art. 24.1) proposed by the President to which ratification should be subject.

The full text of the transmittal documents, including the Report to the President, may be found at *www.access.gpo.gov/congress/cong006.html.*

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DEPARTMENT OF STATE
Washington
October 3, 2000

The President:

I have the honor to submit to you, with a view to its transmission to the Senate for advice and consent to ratification, subject to the understandings, declaration and reservation set forth below, the International Convention for the Suppression of the Financing of Terrorism, adopted by the United Nations General Assembly on December 9, 1999, and signed on behalf of the United States of America on January 10, 2000 (the "Convention").

* * * *

The Convention fills an important gap in international law by expanding the legal framework for international cooperation in the investigation, prosecution, and extradition of persons who engage in the financing of terrorism. By filling this gap, the Convention advances a critical couterterrorism priority of the United States which was articulated in your September 21, 1998, address to the United Nations Gen-

ILI US Digest/3 217 1/8/02, 1:45 PM

eral Assembly when you called on all states to enhance their efforts to combat terrorist financing.

The Convention provides for States Parties to exercise criminal jurisdiction over the unlawful and willful provision or collection of funds with the intention that they be used or in the knowledge that they are to be used in order to carry out certain terrorist acts as defined in the Convention. In creating such a legal regime, the Convention follows the precedents set by numerous terrorism Conventions to which the United States is already a party, including the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, the 1979 International Convention Against the Taking of Hostages, and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, with Related Protocol. Like these earlier Conventions, this new Convention requires States Parties to criminalize under their domestic laws certain types of criminal offenses, and also requires parties to extradite or submit for prosecution persons accused of committing or aiding in the commission of such offenses.

* * * *

Paragraph 1 of Article 2 states that any person commits an offense within the meaning of the Convention "if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" either of two categories of terrorist acts. The first category includes any act which constitutes an offense within the scope of and as defined in one of the treaties listed in the annex to the Convention. The second category is any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict, whether the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.

With respect to the first category, the Convention annex lists nine counterterrorism Conventions, ranging from the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft to the 1997 International Convention for the Suppression of Terrorist Bombings ("Terrorist Bombings Convention"). The United States is a party to the first eight of

ILI US Digest/3 218 1/8/02, 1:45 PM

the listed Conventions and has signed and transmitted to the Senate for its advice and consent to ratification the Terrorist Bombings Convention (Treaty Document 106-6). Paragraph 2 of Article 2 further provides that upon depositing its instrument of ratification, acceptance, approval or accession to the Convention, a state which is not a party to one of the Conventions listed in the annex may declare that in the application of the Terrorist Financing Convention to that State Party, the Convention at issue shall be deemed not to be included in the annex. Article 2.2(a) further provides that this declaration ceases to have effect as soon as that state becomes a party to the relevant Convention, which fact must be notified to the depositary. The United States should make such a declaration with respect to the Terrorist Bombings Convention if it is not a party to that Convention at the time of the deposit of its instrument of ratification with respect to the Terrorist Financing Convention. I therefore recommend that, in the event the United States is not a party to the Terrorist Bombings Convention at the time the United States deposits its instrument of ratification of the present Convention, that the following declaration to Article 2.2 be included in the United States instrument of ratification of the Convention:

> "Pursuant to Article 2.2(a) of the Convention, the United States of America declares that, in the application of this Convention to the United States, the International Convention for the Suppression of Terrorist Bombings shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a)".

In the event the United States is a party to the Terrorist Bombings Convention at the time it deposits its instrument of ratification to the Convention, such a declaration would not be deposited.

The second category of terrorist acts under Article 2.1(b) incorporates language specifically suggested by the United States. The intent, which was broadly shared by other delegations, was to define the terrorist activity meant to be addressed by the Convention in a way that excluded the legitimate actions of the military forces of states by focusing on the intentional targeting of civilians as such. In order to ensure that the Convention encompassed the financing of attacks on off-duty military personnel, as in the cases of the 1996 Al Khobar Towers bombings in Dhahran, Saudi Arabia, and the 1983 Beirut barracks bombings, the provision was

ILI US Digest/3 219 1/8/02, 1:45 PM

expanded to also apply to attacks on "any other person not taking an active part in the hostilities in a situation of armed conflict." The qualifier requiring that the purpose of the act be to "intimidate a population, or to compel a Government" was intended and understood to eliminate mere "ordinary crime" from the scope of the Convention.

Given the importance of protecting the flexibility of the United States to conduct legitimate activities against all lawful targets and consistent with the view taken by the United States in prior counterterrorism Conventions as to their nonapplicability to the activities of state military forces in the exercise of their official duties, I recommend an Understanding to make it clear that nothing in the present Convention precludes States Parties from conducting legitimate activities against all lawful targets in accordance with the law of armed conflict. Further, because suspected offenders may seek to claim the benefit of the "armed conflict" exception in Article 2.1(b) to avoid extradition or prosecution under the Convention, it would be useful for the United States to articulate an Understanding regarding the scope of this exception. In this respect, an appropriate source of authority would be the widely accepted provision in Paragraph 2 of Article 1 of Protocol II Additional to the Geneva Conventions of 12 August, 1949, concluded at Geneva on June 10, 1977, which President Reagan transmitted to the Senate on January 29, 1987, for advice and consent to ratification. (Treaty Doc. 100-2). Specifically, Protocol II states that "armed conflict" does not include "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature." I therefore recommend that the following understanding be included in the United States instrument of ratification of the Convention:

> "The United States of America understands that nothing in the present Convention precludes States Parties from conducting legitimate activities against all lawful targets in accordance with the law of armed conflict. The United States further understands that the term 'armed conflict' in Article 2.1(b) does not include internal disturbances and tension, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."

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ILI US Digest/3 220 1/8/02, 1:45 PM

Article 24.1 provides that disputes between two or more States Parties concerning the interpretation or application of the Convention that cannot be settled through negotiation within a reasonable time shall be submitted at the request of one of them to *ad hoc* arbitration, or, failing agreement on the organization of such arbitration, to the International Court of Justice. Article 24.2 provides that a State may make a declaration excluding this dispute-resolution obligation at the time of signature, ratification, acceptance, approval or accession. In October 1985, the United States withdrew its declaration under Article 36 of the Statute of the International Court of Justice accepting the compulsory jurisdiction of the Court. Consistent with that decision, I recommend that the following reservation to Article 24.1 be included in the United States instrument of ratification:

> "Pursuant to Article 24.1 of the Convention, the United States of America declares that it does not consider itself bound by Article 24.1, but reserves the right specifically to agree in a particular case to follow the arbitration procedure set forth in the Convention or any other procedure for arbitration."

This reservation would allow the United States to agree to an adjudication by a chamber of the Court in a particular case, if that were deemed desirable.

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2. Convention against Transnational Organized Crime, Trafficking Protocol and Migrant Smuggling Protocol

a. U.S. signing of Convention and Protocols

On December 13, 2000, the United States signed the Convention against Transnational Organized Crime, the first multilateral treaty specifically targeting transnational organized crime, and two accompanying optional protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("Trafficking

ILI US Digest/3 221 1/8/02, 1:45 PM

Protocol"); and the Protocol against the Smuggling of Migrants by Land, Sea and Air ("Migrant Smuggling Protocol"). Following two-and-a-half years of negotiations in which the United States actively participated, the Convention was signed by 125 countries during a high-level diplomatic conference in Palermo, Italy, December 12-15, 2000. The Trafficking Protocol was signed by 81 countries, and the Migrant Smuggling Protocol by 79 countries, during the same period. The Convention and Protocols require 40 ratifications each before they will enter into force. All of the provisions of the Convention are also applicable, *mutatis mutandis*, to the protocols. Under Secretary of State for Global Affairs Frank Loy provided the views of the United States on the importance of the three instruments at the time of the signing in Palermo.

Full texts of the Convention and Protocols are available at *http://untreaty.un.org*.

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It has been a good week for the United Nations and for the people of the world. Earlier this week, agreement was reached in Johannesburg on a treaty that addresses the problem of certain toxic chemicals, commonly called Persistent Organic Pollutants or "POPS". About the same number of countries participated as here, and the text was also adopted by consensus. Earlier this year there was another successful negotiation – the Biosafety Protocol to the Convention on Biodiversity, dealing with genetically modified agricultural products. This was also adopted by consensus by a large number of countries.

The successful conclusion of these three agreements, all under United Nations auspices, all by consensus, and all involving a large number of the countries of the world, is heartening news.

Such agreements are hard to come by, and the achievement we are celebrating this week in Palermo should not be taken for granted. Simi-

ILI US Digest/3 222 1/8/02, 1:45 PM

lar agreements on other issues have eluded us so far, notwithstanding the significance of the issues and the commitment of the countries participating in the negotiations.

All of these international agreements deal with the consequences of different aspects of globalization. While globalization has brought progress and expanded economic opportunities to the world, an unfortunate consequence of globalization is transnational crime. As Secretary General Kofi Annan said yesterday, the openness of globalization works both ways. We must match the increasingly sophisticated means that organized criminal groups have found to exploit globalization if we are to win this battle. In particular, it takes international agreements that are global to fight crime that is global.

The Transnational Organized Crime Convention and its supplementary protocols include several common themes that characterize successful global agreements. Perhaps most important, they establish global standards that all countries must meet, and then provide for flexibility in the manner in which they meet them. For example, the convention and protocols define – for the first time in binding international instruments – organized crime, migrant smuggling and trafficking in persons; and they require all parties to criminalize this defined conduct under their domestic law. But they permit individual countries to tailor the manner in which they implement their obligations to the particular needs of their system. For example, the Convention recognizes that different countries have different approaches to the crime that we in the United States label as conspiracy.

The international norms established by this Convention and its protocols lead to another common theme of successful global treaties – namely they facilitate increased cooperation among governments, in this case law enforcement officials. Having accepted definitions of organized crime, migrant smuggling and trafficking in persons makes international collaboration on these subjects easier. The Convention and protocols build on these definitions, by including numerous mechanisms for cooperation. For example, rather than going through the time-consuming and expensive process of negotiating bilateral agreements, countries will be able to rely on these treaties for extradition and mutual legal assistance. Finally, the Convention and protocols recognize the fundamental humanitarian aspects involved in fighting organized crime, particularly trafficking in persons and migrant smuggling. This is a constructive development, which perhaps has not been a common

ILI US Digest/3 223 1/8/02, 1:45 PM

theme in global law enforcement treaties, but which should be. These treaties do not stop with punishing the criminal; that is just the beginning. They also recognize that a cornerstone of our work must be the protection of the victims of these crimes, and the prevention of these criminal activities in the first place. For example, the Convention contains witness protection provisions; and the migrant smuggling protocol reaffirms states' obligations towards migrants under international humanitarian law, and explicitly states that migrants are not punishable under the protocol simply for being an illegal migrant. Of the three agreements, the trafficking in persons includes, with good reason, the most far-reaching provisions for services and protections for victims – including calling for states to provide in appropriate cases shelter, medical and legal assistance, and the possibility of permanent residence.

The completion of this negotiation is certainly cause for celebration, and I again congratulate all involved in it. However, we must recognize that the fight against international organized crime is far from over.

The United States has been at the forefront of this fight and we are committed to staying there. Among other things, we provide law enforcement training and equipment to scores of governments all around the world. This past year alone, the U.S. allocated more than $36 million for such training and technical assistance programs.

In collaboration with host countries, the United States has established and continues to support two international law enforcement academies in Budapest and Bangkok and we will open two more – in Africa and Latin America – in the near future. At these facilities, rank-and-file law enforcement personnel from those countries and their regional neighbors learn how crime syndicates operate, how to recognize trafficking and smuggling operations and much more. Many countries have worked together on this front. Let me pay special tribute to our hosts. The government of Italy has shown great courage and determination in attacking organized crime. Cooperation between our two governments has brought many successes. For example, Italian authorities under the leadership of the courageous Magistrate Giovanni Falcone worked with U.S. law enforcement to uncover and disrupt international trafficking in heroin in the 1980's. This effort also benefited from the cooperation of the German, Swiss, Spanish, Brazilian and Turkish Governments, and remains today a model for multilateral law enforcement cooperation.

ILI US Digest/3 224 1/8/02, 1:45 PM

U.S. support for such cooperation will continue and grow. This Convention, through its comprehensive framework for multilateral law enforcement collaboration will help make that possible.

I want to express my government's hope – and optimism – that negotiations on the Protocol to suppress the illicit manufacture of and traffic in firearms will soon come to a successful conclusion, so that parties to the convention will be able to sign that, too, ratify it and put it to work.

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b. U.S. legislation: Victims of Trafficking and Violence Prevention Act of 2000

On October 28, 2000, the President signed into law the Victims of Trafficking and Violence Prevention Act of 2000 (Pub. L. 106-386, 114 Stat. 1464). Sections 101-113 of the Act constitute the Trafficking Victims Protection Act of 2000, establishing new felony criminal trafficking offenses and other means of combating trafficking worldwide and providing support for victims of trafficking in the United States. The Act defines "severe forms of trafficking in persons" consistent with the definition of "trafficking in persons" in Article 3 of the Trafficking Protocol discussed in B.2. above, which provides that trafficking is:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having

ILI US Digest/3 225 1/8/02, 1:45 PM

> control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

Sections 1001-1513, the Violence Against Women Act of 2000, build on the Violence Against Women Act of 1994, strengthening and improving domestic United States law to fight violence against women and including as Title V provisions relating to Battered Immigrant Women. Finally, sections 2002 and 2003 provide new authorities to compensate American victims of terrorism and their families, discussed in Chapter 8.B.4. Excerpts below, from President Clinton's October 28, 2000 Statement on Signing the Act, describe the effect of the law. 36 WEEKLY COMP.PRES.DOC.2662 (Oct. 28, 2000).

STATEMENT ON SIGNING THE VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000

October 28, 2000

Today I am pleased to sign into law H.R. 3244, the "Victims of Trafficking and Violence Prevention Act of 2000" (the "Act"). This landmark legislation accomplishes a number of important objectives and Administration priorities. It strengthens and improves upon the Nation's efforts to fight violence against women. It also provides important new tools and resources to combat the worldwide scourge of trafficking in persons and provides vital assistance to victims of trafficking. And it helps American victims of terrorism abroad to collect court-awarded compensation.

ILI US Digest/3 226 1/8/02, 1:45 PM

This legislation builds on the "Violence Against Women Act of 1994" (VAWA), which created new Federal crimes and enhanced penalties to combat sexual assault and domestic violence, and established new grant programs for law enforcement agencies, prosecution offices, and victim services organizations to fight violence against women. It also authorized funding for education, outreach, and prevention programs, which have helped to create coordinated community responses to violence against women throughout the United States. While we can certainly take pride in what we have accomplished since 1994, we know we must do more. To that end, H.R. 3244 reauthorizes VAWA and improves on the original bill by establishing several new initiatives.

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Of great importance, H.R. 3244 restores and expands VAWA's protections for battered immigrants by helping them escape abuse and by holding batterers accountable. The Act establishes a new nonimmigrant visa classification, which will offer greater protection to victims, while strengthening the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking, and other violent crimes.

I am confident that enactment of these provisions and the other improvements to VAWA contained in H.R. 3244 will substantially enhance our efforts to end violence against women in America and provide essential services to victims of domestic violence and sexual assault.

Similarly, the Act's anti-trafficking provisions represent a major step forward in my Administration's ongoing effort to eradicate modern-day slavery. In 1998, on International Women's Day, I issued an Executive Memorandum directing my Administration to combat this insidious human rights abuse through a three-part strategy of prosecuting traffickers, protecting and assisting trafficking victims, and preventing trafficking. We worked hard with Democrats and Republicans in Congress to craft comprehensive and effective legislation that would strengthen our ability to implement this strategy. I am pleased that this bipartisan effort has resulted in this landmark anti-trafficking legislation.

Over the past several years, we have taken every opportunity to shine a bright light on this dark corner of the criminal underworld, in part by continually raising with leaders around the world the need to

ILI US Digest/3 227 1/8/02, 1:45 PM

work together to combat this intolerable and reprehensible practice. Last spring, the United States and the Philippines co-hosted a regional conference attended by over 20 Asian and Pacific nations to develop a regional action plan to combat trafficking and protect trafficking victims. The United States proposed and recently concluded 2 years of negotiations on a United Nations protocol to combat trafficking in persons which, for the first time, will require countries everywhere to criminalize trafficking and will provide a framework for enhanced protection of and assistance to victims.

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The Act creates new felony criminal offenses to combat trafficking with respect to slavery or peonage; sex trafficking in children, and unlawful confiscation of the victim's passport or other documents in furtherance of the trafficking scheme. It also creates a new "forced labor" felony criminal offense that will provide Federal prosecutors with the tools needed to prosecute the sophisticated forms of nonphysical coercion that traffickers use today to exploit their victims. Under H. R. 3244, any person convicted of any of these new criminal offenses would be subject to forfeiture of his or her assets and required to pay full restitution to his or her victims. These new offenses and the tougher sentences called for by this legislation will assist Federal prosecutors in ensuring that traffickers are convicted and appropriately punished for their crimes.

The Act also authorizes essential services and protections for victims of trafficking. Within the United States, H.R. 3244 establishes a Cabinet-level interagency task force to combat and monitor trafficking, provides eligibility to trafficking victims for a broad range of Federal benefits, and requires procedures to improve Federal law enforcement's identification of trafficking cases and to provide for trafficking victims' safety and assistance while in the Government's custody. The Act also authorizes the Attorney General to provide grants to develop programs to assist victims of trafficking. A cornerstone of H.R. 3244 is that it makes trafficking victims eligible for a temporary nonimmigrant visa so that they can remain in the United States to help law enforcement in the prosecution of traffickers and receive needed protection and assistance.

The Act establishes international initiatives to enhance economic opportunity for potential victims and public awareness programs on the dangers of trafficking and available protections for victims. The Act

ILI US Digest/3 228 1/8/02, 1:45 PM

encourages other countries to take steps to implement protection and assistance for trafficking victims and to prosecute traffickers, and authorizes the President to assist countries to help them meet certain minimum standards for the elimination of trafficking. The President may withhold assistance from countries that are not making significant efforts to bring themselves into compliance with these minimum standards. Traffickers can themselves be sanctioned. H.R. 3244 also expands existing reporting on the nature and extent of trafficking in each foreign country, which will build upon the Department of State's current coverage of this issue.

Traffickers who prey on vulnerable women and children should have no place to hide, and victims of trafficking must be treated with dignity and afforded vital assistance and protection. I expect this legislation to be of immense benefit in rooting out his despicable practice and in helping future Administrations carry on the vital work that this Administration has begun.

The Act also contains new authorities to compensate American victims of terrorism and their families. I am pleased that the congress and the executive branch have been able to reach agreement on legislation that reflects our shared goals: providing compensation for the victims of international terrorism and protecting the President's ability to act on behalf of the Nation on important foreign policy and national security issues.

There are certain provisions worth noting. First, those persons electing to receive 110 percent of their awarded compensatory damages with statutory interest and court-awarded sanctions relinquish all rights and claims to all amounts awarded and will be deemed to be compensated in full for their judgments. Those persons electing to receive 100 percent of their compensatory damages with statutory interest and court-awarded sanctions relinquish all rights and claims to compensatory damages and amounts awarded as judicial sanctions, and, necessarily, any related interest, costs and attorneys fees. So as not to interfere with important national interests, H.R. 3244 makes clear that persons who receive such payments are prohibited from attaching or executing against certain types of property in order to satisfy other amounts awarded.

Second, Congress has reaffirmed in this Act my statutory authority, which is the authority provided under the Trading with the Enemy Act (50 U.S.C. App. 5(b)), where appropriate and consistent with the

ILI US Digest/3 229 1/8/02, 1:45 PM

national interest, to vest foreign assets located in the United States for the purpose, among other things, of assisting, and where appropriate, making payments to victims of terrorism.

Third, H.R. 3244 repeals the Presidential national security waiver, provided by section 117 of the Treasury and General Government Appropriations Act, 1999, which was applicable to the requirements of subsections (a) and (b). Section 117 (b), which amended the Foreign Sovereign Immunities Act to permit awards of punitive damages against certain defendants in certain circumstances, as well as section 117(a), have never been operative because I executed the national security waiver on October 21, 1998. In its place, H.R. 3244 provides a national security waiver applicable to section 1619(f)(l) of the Foreign Sovereign Immunities Act, and addresses the other national security concerns covered by my earlier waiver by repealing section 117(b) of the Treasury and General Government Appropriations Act, 1999, and modifying section 1610(f)(2) of the Foreign Sovereign Immunities Act. Upon my signing of H.R. 3244, I am exercising the discretion given to me by section 2002(f) of this Act to waive section 1610(f)(1) of the Foreign Sovereign Immunities Act.

Fourth, H.R. 3244 makes the United States fully subrogated to the rights of the persons who receive payments under this Act, to the extent of the payments. The Congress reaffirms my authority to pursue these subrogated rights as claims or offsets against Iran in appropriate ways, including negotiations leading to any normalization process. In addition, no funds are permitted to be paid to Iran, or released to Iran, from property blocked under the International Emergency Economic Power Act or the Foreign Military Sales Fund, until such claims have been dealt with to the satisfaction of the United States. The determination that the claims have been dealt with to the satisfaction of the United States will be subject to Presidential discretion.

This legislation is a measure of the United States Government's commitment to the victims of terrorism, to deter future acts of terrorism, and to defend the United States from its evils. It is not designed to preclude any other means to this end. The United States will continue to pursue an aggressive, comprehensive policy incorporating diplomacy, law enforcement, intelligence, and other means to protect its citizens.

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ILI US Digest/3 230 1/8/02, 1:45 PM

CROSS-REFERENCE:

Protocol on Sale of Children, Child Prostitution and Child Pornography in **6.C.**

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3. Inter-American Convention Against Corruption

On May 2, 2000, Alan Larson, Under Secretary of State for Economic, Business and Agricultural Affairs, testified before the Senate Committee on Foreign Relations in support of ratification of the Inter-American Convention Against Corruption, adopted and opened for signature at the Specialized Conference of the Organization of American States at Caracas, Venezuela, on March 29, 1996, signed by the United States on June 27, 1996. The Convention was submitted to the Senate for advice and consent to ratification on April 1, 1998 (S. Treaty Doc. No.105-39 (1998). Following Ambassador Larson's testimony, the Convention was reported out favorably by the Senate Foreign Relations Committee (S. Exec. Rept. 106-15, 2000) and the Senate gave advice and consent on July 27, 2000. The Convention entered into force for the U.S. on October 29, 2000. Excerpted portions of Ambassador Larson's testimony follow.

The full text of the testimony is available at *www.state/s/l* and the treaty documents may be found at *www.access.gpo.gov/congress/cong006.html.*

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ILI US Digest/3 231 1/8/02, 1:45 PM

A Political Commitment to Combat Corruption in this Hemisphere

The problem of corruption is a major obstacle to development in the Americas, and we believe every effort must be made to address it. Corruption slows and impedes the consolidation of democratic institutions, and weakens the rule of law. It undermines the confidence of people in their government. It is all too often linked with trans-border criminal activity, including drug trafficking, organized crime, and money laundering. In sum, its effects are wide-ranging and pernicious.

Corruption also undermines the ability of businesses of the United States and other countries to operate in a transparent, honest and predictable environment. In 1996, an IMF study found that corruption lowers investment and economic growth. The reason is simple: investors are wary of investing in countries where corruption is prevalent, and low levels of investment lead to low growth. The Finance Ministers of the Western Hemisphere, at their meeting in Mexico in February 2000, noted that "corruption has been recognized as a serious problem that adversely affects investment, public revenue, growth, and development in much of the Western Hemisphere" and that corruption is "a threat to investor and taxpayer confidence."

A shared recognition of the importance of this issue prompted the nations of the Hemisphere to agree to develop an unprecedented regional instrument to help combat that scourge of corruption. During the early 1990s, the democratic governments of Latin America became increasingly aware that corruption threatened political stability and economic growth in their countries. When the 34 democratically elected heads of state met in Miami in 1994 for the first Summit of the Americas, there was widespread support for practical action to combat corruption. The President of Venezuela specifically recommended negotiation of an InterAmerican Convention Against Corruption.

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One Element of a Global Approach

The fight against corruption is a high priority in our foreign policy, particularly with regard to this Hemisphere. The United States has taken a leadership position in combating overseas commercial bribery ever since the enactment in 1977 of the Foreign Corrupt Practices Act

ILI US Digest/3 232 1/8/02, 1:45 PM

("FCPA"). Later, we led the effort to negotiate an international convention that would enshrine the basic provisions of the FCPA: the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the OECD Anti-Bribery Convention"). The United States Senate voted its advice and consent to ratification of that Convention in 1998. In the same year, Congress passed implementing legislation that broadened the FCPA slightly to conform to our obligations under the Convention. Nineteen other states have ratified the OECD Convention, which entered into force in February 1999. A vigorous review of implementation is under way; the domestic implementing laws of 21 countries have been scrutinized by the OECD Bribery Working Group. The success of the United States on the OECD Convention is a tribute to the strong bipartisan support from the members of this Committee, and from others in both the House and Senate.

The Administration is combating corruption on many other fronts. In February of last year, Vice President Gore hosted the Global Forum on Fighting Corruption, which was attended by representatives from over 90 countries. Among the attendees were twenty-one OAS member governments, five at the level of Vice-President, and one head of a national parliament; the Attorney General of Mexico; and several representatives from Latin American non-governmental organizations. At the Forum, the Vice President and the Secretary of State made clear the importance of the Inter-American Convention and the commitment of the Administration to its ratification. We are now making preparations for the Second Global Forum, which we are cohosting with the government of The Netherlands, and which will take place in The Hague in May of next year.

The Administration has encouraged the IMF, the World Bank, and the Inter-American Development Bank to incorporate anti-corruption principles in their programs. All three of these major international financial organizations are involved in supporting and monitoring a wide variety of anti-corruption programs that include judicial reform, integrated financial systems, the development of public ethics offices, and public administration reform. These institutions, along with the U.S. Government, the United Nations and a number of foundations belong to an 18 member Donor Consultative Group on Accountability/Anti-corruption in Latin America and the Caribbean. The Group meets regularly and shares information about anti-corruption activities in the hemisphere.

ILI US Digest/3 233 1/8/02, 1:45 PM

We have also pushed for a strong Anti-Corruption Initiative for the Stability Pact for Southeast Europe. Countries of the region have made commitments to take priority measures against corruption, especially actions to: implement international anti-corruption instruments, promote good governance, strengthen legislation, promote transparency and integrity in business, and support public involvement. An anti-corruption steering group under the Stability Pact will monitor progress in anti-corruption efforts. The United States, the European Commission, the OECD, and the Council of Europe, and the World Bank are working closely in support of this Initiative.

Thus, our anti-corruption effort involves a set of integrated policies. Regional efforts such as the Inter-American Convention are an integral part of this framework.

Provisions of the Inter-American Convention

The Inter-American Convention was adopted at the Specialized Conference on Corruption of the Organization of American States (OAS) in Caracas, Venezuela, on March 29, 1996. Twenty-one states signed the treaty on the date of its adoption. The United States participated actively in the Convention's negotiation, and signed it on June 27, 1996. To date, 26 states have signed, and 18 states have deposited their instruments of ratification. The Convention entered into force on March 6, 1997.

The Convention was the first instrument of its kind in the world to be negotiated, and was adopted and opened for signature on March 29, 1996 at Caracas. In addition to requiring parties to criminalize acts of corruption, the Inter-American Convention will enhance cooperation among the nations in the Hemisphere in the battle against both domestic and transnational acts of corruption. I will describe the principal provisions of the Convention and then summarize some of the distinct advantages to the United States of becoming a party.

The Convention requires that the States Party take specific steps to combat corruption. It imposes an obligation on each State Party to enact such legislation as is necessary to criminalize the acts of corruption specified in the Convention. Such acts include, the solicitation or acceptance of bribes; the offering or granting of bribes; any act or omission by a government official to obtain illicit benefits for himself or others; the fraudulent use or concealment of property derived from the above-mentioned acts; and participation in, or association or conspiracy to commit, such acts.

ILI US Digest/3 234 1/8/02, 1:45 PM

Thus, the treaty requires criminalization not only of the "supply side" or "active" bribery (i.e., the offering of bribes) but also the "demand side" or "passive" bribery (i.e., the solicitation or acceptance of bribes). Although most nations in the Hemisphere already to some extent have enacted corruption legislation, such as anti-bribery laws, the Convention seeks to ensure that such legislation is broad and comprehensive in key areas.

The United States can become a party to the Convention without any additional legislation, because existing U.S. law is already sufficient to satisfy the Convention's provisions regarding requirements for legislation, and the other provisions in the Convention are self-executing and will not require implementing legislation. However, to clarify our interpretation of certain provisions of the Convention, we recommend the submission with the U.S. instrument of ratification of certain Understandings, which I will describe further on in this statement.

The Convention also includes provisions on certain forms of international cooperation and assistance. These include extradition, mutual legal assistance, and asset seizure and forfeiture. With respect to all of these forms of cooperation, the Convention expressly provides that cooperation will be subject to the limitations of applicable existing treaties, including bilateral ones, and to the domestic law of each country. The Convention also contemplates technical cooperation and exchanges of experiences. All of the foregoing are comparable to forms of cooperation already envisioned in various law enforcement treaties to which the United States is a party. Through such cooperation and assistance, the Convention will facilitate the prevention, investigation, and prosecution of acts of corruption.

One especially noteworthy feature of the Convention is the obligation in Article VIII to criminalize the bribery of foreign officials. In recent years, the United States Government has sought in a number of multilateral fora to persuade other governments to adopt legislation akin to the U.S. Foreign Corrupt Practices Act. The Convention represented a breakthrough on that front, and lent impetus to similar measures pursued by the United States in other multilateral fora, such as the OECD, the Council of Europe, and the United Nations.

Benefits of U.S. Ratification

The United States would benefit from becoming a Party to the Inter-American Convention in many ways. First, becoming a Party would

ILI US Digest/3 235 1/8/02, 1:45 PM

strengthen the ability of the United States to continue to assert a leadership role in this area. Most of the countries in this Hemisphere are at least signatories to the Convention, and a significant number either are or may soon become Parties. Given the strong position the United States has historically taken in opposition to corruption, and the fact that our laws and policies on this issue are at the forefront internationally, our absence from this treaty regime would be conspicuous, and would detract from our ability to exert pressure on the various states which are party to implement the Convention to the most vigorous extent possible.

Second, U.S. business will benefit from a legal regime that is designed to address the problem of corruption in this Hemisphere. The corruption of governmental officials significantly hinders business transactions and yields economic inefficiencies. The Convention imposes requirements on other states to criminalize transnational bribery, which would help level the playing field for U.S. companies competing for business in the region. Some countries of the Hemisphere have significant capital-exporting multinational enterprises, so the further expansion of prohibitions on transnational bribery in those countries' legal systems would be a significant complement to the OECD Convention. Clearly, U.S. businesses *see* the benefits of this Convention, as manifested by the letter dated April 7, 2000 sent to Senator Helms by the leaders of 10 leading business associations to express support for the ratification this year of the Convention.

A third advantage to the United States is that the Convention augments existing mechanisms for international cooperation in law enforcement matters. For example, most of our older extradition treaties with countries in the region render extraditable only certain offenses listed in the treaty. The Corruption Convention would supplement such treaties with the additional offenses contemplated by the Convention, thereby enabling the United States to more effectively obtain the extradition of offenders accused of corruption offenses.

Fourth, ratification would further U.S. efforts to support democratic institutions in the region. Corruption debilitates and destabilizes government institutions. Democracy has made impressive strides in the Western Hemisphere; with the exception of Cuba, democratically elected governments are the norm. However, as recent events in Ecuador and Paraguay underline, democracies remain vulnerable and fragile. Public corruption further undermines the legitimacy of governments and weakens support for the often difficult steps that responsible governments

ILI US Digest/3 236 1/8/02, 1:45 PM

must take. Corruption has become a rallying cry for citizens too long denied transparent, accountable government. A recent survey in the Hemisphere demonstrated that while the majority of citizens still support democracy as the preferred system of government, a majority are also deeply dissatisfied with the practice of democracy in their country. In many countries in the region, corruption by entrenched political parties and interests has become a major issue in electoral politics in recent years, bringing the issue front and center and demonstrating how corruption can bring down even democratically elected governments if it is not effectively addressed.

Four Understandings

The Administration recommends that the United States include four Understandings when it deposits its instrument of ratification for the Convention. These Understandings, the proposed texts of which were included in the Administration's transmittal of the Convention to the Senate, would clarify views of the United States about certain provisions of the Convention. Our views as set forth in these Understandings are consistent with the text and history of the Convention.

First, regarding Article I (on definitions), we recommend an Understanding that the Treaty imposes obligations only with respect to the conduct of U.S. federal officials. We believe this needs to be an Understanding, rather than a Reservation, because it simply reaffirms a point that was already addressed without dissent during the treaty negotiations. At the conclusion of the negotiations, the United States delegate read a statement into the record, asserting that we understood the Convention would not impose obligations with respect to officials other than federal officials for countries with a federal system of government. This statement was seconded by the delegation from Canada and from other States with federal systems, and was not challenged by any of the other delegations.

Second, regarding Article VII (on legislation), we recommend an Understanding to the effect that existing U.S. laws already criminalize the conduct that the Convention requires be criminalized, even though such laws may not necessarily be defined in terms or elements identical to those used in the Convention. This should be an Understanding rather than a Reservation because the requirement in Article VII refers to criminalization by the Parties of certain acts of corruption described in

ILI US Digest/3 237 1/8/02, 1:45 PM

Article VI, but does not call for each State Party to incorporate into its domestic law each specific element of the acts specified in Article VI.

Third, concerning Article VIII (on transnational bribery), we recommend an Understanding to indicate that the Foreign Corrupt Practices Act (FCPA), a law already in effect for the United States, satisfies the requirement of this Article. Such an Understanding would be consistent with the negotiating history, as this Article was included at the behest of the United States for the very purpose of requiring other States to enact legislation comparable to the FCPA. We believe an Understanding of this nature is necessary simply because the elements of the FCPA are not identical in every minute respect to the elements of the offense described in Article VIII, and there was no expectation by any of the negotiating delegations that the United States would need to modify the FCPA to comply with the Treaty.

Finally, regarding Article IX (on illicit enrichment), we recommend an Understanding that establishment of such an offense would be inconsistent with the U.S. Constitution and fundamental principles of our legal system, and that therefore—in accordance with the terms of the Article—the U.S. will not establish a new criminal offense of that nature. By its terms, Article IX renders the obligation to criminalize illicit enrichment subject to each State Party's "Constitution and the fundamental principles of its legal system." To the extent that Article IX contemplates establishment of an offense of "illicit enrichment" which would entail shifting the burden of proof to the defendant in a criminal prosecution, it would be inconsistent with the U.S. Constitution and fundamental principles of our legal system. Since the text of Article IX expressly contemplates opt-out in such circumstances, there would be no need to style this statement as a Reservation rather than as an Understanding.

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4. Human Rights and Terrorism

At the Fifty-Sixth Session of the United Nations Commission on Human Rights, noted in Chapter 6.A.1.b., the United States abstained from L.39 on Human Rights and Terrorism because it views terrorists as not state actors but criminals, stating on April 20, 2000:

ILI US Digest/3 238 1/8/02, 1:45 PM

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We regret that we are again obliged to abstain on this resolution. The United States understands clearly that terrorists and terrorist groups do not respect human rights and fundamental freedoms. We have a strong and continuing commitment to combat this evil which includes fully cooperating with appropriate mechanisms established by the international community.

Unfortunately, the sponsors of this resolution have again included language that grants terrorists and terrorist organizations a measure of legitimacy by equating their conduct with that of states. States are held responsible for human rights violations. Terrorists, on the other hand, are not state actors, but criminals who bear individual responsibility for their actions.

For this reason, the United States believes that the subject of terrorism is best addressed in other fora, such as the Sixth Committee of the U.N. General Assembly. The Declaration on Measures to Eliminate International Terrorism, referred to in Paragraph 2, was one of the many resolutions on terrorism adopted by this committee.

As Secretary of State Albright said on April 17 during her visit to Uzbekistan: "One of the most dangerous temptations for a government facing violent threats is to respond in heavy-handed ways that violate the rights of innocent citizens. Terrorism is a criminal act, and that means applying the rule of law fairly and consistently. We have found, through experience around the world, that the best way to defeat terrorist threats is to increase law enforcement capacities while at the same time promoting democracy and human rights."

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C. GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY

1. Establishing Accountability for Crimes Against Humanity

In a speech at the Human Rights Centre of the University of Pretoria on August 22, 2000, entitled "The Global Chal-

ILI US Digest/3 239 1/8/02, 1:45 PM

lenge of Establishing Accountability for Crimes Against Humanity," David J. Scheffer, Ambassador-at-large for War Crimes Issues, U.S.Department of State, provided an overview of efforts to construct credible institutions of justice in the aftermath of genocide, war crimes, or crimes against humanity in a number of countries and the work left to be done in this area.

The full text of the speech is available at *www.state.gov/s/l.*

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I would like to talk today about how accountability mechanisms are being constructed in several areas of the world: the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, Indonesia and East Timor, Burundi, and Iraq. Each shares the common goal of seeking to reinforce the rule of law under unique characteristics that demand unique approaches to justice and reconciliation. I also want to discuss disturbing developments in the Ethiopian/Eritrean conflict, initiatives to prevent atrocities, and the permanent international criminal court.

First, however, I want to emphasize two points. Every society must find its own path with respect to amnesties that have facilitated the transition to peace, democracy, and the rule of law. Last week Chile moved further down its own path when the Chilean supreme court lifted General Pinochet's immunity in a move that Secretary of State Madeleine Albright described as "clearly historic for the rule of law and for the promotion and protection of human rights in Chile. It has reaffirmed," she said, "that it is possible for a country to have a stable democratic transition without sacrificing the principles of accountability and justice."

Each amnesty requires rigorous examination, always keeping in mind that the requirements of justice underpin the establishment of the rule of law. There is no single path. Realism, pragmatism, and even humility are essential in the implementation of any domestic amnesty. But no domestic amnesty can immunize a perpetrator of egregious international crimes from international justice.

ILI US Digest/3 240 1/8/02, 1:45 PM

The second issue I want to emphasize entails one particular development in international criminal law that reflects how determined we must now be never to reverse the tide of justice that has swept so many societies, including South Africa's, in the last decade: rape.

The international crime of mass rape is becoming a standard feature in international investigations and prosecutions of atrocities. Currently, several defendants are on trial before the International Criminal Tribunal for the former Yugoslavia for the systematic rape of Bosnian-Muslim women in Foca, Bosnia, and Herzegovina, during the Bosnian conflict of the early 1990's. The international prosecutor is arguing before a panel of international judges that the widespread and systematic rape and sexual enslavement of Muslim women constitutes a war crime and crime against humanity.

Out of 33 prosecution witnesses in this case, 16 have been rape victims. One female witness recently testified about the killing of her brother by one of the defendants. On cross-examination, the defense counsel asked her, "How do you know that my client is the person who killed your brother?" The witness answered, "Because he told me he killed my brother while he was raping me." Another female witness, "Witness 75," has testified that her mother was killed before her eyes, and that over 20 soldiers raped her on her first day of detention in a make-shift "rape center." In this historic trial unfolding in The Hague, women are courageously testifying about the hundreds of rapes and other abuses committed in 1992 in Foca. They bear witness to the barbarism of the genocide and crimes against humanity committed during the Balkans war and why the need for justice and the search for the truth about what happened is so indispensable to peace and reconciliation in the former Yugoslavia. It was only 5 years ago that thousands of men were slaughtered in the hills of Srebrenica. One of the leading alleged perpetrators of those killings, General Krstic, is now on trial in The Hague. The United States has provided significant support for that trial.

These cases remind us that the war crimes agenda is more than the pursuit of abstract goals and interests. It is about real people who are real victims of real war criminals. The United States is determined that remaining indicted fugitives such as Radovan Karadzic, Ratko Mladic, and Slobodon Milosevic must be prosecuted in The Hague as soon as they either voluntarily surrender, which they would be smart to do, or can be apprehended.

ILI US Digest/3 241 1/8/02, 1:45 PM

Such crimes have not been confined to the former Yugoslavia. From Sierra Leone to East Timor, women and children have been brutalized in times of war and mass persecution. Here in South Africa, the Truth and Reconciliation Commission heard compelling testimony from women who had been raped and sexually assaulted in the context of the political battles that were being fought here.

In Rwanda rape was also used as an instrument of war and persecution during the genocide of 1994. Thousands of women were systematically raped because they belonged to a different ethnic group. Countless stories were told of women, after witnessing their entire family killed, falling victim to acts of sexual violence that included rape, mutilation, and forced nudity. The intent of the assailants was to destroy the women and thus make them irrelevant in the cleansed society. But in Rwanda, justice is having the last word. September 2 marks the second anniversary of a landmark ruling of the International Criminal Tribunal for Rwanda, based in Arusha, in the Akayesu case that for the first time found an individual guilty, before an international tribunal, of the crime of genocide. Also for the first time the systematic rape of women was ruled to be an act of genocide and a crime against humanity. This precedent, made in Africa, set the judicial standard for the world to follow.

These cases underscore the important work being done by the International Criminal Tribunals for the former Yugoslavia and Rwanda. I will be visiting Rwanda again on this trip to Africa and will announce a modest but important voluntary contribution to the Rwanda War Crimes Tribunal that we are making available to strengthen the Tribunal's capability to track indicted fugitives and to better manage its complex case load.

I also will be exploring in Rwanda how best we can further our support for the Gacaca system of justice that the Government of Rwanda is pursuing to handle more than 120,000 suspects of genocide who continue to languish in Rwanda jails without trial 6 years following the genocide. Although the United States is the largest financial contributor to both the Yugoslav and Rwanda War Crimes Tribunals, we have not lost sight of the enormous domestic judicial challenge that has festered like an open wound in Rwandan society and that must be addressed with the support of the international community.

The existing ad hoc tribunals tell only a part of the story about how the international community is dealing with modern-day atrocities. The

ILI US Digest/3 242 1/8/02, 1:45 PM

ethnic conflicts and sheer power grabs that have swamped so many societies in the latter part of the 20th century and into the new millennium pose enormous challenges for accountability, for reconciliation, and for prevention of further atrocities.

SIERRA LEONE

In Sierra Leone, the civilian population has been directly targeted by contemptuous rebels. Thousands of civilians have been murdered, raped, terrorized, or hideously mutilated. I have personally seen the children whose limbs have been chopped off by drug-crazed child soldiers under the command of individuals such as Foday Sankoh. The efforts of the international community to bring peace to Sierra Leone suffered serious setbacks when UN peacekeepers were detained and killed recently. Efforts to promote disarmament, demobilization and rehabilitation were obstructed.

The UN Security Council has condemned these actions in the strongest possible terms and acted to strengthen the presence of UN forces in Sierra Leone, which the United States as a Security Council member strongly supports. Secretary Albright and U.S. Ambassador to the UN Richard Holbrooke have been unwavering in their efforts to confront the toughest challenges in Sierra Leone.

One of those challenges is justice. We have now begun the long march toward accountability, which Sierra Leone desperately needs to eliminate a culture of impunity that undermines all other efforts to bring peace, stability, and reconciliation to that tortured land.

The United States was the prime mover behind UN Security Council Resolution 1315, which was unanimously adopted on August 14th. The resolution authorizes the Secretary General to enter into negotiations with the Government of Sierra Leone to establish an independent special court to bring the principal perpetrators of the most serious violations of international humanitarian law in Sierra Leone to justice. Within a few weeks, UN experts will recommend to the Security Council the steps required to physically establish the special court so that it can begin its work as quickly as possible.

This is the new challenge of judicial carpentry of our time: to build unique courts, sometimes international, sometimes domestic, and sometimes incorporating a hybrid formula, that respond to the unique requirements of the situations that cry out for international criminal accountability. There is no single construction plan. Anyone who believes that

ILI US Digest/3 243 1/8/02, 1:45 PM

he or she knows precisely what is required in any particular society without experiencing and understanding the various interests at stake is delusional. There are general principles embodied in international law that guide any exercise in accountability for genocide, war crimes, or crimes against humanity. The challenge is to give effect to these principles taking into account the unique needs and complexities of any given situation.

We also must not forget that the Lomè Peace Accords called for the establishment of a Truth and Reconciliation Commission (TRC) in Sierra Leone — an objective the Government of Sierra Leone earnestly seeks to undertake. We anticipate that the work of the TRC will complement the trials held before the independent special court for Sierra Leone. While the special court will likely investigate the key leaders who orchestrated the violence in that country, the vast majority of cases involving foot soldiers probably will fall under the jurisdiction of the TRC. There will be much that your own experience in South Africa can bring to this essential exercise in Sierra Leone, and representatives of your TRC have already visited Sierra Leone to offer their advice.

CAMBODIA

Some observers have compared the independent special court planned for Sierra Leone to the "Extraordinary Chamber" that will be established in Cambodia to investigate and prosecute the Khmer Rouge leader responsible for the atrocities of the Pol Pot era of 1975-1979. It is true that the two mechanisms share a key common feature: they are creative attempts by the international community to design unique accountability mechanisms with both international and domestic participation. But they should not be mistaken as identical enterprises.

In Cambodia, the Government and the United Nations have long been involved in negotiations over a draft law that is currently under consideration in the Cambodian National Assembly. The Clinton Administration is proud to have contributed to the process, which also included the courageous and successful efforts of Senator John Kerry of Massachusetts to help break impasses in the negotiations. The new law would establish "Extraordinary Chambers" within the Cambodian judicial system that would provide a venue to bring senior Khmer Rouge leaders to justice. The law will provide for both Cambodian and international participation: judges, prosecutors, and a staff. It is an unprecedented

ILI US Digest/3 244 1/8/02, 1:45 PM

exercise that will require a great deal of hard work to pull off, once there is an agreement. But after two decades of drift in the fields of accountability, the Cambodian people finally will be able to directly confront the principal perpetrators of the mass killing of an estimated 1.7 million Cambodian civilians.

Both Sierra Leone and Cambodia will require voluntary funding to build and sustain these new courts. We are exploring how the United States Government can assist once the courts are formally established. Other governments also should be exploring their own funding capabilities. But I would hope that private sector contributions also could begin to flow into these projects. We have not seen private donations to international criminal courts to the extent that we had hoped. Two exceptions have been IBM and WestLaw Group which have generously assisted the UN Tribunals. But much more will be required and expected in the years ahead. Sierra Leone and Cambodia would be good places to start a revolution of private financing for international justice that will have long-term benefit of helping build societies that can attract foreign investment.

INDONESIA/EAST TIMOR

In another part of the world, Indonesia, there are also elements of domestic and international justice at work. Late last year, the UN Human Rights Commission convened a special session on the situation in East Timor. In addition to condemning the violence that ravaged East Timor following the referendum there 1 year ago, the UN called for an international commission of inquiry. It also called on the Government of Indonesia to investigate and prosecute those responsible for the atrocities associated with last year's referendum in East Timor.

The fact that the international community has given Indonesia the opportunity to fulfill these obligations has been a major test of Indonesia's own ability to investigate and prosecute its own. The government-appointed commission of inquiry into violence in East Timor produced a well-documented report, which has become the basis for criminal investigations. The Indonesian Attorney General appointed a 64-member team to pursue criminal investigations with a view to issuing indictments. The team wasted no time in bringing in several top generals for questioning.

We are concerned about the implications of the recent adoption by the Indonesian People's Consultative Assembly of a constitutional amendment that includes the right of protection from prosecution for any act which was not a crime when committed. We recognize that the universal

ILI US Digest/3 245 1/8/02, 1:45 PM

concept of "ex post facto" is an important due process right. But neither that principle nor this amendment should prevent the anticipated Human Rights Court in Indonesia from trying violations of international humanitarian law embodied in treaties and customary law to which Indonesia is unquestionably bound. We hope that Indonesian prosecutors will be able to bring military commanders to account for the East Timor atrocities and for egregious crimes against civilians committed elsewhere in Indonesia, as the Indonesian authorities have indicated they are prepared to do. We all must carefully scrutinize the next steps in Indonesia to achieve justice for the victims of unwarranted military and militia violence.

Hardliners, of course, will continue to do all they can to obstruct a credible accountability process. In the event they are successful and domestic accountability is no longer a viable option, the international community must be prepared to exert its prerogative to *see* that the principal perpetrators are brought to justice. We recognize the importance of what the UN High Commissioner for Human Rights, Mary Robinson, has said on this subject recently. If the Indonesians do not address this challenge, then the pressure will grow to create an international tribunal to do the job.

That being said, the UN Transitional Administration in East Timor (UNTAET) is doing its part in documenting what transpired in the East Timor violence. We hope that the legal authorities in East Timor and Jakarta will continue to cooperate in this venture. UNTAET and the Government of Indonesia have already signed a memorandum of understanding that provides a framework for the sharing of information and might even allow for joint investigations. There is certainly enough work to go round to avoid unnecessary duplication of effort and competition for suspects and resources. And the courts established by UNTAET may, in light of the recent developments in Jakarta, have to become the most immediate and primary vehicle for justice for East Timor. We will spare no effort in strengthening the rule of law in East Timor and in Indonesia, where criminal violence against large number of civilians in the Moluccas, in Aceh, and in Irian Jaya must not go unanswered.

BURUNDI

The atrocities experienced by the people of Burundi remain one of the toughest challenges in the carpenter's shop for judicial accountability. Nelson Mandela has brilliantly led negotiations for a peace agree-

ILI US Digest/3 246 1/8/02, 1:45 PM

ment in Burundi. The challenge of peace will also be a challenge for justice in Arusha on August 28th. With the help of Nelson Mandela, the parties to the conflict in Burundi and the international community will need to find credible means to address the egregious crimes that have brought such death and mayhem to the civilians of Burundi. In Burundi as well, the crime of rape has been a common feature of military operations. The women of Burundi have played a key role in seeking peace and reconciliation, and the victims of rape deserve justice.

IRAQ

With respect to Iraq, the United States Government is determined to *see* Saddam Hussein and his inner circle stripped of their power and brought to justice. Saddam's regime has murdered hundreds of thousands of its own citizens, frequently with poison gas. It continues to commit numerous atrocities against the Kurds, the Turkomen of northern Iraq and the Shia of the south. Political opponents of any kind are subject to imprisonment, torture, and summary execution. The regime perpetrated war crimes and crimes against humanity against the people of Iran and Kuwait and used massive crimes against the environment as a political weapon. During the Gulf War, Iraq fired 42 Scud missiles — indiscriminate terror weapons — at population centers in Israel. This was an egregious violation of the law of war, given that Israel was a non-belligerent.

The United States supports the creation of an international criminal tribunal for Iraq, as was done for Rwanda and the former Yugoslavia. Additionally, we are assisting various non-governmental organizations to gather evidence for use in prosecution in foreign domestic courts if the opportunity arises. Every day Saddam's list of crimes grows, as does the need for accountability. This is a man and a regime who have brutally and systematically committed war crimes and crimes against humanity for years, are committing them now, and will continue committing them until the international community finally says: "enough."

ETHIOPIA AND ERITREA

We are witnessing in the Ethiopian/Eritrean conflict a sharp rise in actions that appear to be war crimes. These include allegations of Eritrea's mass expulsion through minefields of Ethiopian citizens and deplorable treatment of prisoners of war in violation of the Geneva Conventions of 1949 and Protocol II, which Eritrea has ratified. Alleged Ethiopian mili-

ILI US Digest/3 247 1/8/02, 1:45 PM

tary actions against Eritrean nationals in Ethiopian-occupied Eritrea have included unwarranted bombings of civilian settlements, mass rape, disappearances, and summary executions. The United States has been pressing both Ethiopia and Eritrea to reverse their egregious conduct. Today U.S. Ambassador Richard Bogosian is intensifying our efforts in this region and we call upon other governments to put maximum pressure on Asmara and Addis Ababa to comply strictly with international humanitarian law. Ethiopia and Eritrea stand on the brink of yet another international investigation of conduct that is simply unacceptable in the 21st century. They have the power to either demonstrate their own resolve to comply with international law or invite others to judge their leaders for individual responsibility for criminal conduct.

ATROCITIES PREVENTION

An equal, if not more difficult challenge, is how to prevent atrocities from occurring. This is a vexing issue that has occupied the attention of the academic and non-governmental communities and produced extremely helpful studies and projects that we all are benefiting from. We have also undertaken within the Clinton Administration an ambitious effort to prevent atrocities. Let no one assume that we pretend to be successful, as atrocities are continuing at an alarming rate. The International Rescue Committee's estimate of 1.7 million deaths in recent years attributed to the conflict in the Democratic Republic of the Congo is a sobering, if not frightful, reminder of how far we yet have to go. We owe it to the innocent civilians to do our best to prevent further bloodshed in that tortured land.

I head up the atrocities Prevention Interagency Working Group in the U.S. Government. It was created by President Clinton almost 2 years ago. We recognize in the work of our group that there is indeed a lot of information to draw upon — from NGO's, the media UN relief groups, and our own diplomatic sources of information.

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Last October we convened at the Holocaust Museum in Washington, DC, a Conference for Coordinating Atrocity Prevention and Response where a number of governments, including South Africa, and non-governmental organizations met to explore feasible measures to enhance international cooperation and coordinated efforts in the struggle against mass acts of murder, terrorism, wanton violence, torture, or rape

ILI US Digest/3 248 1/8/02, 1:45 PM

as a weapon of war against civilian populations. The deliberate targeting of civilians, especially children, was given special attention. We agreed upon a Statement of Principles for International Cooperation to Prevent, Ameliorate, or Prosecute Perpetrators of Atrocities that we are finally in a position to make more broadly known. It is our common objective to create an informal atrocities prevention and response network among governments, international organizations, and non-governmental organizations. The network will identify emerging trends and potential responses and help coordinate policy options that will be raised to appropriate governmental and institutional levels.

INTERNATIONAL CRIMINAL COURT (ICC)

Let me conclude with some views about the permanent international criminal court. The United States long led the effort to create an appropriate and effective permanent international criminal court and we deeply engaged in the talks leading up to the Rome Treaty of July 1998. I know. I have been there from the earliest days of the Clinton Administration in 1993 and have led for several years the U.S. delegation to the ICC talks. Our commitment to international justice has been strong and our commitment to the negotiations for an international criminal court second to no other government.

Following the Rome Treaty the United Sates led the UN negotiation for the Elements of Crimes of the International Criminal Court. We drafted the primary document and for nearly 2 years we were in the trenches with South Africa and other governments to finish this work-engine document of the Court. On June 30th of this year we were proud to join consensus with other government in adopting the Elements of Crimes. We also participated actively in the Rules of Procedure and Evidence, an essential for the effective working of the Court. On June 30th we joined consensus on the completion of that document.

We have a remaining fundamental difficulty with the Rome Treaty that we sincerely wish to resolve so that, at a minimum, the United States can be a good neighbor to the International Criminal Court regardless of whether we achieve party status or not in the near future.

That fundamental difficulty is the exposure of our armed forces, which are deployed by the hundreds of thousands around the world at the request of governments and to ensure international peace and security, to prosecution before the Court even before the United States be-

ILI US Digest/3 249 1/8/02, 1:45 PM

comes a party to the Rome Treaty. The possibility that a U.S. soldier fighting to halt genocide could be accused by the other side of war crimes and brought before the Court, before we have even joined the Court, is untenable to the American people. It is untenable because we are at a vital crossroads in world history right now, when the resolve of the international community to confront evil is being tested every day. In any military action, we have to accept the possibility that things will not go as planned; missiles might go off target, and human error could result in unintended destruction. But fear of being accused of war crimes for honest mistakes should not prevent us from acting. We are sometimes criticized for not confronting that evil immediately, for letting it fester too long until too many innocent civilians are slaughtered by fearless, thuggish leaders of tyranny.

We are determined to confront the perpetrators of human misery, but we must do so recognizing the risks and the necessary balance that must be struck between our pursuit of international justice and our common quest to achieve international peace and security and respond to humanitarian calamities.

The United States is not shirking from prosecuting its own for international crimes. We know our responsibilities and we are committed to fulfilling them. We are currently negotiating a proposal that would not amend the Rome Treaty, but would permit a procedure that still requires a nation that is not yet a party to the treaty to act responsibly and bring its own to justice. If a nation, whether a party or not to the Rome Treaty, acts irresponsibly and wages massive crimes against its own people or those of another nation, then we have no interest in permitting such a nation to enjoy any special privilege; let that nation's war criminals stand trial before the ICC. We want to achieve the objectives of the Rome Treaty, and indeed to do so as a non-party until such time as we can join the treaty.

But reason and common sense must prevail if we are to strike this balance. Those who argue that the Clinton Administration is seeking to oppose the Rome Treaty and destroy its objectives are deeply mistaken. There is so much to gain by having the United States on board as a partner to the International Criminal Court. It would be tragic if the opportunity is lost to achieve that partnership. We are so close; it would be a colossal mistake for purist notions about the Rome Treaty to kill off the opportunity for the United States to become a true champion of the Court and to provide it with the kind of assistance and

ILI US Digest/3 250 1/8/02, 1:45 PM

cooperation that it so clearly will need to be an effective engine for international justice.

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2. Rape as a war crime

Ambassador Scheffer had previously elaborated on the evolution of the recognition of rape as a war crime in an address at Fordham Law School on October 18, 1999.

The full text of the speech is available at *www.state.gov./s/l.*

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The crime of rape has long existed under customary international law. The Leiber Code listed rape as a specific offense, and made it a capital offense. The Hague Conventions, World War II prosecutions, and the Geneva Conventions all reinforced the prohibitions on rape and other sexual violence. Although it was not codified in their Charter, some evidence of sexual violence was presented before the International Military Tribunals, after World War II, most notably, before the International Military Tribunal for the Far East where rape was first specifically referenced in the judgments. Unfortunately, in the Tokyo Trials, acts of sexual violence and rape were not placed at a level that would allow them to stand alone. The Tribunal and its lawyers, while deserving ample credit for presenting the evidence and recognizing the atrociousness of the offenses committed upon women in places such as Nanking, Borneo, the Philippines and French Indo-China, lumped the acts of sexual violence under the residual umbrella of Crimes Against Humanity—Inhumane Treatment.

This resulted in a blur. Rape was lost in the barbarous mass of the overall crimes. It became a passing reference in a tale of horror. In the

ILI US Digest/3 251 1/8/02, 1:45 PM

end, no one knew whether rape in time of conflict could be prosecuted as a separate substantive crime standing on its own merits under international law. It was left to scholars and interested people like you to opine and speculate. The only solace arose from the Allied Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity,* which specifically mentioned rape in its charter.

But today, we find ourselves in an enormously stronger position to investigate, document and prosecute rape and other forms of sexual violence. Rape and sexual violence now have a firm foothold as specifically enumerated offenses under international humanitarian law. This cementing began in 1993 and 1994 after rape, and sexual violence, was specifically codified for the first time as a recognizable and independent crime within the statutes of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. These two historic international instruments are now the foundation upon which crimes of rape and sexual violence are punished.

As a result there is now solid caselaw holding that rape and sexual violence are a form of genocide. The ICTY and ICTR cases have also reinforced the legal basis for arguing that rape and sexual violence are individual crimes against humanity, and also constitute violations of the laws and customs of war. This jurisprudence handed down from both ad hoc tribunals has forever altered the landscape of criminal prosecution and affected the scope of consequences that any potential perpetrators must consider.

And it all started quietly within the International Criminal Tribunal for Rwanda in the case of the *Prosecutor v. Jean-Paul Akayesu.* In that case, for the first time rape and acts of sexual violence were put on equal footing with all other offenses. The Chamber in its progressive decision captured the essence of the crime holding that

> "like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of the person. Like torture, rape is a violation of personal dignity, and ... in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

ILI US Digest/3 252 1/8/02, 1:45 PM

The *Akayesu* decision also held that rape or sexual violence can be prosecuted as genocide if the evidence shows that it is accomplished with the intent to physically or psychologically destroy a group. This landmark case is now the cornerstone of all future genocide and crimes against humanity prosecutions. I am proud to say that I now have as a member of my staff the prosecutor of the case, Pierre Prosper. We support the legal strategy of the ICTR's Legal Advisor for Gender, Patricia Sellers and others who put gender on the agenda.

In late 1998, the ICTY produced equally historic precedents in the *Celebici, Furudzija,* and *Delalic* cases. These judgments recognized rape as a violation of the Laws and Customs of War and as a basis of torture under the Geneva Conventions. The Trial Chamber of the ICTY held in *Celebici* that it "considers the rape of any person to be a despicable act which strikes at the core of human dignity and physical integrity." *Furudzija* was a watershed because it was the first case to consist exclusively of rape charges. The ICTY Trial Chamber in *Delalic* adopted the *Akayesu* definition of rape as a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive." The judges of ICTY will soon hear evidence in the *Konarac* and *Kovac* cases that will be the first to allege sexual violence as a form of enslavement. Next year before the ICTR, will be the first ever case of a woman,..., being prosecuted for rape as an aider and abettor.

The law of rape and sexual violence continues to evolve. Nowhere is that more apparent then it is with the International Criminal Court. Next month, in New York, governments will reconvene for the third session of the Preparatory Committee meeting on the Rome Statute for the International Criminal Court. The United States will renew discussions regarding the elements of the offences within the statute. The crimes of rape and other forms of sexual violence have already received extensive discussion among the nations represented at the PrepCom. Throughout the many debates surrounding the creation of the ICC, the United States has been a strong advocate for the inclusion of rape and sexual violence as specific offences for the world body to punish. We fought hard for laws that help ensure the protection of women in times of conflict throughout the world. And in New York we will continue to insist on elements of crimes and rules of procedure and evidence that respect the dignity of victims and the sensitivity of world cultures.

We are following many of the principles set forth in the *Akayesu, Celebici,* and *Furudzija* cases and believe that the ability of a victim of

ILI US Digest/3 253 1/8/02, 1:45 PM

sexual assault to consent, whether a man or a woman, can be stripped away by acts of force or the threat of force or coercion.. Acts that can eliminate consent are any acts that cause fear of violence, duress, detention, or other forms of psychological oppression or abuse of power. In short, an individual cannot take advantage of a coercive environment and claim that a victim was a willing participant. As the Trial Chamber held in *Furudzija,* conditions of captivity can combine to vitiate even an apparent consent by the victim. Nevertheless, the United States' position has been that the perpetrator has a fundamental right to present a defense. In other words, a lack of consent cannot simply be inferred or assumed. The United States has fought to retain the lack of consent as a core component of the crime that cannot be ignored. That is why in the last session of the PrepCom, we insisted and supported the inclusion of language from this line of cases that recognizes the effects an environment can have upon a victim. We also pushed for a broader definition of rape that is gender neutral and treats physical invasions by any object or body part no differently in the eyes of the law, thus further protecting victims from the horror of inhumanity. The ICTY has already recognized this principle in its *Tadic* decision, and the current text of the elements of crimes for the ICC includes a footnote that the concept of physical invasion is intended to be gender neutral.

But as I mentioned, there are cultural sensitivities that must be respected, in particular the question of how descriptive the elements should be and to what level of detail a victim must describe the horrendous events inflicted upon her or him. Should the word "penetration" be used, or is the phrase "physical invasion" as captured by the *Akayesu* decision enough to provide sufficient notice and information to all parties involved in the proceedings?

The United States feels that we must balance the degree of specificity that some nations are demanding with the need not to unduly offend victims and the court with mechanical descriptions of body parts. The weighty decision to convict and punish a rapist should be made based on clear and established criteria. We also do not want to *see* a proceeding become a perverted process insulting to victims and adding to the traumatization. We want a process that is fair to the victim and ensures that an accused is fully informed of the nature of the charges against him or her and can mount a defense. We are committed to working with other delegations to ensure that the language of the final text will balance all interests while embodying a significant advancement in

ILI US Digest/3 254 1/8/02, 1:45 PM

the law applicable to international enforcement of rape and other sexual crimes.

We also want to *see* an expansion of the scope of criminal responsibility. We want to ensure that the jurisprudence is such that no one who is culpable escapes punishment. We welcome recent advancements of international humanitarian law in the area of rape and sexual violence that broaden the scope of individual criminal responsibility to leaders and commanders who lend their influence and tacitly encourage crimes against women. The *Akayesu* and *Furudzija* decisions hold that officials and leaders can be directly responsible when they witness acts of sexual violence and rape committed by attackers, even when those attackers are not strictly under their chain of command. This is reasonable case law in all armed conflicts, both internal and international, as well as situations of genocide. This is ever so important given that today's paramilitary and militia command structures are often covertly organized and not easily defined. We must combat these intentionally loosely knit paramilitary and militia by creating laws that are flexible, thus piercing the shields that are designed to hide the true culprits.

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D. AD HOC TRIBUNALS

1. International Criminal Tribunal for the Former Yugoslavia

On November 15, 2000, the United States filed its Brief on Review of Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, in *Prosecutor v. Simic, Simic, Tadic, Todorovic and Zaric,* Case No. IT-95-9-AR, at the International Criminal Tribunal for the Former Yugoslavia. One of the indictees in the case, Stevan Todorovic, alleged that his arrest by SFOR in Bosnia-Herzegovina was only made possible through an unlawful kidnapping in

ILI US Digest/3 255 1/8/02, 1:45 PM

Serbia carried out by or for SFOR, and that he should therefore be released and returned to Serbia.

On October 18, 2000, Trial Chamber III of the Tribunal ordered SFOR, the United States, and other SFOR participating States to produce certain evidence in response to a discovery request by the defense. (Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, October 18, 2000.) Excerpts from the United States brief urging reversal of the Trial Chamber's Decision as being both erroneous and an abuse of discretion are provided below. The U.S. argued that it was inappropriate for the Tribunal to issue orders directing production of information that SFOR has determined must be withheld for operational security and force protection reasons where SFOR has asserted compelling operational security concerns about the information; that the Trial Chamber should have accepted the accused's assertions of fact and decided (and denied) his requests for release as a matter of law, as urged by the Office of the Prosecutor and SFOR; that neither SFOR, the U.S. or any other SFOR participant State acts as an agent or enforcement arm of the Tribunal when it cooperates in the detention and transfer to the Tribunal of indictees; and finally that the Trial Chamber erred in concluding that U.S. General Shinseki, when acting in his capacity as Commander of SFOR, lacked functional immunity and would be subject to a subpoena requiring him to testify in his individual capacity, notwithstanding his functional immunity as Commander in Chief, U.S. Army Europe. These issues were rendered moot as a result of Todorovic's decision on December 13, 2000 to plead guilty and withdraw his motions for release and for judicial assistance, together with his allegations concerning the circumstances of his arrest. Orders and Decisions in the case are available at ww*w.un.org/icty.*

ILI US Digest/3 256 1/8/02, 1:45 PM

The full text of the U.S. brief is available at *www.state.gov/s/l.*

* * * *

The resolution by the Appeals Chamber of the issues raised by the Decision will be of the utmost significance to the future of the Tribunal, and its relationship with those engaged in the apprehension of persons indicted for war crimes ("PIFWCs") pursuant to Tribunal arrest warrants. The prospect presented by the Decision — that the methods and capabilities employed by SFOR or other entities and States engaged in apprehensions could be subject to unnecessary disclosure — has immediate and far-reaching implications. The disclosure of the identities of those involved in detention activities, and of their capabilities and methods, has the potential for endangering the effectiveness and the safety of units involved in apprehensions — and thus may unnecessarily hinder or restrict future apprehension efforts. It is also likely to have a chilling effect on persons and elements that may be willing to cooperate with those engaged in apprehensions only with a guarantee of strict confidentiality.

As noted in its Request for Review of 2 November, the United States was not before the Trial Chamber and had no opportunity to present views before issuance of the Decision and order against it. The United States endorses and adopts, as equally applicable to it, the arguments set forth by SFOR in its submission to the Trial Chamber dated 9 July 2000. In addition, the United States respectfully submits that the Decision should be reversed for the reasons set forth below.

ARGUMENT

1. *The Trial Chamber erred or abused its discretion in issuing an order for the production of information against the United States of America, when the United States of America was not a party or participant in the proceedings prior to the Decision, and had no opportunity to present its views.*

ILI US Digest/3 257 1/8/02, 1:45 PM

As noted by other States requesting review, to the extent the Decision ordered States to provide information in this case, the Trial Chamber failed to follow the procedures required by Rule 54 *bis* of the Rules of Procedure and Evidence. However, while it may be desirable for the Appeals Chamber to clarify the proper application of Rule 54 *bis*, the United States does not believe that this case should be returned to the Trial Chamber for further proceedings under that Rule.

The United States agrees with SFOR that *no* disclosure of the information at issue should be made through any further proceedings. Rule 54 *bis* provides for the rejection of an application for the production of documents or information if they are "not *relevant* to any matter in issue in the proceedings…or are not *necessary* for a fair determination of any such matter."[2] The accused has not established that the discovery he seeks is relevant or necessary to his defense, nor can he do so. To enable the Tribunal to decide the accused's requests for release while avoiding the grave consequences of disclosure, SFOR and the OTP have urged the Trial Chamber to accept the facts alleged by the accused, viewed in the light most favorable to him. At this point in these lengthy proceedings, it is time for the accused to be held to some standard of pleading — either his allegations, if accepted, establish his entitlement to relief, or they do not. In either case, there is no necessity for further discovery on how he was apprehended.

These consideration are particularly important where, as here, the information at issue raises compelling operational security concerns. In such a case no further inquiry — under Rule 54 *bis* or otherwise — should be permitted. Because this is a question of law, the United States respectfully submits that the Appeals Chamber can and should decide it in this review.

2. *It is inappropriate for the Tribunal to issue orders directing production of information that SFOR has determined must be withheld for operational security and force protection reasons.*

In its submission of 9 July 2000, SFOR reserved its position on the question of the Tribunal's power to issue orders addressed to SFOR. In Decision ¶¶46-49, the Trial Chamber decided that it does have such power, but in ¶¶52 and 56 it noted contradictory authority in another

[2] Rule 54 *bis* ¶ (B)(i)(emphasis added). *See also* Rule 54 (Trial Chamber may issue orders "*necessary*…for the preparation or conduct of the trial") (emphasis added).

ILI US Digest/3 258 1/8/02, 1:45 PM

Trial Chamber, which it declined to follow. As a NATO member and participating State in SFOR, the United States is entitled to address this question.

SFOR's predecessor, the multinational implementation force for Bosnia ("IFOR") was established pursuant to Security Council Resolution 1031 under Chapter VII of the United Nations Charter. Paragraph 14 of that Resolution authorized member States acting through or in cooperation with NATO to establish a multinational implementation force in order to fulfill the role specified in Annex 1-A and Annex 2 of the General Framework Agreement for Peace in Bosnia and Herzegovina (the "Peace Agreement"). This included a broad range of responsibilities for IFOR related to, inter alia, the establishment of a durable cessation of hostilities. Paragraph 15 of Resolution 1031 authorized the member States acting under paragraph 14 "to take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement." Paragraph 17 of that Resolution authorized the member States to take all necessary measures, at the request of IFOR, either in defense of IFOR or to assist the force in carrying out its mission, and it specifically recognized the right of IFOR to take all necessary measures to defend itself from attack or the threat of attack.

Subsequently, Resolution 1088 authorized those same States to establish SFOR as a legal successor to IFOR under the same unified command and control arrangements in order to fulfill the role specified in Annexes 1-A and 2 of the Peace Agreement. Paragraph 19 of that Resolution authorizes member States to take "all necessary measures" to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement; paragraph 20 authorizes member States to take all necessary measures, at the request of SFOR, either in defense of SFOR or to assist the force in carrying out its mission, and it specifically recognizes the right of SFOR to take all necessary measures to defend itself from attack or the threat of attack.

Annex 1-A authorizes the multinational force to fulfill supporting tasks, and specifically contemplates that the North Atlantic Council may establish additional duties and responsibilities for the force to carry out in implementing Annex 1-A. *See* Annex 1-A, paragraphs 3 and 4 of Article VI. The North Atlantic Council in 1995 did establish detention of PIFWCs as such an additional duty. Annex 1-A, paragraph 5 of Article

ILI US Digest/3 259 1/8/02, 1:45 PM

VI, authorizes the commander of the multinational force to do all "that the Commander judges necessary and proper, including the use of military force, to protect the [multinational force] and to carry out its responsibilities."[3] SFOR and the States acting in cooperation with it have participated in a variety of activities related to the apprehension and detention of PIFWCs under the authority. These States, as well as SFOR itself, enjoy authority to take all measures necessary in order to carry out these activities.

Pursuant to the authority conferred by the Security Council and Annex 1-A of the Peace Agreement, SFOR and the States that carry out these Chapter VII functions have adopted various measures regarding the security of the many operations they conduct, including measures that they deem essential for operational security, the effective carrying out of their responsibilities, and the protection of their personnel from hostile action. Of particular importance with respect to this case, and as described in greater detail *infra*, the participants in these Chapter VII operations have determined that disclosure of the information requested by the Trial Chamber would give rise to an unacceptable risk to their forces and compromise their ability to carry out further PIFWC operations. These are judgments that the Security Council, in authorizing these operations under Chapter VII, has entrusted to those responsible for carrying them out.

The Tribunal, of course, also operates pursuant to the authorization of the Security Council under Chapter VII, and therefore it too has "all necessary measures" authority to carry out its mandate. But it is inappropriate for the Trial Chamber to issue an order inconsistent with what those responsible for carrying out SFOR's mission, acting under authority coequal to that of the Tribunal, have concluded is essential to carry out that mission effectively and safely — just as the Tribunal would not expect SFOR to issue orders purporting to require the Tribunal to take actions inconsistent with what those responsible for carrying out the Tribunal's work determined is essential for the Tribunal to carry out its mission.

The need for deference is particularly compelling when, as here, the information at issue is not sought to assist the Tribunal in determin-

[3] In this connection, Article XII of Annex 1-A establishes that the Commander of the multinational force "is the final authority in theatre regarding interpretation" of Annex 1-A.

ILI US Digest/3 260 1/8/02, 1:45 PM

ing the guilt or innocence of an accused — the Tribunal's core mandate — and its absence would not undermine the Tribunal's ability to make that determination. Unlike the *Blaskic* case, discussed *infra*, in which the Tribunal's ability to discharge this core mandate was at stake, in this case information is sought on the means by which a lawfully indicted person was detained. This is a matter within the purview of SFOR, and a compulsory order to produce such information would undermine operational security and effectiveness — an SFOR core mandate.

The United States respectfully submits that the difficult questions of the relative competencies of the Tribunal and SFOR, and of the power of the Tribunal to issue orders to SFOR or its participating States in the circumstances presented here, should be avoided if other grounds are available. The United States further submits that such alternative grounds are available, and that the Decision of the Trial Chamber can and should be reversed on the independent grounds set forth below.

3. *The Trial Chamber erred or abused its discretion in ordering the production of information as to which SFOR had asserted compelling operational security concerns.*

The Trial Chamber rejected what it characterized as SFOR's "blanket objection," noting that "it was open to SFOR to make specific objections to the disclosure of particular documents or other material at the hearing."[4] SFOR did offer specific explanation of its concerns.[5] SFOR was not prepared to discuss "particular documents or other material" specifically,[6] and there is no requirement that it do so.[7] The Decision does not address, much less answer, the concerns raised by SFOR, and this omission represents error or abuse of discretion.

The concerns raised by SFOR are equally applicable to the United States or any other State or entity that participates in SFOR or otherwise supports the efforts of this Tribunal to bring PIFWCs to trial. PIFWCs and their supporters are prepared to resort to extreme measures, includ-

[4] Decision ¶ 60.

[5] SFOR submission of 9 July 2000 at 5-6.

[6] SFOR's caution in this regard can only be said to have been validated by the Trial Chamber's treatment of materials received in confidence, discussed *infra*.

[7] Moreover, in view of the status of SFOR relative to the Tribunal, discussed *supra*, it is arguable that although it was appropriate for SFOR to offer the explanation it did of its objections, in a case of this type only SFOR is in a position to judge the weight of those objections as applied to specific information

ILI US Digest/3 261 1/8/02, 1:45 PM

ing the use of lethal force, to avoid apprehension and frustrate efforts to bring them to justice. Several have taken refuge in areas where the local authorities grant them tacit or overt sanctuary. SFOR and other States and entities can only plan and undertake detention operations on the basis that the modalities by which such operations are conducted will not be subject to disclosure. Thus, the need to maintain operational security for any entity engaged in apprehensions precludes the disclosure of information of the type sought by the accused.

* * * *

Nor is there any justification for imposing on SFOR or its participating States the same type of inquiry employed by the Tribunal in seeking information from States or entities of the former Yugoslavia, whose forces are the subject of the Tribunal's investigations and prosecutions. As noted above, request for information to States or entities of the former Yugoslavia typically go to the core mandate of the Tribunal — the adjudication of the guilt or innocence of an accuse. "Blanket" assertions of national security concerns are inherently suspect in the case of such States and entities, whose political and military leaders and institutions are frequently implicated in the matters under investigation and prosecution. Skepticism is appropriate concerning blanket assertions of national security concerns by such States and entities, because the information they are attempting to shield concerns *past* activities — in *Blaskic*, for example, the issue was military campaigns that had occurred years before, in a conflict that had ended. Here, it is not historical information that is at issue, but information that goes directly to *current* and *future* detention operations in support of the Tribunal's mandate. Finally, in the case of former Yugoslav States and entities, there is no concern about deterring or hindering legitimate activities pursuant to U.N. Security Council resolutions and this Tribunal's lawful indictments and arrest warrants. Here, by contrast, disclosure of operational information has the very real potential of impairing the operational security and effectiveness of legitimate activities in support of the Tribunal's mandate. Even the *prospect* of such disclosure — with or without possible protective measures — will undercut the willingness of States to engage in detentions and chill the willingness of individuals whose cooperation is vital to such operations.

ILI US Digest/3 262 1/8/02, 1:45 PM

The Trial Chamber in this case recognized such considerations in its "ICRC decision."[8]

* * * *

4. *The Trial Chamber Should Have Accepted the Accused's Assertions of Fact and Decided His Requests for Release as a Matter of Law.*

In view of the compelling operational security concerns raised by SFOR, the Trial Chamber erred or abused its discretion in ordering the production of the requested information, when the OTP and SFOR concurred that, in the absence of that information, the accused's assertions of fact could be taken as established for the purposed of his requests for release, and that those requests could then be decided as a matter of law.[10] Both SFOR and the OTP addressed in detail the reasons why, as a matter of law, the accused is not entitled to the relief he seeks. The Trial Chamber adverted to those arguments, but did not address them. Instead, it concluded that these arguments were "erroneous," for the glaringly circular reason that the accused is seeking information in support of the relief he seeks:

> The main contention of both SFOR and the Prosecution in opposing this Motion is that the Motion should be dismissed because Todorovic is not entitled to the relief he seeks, even if his allegations were to be accepted. This argument proceeds on the assumption that the evidence is complete. That assumption is erroneous, as what Todorovic is seeking is further evidence from SFOR which will assist him to obtain the relief which he seeks. Only when Todorovic has had the opportunity to present all the available evidence

[8] *Prosecutor v. Simic et al.*, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.

[10] *See* Decision ¶¶ 22, 59. Indeed, even the accused argued that, if SFOR failed to produce the information he seeks, the Tribunal could decide that he had "established a prima facie case." *Id.* ¶ 27. Although we disagree with the accused's legal conclusion, his argument reinforces the soundness of deciding his motions as a matter of law, without further production of information.

ILI US Digest/3 263 1/8/02, 1:45 PM

> will it be possible for the Trial Chamber to determine whether he is entitled to the relief he seeks.[11]

This reasoning is itself plainly erroneous. If all the accused's allegations can be taken as established, and these allegations still will not support the relief he seeks as a matter of law, then there is no conceivable "further evidence…which will assist him to obtain the relief which he seeks." To persist in ordering the production of such "further evidence," in the face of SFOR's well-founded security concerns, is futile, erroneous, and an abuse of discretion.

The accused, to this day, has not asserted involvement in his alleged abduction by the OTP or any other entity connected with the Tribunal. To the contrary, while he states that the "record is still open," he makes clear that SFOR involvement, not OTP involvement, is the issue he is pursuing, on the theory that SFOR is the OTP's (and thus the Tribunal's) "alter ego or agent."[12] However, as discussed *infra*, SFOR is *not* the agent of the OTP, and in the absence of a connection between the OTP and the alleged abduction, the accused's requests for release fail as a matter of law.

The Appeals Chamber's second decision in *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72 (31 March 2000), stands for the proposition that the Tribunal's jurisdiction is not impaired by the acts of third parties. In an initial decision in that case (3 November 1999) the Appeals Chamber held the Prosecutor responsible for egregious delays in an indictee's case, and ordered the indictee released. However, on reconsideration the Appeals Chamber revised its decision, concluding that a significant portion of the delay was due to other actors, and not attributable to the OTP. Accordingly, the Appeals Chamber rejected the request for release.

This general principle is fully consistent with the case law. We are aware of no case in any jurisdiction that would require the release of the accused on the facts he alleges. Courts are not require to relinquish personal jurisdiction over an accused because of the acts of third parties, not part of their State apparatus and not under their supervision and control.

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[11] Decision ¶ 59 (footnote omitted)

[12] Accused Stevan Todorovic's Motion to Dismiss the Prosecutor's Appeal, Opposition to Application for Leave To Appeal Against Trial Chamber's Interlocutory Order dated October 18, 2000 and in Opposition of a Stay; Motion for an Expedited Appeal Should Leave Be Granted; Joinder in Application for Oral Hearing on Stay, filed 31 October 2000 ("Defence Opposition") at 4-5 and n.7.

ILI US Digest/3 264 1/8/02, 1:45 PM

Indeed, even in cases in which there is an element of State involvement, such as when police informants are involved, courts have been very reluctant to find a violation that would justify the remedy of release. *Stockè v. Germany*, ECHR Ser A No. 199 (1991), a case involving facts and allegations of significant State involvement, illustrates this most vividly. In *Stockè*, an informant clearly working with government authorities abducted the applicant to facilitate his arrest in Germany. Following the applicant's arrest, the German authorities reimbursed the expenses of the airplane charter used by him in carrying out the abduction. Nonetheless, the German authorities denied having authorized the abduction, and the Court found that "it has not been established that the cooperation between the German authorities and [the informant] extended to unlawful activities abroad." *Id.* ¶ 54. The allegation by the accused in this case concerning a connection between the prosecuting and detaining authorities do not approach those found insufficient in *Stockè*, and the Trial Chamber should hesitate before creating a right to release for an indicted war criminal, based on them.

A variety of other cases address the lawfulness of cross-border abductions, with some upholding the principle that an abduction in violation of the law of one State does not divest another State to which he is brought of jurisdiction to prosecute and others suggesting that a State's courts may exercise discretion to decline jurisdiction over an individual brought before them under such circumstances. However, when agents of the prosecuting State have not been shown to be complicit, there are no grounds for such discretion. In the current case, the OTP plays the same role as the agents of the prosecuting State, while SFOR and other entities and States have no such role.[13]

Moreover, in no such case of which we are aware has a court been required to take into account the difference between persons subject to arrest and prosecution before an international tribunal under a U.N. Se-

[13] As discussed *infra*, while States and international entities like SFOR detain indictees to hand them over to the Tribunal, they do not act under its direction or supervision and do not stand in the same relationship to it as do officials of a State to the courts of that State. The contrary ruling would suggest, for example, that an accused before the Tribunal could seek release based on substantive or procedural irregularities in the extradition or other procedures through which he was surrendered to the Tribunal. The Tribunal's custody over indictees should not depend upon the vagaries of domestic law or procedure. *See* Tribunal Rule 12 ("determinations of courts of any State are not binding on the Tribunal"). Nor should it depend on actions taken by persons who are not subject to the control or supervision of the Tribunal.

ILI US Digest/3 265 1/8/02, 1:45 PM

curity Council Resolution, on the one hand, and persons subject to arrest and prosecution before national courts on the basis of national law or bilateral treaty obligations, on the other hand. Instead, all other cases of which we are aware were predicated on the existence of what the Appeals Chamber has described as a "horizontal" legal relationship, in which national legal systems stand on an equal footing and law of one State is not binding on or applicable in the territory of another. "Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997" in *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-AR108*bis*, ¶ 47, at 36 (29 October 1997). Thus, a person residing in State A who is indicted by State B continues, under the governing law of State A to enjoy the right to remain at liberty.

The same is not true, however, regarding the relationship between the Tribunal and the State whose sovereignty is alleged to be in question here, the FRY — that relationship is manifestly "vertical," *Blaskic* ¶ 47, at 37. The FRY, like all States, is obligated to cooperate with the Tribunal and is required in particular to comply with orders for arrest. This is of decisive significance to the question at issue — the accused's asserted right to be released from the custody and jurisdiction of the Tribunal, and to be returned to the FRY as a country of "refuge," under whose law he evidently asserts a right to remain at liberty. However, any domestic legal entitlement that the accused may have been able to assert to remain at liberty in the FRY was overcome by his indictment by the Tribunal. In sharp contrast to cases involving national prosecutions, the accused in this case can, after the Tribunal indictment, no longer claim that his detention by SFOR and his prosecution before this Tribunal infringe upon any legal right to be at liberty in the FRY. Accordingly, he is not entitled to the relief he seeks of release from Tribunal custody and return to the FRY.

For all of the above reasons, the accused is not entitled to the relief he seeks. Accordingly, it was error and abuse of discretion for the Trial Chamber to order the production of information in support of the accused's motions for that relief.

5. *Neither SFOR nor the United States, nor any Other Entity or State, Acts as an Agent or Enforcement Arm of the Tribunal.*

The Trial Chamber erred in tacitly ruling that SFOR performs a quasi-police function and operates as an enforcement arm of the Tribunal.[14]…

[14] This error led in turn to the Trial Chamber's failure to accept the OTP's proffer of evidence of its noninvolvement in the alleged abduction, discussed *infra*.

ILI US Digest/3 266 1/8/02, 1:45 PM

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This conclusion is erroneous. … [It] appears to rest in large part on a Memorandum of Understanding concerning the detention and transfer to the Tribunal of PIFWCs by IFOR (now SFOR).[16] This MOU, which the Trial Chamber both quotes and discusses at length,[17] contains nothing whatever that would support the conclusion that SFOR functions as an agent of the Tribunal, or acts under the Tribunal's direction or supervision.

To the extent SFOR detains a PIFWC pursuant to a Tribunal arrest warrant, it stands in exactly the same position as any State performing the same function. A State detaining a PIFWC is not an agent of the Tribunal, and does not act at the direction or under the supervision of the Tribunal. It acts, as does SFOR, under Security Council authority to assist the Tribunal. The execution of an MOU on the subject in no way alters the nature of the relationship, unless SFOR or the cooperating State were to agree therein to create an agency relationship — an agreement which is completely absent from the MOU in question. The United States has entered into an agreement with the Tribunal on the surrender

[16] Memorandum of Understanding (MOU) between the International Criminal Tribunal for the Former Yugoslavia and the Supreme Headquarters Allied Powers Europe Concerning Practical Arrangements for the Detention and Transfer to the Tribunal of Persons Indicted for War Crimes by the Tribunal, 9 May 1996.

[17] Decision ¶¶ 44, 45. We observe that the MOU at issue is marked "NATO/IFOR/TRIBUNAL EYES ONLY," and that the Trial Chamber acknowledges that it received the MOU "on the understanding that it would not be disclosed to anyone outside the Chamber." Decision at fn. 55. It is therefore a matter of concern that the Trial Chamber discusses and quotes the MOU at length, on the grounds that the MOU "contains provisions that are relevant to this Motion," and that "there could be no prejudice caused by the disclosure of the provisions quoted." *Id*. The appropriate procedure would have been to consult and obtain agreement of other interested parties in advance. This unilateral disclosure validates SFOR's caution about the proposition that documents and other materials compromising the security and safety of sources, methods, and personnel may with assurance be turned over or discussed in Tribunal proceedings. In the present case, the United States agrees with SFOR that the risks of unauthorized or inadvertent disclosure are too great — particularly when, as argued before the Trial Chamber and herein, as a matter of law this sensitive information is not required.

ILI US Digest/3 267 1/8/02, 1:45 PM

and transfer of PIFWCs,[18] and it categorically rejects any suggestion that by doing so it has become a Tribunal agent or made itself subject to the direction or supervision of the Tribunal in the matter of arrests and extraditions.

If the alleged actions of SFOR — which are neither dictated nor controlled by the Tribunal — can form the basis for a challenge to the jurisdiction of the Tribunal, the actions of a detaining State could equally form the basis for such a challenge. Moreover, the kinds of actions that could potentially form the basis for such challenges cannot logically be limited to detentions, but would instead extend to a range of other alleged violations of rights. This could put the Tribunal in the untenable position of having to hear challenges based on real or imagined violations by detaining States, that could be asserted by virtually any accused. Nothing in the law compels, or justifies, a ruling that would so undermine the Tribunal's jurisdiction.

If, as we respectfully submit, the Trial Chamber erred in assuming that SFOR acts as an agent or "enforcement arm" of the Tribunal, the only actor as to which information might be relevant would be the OTP, discussed *infra*.

6. *The Trial Chamber erred or abused its discretion in not accepting, before the issuance of its Decision, the OTP's proffer of evidence of its non-involvement in the alleged abduction of the accused.*

The accused asserts SFOR involvement in his alleged abduction, and information concerning that involvement is what he expressly seeks.[19] But the OTP and SFOR have clearly stated that the accused's well-pleaded allegations may be accepted for the purposes of his motions. Hence, additional "evidence" of SFOR's alleged involvement is plainly superfluous, and it was error or abuse of discretion to order its production in the face of the objections raised by SFOR.

* * * *

7. *The Trial Chamber erred in concluding that General Shinseki would be subject to a subpoena.*

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[18] Agreement on Surrender of Persons Between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia, 5 October 1994.

[19] Defence Opposition at 4-5.

ILI US Digest/3 268 1/8/02, 1:45 PM

The Trial Chamber erred in concluding that, "it would be appropriate to issue a subpoena to General Shinseki in due course," requiring him to testify in his individual capacity.[25] The Trial Chamber relied on the *Blaskic* decision, in which the Appeals Chamber distinguished the "functional immunity" enjoyed by State government officials from the situation of an official serving as a member of a peacekeeping force:

> The situation differs for a State official (e.g., a general) who acts as a member of an international peacekeeping or peace-enforcement force, such as UNPROFOR, IFOR or SFOR. Even if he witnesses the commission or the planning of a crime in a monitoring capacity, while performing his official functions, he should be treated by the International Tribunal *qua* an individual. Such an officer is present in the former Yugoslavia as a member of an international armed force…and not *qua* a member of the military structure of his own country.[26]

This discussion was *dicta*. To the extent the Appeals Chamber finds it persuasive, it should nevertheless note that the facts here differ in three important respects from the abstract situation envisioned in *Blaskic*. First, as discussed below, General Shinseki was present in Bosnia in a *dual* capacity — his other capacity being Commander in Chief, United States Army Europe. There can be no question that General Shinseki was entitled to functional immunity in that capacity. There is no way to disentangle his two capacities in this instance, nor is there any need to do so.

Second, the passage in *Blaskic* relied upon by the Trial Chamber envisioned an entirely different situation in which a peacekeeping officer witnesses the commission or planning of a crime that is within the jurisdiction of the Tribunal. As discussed *supra*, this would involve information critical to the adjudication of guilt or innocence — the Tribunal's core mandate. The alleged actions at issue here, however, do

[25] Decision ¶ 62.

[26] *Prosecutor v. Tihomir Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (19 Oct. 1997) at ¶ 50.

ILI US Digest/3 269 1/8/02, 1:45 PM

not concern a crime within the Tribunal's jurisdiction. Rather, they concern the operations of SFOR in the discharge of its own mandate, and the very security concerns raised by SFOR illustrate why SFOR has an interest in asserting "functional immunity" for its officers that equals the interest of the United States of America and other States in the "functional immunity" of their officials.

Third, General Shinseki at all times retained his status as a U.S. military officer. When the United States assigns U.S. military personnel to an international organization such as SFOR, such personnel remain members of the U.S military structure. U.S. military personnel are assigned as national representatives to, and national participants in, international and armed forces. Though U.S. forces are assigned under NATO operational control, the U.S. national command authorities (NCA) never relinquish command authority over U.S. military personnel. The NCA retain ultimate responsibility, for example, for reviewing and approving the Rules of Engagement under which U.S. personnel operate, the command structure to which U.S. personnel are assigned, and the missions which U.S. personnel perform. The NCA assign and withdraw personnel as required, and are responsible for discipline and administration of U.S. personnel.

The retention of command authority by nations over personnel assigned to peacekeeping operations holds true for all member nations of NATO, as well as those non-NATO nations who participate in NATO operations such as SFOR. NATO publication AAP-6, the NATO glossary of terms, defines "operational control" as follows:

> The authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location; to deploy units concerned, and to retain or assign tactical control of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it, of itself, include administrative or logistic control.

On the other hand, "full command" is defined in AAP-6 as:

> The military authority and responsibility of a superior officer to issue orders to subordinates. It covers

ILI US Digest/3 270 1/8/02, 1:45 PM

> every aspect of military operations and administration and exists only within national services. The term command, as used internationally, implies a lesser degree of authority than when it is used in a purely national sense. It follows that no NATO commander has full command over the forces that are assigned to him. This is because nations, in assigning forces to NATO, assign only operational command or operational control.

Thus it is clear that the Trial Chamber erred when it concluded that General Shinseki was "present in the former Yugoslavia as a member of an international armed force…and not *qua* a member of the military structure of his own country."

Throughout his service with SFOR, General Shinseki remained a member of the military structure of the United States of America and was fully integrated into those forces at all times. He is therefore entitled to the immunity enjoyed by State government officials. To conclude otherwise would allow the *Blaskic dicta* to negate such immunity entirely. Furthermore, the Decision would eviscerate any assurance that national security concerns could be protected while personnel are assigned to international organizations. Especially in cases where international organizations have responsibilities for, or participate in, operations connected with war crimes prosecutions, States would no longer have confidence that their national personnel would be protected from being required to provide information directly affecting the national security of the sending State and its personnel.

Finally, the arguments set out above concerning the errors or abuses of discretion in the Decision apply fully to the Trial Chamber's ruling regarding General Shinseki.

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2. International Criminal Tribunal for Rwanda

The surrender of Elizaphan Ntakirutimana to the International Criminal Tribunal for Rwanda is discussed in 3.A. 4 above.

ILI US Digest/3 271 1/8/02, 1:45 PM

E. INTERNATIONAL CRIMINAL COURT

1. U.S. Signing of Rome Treaty

The United States signed the Rome treaty establishing the International Criminal Court on December 31, 2000. UN Doc. A/CONF. 183/9, available at *www.un.org/low/icc.* On that day, President Clinton issued the following statement explaining the decision to sign and the continuing U.S. concerns with the treaty:

The United States is today signing the 1998 Rome Treaty on the International Criminal Court. In taking this action, we join more than 130 other countries that have signed by the December 31, 2000 deadline established in the treaty. We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity. We do so as well because we wish to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come.

The United States has a long history of commitment to the principle of accountability, from our involvement in the Nuremberg tribunals that brought Nazi war criminals to justice to our leadership in the effort to establish the International Criminal Tribunals for the former Yugoslavia and Rwanda. Our action today sustains that tradition of moral leadership.

Under the Rome Treaty, the ICC will come into being with the ratification of 60 governments, and will have jurisdiction over the most heinous abuses that result from international conflict, such as war crimes, crimes against humanity and genocide. The treaty requires that the ICC not supersede or interfere with functioning national judicial systems; that is, the ICC prosecutor is authorized to take action against a suspect only if the country of nationality is unwilling or unable to investigate allegations of egregious crimes by their national. The U.S. delegation to the Rome Conference worked hard to achieve these limitations, which we believe are essential to the international credibility and success of the ICC.

ILI US Digest/3 272 1/8/02, 1:45 PM

In signing, however, we are not abandoning our concerns about significant flaws in the Treaty. In particular, we are concerned that when the Court comes in existence, it will not only exercise authority over personnel of States that have ratified the treaty, but also claim jurisdiction over personnel of States that have not. With signature, however, we will be in a position to influence the evolution of the Court. Without signature, we will not.

Signature will enhance our ability to further protect U.S. officials from unfounded charges and to achieve the human rights and accountability objectives of the ICC. In fact, in negotiations following the Rome Conference, we have worked effectively to develop procedures that limit the likelihood of politicized prosecutions. For example, U.S. civilian and military negotiators helped to ensure greater precision in the definitions of crimes within the Court's jurisdiction.

But more must be done. Court jurisdiction over U.S. personnel should come only with U.S. ratification of the Treaty. The United States should have the chance to observe and assess the functioning of the Court, over time, before choosing to become subject to its jurisdiction. Given these concerns, I will not, and do not recommend that my successor, submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied.

Nonetheless, signature is the right action to take at this point. I believe that a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide, and that signature increases the chances for productive discussions with other governments to advance these goals in the months and years ahead.

2. U.S. Policy on the International Criminal Court

In an address to the American University School of Law on September 14, 2000, Ambassador Scheffer explained the evolution of the U.S. policy toward the International Criminal Court.

The full text is available at *www.state.gov/s/l.*

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I have been asked to cover a large subject today, namely the evolution of U.S. policy towards the ICC. I do not want to reiterate so much of what I have already written and spoken about elsewhere, particularly in the January 1999 issue of the *American Journal of International Law* and the *ASIL Proceedings of 1999.* 1 will look back however and emphasize a few points I have written about before, as well as focus on the national security aspects of our approach to the Rome Treaty.

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There remains a lot of confusion and, frankly, misrepresentations about U.S. policy towards the ICC in the popular media as well as in some of the scholarly works I have read. Overall, there appears to be a common perception that the United States has always stood and continues to stand in opposition to the creation of a permanent International Criminal Court.

This perception, of course, is false. The Clinton Administration engaged in the negotiations for an ICC, which formally began in 1995, strongly supporting the establishment of an ICC. We demonstrated that support by being intensively engaged in the negotiations and producing a large number of papers commenting on and proposing text for the emerging draft treaty. President Clinton on six occasions publicly expressed his support for the establishment of a permanent International Criminal Court. From the very beginning, however, we never intended that the treaty's personal jurisdiction would extend as far as the Rome Treaty finally established under Article 12. To argue that our position on personal jurisdiction reflected an underlying opposition to the whole concept of a permanent International Criminal Court or to the Rome Treaty itself is a deeply flawed argument. We have remained on the front line every day since the first UN session in early 1995 negotiating to support the establishment of a permanent court that the United States can participate in with confidence and in a manner that is compatible with our national and international security responsibilities. The American people expect that of us and we have remained faithful to their interests.

ILI US Digest/3 274 1/8/02, 1:45 PM

For years, and until the third week of the Rome Conference in July 1998, the U.S. position on how the ICC's jurisdiction would be triggered remained consistent. We accepted very early in the UN talks the proposition that a State Party could initiate an ICC investigation of a situation falling within the subject matter jurisdiction of the statute of the Court. We also agreed with others that the Security Council could initiate ICC investigations by referring a situation pursuant to a resolution. We argued for a long time that such a Security Council referral did not have to be authorized under Chapter VII of the United Nations Charter. We argued strongly, however, that if Chapter VII authority were invoked by the Security Council, then the ICC's powers could be greatly strengthened by that Chapter VII mandate. It became clear prior to Rome that governments were determined to require a Chapter VII basis for Security Council referrals, and we ultimately conceded that point. However, it should be noted that our original position would have made it much easier for the Security Council to use the ICC for investigations because the Council would not have necessarily had to engage in the very difficult negotiations that are always required for Chapter VII actions and which sometimes result in the veto power blocking effective action by the Council. If, in future years; the Council does not refer a particular case to the ICC, this may well be the reason.

The third component of our position on initiating ICC investigations was to require that if a State Party referred a situation to the Court and that situation already was the object of Security Council deliberations, then the Security Council's approval would be required before the matter could be taken up by the ICC. This was an important and entirely logical position to take in light of the Security Council's responsibilities for international peace and security and America's own extensive commitments globally to international peace and security. As you all know, that position proved unsustainable as the Rome Conference progressed in the summer of 1998. The outcome was the Singapore compromise, now reflected in Article 16 of the Rome Treaty, and we of course supported that compromise as the best we could obtain under the circumstances.

During the final two weeks of the Rome Conference, we sought three different paths in order to achieve U.S. support for the text of the Rome Treaty and thus join consensus on July 17. Though some may fault us for not having initiated these efforts earlier in the negotiations, they fail to appreciate the complex and multifaceted national security

ILI US Digest/3 275 1/8/02, 1:45 PM

interests that needed to be balanced as we confronted these issues. We shoulder responsibilities worldwide that no other nation comes even close to undertaking. Even those close allies of ours that are deeply engaged in support of U.N. peacekeeping operations are not assuming the vast international security responsibilities that our military has worldwide.

Our first effort mid-way through the Rome Conference was to introduce a proposal that would permit a State Party to "opt out" of crimes against humanity and/or war crimes, but not genocide. This had originally been proposed by the International Law Commission in 1994. We proposed that any such State Party would forfeit its right to refer matters to the Court, however, if it chose to opt out of either of these categories of subject matter jurisdiction. And the Security Council could override the "opt out" with a Chapter VII referral. Although 22 governments openly supported that proposal, it failed to attract enough support to be sustainable.

Our second effort, in the final week of the Rome Conference, was a package deal developed with the other permanent members of the Security Council that would permit a ten-year transitional period during which a State Party could opt out of crimes against humanity and/or war crimes. That privilege would expire at the end of the ten-year period but could be extended through certain arrangements if there were general agreement among the States Parties. If that agreement could not be obtained and the State Party still required the privilege, then it would have the option of withdrawing from the Treaty. However, the P-5 proposal failed to attract sufficient support quickly enough to be sustainable. The modified version of it which is now reflected in Article 124 of the Treaty was never presented to us until it appeared on the final day of the conference (although there was a speculative hint about it someone made to me on the penultimate day of the conference). The provision did not meet the hard fought requirements that the United States needed for this particular approach to subject matter jurisdiction. Of course, we will never know what might have transpired if the conference had afforded us more time, as we requested, to consider the provision and discuss it both within the U.S. Government and with other governments.

Our third effort was to propose that Article 12 be drafted *either* (1) to require the express approval of both the territorial state of the alleged crime and the state of nationality of the alleged perpetrator in the event either was not a party to the treaty, or (2) to exempt from the court's jurisdiction conduct that arises from the official actions of a nonparty

ILI US Digest/3 276 1/8/02, 1:45 PM

state acknowledged as such by the nonparty. The former proposal recognized the large degree of support at the conference for the consent of the territorial state, but also remedied the dangerous drift of Article 12 toward universal jurisdiction over nonparty states. The latter proposal required a nonparty state to acknowledge responsibility for its actions in order to be exempted, an unlikely occurrence for those who have committed genocide or other heinous crimes. In contrast, the United States as a likely nonparty state for at least some period of time would never hesitate to acknowledge that humanitarian interventions, peacekeeping actions, or defensive actions to eliminate weapons of mass destruction are "official state actions." But our proposals failed to attract sufficient support.

As I have often said, we had hoped that the Rome Conference could be extended to iron out these fundamental problems and arrive at a formula that the United States and, frankly, some other major States could support. I worked very hard in the final days to achieve an extension, including a direct appeal to Secretary-General Kofi Annan through his representative at the conference. I still believe a fatal flaw in the process was the decision not to extend the conference, as is so often done with other treaty negotiations in order to achieve broader consensus. So while I know there are critics who argue the United States did not seize opportunities early enough to push alternative strategies, it must also be recognized that the Rome Conference did not seize the opportunity to allow more time to address a fundamental problem with the Treaty. It could have made an enormous difference in support for the Treaty if we could have labored over it for an additional but brief period of time.

That is the past. Since Rome, the United States has remained deeply engaged in the Preparatory Commission sessions. We led the negotiations on the Elements of Crimes and provided the working draft for those negotiations. We also remained deeply engaged with the negotiations on the Rules of Evidence and Procedure, and were satisfied with the leadership of Australia, Canada, and France in those talks. On June 30 of this year, we joined consensus in support of both of those work-engine documents of the Court. Those are not the actions of a government retreating from the treaty or waging an opposition campaign against it. We are determined to remain engaged every step of the way to represent important U.S. interests in the process and to advance the cause of international justice. But that cause will fall far short of its potential unless the

ILI US Digest/3 277 1/8/02, 1:45 PM

United States can be, at a minimum, a good neighbor to the Court when it is established. The ICC will need the United States if it hopes to be a truly effective institution.

Some of our post-Rome concerns about the ICC statute have been addressed in the Elements of Crimes and the Rules of Procedure and Evidence. A couple of other issues are slated for consideration at later stages in the PrepCom process. Those are encouraging developments for the United States and for the ICC. But we have a remaining fundamental difficulty with the Rome Treaty that we sincerely wish to resolve so that, at a minimum, the United States can be a good neighbor to the ICC regardless of whether we achieve party status or not in the near future.

That fundamental difficulty is the exposure of our armed forces, which are deployed by the hundreds of thousands around the world at the request of governments and to ensure international peace and security, to prosecution before the Court even before the United States becomes a party to the Rome Treaty. The possibility that a U.S. soldier fighting to halt genocide could be accused by the other side of war crimes and brought before the Court, before we have even joined the Court, is untenable to the American people. We are at a vital crossroads in world history, reflected in the Millennium Summit last week, when the resolve of the international community to confront evil is being tested every day. In any military action, we have to accept the possibility that things will not go as planned; missiles or bombs may go off target, and human error could result in unintended destruction. But fear of being accused of war crimes for honest mistakes should not prevent us from acting. We are sometimes criticized for not confronting that evil immediately, for letting it fester too long until too many innocent civilians are slaughtered by fearless, thuggish leaders of tyranny. We should be determined to confront the perpetrators of human misery, but we must do so recognizing the risks and the necessary balance that must be struck between our pursuit of international justice and our common quest to achieve international peace and security and respond to humanitarian calamities.

The United States is not shirking from prosecuting its own, as some falsely claim. We fully recognize the significance in the Rome Treaty of the provisions on complementarity that we inspired and helped draft. We know how important this logical deferral to national investigation and prosecution is in the treaty and we are very conscious of the views

ILI US Digest/3 278 1/8/02, 1:45 PM

of other governments and non-governmental organizations and scholars about the sufficiency of complementarity in the Treaty framework. We are currently negotiating a proposal that would not amend the Rome Treaty, but would permit a procedure that still requires a nation that is not yet a party to the treaty to act responsibly and bring its own to justice. If a nation, whether a party or not to the Rome Treaty, acts irresponsibly and wages massive crimes against its own people or those of another nation, then we have no interest in permitting such a nation to enjoy any special privilege; let that nation's war criminals stand trial before the ICC. We want to achieve the objectives that inspired the Rome Treaty, and indeed to do so as a nonparty until such time as we can join the Treaty.

The proposal that we floated last March has benefited from critical comment by other governments and non-governmental organizations, and we are prepared to adjust that proposal to (1) eliminate its reference to the Security Council, and (2) revise its wording so that only nonparty states acting responsibly in the international community and honoring the principle of complementarity can invoke a privilege of non-surrender of its nationals to the Court.…

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There is much to gain by having the United States on board as a partner to the ICC. We are so close; it would be a colossal mistake for purist notions about the Rome Treaty to kill off the opportunity for the United States to become a true champion of the Court and to provide it with the kind of assistance and cooperation that it so clearly will need to be an effective engine for international justice.

3. Jurisdictional Issues

a. Non-Parties

Ambassador Scheffer had provided a more technical analysis of U.S. concerns with the jurisdictional reach of the International Criminal Court over non-parties under Article 12 in an address to the annual meeting of the American Society of International Law on March 26, 1999.

ILI US Digest/3 279 1/8/02, 1:45 PM

The full text is available at *www.state.gov/s/l.*

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The United States continues to have a compelling interest in the establishment of a permanent international criminal court. The issue for us remains whether the ICC would operate efficiently, effectively, and appropriately within a global system that also requires our constant vigilance to protect international peace and security. Our remaining objections to the Rome treaty are grounded both in law and in the reality of the international system. As Secretary of State Madeleine Albright stated at Wesleyan University last month, "We believe the effectiveness of an international criminal court will depend significantly on the definition of the court's jurisdiction and whether the Court addresses the fundamental concerns of a wide range of governments. We also believe that the problems with the Rome treaty can be solved, and are prepared to work with others to establish a Court that will live up to the hopes and expectations of its sponsors."

As we step back from the results of the Rome Conference, we firmly believe that the true intent of national governments cannot be that which now appears be the interpretation of several crucial provisions of the Rome treaty.

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Government and non-governmental representatives have often told me that their intention behind establishing an international criminal court is to prosecute the Pol Pots and Saddam Husseins of the world—those leaders of lawless regimes that bring death and terror upon their own people and citizens of neighboring states. Their intention, they say, is not to "go after" the United States or our armed forces. The United States, to a substantial extent, embraces that intention.…

That is why we find it so paradoxical that our own intention to focus on the truly important targets of a future international criminal court is clouded by our need to address the possibility of unwarranted exposure of U.S. personnel to the ICC's jurisdiction during that period of time, which may last many years, before the United States could ratify the treaty and become a state party to it. Even if our concerns about the

ILI US Digest/3 280 1/8/02, 1:45 PM

treaty were satisfactorily addressed in the near term, we have no way of predicting how long it might take to achieve the advice and consent of the U.S. Senate for ratification. So, in one sense, while the need to consider how the treaty affects non-party states is a fairly narrow problem, in another sense this is a problem of enormous importance to the United States and to our role in the world.

The single most problematic part of the Rome Treaty is Article 12. Let us be clear what Article 12 states. It is not an article that grants the Court universal jurisdiction over the list of crimes in Articles 5. A proposal to that effect was defeated at Rome. Rather, in the absence of a Security Council referral, Article 12 establishes, as a precondition to jurisdiction over Article 5 crimes, that when there is a referral of a situation by a State Party or when the Prosecutor has initiated an investigation of a situation, either (1) the state of [the] territory where the crime was committed or (2) the state of nationality of the accused, must be a State Party to the treaty or have accepted the jurisdiction of the the Court with respect to the crime in question.

So, we are told, Article 12 empowers the ICC to exercise jurisdiction over the nationals of non-party states if the state of [the] territory where the crime was committed is either a State Party to the treaty or, as a non-party, has lodged a declaration of acceptance of jurisdiction. Never mind that Article 11, paragraph 2, requires the Court to exercise jurisdiction only with respect to crimes committed after entry into force of the statute for any particular State unless, as a non-party, the State has made a declaration under Article 12, paragraph 3. I wonder how Article 11, paragraph 2, makes sense in the context of an international criminal court whose only targets of prosecution are individuals if that provision does not apply to the nationals of the State in question.

Never mind that Article 24, paragraph 1, states, "No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute." It seems to me that this provision can only be consistent with Article 11, paragraph 2, if it means "entry into force of the Statute *for the state of nationality of such person"* unless there is a Security Council referral under Chapter VII.

Never mind that Article 22, paragraph 1, which articulates the principle of *nullum crimen sine lege*, states that, "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." It is puzzling how a national of a non-party state that has *not*

ILI US Digest/3 281 1/8/02, 1:45 PM

accepted the jurisdiction of the ICC at the time the conduct takes place, could be criminally responsible before the ICC for *conduct* that does not in fact fall within the jurisdiction of the Court.

However, even if you believe that Articles 11, 22, and 24 have nothing to do with the nationals of non-party states and their rights, Article 12 runs counter to some serious norms of international law if it purports to empower the Court to exercise jurisdiction over non-party nationals.…

Let me begin with the question of universal jurisdiction as a rationale for jurisdiction. As everyone agrees, Article 12 of the Rome Treaty rejects universal jurisdiction for the Court. Yet there is an argument that States Parties delegate to the ICC their right to prosecute domestically individuals of any nationality for certain international crimes of universal jurisdiction. But the foundations of that argument are paper thin. The ICC treaty itself relies explicitly not on universal jurisdiction but on the consent to jurisdiction either by the act of becoming a state party or by special consent under Article 12, paragraph 3.

Professor [Madeline] Morris has argued that "reliance on universal jurisdiction would render nonsensical the jurisdictional provisions that were adopted" in Rome. She is right. *First*, the requirement of the consent of the state on whose territory the crime was committed would be unnecessary if the Court's basis for jurisdiction were universality.

Second, not all of the crimes within the subject matter jurisdiction of the Court in fact enjoy universal jurisdiction under customary international law. Those international treaties that do use universal jurisdiction as a means of enforcement before domestic courts are well understood to apply to crimes of universal jurisdiction, such as torture, terrorism, and hostage-taking. Professor [Ruth] Wedgwood has pointed out that enforcement of these treaties has generally been among treaty parties and, I would stress, before the national courts of those treaty parties. She also points to various war crimes (embodied in the ICC statute) that stem from the Hague regulations or from the laws and customs of war, neither of which directly provides for universal jurisdiction.

Third, as a matter of law, is it true that the universal jurisdiction over a crime that a state may seek to exercise itself can be delegated to a treaty-based collective international court? We believe the Vienna Convention on the Law of Treaties states rather clearly that treaties cannot bind non-party states, and, we would add, particularly with respect to treaty-based international institutions. A state that recognizes universal

ILI US Digest/3 282 1/8/02, 1:45 PM

jurisdiction for a particular crime may not, even as a state party, wish to delegate such jurisdiction to an international court. By becoming a party to the treaty, a state makes a one-time delegation of such jurisdiction to the court. Such delegation thereby eliminates any possibility for bilateral negotiations with another state, even if it is a non-party, on a case-by-case basis unless there is an extradition under Article 98 of the ICC statute or other relevant bilateral agreement between the two states.

Thus, as I wrote in my AJIL article, "While certain conduct is prohibited under customary international law and might be the object of universal jurisdiction by a national court, the establishment of, and a state's participation in, an international criminal court are not derived from custom but, rather, from the requirements of treaty law." Recall that the ad hoc international criminal courts for the former Yugoslavia [and for] Rwanda were established by the Security Council pursuant to Chapter VII of the U.N. Charter and are subsidiary bodies of the Security Council. Recall also that the Nuremberg and Tokyo Tribunals actually operated with the consent of the state of nationality of the defendants as a consequence of the surrender instruments signed by Germany and Japan, respectively. In the case of Nuremberg, the Allied Powers also had supreme authority in Germany.

Another major argument advanced to support Article 12's purported reach over the nationals of non-party states is that the state of territory where the crime was committed has delegated its own jurisdiction to the ICC. I recently experienced much advocacy of this during a conference at Cornell Law School. It is certainly true that a state may delegate its territorial jurisdiction to another state in particular cases with the consent of the state of nationality, as we know is possible among states parties to the European Convention on the Transfer of Proceedings in Criminal Matters. We also know, after arduous months addressing the fate of PKK leader Abdullah Ocalan, that even where the right to try a suspect is clearly established, governments resist exercising their right to transfer or receive jurisdiction over a hot potato. Indeed, some *see* virtue in lobbing the suspect out of their jurisdiction altogether to avoid the political turmoil he generates. As Professor Morris notes, there seem to be no precedents for delegating territorial jurisdiction to another state when the defendant is a national of a third state in the absence of consent by that state of nationality.

An attempt to delegate territorial jurisdiction pursuant to Article 12 also can lead to intolerable abuse, regardless of how many states

ILI US Digest/3 283 1/8/02, 1:45 PM

have ratified the treaty and established a supposedly objective court. I find Professor Morris' example compelling. In her words, "Imagine, for instance, that France is holding for trial a U.S. national who has committed a crime on French territory. The U.S. has no basis to object to exercise by France of its territorial jurisdiction over that U.S. national. Now let us imagine that France proposes to delegate its territorial jurisdiction to Libya and to transfer the defendant to Libya for prosecution. (Just to flesh out the tale, let us say that Libya is holding a French national for trial and is willing to transfer that case to France in exchange for the case of the U.S. national.) Does the U.S. have a legal basis to object to the delegation by France of its territorial jurisdiction over a U.S. national to another state without U.S. consent? The U.S. would appear to have a plausible argument that Libya does not have territorial (nor any other internationally recognized basis for) jurisdiction and that France cannot confer territorial jurisdiction upon a state on whose territory the conduct did not occur, by delegation or otherwise. If it is dubious whether a state may delegate its territorial jurisdiction to another state without consent by the state of nationality, it is even less clear whether territorial jurisdiction may be delegated, without that consent, to a collective court."

Professor Morris' phrase, which I hope will become an epigram, is that territorial jurisdiction is not "a form of negotiable instrument."

It is therefore a very serious question whether the customary international law of territorial jurisdiction permits the delegation of territorial jurisdiction to an international court without the consent of the state of nationality of the defendant. Can, and should, the nationals of a non-consenting, non-party state—particularly when they are associated with official actions of that state—be subject to prosecution before a treaty-based international court? The requirements of the Vienna Convention on the Law of Treaties cannot be so easily avoided.

I hope that, on reflection, governments that have signed, or are planning to sign, the Rome treaty will begin to recognize that Article 12 has limits and that its misuse would do great damage to international law and the international political system. As I have often said, the presumption that, upon ratification by 60 states, the newly-established ICC could try, absent a Security Council referral, to reach anyone anywhere in the world based only on the consent of the state of territory is an untenable overreach of jurisdiction by a treaty-based organization.

ILI US Digest/3 284 1/8/02, 1:45 PM

I recognize the irony of having to speak in such detail about non-party status under the Rome treaty, but Article 12 is the key to resolving our most fundamental difficulty with the treaty. We look forward to the problem of Article 12 being solved, because by solving it, the interests of international law and justice that we all share will be served.

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b. Cases not referred by Security Council

Ambassador Scheffer described the need for a satisfactory procedural method of dealing with cases not made by referral from the Security Council under Article 13(b) of the Statute in a statement to the Sixth Committee of the U.N. General Assembly on October 18, 2000.

The full text is available at *www.state.gov/s/l.*

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The United States has long worked towards an effective International Criminal Court that will function efficiently and fairly. The United States also wants to be a good neighbor to the Court so that we can undertake important cooperative measures with the Court. To achieve these objectives, we strongly believe that a fundamental issue needs to be resolved at the November session of the Preparatory Commission. Unless there is a referral to the Court under Article 13(b) of the Statute, we believe there should be a means to preclude the automatic surrender to the Court of official personnel of a non-party State that acts responsibly in the international community and is willing to exercise and capable of exercising complementarity with respect to its own personnel. That is, indeed, what the Statute envisions. Such an outcome would open the door for the United States to become the good neighbor to the Court. This can be accomplished without harming the fair and efficient func-

ILI US Digest/3 285 1/8/02, 1:45 PM

tioning of the Court or in any way undermining the integrity of the Rome Treaty.

We are open to discussions about how to resolve this fundamental issue. We need a clear articulation of the procedure to give confidence to non-party States that their good faith performance will be honored by the Court. We also need this articulation in order to encourage non-party States seeking to contribute responsibly to international peace and security that their tangible support remains welcome as the goals of international justice are pursued. Further, building this kind of confidence in the fairness of the treaty regime will, over time, encourage even more governments to join the Rome Treaty.

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4. Definition of Aggression

On December 6, 2000, Theodor Meron, Counselor on International Law, Office of the Legal Adviser, Department of State, presented the views of the United States at the Sixth Session of the ICC Prepatory Commission in New York concerning the definition of the crime of aggression, as called for in Article 5 of the Rome Treaty.

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…We have had an important and illuminating discussion on some of the most difficult questions of international law: how to define the crime of aggression, how to keep that definition within the parameters of customary law, how to describe the role of the Security Council under the Charter and how to relate it to the judicial function of the Court.

In the course of our discussion, several distinguished delegates, including those from Italy and Portugal, Egypt and New Zealand, raised questions about our preference for the use of customary law as a benchmark, as one of the benchmarks, for considering the various proposals. Did not Articles 7 and 8 of the ICC Statute already go beyond customary

ILI US Digest/3 286 1/8/02, 1:45 PM

law, they asked. And if these Articles did extend beyond customary law, why can't we legislate rather than codify the definition of the crime of aggression?…

First, may I point out that there has been a strong body of support already for the necessity of the definition of aggression resting on a strong foundation of customary law. I would like to mention among others the delegations of the United Kingdom, Germany, Norway, Australia and China, Denmark and Russia.

Second, in discussing the customary law nature of Articles 6-8 of the Statute, I said that they were in "general conformity with customary law." Of course, there was some filling in of gaps in Rome, but this took place in the interstices of rules, not on the core of the rules, and only on the margins of delineating crimes against humanity and war crimes.

The context was quite different. In the area of crimes against humanity and war crimes there has been some jurisprudence since Nuremberg. There were the famous trials of Barbie and Touvier in France, a considerable body of German case law, cases in the United States, Canada, and elsewhere.

Third, there were the Statutes of the ad hoc tribunals for former Yugoslavia and for Rwanda and the famous 1993 report of the Secretary-General to the Security Council which explained that certain articles on crimes contained in the Statute for the International Criminal Tribunal for former Yugoslavia were declaratory of customary law.

Fourth, there were the decisions of the ICTR and the ICTY defining various aspects of international humanitarian law, especially as regards non-international armed conflicts, as customary rules whose violations involved the individual criminal responsibility of the perpetrators.

In short, we had a more recent and firm foundation of customary law than for the definition of the crime of aggression, which in terms of customary law, is still shaped by the Charter and the jurisprudence of Nuremberg. Our Russian colleague mentioned the important fact that his criminal code contains the language of Nuremberg, thus demonstrating the impact of Nuremberg on the practice of states.

Experience shows that the prudence displayed in Rome has proven wise. May I suggest that one of the reasons why the list of crimes in the Statute of the ICC has attained such a credibility and why that list has had such a significant impact on national legislations is exactly because of the high level of comfort that the general conformity of Articles 7-8

ILI US Digest/3 287 1/8/02, 1:45 PM

with customary law provided to governments, judges, legislators and academics.

Does all of this matter? We have heard some delegates suggest that customary law is what we want it to be. Is such a relaxed view good for the court and its credibility?

Much has been said about the [UN General Assembly Resolution] on the Definition of Aggression. Let me make it quite clear, first, that we are in no way trying to denigrate or to diminish the importance of this Resolution. But we remain unconvinced that the Resolution states customary norms for purposes of international criminal law, for the crime of aggression.

At the time of its adoption, the Resolution did not, as my distinguished colleague from Egypt appeared to recognize, restate already existing customary law.

Of course, a resolution could become customary law subsequent to its adoption. A resolution could become a focal point of a subsequent practice of states and harden into customary law. This is the so-called generating effect of GA Resolutions.

But, as the ICJ taught us time and again, for this kind of transformation, two requirements have to be complied with. You have to have concordant settled practice and you have to have opinio juris generalis. In the words of the North Sea Continental Shelf cases, one has to demonstrate a settled practice and evidence of a belief that the practice is obligatory by the existence of a rule of law requiring it. Or as the Nicaragua judgment stated, the existence of a rule in the opinio juris of states must be confirmed by practice.

Obviously, there has been no concordant practice based on the GA Res. Just look at the records of the Security Council. And if anyone still had any doubts, the controversy about Resolution 3314 in our own discussions, has clearly demonstrated the absence of opinio juris generalis.

Unless customary law is followed, unless the crime is clearly defined in ways that meet the requirements of criminal justice, the principles of legality and nullum crimen cannot be observed.

Surely, the concept of customary law must be taken seriously. Customary law must mean something more than what a fiat of any one country or a group of countries would like it to be. It must be not ideology but a reflection of both widespread practice and the general opinio juris of states.

ILI US Digest/3 288 1/8/02, 1:45 PM

To define a new crime by treaty, to follow the legislative approach, would open the door to governments and individuals contesting in the future the legitimacy of the ICC. This can and should be avoided by basing our work on firm foundations of customary law. Not a straight jacket, mind you, but foundations, certainly. As the distinguished delegate of Norway observed, an international criminal court must have, in so far as crimes are concerned, a rock solid customary law basis.

Enough of customary law. I now turn to the revised version of the proposal by Greece and Portugal. First, let me start by expressing our gratitude to their distinguished representatives for their untiring efforts.

But I am truly sorry that the revision contains, for my Delegation, the same flaws that the original version contained, and which I discussed in the informals.

Let me explain, briefly. Paragraph 1, the definition itself, still defines as crimes of aggression any use of force in violation of Article 2(4) of the Charter. But as the distinguished delegate of China explained the other day, not all instances of illegal use of force constitute aggression.

We must not trivialize, we must not banalize, the supreme crime of aggression. Under the proposal by Greece and Portugal, scores of violent but short lived and limited territorial clashes would be branded as aggression. Too many of the armed conflicts taking place in Africa, for example, could be characterized as aggression, prejudicing, not helping, prospects for peaceful settlement of disputes by the United Nations.

This was not the scheme of things envisaged by the founding fathers of the Charter of the United Nations. That is why Article 39 speaks of determination of aggression, not of finding that a violation of Article 2(4) has occurred. In the trio mentioned in Article 39, threat to the peace, breach of the peace, and act of aggression, aggression is the third and the most egregious violation. The Charter has not made every violation of Article 2(4), not every breach of the peace, tantamount to aggression. It left the determination of aggression to the wisdom and to the functions of the Security Council.

Just like the original proposal, the revised version emasculates the prerogatives of the Security Council under the Charter. Apart from the 12 months requirement, the proposal of Greece and Portugal makes inaction by the Council equivalent to a determination that an act of aggression has taken place. Requiring the Council to act within 12 months or abdicate its responsibility for the maintenance of international peace and security is clearly contrary to the Charter. As I have

ILI US Digest/3 289 1/8/02, 1:45 PM

already pointed out, the Council may have many legitimate reasons not to proceed through the route of Article 39 and Chapter VII but choose other avenues, including the possibility of giving a chance to Chapter VI which concerns the pacific settlement of disputes. Not to act in a particular case needs not be a proof of failure; it may be evidence of statesmanship.

Moreover, to ask the Court in the absence of a determination by the Security Council to decide that an act of aggression has taken place, would force the Court to become immersed in political controversies between states, endangering its judicial role and image. As France rightly explained, aggression is an act of states. Imagine the immense difficulties the ICC, as a court of law, would face in dealing even with relatively simple acts of aggression. Could the Court consider, is it equipped to consider such matters as historical claims to territory, maritime boundaries, legitimate self-defence under Article 51 or legitimate reprisals? Do we want to expose the Court to the inevitable accusations of politicization? And is the competence of the Court, in any event, not limited to jurisdiction over natural persons? As the delegate of Norway noted, we must not turn the ICC into a political forum discussing the legality of use of force by states.

None of these adverse consequences would occur if the Court's role were confined to the question of the criminal responsibility of individuals, of leaders responsible for the crime of aggression following a determination by the Security Council that an act of aggression has taken place.…

Some distinguished delegations have suggested that in the absence of a Security Council Resolution, an advisory opinion of the International Court of Justice be requested, presumably by the General Assembly. However, as the distinguished delegate of France has already observed, such a referral would have the potential of placing the ICJ in direct conflict with the Security Council, when the Council has already chosen not to take action in a particular context. Moreover, such a solution would be equally questionable under the Charter, which, in Article 39, gave the Security Council the exclusive right to determine that an act of aggression has taken place.

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ILI US Digest/3 290 1/8/02, 1:45 PM

CROSS-REFERENCE:

Understandings concerning cooperation with the ICC attached to extradition and mutual legal assistance treaties, in **3.A.1.b.**

ILI US Digest/3 291 1/8/02, 1:45 PM

ILI US Digest/3 292 1/8/02, 1:45 PM

CHAPTER 4

Treaties and Other International Agreements

A. PARTIES

1. Role of individual states of the United States

In a letter of January 13, 2000, responding to an inquiry from the Embassy of Canada, Duncan B. Hollis, Attorney-Adviser in the Office of Treaty Affairs, Office of the Legal Adviser of the Department of State, provided information concerning the role of individual states of the United States in United States treaty practice.

The letter is available at *www.state.gov/s/l.*

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You ask several questions about the authority of individual U.S. states to negotiate, conclude and/or ratify treaties. Article I, Section 10 of the United States Constitution provides that "No State shall enter into any Treaty, Alliance or Confederation." In practice, the United States has interpreted this prohibition to apply to the term treaty in both its restrictive sense (i.e., with respect to those international agreements made by the President with the advice and consent of the Senate in accordance with Article II, section 2 of the U.S. Constitution) and the generic sense (i.e., with respect to any international agreement by which the United States

ILI US Digest/4 293 1/8/02, 1:45 PM

intends to bind itself under international law). As a result, U.S. states do not have any formal role in the negotiation and/or conclusion of treaties subject to Senate advice and consent or the host of other international agreements concluded by the United States; i.e., international agreements concluded solely within the President's Constitutional Powers; international agreements subject to approval or implementation by the U.S. Congress; or international agreements executed pursuant to existing legislation or a prior treaty. In all these cases, the authority to negotiate and conclude the agreement rests solely with the Federal Government.

Since individual states have no authority to negotiate or conclude international agreements, the Federal Government does not consider itself required to consult with or receive a U.S. state's consent prior to or following the negotiation of an international agreement. That said, the Federal Government does seek the views of individual U.S. state(s) on the negotiation and/or conclusion of a treaty or international agreement when it determines that the circumstances warrant consultation – i.e., where the subject matter of the treaty or executive agreement could have a direct impact on activities that are of concern to a particular U.S. state(s). For example, the Federal Government sought the views of state officials in Texas (along with concerned city and county officials) in negotiating the return of certain territory to Mexico as part of the relocation of the Rio Grande near El Paso under the *Convention between the United States and Mexico for the Solution of the Problem of the Chamizal*, signed at Mexico City on August 29, 1963. More recently, the Federal Government sought the views of the states of Alaska, Oregon, and Washington in the course of negotiating and concluding with Canada an *Agreement Relating to and Amending Annexes I and IV of the Treaty Concerning Pacific Salmon of January 28, 1985, with Attachments*, which was effected by an exchange of notes on June 30, 1999.

In terms of implementation, Article VI, Section 2 of the U.S. Constitution provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." As such, treaties and other properly-authorized international agreements intended to be binding under international law are considered to take precedence over inconsistent U.S. state laws and administrative regulations. Depending on the agreement, implementation of an international agreement may arise simply by the agreement's entry into force; i.e., a "self-executing" text that is intended to prescribe specific rules by which rights may be determined so that no additional statutory or administra-

ILI US Digest/4 294 1/8/02, 1:45 PM

tive action is required; or a text where statutory and administrative authority already exists to support compliance with its terms. In other instances, Congress or a federal agency may need to "implement" the agreement's rights and obligations through statutory or administrative rule-making.

Although U.S. states generally have no formal role in the United States' international obligation to implement treaties and other international agreements, U.S. states will sometimes have a domestic role in implementing such agreements. For example, in the context of the Amendment to the Pacific Salmon Agreement discussed above, the United States' obligations are largely implemented by the states of Alaska, Oregon and Washington, although the Federal Government has existing statutory authority to "preempt" state action/inaction where it would place the United States in jeopardy of not fulfilling its international obligations under the Agreement. In other instances, where the agreement will impact the activities of a large number of states, the Federal Government has endeavored to inform state officials on how the agreement will apply in the United States. Thus, the Department of State sent letters in 1952 and again in 1965 to the Governors of each U.S. state detailing the reciprocal privileges and requirements of the *International Convention on Road Traffic of 1949* as it would apply to foreign motorists driving in individual U.S. states. In other areas, the Federal Government has given individual states a more discretionary role in the implementation of a treaty in light of those states' varying domestic legal authorities. In the case of the *Convention on the Transfer of Sentenced Persons signed at Strasbourg on March 21, 1983*, the United States informed other States Party to the Convention in a September 2, 1997 letter to the Secretary General of the Council of Europe, that the United States would not consent to a prisoner transfer of a person convicted of a state offense in a state court who was incarcerated in a state jail unless the authorities of the state of the United States in which the prisoner was incarcerated had the legal authority to transfer the person and consented to do so.

Finally, you inquired as to the authority of individual U.S. states to enter into "ententes" (defined as an inter-governmental arrangement that is not binding in international law). Article I, Section 10 of the U.S. Constitution provides that "No State shall, without the Consent of Congress … enter into any Agreement or Compact … with a foreign Power …" Accordingly, even at a level below international agreements binding under international law, U.S. states generally need Congressional con-

ILI US Digest/4 295 1/8/02, 1:45 PM

sent to enter into arrangements with other national or sub-national foreign governments. Congressional consent to such compacts has been relatively rare and limited to matters of local (as opposed to national) policy. For example, in legislation enacted in 1949 and 1952, Congress authorized the establishment of the *Northeastern Interstate Forest Fire Protection Compact* to serve as the basis for cooperative efforts among northeastern states and contiguous Canadian provinces in combating forest fires. The United States does not consider this Compact an agreement subject to international law, although the extension of the Compact to cover New Brunswick and Quebec was effected, at the Canadian government's request, via a January 29, 1970 exchange of notes.

On occasion, moreover, the Federal Government will step in where a state or other sub-national government entity is negotiating an agreement or an arrangement that should be addressed at the federal level and/or be subject to international law. Thus, in the *Treaty between the United States and Canada Relating to the Skagit River and Ross Lake in the State of Washington and the Seven Mile Reservoir on the Pend D'Oreille River in the Province of British Columbia, signed at Washington April 2, 1984*, the Treaty provided the necessary legal basis for an arrangement under which the City of Seattle and British Columbia settled a longstanding dispute that directly impacted the boundary between the United States and Canada. Specifically, the Treaty included an appended agreement between Seattle and British Columbia where Seattle agreed to refrain from raising the Ross Dam on the Skagit River, which would have flooded Canadian territory, in return for a guaranteed long-term supply of electrical power from British Columbia.

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2. Supranational organizations

The emerging role of supranational organizations such as the European Union as members of international organizations and as parties to multilateral treaties has given rise to several legal issues of importance to the United States. The issues are particularly evident in cases where not only the supranational organization but also some or all of its member states seek to be included. While welcoming the

ILI US Digest/4 296 1/8/02, 1:45 PM

participation of the EU in international agreements and organizations, the United States has made clear its views on the need to determine allocation of competence in such situations and to ensure that participation of the organization is alternative, not additional, to that of the member states in, for example, voting and counting Parties for entry into force of international agreements.

a. Madrid Agreement Concerning the International Registration of Marks: Role of European Union

On September 5, 2000, the President of the United States transmitted the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks ("Madrid Protocol") to the Senate for its advice and consent to accession. The Protocol, which was adopted in 1989 and entered into force on December 1, 1995, establishes an international trademark registration system. The Report to the President from the Department of State submitting the Protocol, excerpts of which are set forth below, explained the advantages to the United States in becoming a party. The Report also explained the United States opposition to a provision in the Madrid Protocol allowing supranational organizations such as the EU with regional offices that register marks to have an additional vote separate and independent from that of its member States. As explained in the Report, those concerns were alleviated in this instance on the basis of a letter from the Council of the European Union on February 2, 2000 setting forth an approved Statement of Intent to address U.S. objections.

The full text of the transmittal documents, including the report of the Department of State, may be found in S. Treaty Doc. No. 106-41 (2000) at *www.access.gpo.gov/congress/cong006.html.*

ILI US Digest/4 297 1/8/02, 1:45 PM

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DEPARTMENT OF STATE

Washington

July 11, 2000

The President:

I have the honor hereby to submit to you, with a view to its transmittal to the Senate for advice and consent to accession, the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks ("Protocol"), adopted at Madrid June 27, 1995. Also enclosed for the information of the Senate is a February 2, 2000, letter from the Council of the European Union regarding voting within the Assembly established under the Protocol.

The Protocol traces its genesis to the Madrid Agreement Concerning the International Registration of Marks (1891), revised…,which established an international trademark registration system that is administered by the International Bureau of the World Intellectual Property Organization (respectively, "International Bureau" and "WIPO"). As of May 10, 2000, fifty-two countries are Contracting Parties to the Madrid Agreement. The United States is not a Contracting Party to the Madrid Agreement.

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BACKGROUND

The United States has never belonged to an international trademark system, but has considered it in the past because of the trade advantages such a system would offer. Trademarks, representing the good will of a business and identifying its products and services, are among the most valuable assets of a business. In most countries other than the United States, trademark rights are obtained only by registration. One major obstacle to the international protection of trademarks is the difficulty and cost of obtaining and maintaining a registration in each and every country.

ILI US Digest/4 298 1/8/02, 1:45 PM

In the late 1960s the United States considered joining the Madrid Agreement, but concluded that it contained provisions disadvantageous to U.S. trademark owners and was unworkable under existing U.S. law.

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The Protocol establishes a separate international trademark registration system from, and contains significant modifications to, the Madrid Agreement. These modifications address and resolve the concerns that led the United States to reject accession to the Madrid Agreement.

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…[T]he Protocol establishes an international procedure for the *filing* of trademark applications. Adherence will not require the United States to adopt any changes to its substantive trademark laws. Legislation has been introduced, and has already been passed by the House of Representatives, to implement the changes in procedure needed to fulfill the obligations of the Protocol.

THE PROTOCOL PROCESS

In the event that the United States accedes to the Protocol and Congress passes the necessary implementing legislation, the Protocol would operate in the United States as follows.

The Protocol will provide a trademark registration filing system that will permit a U.S. trademark owner to file for registration in any number of Contracting Parties by filing a single standardized application, in English, with a single payment in dollars, at the [U.S. Patent and Trademark Office ("PTO"]. Pursuant to Article 3, the PTO must review the international application and certify that it is identical to the underlying U.S. application or registration that is claimed as the basis for the international application. If the international application meets that test, the PTO must forward the international application to the International Bureau. After a formalities check, the International Bureau then registers the application as an international registration and forwards the data in the application to the Contracting Parties that applicant has selected. Thus, international registration may be obtained without obtaining a local agent and without filing a national or regional application with each Contracting Party. Equally important, under the Protocol, renewal of all

ILI US Digest/4 299 1/8/02, 1:45 PM

of the extensions of protection may be made by filing a single request with a single payment under Article 7.

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THE ASSEMBLY OF THE MADRID UNION

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From the perspective of the United States, the most controversial aspect of the Protocol has been the voting provision contained in Article 10(3)(a), which provides that "[e]ach Contracting Party shall have one vote in the Assembly." Since, in accordance with Article 14, not only States but also intergovernmental organizations may become Contracting Parties, this provision has the effect of allowing an intergovernmental organization (such as the European Community ("EC")) to have an additional vote separate and independent from that of its member States if it were to become a Contracting Party to the Protocol. The United States has consistently opposed such voting as an unwarranted expansion of the voting power of intergovernmental organizations and their member States – and a correspondingly unwarranted dilution of U.S. voting power.

The United States harbored significant concern that the Protocol would establish an unfavorable precedent and that comparable voting provisions would be adopted in other treaties, to the detriment of U.S. interests. In the aftermath of the negotiations that led to the Protocol, in the field of intellectual property alone, the European Union ("EU") proposed concurrent voting for the EC and its Member States in the negotiating texts of numerous proposed treaties. During the negotiation of the Trademark Law Treaty, EU insistence on an independent vote forced negotiators to accept a compromise arrangement whereby all provisions relating to voting were dropped from the agreement – a development that significantly constrains the ability of the parties to effect necessary revisions.

The United States was an observer, not a participant, in the negotiations leading to the Protocol. More than a decade has passed since that negotiation was concluded. Throughout this period, the United States has forcefully and successfully opposed every attempt by the European Union to include comparable voting provisions in other treaties. Last year, in the context of negotiations for the Hague Agreement Concerning the International Deposit of Industrial Designs, the EU and its Mem-

ILI US Digest/4 300 1/8/02, 1:45 PM

ber States did not press for an independent vote for intergovernmental organizations such as the EC. That marked a watershed because in prior years the EU had repeatedly described the Hague Agreement context as involving concurrent competence analogous to that in the Protocol and warranting analogous voting provisions. We are now satisfied that the United States opposition to such voting provisions has been heard and that the Protocol cannot be considered a paradigm for voting provisions in multilateral treaties.

While certainly desirable, revising Article 10(3)(a) of the Protocol is not a feasible prospect at this juncture. However, the United States, the EC (which, like the United States, is not yet a Contracting Party to the Protocol), and its Member States have been able to reach an accommodation regarding the voting issue.

At the request of the United States, the EC and its Member States have affirmed, in a February 2, 2000, letter from Margarida Figueiredo, Chairwoman of the Permanent Representatives Committee on behalf of the Council of the European Union, their commitment to a consensus-based decision process within the Assembly of the Madrid Union. They have also indicated that, in the event that a vote is called for, they will endeavor to conduct consultations with the United States and, where appropriate, with other like-minded participants. The February 2 letter also affirms that, where these consultations do not lead to a common position among the United States, the EC, and its Member States on the subject put to a vote, it is the intention of the EC and its Member States to use their voting rights in such a way as to ensure that the number of votes cast by the EC and its Member States does not exceed the number of the EC's Member States.

Consensus-based decision making has long been used in the Assembly of the Madrid Union. Indeed, we understand that no issue has been put to a vote since the early 1970s. Accordingly, we have concluded that, although the unilateral statement of intent reflected in the Council of the European Union's February 2, 2000, letter is not an ideal resolution of the voting issue and is currently not an acceptable model for future agreements, it does provide sufficient protection for U.S. interests in the unique context of the Protocol to allow me to recommend that the United States now become a Contracting Party.

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ILI US Digest/4 301 1/8/02, 1:45 PM

b. Allocation of competence between European Union and its member states

The Legal Adviser of the Department of State, David R. Andrews, addressed the Conference on Transatlantic Regulatory Cooperation at Columbia University Law School on April 16, 1999. The excerpts provided below concerned the need for clear cut allocation of competence between a supranational organization and its member states in international dealings, as well as a specific developing issue between the United States and the European Union, electronic commerce.

The full text of the speech is available at *www.state.gov/s/l.*

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Transatlantic Regulatory Cooperation between the US and EU is an issue of enormous importance. With combined annual trade and investment totaling a trillion dollars, it exceeds US trade and investment with both Canada and Japan. The US/EU relationship has also resulted in wide ranging and important accomplishments in combating crime, terrorism, proliferation, pollution, drugs and disease. For example, our partnership has included efforts to limit terrorists' access to funds, efforts to halt the spread of child pornography over the Internet and break up prostitution rings that entrap women from Eastern Europe. Regulatory cooperation is an important aspect to sustaining and expanding our economic relationship while addressing critical social problems.

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On a day to day basis, the State Department plays a very limited role on the substance of regulatory cooperation. State typically does not take the lead on such matters since the responsibility and technical expertise resides with the specialized agencies of the U.S. government. There, USTR, the Departments of Commerce, Agriculture and Trans-

ILI US Digest/4 302 1/8/02, 1:45 PM

portation, for example, all play a much more active role when it comes to the substance of regulatory cooperation between the US and the EU. One exception to this is in the area of electronic commerce, a topic I will touch upon shortly.

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State, and my office specifically, plays a particularly important facilitation role given its responsibility for interpreting and applying treaty law. My office must handle the fundamental issues associated with ensuring that the agreements between the US and EU are legally sufficient. It's in this context that the difficulties of promoting regulatory cooperation can sometimes arise.

For example, one of the novel legal issues that the United States and other governments face in working with the European Union arises out of its composition of both member states and the supranational European Commission. The notion that a group of states would cede significant parts of their sovereignty to a supranational regional body is a relatively new one.

The EU is the salient example of an institution that treaty lawyers like to call a "regional economic integration organization" or "REIO". Not surprisingly, the traditional international law of treaties and institutions, premised on the notion of a nation state, has been stretched by the new and ever-changing concepts and institutions such as those now taking shape in Europe. The treaty and institutional policies that we apply with respect to the EU are important not only in their own right, but also because of the precedents we set for dealing with future economic integration organizations that emerge in other regions.

One question that frequently arises in our dealings with the EU is that of "competence." It is my office, for example, that must consider the legal implications of European decisions on whether the community, the member states or both will sign any particular agreement.

This can be a tricky question. With respect to a particular subject area, sometimes the member states have exclusive competence, sometimes the Community has exclusive competence and sometimes competence is shared. To make matters a bit more complicated, the allocation of competence within the EU is constantly evolving. And, as one would expect in any institution, the member states and the European Commission do not always have identical perspectives about the allocation of competence with respect to a particular issue.

ILI US Digest/4 303 1/8/02, 1:45 PM

I do not mean to criticize these uncertainties, which are inevitable in a new, ambitious and rapidly changing institution like the EU. They do, however, present particular challenges for EU treaty partners like the US which are engaged in efforts to increase regulatory cooperation. If the allocation of competence is uncertain, for example, it can be difficult to determine whether the proper parties to a treaty should be the EC alone, the member states alone, or the EC and the member states.

In the case of a "mixed agreement," one in which both the REIO and its member states are parties, uncertainties can also arise in the implementation of an agreement. If a treaty partner is concerned that there may have been a breach of the agreement by the REIO and/or the member states, to whom does the treaty partner turn to address the problem? What if the REIO and some or all member states disagree as to the resolution of the problem? Worse still, what if the REIO claims that the member state is responsible for that particular aspect of the agreement and the member state claims that it is the REIO that is responsible? The answers to these questions, as well as our ability to be comfortable within a legal environment of shifting competence, will be important to expanding future regulatory cooperation.

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As I mentioned at the outset, although State does not typically engage with the EU on the substance of issues related to regulatory cooperation, one exception is electronic commerce. This is an area in which my office of Private International Law plays a major role. It is also an issue which provides some insights to the US/EU relationship. I want to spend a few minutes on this topic before concluding with "where might we go from here." As we are all increasingly aware in our private and professional lives, the Internet is growing at a breathtaking rate. Computer-based technology changes and new applications of the technology in commerce spring up almost daily, and there is no sign they are slowing. For example, Internet purchasing and contract arrangements between remote parties who have no previous business relationship or even certainty as to where each other's commercial operations may be are becoming commonplace.

Carrying out commerce on the Internet is not only very new; by the nature of the medium, it is often inherently transnational. Indeed, the speed with which electronic commerce is emerging means that we are engaged for perhaps the first time in the concurrent development of na-

ILI US Digest/4 304 1/8/02, 1:45 PM

tional and international rules. To use Jean Louis [Dewost's] term, it is an example of de-territorialization of law, with legal regimes divorced from national boundaries.

Existing legal standards and traditional legal approaches to contracts, data rights, and telecommunications all need to be adapted to the world's new information systems in order to provide reasonable levels of predictability and risk. But the effort through regulation to provide predictability runs the risk of stifling innovation and competitive ideas.

This dynamic intersection between new technology and trade, with immediate transnational effects, has highlighted differences between US-led efforts to let market forces shape new rules, and the desire of some EU member states and the European Commission to take a more centralized, regulatory approach. To that end, the EU has moved forward quickly to fill the gap with new laws, and to seek to harmonize them across the Atlantic and the world.

This approach has the benefit of providing a legal framework in which commercial actors can find certainty and predictability. While some new technological developments and applications will still grow out of this environment, as a practical matter, regulatory approaches at this stage inevitably focus on the chosen regulatory framework and limit the ability to develop new technologies and applications.

The US has sought to avoid a particular regulatory framework in order to avoid resolving issues based on any given technology. Our view is that electronic commerce remains at an early stage in its development, and it is better to create a minimal regulatory environment, one which will support the use of all technologies and applications. Industry sectors should be given more freedom, not less, to develop their own commercial practices and regimes.

This conflict reflects the differing cultures and emphasis that the EU and US place on issues of commerce and regulation. Jean Louis alluded to these differing regulatory approaches in his comments. These differences will make the challenges of regulatory cooperation in electronic commerce and elsewhere formidable. But here, I agree with Jean Louis, that fundamental shared values on political, economic and legal issues provide the way forward.

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ILI US Digest/4 305 1/8/02, 1:45 PM

c. Convention on the Establishment of an Inter-American Tropical Tuna Commission: member of European Union representing interests of a territory

On a related matter, on July 25, 2000, the Department of State submitted the Protocol to amend the 1949 Convention on the Establishment of an Inter-American Tropical Tuna Commission to the President for transmittal to the Senate for advice and consent to ratification. As explained in the report to the President by the Department of State, the United States supports the Protocol, which amends the Inter-American Tropical Tuna Convention to allow the European Union to become a Party while at the same time allowing a member of the European Union to become or remain a Party only insofar as it is representing the interests of a territory over which the EU does not exercise competence. (The Protocol was transmitted to the Senate by the President on January 8, 2001. S. Treaty Doc. No. 107-2 (2001)).

The full text of the transmittal documents including the report of the Department of State is available at *www.access.gpo.gov/congress/cong006.html.*

◆

Department of State

Washington, July 25, 2000

The President,
The White House.

The President: I have the honor to submit to you the Protocol to Amend the 1949 Convention on the Establishment of an Inter-American Tropical Tuna Commission ("the Protocol"), done at Guayaquil, June 11, 1999. The United States signed the Protocol, subject to ratification, in Guayaquil, Ecuador, on the same date. I recommend that the

ILI US Digest/4 306 1/8/02, 1:45 PM

Protocol be transmitted to the Senate for its advice and consent to ratification.

The Protocol amends the Convention for the Establishment of an Inter-American Tropical Tuna Commission, done at Washington May 31, 1949 and entered into force March 3, 1950 ("the Convention") to allow the European Union to become a member of the Inter-American Tropical Tuna Commission (IATTC) created under the Convention. Over the last 50 years, the IATTC has grown in importance and membership. Today it is the principal international organization addressing the conservation and management of highly migratory fish stocks in the eastern Pacific Ocean. The IATTC currently has 11 members: Costa Rica, Ecuador, El Salvador, France, Japan, Mexico, Nicaragua, Panama, the United States, Vanuatu and Venezuela.

Spain, a member of the European Union (EU), has vessels fishing in the eastern Pacific Ocean (currently the only EU member with vessels fishing in the region). Like all members of the EU, Spain has transferred competence for fisheries matters to the European Commission pursuant to the Common Fisheries Policy adopted by the EU in 1983, including the authority to enter into international agreements with respect to those matters.

The European Union (through the European Community, the juridical entity with the capacity to enter into international agreements) now wishes to adhere to the 1949 Convention and become a full member of the IATTC on behalf of its Member States fishing in the region. However, Article V(3) of the Convention currently limits membership in the IATTC to governments whose nationals participate in the fisheries covered by the Convention. It does not provide for membership by regional economic integration organizations such as the European Union. Thus, for the European Union to become a party to the Convention (and a member of the IATTC) the Convention must be amended. The United States generally supports regional economic integration organizations ("REIOs") such as the European Union becoming party to treaties in which they have exclusive or shared competence in the treaties subject matter, provided the rights and obligations of the REIO and its Member States under the treaty do not give rise to conflicting obligations or create a situation where the REIO and its Member States together receive greater rights than other states party to the treaty that are not members of a REIO.

ILI US Digest/4 307 1/8/02, 1:45 PM

In this case, the European Union has exclusive competency over the fishing fleets of its Member States. Thus, the Department supports the desire of the European Union to participate as a member of the IATTC so that the vessels operating under the jurisdiction of the European Union will be bound by the conservation and management measures adopted by the Commission for the fishery resources of the eastern Pacific Ocean. (Despite the transfer of competence on fisheries matters to the EU, France has remained a member of the IATTC, primarily due to the fact that France participates in the IATTC in respect to certain Pacific territories over which the EU does not exercise competence.)

Last year, the members of the IATTC negotiated a Protocol to amend the Convention so as to allow REIOs such as the European Union to become a party to the Convention and a full member of the IATTC.

* * * *

Article 1 paragraph 7 is the operative section of the Protocol, amending the membership clause (Article V(3)) of the Convention. Paragraph 7 provides that governments and REIOs (defined as an organization constituted by states that have transferred to such organization both competence over matters within the purview of the Convention and the capacity to enter into international agreements with respect to such matters) which have jurisdiction over nationals engaged in fishing covered by the Convention, may express a desire to adhere to the Convention. The paragraph requires the unanimous consent of all parties to the Convention in order for such government or REIO to adhere to the Convention. Furthermore, this paragraph also specifies that when a REIO adheres to the Convention, each of its Member States is barred from becoming a party, or continuing to be a party, to the Convention except in respect of territories not covered by the treaty establishing the REIO, in which case such Member State's participation under the Convention is limited to representing the interests of those territories. Thus, should the EU eventually join the IATTC, France would continue to be a party to the Convention in respect to its Pacific territories of Clipperton Island and French Polynesia, which do not fall within the geographic scope of the treaty establishing the European Union.

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3. U.S.-UNTAET Terms of Reference

On February 26, 2000, the United States signed a "Terms of Reference Between the Government of the United States of America and the United Nations Transitional Administration in East Timor for United States Forces Operating in East Timor ('UNTAET')." As the text indicates, UNTAET is the appropriate entity to enter into this agreement with the United States because of the authority vested in it by UN Security Council Resolution 1272 of October 25, 1999. The Preamble and Articles 1 and 11 of the Agreement are set forth in full.

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TERMS OF REFERENCE BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE UNITED NATIONS TRANSITIONAL ADMINISTRATION IN EAST TIMOR FOR UNITED STATES FORCES OPERATING IN EAST TIMOR

The Government of the United States of America and the United Nations Transitional Administration in East Timor (UNTAET) (hereinafter the parties), following discussions on the roles and responsibilities of the military forces of the United States of America operating in East Timor and the status such forces shall enjoy while present in East Timor, and considering the executive and legislative authority of the United Nations Transitional Administration in East Timor pursuant to United Nations Security Council Resolution 1272, of October 25, 1999, have agreed as follows:

ILI US Digest/4 309 1/8/02, 1:45 PM

Article I: Purpose

The United States intends to deploy military and civilian personnel of the U.S. Department of Defense (U.S. personnel) to East Timor to provide support to East Timor's citizens in their transition to independence. The United States military presence in East Timor described in Article 2 shall be separate from that of UNTAET and shall consist of a United States Support Group East Timor (USGET) and rotational presence operations.

* * * *

Article II

The terms of this Agreement shall continue so long as UNTAET is authorized to exercise executive and legislative control in East Timor.

CROSS-REFERENCE

Role of Taiwan in **12.2.**

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B. TECHNICAL ISSUES

1. U.S.-European Community Education Agreement

On December 18, 2000 the United States signed an "Agreement Between the United States of America and the European Community Renewing a Programme of Cooperation in Higher Education and Vocational Education and Training." Article 11 describes the territorial application of the Agreement as follows:

ILI US Digest/4 310 1/8/02, 1:45 PM

"This Agreement shall apply, on the one hand, to the territory of the United States of America and, on the other hand, to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty."

The signature block of the Agreement contains the signature of Madeline Albright "For the United States of America" and two signatures: Hubert Vedrine, French Minister of Foreign Affairs, the Chair of the European Union, and Christopher Patten, Member of the European Commission, "For the European Community." This reaffirms the United States practice of having a single signature bind the United States even where the other side makes use of multiple signatories.

The full text of the Agreement is available at *www.state.gov/s/l.*

2. Ethiopia-Eritrea Peace Agreement

On December 12, 2000, Ethiopia and Eritrea signed a peace agreement, the Agreement Between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia ("Agreement"). The United States, through the President's Special Envoy Anthony Lake, and the Organization of African Unity, represented by the President of Algeria, had been actively involved in facilitating the negotiations leading to the Agreement. The Agreement is signed by representatives of the two Parties: the President for the Government of the State of Eritrea and the Prime Minister for the Government of the Federal Democratic Republic of Ethiopia. Several key participants

ILI US Digest/4 311 1/8/02, 1:45 PM

in the process of reaching agreement, including the U.S., were asked to sign as witnesses to these signatures. The Agreement contains no obligations for the United States Government and the signature of the Secretary of State of the United States as witness has no legal implications for the United States. A Department of State Press Statement of December 8, 2000 records the capacity in which Secretary of State Albright signed:

Secretary of State Madeline K. Albright will witness the signing of the peace agreement by Ethiopia and Eritrea in Algiers on December 12, at the invitation of President Bouteflika of Algeria. The final peace agreement builds on a Cessation of Hostilities Agreement brokered by the United States and the Organization of African Unity last June.

The full text of the agreement is available at *www.state.gov/s/l*.

C. ROLE IN DOMESTIC LITIGATION

Effort to create private right of enforcement: *Cardan v. United States of America*

On November 6, 2000, the United States filed a Motion to Dismiss and in Response to Court's Order to Show Cause in *Cardan v. United States of America*, (C.D.Cal.)(No. CV 99-13570-WJR). The case involved a civil action for injunctive relief and damages filed against the U.S. Government and a number of U.S. officials alleging that the Panama Canal Treaty of 1977 violated the U.S. Constitution and an 1846 treaty between the United States and the Republic of New Granada (now Colombia). The Memorandum of Points and Authorities in Support of the Motion argued that plaintiff lacked standing to bring this case, which is based on an alleged injury to Colombia, a country

ILI US Digest/4 312 1/8/02, 1:45 PM

with which he has no connection, and because any claim would be mooted by the fact that the Canal has already been returned to Panama. (The motion to dismiss was granted on January 25, 2001.) Excerpts from the Motion set forth below provide the further argument that the Complaint is subject to dismissal because, as an individual, Cardan has no private right of action to enforce terms of an international treaty and the treaty he relies on has been superseded in any event.

The full text of the Motion and supporting Memorandum are available at *www.state.gov/s/l.*

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STATEMENT OF FACTS

In 1846, the United States and New Granada, which later became the nation of Colombia, signed a treaty which recognized the sovereignty of New Granada over the Panamanian Isthmus. Complaint at 5, 7. A portion of the nation of Colombia located on the Isthmus declared independence in 1903 and became the new nation of Panama. *Id.* In 1914, the United States and Colombia signed a treaty which recognized the title of the United States to the Canal, granted Colombia with certain rights regarding the Canal, and provided for a $25,000,000 payment by the United States to Colombia. … The United States signed a treaty with Panama in 1977 which provided that the Canal would be turned over to Panama by the United States on December 31, 1999. Complaint at 3. The Canal was in fact transferred to Panama on December 31, 1999.

* * * *

ARGUMENT

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ILI US Digest/4 313 1/8/02, 1:45 PM

B. Cardan Has Not Alleged Any Personal Connection to the Panama Canal or to Colombia, Therefore, He Lacks Standing.

Cardan lacks standing to maintain this action because he has not set forth any personal connection to the Panama Canal or to the nation of Colombia, therefore, the Court lacks subject matter jurisdiction over the Complaint. The Supreme Court has held that an APA plaintiff has standing to sue under Section 702 only if the challenged governmental action (1) caused the plaintiff injury-in-fact, and (2) the injury was to an interest arguably within the zone of interests to be protected or regulated by the law that plaintiff claims that the government has violated. *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686,…(1973), *citing Sierra Club v. Morton*, 405 U.S. 727, 733,…(1972). The second prong of the foregoing analysis is referred to as the "zone of interests" test. *See Sierra Club*, 405 U.S. at 733, n.5.

Cardan cannot satisfy either prong of this test because he has not alleged that he has been injured in any manner that is particular to him nor has he shown that he is within the relevant zone of interest. The gravamen of Cardan's Complaint is that the transfer of the Panama Canal by the United States to Panama is a violation of the December 12, 1846 Treaty of Peace, Amity, Navigation, and Commerce between Colombia (which was then called New Granada) and the United States (the "1846 Treaty"). Complaint at 2-3, 5-10. The area that is now the nation of Panama was, prior to the construction of the Canal, a part of Colombia. *See id.* at 3. In 1903, Panama declared its independence from Colombia and the United States proceeded to construct the Canal in Panama. *Id.* at 2. Cardan alleges that the acquisition of the Canal by the United States was illegal because it purportedly violated several provisions of the 1846 Treaty. *Id.* Because the Canal allegedly was not obtained in a legitimate manner, Cardan contends that the September 7, 1977 Panama Canal Treaty, which required the United States to transfer the Canal to Panama on December 31, 1999, lacked a legal basis. *Id.* at 2-3. As a result, Cardan asserts that it is unlawful for the United States to return the Canal to Panama. *Id.* at 3-4.

It is apparent from the foregoing review that Cardan's action asserts an alleged injury to Colombia. Cardan contends that the United States is transferring territory (i.e., the Canal) to Panama over which Colombia should have sovereignty. *See id.* at 4. However, Cardan does not allege that he has any relationship with Colombia such that an al-

ILI US Digest/4 314 1/8/02, 1:45 PM

leged injury to Colombia would have any personal effect on him. Cardan acknowledges that he is a citizen of the United States, not Colombia. *Id.* at 1. Cardan resides in California. *See id.* at 1 (setting forth Cardan's address in Beverly Hills, California). Nowhere in his Complaint does Cardan show that he has any connection with Colombia. Therefore, even if it were assumed *arguendo* that Cardan was correct in his assertion that the transfer of the Canal to Panama was harmful to Colombia, he has not shown that this would result in any injury to him. Accordingly, Cardan fails to satisfy the requirement of an injury-in-fact to himself and, as a result, he lacks standing.

In addition, Cardan cannot establish standing because he has not shown that he is within the relevant zone of interest. In order to assess whether an APA plaintiff falls within the zone of interest so as to have standing, a court must determine which law's violation forms the basis of the complaint. *See Air Courier Conference of America v. American Postal Workers' Union*, 498 U.S. 517, 529-30,…(1991); *Lujan v. Nat'l Wildlife Fed'n* 497 U.S. 871, 886,…(1990) ("Lujan I"); *cf. Natural Resources Defense Council v. Patterson*, 791 F. Supp. 1425, 1429-30 (E.D.Cal. 1992), *aff'd.*, 146 F.3d 1118 (9th Cir. 1998) (court first must determine which statute is violated before considering whether plaintiff's interests are within zone). As explained above, the alleged violation of the 1846 Treaty forms the basis of Cardan's Complaint.…Cardan's Complaint does not show that Cardan has any personal stake in those interests which were to be advanced by the 1846 Treaty. On the contrary, Cardan appears to have no connection to the relationship between the United States and Colombia that is any different than the general interest that any American citizen has in the lawful conduct of affairs by the United States. However, such a general interest by a citizen in lawful governance has been consistently held by the Supreme Court not to be sufficient to support standing. *Lujan v. Nat'l Wildlife Fed'n*, 504 U.S. 555, 573,…(1992) ("Lujan II") (no standing to assert a claim only of harm to the interest of the plaintiff and every other citizen in the proper application of the Constitution and the laws which seeks relief that does not benefit plaintiff more than the public at large). As Cardan has not shown any injury-in-fact or that he falls within the zone of interest protected by the 1846 Treaty, he cannot establish that he has standing.

Standing is a necessary prerequisite to federal court jurisdiction. *Id.* at 561. Because Cardan cannot show that he has standing to bring this action, the Court lacks subject matter jurisdiction over it. *Id.* There-

ILI US Digest/4 315 1/8/02, 1:45 PM

fore, the Complaint should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

C. The United States Has Already Returned the Canal to Panama, Therefore, this Action Is Moot.

In addition to lacking standing, Cardan's action is also barred as moot because the United States has already returned the Canal to Panama. As Cardan points out in the Complaint, the United States was scheduled to transfer the Canal to Panama on December 31, 1999 in accordance with the 1977 Panama Canal Treaty. Complaint at 3. Pursuant to this arrangement, the Canal was indeed turned over to Panama on December 31, 1999.…

The ability of a federal court to consider a claim depends on the existence of a case or controversy. *North Carolina v. Rice*, 404 U.S. 244, 246,…(1971). This basic requirement is set forth in Article III of the Constitution. *Id.* As a result of the case or controversy requirement, "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *Id.* To satisfy this criterion, the action must "touch[] the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief". *Id.* If no case or controversy exists, the action is moot, and subject matter jurisdiction is absent. *See id.*

* * * *

D. Even If Cardan Had Standing and the Action Were Not Moot, He Cannot State a Claim for Relief Because the Relinquishment of the Canal Was Consistent with Law.

Even if it were assumed *arguendo* that Cardan could overcome the threshold jurisdictional hurdles of standing and mootness, this Complaint would nevertheless be subject to dismissal for failure to state a claim. Cardan cannot state a cognizable claim that the transfer of the Canal is unlawful for two reasons: (1) as an individual, he does not have a private right of action to enforce terms of an international treaty, and (2) the provisions of the 1846 Treaty upon which Cardan relies were superseded by a later treaty between the United States and Colombia. It has

ILI US Digest/4 316 1/8/02, 1:45 PM

been widely recognized that international treaties do not create a private right of action in the absence of an express provision therefor in the treaty. *Goldstar (Panama) S.A. v. U.S.*, 967 F.2d 965, 968 (4th Cir. 1992); *More v. Intelcom Support Servs., Inc.*, 960 F.2d 466, 469 (5th Cir. 1992); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990). The 1846 Treaty does not contain any provision for a private right of action; on the contrary, it states that, if it is violated, the aggrieved nation shall present a claim to the other nation. *See* Complaint at 8. As Cardan lacks a right a right of action to sue to enforce the 1846 Treaty, he cannot state a claim upon which relief may by granted.

Furthermore, even if it were assumed *arguendo* that Cardan could have a right of action, his Complaint should be dismissed nevertheless because the 1846 Treaty was superseded by a later [1914] treaty between the United States and Colombia.…

In addition, the 1914 Treaty set forth the "rights in respect to the interoceanic Canal" which "shall be enjoyed" by Colombia, which did not include the right of sovereignty which is asserted by Cardan. Ex. 1 at 2. Furthermore, the 1914 Treaty precluded any assertions, such as that asserted by Cardan, that Colombia retained a claim to the Canal, by its express acknowledgement that "the title to which [i.e., the Canal] is now vested entirely and absolutely in the United States of America, without any incumbrances or indemnities whatever." *Id.*

* * * *

CROSS-REFERENCE

Effect of U.S. treaty obligations on private litigation in **8.B.2.**

ILI US Digest/4 317 1/8/02, 1:45 PM

ILI US Digest/4 318 1/8/02, 1:45 PM

CHAPTER 5

Federal Foreign Affairs Authority

A. CONSTITUTIONALITY OF STATE LAW REGULATING ASPECTS OF TRADE WITH BURMA: *CROSBY V. NATIONAL FOREIGN TRADE COUNCIL*

In 1996 the State of Massachusetts adopted legislation restricting state entities from buying goods or services from companies that did business with Burma. Mass. Gen. Laws Ann. Ch. 7, § 22G-22M (West Supp. 1998). In a suit brought by the National Foreign Trade Council, a trade association whose members include companies affected by the Massachusetts law, the federal District Court for the District of Massachusetts permanently enjoined enforcement of the state Act, holding that it unconstitutionally impinged on the federal government's exclusive authority to conduct foreign affairs. *National Foreign Trade Council v. Baker*, 26 F. Supp.2d 287, 291 (D.Mass.1998). The United States Court of Appeals for the First Circuit affirmed, finding that the state Act unconstitutionally interfered with the foreign affairs power of the federal government, violated the "dormant" Foreign Commerce Clause and the supremacy clause, and was preempted by federal sanctions against Burma. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999). In February 2000, the United States filed a brief as *amicus curiae* supporting affirmance by the U.S. Supreme Court of a permanent injunction against enforcement of the statute. Excerpts from the U.S. brief are set forth below. On June

ILI US Digest/5 319 1/8/02, 1:46 PM

19, 2000, the Supreme Court affirmed the holding of the lower courts, finding that the Massachusetts law was invalid under the Supremacy Clause of the U.S. Constitution. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 388 (2000).

The full text of the brief is available at *www.state.gov/s/l.*

INTEREST OF THE UNITED STATES

The United States has condemned, in the strongest possible terms, the Burmese government's violations of human rights.[1] The President

[1] *See*, *e.g.*, President's Message to Congress Transmitting a 6-Month Periodic Report on the National Emergency with Respect to Burma 5 (Dec. 14, 1999) (reporting that the Burmese government "has continued to refuse to negotiate with pro-democracy forces and ethnic groups for a genuine political settlement to allow a return to the rule of law and respect for basic human rights"); Remarks by the President to the International Labor Organization Conference 4 (June 16, 1999) (condemning "the flagrant violation of human rights" in Burma); U.S. Dep't of State, 1 *Country Reports on Human Rights Practices for 1998: Report to the Senate Comm. on Foreign Relations and the House Comm. on International Relations* at xvii (1999) (Assistant Secretary of State Koh observes that the Burmese military junta in 1998 "continued its highly repressive policies, targeting all forms of dissent and intensifying its restrictions of free assembly and association"); *id.* at 813 (criticizing the Burmese government's "longstanding severe repression of human rights," including "extrajudicial killings and rape" by soldiers, "[a]rbitrary arrests and detentions for expression of dissenting political views," "forced unpaid civilian labor," and extensive "restrictions on basic rights of free speech, press, assembly, and association"); *Human Rights in Burma: Hearing Before the Subcomm. on International Operations and the Subcomm. on Asia and the Pacific of the House Comm. on International Relations*, 105th Cong., 2d Sess. 2 (1998) (*Human Rights in Burma*) (testimony of Acting Assistant Secretary of State Smith (Sept. 27, 1998)) ("The people of Burma continue to live under a highly repressive, authoritarian military government that is widely condemned for its serious human rights abuses."); Bureau of Int'l Labor Affairs, U.S. Dep't of Labor, *Report on Labor Practices in Burma* 2 (1998) ("The Burmese military government has been widely criticized for human rights abuses," which include "arbitrary, extrajudicial and summary executions, torture, rape, arbitrary arrests and imprisonment, the imposition of forced labor on large sections of the population…, forced relocations and confiscation of property."); J.A. 134 (statement of Deputy Assistant Secretary of State Marchick) (noting Secretary of State Albright's expressions of "the United States outrage at egregious violations of human rights and international norms in…Burma"); *U.S. Policy Toward Burma: Hearing Before the Subcomm. on Foreign Operations of the Senate Comm. on Appropriations*, 104th Cong., 1st Sess. 2 (1995) (*U.S. Policy Toward Burma*) (testimony of Assistant Secretary of State Lord (July 24, 1995)) (discussing "[e]gregious human rights violations" in Burma).

ILI US Digest/5 320 1/8/02, 1:46 PM

and Congress have crafted a policy toward Burma that includes economic sanctions, restrictions on U.S. assistance, and coordinated international action to promote respect for human rights and the democratic process in that country. There is thus no disagreement between the United States and Massachusetts on the need for action to encourage reform in Burma. The disagreement is only over whether the State could permissibly take the sort of action reflected in the Massachusetts Burma Act.

The Constitution assigns to the national government the exclusive responsibility to direct the United States' relations with other countries. Accordingly, while States may speak out on matters of foreign policy, the ultimate authority to act on behalf of the United States, and each of its States, in the international arena resides with the President and Congress alone. The national government's ability to exercise that authority effectively, expeditiously, and flexibly may be undermined when States pursue their own foreign-policy objectives in their own ways. That may be so even where, as here, a state or local government is pursuing an objective that is also being pursued by the national government.

The Massachusetts Burma Act, while consistent with United States foreign policy in its ultimate end, seeks to achieve that end by means that diverge from those chosen by the President and Congress. The Act imposes sanctions that are designed to discourage *all* foreign economic engagement with Burma, and that are applicable to *all* entities, both U.S. and foreign, that do business with Burma, including those whose only connection to Burma is through a parent, subsidiary, or affiliate. Because the Act discriminates against foreign commerce beyond what a State may do as a market participant, departs from the carefully crafted framework established by Congress and the President for imposing economic sanctions against Burma, and impermissibly intrudes into the national government's exclusive authority over foreign affairs, the United States has a substantial interest in this case.

* * * *

ARGUMENT

I. The Massachusetts Burma Act Violates The Foreign Commerce Clause

The Commerce Clause "has long been understood … to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted.'" *Barclays Bank PLC v. Franchise Tax*

ILI US Digest/5 321 1/8/02, 1:46 PM

Bd., 512 U.S. 298, 310 (1994) (quoting *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945)). Because "the Founders intended the scope of [Congress's] foreign commerce power to be … greater" than its power over interstate commerce, the Court has applied heightened scrutiny when "ascertaining the negative implications of Congress' power to 'regulate Commerce with foreign Nations.'" *Japan Line*, 441 U.S. at 448-449. Accordingly, a state law may violate the Foreign Commerce Clause, even in the absence of a superseding federal law, if the state law *either* discriminates against foreign commerce, *Barclays*, 512 U.S. at 311, 312-314 *or* "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments,'" *Japan Line*, 441 U.S. at 451 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).[12] The Massachusetts Burma Act suffers from both infirmities. The Act therefore violates the Foreign Commerce Clause unless it can be saved on the theory that the State is acting as a market participant in penalizing companies that do business in Burma. As we show in Point C, *infra*, however, the Act cannot be sustained on that theory.[13]

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[12] A state tax must satisfy additional criteria in order to survive a challenge under the Foreign or Interstate Commerce Clause. *See Barclays*, 512 U.S. at 310-311 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). Questions concerning the validity of state taxes are not presented here. Nor is there any occasion in this case to consider the application of the Foreign Commerce Clause to state measures that do not facially discriminate against foreign commerce or prevent the Nation from speaking with one voice, but nevertheless are claimed to impermissibly burden foreign commerce. Cf. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-354 (1977) (invalidating a facial[ly] neutral[]" state statute as imposing an undue burden on interstate commerce).

[13] As we have pointed out above (*see* pp. 11-12 & n.8, *supra*), the Foreign Commerce Clause is one of the explicit provisions manifesting the Constitution's grant of authority to the national government over foreign affairs generally. In *Zschernig*, the Court relied on that general foreign affairs power to invalidate a state inheritance statute that required determinations regarding the conduct of foreign governments. We explain in Section III of this Brief that the Massachusetts Burma Act also is unconstitutional because it impermissibly intrudes into the conduct of foreign affairs by the President and Congress. That is so, however, for essentially the same reasons that the Act is inconsistent with the Foreign Commerce Clause. We have elected to address the Foreign Commerce Clause first because this case, unlike *Zschernig*, involves foreign commerce. In our view it would be appropriate for the Court to rest its decision on the clause of the Constitution that is specifically applicable to the subject matter, rather than on the national government's more general power over foreign affairs, of which the Foreign Commerce Clause is but one (albeit significant) exemplification. We will not repeat in detail in Section III all of the ways in which the Massachusetts Burma Act intrudes upon the powers of the national government.

ILI US Digest/5 322 1/8/02, 1:46 PM

A. The Massachusetts Act Discriminates Against Foreign Commerce

The Massachusetts Burma Act facially discriminates against commerce with Burma. The Act penalizes all companies that engage in commerce with Burma, whether directly or through a corporate parent, affiliate, or subsidiary, by effectively foreclosing procurement opportunities with the State.[14] Companies are forced to choose between doing business with Burma and doing business with Massachusetts. Such discrimination is not merely an incidental consequence of the Act. It is the very means that the State has selected to pursue its foreign-policy objectives with respect to Burma. *See*, *e.g.*, pp. 7-8, *supra*, and pp. 36-77, *infra*.

Contrary to Massachusetts' assertion (Br. 47), a state statute that facially discriminates against interstate or foreign commerce violates the Commerce Clause, even if the statute was not "intend[ed] to secure economic advantages for local businesses at the expense of businesses situated elsewhere." In *Kraft General Foods v. Iowa Department of Revenue*, 505 U.S. 71, 78 (1992), this Court rejected a State's analogous argument that its tax system, which treated dividends received from foreign subsidiaries less favorably than dividends received from domestic subsidiaries, did not violate the Foreign Commerce Clause because "it [did] not favor local interests." The Court explained that a state statute that discriminates against foreign commerce "is inconsistent with the Commerce Clause even if the State's own economy is not a direct beneficiary of the discrimination." *Id.* at 79. "As the absence of local benefit does not eliminate the international implications of the discrimination," the Court said, "it cannot exempt such discrimination from Commerce Clause prohibitions." *Ibid*.

Nor is the Massachusetts Burma Act rendered permissible, as Massachusetts contends (Br. 47), by the fact that the Act applies to domestic, as well as foreign, companies that do business in Burma. A statute may violate the Foreign Commerce Clause by discriminating against foreign *commerce* (*e.g.,* commerce with a particular foreign nation) as well as by discriminating against foreign *persons*.[15]

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[14] For example, Massachusetts would be required to discriminate against a Pennsylvania company that sells office products solely because the company is owned by a French conglomerate that also owns a Japanese company that sells food products in Burma.

[15] Cf. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575-583 (1997) (a state property tax violated the Interstate Commerce Clause by discriminating between domestic charitable organizations operated principally for the benefit of state resident and domestic charitable organizations operated principally for the benefit of non-residents)

ILI US Digest/5 323 1/8/02, 1:46 PM

That conclusion is compelled by the text of the Foreign Commerce Clause, which refers to commerce "with foreign *Nations*," and by its principal purpose, which was to prevent individual States from embroiling this Nation in disputes with other nations, thereby inviting retaliation that would harm the United States as a whole. *See* pp. 12-13, *supra*; *see also Kraft Gen. Foods*, 505 U.S. at 79; *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 317 (1851) (one of the purposes of the Commerce Clause was to eliminate state laws that create "discriminations favorable or adverse to commerce with particular foreign nations").[16]

B. The Massachusetts Act Prevents The United States From Speaking With One Voice On Foreign Commerce

The Massachusetts Burma Act violates the Foreign Commerce Clause for an additional, independent reason: It prevents the United States from "speak[ing] with one voice when regulating commercial relations with foreign governments." *Japan Line*, 441 U.S. at 449; accord *Barclays*, 512 U.S. at 320. The Court has explained that a state statute "will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive." *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983). The Massachusetts Burma Act not only "implicates foreign policy issues" – whether economic sanctions should be used to press for political reform in Burma and, if so, the nature, extent, and duration of those sanctions – but does so through an approach that departs, in significant respects, from the approach chosen by the national government.[17]

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[16] Because the Massachusetts Burma Act facially discriminates against a species of foreign commerce (*i.e.,* commerce with Burma), the Act is unlike the California tax statute that was held to be nondiscriminatory in *Barclays*. The California statute, which prescribed the use of the "world-wide combined reporting" method by multinational corporations, applied the same method to domestic and foreign corporations. *Barclays*, 512 U.S. at 310-311. Indeed, the only claim of discrimination in that case was that the cost of complying with the statute would be higher for foreign corporations than for domestic corporations (*e.g.*, because domestic corporations "already keep most of their records in English, in United States currency, and in accord with United States accounting principles"). *Id.* at 313. The Court concluded that "[t]he factual predicate of [that] discrimination claim, however, is infirm." *Ibid*.

[17] Because Congress and the President have spoken for the United States with respect to sanctions against Burma, there is no occasion to consider the application of the "one voice" aspect of the dormant Foreign Commerce Clause to state purchasing restrictions where the national government has not spoken.

ILI US Digest/5 324 1/8/02, 1:46 PM

As explained more extensively below (at 31-35), although the national government and the State seek the same end with respect to democratic reform in Burma, they have chosen to do so through different means.[18] The national government has chosen a carefully calibrated strategy of penalties and incentives, which are capable of being applied flexibly by the President in response to the Burmese regime's conduct, the actions of the international community, and other national security considerations. The national government has elected not to penalize U.S. companies with existing investments in Burma or to prohibit "the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology." Federal Burma Act § 570(f)(2), 110 Stat. 3009-167. The national government has also recognized that the most effective means to achieve reform in Burma is through "a comprehensive, multilateral strategy" that involves those nations, primarily in Asia, that have stronger economic ties to Burma than has the United States. § 570(c), 110 Stat. 3009-166.

The State's approach is inconsistent with the national government's approach in a number of respects. First, the Massachusetts Burma Act undermines the President's flexibility in dealing with the Burmese regime. Whereas the sanctions under the Federal Burma Act and the Burma Executive Order may be adjusted in response to changing circumstances, the sanctions under the Massachusetts Burma Act are applied inflexibly. *See* pp. 31-33, *infra*. Second, the Massachusetts Burma Act seeks to discourage all business by U.S. companies, contrary to Congress's and the President's decision that only "new investment" is to be prohibited. *See* pp. 33-34, *infra*. Third, the Massachusetts Burma Act operates against foreign companies as well as U.S. companies, which has antagonized U.S. allies and complicated the development of a multilateral strategy

[18] The Massachusetts Burma Act prevents the United States from "speaking with one voice" with respect to foreign commerce for essentially the same reasons that, as set forth in Sections II and III, *infra*, the Act is preempted by the federal statutory scheme governing economic sanctions against Burma (*see* pp. 30-35, *infra*) and interferes with the national government's exclusive authority over foreign affairs (*see* pp. 35-38, *infra*). As explained in this Section, whether or not the Massachusetts Burma Act is actually preempted by the Federal Burma Act and the Burma Executive Order, the Act prevents the United States from speaking with one voice with respect to the regulation of commerce with Burma (and therefore violates the Foreign Commerce Clause) because the different federal strategy embodied in the Federal Burma Act and the Burma Executive Order *is* the one voice of the United States on the subject.

toward Burma. *See* pp. 34-35, *infra*. Clearly, then, the Act undermines the United States' ability to "speak with one voice."

Indeed, if the Massachusetts Burma Act were sustained, a multitude of different, and differing, state and local measures sanctioning foreign governments could be expected. At least 18 local governments have adopted similar, although not necessarily identical, selective-purchasing statutes directed at Burma. J.A. 155-156. And various state and local governments have adopted or considered similar selective-purchasing statutes aimed at other countries including China, Cuba, Egypt, Indonesia, Iran, Iraq, Laos, Morocco, Nigeria, North Korea, Pakistan, Saudi Arabia, Sudan, Switzerland, Tibet, Turkey, and Vietnam. J.A. 144-156. Cf. *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984) (in determining whether a state tax discriminates against interstate commerce, the Court inquires whether the tax is "such that, if applied by every jurisdiction, there would be no impermissible interference with free trade") (internal quotation marks omitted).[19]

C. The Massachusetts Act Is Not Saved On The Theory That The State Is Acting Simply As A Market Participant

The State contends that the Massachusetts Burma Act does not violate the Foreign Commerce Clause – whether or not the Act discriminates against foreign commerce or undermines national uniformity – because the State is acting as a "market participant" in refusing to deal

[19] Massachusetts suggests (Br. 19) that Congress has acquiesced in the Massachusetts Burma Act by declining to preempt it. In *Barclays*, the Court explained that Congress's acquiescence in a state statute that discriminates against foreign commerce must appear with "unmistakable clarity," whereas Congress's acquiescence in a state statute that undermines the United States' ability to "speak with one voice" on foreign commerce need not be as explicit. 512 U.S. at 323. The Court applied only the latter standard in *Barclays* because the California tax statute at issue there, unlike the Massachusetts Burma Act, did not discriminate against foreign commerce. Moreover, this case does not present the sort of evidence of congressional acquiescence in a state statute that the Court deemed sufficient in *Barclays*. Whereas Congress repeatedly declined to enact legislation that would have precluded the taxing method used by California (*see Barclays*, 512 U.S. at 325-328), Congress has not considered and rejected legislation to preclude state laws such as the Massachusetts Burma Act, and that Act is in significant tension with the strategy adopted by Congress and the President for bringing about reform in Burma.

ILI US Digest/5 326 1/8/02, 1:46 PM

with companies that do business in Burma. The Massachusetts Burma Act cannot be sustained on that theory.[20]

1. This Court has identified a "narrow exception to the dormant [Interstate] Commerce Clause for States in their role as 'market participants.'" *Camps Newfound/Owatonna Inc. v. Town of Harrison*, 520 U.S. 564, 589 (1997). The Court has not yet decided whether, or to what extent, the market-participant exception applies to foreign commerce. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 438 n.9 (1980) ("We have no occasion to explore the limits imposed on state proprietary actions by the 'foreign commerce' Clause …. We note, however, that Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged."). It is significant, however, that even in the purely domestic context, the Court has never extended the market-participant exception to state action analogous to that at issue here, *e.g.*, to a state procurement statute that discriminates against companies that do business in another State in order to influence that other State's internal policies.

The market-participant exception originated in two cases in which the State, as a participant in commercial activity, preferred its own citizens over citizens of other States. In *Hughes v. Alexandria Scrap Corp*., 426 U.S. 794 (1976), the Court held that a State, in paying a "bounty" to encourage the processing of abandoned automobiles into scrap metal, could prefer local processors over out-of-state processors. The Court reasoned that the State was not seeking to regulate the market for abandoned automobiles; "[i]nstead, it ha[d] entered into the market itself to bid up their price." *Id.* at 806. The Court then concluded that the Commerce Clause does not "prohibit a State, in the absence of congressional action, from participating in the market and

[20] This case presents no question concerning the interpretation of federal statutes governing the President's authority in prescribing the terms for procurement by federal agencies. *See* Federal Property and Administrative Services Act, 40 U.S.C. 486(a) (authorizing the President to "prescribe such policies and directives … as he shall deem necessary to effectuate the provisions of [this] Act"); *see also AFL-CIO v. Kahn*, 618 F.2d 784, 789 (D.C. Cir.) (en banc) (noting that the Act "grants the President particularly direct and broad-ranging authority" over federal procurement), cert. denied, 443 U.S. 915 (1979); *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 170 (3d Cir.) (noting the Act's "broad grant of procurement authority" to the President), cert. denied, 404 U.S. 854 (1971); cf. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1333-1339 (D.C. Cir. 1996).

exercising the right to favor its own citizens over others." *Id.* at 810. Similarly, in *Reeves*, the Court held that a State, as the operator of a cement plant, could choose to sell the cement only to its own citizens. 447 U.S. at 440-447.

The Court's subsequent decisions make clear that the market-participant exception does not exempt all of a State's procurement decisions from the constraints of the Commerce Clause. In *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983), the Court upheld an executive order issued by the Mayor of Boston that required that city residents constitute 50 percent of the workforce on public construction projects funded wholly with city funds. The Court reasoned that such a preference for city residents did not violate the Commerce Clause because, "[i]nsofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant." *Id.* at 214-215. The Court acknowledged that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business." *Id.* at 211 n.7. The Court found it "unnecessary in this case to define those limits with precision," however, because "[e]veryone affected by the order is, in a substantial if informal sense, working for the city." *Ibid*. Thus, in *White*, the Court again sustained a procurement provision that simply preferred the city's (and thus the State's) own residents in the expenditure of the city's own funds on the city's own construction projects. The city did not broadly make employment on city-funded construction projects open to residents and nonresidents alike but then disqualify residents of a particular State based, for example, on the city's disapproval of the policies of the State. Nor did the city seek to influence the contractors' actions aside from their work for the city itself.

The Court addressed some of the limits on the market-participant exception in *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282 (1986), which concerned a Wisconsin statute that barred the State from doing business with companies that had committed multiple violations of the National Labor Relations Act (NLRA). The State did not dispute that, if the statute was "regulatory" in nature, the statute would be preempted under *San Diego Building & Trades Council v. Garmon*, 359 U.S. 236 (1959). The Court rejected the State's argument that the statute "escapes preemption because it is an exercise of the State's spending power rather

ILI US Digest/5 328 1/8/02, 1:46 PM

than its regulatory power," which the Court found to be "a distinction without a difference, at least in this case, because on its face the debarment statute serves plainly as a means of enforcing the NLRA." *Gould*, 475 U.S. at 287. In other words, given that "the point of the statute is to deter labor law violations," *ibid*., the statute was regulatory, although the statute involved the exercise of the State's spending power. The Court also rejected the State's related argument that it was merely acting as a market participant in refusing to deal with companies that violated the labor laws. The Court observed that "by flatly prohibiting state purchases from repeat labor law violators Wisconsin simply is not functioning as a private purchaser of services; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Id.* at 289 (internal quotation marks and citation omitted). The Court since explained its holding in *Gould* on the ground that the state statute in that case "addressed employer conduct unrelated to the employer's performance on contractual obligations to the State" for the purpose of "deter[ring] NLRA violations." *Building & Constr. Trades Council v. Associated Builders*, 507 U.S. 218, 228-229 (1993).

Similarly, in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), a plurality of the Court concluded that Alaska was not acting as a market participant in requiring those who purchased timber on state lands to have the timber processed within the State. *Id.* at 93-99 (plurality opinion of Justice White). The plurality observed that the market-participant doctrine "is not *carte blanche* to impose any conditions that the state has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." *Id.* at 97. The plurality concluded that the market-participant exception was inapplicable because "the State [was] attempting to govern the private, separate economic relationships of its trading partners" in a market in which the State was not a participant. *Id.* at 99.

2. We do not disagree with the State's submission that the market-participant exception applies, at least to some extent, to foreign as well as domestic commerce. For example, South Dakota, in selling cement from its cement plant, could prefer its own citizens not only over a would-be purchaser from Wyoming, as in *Reeves*, but also over a would-be purchaser from Canada, in the absence of a federal statute or treaty providing otherwise. And the preferences in *Hughes* and *White* for local residents could have been enforced against residents of other countries

ILI US Digest/5 329 1/8/02, 1:46 PM

as they were against residents of other States absent a contrary federal statute or treaty.[21]

There is no occasion in this case, however, to consider the precise limits of the market-participant exception in the context of foreign commerce. Whatever those limits might be, the Massachusetts Burma Act exceeds them. The Commerce Clause confers on Congress, not the States, the power to "regulate" commerce "with foreign Nations, and among the several States." Accordingly, an exercise of a State's procurement power falls outside the market-participant exception whenever it is "regulatory" in nature.

Here, several characteristics of the Massachusetts Burma Act make clear that the Act, like the state statutes in *Gould* and *South-Central Timber*, is properly regarded as regulatory in nature. First, in contrast to the state action that this Court has held to come within the market-participant exception, the Massachusetts Burma Act does not seek to advance the economic interest of the State or its own citizens through the State's participation in the marketplace. Second, the "point of the statute," *Gould*, 475 U.S. at 287, is to deter U.S. and foreign companies from doing business in Burma, and thereby to pressure the Burmese regime for political reform. The Act thus "address[es] [such companies'] conduct unrelated to [their] performance or contractual obli-

[21] This Court has reserved the question whether "Buy American" statutes, which give a preference in a State's purchases to goods produced in the United States over goods produced in other countries, violate the Commerce Clause. *See Reeves*, 447 U.S. at 437 n.9. The lower courts have divided on the question. Compare *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990) (sustaining Buy American statute), cert. denied, 501 U.S. 1212 (1991), and *K.S.B. Tech Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774, 776 (N.J. 1977) (same), with *Bethlehem Steel Crop. v. Board of Comm'rs*, 80 Cal. Rptr. 800, 803 (Ct. App. 1969) (invalidating Buy American statute). A Buy American statute differs from the state actions at issue in *Reeves, Hughes,* and *White*, because the state is not simply preserving the benefits of its expenditures for its own citizens as against everyone else, domestic and foreign alike. The State is singling out suppliers of imported goods for disfavored treatment. In contrast to the Massachusetts Burma Act, however, a Buy American statute does not single out particular foreign governments for disfavored treatment, seek to affect the internal policies of a foreign government, or penalize companies merely because they do business in a particular country. In considering the validity of such Buy American statutes as applied to goods from particular countries, the Agreement on Government Procurement (*see* note 6, *supra*) now would have to be consulted.

ILI US Digest/5 330 1/8/02, 1:46 PM

gations to the State." *Associated Builders*, 507 U.S. at 228-229; accord *South-Central Timber*, 467 U.S. at 97 (plurality opinion) ("The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further."). Third, as reflected in the Act's design, operation, and scope, the Act seeks to affect the conduct not only of the State's own contracting partners, but also of third parties – and, indeed, the conduct of those third parties outside the United States. Because the Act penalizes companies that do business in Burma, the Act regulates conduct even further from a company's own "contractual obligations to the State" than did the statutes in *Gould* and *South-Central Timber*. And the Act ultimately seeks, of course, to affect the conduct of Burmese officials.[22]

The conclusion that the Massachusetts Act falls outside the market-participant exception is especially evident when the analogous question is considered in the context of commerce among the States. If Massachusetts refused to do business with any companies that do business with Texas, or their parents, subsidiaries, or affiliates, in order to induce a change in the internal policies of Texas, there could be little doubt that Massachusetts would violate the Commerce Clause. Such a boycott is no more consonant with that Clause when a State targets another country rather than another State. The Interstate Commerce Clause was intended to prevent "economic Balkanization" and retaliation by one State against another, *see Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-180 (1995), and the Foreign Commerce Clause was designed to prevent individual States from embroiling the Nation in disputes with other nations and triggering retaliation against the United States as a whole, *see Kraft Gen. Foods*, 505 U.S. at 79. It would be inconsistent with those overriding purposes of the Commerce Clause to sustain a state statute that singles out companies because they do busi-

[22] That some private companies might engage in boycotts of suppliers does not mean that Massachusetts' conduct falls within the market-participant exception. As the Court has explained, "[t]he private actor under such circumstances would be attempting to 'regulate' the suppliers and would not be acting as a typical proprietor." *Associated Builders*, 507 U.S. at 229. But the private actor, unlike the State, would not be subject to the constraints of the dormant Commerce Clause. *See ibid*. ("When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding.").

ness with another State or another nation for the purpose of affecting the internal policies of that State or nation.

That is not to say that the Constitution leaves no room for States to take action with respect to another country based on concerns about its record on human rights or similar matters. A State may adopt a resolution condemning the conduct of a repressive foreign regime. A State may petition Congress and the President to take action against the regime, including the imposition of economic sanctions, or to authorize the States themselves to take certain actions. A State may decline to send its own officials on trade missions to the country so long as the repressive regime remains in power. And a State may call attention to its concerns in other ways. Such measures would not involve the State in any regulation of foreign commerce. They consequently would not implicate the Foreign Commerce Clause.

Moreover, we are not prepared to say that there would be no instances in which a State could take action in a commercial setting to express its concerns about violations of human rights. For example, a state statute that required state pension funds to divest their holdings in companies doing business in a particular country would present different considerations under the Foreign Commerce Clause than does a state statute that restricts a State from entering into procurement contracts with such companies. While a divestment statute might be regarded as regulatory to the extent that it is perceived to be seeking to affect conduct unrelated to the companies' performance in the financial markets, such a statute might also be regarded as serving only to disassociate the state, as an ultimate "owner" of such companies through the pension funds, from any affinity with a repressive regime that results from stock ownership, not to regulate that companies' conduct with respect to that regime. *See Board of Trustees v. Mayor & City Council*, 562 A.2d 720, 746 (Md. 1989) (describing the purpose of a divestment statute as "simply to ensure that city pension funds would not be invested in a manner that was morally offensive to many city residents and many beneficiaries of the pension funds"), cert. denied, 493 U.S. 1093 (1990).[23] Nor

[23] *See also Constitutionality of South African Divestment Statutes Enacted by State and Local Governments*, 10 Op. Off. Legal Counsel 49, 51-59 (1986) (concluding that state and local divestment statutes come within the market-participant exception). The Office of Legal Counsel Opinion assumed that the same analysis would apply to statutes that prohibit state or local governments from entering into procurement con-

ILI US Digest/5 332 1/8/02, 1:46 PM

could such a statute be expected to have as direct a regulatory effect as the Massachusetts Burma Act, because stock sold by the pension fund would be purchased by someone else, and the transaction would not be conditioned on any conduct by the purchaser, the company, or the foreign government. It may be that in appropriate circumstances a State could take other actions for similar purposes in a commercial setting. There is no occasion in this case, however, to consider the validity of state divestment statutes targeted at companies doing business in a particular country, or to consider the application of the market-participation exception to other state action with respect to foreign commerce. Whatever may be the precise limits of the market-participation exception, the Massachusetts Burma Act exceeds them.[24]

II. The Massachusetts Burma Act Is Preempted By the Federal Statutory Scheme Governing Economic Sanctions Against Burma

Because the regulation of foreign commerce and the conduct of foreign policy are committed to the national government exclusively, and because tension between federal and state laws in those areas raises unique concerns, the Supremacy Clause applies with special force to state laws that deal with foreign commerce and foreign policy. As this Court has explained, when a state law operates in a field of "uniquely federal interest," as opposed to "a field which the States have tradition-

tracts with companies that do business in a particular country. For the reasons discussed in the text, however, a statute like the Massachusetts Burma Act does not fall within the market-participant exception. To the extent that the Office of Legal Counsel Opinion is inconsistent with the views set forth in this Section or in Sections II and III, it no longer represents the position of the United States.

[24] Even if the Court were to hold that States have the latitude under the dormant Foreign Commerce Clause to adopt a policy of mandatory divestment from companies doing business in another country, it would not necessarily follow that States would have the same latitude to adopt a policy of mandatory divestment from companies doing business in another State. Whether the dormant Interstate Commerce Clause preserves any such power for the States would be informed by its purpose "to create an area of free trade among the several States," *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981), by the reciprocity and mutual respect owed by the States to one another as coordinate sovereigns under the plan of the Constitutional Convention, and by the applicability of self-executing provisions of the Constitution that embody shared values and protect fundamental human rights in *all* of the States.

ILI US Digest/5 333 1/8/02, 1:46 PM

ally occupied," the "conflict with federal policy need not be as sharp" in order for the state law to be preempted. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988). Accordingly, when a State legislates in an area "that touch[es] international relations," the Court should be "more ready to conclude that a federal Act … supersede[s] state regulation." *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942).

In *Hines*, the Court held that a Pennsylvania alien registration law was preempted by the subsequently enacted federal Alien Registration Act, even though the federal Act did not contain an express preemption provision or impose inconsistent obligations on aliens. 312 U.S. at 62-74. The Court explained that, at least in an area that is "so intimately blended and intertwined with responsibilities of the national government" over "the exterior relation of this whole nation with other nations and governments," *id*. at 66, a state law must yield to a federal law on the same subject if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *id*. at 67. The Court emphasized that "Congress was trying to steer a middle path" in the Alien Registration Act, *id*. at 73, excluding from the final version various provisions that had been criticized as unduly harsh, such as a requirement that aliens carry identification cards at all times, *id*. at 71-73 & n.32. The Court found that the continued enforcement of the state law, which imposed requirements on aliens that were similar to some of those that had been omitted from the federal law, would undermine Congress's purpose "to obtain the information deemed to be desirable in connection with aliens … in such a way as to protect [their] personal liberties." *Id*. at 74.

In three respects, the Massachusetts Burma Act similarly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq*. (IEEPA), the Federal Burma Act, and the Burma Executive Order. That is so even though the ultimate end sought by the United States and the State is the same: a free and democratic Burma that fully respects human rights of its people.

A. Congress and the President have crafted a policy toward Burma that emphasizes the President's flexibility and discretion to impose, adjust, and suspend economic sanctions to reflect changing circumstances. The Massachusetts Burma Act, in contrast, undermines the President's flexibility and discretion with respect to Burma.

ILI US Digest/5 334 1/8/02, 1:46 PM

IEEPA "codifies Congress's intent to confer broad and flexible power upon the President to impose and enforce economic sanctions against nations that the President deems a threat to national security interests." *United States v. McKeeve*, 131 F.3d 1, 10 (1st Cir. 1997). IEEPA broadly defines the situations in which the President may impose economic sanctions, 50 U.S.C. 1701(a), and broadly defines the sorts of economic sanctions that the President may impose, 50 U.S.C. 1702(a)(1). IEEPA thus gives the President considerable flexibility with respect to the use of economic sanctions to seek to influence the conduct of a foreign government. *See Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981) (recognizing the importance of sanctions under IEEPA as a "'bargaining chip' to be used by the President when dealing with a hostile country").

The Federal Burma Act, which authorizes and directs the President to impose particular economic sanctions to respond to a particular international threat, applies that flexible approach in the specific context of Burma. The President is, for example, given broad discretion not only over whether to impose certain sanctions, but also over whether to suspend or terminate those sanctions and the other sanctions imposed under the Act. Federal Burma Act, § 570(a) and (e), 110 Stat. 3009-166 to 3009-167. Senator Cohen, the principal sponsor of the Federal Burma Act, emphasized the importance of giving "the administration flexibility in reacting to changes, both positive and negative, with respect to the behavior of the [Burmese regime]." 142 Cong. Rec. 19,212 (1996). Similarly, Senator McCain, a co-sponsor, described the Act as "giv[ing] the President, who, whether Democrat or Republican, is charged with conducting our Nation's foreign policy, some flexibility." *Id*. at 19,221.

The Massachusetts Burma Act is in tension with Congress's purpose to assure the President has extensive discretion over the taking of economic action directed at a foreign government and the nature, extent, and duration of that action. The Act does not acknowledge any authority in the President to modify, suspend, or terminate its economic sanctions.[25]

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[25] Although Congress or the President could expressly preempt state and local economic sanctions, such action could not, in some instances, be taken without significant diplomatic (or other) costs. Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436 (1964) (recognizing that "[o]ften the State Department will wish to refrain from taking an official position" on whether an act of a foreign government violates international law because doing so "might be inopportune diplomatically" or might produce "[a]dverse domestic consequences").

ILI US Digest/5 335 1/8/02, 1:46 PM

As a consequence, the Executive Branch's flexibility in dealing with the Burmese regime or in building international coalitions could be diminished, thereby undermining the ultimate goal of both the United States and Massachusetts.

B. In the Federal Burma Act and the Burmese Executive Order, Congress and the President deliberately chose to "steer a middle path," *Hines*, 312 U.S. at 73, to the extent of permitting U.S. companies to continue to engage in many categories of business in Burma. The Federal Burma Act authorizes the President to prohibit only "new investment" in Burma by "United States persons," and excludes from the scope of federal restrictions the "performance of … a contract to sell or purchase goods, services, or technology." Federal Burma Act § 570(c) and (f), 110 Stat. 3009-166 to 3009-167.[26] The Burma Executive Order, issued pursuant to the Federal Burma Act and IEEPA, incorporates those restrictions. Thus, as one of its co-sponsors observed, the Federal Burma Act is a means of "strik[ing] a balance between unilateral sanctions against Burma and unfettered United States investment in that country." 142 Cong. Rec. at 19,279 (Sen. Breaux).

The Massachusetts Burma Act is inconsistent with the choice made by Congress and the President to restrict only "new investment" in Burma by "United States persons." It discriminates against *all* prospective contractors that do business in Burma. It extends not only to U.S. companies but also to foreign companies. It applies not only to companies that do business in Burma themselves, but also to companies with a parent, an affiliate, or a subsidiary that does business in Burma. And it applies not only to companies engaging in "new investment" in Burma, but also to companies engaging, directly or indirectly, in a wide array of other economic activity in Burma, even activity that commenced before its enactment. The Act thus discourages the sort of continuing economic activity in Burma by U.S. companies that Congress and the President chose not to prohibit.

C. The Federal Burma Act directs the President to "seek to develop, in coordination with members of ASEAN and other countries having major trading and investment interests in Burma, a comprehensive, multilateral strategy to bring democracy to and improve human

[26] IEEPA permits the President to impose economic sanctions broader than those contained in the Federal Burma Act and the Burma Executive Order, but only with respect to transactions involving persons or property "subject to the jurisdiction of the United States." 50 U.S.C. 1702(a)(1).

ILI US Digest/5 336 1/8/02, 1:46 PM

rights practices and the quality of life in Burma." Federal Burma Act § 570(c), 110 Stat. 3009-166. The Senate sponsors of the Act perceived that multilateral action is the most effective means of achieving these goals. *See*, *e.g.*, 142 Cong. Rec. at 19,212 (Sen. Cohen) ("[T]o be effective, American policy in Burma has to be coordinated with our Asian friends and allies."); *id*. at 19,219 (Sen. Feinstein) ("Only a multilateral approach is likely to be successful.").[27]

The Massachusetts Burma Act, by discriminating against foreign companies as well as U.S. companies that do business in Burma, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. The Act has generated friction between the United States and its allies because of its application to foreign companies, and thereby has distracted attention from Congress's purpose of encouraging the development of "a comprehensive, multilateral strategy" toward Burma. *See* pp. 8-9 & n.7, *supra* (discussing protests from the European Union, Japan, and ASEAN). Under Secretary of State Larson has thus observed that the Act "complicates efforts to build coalitions with our allies" to encourage democratic reform in Burma. Alan Larson, *State and Local Sanctions: Remarks to the Council of State Governments* 5 (Dec. 8, 1998). He has noted, for example, that "the EU's opposition to the Massachusetts law has meant that U.S. government high level discussions with EU officials often have focused not on what to do about Burma, but on what to do about the Massachusetts Burma law." *Id*. at 6.[28] More broadly, the Massachusetts Burma Act and other such state and local statutes have, according to

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[27] As a general matter, the United States pursues its foreign-policy objectives through multilateral cooperation, whenever possible. *See*, *e.g.*, J.A. 108 (testimony of then-Under Secretary of State Eizenstat) ("Sanctions are much more likely to be effective when they have multilateral support and participation. Multilateral sanctions maximize international pressure on the offending state while minimizing damage to U.S. competitiveness and more equitably distributing the sanctions burden across the international community."); accord J.A. 162 (testimony of Deputy Assistant Secretary of State Marchick); *see also Human Rights in Burma* 708 (testimony of Acting Assistant Secretary of State Smith) (Sept. 28, 1998) (describing the United States' multilateral strategy with respect to Burma).

[28] *See also* J.A. 115 (testimony of then-Under Secretary of State Eizenstat) (observing that the Massachusetts Burma Act and similar measures "risk shifting the focus of the debate with our European Allies away from the best way to bring pressure against [Burma] to a potential WTO dispute over [the Act's] consistency with our international obligations").

ILI US Digest/5 337 1/8/02, 1:46 PM

U.S. embassy reports, raised allies' concerns about the United States' credibility in international negotiations and its ability to deliver on its international commitments.

III. The Massachusetts Burma Act Impermissibly Intrudes into the Conduct of Foreign Affairs

This Court has recognized that state action may impermissibly infringe upon the national government's exclusive authority to conduct foreign affairs "even in [the] absence of a treaty" or an Act of Congress. *Zschernig*, 389 U.S. at 441. The Massachusetts Burma Act, even if not preempted by federal law, is nonetheless invalid as inconsistent with the Constitution's assignment of the foreign-affairs power to the national government, not the States.

In *Zschernig*, the Court struck down a state probate law that prevented the distribution of an estate to a foreign heir if the proceeds of the estate were subject to confiscation by his government. The Court explained that such statutes, which required state courts to engage in "minute inquires concerning the credibility of foreign diplomatic statements," had a "great potential for disruption or embarrassment" of the United States in the international arena. 389 U.S. at 435. The Court concluded that such statutes therefore had "a direct impact upon foreign relations," *id*. at 441, and not merely "some incidental or indirect effect," *id*. at 434. Accordingly, even though the state statute involved a subject "traditionally regulated" by the States and was not affirmatively preempted by an Act of Congress, *id*. at 440-441, the statute was held to constitute "forbidden state activity," *id.* at 436.

The Massachusetts Burma Act, even more clearly than the state statute in *Zschernig*, is an impermissible "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." 389 U.S. at 432. In its purpose, its operation, and its consequences, the Act has an impact on foreign relations that is "direct," not merely "incidental." *Id.* at 441, 434.[29]

First, the Massachusetts Burma Act, as its sponsors declared, was designed as "foreign policy" legislation to "stop the violation of human rights" in Burma. J.A. 39 (statement of Rep. Rushing); J.A. 51 (state-

[29] The tension between the Massachusetts Burma Act and the national government's policy toward Burma is addressed more extensively in Section II, *supra*.

ILI US Digest/5 338 1/8/02, 1:46 PM

ment of Sen. Walsh); *see also* J.A. 31 (letter of Rep. Rushing). The State acknowledged earlier in this case that the Act is part of a "growing effort … to apply indirect economic pressure against the Burma regime for reform." Pet. App. 9. The Act thus constitutes a deliberate attempt by a State to conduct its own foreign policy.

Second, by its structure and design, the Massachusetts Burma Act operates to apply pressure on the Burmese regime through third parties, *i.e.*, companies, foreign and domestic alike, that seek to do business with the State, whether or not their business in Burma bears any relation to their business with [the] State. Massachusetts does not suggest that the Act in any way advances its interests in procuring quality goods at a low price or in dealing only with responsible contractors; to the contrary, by eliminating qualified low bidders, the Act impairs the State's economic interests in order to advance its foreign-policy interests. Nor does the Act serve simply to disassociate Massachusetts from a direct relationship with the Burmese regime. Thus, the scope of the Act confirms that, as its sponsors state, the Act is foreign-policy legislation.

Finally, as explained above (at 8-9, 34-35), the Massachusetts Burma Act has adversely affected the United States' own foreign policy in several respects. Most significantly, the Act has undermined the development of "a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the equality of life in Burma." Federal Burma Act § 570(c), 110 Stat. 3009-166. As senior U.S. officials have stated, the Massachusetts Burma Act, by antagonizing U.S. allies and trading partners, has diverted attention from Burma itself and complicated the implementation of such a multilateral strategy, which the United States views as the most effective means to seek reform in Burma. *See* pp. 9, 34-35, *supra*. In addition, the Act is inconsistent with the choice of Congress and the President to permit some U.S. economic activity in Burma (short of "new investment"). The Act also has the potential to undermine the President's flexibility to adjust the economic sanctions against Burma based on the conduct of the Burmese regime, the actions of the international community, or other national security concerns.[30]

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[30] The judgment by the United States condemning the abuses of the Burmese regime is now formally embodied in the Federal Burma Act and the Burma Executive Order. Consequently, the Massachusetts Burma Act does not present the concern, identified in *Zschernig*, of the States' making their own independent judgments regarding "the 'democracy quotient' of a foreign regime." 389 U.S. at 435.

In sum, whatever the outer limits of the foreign affairs doctrine applied in *Zschernig*, those three characteristics of the Massachusetts Burma Act render it plainly invalid. The Act, in its purpose and effect, has implemented a state foreign policy toward Burma, and the Act has interfered with the conduct of the United States' own foreign policy. The Act thus has the sort of "direct" and detrimental, not merely "incidental," impact on the national government's foreign-affairs power that renders state action impermissible under *Zschernig*. 389 U.S. at 434, 441.

B. U.S. LEGISLATION CONCERNING STATUS OF PUERTO RICO

On October 4, 2000, Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs, U.S. Department of State, testified before the U.S. House of Representatives' Resources Committee regarding H.R. 4751 on the status of Puerto Rico. In his testimony, Mr. Dalton addressed the foreign relations and citizenship issues presented by the bill, which would make Puerto Rico a sovereign nation in a permanent union with the United States while maintaining United States citizenship for its citizens.

The testimony is available at *www.state.gov/s/l.*

Mr. Chairman and members of the Committee:

I am pleased to have this opportunity to discuss some aspects of H.R. 4751, the proposed legislation on the future status of Puerto Rico.

Specifically, I am here to testify on three points: 1) the foreign relations aspects of the legislation, particularly the proposed provisions regarding Puerto Rico's ability to enter into agreements with foreign

ILI US Digest/5 340 1/8/02, 1:46 PM

nations and participate in international organizations; 2) the implications of the proposal that residents of Puerto Rico be guaranteed U.S. citizenship; and 3) constitutional issues posed by the legislation as drafted, with respect to executive branch prerogatives in the conduct of foreign relations.

1. FOREIGN RELATIONS ISSUES

As this Administration and previous ones have repeatedly stated, Puerto Rico is free to opt, in its own discretion, to become an independent nation or a nation in free association with the United States, and if such choice were made the United States would handle its foreign relations with Puerto Rico in much the same way it does with other sovereign nations. Puerto Rico would have full control over the handling of its foreign affairs, including decisions regarding whether to enter into treaties and agreements with other nations, and to become a member of international organizations.

The proposed legislation, however, would purport to make the Commonwealth a nation legally and constitutionally and provide it with many of the trappings of a sovereign nation, and yet at the same time would retain or create links to the United States that are inconsistent with sovereignty as that term is understood in international law. It is this hybrid nature of the arrangement contemplated in the legislation that renders the arrangement untenable as a functional matter. I will now address some of the specific reasons for this conclusion.

Under our system of government, the conduct of foreign affairs is constitutionally vested solely in the federal government. The exercise of a parallel and co-existing foreign affairs authority by a sub-federal unit of the United States would not only be unconstitutional, but retrogressive and impractical as well. The existing U.S. territories and commonwealths have different relationships with the Federal Government in terms of the degree of autonomy they exercise in the conduct of domestic affairs.

But a few general principles apply to all of them with respect to the conduct of foreign affairs. Just as with the States of the Union, there are many types of foreign activities in which a U.S. territory or commonwealth may choose to engage. Indeed, activities such as trade promotion and participation in cultural and sports events can be beneficial to the United States as a whole. At the same time, however, the Federal Government is responsible internationally for the affairs of the territories and commonwealths in precisely the same manner as for the States of

ILI US Digest/5 341 1/8/02, 1:46 PM

the Union. The Federal Government is held responsible for meeting commitments relating to them and for ensuring that the obligations of other nations towards them are met. The efficacy of U.S. international relations accordingly depends upon the foreign activities of territories and commonwealths, as well as of the States, fitting within the framework of an overall United States foreign policy. This point was central in the recent Supreme Court decision in the case of *Crosby v. National Foreign Trade Council,* 530 U.S. [363] (2000), in which the Court struck down a Massachusetts state law that barred state entities from buying goods and services from companies doing business with Burma, on the grounds (inter alia) that such law limited "the plenitude of Executive authority" by the federal government in the implementation of sanctions against Burma.

Not every foreign commitment must always apply in identical fashion to each of the territories and commonwealths as well as the States; there are in some instances considerations of local interests, geography, historical and cultural ties, and the like, which warrant application of certain arrangements with foreign governments to one or more of the territories or commonwealths and not to the States, or vice versa. But what is essential ultimately is that the component parts of U.S. foreign policy form a coherent and internally consistent whole. This cannot be accomplished if areas that are within U.S. control, or that are populated principally by U.S. citizens, conduct their own foreign affairs. It benefits neither the United States as a whole nor the territories and commonwealths if the United States is perceived as speaking with many, inconsistent voices internationally.

The founding fathers—based on unhappy lessons learned under the Articles of Confederation—wisely recognized this in framing our Constitution. The conclusion of international agreements, for example, is one of the most basic functions of foreign policy, and the framers emphasized the exclusive authority of the Federal Government with respect to foreign policy functions by inserting the following prohibition in Article 1, Section 10, Clause I of the U.S. Constitution: "No State shall enter into any treaty, alliance, or confederation." Clause 3 of that Section further provides: "No State shall, without the Consent of the Congress, enter into any Agreement or Compact with another State, or with a foreign power…"

The juxtaposition of the foregoing provisions of Article I and Article IV, Section 3, Clause 2, of the Constitution concerning the power of

ILI US Digest/5 342 1/8/02, 1:46 PM

the Congress to "make all needful Rules and Regulations respecting the Territory of the United States" raise a number of issues. Should the rules with respect to making international agreements applicable to the States be narrower than those made applicable to the territories by the Congress? How broadly should the term "Agreement" in clause 3 of Article 1, Section 10 of the Constitution be read? Would the proposed legislation insofar as it refers to making international agreements be an unconstitutional delegation of authority by the Congress? These are questions that the Executive Branch is not prepared authoritatively to answer at this time.

The Department of State is concerned that a broad delegation of authority to Puerto Rico to make international agreements with respect to certain subjects could result in the simultaneous existence of different—perhaps conflicting—obligations to foreign countries. Such cases could make it impossible for the United States to fulfill its responsibility to guarantee that all of its constituent units comply with U.S. treaty obligations. That is why a fundamental feature of the various organic instruments establishing the relationship between the Federal Government and the territories and commonwealths is that ultimate authority over the conduct of foreign relations is retained by the Federal Government.

This arrangement makes eminent sense, as one can envision the possible consequences of allowing a territory, commonwealth, State, or other political subdivision of the United States to enter into its own agreements. Let me posit, as an example, a hypothetical case in which a U.S. subdivision were to enter into an agreement to maintain information or cultural offices in Saddam Hussein's Iraq. Such an agreement could directly contradict, and interfere with, federal measures taken against Iraq, and at a minimum could embarrass the United States.

Under the current arrangement with Puerto Rico, matters of foreign relations and national defense are conducted by the United States, as is the case with the States of the Union. Thus, any actions by Puerto Rico that have implications on an international level must be consistent with the foreign policy set and pursued by the Federal Government. As a practical matter, this consistency is achieved through consultations with the State Department. In that process, as appropriate, the Department also obtains and coordinates the views of other Federal departments and agencies which may have an interest in any particular proposed activity. Where possible, the Department seeks to accommodate

ILI US Digest/5 343 1/8/02, 1:46 PM

such proposed activity, so long as it is compatible with U.S. foreign policy.

Under the arrangement proposed in the legislation before us, however, Puerto Rico would be granted foreign policy prerogatives that could affect the foreign relations of the United States, and that could yield inconsistent foreign policy commitments and measures of the sort mentioned above. Although the framework calls for a "common defense, market, and currency" (Sec. 2(l)), it also provides that "the Commonwealth may arrange commercial and tax agreements, as well as other agreements, with other countries and belong to regional and international organizations (Sec. 2(5); *see also* Sec. 3(17)). And although this grant of authority to Puerto Rico in the foreign affairs area is rendered subject to the "defense and security interests of the United States ..." it is not likewise subordinated to the United States' foreign policy interests. Moreover, the legislation contemplates that "the Commonwealth shall control its international trade…" (Sec. 3(16)), and it is unclear how this provision would be compatible with having Puerto Rico be part of a common market with the United States. The potential for trade policies and measures inconsistent with those of the U.S., and possibly at odds with U.S. treaty obligations, is patent.

In sum, the hybrid nature of the status proposed for Puerto Rico in H.R. 4751 would render it impossible for the United States to maintain a unitary foreign policy with respect to all areas under its control or to maintain cohesive overall control over laws and policies affecting the entirety of the U.S. citizenry. For this reason, the Department of State opposes the provisions of the proposed legislation relating to the foreign affairs powers to be conferred on Puerto Rico, which would be untenable functionally in the overall context of the proposed arrangements for Puerto Rico's status.

2. CITIZENSHIP ISSUES

The Department of State opposes HR 4751's attempt to legislate dual nationality for residents of Puerto Rico. Our opposition is grounded in the recognition that the conferral of that status upon the citizens of another nation is wholly incompatible with the notion of sovereignty.

Moreover, our opposition is not based merely on conceptual difficulties in reconciling dual nationality with sovereignty. The United States takes seriously the protection of its citizens in other countries and devotes considerable consular resources to assisting them. It is difficult to

ILI US Digest/5 344 1/8/02, 1:46 PM

overestimate the size or complexity of the undertaking that would be necessary on the part of the United States Government to provide consular protection to United States citizens in Puerto Rico in the framework envisioned by this legislation. This is particularly true in light of Sec. 3 para 13 of H.R. 4751, which states that U.S. citizens living in Puerto Rico would be "protected by all the rights, privileges and immunities conferred upon them by the United States Constitution" as well as the Constitution of Puerto Rico.

Under the proposed scheme, every action or decision of Puerto Rican government officials would be scrutinized to assess its impact on U.S. citizens, and, one could easily presume, challenged based upon considerations of United States law. Our consular officials would be asked to intervene in the day-to-day actions of local government. In this untenable state of affairs, the U.S. Embassy in San Juan, were there to be one, would function as a "shadow government," in effect, ever watchful of the interests and concerns of the millions of U.S. citizens in Puerto Rico.

In addition, given Sec. 3 para. 6 of the proposed legislation, which mandates that all persons born in Puerto Rico receive U.S. citizenship, the United States would be required to confer U.S. citizenship on persons whose admission to Puerto Rico it apparently would not control. This is an unacceptable surrender of sovereignty by the United States with profound consequences since birth in Puerto Rico would guarantee the right to enter, live, and work in any part of the United States.

3. CONSTITUTIONAL ISSUES

The proposed legislation makes reference to an agreement that the United States would need to enter into with Puerto Rico. The bill indicates that such agreement will not be subject to unilateral nullification or change (*see* Sec. 1), and it also purports to dictate the structure and size of the U.S. negotiating team (Sec. 3, para. 21), and the dispute resolution mechanism that the parties would need to resort to if a controversy between the parties to the negotiation do not admit of solution (Sec. 3, para. 22). The Department believes that in this regard the legislation would encroach unconstitutionally on the foreign affairs prerogatives of the executive branch conferred on the President by Article II of the U.S. Constitution. The negotiation of agreements with foreign states (which is essentially what Puerto Rico would functionally constitute at the point of the proposed negotiations), including issues relating to the

ILI US Digest/5 345 1/8/02, 1:46 PM

U.S. Government's negotiating team, and the articulation of terms for dispute resolution mechanisms to resolve controversies with foreign states, are essentially foreign relations functions, within the province of the executive branch. The legislation also directs the executive branch to support the entry by Puerto Rico into international organizations, and to "endorse Puerto Rico's participation or membership in agreements…." Sec. 3, para. 17.

The Department of State therefore would oppose those provisions of the legislation that purport to constitute mandatory stipulations regarding the proposed agreement with Puerto Rico, the negotiation of such agreement, and related issues, as well as the decision of whether or not to endorse Puerto Rico's participation in particular international organizations or agreements, as all of these are matters with respect to which the U.S. Constitution confers responsibility solely on the executive branch.

Thank you, Mr. Chairman. I would be pleased to answer any questions the Committee members may have.

CROSS-REFERENCES:

Role of individual states in U.S. treaty practice in **4.A.1.**

Treatment of U.S. treaty obligations in private litigation in **4.C., 8.B.2.** and **8.B.3.**

Federal-state relations in context of settlement of Nazi era claims in **8.B.1.b.3).**

Diplomatic and consular exemption from Hawaii state sales tax in **10.B.1.**

ILI US Digest/5 346 1/8/02, 1:46 PM

CHAPTER 6

Human Rights and Humanitarian Law

A. GENERAL HUMAN RIGHTS REPORTS

On February 25, 2000, the Department of State published the 1999 Country Reports on Human Rights Practices, in compliance with Sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961, as amended, and Section 504 of the Trade Act of 1974, as amended, available in full at *www.state.gov/www/global/human_rights.* This publication is often cited as a source for United States views on various aspects of human rights practice in other countries.

B. DISCRIMINATION

1. Race

a. U.S. Report under Convention on the Elimination of Racial Discrimination

On September 21, 2000, the United States transmitted the initial report of the United States of America to the UN Committee on the Elimination of Racial Discrimination under the terms of the Convention on the Elimination of All Forms of Racial Discrimination, done at New York on December 21, 1965, 660 U.N.T.S. 195. Excerpts below

ILI US Digest/6 347 1/8/02, 1:46 PM

from a public briefing by Assistant Secretary of State for Democracy, Human Rights and Labor Harold Hongju Koh and Assistant Attorney General for Civil Rights Bill Lann Lee provide Mr. Koh's summary of the report.

The full text of the briefing and report can be found at *www.state.gov/www/global/human_rights.*

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The U.S. played a leading role in developing and drafting the International Convention on Elimination of All Forms of Racial Discrimination, signing it in 1992. In October 1994, the U. S. ratified the Convention, which entered into force for the United States on November 20, 1994.

Under the Convention's terms, state parties are required to report to the treaty's committee of experts regarding their efforts to comply with their obligations under the Convention. The report, written to UN specifications and current through August 2000, was prepared by the U.S. Departments of State and Justice, with extensive input from the White House, the Equal Employment Opportunity Commission, and other executive branch departments and agencies, as well as nongovernmental organizations and concerned individuals.

In addition to my colleagues at the Justice Department and other federal agencies, let me give special thanks to Assistant Legal Adviser Andre Surena and Chris Camponovo of the Legal Adviser's Office of Human Rights and Refugees, and the staff of my own bureau for their outstanding efforts to make this report possible. This report represents our government's unqualified commitment to fulfilling its obligations under the Race Discrimination Convention. Our country was founded to promote the vision of universal human rights stated in the Declaration of Independence and was dedicated to the proposition that all men are created equal, and women, too.

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ILI US Digest/6 348 1/8/02, 1:46 PM

As our report chronicles, the American struggle to secure racial equality remains incomplete. The residual effects of slavery and institutionalized racism can still be seen in lingering disparities between blacks and whites in income, levels of education and health care, and rates of incarceration in our nation's prisons. But, at the same time, our nation's progress in closing these gaps can also be measured, particularly in the rapidly increasing number of African American professionals, business leaders and elected political officials, and in growing income and education levels for millions.

Much the same can be said for the many other minority and ethnic groups that came to the United States seeking opportunities they could not find at home. The United States stands as one of the most racially and ethnically diverse nations in the world. Our diversity drives our growing tolerance, our prosperity and our national dynamism. The United States remains a land of promise where children of immigrants can aspire not just to be Secretary of State, but also Assistant Attorney General and Assistant Secretary of State.

The report we submit today demonstrates democracy in action, how our constitutional and legal guarantees have helped shape a system that affords every American—irrespective of race, religion, or ethnic background—the most extensive set of legal protections in the world. Racial and ethnic discrimination are prohibited in housing, employment, education, voting, access to public accomodations, housing and mortgage credits, the military, and programs receiving federal financial assistance. President Clinton has made issues of racial diversity and equal opportunity core elements of his Administration's agenda. In 1997, he established the President's Initiative on Race, a national education effort, encouraging a country-wide dialogue on race.

In 1998, he established the White House Office on the President's Initiative for One America, which calls on community leaders to develop new approaches to address racial tensions and to expand opportunities for racial and ethnic minorities. His initiative also coordinates the efforts of the federal government in eliminating racial discrimination. In addition, a series of new state and local laws have been passed in recent years to target perpetrators of hate crimes. Here, as in other areas, the work that the federal, state and local governments have been doing has been supported by the work done by hundreds of private groups and NGOs.

ILI US Digest/6 349 1/8/02, 1:46 PM

The report that you have before you today recounts these efforts, even as it reflects how much we still must do. It identifies remaining obstacles, including the persistence of attitudes, policies and practices reflecting a legacy of segregation and discrimination; inadequate enforcement of existing law; economic disparities, including lack of equal access to education, opportunity and technology; discrimination in employment; continued segregation and discrimination in housing and voting; and racial disparities in the criminal justice system.

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b. United Nations Commission on Human Rights

At the Fifty-sixth Session of the United Nations Commission on Human Rights, held in Geneva March 20 to April 28, 2000, the United States provided explanations of its positions and votes on Statements offered by the Commission.

The full text of the U.S. statements and the documents to which they relate may be found at *www.humanrights-usa.net*/2000.

As to L.13 condemning Racism, Racial Discrimination, Xenophobia and Related Intolerance, on April 17, 2000, the United States stated:

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The United States believes strongly that racism is abhorrent. We welcome this resolution, therefore, and consider it a strong restatement of the commitment of the states represented here to condemn racial dis-

ILI US Digest/6 350 1/8/02, 1:46 PM

crimination, prosecute those who commit crimes of racial hatred, and, most importantly, foster a climate of tolerance for all.

These measures are some of the "appropriate measures to prevent" racial discrimination that the United States actively pursues at the federal, state, and local levels. These are in addition to the activities that engage the efforts of many NGOs, civil groups, and individuals.

These groups and individuals are able to challenge and condemn racial discrimination and promote the enjoyment of racial equality because their rights to speak freely and publicly and to petition the government are protected by the U.S. Constitution. American citizens who oppose racial discrimination in all of its forms value greatly that their right to challenge such odious conduct is protected in our society, as do all our citizens.

Thus, while we firmly denounce statements and actions that promote racial intolerance, we also firmly believe that a robust protection of the freedom of speech is an inherent element of our society and one to which all democracies should aspire. We regard unfettered freedom of expression as a crucial instrument for attaining and maintaining other human rights.

We look forward to working with all countries at the World Conference on Racism and its upcoming Prepcom on ways to eliminate racism in the most effective manner.

2. Gender

Women 2000 Gender Equality, Development and Peace for the Twenty-first Century

On June 9, 2000, at the twenty-third special session of the United Nations General Assembly, the United States joined consensus on the Outcome Document of the Women's 2000/Beijing Plus Five Conference, "Women 2000: Gender Equality, Development and Peace for the Twenty-first Century." The Outcome Document is composed of two parts: a Declaration and a resolution con-

ILI US Digest/6 351 1/8/02, 1:46 PM

taining "[f]urther actions and initiatives to implement the Beijing Declaration and Platform for Action." The latter reviews and appraises progress on implementing the Platform for Action, adopted at the Fourth World Conference on Women, September 4-15, 1995 in Beijing, and identifies obstacles and current challenges to further implementation. The document recognizes that many of the goals and political commitments made in the Platform for Action have not been fully achieved and sets forth further actions and initiatives at the local, national, regional and international levels to accelerate its implementation. At the time it joined consensus, the United States provided its interpretative statement in remarks by Ambassador Betty King.

The statement is available in the Remarks database at *www.state.gov/www/global/human_rights.*

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The United States is pleased to join consensus in this document, which represents an important milestone in the international community's efforts to promote the advancement of women. The United States has submitted to the Secretariat a written interpretive statement that we request be included in the proceedings of this conference, and in part, our consensus is based thereon.

The United States understands that, as with the Beijing Declaration and Platform for Action, any commitments referred to in the Outcome Document for further actions and initiatives to implement the Beijing Declaration and Platform for Action attributed to States are (unless such States indicate to the contrary) not legally binding, and they consist of recommendations concerning how States can and should promote the objectives of the Conference. Therefore, these references to commitments constitute a general commitment to undertake meaningful implementation of the recommendations overall, rather than a specific

ILI US Digest/6 352 1/8/02, 1:46 PM

commitment to implement each element thereof. Further, the United States wishes to emphasize that only states parties are obligated to implement treaties.

In the context of the Beijing Platform for Action, there are certain key issues directly connected to issues of gender and the furtherance of women's rights. In particular, the United States Government has a firm policy of non-discrimination on the basis of sexual orientation and considers that the omission of such a position from the Outcome Document in no way justifies such discrimination in any country.

In addition, the United States fully supports the call in the Platform for Action for governments to recognize and address the health impact of unsafe abortions. We regret that little progress has been made. Since Beijing, nearly 400,000 women have died unnecessarily from unsafe abortion. Even where abortion is legal under certain circumstances, too many countries have not yet trained and equipped health care providers nor have they taken other measures to ensure that such abortions are safe and accessible, or to safeguard women's health. We are heartened and encouraged that actions to address the health impact of unsafe abortions as a major public health concern were specified in the five-year review of the International Conference on Population and Development. On this very important issue—saving and protecting women's lives and health—the United States will be guided by the consensus language adopted in the Report of the U.N. General Assembly Special Session on ICPD Plus Five on steps the international community is committed to take to save the lives of women.

The United States wishes to draw attention to the fact that a number of institutions, organizations and others have been requested to implement the Outcome Document. Nonetheless, Governments alone will adopt the Political Declaration and Outcome Document. When the Outcome Document mentions the actions these other actors may take, it thereby invites and encourages the suggested actions; it does not, and cannot, require such actions. We understand that references to actions the media may take are in the nature of suggestions and recommendations. They may not be construed to allow any impingement on the freedom of the press, speech and expression, which are fundamental democratic freedoms.

As to the use of the term foreign occupation, the United States recognizes that human rights violations can and do occur in situations of foreign occupation around the world. Nevertheless, the United States

ILI US Digest/6 353 1/8/02, 1:46 PM

continues to have reservations, as it did at the World Conference on Human Rights in Vienna about any implication that foreign occupation is a human rights violation per se.

The United States must request that the record of today's proceedings reflect that the United States dissociates itself from the paragraphs in the Outcome Document currently numbered 29, 30 ter, and 35(i), dealing with globalization and economic issues, and is generally concerned about the language in the document that deals with these issues. These paragraphs characterize globalization and debt as significant obstacles to achieving gender equality. It is our view that national governments bear the primary responsibility for social and economic development, and for ensuring equality for women in all walks of life. Most aspects of equality for women have no direct link to international economic and financial issues.

The record should also show that the United States dissociates itself from the paragraph currently numbered 133m bis, which concerns disarmament. The United States has two concerns with this paragraph. First, the United States disagrees with the paragraph's assertion that the United Nations establishes priorities for disarmament. We believe that establishing priorities for disarmament is the prerogative of the member states of the United Nations. Second, the paragraph proposes that resources made available as a result of disarmament activities be allocated to social programs which benefit women and girls. While the United States strongly supports economic and social development programs, especially those that promote gender equality, the United States also has a long-standing position of not linking the two distinct issues of disarmament and the predetermined use of resources realized, if any, from disarmament.

The United States reiterates that, with respect to all references to foreign assistance and official development assistance, it is not one of the countries that have accepted an "agreed target" for such assistance or have made commitments to fulfill any such targets.

The United States fully supports the objectives of the Outcome Document and is willing to work with others to ensure that there is a proper allocation of resources to address commitments made in the Outcome Document. However, the United States cannot agree to an increase in funding for matters dealt with in the Outcome Document, other than in the context of reallocation of existing resources, or unless sources of funding other than governmental assessments are in-

ILI US Digest/6 354 1/8/02, 1:46 PM

volved. The United States believes actions to be taken in accordance with the Outcome Document can be accomplished through actions at the national and local level.

Finally, the United States notes that many of the issues covered by the Outcome Document were, of course, covered in the Beijing Declaration and Platform of Action. Therefore, the United States understands that the written interpretive statement that it submitted in that connection is applicable, where relevant and appropriate, to the Outcome Document.

3. Religion

Report on International Religious Freedom

On September 5, 2000, the Department of State published the 2000 Annual Report on International Religious Freedom, prepared by the Bureau of Democracy, Human Rights and Labor, which provides the views of the United States on religious freedom in human rights in other countries.

The report, which is required by the International Religious Freedom Act of 1998, Pub. L. 105-292, 112 Stat. 2787, is available in full at *www.state.gov/www/global/human_rights.*

C. Children

Optional Protocols to the United Nations Convention on the Rights of the Child

On July 5, 2000, President Clinton signed two Optional Protocols to the United Nations Convention on the Rights of the Child ("Convention"): 1) Involvement of Children in Armed Conflicts and 2) Sale of Children, Child Prostitution and Child Pornography and transmitted them to the

ILI US Digest/6 355 1/8/02, 1:46 PM

Senate for advice and content to ratification on July 25, 2000. The excerpts which follow from the report of the Department of State, submitting the treaties to the President for transmittal to the Senate, provided the views of the United States on the Protocols and their implementation in the United States. S. Treaty Doc. No. 106-37 (2000). As indicated in the Report, a detailed analysis providing the basis for the United States views, including a review of relevant United States federal and state law, was set forth in the article-by-article analysis enclosed with the Department of State Report and transmitted with it for the information of the Senate.[1]

The transmittal documents, including the report of the Department of State, are available at *www.access.gpo.gov/congress/cong006.html*.

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Department of State,
Washington, July 13, 2000.

The President,
The White House.

The President: I have the honor to submit to you, with the recommendation that they be transmitted to the Senate for advice and consent to ratification, two Optional Protocols to the Convention on the Rights of the Child adopted at New York November 20, 1989 (the "Convention"): (1) the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (the "Children in Armed Conflict Protocol"); and (2) the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (the "Sale of Children Protocol"). On July

[1] For a discussion of the current status of U.S. steps toward becoming a party to the Adoption Convention, mentioned in the Fifth Recommended Understanding to the Protocol on Sale of Children, *see* II.B.3. above.

ILI US Digest/6 356 1/8/02, 1:46 PM

5, you signed both Protocols. I have also enclosed, for the information of the Senate, article-by-article analyses of both Protocols.

Though styled as Protocols to the Convention, both texts, by their terms, will operate as independent multilateral agreements under international law. Significantly, States can become parties to either or both Protocols without becoming a party to the Convention or being subject to its provisions. The United States seeks the widest possible acceptance of these two Protocols by the community of nations to make it clear that the Protocols speak forcefully for the protection of all children. It is essential that we work with all of our international partners to achieve our common objective: the elimination of abuses of the world's children.

BACKGROUND

On May 25, 2000, the United Nations General Assembly adopted both the Children in Armed Conflict Protocol and the Sale of Children Protocol. Adoption of these Protocols greatly strengthens international efforts to define and enforce norms to protect the most vulnerable children. These children desperately need the full attention of the United States and the world.

(A) The Children in Armed Conflict Protocol

The Children in Armed Conflict Protocol deals realistically and reasonably with the difficult issue of minimum ages for compulsory recruitment, voluntary recruitment, and participation in hostilities, while fully protecting the military recruitment and readiness requirements of the United States.

The Protocol raises the age for military conscription to 18 years; international law had previously set this at only 15 years. The Protocol also calls for governments to set a minimum age for voluntary recruitment above the current international standard of 15 years and to report on measures to ensure that recruitment is truly voluntary. States must take "all feasible measures" to ensure that members of their armed forces who are not yet 18 do not take a "direct" part in hostilities. States that become party to the Protocol also agree to "take all feasible measures to prevent" the recruitment and use of persons younger than 18 in hostilities by non-governmental armed groups, including by adopting legal measures to prohibit and criminalize such practices.

Another important provision of the Protocol is its promotion of international cooperation and assistance in the rehabilitation and social

ILI US Digest/6 357 1/8/02, 1:46 PM

reintegration of children who have been victimized by armed conflict.

No implementing legislation would be required with respect to U.S. ratification of the Children in Armed Conflict Protocol because current U.S. law meets the standards in the Protocol. The United States does not permit compulsory recruitment of any person under 18 for any type of military service. While inactive, the selective service system remains established in law and provides for involuntary induction at and after age 18. The United States also does not accept voluntary recruits below the age of 17 pursuant to 10 U.S.C. § 505(a) (1994). Additionally, the United States will take "all feasible measures" to ensure that [such] members of its armed forces do not take "a direct part in hostilities" without necessitating any change in U.S. law. U.S. law already prohibits insurgent activities by non-government actors against the United States, irrespective of age, under 18 U.S.C. § 2381, et seq.

The Department does recommend, however, that the Senate's advice and consent to ratification of the Children in Armed Conflict Protocol be subject to three understandings and a declaration, as follows.

First, as noted above, the United States considers the Children in Armed Conflict Protocol to operate by its very terms as an independent international agreement. As such, by ratifying the Protocol, the United States understands that it would not become a party to the Convention or assume any rights or obligations under the Convention. The following understanding is recommended to accompany the U.S. instrument of ratification:

> The United States understands that the Protocol constitutes an independent multi-lateral treaty, and that the United States does not assume any obligations under the Convention on the Rights of the Child by becoming a party to the Protocol.

Second, as detailed in the enclosed article-by-article analysis, the United States views the obligation in Article 1 to take all "feasible measures" to ensure that members of its armed forces who have not attained the age of 18 years do not take a "direct part" in hostilities as reflecting standards whose meanings are well grounded in international law and which the United States can meet while fully protecting its military recruitment and readiness requirements without harming its force readiness. The following understanding concerning the meaning

ILI US Digest/6 358 1/8/02, 1:46 PM

of these standards is recommended to accompany the U.S. instrument of ratification:

> With respect to Article 1, the United States understands that the term "feasible measures" are those measures which are practical or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations. The United States understands the phrase "direct part in hostilities" to mean immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy. The phrase "direct participation in hostilities" does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions and other supplies, or forward deployment. The United States further understands that any decision by any military commander, military personnel, or any other person responsible for planning, authorizing, or executing military action shall only be judged on the basis of that person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken.

Third, under Article 3(1), States Parties to the Children in Armed Conflict Protocol are required to raise the minimum age for voluntary recruitment into their national armed forces from that set out in Article 38(3) of the Convention. Article 38(3) of the Convention provides a minimum age of 15 years, which reflects the minimum age currently provided for in international humanitarian law. To make clear the nature of the obligation assumed under Article 3(1) of the Protocol, the following understanding is recommended to accompany the U.S. instrument of ratification.

ILI US Digest/6 359 1/8/02, 1:46 PM

> The United States understands that Article 3 obliges States Parties to raise the minimum age for voluntary recruitment into their national armed forces from the current international standard of 15.

Fourth and finally, Article 3(2) requires each State Party to the Children in Armed Conflict Protocol to deposit a binding declaration upon ratification setting forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced. In order to satisfy this requirement, the following understanding is recommended to accompany the U.S. instrument of ratification.

> Pursuant to Article 3(2) of the Protocol, the United States declares that the minimum age at which it will permit voluntary recruitment into its armed forces is 17. The United States has a number of safeguards in place to ensure that such recruitment is not forced or coerced, including a requirement in U.S. law, Title 10, United States Code, Section 505(a), that no person under 18 years of age may be originally enlisted without the written consent of his or her parent or guardian, if he or she has a parent or guardian entitled to his or her custody and control. Moreover, each person recruited into the military receives a comprehensive briefing and must sign an enlistment contract which, together, specify the duties involved in military service. All recruits must provide reliable proof of age before their entry in the military service.

B. The Sale of Children Protocol

The Sale of Children Protocol takes a vital step forward in our efforts to combat crimes of trafficking in children. Those who traffic in children prey on the most vulnerable children, who are most in need of legal and other protections. The Protocol is the first international instrument to define the terms "sale of children," "child pornography," and "child prostitution." The Protocol requires theses offenses to be treated as criminal

ILI US Digest/6 360 1/8/02, 1:46 PM

acts, and provides law enforcement and cooperation tools to help guarantee that offenders will not go unpunished. Additionally, the Protocol establishes stronger, clearer grounds for jurisdiction and extradition, to better ensure that offenders can be prosecuted regardless of where they are found. Moreover, its extensive provisions on prevention and cooperation will help child victims to receive protection and assistance.

It was especially important for the United States that the Protocol contain effective and practical strategies to prosecute and penalize those who commit crimes involving child prostitution, child pornography and trafficking in children. The administration is committed to ensuring that no child is subjected to these crimes.

It is recommended that the Senate's advice and consent to ratification of the Sale of Children Protocol be subject to five understandings and a declaration, as follows:

First, as noted above, the United States considers the Sales of Children Protocol, by its very terms, to operate as an independent international agreement. As such, by ratifying the Protocol, the United States understands that it would not become a party to the Convention or assume any rights or obligations under the Convention. The following understanding is recommended to accompany the U.S. instrument of ratification:

> The United States understands that the Protocol constitutes an independent multilateral treaty, and that the United States does not assume any obligations under the Convention on the Rights of the Child by becoming a party to the Protocol.

Second, Article 2(a) of the Protocol defines the term "sale of children" in general as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or other consideration." To further clarify the meaning of the term "sale of children," the following understanding is recommended to accompany the U.S. instrument of ratification:

> The United States understands that the definition of "sale of children" in Article 2(a) is intended to reach transactions in which remuneration or other consideration is given and received under circumstances in which a person who does not have a lawful right to

ILI US Digest/6 361 1/8/02, 1:46 PM

> custody of the child thereby obtains *de facto* authority to exercise control over the child.

Third, Article 2(c) defines child pornography as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child, the dominant characteristic of which is a depiction for a sexual purpose." To clarify the meaning of the term further, the following understanding is recommended to accompany the U.S. instrument of ratification:

> The United States understands the definition of child pornography in Article 2(c) to mean the visual representation of a child, engaged in real or simulated sexual activities, or of the genitalia of a child where the dominant characteristic is depiction for a sexual purpose.

Fourth, Article 3(1)(a)(i) requires States Parties to ensure that, in the context of sale of children, the offering, delivering, or accepting of a child for the purpose of "transfer of organs of the child for profit" is fully covered under its criminal law. To clarify the scope of the obligation to criminalize the transfer of organs in Article 3, the following understanding is recommended to accompany the U.S. instrument of ratification:

> With respect to Article 3(1)(a)(i), the United States understands that the "transfer of organs for profit" in the context of the sale of a child is not intended to reach situations in which a child donates an organ pursuant to lawful consent, which could never arise in the context of such a sale. Moreover, the United States understands that "profit" does not extend to the lawful payment of reasonable payments associated with such transfer, for example for expenses of travel, housing, lost wages, and medical costs arising therefrom.

Fifth, Article 3(1)(a)(ii) requires States Parties to ensure that, in the context of sale of children, "improperly inducing consent, as an in-

ILI US Digest/6 362 1/8/02, 1:46 PM

termediary for adoption in violation of applicable international legal instruments on adoption" is fully covered under its criminal law. In order to clarify the nature of United States obligations under Article 3(1)(a)(ii), the following understanding is recommended to accompany the U.S. instrument of ratification:

> The United States understands the reference to "applicable international legal instruments" in Article 3(1)(a)(ii) of the Protocol to mean the Convention on Protection of Children and Co-operation in respect to Intercountry Adoption (the "Hague Convention"). Since the United States is not currently a party to the Hague Convention, it understands that it is not obligated to criminalize conduct prohibited therein. The United States further understands the term "improperly inducing consent" in Article 3(1)(a)(ii) to mean knowingly and willingly inducing consent by offering or giving compensation for the relinquishment of paternal rights.

Sixth, and finally, Article 4(1) obligates every State Party to take "such measures as may be necessary" to establish jurisdiction over the offenses referred to in Article 3(1), when the offenses are committed in its territory or on board a ship or aircraft registered in that State. U.S. law provides a broad range of bases on which to exercise jurisdiction over offenses covered by the Protocol that are committed "on board a ship or aircraft *registered* in" the United States [emphasis added]. U.S. jurisdiction in such cases is not uniformly stated for all crimes covered by the Protocol, nor is it always couched in terms of "registration" in the United States. Therefore, the reach of U.S. jurisdiction may not be co-extensive with the obligation stipulated by this article. The following declaration is recommended to accompany the U.S. instrument of ratification:

> Subject to the declaration that, to the extent that the domestic law of the United States does not provide for jurisdiction over an offense referred to in Article 3(1) of the Protocol when the offense is committed

ILI US Digest/6 363 1/8/02, 1:46 PM

on board a ship or aircraft registered in the United States, the obligation of the United States with respect to jurisdiction over that offense shall be suspended. The suspension shall terminate when the United States informs the Secretary-General of the United Nations that its domestic law is in full conformity with the requirements of Article 4(1) of the Protocol.

CONCLUSION

The Children in Armed Conflict and Sale of Children Protocols constitute historic advances in efforts to strengthen and enforce norms to protect millions of vulnerable children, who desperately need the world's full attention. Subject to the recommended understandings and declarations described above, both Protocols are consistent with U.S. law. Ratification by the United States will reaffirm the tradition of U.S. leadership in efforts to improve the protection of children.

The Department of Defense for the Children in Armed Conflict Protocol, and the Department of Justice for the Sale of Children Protocol, join me in favoring ratification of these Protocols, subject to the conditions previously described.

CROSS-REFERENCE

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children in **3.B.2**.

D. Corporate Responsibility

Statement on Voluntary Principles on Security and Human Rights

On December 19, 2000, the Governments of the United States and the United Kingdom issued a Statement on Voluntary Principles on Security and Human Rights. The participants (including the two governments, private compa-

ILI US Digest/6 364 1/8/02, 1:46 PM

nies in the extractive sectors and non-governmental organizations) express support for Voluntary Principles to guide private companies in three categories: risk assessment, relations with public security and relations with private security. Each of these categories is described in general terms, elucidated with enumerated factors. The general description in each category is set forth below; the full text is available at *www.state.gov/www/global/human_rights.*

VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS

Statement by the Governments of the United States of America and the United Kingdom

* * * *

This has been a cooperative and constructive process. The Governments salute the willingness of the participants—Companies and civil society alike—to address these issues seriously and with a determination to both understand and account for each other's concerns. We look forward to continuing this dialogue in the spirit of cooperation and mutual understanding that led to broad consensus among the participants on these voluntary principles.

We hope that other companies, governments, and civil society organizations as well as international institutions will share these goals and choose to be involved in this continuing dialogue. We welcome their support for these principles as well as their participation in this dialogue. Those wishing to take up this invitation should contact either the U.S. Department of State or the Foreign and Commonwealth Office.

The companies and organizations listed below support this process and welcome these principles:

Chevron, Texaco, Freeport MacMoran, Conoco, Shell, BP, Rio Tinto, Human Rights Watch, Amnesty International, International Alert, Lawyers Committee for Human Rights, Fund for Peace, Council on Economic Priorities, Business for Social Responsibility, the Prince of

ILI US Digest/6 365 1/8/02, 1:46 PM

Wales Business Leaders Forum, and the International Federation of Chemical, Energy, Mine and General Workers' Unions.

Voluntary Principles on Security and Human Rights

The Governments of the United States and the United Kingdom, companies in the extractive and energy sectors ("Companies"), and non-governmental organizations, all with an interest in human rights and corporate social responsibility, have engaged in a dialogue on security and human rights.

The participants recognize the importance of the promotion and protection of human rights throughout the world and the constructive role business and civil society—including non-governmental organizations, labor/trade unions, and local communities—can play in advancing these goals. Through this dialogue, the participants have developed the following set of voluntary principles to guide Companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms. Mindful of these goals, the participants agree to the importance of continuing this dialogue and keeping under review these principles to ensure their continuing relevance and efficacy.

Acknowledging that security is a fundamental need, shared by individuals, communities, businesses, and governments alike, and acknowledging the difficult security issues faced by Companies operating globally, we recognize that security and respect for human rights can and should be consistent;

Understanding that governments have the primary responsibility to promote and protect human rights and that all parties to a conflict are obliged to observe applicable international humanitarian law, we recognize that we share the common goal of promoting respect for human rights, particularly those set forth in the Universal Declaration of Human Rights, and international humanitarian law;

Emphasizing the importance of safeguarding the integrity of company personnel and property, Companies recognize a commitment to act

ILI US Digest/6 366 1/8/02, 1:46 PM

in a manner consistent with the laws of the countries within which they are present, to be mindful of the highest applicable international standards, and to promote the observance of applicable international law enforcement principles (e.g., the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials), particularly with regard to the use of force;

Taking note of the effect that Companies' activities may have on local communities, we recognize the value of engaging with civil society and host and home governments to contribute to the welfare of the local community while mitigating any potential for conflict where possible;

Understanding that useful, credible information is a vital component of security and human rights, we recognize the importance of sharing and understanding our respective experiences regarding, inter alia, best security practices and procedures, country human rights situations, and public and private security, subject to confidentiality constraints;

Acknowledging that home governments and multilateral institutions may, on occasion, assist host governments with security sector reform, developing institutional capacities and strengthening the rule of law, we recognize the important role Companies and civil society can play in supporting these efforts;

We hereby express our support for the following voluntary principles regarding security and human rights in the extractive sector, which fall into three categories, risk assessment, relations with public security, and relations with private security:

Risk Assessment

The ability to assess accurately risks present in a Company's operating environment is critical to the security of personnel, local communities and assets; the success of the Company's short and long-term operations; and to the promotion and protection of human rights. In some circumstances, this is relatively simple; in others, it is important to obtain extensive background information from different sources; monitoring and adapting to changing, complex political, economic, law enforcement, military and social situations; and maintaining productive relations with local communities and government officials.

ILI US Digest/6 367 1/8/02, 1:46 PM

The quality of complicated risk assessments is largely dependent on the assembling of regularly updated, credible information from a broad range of perspectives—local and national governments, security firms, other companies, home governments, multilateral institutions, and civil society knowledgeable about local conditions. This information may be most effective when shared to the fullest extent possible (bearing in mind confidentiality considerations) between Companies, concerned civil society, and governments.

* * * *

Interactions Between Companies And Public Security

Although governments have the primary role of maintaining law and order, security and respect for human rights, Companies have an interest in ensuring that actions taken by governments, particularly the actions of public security providers, are consistent with the protection and promotion of human rights. In cases where there is a need to supplement security provided by host governments, Companies may be required or expected to contribute to, or otherwise reimburse, the costs of protecting Company facilities and personnel borne by public security. While public security is expected to act in a manner consistent with local and national laws as well as with human rights standards and international humanitarian law, within this context abuses may nevertheless occur.

* * * *

Interactions Between Companies And Private Security

Where host governments are unable or unwilling to provide adequate security to protect a Company's personnel or assets, it may be necessary to engage private security providers as a complement to public security. In this context, private security may have to coordinate with state forces, (law enforcement, in particular) to carry weapons and to consider the defensive local use of force. Given the risks associated with such activities, we recognize the following voluntary principles to guide private security conduct.

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ILI US Digest/6 368 1/8/02, 1:46 PM

E. DEVELOPMENT

1. World Summit for Social Development and Beyond: Achieving Social Development for All in a Globalizing World

On July 1, 2000, the United States joined consensus in adopting the outcome document for the Twenty-Fourth Special Session of the United Nations General Assembly entitled "World Summit for Social Development and Beyond: Achieving Social Development for All in a Globalizing World." In a statement for the record, available at *www.state.gov/s/l,* the United States made the following points:

* * * *

The United States is pleased to join the consensus in adopting the outcome document for this conference. I believe it represents an important milestone in the effort that we all began five years ago, in Copenhagen, to put social development at the top of the international agenda and in each of our countries, We have strongly reaffirmed the ten commitments contained in the Copenhagen Declaration, and have agreed on an ambitious, but achievable program of work to bring these ten commitments to full realization in the years ahead.

In the call for Further Actions and Initiatives, one of the areas in which we made important progress was Commitment 3.

• We recognized the major step that was taken through the Declaration on Fundamental Principles and Rights at Work, and agreed to build on that historic agreement through furthers steps by governments and the private sector. These steps will help us ensure that we break the vicious cycles of child and forced labor, end discrimination in employment and guarantee workers the right to participate in the decisions that affect their economic lives.

• We decided on a range of measures to promote opportunities for productive employment for people everywhere, recognizing that decent work is the surest way out of poverty.

ILI US Digest/6 369 1/8/02, 1:46 PM

• And we called for steps to help prepare all of our citizens for the rapidly changing labor markets by improving access to new technologies and lifelong learning.

For the record, Mr. President, I must clarify U.S. policy in three particular areas. First, in the area of debt relief, we believe that international efforts must concentrate on successful implementation of the Enhanced Heavily Indebted Poor Countries (HIPC) initiative. We are concerned that paragraph 5bis of the draft outcome document takes us well outside the framework of that initiative, and thus risks dissipating our efforts. For this reason, the United States must dissociate itself from the consensus on that particular paragraph, just as we did on a similar paragraph in the Beijing+5 document.

Secondly, we would have preferred to retain the language as originally negotiated in paragraph 18.

Finally, with respect to paragraph 38 of the draft document, I wish to stress that ratification of all treaties and conventions by the United States is the prerogative of the U.S. Senate under our "advice and consent" procedure. Thus it would be inappropriate for the executive branch to do more than "consider" ratification of treaties or conventions, and it is in this sense that we interpret the commitment we have made under paragraph 38.

2. Right to Housing, Right to Food

At the Fifty-Sixth Session of the United Nations Commission on Human Rights, noted above in 6.A.1.b., the United States on April 17, 2000, explained its positions as to L. 17, The Right to Housing, and L.19, The Right to Food, as follows:

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* * * *

The United States plays a leading role in advancing internationally recognized human rights. We fully subscribe to the Universal Declaration on Human Rights which includes the statement in Article 25 that says: "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care and necessary social services."

ILI US Digest/6 370 1/8/02, 1:46 PM

In our view, that means that everyone has the right to access to food and housing as components of the right to an Adequate Standard of Living. This is enshrined in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and other human rights instruments.

The United States is pleased that we were able to join consensus on L.17 after all sides worked constructively to achieve this common goal, including the mandate for a new Special Rapporteur on housing.

As to the resolution on the Right to Food, L. 19, we find ourselves in an anomalous position. The United States contributes to global food security by being the world's largest exporter of agricultural commodities, as well as the world's largest donor of food aid. We make every possible effort to have policies and programs aimed at ensuring that people within our country are free from hunger. We take into account the food security impact of trade and aid decisions and believe that the process of agricultural trade liberalization now underway is critical for long-term global food security.

Yet, the mandate of the Special Rapporteur on Food in L. 19 is inconsistent with the mandate on housing in L. 17, even though both are only components of the Right to an Adequate Standard of Living. In establishing new Special Rapporteurs, we must be careful to base their mandates on existing international instruments. Whereas the mandate of the Special Rapporteur on Housing does this, the mandate of the Special Rapporteur on Food does not.

Moreover, there is an inconsistency between the way L. 17 and L. 19 discuss the General Comments, including number 12, which were released last May by the Committee on Economic, Social and Cultural Rights. Number 12, for example, reputedly sets forth the "authoritative definition on the right to food." We disagree that this definition is authoritative.

While we can support L. 17, which takes note of the General Comment 12, we have difficulties with L. 19, which "welcomes" and "affirms" it.

This Comment contains many assertions that the United States cannot support. For example, it takes quite a different approach from the Universal Declaration, the International Covenant on Economic, Social and Cultural Rights. It also states that there is a violation of this right if a state does not provide food to all and also allows a remedy against the state to those individuals who believe their right has been denied.

Because we oppose these views, we cannot support L. 19.

ILI US Digest/6 371 1/8/02, 1:46 PM

Mr. Chairman, we believe the best route to food security is through sound policies that expand food production, encourage economic growth and improve access to food, particularly by reducing protectionist barriers to trade and eliminating policies that raise food prices worldwide. We had hoped that the principal sponsors of L. 19 would negotiate with us either directly or indirectly on a consensus text.

We regret that we have been forced to call for a vote on L. 19 and vote "no" on this text.

F. TORTURE

1. Committee Against Torture: U.S. Remarks on its Report

In Geneva on May 10 and 11, 2000, the Committee Against Torture considered the initial United States report on measures giving effect to its undertakings under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, submitted in accordance with Article 19 of that Convention. The full text of the report is available at www.state.gov/www/global/human_rights. Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights & Labor, described the report as follows in remarks to the Committee on May 10, 2000.

The full text of his remarks and those that follow of William Yeomans, Department of Justice, are available at *www.state.gov/s/l.*

* * * *

It is a great honor to appear before you today, along with my colleagues, to discuss the initial report that the United States submitted to this Committee in October of 1999 concerning its compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading

ILI US Digest/6 372 1/8/02, 1:46 PM

Treatment or Punishment. This report has been prepared through extensive collaboration between the U.S. Departments of State and Justice, with input from other Executive Branch departments and agencies, as well as non-governmental organizations and concerned individuals.

As the Introduction to our Report makes clear, the United States has long been a vigorous supporter of the international fight against torture. The United States government played a major role in formulating the U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in 1975, and in developing the Torture Convention, which we view as a major step forward in the global effort to end torture and other cruel, inhuman or degrading treatment or punishment. We commend this body for its excellent work on behalf of this most worthy goal.

Since the beginning of our Republic, the people of the United States have believed that freedom from torture is an essential component of a functioning democracy and a critical guarantee to any free people. The Eighth Amendment of our Constitution's Bill of Rights, adopted more than two centuries ago, specifically prohibits "cruel and unusual punishments." The Fourth Amendment declares that "[t]he right of the people to be secure in their persons…against unreasonable searches and seizures, shall not be violated," and our Fifth Amendment recognizes a constitutional privilege against self-incrimination that acts, in important part, to bar coerced extraction of confessions, even in pursuit of legitimate law enforcement goals.

Since that time, an extensive body of constitutional doctrine, legislation, regulation and administrative and judicial precedent has been established which gives every person in the United States comprehensive protection against torture. To confirm the United States' abhorrence of torture and our profound commitment to eliminate it in all of its forms, we signed the Convention Against Torture in 1992, and ratified it in October of 1994.

Our report makes clear our unequivocal and unambiguous condemnation of torture as a tool of governmental policy. As the report states: "torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. In every instance, torture is a criminal offense. No official of the government, federal, state, or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official con-

ILI US Digest/6 373 1/8/02, 1:46 PM

done or tolerate torture in any form. No exceptional circumstances may be invoked as a justification for torture."

To honor this commitment, Congress has legislated both federal civil and criminal sanctions against those who practice torture. The courts have condemned the practice as a matter of international, federal and state law. Under the Alien Tort Claims Act and the Torture Victims Protection Act, we have recognized civil remedies against torturers found in the United States, and the federal and state executive branches have indicated zero tolerance for torture within their jurisdictions. As our report states, "Every unit of government at every level within the United States is committed, by law as well as by policy, to the protection of the individual's life, liberty and physical integrity. Each must also ensure the prompt and thorough investigation of incidents when allegations of mistreatment and abuse are made, and the punishment of those who are found to have committed violations." In addition, the Executive Branch established new regulations last year to ensure that those who can demonstrate that they are more likely than not to be tortured upon return to their country of origin cannot be extradited or deported to face torture at home.

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Although we are very proud of our record in eliminating torture, we acknowledge continuing areas of concern within the United States. Although our commitment is unambiguous, our record is not perfect. From time to time, allegations of torture do arise, particularly within the difficult domain of law enforcement. Indeed, a few recent incidents have attracted considerable attention both within and without our territorial borders. But we note that torture does not occur in the United States, except in aberrational situations and never as a matter of governmental policy. When it does occur, it constitutes a serious criminal offense, subjecting the perpetrators to prosecution, and entitling the victims to various remedies, including rehabilitation and compensation. Any act falling within the Convention's definition of torture is clearly illegal and prosecutable everywhere in the country. Although we acknowledge areas where we must work harder, we believe that our report accurately and thoroughly exposes our strengths as well.

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ILI US Digest/6 374 1/8/02, 1:46 PM

…Fortunately, we have very active, free, and independent media and an extremely open society that quickly bring missteps to public light. When added to our independent and effective judicial system, these factors give us confidence that those who still commit torture cannot do so with impunity.

Equally important, we manifest our commitment to eliminating torture worldwide by monitoring, in our annual country reports on human rights practices, the extent to which other countries adhere to their international human rights obligations with respect to torture. At the U.N. Human Rights Commission each spring and at the United Nations General Assembly each fall, we support country-specific resolutions that mention cases of torture and thematic resolutions that support the work of the U.N. Special Rapporteur on Torture. Where there is evidence of torture, we demand an accounting, whether by the creation of international criminal tribunals, as in the former Yugoslavia and Rwanda, or by supporting the work of truth comissions in such countries as South Africa, Guatemala, and El Salvador.

The United States also recognizes that ending the practice of torture is only half the battle. We are strongly committed to assisting survivors of torture, so that they will not simply be left to fend for themselves. In 1992 the President and Congress worked together to enact the Torture Victims Protection Act and in October 1998, the Torture Victims Relief Act to support the efforts of torture victims who have sought refuge in the U.S. to find justice and compensation for their suffering. Since 1980, the U.S. government has supported civil claims by torture victims under the Alien Tort Claims Act and its successor statutes and has worked with like-minded governments—for example, Denmark—to support torture relief centers in our own country and elsewhere. As our report chronicles, the National Institute of Mental Health has made extensive funding available for research for survivors of torture and related trauma and the Office of Refugee Resettlement of the U.S. Department of Health and Human Services currently provides some $1.7 million in funding to ten organizations in major cities to identify torture survivors among refugee communities.

Nor is the U.S. commitment to helping torture victims confined to U.S. residents alone. As our report indicates, the United States Agency for International Development is committed to assisting torture victims throughout the world, and supports programs in Latin America, Africa, Asia, Europe, and the Newly Independent States. We continue to be the

ILI US Digest/6 375 1/8/02, 1:46 PM

largest single donor to the U.N. Voluntary Fund on Torture, having contributed over $12 million in total, and providing $3 million in 1999 alone.

To honor more fully our obligations under the Torture Convention and other human rights treaties, on December 10, 1998, President Clinton signed a historic executive order, Executive Order 13107 which created an inter-agency working group comprised of representatives from, inter alia, the Departments of State, Justice, Defense, and Labor, and directed that group to work together to ensure that our obligations under international human rights treaties are fully implemented.

William Yeomans, Chief of Staff to the Assistant Attorney General for Civil Rights, U.S. Department of Justice, expanded on Mr. Koh's description of the U.S. federal government's role in these matters:

* * * *

The Department of Justice is committed to working to ensure that the United States fulfills its obligations under the [Convention Against Torture (CAT)] and other international treaties. We are a member of the White House Inter-Agency Working Group on Human Rights, chaired by the National Security Council, which helps link our domestic enforcement to our international treaty obligations and includes representation from the State Department, the Immigration and Naturalization Service, and other agencies whose work is closely related to our international obligations.

Torture is prohibited by law throughout the United States. No person who commits abuse while acting under color of state or federal law is immune from prosecution. When the Department of Justice is informed of credible allegations of abuse or mistreatment by police officers, prison guards, or other state actors, those matters are investigated. If the evidence supports a prosecution, those cases are tried in open court. In criminal matters, because of our federal system, state prosecutors also have the ability to bring the abuser to justice. Either way, those who commit torture in the United States are not above the law.

ILI US Digest/6 376 1/8/02, 1:46 PM

However, while the United States is committed to the full and effective implementation of its obligations under the Convention, within the United States there continue to be concerns warranting continuing vigilance regarding matters such as the excessive use of force by law enforcement officers and physical and sexual abuse of inmates.

The Civil Rights Division at the Department of Justice bears principal responsibility for the enforcement of federal civil rights laws, including laws designed to combat discrimination on account of race, national origin, citizenship status, religion, sex, age, or disability. We are also the entity responsible for enforcing federal laws that protect against the use of excessive force by law enforcement, and that protect the constitutional and other federal rights of prisoners. These laws are enforceable in federal court. In most instances, these federal protections complement similar guarantees pursuant to state law.

In the United States, it is a crime for one or more persons acting under color of law willfully to deprive or conspire to deprive another person of any right protected by the Constitution or laws of the United States. (18 U.S.C. § § 241, 242). "Color of law" simply means that the person doing the act is using power given to him or her by a governmental agency (local, State, or Federal). A law enforcement officer acts "under color of law" even if he or she is exceeding his or her rightful power. The types of law enforcement misconduct covered by these laws include the use of excessive force and sexual assault. If the Department determines that a law enforcement official has violated the federal excessive force statute, that official can be criminally prosecuted in federal court and sentenced to serve time in a federal prison.

At any given time, the Department is investigating several hundred allegations of criminal police misconduct around the country.

* * * *

The Civil Rights Division is also responsible for enforcement of 42 U.S.C. § 14141, which was enacted in 1994. This law makes it unlawful for State or local law enforcement officers to engage in a pattern or practice of conduct that deprives persons of rights protected by the Constitution or laws of the United States. The types of conduct covered by this law can include, among other things, the use of excessive force, discriminatory harassment, false arrests, coercive sexual conduct, and unlawful stops, searches or arrests.

ILI US Digest/6 377 1/8/02, 1:46 PM

If we conclude that a law enforcement agency has engaged in a pattern or practice of misconduct, the Department of Justice can sue it in federal court to obtain injunctive relief, such as court orders to end the misconduct and court enforced changes in the agency's policies and procedures that resulted in the misconduct. Private individuals may seek similar relief, as well as monetary compensation, pursuant to other federal and state laws.

* * * *

The Civil Rights Division is currently involved in several ongoing civil investigations of police departments regarding issues of excessive use of force. These include investigations of the Los Angeles Police Department, the New Orleans Police Department, and an investigation of the New York City Police Department undertaken in conjunction with the U.S. Attorneys for the Southern and Eastern Districts of New York.

The Department's work to combat police misconduct rests on the principle that our nation cannot afford to tolerate officers who abuse their positions by mistreating citizens, or who bring their own racial bias to the job of policing. No person should be subject to unreasonable force, and no person should be targeted by law enforcement based on the color of his or her skin.

The Civil Rights Division also works to combat systemic abuse and misconduct in our nation's prisons and jails. Since the enactment of the Civil Rights of Institutionalized Persons Act (CRIPA) in 1980, the Civil Rights Division has investigated more than 300 facilities in 39 states, the District of Columbia, Puerto Rico, the Northern Mariana Islands, Guam and the Virgin Islands. As a result of the Department's CRIPA efforts, tens of thousands of institutionalized persons who were living in dire, often life-threatening, conditions now receive adequate care and services.

The Division's work focuses on protection from abuse and harm, provision of adequate medical and mental health services, and proper sanitary and fire-safety conditions. For example, in 1997 we entered into consent decrees with institutions in Wisconsin and Tennessee regarding those facilities' provision of proper medical treatment, use of restraints, and use of psychotropic medications on the mentally retarded. In that same year, the Division settled a lawsuit against the Montana State Prison with an agreement that protects vulnerable inmates from

ILI US Digest/6 378 1/8/02, 1:46 PM

predatory inmates. In recent years, the Division's work has also focused on problems such as abuse and neglect in nursing homes and juvenile facilities, sexual victimization of women prisoners, inadequate education in facilities serving children and adolescents, and the unmet mental health needs of inmates and pre-trial detainees.

To date, the Division has been successful in resolving the vast majority of CRIPA investigations that have uncovered unlawful conditions by obtaining voluntary correction or a judicially enforceable settlement designed to improve conditions. If state or local officials fail to correct the deficiencies or to agree to an appropriate settlement, CRIPA authorizes the Attorney General to file suit in federal court.

I would like to describe briefly what the Justice Department is doing to comply with Article 3 of the CAT, which requires member states not to "expel, return ('refouler') or extradite" a person to another state where he or she would be tortured. In 1998, President Clinton signed into law a statute that required the promulgation of regulations to implement U.S. obligations under Article 3. On February 19, 1999, the Department of Justice published an interim rule to establish procedures for an alien to raise a claim to protection from removal to a country where he or she fears torture. These regulations provide that an immigration judge will consider a claim to protection under the CAT, along with any other applications, during removal proceedings. The Department's expectation is that the various safeguards that are part of this new interim rule will ensure fair and accurate decisions.

The Department of Justice remains committed to prosecuting law enforcement officers for excessive use of force and other misconduct, protecting the constitutional rights of prisoners, and ensuring that police departments across the country refrain from engaging in patterns of misconduct. We have more work to do, but we are confident that we can continue to make progress.

2. Questions and Answers

On May 11, 2000, Mr. Koh and Mr. Yeomans appeared again before the Committee to answer questions.

ILI US Digest/6 379 1/8/02, 1:46 PM

Their answers to questions concerning interpretation of the Torture Convention are provided below, with full text at *www.state.gov/s/l.* The conclusions and recommendation of the UN Committee Against Torture on the U.S. Report are available at: *www.unhchr.ch/tbs/doc.nsft*.

* * * *

Q: Why did the United States adopt an understanding of the definition of "torture" under Article I which varies from the definition articulated in the Convention?…

A: We believe that there is no inconsistency between the U.S. understanding and Article I of the Convention. Contrary to the apparent perception of some members of the Committee, where official mistreatment results solely in mental suffering, such mistreatment constitutes "torture" under our understanding of Article I of the Convention so long as it constitutes prolonged mental harm, and is caused by or results from four sources: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened infliction or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality.

In our view, this understanding does not modify the meaning of Article 1. Rather, it clarifies that article by recognizing the reality that torture can—and does—occur through the infliction of mental suffering, while at the same time, providing the precision required by U.S. domestic law. The United States sees no inconsistency, therefore, between its understanding and Article 1. Rather, the United States considers that its understanding of the term "torture" is fully consistent with the definition of that term in Article 1.

* * * *

Q: Why does the U.S. construe Article 3 to require proof that it is "more likely than not" that someone will be returned to condi-

ILI US Digest/6 380 1/8/02, 1:46 PM

tions of torture differently than the Convention as interpreted by the Committee?

A. Under U.S. law existing at the time of ratification of the Torture Convention, an individual could not normally be expelled or returned to a State where his "life or freedom would be threatened…on account of race, religion, nationality, membership in a particular social group, or political opinion." The US Supreme Court had interpreted this provision—derived from Article 33 (the "non-refoulement provision") of the 1951 Convention Relating to the Status of Refugees- to mean that a person entitled to its protections could not be deported to a country where it was more likely than not that he would be persecuted. Insofar as Article 3 of the Convention Against Torture extended the prohibition on deportation and removal under US law to all cases of torture even if they did not involve persecution on one of the five listed impermissible grounds—the "more likely than not" understanding ensured that the Article 3 protection against non-return to conditions of torture would be applied in a manner consistent with existing U.S. law regarding non-refoulement (non-return) to other forms of persecution. To ensure consistency, this interpretation was similarly extended to cases of extradition to conditions of torture. Yesterday, the Chairman suggested that under Article 3, by analogy to common law tort law, the issue should be whether there is a "real risk" that a person might be returned to torture, and that a "real risk" might be determined by less than a probability. With respect, I should point out that the evidentiary standard of proving a common law tort is also "more likely than not."

* * * *

Q: Article 5 requires States to establish universal jurisdiction over torture. If a non-US citizen commits torture abroad, and he is later found in the United States and no country requests his extradition, can the United States prosecute him for torture? Or, if extradition were requested, and the United States declined, could the United States still prosecute the individual for torture?

A. The answer is yes in both cases. The United States has criminal jurisdiction over the crime of torture committed abroad by any official, irrespective of nationality, if that person is later found in the United States. Chapter 18 of the United States Code, 18 U.S.C. 2340A, provides, in relevant part:

ILI US Digest/6 381 1/8/02, 1:46 PM

> "Whoever outside the United States commits or attempts to commit torture [as defined elsewhere in the Act in a manner consistent with U.S. obligations under the Convention] shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
>
> (b) Jurisdiction. There is jurisdiction over the activity prohibited in subsection (a) if
>
> (1) the alleged offender is a national of the United States; or
>
> (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender."

I should also note that since the landmark case of *Filartiga v. Pena-Irala*, 630 F.2d 774 (2d Cir. 1980), based on the theory of the "transitory tort," the United States federal courts have exercised civil jurisdiction under the Alien Tort Claims Act of 1789, 28 U.S.C. sec. 1350, over suits by alien plaintiffs against alien torturers based on acts of torture committed outside the United States. *See* United States Initial Report, paras. 277-280.

* * * *

Q: Why was the Peruvian official Ricardo Anderson Kohatsu permitted to return to Peru following his recent trip to the United States?

A: In March 2000, Ricardo Anderson Kohatsu, a Peruvian official, traveled to Washington, D.C., U.S.A. as a member of a Peruvian delegation to the OAS Inter-American Commission, an organ of the Organization of American States, to testify on behalf of Peru at a hearing of that international organization. Based on the circumstances of his travel and the specific provisions of the 1975 Agreement between the United States and the OAS on privileges and immunities of member state delegations, the Government of Peru asserted a claim of immunity from arrest on Mr. Anderson's behalf and sought permission for Mr. Anderson to depart the United States. Based on the advice of the Legal Adviser of the State

ILI US Digest/6 382 1/8/02, 1:46 PM

Department, the United States Government concluded that its treaty obligations to the Organization of American States required the United States to honor that request.

* * * *

Q: Why has the United States declined to extradite Emmanuel Constant, a Haitian citizen, back to Haiti even though the Government of Haiti has requested his extradition?

A: In the case of Emmanuel Constant, the Chairman's question is based on a misunderstanding of fact. As of the present, the United States Government has never received any request for Mr. Constant's extradition from any government, including the Government of Haiti. The United States is aware of reports that Mr. Constant committed acts of torture in Haiti, and the United States emphatically has no interest in harboring torturers. However, based upon the facts as publicly reported, it appears that the only ground for exercising independent criminal jurisdiction over Mr. Constant in the United States would be under 18 U.S.C. section 2340A, which was enacted on April 30, 1994. Because the acts of torture abroad alleged to have been committed by Mr. Constant would have taken place before this law's enactment, the prohibition in the Sixth Amendment to the U.S. Constitution against the retroactive application of criminal statutes (*i.e.,* ex post facto laws) might well stand as a bar to his prosecution.

Q: Can the U.S. confirm that there have been no extraditions for torture since submission of its report?

A: Yes. To the best of our knowledge, since the submission of the U.S. Report to the Committee Against Torture in October 1999, we know of no requests for the extradition of a person for the offense of torture.

* * * *

Q: What is the U.S. doing to abide by the United Nations Minimum Rules with regard to the questioning and detention of juveniles?…

A: The Federal Bureau of Investigation has a policy of having parents present while its agents are interviewing juveniles. The Supreme Court protects juveniles with the same privileges against self-incrimination that are provided to adults. Thus, while there is no specific constitutional or statutory right to have a juvenile's parent present before a statement made by a juvenile could be admitted into open court,

ILI US Digest/6 383 1/8/02, 1:46 PM

as with any statement admitted against a witness in a criminal case, an inquiry would be made as to the voluntariness of the juvenile's statement. Any such inquiry would take into account the age and maturity of the individual making the statement.

With regard to the detention of juveniles, as a condition of receiving federal grants or funding, states must hold juveniles who are being processed in the juvenile justice system separately from adults. Thus, it is the general practice in the states to separate juveniles from adults both in pre-trial facilities and in prisons.

In the federal system, juveniles are never housed with adult offenders. While in limited circumstances juveniles can be convicted of federal offenses, the Federal Bureau of Prisons contracts such cases with state and local agencies, and private corrections firms that house juvenile offenders. This process facilitates maintaining close family ties. The federal prison system has only one institution which confines a limited number of juvenile offenders. That facility, the Metropolitan Detention Center in Guyanabo, Puerto Rico, maintains strict separation between juvenile and adult offenders.

The Immigration and Naturalization Service does not detain juveniles together with adults. INS uses juvenile facilities that are licensed by an appropriate authority at the local, State, or Federal level and specially trained INS personnel inspect each facility on an annual basis to help ensure that all facilities are in compliance with INS' requirements for housing juveniles.

The Chairman also expressed concern over the housing of juvenile inmates on death row. Under the law of some states, persons aged 16 and above may be sentenced to death where the nature of their crime requires they be tried as an adult. In some circumstances, these individuals will be housed on death row after they have been tried, convicted, and sentenced to death. However, it is important to recognize that while these inmates may be under the age of 18, under U.S. law, the nature of their conduct warrants a determination that they clearly have reached the age of majority in advance of their eighteenth birthday, and, therefore, should be tried, convicted, sentenced and imprisoned as an adult.

Q: Has there been an evaluation of the use of restraint procedures such as restraint chairs and shackles?…

A: Restraint devices are used in settings such as hospitals and nursing homes for patient safety reasons in addition to their use in jails and

ILI US Digest/6 384 1/8/02, 1:46 PM

prisons. Such devices should only be used to keep an inmate from hurting himself or others, when less restrictive means of controlling the inmate have failed. They are not designed as punishment, but rather as an effective means of short-term control of a suicidal inmate or one who is engaging in self-mutilation, for example, until such time as a mental health professional can be brought to the scene. Unfortunately, we have uncovered circumstances in which jails and prisons were using restraint chairs or four or five-point restraint on a bed for excessive time or when other less restrictive methods of preventing harm had not been attempted. The Department of Justice condemns such use and has sought to remedy it when we have uncovered such practices.

The U.S. Constitution does not permit use of restraint as a means of punishment or for purposes of interrogation, and we seek to eliminate such uses when we find them.

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Q: Given the fact that prison investigations are done in the first instance by the prison itself, are U.S. federal courts not the only effective means of oversight of prison practices? Does the United States intend to create independent review mechanisms to review complaints & monitor conditions?

A: No to both questions. In our judgment, an independent review mechanism to review prison complaints and monitor prison conditions is unnecessary, and would needlessly replicate the work of the Federal Bureau of Prisons, the National Institute of Corrections, the Department of Corrections in the fifty states and in the territories, the work of the Civil Rights Division of the Department of Justice, not to mention the many private entities who monitor prison conditions, including the American Correctional Association, which accredits prisons and jails. State and federal courts have also engaged in extensive oversight in prisons in response to lawsuits brought by government agencies, as well as inmates, both individually and in class action litigation.

* * * *

Q: Art. 27 of the Vienna Convention on the Law of Treaties states that a state party to a treaty cannot rely on internal difficulties to excuse its failure to fulfill international obligations that it has assumed. Is the United States acting in accordance with this principle?

ILI US Digest/6 385 1/8/02, 1:46 PM

A. Yes. We agree entirely with the Committee's restatement of this basic principle of treaty law. The United States' statement about federalism in its general reservation to the treaty does not, and is not intended to, exempt the United States from ensuring that both state and federal law is in compliance with US obligations under the Convention. Instead, it concerns the steps to be taken domestically by state and federal authorities to give effect to US obligations under the Convention.

The United States has a federalist system of government, with a federal government of limited powers. Those powers not delegated to the federal government are expressly reserved for the states and the people under the Tenth Amendment to the US Constitution. So, while the federal government cannot dictate the basic form or internal workings of state government, it can establish and enforce uniform standards for the respect of the right to be free from torture and cruel and unusual punishment, which could include direct invalidation of any offending laws at the state level under the Supremacy Clause, Article VI of the Constitution. To make this point explicit, the United States instrument of ratification specifies that "to the extent that constituent units [of the United States] exercise jurisdiction over such matters, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Convention."

Q: How does the U.S. respond to the argument that the only permissible reservation to the Convention is pursuant to Article 28, i.e., with respect to the competence of the Committee to receive state-state complaints under Article 20?…

A. With respect, we must take issue with this interpretation of the Convention. Under the Vienna Convention on the Law of Treaties and the Permanent Court of International Justice's Advisory Opinion regarding Reservations to the Genocide Convention, a state party may condition its ratification of a multilateral treaty unless the instrument itself prohibits reservations or such a condition would defeat the object and purpose of the treaty, as viewed by other parties to the multilateral convention. We note the Convention Against Torture does not prohibit reservations, and no state party to the Convention has adopted Mr. Camara's interpretation.

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ILI US Digest/6 386 1/8/02, 1:46 PM

Q: How can the U.S. comply with the CAT if prisons are operated by private companies?…

A: The fact that a correctional facility that houses state or local inmates is operated by a private company in no sense insulates that facility, or its employees, from scrutiny under our federal constitution or statutes. State and local contracting agencies are ultimately accountable for conditions in institutions housing individuals in the state's legal custody. The individuals operating the facility become state actors for these purposes.

This point is made clear by the fact that a number of the Civil Rights Division's cases pursued to protect the constitutional rights of prisoners have involved private providers who house or otherwise provide services to individuals in the custody of states or local subdivisions. Most recently, for example, we obtained extensive relief involving a private juvenile facility in the state of Louisiana.

In short, a corporation that operates a prison facility under a contract with the state is subject to the same liabilities under federal law as a public facility. Thus, a prison official working in a private facility that contracts with a state to house state prisoners is subject to prosecution under federal criminal civil rights laws for misconduct, including the use of excessive force and racial discrimination.

* * * *

Q: How does the United States explain the failure of the Illegal Immigration and Immigrant Responsibility Act of 1996 to identify fear of torture as a ground for not returning a person to his country of origin in light of this requirement under the Convention?

A: This is not a gap in United States law. Immediately upon the entry into force for the United States of the Convention, and prior to the adoption of formal regulations by the Immigration and Naturalization Service (INS), the INS adopted a comprehensive interim administrative process to assess the applicability of Article 3 to individual cases of aliens subject to removal. Under this process, if there were reason to believe that an alien would be tortured in a particular country after all removal proceedings had been completed and before a final order of removal was executed, the INS would consider whether Article 3 prohibited the alien's removal to that country. The INS took an inclusive approach to identifying cases to be examined under Article 3, allowing aliens to raise this issue at any point in the removal process. If an alien

ILI US Digest/6 387 1/8/02, 1:46 PM

or his attorney or representative requested protection under Article 3 or expressed a fear of torture at any time before removal, the INS assessed the case under Article 3. In addition, the INS worked with the United Nations High Commissioner for Refugees to develop an informal process under which that agency could bring to the government's attention cases which it believed raised issues under Article 3.

On October 21, 1998, President Clinton signed into law a bill which required "[n]ot later than 120 days after the date of enactment of this Act, the heads of appropriate agencies [to] prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." Accordingly, the INS promulgated regulations to implement Article 3, consistent with U.S. reservations, understanding and declarations.

On February 19, 1999 the Department of Justice published an interim rule prescribing regulations that implement formally, as directed by the Congress, U.S. obligations under the Convention Against Torture. The interim rule became effective on March 22, 1999. (A full text of the rule is at Annex IV of the US Report.)

Q: Is it not true that the Anti-Terrorism and Effective Death Penalty Act improperly curtails the power of the federal courts to remedy erroneous decisions of the state courts?

A: As the Supreme Court has recently demonstrated in *Williams v. Taylor*, the AntiTerrorism and Effective Death Penalty Act does not limit the ability of federal courts to address errors by state courts that are of constitutional dimension. Rather, it requires that such cases be brought within one year of any one of a series of triggering events and that there not be more than one habeas challenge brought in the same case.

However, as an exception to those procedural rules, the state defendant may still maintain a federal habeas corpus action if he or she can establish that there is a new rule of constitutional law which the Supreme Court has held to apply retroactively or that the factual predicate for the action could not have been discovered earlier through the exercise of due diligence and that the facts underlying the claim provide clear and convincing evidence of actual innocence or that the lower court did not give adequate consideration to the initial petition for habeas corpus.

ILI US Digest/6 388 1/8/02, 1:46 PM

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G. JUDICIAL PROCEDURE, PENALTIES AND RELATED ISSUES

1. Inter-American Commission on Human Rights: Petition of Juan Garza

Juan Raul Garza was convicted in the U.S. District Court for the Southern District of Texas of five violations of federal drug trafficking laws, operating a continuing criminal enterprise, money laundering, and three counts of killing in furtherance of a continuing criminal enterprise. At a later punishment hearing, the government introduced evidence showing that he had committed four additional murders in Mexico. The jury recommended a sentence of death. This conviction and sentence were affirmed on appeal. *United States v. Garza,* 63 F.3d 1342 (5th Cir. 1995); *rehearing denied,* 77 F.3d 481 (5th Cir. 1995), *cert. denied, Garza v. United States*, 519 U.S. 825 (1996).

On January 27, 2000, Garza lodged a petition with the Inter-American Commission on Human Rights, Case No. 12.243, alleging violations of the American Declaration of the Rights and Duties of Man, in particular Article 1 (death penalty violates right to life), Article 18 (right to a fair trial) and Article 26 (right to due process of law). The Commission forwarded Garza's petition to the Government of the United States on the same day, requesting that precautionary measures be taken "to preserve Garza's life and physical integrity so as not to hinder the processing of his case before the Inter-American system." The Reply of the Government of the United States, filed in June 2000, which is excerpted here, requested the Commission to declare the petition in-

ILI US Digest/6 389 1/8/02, 1:46 PM

admissible under Commission Regulations 35(c) and 41(b)-(c) because it failed to state facts that constitute a violation of rights set forth in the Declaration. At the end of the year, the Commission had the case under consideration.

The full text of the Reply and of a Second Reply filed August 21, 2000, are available at www.state.gov/s/l.

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The petition portrays this as a case in which Garza was victimized by a system that failed to afford him adequate protection for his right to a fair trial. This could not be farther from the truth. Garza's proceedings were conducted in complete compliance with United States law, the rights set forth in the American Declaration, and customary international law.

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I. The Commission's Request for the United States to take Precautionary Measures is a Recommendation and Therefore not Obligatory.

The practice of requesting precautionary measures is based on Article 29 of the Commission Regulations. The sole basis this regulation has in the Commission's organic document—the American Convention on Human Rights ("American Convention")—or in the Statute of the Inter-American Commission on Human Rights ("Commission Statute") is the Commission's authority to "make recommendations." Thus, its request for the United States to take precautionary measures in this case is a non-binding "recommendation," of which the U.S. Department of State has taken note.

II. Garza's Sentencing did not Violate any Rights Set Forth in the American Declaration.

Petitioner claims that the United States[1] has violated Article 1 (right to life), Article 18 (right to a fair trial), and Article 26 (right to due pro-

[1] Interestingly, the petition identifies Janet Reno, U.S. Attorney General, and Kathleen Hawk Sawyer, Director of the Federal Bureau of Prisons, as the persons who

ILI US Digest/6 390 1/8/02, 1:46 PM

cess of law) of the American Declaration in the sentencing of Garza. Because the petition fails to state facts that constitute a violation of any rights set forth in the American Declaration and is manifestly groundless, it should be declared inadmissible.

A. The Petition does not Allege a Violation of the Right to Life

In conclusory fashion, the petition alleges that "on a straight reading of the [American Declaration], it would seem that the death penalty constitutes a violation of the right to life." This, however, is not a "straight reading" of the text. At the time of the adoption of the American Declaration there was no international legal prohibition on the death penalty. There is similarly no such prohibition today.

Although Article 1 of the American Declaration protects the right to life, this right does not proscribe capital punishment. Throughout the world, most countries practiced capital punishment at the time the American Declaration was adopted, and a majority of countries still do. The same was and is true for the Universal Declaration of Human Rights. In addition, Article 6 of the International Covenant on Civil and Political Rights, to which the United States is a party, expressly recognizes the right of countries that have not abolished the death penalty to impose it for the most serious crimes.

A number of countries have chosen to become parties to other treaties obligating them to abolish capital punishment, either entirely or in ordinary circumstances. *See, e.g., Protocol to the American Convention on Human Rights, reprinted in Basic Documents at 83; Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty,* U.N. Doc. A/RES/44/128 (1991). These treaties, however, neither bind non-parties, such as the United States, nor change the status of capital punishment under international law.

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committed the alleged violations of the American Declaration. However, *Garza* was not sentenced by either of these persons. His sentence was recommended by a jury of his peers, empanelled by a federal district court and operating pursuant to law. While petitioner takes issue with the U.S. Attorney's use of evidence of "unadjudicated offenses" at the sentencing phase of *Garza's* trial, such use is entirely lawful under federal authorities, and indeed, was permitted by the federal judge presiding over this case. There is simply no basis in fact or law for the petition's claim that Ms. Reno or Ms. Sawyer violated Garza's rights.

ILI US Digest/6 391 1/8/02, 1:46 PM

The simple fact is that a majority of countries retain the death penalty for the most serious offenses. The Secretary-General reported to the U.N. Commission on Human Rights that as of March 10, 1999, 87 countries retained and used the death penalty for the most serious ordinary crimes and that another 26 countries retained the death penalty for ordinary crimes but had not executed anyone within the last 10 years; indeed, only 65 countries have formally abolished the death penalty for all crimes. *See* U.N. Doc. E/CN.4/1999/52/ Corr.1. State practice is clear and consistent: there is no prohibition in international law on the use of the death penalty.

When carried out in accordance with due process, capital punishment for the most serious crimes is consistent with international law, including applicable human rights treaties. This case is no different. Garza's crimes—three execution-style murders—were sufficiently serious to merit a sentence of death. Moreover, he received all appropriate due process, including the review of his case numerous times by the federal district and appellate courts.

Accordingly, the petition fails to state facts which show a violation of the right to life, and is manifestly groundless. On this ground, the Commission should declare this claim inadmissible.

B. The Petition does not Allege a Violation of Either the Right to a Fair Trial or the Right to Due Process of Law.

According to the petition, Garza's right to a fair trial was violated by the introduction of evidence of "unadjudicated crimes" during the sentencing phase of Garza's trial. The petition also appears to rest its due process argument on the same basis: specifically, the petition claims that the principle of "equality of arms"[2] was violated.

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[2] The petition alleges that Garza's right to due process of law was violated by merely repeating the argument made in support of its claim that Garza's right to a fair trial was violated, *i.e.,* the use of evidence of "unadjudicated crimes" during the sentencing phase created inequality of arms.

Under international law, the principle of equality of arms is generally considered part of the right to a fair trial. *See*, e.g., *Grant v. Jamaica,* Communication No. 353/1988, U.N. Doc. CCPR/C/50/D/353/1988 (1994)(decision of the U.N. Human Rights Committee recognizing "equality of arms" as an element of the right to a fair trial protected by Article 14 of the International Covenant on Civil and Political Rights). In any event, the Government will address the petition's due process and fair trial claims in this section by explaining how the principle of equality of arms was fully observed in this case.

ILI US Digest/6 392 1/8/02, 1:46 PM

While the petition is correct in noting that the principle of equality of arms is implicated in the right to a fair trial, it mistakenly attempts to expand the concept beyond that which is recognized under international law. There was nothing about Garza's trial—during either the liability or sentencing phase—that fell short of international standards for both equality of arms and Garza's right to a fair trial.

As a preliminary matter, the Commission should note that the petition relies entirely for support on opinions of judicial and quasi-judicial bodies outside the Inter-American System of Human Rights. More important, none of these authorities interpret or apply the American Declaration—the sole instrument the Commission is authorized to interpret and apply to the United States. Commission Statute, art. 20(a). None of these decisions is binding on the Commission, nor can the paucity of authority cited by the petition be considered as reflective of customary international law on this issue.

Indeed, the law of equality of arms is in stark contrast to the petition's portrayal of the principle. As the International Criminal Tribunal for the Former Yugoslavia ("ICTY") has held, "'the principle of equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case." *See Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment (Appeals Chamber, Int'l Crim. Trib. Former Yugo., 1999). Equality of arms requires procedural equality, not substantive equality. *See id.* Here, the petition alleges no facts that would indicate Garza was treated with anything but full procedural equality over the course of his trial and sentencing.

In Tadic, the court rejected the defendant's claim that he was denied equality of arms because he was unable to secure the attendance of witnesses for his defense at trial. Here, the petition presents a remarkably similar claim: because Garza was unable to secure the attendance of alleged favorable witnesses and to obtain unspecified exculpatory evidence at his sentencing, he claims that he was denied equality of arms. Just as the ICTY rejected this improper expansion of this principle, the Commission should also reject it as inconsistent with international law.

Further, contrary to the petition's assertions, the law of the European Court of Human Rights and the Human Rights Committee is in accord. For instance, in *Dombo Beheer B.V. v. The Netherlands,* 27 Oct. 1993, A. 274, the European Court adopted the view of the European Commission that "'equality of arms' implies that each party must be

ILI US Digest/6 393 1/8/02, 1:46 PM

afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-á-vis his opponent." And, in *B.d.B. et al. v. The Netherlands,* Communication No. 273/2989 (30 March 1989), U.N. Doc. Supp. No. 40 (A/44/40) at 286 (1989), the Human Rights Committee observed that Article 14 of the International Covenant on Civil and Political Rights (the right to a fair trial) "guarantees procedural equality" to ensure that the conduct of judicial proceedings is fair.

Reviewing this case in light of the above authorities, it is clear that neither the law nor the court imposed any conditions that placed Garza at a substantial disadvantage vis-á-vis the prosecution. While it is true that the prosecution had some advantages—as does the state in any criminal prosecution—the procedural conditions at sentencing were the same for both parties. Garza was free to cross-examine all of the prosecution's witnesses. Garza was free to impeach the prosecution's evidence in any manner. Garza was free to call witnesses in his defense. Mere access to greater resources by the prosecution cannot be the basis for inequality of arms. If this were the standard, no criminal trial could possibly satisfy such a broad reading of the principle.[3]

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[3] The petition places great emphasis on a Mutual Legal Assistance Treaty between the United States and Mexico which it claims "shows clearly that the state and the victim did not have equality of arms." This conclusion does not flow from either the existence of the treaty or from the petition's recitation of the treaty's non-self-executing treaty clause.

First, for the reasons detailed above, the treaty's existence does not create inequality—it merely enhances the state's ability to collect evidence against the accused. The treaty in no way restrains the defendant from challenging that evidence or presenting his own.

Second, the fact that the treaty does not create any private rights is irrelevant. Any and all aggravating or mitigating evidence collected by the government is required—under the U.S. Constitution—to be turned over to the defendant before trial, *see Brady v. Maryland,* 373 U.S. 83 (1963).

Further, the petition's claim regarding the lack of a letters rogatory process between the United States and Mexico for criminal matters is simply wrong. The existence of a Mutual Legal Assistance Treaty between the two countries in no way affects the ability of a litigant—either civil or criminal—from obtaining evidence through the letters rogatory process. Similarly meaningless is the decision of Mexico and the United States not to apply the Inter-American Convention on Letters Rogatory to criminal matters. The letters rogatory process is one rooted in custom, and it exists between two countries willing to grant comity to each's judicial process regardless of whether they are in treaty relations.

ILI US Digest/6 394 1/8/02, 1:46 PM

The very statute which the petition puzzlingly cites as evidence of inequality unambiguously creates procedural equality for both parties: "Any other information relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant . . ." 21 U.S.C. § 848 (emphasis added). The petition is correct in noting that the ordinary rules of evidence do not apply during a sentencing proceeding, however this works to the benefit (and detriment) of both parties. Section 848 creates a procedurally level playing field. And, indeed, this is the very nature of the equality of arms principle.[4]

Indeed, U.S. law goes well beyond what is required by this principle. Garza has been represented throughout this case (and continues to be represented) by competent appointed counsel. Federal law requires the appointment of experienced counsel for every capital defendant, and also guarantees the availability of funds for necessary investigative and forensic services. *See* 21 U.S.C. § 848(q)(4)-(10); 18 U.S.C. § 3005. These procedural protections go far beyond the minimum required by international law.

None of the authorities cited in the petition contradict the notion that equality of arms requires procedural equality, not substantive equality. As pointed out, in *Barbera, Messegue and Jabardo v. Spain,* the European Court found that the right to a fair trial requires that a defendant be able "to examine or have (sic) witnesses against him and to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him." 11 EHRR 360 (1994). No facts are alleged showing the court either prevented Garza from examining adverse witnesses or from obtaining the attendance of witnesses on his behalf. Similarly, there is no evidence the court treated Garza's witnesses, or his ability to examine them, any differently from the manner in which it treated the prosecution's witnesses. Garza's sentencing was conducted entirely in accordance with the principle articulated in *Barbera.*

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[4] Also puzzling is the petition's reference to Justice Marshall's statement in *Williams v. Lynagh,* 484 U.S. 935, 938 (1987). Justice Marshall indicated his objection to a Texas statute which permitted the introduction of evidence of unadjudiated crimes during sentencing on the defendant's application for a writ of certiorari. At least six other justices found that the case was not worthy of review, therefore, Justice Marshall's statement is of no legal import—the Supreme Court never reviewed the case.

ILI US Digest/6 395 1/8/02, 1:46 PM

Finally, in *Jespers v. Belgium,* a case in which the European Commission found that the principle of equality of arms had not been violated, the petition correctly notes that the European Commission observed that equality of arms applied to sentencing, albeit it did so in dicta. *See* 27 D.R. 61 (1981). More important, however, was the Commission's recognition of the limited scope of this principle, i.e., that under the European Convention, equality of arms requires that a defendant have access to any information in the prosecution's possession that might exonerate him or lead to a reduction in sentencing. *Id.* This principle is equally applicable in federal courts under the *U.S. Constitution, see Brady v. Maryland,* 373 U.S. 83 (1963), and indeed, the Fifth Circuit Court of Appeals found that the government fully complied with Brady in this case. *United States v. Garza,* 165 F.3d 312, 314-15 (5th Cir. 1999). The petition has identified no evidence to the contrary.

U.S. law permits both the government and the defendant to present all relevant evidence of mitigating or aggravating factors during sentencing. And, under U.S. law the prosecution must turn over to the defendant any and all mitigating evidence. Without evidence that the court deviated from these basic guarantees of procedural equality, the petition's claim of inequality of arms is without merit. Accordingly, the Commission should declare this claim inadmissible.

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2. Capital Punishment

On October 18, 2000, the United States Delegation to the OSCE Human Dimension Implementation Meeting provided its views on capital punishment as follows:

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Capital punishment is a controversial and emotional issue in the United States, with strong opponents and defenders. It is the subject of ongoing, passionate debate at all levels of American society.

ILI US Digest/6 396 1/8/02, 1:46 PM

It should be recognized that the United States is not monolithic about the death penalty. Several states do not use capital punishment, either because of a moratorium, or a statutory or judicial prohibition on use of the death penalty. And, most of the states that do permit capital punishment rarely impose it; over the last twenty years, almost half of the executions in the U.S. took place in only two states.

As evidence of the ongoing debate in our country, in January of this year, the governor of the State of Illinois announced a moratorium on executions in his state. Moreover, the United States Department of Justice has initiated an extensive review of the federal death penalty and the procedures under which it is imposed.

Nevertheless, at present, a majority of Americans support use of the death penalty and, therefore, the majority of states and the f*edera*l government retain the authority to impose capital punishment but only for the most serious crimes. The practice of the United States and its constituent states is, in this regard, consistent with international law.

While international law limits capital punishment to the most serious crimes and requires certain safeguards, most notably due process, it does not prohibit capital punishment. Indeed, the International Covenant on Civil and Political Rights specifically recognizes the right of states that have not abolished the death penalty to impose it. In the United States, the U.S. Supreme Court has strictly limited the application of the death penalty in a manner that conforms with the international obligations we have accepted.

We believe, that in a democratic society, the criminal justice system, including the punishments prescribed for the most serious crimes should reflect the will of the people, freely expres[s]ed and appropriately implemented. We recognize that many countries have abolished the death penalty under their domestic laws; however, in the United States, our open and democratic processes have led to a different result.

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3. Extrajudicial, Summary, or Arbitrary Executions

Also on April 20, at the Fifty-Sixth Session of the United Nations Commission on Human Rights, noted above in 6.A.1.b., the United States explained its support for L.

ILI US Digest/6 397 1/8/02, 1:46 PM

40, Extrajudicial, Summary or Arbitrary Executions, stating:

* * * *

The United States would like to express its appreciation to Sweden and others who are responsible for this text. In particular, we welcome the inclusion of Operative Paragraph 6 which notes the Commission's concern about killings in the name of honor and cases in which people have been killed because of their sexual orientation.

We have already noted at this Commission our deep concern about women who are killed by relatives for allegedly bringing shame to their families. We have made clear that governments must accept their responsibility to prosecute these arbitrary killings.

We have also spoken here about the discrimination that gays and lesbians face in virtually every country, and the necessity that governments prosecute those responsible when these vulnerable individuals are subjected to arbitrary killing. The terrible murder of Matthew Shepard in my own country reminds us that it is the fundamental duty of governments everywhere to investigate these cases thoroughly and to ensure that those who commit acts of violence against members of these vulnerable groups are brought to ju*stice.*

4. Alien Tort Claims Act: *Alvarez-Machain v. Sosa*

In March 2000 the United States filed a brief as amicus curiae in the Ninth Circuit Court of Appeals in *Alvarez-Machain v. Sosa*, No. 99-56880. Dr. Alvarez-Machain had been detained in 1990 by Mexican nationals, with the approval of the U.S. Drug Enforcement Administration, for transportation to the United States where he was arrested and tried on charges connected with his alleged involvement in the torture and murder of DEA Special Agent

ILI US Digest/6 398 1/8/02, 1:46 PM

Enrique Camarena-Salazar in Guadalajara, Mexico in 1985. In the subsequent criminal proceedings against Dr. Alvarez-Machain, he contended that the federal courts lacked jurisdiction to try him because of the manner by which he was apprehended. That claim was rejected by the Supreme Court, *Alvarez-Machain v. United States*, 504 U.S. 655 (1992). On remand, Dr. Alvarez-Machain was acquitted. Dr. Alvarez-Machain then brought this action against certain United States government officials under the Alien Tort Claims Act, 28 U.S.C. § 1350, which provides jurisdiction over civil tort actions by an alien "committed in violation of the law of nations or a treaty of the United States." The District Court concluded that his transborder arrest violated a "specific, universal and obligatory" norm of international law and granted judgment against Sosa. The following excerpt from the brief filed by the United States in the Ninth Circuit as amicus curiae sets forth the legal arguments of the United States supporting reversal of the judgment below, denying that plaintiff has standing to seek a remedy under the Alien Tort statute for transborder arrest and urging that the District Court erred in holding Sosa liable for plaintiff's detention under the statute.

The full text of the U.S. brief is available at *www.state/gov/s/l.*

ARGUMENT

1. Plaintiff Does not have Standing to Seek a Remedy under the Alien Tort Statute for Transborder Arrest.

1. The Alien Tort statute, 28 U.S.C. § 1350, provides as follows:

ILI US Digest/6 399 1/8/02, 1:46 PM

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

This statute requires, at a minimum, an alien and a tort in violation of international law. In re Estate of Ferdinand E. Marcos Litigation, 978 F.2d 493, 499 (1992), cert. denied, 508 U.S. 972 (1993) ("Estate I"). This Court has held, however, that not every claimed violation of the "law of nations" can be relied upon for purposes of this statute. To meet this element, a plaintiff must show that the international norm "is specific, universal, and obligatory." In re Estate of Ferdinand Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995) ("Estate II") citing, inter alia, *Filartega v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980). To determine whether a plaintiff has met his burden, the Court has stated that it

> must decide whether there is an applicable norm of international law, whether it is recognized by the United States, what its status is, and whether it was violated in the particular case.

Estate I, 978 F.2d at 502. While the Court will look for guidance on these matters to "court decisions, the works of jurists and the usage of nations," *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383-84 (9th Cir. 1998), the views of the Executive Branch, which is primarily responsible under the Constitution for U.S. relations with foreign States, are entitled to deference on these matters as well. *Haig v. Agee*, 453 U.S. 280, 292 (1981); U.S. Const., Art. II, §§ 2, 3.

2. Plaintiff does not have standing in this case to seek a remedy under the Alien Tort statute because he is not complaining of the violation of an international legal norm of which he, as an individual, is the

[3] While plaintiff also invokes the general principle that "[a] state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state," this principle is merely a "corollary" of the principle of state territorial sovereignty and adds nothing to plaintiff's argument. Restatement (Third) of Foreign Relations Law § 432(2) & cmt. b (1987) (Reinstatement).

ILI US Digest/6 400 1/8/02, 1:46 PM

beneficiary. Seeking to show that he is entitled to relief under section 1350,2 plaintiff primarily relies on the international norm that every nation has exclusive jurisdiction over its own territory, *See The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812), and claims that his apprehension by individuals acting on DEA's behalf violates this principle of State territorial sovereignty. ER 93.[3]

The principle of territorial sovereignty governs relations between sovereign States; it does not govern relations between States and individuals. Any violation of Mexican territorial integrity that may have occurred in connection with plaintiff's arrest is a matter of which only Mexico, exercising its own rights under international law, may properly complain. As a principle governing relations between sovereign States —and not between States and individuals—the principle cannot provide an operative legal rule, the violation of which entitles an individual to a remedy.[4] The United States does not believe that any violation of Mexico's sovereignty that occurred in connection with plaintiff's arrest is the kind of violation of international law for which an individual can seek relief under section 1350.[5]

Rather, as shown below, the remedies available for such a violation are to remedy the violation of the State's rights, not the individual's rights. Otherwise, a State-to-State international norm is transformed into a remedial vehicle for individuals, a purpose for which it seems particularly ill suited. For example, during NATO's recent bombing campaign in Kosovo, one can imagine a hypothetical situation where a

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[4] In contrast to this claim the international legal norms previously recognized by this Court as actionable under section 1350 have all implicated the relations of States to individuals, rather than the relations of States to States. *Compare Martinez*, 141 F.3d at 1383-84 (arbitrary arrest, prolonged arbitrary detention); *Estate II,* 25 F.3d at 1475 (summary execution, causing "disappearance"); *Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 714, 717 (9th Cir.1992), *cert. denied,* 507 U.S. 1017 (1993) (torture).

[5] We recognize this Court has held that section 1350 provides plaintiff with a cause of action. *Estate II,* 25 F.3d at 1475. As plaintiff noted in the Supreme Court, however, the issues of standing and a cause of action are conceptually "distinct," Brief For Respondent, 1992 WL 526163, at *41, *Alvarez-Machain, supra, citing Davis v. Passman,* 442 U.S. 228, 239-40 n.18 (1979). While plaintiff would have a cause of action under section 1350 if he could show that his rights under international law had been violated, he has no standing to complain of any violation of Mexico's territorial sovereignty as a result of his arrest.

precision-guided NATO bomb accidentally goes astray and falls on a house, injuring the owners. The rule applied by the district court would recognize the standing of the individual aliens to seek a remedy for this "tort" under the Alien Tort statute by, for example, suing the Secretary General of NATO in district court for violation of principle of territorial integrity, even though the "tort" (the personal injury) is not "in violation of the law of nations" (territorial sovereignty) in any relevant sense and the appropriate subject of any remedy for the violation of territorial integrity is the State, not the individual.

The expansion of the Alien Tort statute by the district court also may have dangerous international consequences for the United States. In pursuit of its legitimate foreign policy objectives, the United States occasionally may take actions that some would say violate its international obligations; this could include actions alleged to violate the territorial sovereignty of another State.[6] In plaintiff's view, any alien is entitled to complain of such conduct in federal court under section 1350, if a "tort" occurs thereby. Such a rule might render actionable efforts by the United States (and those acting on its behalf) to pursue its legitimate foreign policy aims (such as U.S. attacks on Usama Bin Laden's facilities in response to the African Embassy bombings or U.S. enforcement actions against fugitive international terrorists or drug traffickers), if such conduct violates another State's territorial integrity. The Alien Tort statute is not intended as a vehicle for U.S. courts to judge the lawfulness of U.S. government actions abroad in defense of national security and any remedies for such actions are appropriately matters for resolution by the political branches, not the courts.[7] This Court should reject the district court's extension of the Alien Tort statute to encompass legal principles that properly govern relations between sovereign States, rather than the relations between States and individuals.

3.a. The district court in this case stated that plaintiff cited a "wealth of international authority" to support the claim that his transborder arrest violates international law for purposes of section 1350. ER 93. Plaintiff, in fact, relied on these same authorities before the Supreme Court to

[6] In order to effectively carry out its legitimate policies, the United States may violate international law. *United States v. Howard-Arias,* 679 F.2d 363, 371-72 (4th Cir.), *cert. denied,* 459 U.S. 874 (1982).

[7] Indeed, such matters touch on political questions, inappropriate for judicial resolution. *See Baker v. Carr,* 369 U.S. 186, 210-13 (1962).

ILI US Digest/6 402 1/8/02, 1:46 PM

claim that his apprehension "is a violation of international law." *See* Brief For Respondent, 1992 WL 526163, at *16-*22, *43-44, Alvarez-Machain, supra. In concluding that plaintiff could be tried by U.S. courts consistently with the terms of the U.S.-Mexica*n* extradition treaty, notwithstanding the manner of his apprehension, the Supreme Court was unpersuaded, noting only that these a*utho*rities "may show the practice of nations" and that plaintiff's apprehension "may be in violation of general international law principles" but that determination of the appropriate remedy for that violation "is a matter for the Executive Branch." Alvarez-Machain, 504 U.S. at 666-69 & nn.15-16 (emphasis added). Certainly, the Supreme Court's treatment of these authorities does not demonstrate the sort of "specific, universal, and obligatory" norm of international law for which an individual remedy should be available under section 1350. Estate II, 25 F.3d at 1475. Further, the Court properly deferred to the role of the Executive Branch in resolving these foreign relations matters, both in plaintiff's case and more generally.[8]

b. There are a variety of negotiated State-to-State remedies for a State-sponsored transborder arrest under international law. That State-to-State remedial régime is by agreement of the States involved and does not entitle a plaintiff to an individual remedy. One possible remedy for a transborder arrest is the return of the arrested party by the apprehending State to the State from which he or she was taken. *See* Restatement, supra, § 432, cmt. c, at 329-30; Preuss, Settlement of Jacob Kidnapping Case, 30 Am. J. Int'l L. 123 (1936) (Former German citizen taken from Switzerland by Germany; after State-to-State arbitration, citizen returned to Switzerland); In re Vincenti (1920) reprinted in 1 H. Hackworth, Digest of International Law 624 (1940) (U.S. citizen arrested by federal agents in British territorial waters; at U.S. direction, criminal case dismissed and defendant released); Abraham Abromovsky, Extraterritorial Abductions: American's 'Catch And Snatch' Policy Run

[8] Plaintiff also relies on a legal opinion of the Inter-American Juridical Committee of the Organization of American States (OAS) that the *Alvarez-Machain* decision is contrary to international law. Opinion of the Inter-American Juridical Committee, *reprinted in* 13 Hum. Rts. L.J. 395-99 (1992). The Committee acknowledged, however, that its views were "a matter of consultative opinions that have no binding effect." *Id.* at 396. Indeed, Judge Rubin entirely abstained from ruling on the ground "the Committee has no jurisdiction to act in this way." *Id.* at 399.

ILI US Digest/6 403 1/8/02, 1:46 PM

Amok, 31 Va. J. Int'l L. 151, 208-10 (1991) (remedy "must be the repatriation of the defendant to his home country"); F.A. Mann, "Reflections on the Prosecution of Persons Abducted in Breach of International Law," International Law in a Time of Perplexity 411 (1989) (same).[9] This is a State-to-State remedy that the Executive Branch declined to apply in plaintiff's case. Alvarez-Machain, 504 U.S. at 666-70. It is not a remedy that individuals may claim, however. *Id.* Indeed, in the one case cited by plaintiff which holds, consistently with Alvarez-Machain, that the manner of rendition does not affect the prosecution, the French court rejected the individual's claim to a remedy:

> Examining the complaint based on the violation in this case of the rules of international law and of the principle of the sovereignty of States on their territory, the Court observes that the State which is entitled to complain of damage suffered by one of its nationals or protected persons in violation of its territorial sovereignty exercises its own right when it claims reparations. Individuals have no capacity to plead in judicial proceedings a contravention of international law. The putting in issue of international responsibilities concerns only relations between State and State, without individuals being entitled to intervene.

Re Argoud 45 I.L.R. 90, 96 (Cour de Cassation 1964) (emphasis added).[10]

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[9] Some of the authorities on which plaintiff relies permit the individual to raise the manner of apprehension as a basis for dismissal of the charge. *Bennett v. Horseferry Road Magistrate's Court,* [1993] 3 All E.R. 138 (House of Lords); *S. v. Ebrahim,* 1991 S. Afr. L. Rep. I (Apr.-June 1991); *In re Jolis,* [1933-34] Ann. Dig. 191 (Tribunal Correctional d'Avesnes). Such a result, however, was rejected by the Supreme Court as to this plaintiff. *Alvarez-Machain,* 507 U.S. at 666-670.

[10] The last case cited by plaintiff is a very confused decision concerning whether German authorities properly exercised jurisdiction over six French Foreign Legion deserters in Morocco, which, at the time, was under French military occupation. The case does not support an individual remedy. In fact, the court held that "the conflict between the two [State] jurisdictions [over the deserters] could not be determined by any absolute or general rule." *Casablanca Case (France v. Germany),* Hague Ct. Rep. 110 (Scott ed. 1916).

ILI US Digest/6 404 1/8/02, 1:46 PM

A second possible remedy is State-to-State negotiation and/or agreement to a treaty to resolve the dispute. In fact, the governments of the United States and Mexico pursued such a remedy here. Following plaintiff's apprehension, the United States gave written assurances to the Mexican government that it would "neither conduct, encourage or condone" similar transborder arrests from Mexico while the parties negotiated to resolve the issue. Statement of Alan J. Kreczko, Deputy Legal Adviser, Department of State, before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 3 State Department Dispatch 616 (August 3, 1992).[11] Subsequently, the United States and Mexico signed a Treaty on the subject. Treaty to Prohibit Transborder Abductions, *reprinted in* 5 M. Abell & B. Ristau, *International Judicial Assistance: Criminal,* A-676.3 to 676.6 (1995). That treaty prohibits transborder arrests by either State (Art. 2), provides procedures for resolving such incidents between the two States (Art. 4), and sets out various possible State-to-State remedies, including repatriation of the apprehended party in certain instances (Art. 5) and sanctions against the individuals responsible for the seizure (including prosecution, extradition[12] and civil or administrative sanctions) (Art. 6). *Id.* The Treaty, however, also makes clear that its provisions "may be invoked only by the Parties, are not intended to benefit third parties, and shall not give rise to a right on the part of any private person." *Id.* at A-676.5 (Art. 7). Although the Treaty is not in force,[13] the negotiations of the United States and Mexico leading to this Treaty—and the Treaty's disclaimer of private rights—sharply undercuts plaintiff's assertion that he is entitled to a remedy under international law.

A third possible remedy for transborder arrest is for the State whose territory has been violated to "receive reparation from the offending [S]tate." Restatement, supra, § 432, cmt. c; *Re Argoud,* 45 I.L.R. at 96. Reparations were used in the Eichmann case, on which plaintiff relies. After Eichmann's apprehension in Argentina by Israel, the United Na-

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[11] Mr. Kreczko, however, also stated that the United States was "not prepared to categorically rule out unilateral action…in certain extreme cases" as a matter of "self-defense." *Id.*

[12] As the Treaty indicates, extradition of the individuals responsible for the seizure is another possible State-to-State remedy and has been agreed to by the United States under certain circumstances. *See Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983).

[13] The Treaty is subject to ratification (Art. 9) and has not been ratified.

tions declared that his seizure "affect[ed] the sovereignty of a Member State [Argentina]," that, "if repeated," it might "endanger international peace and security" and requested "the Government of Israel to make appropriate reparations [to Argentina] in accordance with the Charter of the United Nations and the rules of international law." Security Council Resolution concerning Adolf Eichmann, U.N. Doc. S/4349 (23 June 1960).[14] As explained by U.N. Ambassador. Henry Cabot Lodge, "adequate reparations" simply consisted of the "expression of views by the Security Council in the pending resolution [that was eventually adopted] together with the statement of the Foreign Minister of Israel making apology [to Argentina] on behalf of the Government of Israel." 5 M. Whiteman, Digest of International Law 212-13 (1965). Again, these are State-to-State remedies, not individual remedies.[15]

c. Plaintiff also bases his claims on treaty provisions concerning territorial integrity in several international agreements, including both the Charters of the United Nations[16] and the Organization of American States.[17] Courts, however, have refused to allow individuals to complain

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[14] Unless adopted as a decision under Chapter VII of the U.N. Charter, U.N. Resolutions, including the one adopted in the Eichmann case, are non-binding. G. Schwarzenberger & E.D. Brown, A Manual of International Law 237 (1976). In Eichmann's prosecution, the Israeli courts held that the manner of his rendition "must…find its solution at th[e] international level" rather than before Israel's domestic tribunals. *Attorney General v. Eichmann,* 36 I.L.R. 277, 305 (S.Ct. Israel 1962).

[15] The only instance cited by plaintiff in which reparations were paid to an individual involved the situation where the seized party was executed by the apprehending State before he could be returned. *Amekrane v. United Kingdom* discussed in I Bassiouni, International Extradition: United States Law & Practice ch. V, § 5.4, at 236-37 (2d rev. ed. 1987). As Bassiouni explains, the abducted person's "widow received compensation as part of a settlement solution" between the affected States which, since the abducted person was dead, "there was no alternative remedy of requesting the country which kidnapped him to return him." *Id.* That is hardly the situation here.

[16] U.N. Charter, 59 Stat. 1037, art. 2(4) (June 26, 1945):

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

[17] Charter of the OAS, 2 U.S.T. 2420, TIAS No. 236 1, art. 17, as amended by the Protocol of Buenos Aires, 21 U.S.T. 607, 659, 662, TIAS No. 6847 (April 30,1948), Art. V (amending Art. 17 to Art 20):

The territorial integrity of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another

ILI US Digest/6 406 1/8/02, 1:46 PM

of violations of such multilateral *c*ompacts between States. Such agreements are not "self-executing" and require implementing legislation before they may be relied upon by individuals. *Committee of Citizens v. Reagan,* 859 F.2d 929, 937-38 (D.C. Cir. 1988). That is the case with both the U.N. Charter, *id.*, and the OAS Charter, *United States v. Noriega,* 746 F. Supp. 1506,1533 (S.D. Fla. 1990), aff'd, 117 F.3d 1206 (11th Cir. 1997), *cert. denied,* 523 U.S. 1060 (1998).

Plaintiff similarly relies on two provisions (Arts. 2(2)[18] and 2(3)[19]) of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs (28 I.L.M. 493). This Convention, similar to the U.N. and OAS Charters, is a multilateral treaty that is not self-executing. Indeed, it contains remedial provisions (Art. 32(1) and (2)) that require parties to resolve disputes under the Convention by "consult[ing] together with a view to the settlement of the dispute," and, if consultations fail, to refer the dispute "to the International Court of Justice for decision." 28 I.L.M. at 525. These State-to-State remedies wholly undercut plaintiff's claim that the Convention's provisions may be invoked by a private party.

In sum, whatever violation of the principle of State territorial sovereignty may have occurred in connection with plaintiff's arrest by individuals acting on DEA's behalf, such a violation is not one of which plaintiff has standing to complain under section 1350. A violation of State sovereignty is for the State to pursue, not the individual, and the remedies available for such a violation are to remedy the violation of the State's rights, not the individual's. The principle of State sovereignty relied on by plaintiff is not a "specific, universal, and obligatory" international norm in relation to individuals such that plaintiff has standing to seek a remedy under section 1350. Estate II, 25 F.3d at 1475.

4. Perhaps recognizing the weakness of his reliance on Mexico's rights, plaintiff alternatively asserts that State-sponsored transborder ar-

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State, directly or indirectly, on any ground whatsoever. No territorial acquisitions or special advantages obtained either by force or other means of coercion shall be recognized.

[18] "The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."

[19] "A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law."

ILI US Digest/6 407 1/8/02, 1:46 PM

rest is itself a violation of international human rights law, for which section 1350 provides a remedy. *See* ER 96. In support of his argument, plaintiff relies on provisions in the following documents: (1) the American Convention on Human Rights, 9 I.L.M. 673 (July 4, 1977), Art. 7 & 22[20]; (2) the International Covenant on Civil and Political Rights, Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171, (December 19, 1966), Art. 9 & 10[21]; (3) the Universal Declaration of Human Rights, G.A. Res. 218A, U.N. GAOR, 3d Sess. pt. 1, 67th Plea. Mtg., U.N. Doc. A/810 (1948), Arts. 3, 9, 10[22]; and (4) the American Declaration of the Rights and Duties of Man, signed May 2, 1948, O.A.S. Off. Rec. OEA/Ser./V/II.23 doc. 21, rev. 6 (English 1979), Art. 1 & 8.[23] None of these documents, either individually or collectively, evince a "specific, universal and obligatory" rule of customary international law proscribing State-sponsored transborder arrest to support a section 1350 claim. *Estate II,* 25 F.3d at 1475.

First, only the International Covenant on Civil and Political Rights is an operative treaty for the U.S. and it is not self-executing. While the United States has signed the American Convention on Human Rights, it is not a party to that Convention since it not yet been ratified (sic). Further, while the United States has ratified the International Covenant on Civil and Political Rights (the Senate gave its advice and consent on

[20] Art. 7. Right to personal liberty: "1. Every person has the right to personal liberty and security"; "3. No one shall be subject to arbitrary arrest and imprisonment"; Art. 22. Freedom of movement and residence: "5. No one can be expelled from the territory of the State of which he is a national, or deprived of the right to enter it."

[21] Art. 9: "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention." "5. Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation"; Art. 10: "1. All persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person."

[22] Art. 3: "Everyone has the right to life, liberty and security of person"; Art. 9: "No one shall be subjected to arbitrary arrest, detention, or exile"; Art. 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him."

[23] Art. 1: "Every human being has the right to life, liberty and the security of his person"; Art. 8: "Every person has the right to fix his residence within the territory of the state in which he is a national, to move about freely within such territory, and not to leave it except by his own will."

ILI US Digest/6 408 1/8/02, 1:46 PM

April 2, 1992, and that Covenant entered into force for the United States[24] on September 8, 1992, over two years after the events underlying this suit), the Senate and the Executive Branch agreed at the time of ratification that the Covenant articles on which plaintiff relies (Arts. 9 and 10) are not self-executing and may not be relied upon by individuals. S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9,19,23 (1992); 138 Cong. Rec. 8068, 8070-71 (April 2,1992). Where the political branches have explicitly agreed to preclude an individual remedy under these provisions, it would be particularly anomalous for this Court to recognize one here. Cf. *Humanitarian Law Project v. Reno,* 2000 WL 235310, at *4 (9th Cir. March 3, 2000) (political branches should have "wide latitude" in judgments "bound up with foreign policy considerations").

The two Declarations are not treaties, nor are they binding international agreements. Indeed, at the time of passage of the Universal Declaration of Human Rights, Eleanor Roosevelt, Chairman of the U.N. Human Rights Commission, who was instrumental to its passage, stated that the Declaration "is a declaration of basic principles" but "is not and does not purport to be a statement of law or legal obligation." 5 M. Whiteman, *supra*, at 243.

Second, even taken together, these documents do not evince a "specific, universal and obligatory" rule of customary international law prohibiting transborder arrests. None of these documents explicitly prohibits State-sponsored transborder arrests. As the Restatement acknowledges," [n]one of the international human rights conventions to date provide that forcible abduction or irregular extradition is a violation of international human rights law." Restatement, *supra*, § 432, Reporters Note 1, at 330.

Thus, the documents cited by plaintiffs neither individually nor collectively establish a basis for a claim under section 1350 for State-sponsored transborder arrest.

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[24] Even if plaintiff could invoke the provisions of the Covenant, there is doubt whether it would apply. Under the Covenant, the United States only agreed to ensure the rights recognized by the Covenant "within its territory and subject to its jurisdiction." Covenant, *supra,* Part II, Art. 2. 1. In this case, plaintiff complains of Sosa's conduct in Mexico resulting in plaintiff's transfer to U.S. custody; prior to his arrest in El Paso, plaintiff was not "within the territory" or "subject to the jurisdiction" of the United States and the Covenant is not applicable.

5. As our submission indicates, the United States does not believe that international law currently recognizes the standing of an individual—as contrasted with the standing of a sovereign State—to complain of a State-sponsored transborder arrest. One can also draw an analogy here to the considerations underlying the Supreme Court's decision in *Anderson v. Creighton,* 483 U.S. 635 (1987).

Anderson, of course, concerned the contours of an individual's remedy under *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971), for a violation of the Constitution. One might roughly analogize an alien's remedy under section 1350 to an individual's *Bivens* remedy under the Constitution. *Bivens*, however, is not a strict liability régime. Rather, a government official is liable *only* to the extent that he violated "clearly established…constitutional rights of which a reasonable person" would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). This standard attempts to balance conflicting concerns, *e.g.*, the need to provide a remedy for clearly illegal conduct with the fear that the unqualified imposition of liability would dampen the ardor of public officials seeking to properly carry out important duties. *See Harlow,* 457 U.S. at 814.

An individual official, consequently, is not liable under *Bivens* for violation of only generalized constitutional mandates. Rather, the specific "right the official is alleged to have violated must be clearly established in a more particularized, and hence, more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. By analogy here, the broad principles of State territorial sovereignty have never before been defined in the "more particularized" sense as a "specific, universal, and obligatory" international norm benefitting individuals such that the persons acting on DEA's behalf, including Sosa, would understand that what they were doing was tortious as to plaintiff. Indeed, the district court acknowledged that "[b]ecause of the unsettled state of [international] law, Defendant Sosa did not have a clear warning of the impropriety of his conduct." ER 147.[25]

Another aspect of *Bivens* is also relevant here. Courts do not allow a private remedy under *Bivens* where "special factors counsel[] hesitation."

[25] In this connection, the United States notes that, by virtue of the warrant, the district court held that neither Sosa nor any other federal law enforcement agents were liable under California tort law for either false arrest or false imprisonment. ER 81-89.

ILI US Digest/6 410 1/8/02, 1:46 PM

Schweiker v.Chilicky, 487 U.S. 412, 420-23 (1988). As explained above, the remedies for State- sponsored transborder arrest—and any related violation of State territorial sovereignty—are negotiated State-to-State remedies. In *Alvarez-Machain,* the Supreme Court indicated that such remedy questions, which involve foreign relations, are primarily for the Executive Branch, with which courts should not interfere. *Alvarez-Machain*, 504 U.S. at 669 & n.16. The Executive Branch's primacy in foreign relations provides a "special factor" counseling against extension of the Alien Tort statute to these circumstances. *Haig,* 453 U.S. at 292; *see also United States v. Verdugo-Urquidez,* 494 U.S. 259, 274 (1990); J.M. Rogers, International Law And United States Law 213-15 (1999). The existing State-to-State remedial régime under international law for State-sponsored transborder arrests—and the primacy of the Executive Branch in determining our nation's response to such incidents—cuts sharply against extension of section 1350 to the present circumstances.

II. The District Court Erred in Holding Sosa Liable for Plaintiff's Detention under the Alien Tort Statute.

This Court has held that "prolonged arbitrary detention" is an actionable violation of international human rights law under section 1350, *Martinez*, 141 F.3d at 1383-84; accord *Hilao v. Estate of Marcos,* 103 F.3d 789, 790-91, 794-95 & n.9 (9th Cir. 1996), and has upheld liability where aliens have been detained for prolonged periods by their own government without adequate legal process. *Id.* The district court erred in holding Sosa liable here for two reasons.

First, there is no basis for concluding that plaintiff's detention was arbitrary. As noted above, plaintiff's detention by Sosa was supported by a properly issued federal warrant following indictment by a grand jury. By reason of the warrant, plaintiff's detention was simply not "arbitrary" as a matter of law. *Martinez*, 141 F.3d at 1384. The district court distinguished *Martinez* on the ground that, in *Martinez*, there was a valid Mexican warrant and here there was not. ER 108. This confuses Mexican domestic law with *international* law. Whether the lack of a Mexican warrant raises concerns, either as a matter of Mexican law or as a breach of territorial integrity (discussed above), it does not render plaintiff's detention by agents acting on behalf of DEA "arbitrary," either as a matter of fact or legal process.

Second, even if arbitrary, plaintiff's detention simply was not prolonged. It is uncontested that plaintiff was detained for less than

ILI US Digest/6 411 1/8/02, 1:46 PM

twenty-four hours. ER 101, 109-10, 116-20. The district court held that plaintiff's claim "does not depend on the length of his detention"; rather, that period only goes to the issue of damages. *Id*. This ruling effectively eliminates the term "prolonged" from the actionable violation, rendering individuals liable under section 1350 for *any* arbitrary detention. It is also contrary to the Restatement, which recognizes that "arbitrary detention violates customary law" only "if it is *prolonged*…." Restatement, supra, § 702, cmt. h (emphasis added).

Plaintiff's brief detention by Sosa was not a "prolonged, arbitrary detention" and the district court's judgment on this ground should be reversed.

5. Impartiality of foreign courts: *Aguinda v. Texaco, Inc.* and *Jota v. Texaco, Inc.*

In an order of January 31, 2000, the U.S. District Court of the *So*uthern District of New York reopened the record on a pending motion to dismiss cases against Texaco, Inc. on grounds of forum non conveniens and international comity premised on defendant's consent to the ju*risd*iction of the courts of Ecuador and Peru. *Aguinda v. Texaco, Inc.,* No. 93 Civ. 7527 and *Jota v. Texaco, Inc.,* No. 94 Civ. 9266, 2000 Dist. LEXIS 745 (S.D.N.Y. Jan. 31, 2000). The record was reopened to receive any additional submissions by the parties regarding the independence and impartiality of the courts of Ecuador and/or Peru. By letter to Edward Scarvalone, Assistant U.S. Attorney for the Southern District of New York, the Honorable Jed S. Rakoff, United States District Judge, Southern District of New York, requested the views of the U.S. Department of State on whether the courts of Ecuador and Peru could be expected to adjudicate the cases in a fair and impartial manner. Paolo Di Rosa, Attorney Adviser, Office of Western Hemisphere Affairs, U.S. Department of State, provided the following response in a letter to Mr. Scarvalone of June 8, 2000.

ILI US Digest/6 412 1/8/02, 1:46 PM

The full text of both letters is available at *www.state/gov/s/l.*

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This letter responds to the request from United States District Judge Jed S. Rakoff set forth in a letter addressed to you, dated May 9, 2000. In that letter, Judge Rakoff asked for your assistance in obtaining input from the U.S. Department of State on certain issues bearing on the above-captioned cases.

Specifically, Judge Rakoff indicated in his letter and related Memorandum Order (dated January 31, 2000) that he had reviewed the 1998 and 1999 Country Reports on Human Rights Practices (hereafter "Human Rights Reports") for Ecuador and Peru, published by the U.S. Department of State, and queried whether the observations contained in those reports regarding the judicial systems of those countr[ie]s extend both to the criminal and civil courts.

By way of preface, it bears noting that United States Embassies abroad do not, as a matter of course in the exercise of their functions, engage in an exhaustive review of the host nation's judicial system in civil cases. At the same time, the views set forth by the Department of State in those portions of the Human Rights Reports that discuss the judicial system of a given country are not based exclusively on information from the criminal court system, and are not by design or definition limited to the criminal area; rather, they reflect conclusions drawn from the totality of the Embassy's exposure to, and analysis of, the host country's judicial system generally.

Accordingly, we ask that you convey to Judge Rakoff that the Department of State regards the relevant Human Rights Reports as an authoritative reference source. We understand that the judge has already reviewed the relevant reports online, but for convenience we are enclosing at Tabs A and B hard copies of the most recent reports.

In addition, in an effort to be as responsive as we can to the judge's inquiry, we are also enclosing (at Tabs C and D) copies of the most recently published Country Commercial Guides for each of the two countries at issue. These guides are prepared annually by U.S. Embassies with the assistance of several U.S. Government agencies, and are intended to provide guidance on the commercial environment in the host nation. Although perhaps not as directly on point for the purpose at hand as the Human Rights Reports, the commercial guides do contain brief

ILI US Digest/6 413 1/8/02, 1:46 PM

sections describing the local court system, and analyzing corruption issues. I direct your attention in particular to the sections indicated below. In the Ecuador guide: Chapter II.A, at p. 3; Chapter III.C at p. 5; Chapter VII.C at p. 4; Chapter VII.G at p. 7; and Chapter VII.L at p. 13. In the Peru guide: Chapter III at p. 2; Chapter VII.A.4 at p. 4; Chapter VII.A.7 at p. 7; and Chapter VII.A.11 at pp. 10-11. The commercial guides can be found online at the following website: *www.usatrade.gov.*

We hope this information is helpful to the Court in its analysis. You should feel free to share this letter, along with its attachments, with Judge Rakoff in the manner you deem fit. Please let me know if the Department of State can be of any further assistance.

CROSS-REFERENCE

Human Rights and Terrorism in **3.B.4.**

ILI US Digest/6 414 1/8/02, 1:46 PM

CHAPTER 7

International Organizations and Multilateral Institutions

A. DEFINTION OF "INTERNATIONAL ORGANIZATION"

U.S. domestic law uses the term "international organization" in a variety of contexts, usually without specifically defining it. The excerpt below from a file memorandum provides the analysis of that term under international law, applied by the Department of State in domestic legislation it administers.

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"International organization" is a term of art frequently used in a similar sense in both international and U.S. domestic law. Under international law, an international organization is an entity created by States in order to transact some specified international business. International organizations have a membership composed exclusively or predominantly of States, and are usually created by means of a treaty or formal international agreement. They have a formal system of governance through which participating States decide on the activities of the organization. They typically have substantial immunities from national law where they operate, and have been given legal personality both under domestic and international law. (That is, they can enter into contracts and the like under domestic law, and have the right to conclude treaties and make international claims under international law.) They typically have an indefinite (or at least long) duration.

The Department of State applies the tests applicable under international law in determining whether a particular entity is an international

ILI U.S. Digest/7 415 1/8/02, 1:46 PM

organization for purposes of statutes it administers. For example, we are regularly called upon to decide whether particular entities are qualifying to which U.S. Federal employees are detailed under the terms of 5 U.S.C. 3343(b) and 3581 et seq. The statute does not define this term. However, our longstanding practice is to employ a set of criteria corresponding to the requisites of an international organization as sketched above. The Department requires that, to qualify as an international organization, an entity must be composed substantially, if not exclusively, of States and be generally formed by, or pursuant to a multilateral act such as a treaty or bilateral agreement. We also consider whether the organization has separate legal personality, operates under a formal constitutive document and performs functions of a genuinely international character. We also take into account whether the entity has been recognized as having the status of an international organization (as opposed to an association, corporation or NGO) with the United Nations.

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B. COMMENTS ON REPORT OF INTERNATIONAL LAW COMMISSION 2000

James H. Thessin, Acting Legal Adviser, U.S. Department of State, addressed the Sixth Committee of the United Nations General Assembly on October 27, 2000, on the Report of the International Law Commission regarding its work during the year 2000 (Agenda Item 159). His comments on the Commission's revisions of draft articles on State responsibility as well as treatment of diplomatic protection, unilateral acts of state, reservations to treaties and international liability for injurious consequences arising out of acts not prohibited by international law are set forth below.

The text is available at *www.state.gov/s/l.*

ILI U.S. Digest/7 416 1/8/02, 1:46 PM

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Mr. Chairman,

We recognize that countermeasures are a subject concerning which there appears to be some significant difference of opinion in the international community. Moreover, we note that countermeasures are the only circumstance precluding wrongfulness that are the subject of detailed treatment in the draft articles. In addition, we are mindful that, if the Commission intends to complete its work on the State Responsibility topic at its next session, there will be only a limited amount of time available to the Commission to devote to the revisions in the current text of the draft articles on countermeasures that a number of States, the United States included, believe are necessary. Accordingly, we believe that the Commission may wish to consider at its next session a range of issues with respect to its treatment of countermeasures, including whether the detailed treatment of countermeasures in the State Responsibility articles could be deleted, leaving the subject for development at some later date, and, should the Commission decide to include a Chapter on countermeasures, how the text of the current draft articles can best be revised to arrive at a text that better reflects customary law.

The United States is pleased that the concept of "international crimes" has been removed from the draft articles. With respect to the suggested provisions dealing with serious breaches of essential obligations to the international community, however, we are of the preliminary view that the broad language used in Article 42(1) to define what constitutes a "serious breach" is vague and risks being over-inclusive. Almost any breach of an international obligation could be described by an injured State as meeting the criteria for "serious breach." Moreover, it is not clear how the international community benefits from suggesting two categories of breaches — serious and other — nor why certain remedies should be available to one category but not the other. There are no qualitative distinctions among wrongful acts in customary international law and we would not support the introduction of any such distinctions.

We are also concerned with the consequences delineated in Article 42 for States found to have committed serious breaches of obligations to the international community as a whole. In particular, Article 42(1) includes language ("damages reflecting the gravity of the breach") that some might interpret to allow punitive damages for serious breaches. The United States believes such an interpretation would be contrary to

ILI U.S. Digest/7 417 1/8/02, 1:46 PM

long standing customary international law which excludes punitive damages from the scope of potential remedies. We are also uncertain that the obligations of States under Article 42(3) have a firm basis in customary international law. We note that the United Kingdom in its presentation to this Committee earlier this week raised the possibility that the question of serious breaches might be dealt with by some form of saving clause without harming the structure or objective of the draft articles as a whole. Such a saving clause might be to the effect that the draft articles are without prejudice to any regime that may be established to deal with serious breaches of obligations erga omnes. We invite the Commission to give careful consideration to the suggestion that it proceed by means of a saving clause, especially in light of the limited time available to the Commission to complete its work on the State Responsibility topic, if, as we understand, it intends to complete this work at its next session.

On the subject of the definition of "injured State", the United States is pleased that the Commission has drawn a distinction between States that are specifically injured by the acts of wrongdoing States, and other States that do not directly sustain injury. Both injured States and other States can demand cessation of the wrongful conduct of another State that breaches an obligation owed to the international community as a whole, but only injured States can seek reparation on their own behalf. We believe that the distinction between injured States and other States is a sound one. However, we hope that the Commission will consider whether the definition of injured State can be narrowed even further. The United States notes, in this respect, that draft Article 43(b)(ii) provides that if an obligation breached is owed to a group of States or the international community as a whole and "is of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned," then a State may claim injured status. This language appears to us to be too broad, in that it might permit almost any State to assert its status as an injured State, and therefore defeat the purpose of drawing a distinction between injured States and other States. We hope that the Commission will give its careful attention to the scope of this provision. As with a number of our other observations, we will provide more detail on our views in the written comments that we intend to provide before the date set by the Commission.

Turning now to the question of what form the draft articles on State Responsibility should ultimately assume, a question that has received

ILI U.S. Digest/7 418 1/8/02, 1:46 PM

significant and thoughtful attention during this week's debate, we are of the view that it would not be useful or productive to seek to finalize the Commission's work in the form of a Convention. First, we note that the character of the draft articles, as reflecting secondary rules of international law, does not appear to us to call for the Convention form in the same manner that might be true with respect to an instrument establishing primary obligations. In addition, we believe that there is a significant risk that an effort to reach agreement on a Convention could, in the end, if not wholly successful, result in leaving the Commission's work in an unsettled state in which it would be less useful to the international community than may be the case if another ultimate product is sought. We note also that a decision not to proceed to a Convention would permit the Commission to continue to leave to one side the dispute settlement provisions contained in the text from the first reading and omitted from the current text, as to which we believe there is a marked lack of consensus in the international community.

We are pleased with the progress the Commission has made in this session on the important topic of diplomatic protection, referring draft articles 1, 3 and 5 through 8 to the Drafting Committee for further consideration. We are giving careful thought to the questions concerning nationality raised by the Commission in Part III of its report, and plan to provide a response to these questions at a later date.

The United States notes that the Commission wisely concluded that draft Article 4 was not yet ripe for consideration by the Commission. Draft Article 4 would impose a legal duty on the State to exercise diplomatic protection on behalf of an injured person upon request, if injury resulted from breach of a *jus cogens* norm attributable to another State. The United States strongly objects to the view that diplomatic protection is the right of the individual. Under customary international law, diplomatic protection clearly is a discretionary right of the State. The progressive development of the law of diplomatic protection should take place only in areas customary international law fails to address adequately. The nature of diplomatic protection is not such an area.

The wisdom and practicality of adopting unilateral acts of state as a subject for codification and progressive development are unclear. Articles on the subject would likely restrict the flexibility that States enjoy in employing a variety of appropriate unilateral acts. In addition, unilateral acts can be extremely varied, and there is a real question regarding the possibility of developing general rules applicable to all of them. A

ILI U.S. Digest/7 419 1/8/02, 1:46 PM

simple survey of state practice by the rapporteur might therefore be preferable to a set of articles, at least in the first instance.

The United States welcomes the work being done by the International Law Commission on reservations to treaties. Articles 19 through 23 of the Vienna Convention on the Law of Treaties provide the fundamental legal rules on this subject. Nevertheless, developments over the last three decades have made it desirable that the Commission develop a Guide to Practice relating to the legal regime of reservations and interpretative declarations. We believe that the Special Rapporteur for this topic, Professor Pellet, is making a valuable contribution in this area and look forward to the Commission completing its work on the guidelines within a reasonable period.

With respect to Chapter VIII of the report concerning "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (Prevention of Transboundary Damage From Hazardous Activities)," we commend the ILC, the working group studying this issue, and the Special Rapporteur, for their continuing work on this issue and their focus on the matter of prevention. This topic is of particular importance in the field of international environmental law. We believe that the draft articles on the prevention of transboundary damage from hazardous wastes contain many useful elements. International regulation in the area of liability ought to proceed in careful negotiations concerned with particular topics (e.g., oil pollution, hazardous wastes) or with particular regions (e.g., environmental damage in Antarctica). We agree with the decision taken by the Commission to defer consideration of the question of international liability, pending completion of the second reading of the articles on prevention.

CROSS-REFERENCES:

Claim of violation of due process filed with Inter-American Commission on Human Rights in **6.G.1.**

Role of Supranational organizations in multilateral organizations and treaties in **4.A.2**.

ILI U.S. Digest/7 420 1/8/02, 1:46 PM

CHAPTER 8

International Claims and State Responsibility

A. GOVERNMENT-TO-GOVERNMENT CLAIMS

1. Claims relating to Bombing of Chinese Embassy in Belgrade

a. U.S. statutory authority to make payment to People's Republic of China

The Consolidated Appropriations Act, Pub. L.106-554, 114 Stat. 2763, signed into law December 15, 2000, included authority to fund an agreement entered into between the United States and China to settle Chinese claims for property loss and damage as a result of the accidental U.S. bombing of the Chinese Embassy in the Federal Republic of Yugoslavia in May 1999, during the NATO bombing campaign. (References to May 7 or 8 reflect the difference in time zones between the U.S. and China.) The Act provides in Section 602, Division A, that funds appropriated to the Economic Support Fund account for 2001

> may be made available, notwithstanding any other provision of law, to provide payment to the government of the People's Republic of China for property loss and damage arising out

ILI U.S. Digest/8 421 1/8/02, 1:46 PM

of the May 7, 1999 incident in Belgrade, Federal Republic of Yugoslavia.

b. U.S. agreement to pay damages

The Agreement Between the Government of the United States of America and the Government of the People's Republic of China, entered into on December 16, 1999, provided for payment for such damage in the amount of $28 million:

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AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA

The Government of the United States of America and the Government of the People's Republic of China have reached the following agreement on the settlement of the Chinese claims for property loss and damage suffered by the Chinese side as a result of the U.S. bombing of the Chinese Embassy in the Federal Republic of Yugoslavia on 8 May 1999:

Article 1

The sum of twenty eight million U.S. dollars shall constitute the final settlement amount. The payment shall be subject to the completion of national legal procedures by the two governments. The Government of the United States shall pay the above-mentioned amount to the Government of the People's Republic of China in a single payment to an account opened by the Chinese Government with the Bank of China Headquarters, Beijing, no later than 15 days after each government notifies the other of the completion of its national legal procedures.

Article 2

The agreed amount, when fully paid as agreed, will constitute a full and final settlement of any and all claims for property loss and damage suffered by the Chinese side as a result of the U.S. bombing of the Chinese Embassy in the Federal Republic of Yugoslavia.

ILI U.S. Digest/8 422 1/8/02, 1:46 PM

Article 3

Any dispute regarding the interpretation or application of this agreement shall be settled by the two sides through consultations.

Done in duplicate in Beijing on 16 December 1999 in English and Chinese languages, both texts being equally authentic.

* * * *

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c. U.S. letter concerning requirement for legislation

At the same time, David R. Andrews, the Legal Adviser of the Department of State and head of delegation for the negotiations, provided a letter to Mme. Xue Hanqin, Director General of the Department of Treaty and Law in the Chinese Ministry of Foreign Affairs, his Chinese counterpart, to make clear that the reference to "national legal procedures" in Article 1 of the Agreement meant that no payment could be made by the United States without the kind of legislative authority provided in Public Law 106-554. (*See* A.1a.above.)

The letter is available at *www.state.gov/s/l*.

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This letter follows up on our conversations regarding the meaning of "national legal procedures" referred to in Article 1 of the Agreement between the Government of the People's Republic of China and the Government of the United States of America ("the Agreement"), which we will sign on behalf of our countries later today.

As I have indicated over the course of our discussions, the U.S. Executive Branch must seek an appropriation for the purpose of settling the claims of the People's Republic of China for the property damage suffered by the Chinese side as a result of the U.S. bombing of the Chi-

ILI U.S. Digest/8 423 1/8/02, 1:46 PM

nese Embassy in the Federal Republic of Yugoslavia on 8 May 1999. To that end, the U.S. Executive Branch will seek such an appropriation when it presents its budget early next year to the Congress for the fiscal year beginning October 1, 2000.

The reference in Article 1 of the Agreement to "national legal procedures" refers to the domestic legal requirement that an appropriation from Congress must first occur before the Government of the United States has completed its national legal procedures.

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d. Chinese agreement to pay damages

Also on December 16, 1999, the United States and the People's Republic of China entered into a Memorandum of Understanding in which China agreed to pay 2.87 million U.S. dollars to settle U.S. claims for property loss and damage suffered as a result of rioting and attacks on the U.S. Embassy in Beijing, the residence of the U.S. consul-general in Chengdu, and the consulate in Guangzhou.

The full text is available at *www.state.gov/s/l.* Articles 1 and 2 of the Memorandum provide:

◆

MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA

The Government of the United States of America and the Government of the People's Republic of China have reached the following understanding on the settlement of the U.S. claims for property loss and damage suffered by the U.S. side after the U.S. bombing of the Chinese Embassy in the Federal Republic of Yugoslavia on 8 May 1999:

ILI U.S. Digest/8 424 1/8/02, 1:46 PM

Article 1

The sum of 2.87 million US dollars shall constitute the final settlement amount. The Government of the People's Republic of China shall pay the above-mentioned amount to the Government of the United States in a single payment to an account opened by the Embassy of the United States in Beijing no later than ten working days after the payment by the Government of the United States under the Agreement Between the Government of the United States of America and the Government of the People's Republic of China done on the same day.

Article 2

The agreed amount, when fully paid as agreed, will constitute a full and final settlement of any and all claims for the property loss and damage suffered by the U.S. side after the U.S. bombing of the Chinese Embassy in the Federal Republic of Yugoslavia.

* * * *

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e. U.S. apology for accidental bombing

Immediately following the bombing, the United States had apologized for the bombing, which killed three Embassy employees and wounded 27 others in addition to severely damaging the Embassy building. The United States made clear that the bombing was a grave mistake and a tragedy that occurred as a result of a series of failures in U.S. intelligence and targeting procedures. A letter from Secretary of State Madeleine K. Albright to Minister of Foreign Affairs of the People's Republic of China Tang Jiaxuan, dated May 8, stated:

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ILI U.S. Digest/8 425 1/8/02, 1:46 PM

I know Ambassador Sasser and other officials have already conveyed our deep regret about the tragic, accidental fall of bombs on your Embassy in Belgrade, but I wanted to express personally to you my sincere sorrow for the loss of life, injuries, and damage. On behalf of my government and as a member of NATO, I extend sincere apologies and condolences.

NATO has made every effort to confine the air strikes to Serb military and strategic targets and avoid harm to civilian targets. There was absolutely no intention to hit your Embassy as NATO has announced. Despite all of these efforts, there have been unfortunate accidents, including the tragic damage and losses at your Embassy.

I understand your continuing concerns about NATO's actions in Yugoslavia, but in this difficult period, it is also important to remember why NATO undertook this mission. Milosevic and Serb forces are engaged in a systematic and brutal attack on ethnic Albanians. NATO cannot allow Milosevic's "ethnic cleansing" to go unchecked, and its mission will continue until an acceptable resolution is reached.

We understand the high emotions this accident has generated among the Chinese people, but we are concerned that the large-scale demonstrations at our Embassy and Consulates in China are threatening the safety of our officials and their families and causing damage to our properties. We expect and ask the Chinese government to meet its responsibility to take all appropriate measures to ensure the safety of all Americans in China and protection of American properties. We ask that the Chinese government provide as soon as possible substantial security reinforcements around the Embassy and Consulate buildings.

In this difficult period, I think it is more important than ever for us to remember our Presidents'—and our—commitment to work together to build a constructive strategic partnership. There is too much at stake for us not to do so. We need to continue to work together on matters of mutual and global concern, including resolution of the situation in Kosovo. I am committed to continuing our productive cooperation on these and other important bilateral issues.

Again, please accept my deepest regret and condolences.

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ILI U.S. Digest/8 426 1/8/02, 1:46 PM

f. U.S. briefing to Chinese on errors and compensation issues

In an oral briefing provided to the Chinese Government on June 17, 1999, Under Secretary of State for Political Affairs Thomas Pickering provided a detailed explanation of the errors that had led to the bombing of the Embassy. The excerpts below addressed the Chinese requests for compensation.

The full text of the briefing is available at *www.state.gov/s/l.*

* * * *

I am here at the instruction of President Clinton as his personal envoy. He has asked me to deliver a letter from him to President Jiang; to present the official report of our investigation into the accidental bombing of your embassy in Belgrade; and to answer any questions you may have about the report. My remarks and comments will constitute a full report to you.

The attack was a mistake. Our examination explains how a series of errors and omissions led to that mistake. Let me emphasize: no one targeted the Chinese Embassy. No one, at any stage in the process, realized that our bombs were aimed at the Chinese Embassy.

It is entirely appropriate that we provide you with an explanation of how this awful tragedy occurred. The U.S. Government recognizes our responsibility to provide a full explanation. We have undertaken our own internal investigation into this matter and want to share our results with you.

* * * *

In this tragic case, the facts show a series of errors: that the target was mislocated; the databases designed to catch mistakes were inaccurate and incomplete; and none of the reviews uncovered either of the first two errors.

ILI U.S. Digest/8 427 1/8/02, 1:46 PM

COMPENSATION:

The bombing of the Embassy in Belgrade was a tragic accident occurring during a time of ongoing hostilities in Yugoslavia. While the action was completely unintended, the United States and NATO nevertheless recognize that it was the result of a set of errors which led to the embassy being mistakenly targeted.

In view of these circumstances, and recognizing the special status of the diplomatic personnel who were affected, the United States wishes to offer immediate ex gratia payments to those individuals who were injured in the bombing and to the families of those killed, based on current experience internationally for the scale of such payments.

I have asked Ambassador Sasser to discuss the particulars of this offer on our part with you in the next few days.

As for the damage to the embassy property in Belgrade, this is clearly a more complicated question. There is also the question of damage suffered by U.S. diplomatic and consular facilities in China in early May due to attacks by demonstrators.

Because of their complexity, these latter issues will need to be examined with some care. We believe they too can be discussed through diplomatic channels and are ready to do so at a mutually suitable time.

g. U.S. voluntary humanitarian payments for deaths and injuries

Voluntary humanitarian payments by the United States for the families of the three killed and for the 27 injured as a result of the bombing of the Embassy referred to in Under Secretary Pickering's June 17 briefing, in the amount of $4,500,000, were provided for in a Memorandum of Understanding dated July 30, 1999. Excerpts are provided below.

The full text is available at *www.state.gov/s/l.*

ILI U.S. Digest/8 428 1/8/02, 1:46 PM

MEMORANDUM OF UNDERSTANDING BETWEEN THE DELEGATION OF THE UNITED STATES OF AMERICA AND THE DELEGATION OF THE PEOPLE'S REPUBLIC OF CHINA

The U.S. Delegation, headed by Mr. David Andrews, Legal Adviser of the State Department of the United States of America, and the Chinese Delegation, headed by Mr. Yin Yubiao, Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of the People's Republic of China, conducted two rounds of negotiations on July 15 and 16 and July 28 and 30, 1999 in Beijing on the settlement of Chinese claims for the deaths and injures and for property loss and damage suffered by the Chinese side as a result of the U.S. bombing of the Chinese Embassy in the Federal Republic of Yugoslavia. The two sides have reached the following understanding:

1. The two sides have reached a consensus on the payment relating to deaths, injuries or losses suffered by the personnel of the Chinese side. The U.S. Government will pay to the Chinese Government the sum of U.S. $4,500,000 in a single payment as promptly as possible consistent with U.S. legal requirements, for direct distribution by the latter to the bereaved families and those suffering injuries or losses.

2. The Chinese Government, upon receipt of the amount mentioned above, will distribute, as soon as possible, all the funds among the bereaved families and those suffering injuries or losses, and provide the U.S. Government with relevant information and receipts confirming the distribution.

3. The agreed amount, when fully paid as agreed, will constitute a full and final settlement of any and all claims for deaths, injuries or losses suffered by the personnel of the Chinese side caused by the U.S. bombing of the Chinese Embassy in the Federal Republic of Yugoslavia.

2. Partial Award in Case No. A-11, Iran-U.S. Claims Tribunal

On April 7, 2000, the Iran-United States Claims Tribunal in The Hague issued a Partial Award in *The Islamic Republic of Iran and The United States of America*, Case No.

ILI U.S. Digest/8 429 1/8/02, 1:46 PM

A-11 (Award No. 597-A11-FT, available on Westlaw in the U.S.-Iran Claims Tribunal database). The Partial Award was signed by all nine members of the Tribunal, but with Judges Broms, Noori, Ameli and Aghahosseini noting their dissent in part and with Judges Broms and Ameli filing separate opinions.

In its Statement of Claim, Iran had asserted that the United States violated certain of the obligations imposed by Point IV (paragraphs 12-15) of the General Declaration of the Algiers Accords concerning Iran's claims for the assets of the Shah and his close relatives allegedly located in the United States. The United States argued that Iran was mischaracterizing the requirements of Point IV and that the United States had fulfilled all of its obligations. A full history of the events leading to the conclusion of the Accords, adhered to by the United States and Iran on January 19, 1981, the role of such assets in the negotiations and steps taken by the United States in implementation of Point IV are set forth in the Partial Award. *Id*. at 8-20. In 1993 the Tribunal bifurcated proceedings in the case. The Partial Award addresses the first half of the issues—"the legal and factual basis of the United States' liability." The issue of remedies will be addressed separately. A hearing on the liability issues was held on February 16-18, 1998 in the Peace Palace at The Hague.

The Tribunal found in its Partial Award that under point IV the United States was obligated to help Iran in specific ways with litigation concerning assets of the Shah and his close relatives that Iran believed to be located in the United States but was not obligated, as Iran claimed, to ensure the success of such litigation nor to return or cause to return any assets without a final judgment in a U.S. court; that the U.S. obligation to freeze "property and assets in the

ILI U.S. Digest/8 430 1/8/02, 1:46 PM

United States within the control of the estate of the Shah" never arose because no personal representative of the Shah was appointed in the United States and there was thus no legally constituted estate; that the parties did not intend to grant Iran full immunity from all procedural and jurisdictional defenses; and that the United States was only obligated to instruct its courts to enforce Iranian decrees and judgments concerning the assets in accordance with U.S. procedural and substantive law. As to the U.S. obligations to freeze and require reporting about assets of a close relative of the Shah "served as a defendant by Iran," the Tribunal defined the term "served" to mean "served in apparent compliance with the law", contrary to the United States position that the term required service to be either "uncontested or, if contested, upheld by the highest court presented with the issue." As a result, it found U.S. actions to be deficient in several cases. In a subsequent proceeding on damages the Tribunal will determine whether Iran has established that it has suffered a loss as a proximate result of any failure of the United States to fulfill any of its obligations under Point IV. Partial Award at 114-119. The United States position is summarized in the excerpts below from its 1996 Hearing Memorial and Evidence of the United States on the Issue of Liability (filed December 12, 1996).

The full text of the Memorial and the affidavit of Warren Christopher are available at *www.state.gov/s/l.*

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SUMMARY OF AGREEMENT

In the Majlis Resolution of November 1980, the Majlis demanded that the United States confiscate and return to Iran the Pahlavi family assets. Throughout the negotiations leading to the conclusion of the Algiers Accords, the United States made clear that the United States Constitution prohibited the Executive Branch from unilaterally transfer-

ILI U.S. Digest/8 431 1/8/02, 1:46 PM

ring such assets because only the courts acting independently could order the transfer of such property. The United States also made clear that Iran would have to undertake litigation to pursue its claims to any property located in the United States, but that the United States could not guarantee that Iran would be successful in its litigation. Iran then demanded a $10 billion guarantee against the chance that it might lose in its litigation. The United States refused to make that guarantee because itr would have been akin to paying ransom for the release of the hostages. Ultimately, Iran agreed to take its chances in U. S. courts, and the United States agreed to provide the assistance specified in Point IV of the General Declaration.

In this case, Iran seeks to obtain what it tried but failed to obtain during the negotiation of Point IV of the General Declaration: a guarantee by the United States of the return to Iran of the alleged wealth of the late Shah and his family. Point IV contains no such guarantee or obligation. Instead, Point IV requires Iran to undertake certain specific actions to initiate and prosecute U.S. litigations to recover the assets of the Shah's estate and the Shah's close relatives. The United States' obligations under Point IV are directly tied to steps Iran must first take in its U. S. litigation. Until Iran accomplishes these steps, none of the Point IV obligations of the United States is triggered.

* * * *

ARGUMENT

This Tribunal has repeatedly recognized that the touchstone for interpreting the Algiers Accords is Article 31(1) of the Vienna Convention on the Law of Treaties,[18] which provides that a treaty shall be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[19] In applying the Vienna Convention to the Algiers Accords,

[18] Vienna Convention on the Law of Treatises, May 23, 1969, U.N. Doc. A/Conf. 39/27, 1155 U.N.T.S. 332 (hereinafter "Vienna Convention").

[19] *See Iran v. United States*, AWD No. 382-B1-FT, ¶ 47, *reprinted in* 19 Iran-U.S. C.T.R. 273, 287 (Aug. 31, 1988); *United States v. Iran*, DEC No. 37-A17-FT, ¶ 9, *reprinted in* 8 Iran-U.S. C.T.R. 189, 200 (May 13, 1985); *Iran v. United States*, AWD No. ITL 63-A15-FT, ¶ 17, *reprinted in* 12 Iran-U.S. C.T.R. 40, 46 (Aug. 20, 1986); *Iran v. United States*, DEC No. 32-A18-FT, at 14, *reprinted in* 5 Iran-U.S. C.T.R. 251, 259-260, 273 (Apr. 6, 1984); *Iranian Customs Administration v. United States*, AWD No. 172-B3-3, at 5, *reprinted in* 8 Iran-U.S. C.T.R. 89, 92 (Apr. 17, 1985).

ILI U.S. Digest/8 432 1/8/02, 1:46 PM

the Tribunal has further recognized that, because Iran and the United States negotiated the Accords through intermediaries, "[t]he terms themselves should be given primary weight in the analysis of the text." *United States v. Iran*, DEC No. 37-A17-F, ¶ 9, *reprinted in* 8 Iran-U.S. C.T.R. 189, 200-201 (May 13, 1985). Applying the familiar standards of Article 31(1) to the text of Point IV demonstrates that the United States' obligations are explicitly tied to Iran's efforts to transfer property from the Shah and his family through U.S. litigation. Further, the facts—which are largely undisputed—establish that the United States has complied with each of the obligations imposed by Point IV.

* * * *

I. The United States Has Complied Fully with Its Paragraph 12 and 13 Obligations to Freeze and to Collect Information Concerning U.S. Assets Controlled by the Shah's Estate or His Close Relatives Served as a Defendant in U.S. Litigation.

* * * *

A. Under Paragraph 12 of the General Declaration, the Estate of the Shah and the Shah's Close Relatives Are Treated Identically.

The ordinary meaning of the text of Paragraph 12 supports the conclusion that the Shah's estate and the Shah's close relatives are treated identically—*i.e.*, that either must be served as a defendant to trigger the freeze and information gathering requirements. This similar treatment is clearly reflected in the language of Paragraph 12: the obligations as to the property of the Shah's estate and the property of the Shah's close relatives are dependent upon Iran having "served as a defendant" either the Shah's estate or the close relative, as the case might be. Thus, Paragraph 12 provides that:

> … the United States will freeze, and prohibit any transfer of, property and assets in the United States within the control of the estate of the former Shah or of any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets as belonging to Iran. As to

ILI U.S. Digest/8 433 1/8/02, 1:46 PM

> any such defendant, including the estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated….

The ordinary meaning of the first sentence is that the United States will freeze property controlled by the estate of the Shah or a close relative only after the estate or the close relative has been served as a defendant.

The second sentence in Paragraph 12 leaves no doubt that the "served as a defendant" language in the first sentence applies to both the Shah's estate and the Shah's close relatives: "As to *any such defendant, including the estate of the former Shah*, the freeze order will remain in effect until such litigation is finally terminated." (Emphasis added.) Plainly, the phrase "such defendant, including the estate of the former Shah" refers to the "served as a defendant" phrase in the first sentence—the Shah's estate could not be a defendant unless it had been served. Further, the last phrase of the second sentence of Paragraph 12 also explicitly ties the freeze obligations to litigation: "the freeze will remain in effect until such litigation is finally terminated." Thus, interpreting Paragraph 12 by looking to the ordinary meaning of its terms leads to the conclusion that the "served as a defendant" requirement applies to both the estate of the former Shah and the Shah's close relatives.

The context of Paragraph 12—the remainder of Point IV—reinforces this interpretation.…

The object and purpose of Point IV—to create a mechanism whereby Iran could receive a measure of United States' assistance in its efforts to pursue allegedly stolen assets in U.S. litigation—also confirms the ordinary meaning of the terms of Paragraph 12.…

To the extent that there is any ambiguity in Paragraph 12, the negotiating history of the Accords (*i.e.*, the preparatory work) confirms that the phrase "served as a defendant" applies to both the estate of the Shah and the Shah's close relatives.[21] One of the United States' interests was to ensure that those from whom Iran sought assets would receive due process in U.S. courts.

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[21] Article 32 of the Vienna Convention provides that "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the application of Article 31 leads to an ambiguous or absurd interpretation.

ILI U.S. Digest/8 434 1/8/02, 1:46 PM

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…Iran argues that, because the United States initially offered to initiate a freeze as to the Shah's assets—without any express link to Iran's prosecuting litigation in U.S. courts—that the Accords must be read to incorporate that position.

It is undisputed, however, that Iran *rejected* the U.S. offer to impose a freeze in the manner suggested in the draft Executive Orders of November 10 and December 3, 1980. This Tribunal should not countenance Iran's blatant attempt to rewrite the Accords to incorporate a requirement that Iran rejected, and that was not included in the Accords.

* * * *

B. "Served as a Defendant" Should be Given Its Ordinary Meaning under U.S. Law.

The ordinary meaning of "served as a defendant" can only be its meaning under U.S. law, because the litigation contemplated by Point IV is litigation brought by Iran in U.S. courts. The phrase "served as a defendant" is a commonly used term of art.[24] "Served" means delivering documents according to the statutory mandate so that notice is provided to the defendant, and jurisdiction over that defendant is obtained by the court. *Mullane v. Central Hanover Bank and Trust*, 339 U.S. 306, 314 (1950); *Attwell v. LaSalle Nat. Bank*, 607 F.2d 1157 (5th Cir. 1979), *cert. denied*, 445 U.S. 954 (1980). The court has no power to adjudicate a claim against a defendant unless it has jurisdiction over him. *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100 (1969).[25]

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[24] Indeed, although its precise requirements vary among international agreements, the concept of "service" is a well developed principle in private international law. *See* Hague Conference on Private International Law; Final Act of Tenth Session, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, November 15, 1965, 4 I.L.M. 338, 341 (1965); Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, 28 I.L.M. 620 (1989); Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229 (1969).

[25] The requirements of service are more fully discussed in the United States' Statement of Defense. (Doc. 6, Statement of Defense at 45-51.)

ILI U.S. Digest/8 435 1/8/02, 1:46 PM

In support of its argument that "served as a defendant" means "attempted" to serve as a defendant, Iran argues that the service requirement was only meant to "name" those close relatives whom Iran believed possessed stolen assets. Iran contends that once an individual was "named" as a defendant, the freeze obligations would be triggered. (Doc. 105, Iran's Hearing Memorial at 20-22.) This argument must be rejected because it is contrary to the most basic application of Article 31 of the Vienna Convention: it is not a good faith reading of the ordinary meaning of "served as a defendant" in the context of the Accords. If the parties had meant to condition the United States' obligations on merely naming persons as defendants, they could have said so. They did not. Rather, the parties agreed that before any freeze obligations were triggered, Iran had to do more than just name defendants—it had to serve them.

* * * *

C. The Obligations to Freeze and Require Reports About Shah-Related Assets Are Explicitly Tied to Iran's Prosecution of U.S. Litigation to Obtain Those Assets.

As we have demonstrated in sections A and B, *supra*, the ordinary meaning of the text of Paragraph 12 explicitly conditions the operation of the United States' freeze of assets upon Iran having served as a defendant the estate of the Shah or the Shah's close relatives in U.S. litigation to recover such assets as belonging to Iran.

So too, the ordinary meaning of the text of Paragraph 13 explicitly conditions the initiation of reporting requirements upon Iran having served as a defendant the estate of the Shah or the Shah's close relatives in U.S. litigation to bring about the return of such assets as belonging to Iran. Paragraph 13 provides:

> Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will order all persons within U.S. jurisdiction to report to the U.S. Treasury within 30 days, for transmission to Iran, all information known to them, as of November 3, 1979, and as of the date of the order, with respect to the property and assets referred to in Paragraph 12. Violation of the requirement will be subject to the civil and criminal penalties prescribed by U.S. law.

ILI U.S. Digest/8 436 1/8/02, 1:46 PM

The reporting requirements of Paragraph 13 are directly tied to the conditions imposed by Paragraph 12—*i.e.*, the reporting requirements apply only "with respect to the property and assets referred to in Paragraph 12." (General Declaration, ¶ 13.) The property and assets referred to in Paragraph 12 are "property and assets in the United States within the control of the estate of the former Shah or any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets as belonging to Iran." (General Declaration, ¶ 12.)

* * * *

The negotiating history confirms this textual analysis, and demonstrates that Iran's argument is unfounded. Iran insisted over and over during the negotiations that the United States would have to impose a freeze on assets, followed by an outright transfer of these assets to Iran. (*Id*. at Exhibit 1, p. 15.) These reporting requirements were explicitly tied to Iran's litigation. (Exhibit 1, Christopher Affidavit, ¶¶ 26, 28.) There is no evidence that Iran told the Algerians—nor that the Algerians informed the U.S. negotiators—that it conceived of the reporting requirements as a method to facilitate its litigation in the United States and around the world.

* * * *

D. In Each Case Where Iran Served as a Defendant Either the Shah's Estate or a Close Relative, the United States Froze the Assets Controlled by that Defendant, Required Reporting, and Transmitted the Information to Iran.

It is undisputed that, of the four lawsuits brought by Iran to recover "property and assets as belonging to Iran", Iran only effected service on two defendants.[29] The first defendant served by Iran was Ashraf Pahlavi in *Islamic Republic of Iran v. Ashraf Pahlavi*, No. 4432/

[29] Although in *Iran v. Mohammed Reza Pahlavi and Farah Diba Pahlavi* the trial court found service on the Empress to be valid in the same order in which it dismissed the case on *forum non conveniens*, the Empress cross-appealed this decision and thus service remained contested. The service issue became moot because the appellate courts affirmed the dismissal.

ILI U.S. Digest/8 437 1/8/02, 1:46 PM

80 (N.Y. Sup. Ct.). In March 1981 Iran informed OFAC that Ashraf Pahlavi had filed a motion to dismiss, but had not contested the effectiveness of service. Because Ashraf Pahlavi had been "served as a defendant," in May 1981 OFAC froze Ashraf Pahlavi's assets and instituted the reporting requirements of Paragraph 13. (Doc. 6, Statement of Defense at Exhibit 6.) The information reported to the Treasury was transmitted to Iran. (Doc. 58, Reply at 26.) As required by the Accords, the freeze on Ashraf Pahlavi's assets remained in place until litigation was "finally terminated." (General Declaration, ¶ 12.) At that time, the freeze was dissolved. (*See* Exhibit 6.) None of these facts is disputed by Iran.

The second defendant served by Iran was Shams Pahlavi in *Islamic Republic of Iran v. Shams Pahlavi*, No. WEC 069489, (Cal. Super. Ct.). After OFAC learned that the California courts determined that Iran had served Shams Pahlavi as a defendant, OFAC imposed a freeze on Pahlavi's assets, and implemented the reporting requirements of Paragraph 13. (*See* Exhibit 6.) The freeze and reporting obligations were imposed within two months of Iran's informing OFAC that the courts had determined that service had been effected.[30] (*See* Exhibit 9.) The information was transmitted to Iran.[31] The freeze remained in effect until after this litigation was "finally terminated." Once again, these facts are undisputed by Iran.

* * * *

II. The United States has Complied Fully with Its Paragraph 14 Obligations to Facilitate Iranian Litigation in U.S. Courts.

* * * *

[30] As with the case of Ashraf Pahlavi, Shams Pahlavi was required to "report to the U.S. Treasury within 30 days … all information known to" her with respect to property in her control located in the United States as of November 3, 1979 and as of the date of the order. Iran has not pointed to any assets that escaped the freeze because they were removed during the period between Iran's notification of service and the imposition of the reporting requirement two months later.

[31] In fact, when Shams Pahlavi did not file her report within the 30 days required by the OFAC regulations, OFAC imposed a $1,000 penalty on Shams Pahlavi. Thus, the United States fulfilled its obligation under Paragraph 13 that violation of the reporting requirement "will be subject to the civil and criminal penalties prescribed by U.S. law." (*See* Doc. 6, Statement of Defense at Exhibit 6.)

ILI U.S. Digest/8 438 1/8/02, 1:46 PM

A. Paragraph 14 Does Not Require U.S. Courts to Provide Iran a Forum in which to Bring Lawsuits.

1. Paragraph 14 Provides that the United States Will Facilitate Actions by Making Known to U.S. Courts that Suits Should Not Be Barred by Foreign Sovereign Immunity Principles or the Act of State Doctrine.

Paragraph 14 provides that the United States will:

> …make known, to all appropriate U.S. courts, that in any litigation of the kind described in Paragraph 12 above the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine….

General Declaration, ¶ 14.[32]

* * * *

Despite the specific language of Paragraph 14, Iran argues that Paragraph 14 places upon the United States an obligation to "make available to Iran domestic United States courts in which Iran could pursue its claims to the Pahlavi assets on the merits." (Doc. 58, Reply at 86.) In effect, Iran argues that the United States agreed to ensure that U.S. courts would hear and decide cases, and that Iran would recover Pahlavi assets. Iran's interpretation is wrong. The United States did not and could not agree to this. As Secretary Christopher explains:

> As we repeatedly stressed to the Algerian intermediaries, given the constitutional limitations on the Execu-

[32] President Carter implemented the provisions of Paragraph 14 by issuing Executive Order 12284. Section 1-104 of Executive Order 12284 provided:

> The Attorney General of the Untied States having advised the President of his opinion that no claim on behalf of the Government of Iran for recovery of property described in section 1-101 of this order should be considered legally barred either by sovereign immunity principles or by the act of state doctrine, the Attorney General is authorized and directed to prepare, and upon the request of counsel representing the Government of Iran to present to the appropriate court or courts within the United States, suggestions of interest reflecting that such is the position of the United States…

Executive Order 12284, Section 1-104. (Doc. 6, Statement of Defense at Exhibit 5.)

ILI U.S. Digest/8 439 1/8/02, 1:46 PM

> tive Branch and the constitutionally based separation of powers between the Executive and Judicial Branches of government, we could not do more than provide only limited assistance in these lawsuits. It is beyond the constitutional authority of the Executive Branch to require the Judicial Branch to hear and decide cases, and we did not agree to attempt the impossible.

(Exhibit 1, Christopher Affidavit, ¶ 29.)

* * * *

Of course, the U.S. negotiators only made these commitments because they believed that U.S. courts would follow the suggestions made by the Executive Branch.[33]

* * * *

2. Iran Has Not Identified a Single Instance in which the United States Failed to Make Known to an Appropriate U.S. Court that Iran's Claims Should Not Be Considered Legally Barred by Sovereign Immunity Principles or the Act of State Doctrine.

The United States has clearly complied with its Paragraph 14 obligations to make known to appropriate U.S. courts that foreign sovereign immunity principles and the act of state doctrine should not be considered to bar Iranian litigation. No defendant ever raised, and no court ever considered, either of there defenses. Iran cannot dispute these facts. Because these defenses were never at issue, it was neither appropriate nor necessary for the United States to file suggestions of interest…

* * * *

[33] As the United States indicated in its Rejoinder, both the sovereign immunity and act of state defenses are based upon considerations of foreign policy, an area in which the Executive Branch of the United States Government has great expertise and one in which courts in the United States have granted great deference to the Executive. It was for this reason that the negotiators identified these two narrow defenses as ones on which the Executive could express its opinion. In contrast, the *forum non conveniens* defense is based primarily upon considerations of judicial economy and fairness, areas in which the judiciary has the greatest expertise and in which Executive Branch interference would likely be both ignored and resented. (Doc. 64, Rejoinder at 6 n.2.)

ILI U.S. Digest/8 440 1/8/02, 1:46 PM

B. The Refusal by a U.S. Court to Enforce Iranian Judgments or Decrees Does Not Violate the Accords Because Paragraph 14 Provides Only that U.S. Courts shall be Notified that Such Judgments and Decrees should be Enforced in Accordance with U.S. Law.

With respect to the enforcement of Iranian judgments and decrees relating to assets allegedly illegally taken by the late Shah or his close relatives from Iran, the Accords obligate the United States to

> … make known, to all appropriate U.S. courts, that in any litigation of the kind described in Paragraph 12 above … that Iranian decrees and judgments relating to such assets should be enforced by [U.S.] courts in accordance with United States law.

General Declaration, ¶ 14.[37]

Iran argues that Paragraph 14 obligates U.S. courts to provide more favorable treatment to Iranian actions to enforce domestic Iranian judgments and decrees than the enforcement of other foreign judgments, and that the United States has violated this obligation by allowing its courts to dismiss Iran's two enforcement actions. Again, Iran's interpretation of Paragraph 14 is incorrect.

The plain text of Paragraph 14 clearly defines the scope of the obligation: in U.S. court proceedings in which Iran seeks to enforce a domestic Iranian judgment or decree, the United States shall notify the court that the judgment should be enforced in accordance with United States law.

The negotiating history confirms this interpretation.…

* * * *

At Iran's request, the United States filed a Suggestion of Interest in *Iran v. Shams Pahlavi* on September 27, 1991. (*See* Exhibit 12; Doc.

[37] In order to implement this provision, President Carter issued an Executive Order which provided that, upon the request of counsel representing the Government of Iran, the Attorney General will prepare and submit suggestions of interest stating that it is the position of the United States that "Iranian decrees and judgments relating to the assets of the former Shah and judgments relating to the assets of the former Shah and [relatives of the former Shah] should be enforced by courts in accordance with United States law." Executive Order 12284, Section 1-104. (Doc. 6, Statement of Defense at Exhibit 5.)

ILI U.S. Digest/8 441 1/8/02, 1:46 PM

105, Iran's Hearing Memorial at Exhibit 4.) In that Suggestion of Interest, the United States indicated to the court that the Iranian decree should be enforced in accordance with United States law. (Doc. 105, Iran's Hearing Memorial at Exhibit 4.)…Ultimately, however, Iran's complaint in this case was dismissed precisely because Iran *refused* to follow United States law by refusing to comply with the court's order compelling discovery.…

The only other case in which Iran asserts it attempted to enforce an Iranian judgment pursuant to Paragraph 14 is *Bank Melli Iran & Bank Mellat v. Shams Pahlavi*. There, the plaintiff banks brought suit in 1992 to enforce domestic Iranian judgments against Shams Pahlavi for her alleged default on promissory notes issued in 1982 and 1986. (*See* Exhibit 21.) As noted above, this case does not fall within the description of litigation covered by Point IV because it was an action to enforce an Iranian judgment for damages in a *breach of contract claim*. It was not, as is required in Paragraph 14, an action to enforce "Iranian judgments or decrees relating to" assets located in the United States allegedly belonging to Iran. There, counsel for Iran did not even request a Suggestion of Interest from the United States on the question of the enforceability of the domestic Iranian judgment. Nevertheless, as in *Iran v. Shams Pahlavi*, the court enforced the Iranian judgment in accordance with U.S. law. After consideration, the court dismissed the banks' enforcement proceeding, determining that the Iranian judiciary could not have afforded Shams Pahlavi due process protections in the various judicial proceedings in Iran. (*See* Exhibit 25 at 1413.) The lower court's decision was affirmed on appeal, and the United States Supreme Court denied the banks' request for review. (*See* Exhibit 25.)

* * * *

III. Point IV of the General Declaration Does Not Incorporate, Either in Substance or in Spirit, the Fourth Condition of the November 1980 Majlis Resolution.

In the preceding sections, we have demonstrated that a good faith interpretation of the ordinary meaning of the terms of Point IV of the General Declaration establishes that all of the obligations undertaken by the United States are explicitly tied to Iran taking specific steps to prosecute litigation in U.S. courts. We have also shown that the United States complied with each of the obligations undertaken by it. Iran makes one

ILI U.S. Digest/8 442 1/8/02, 1:46 PM

further argument, however, that is not even arguably based upon a good faith reading of the text of Point IV.

As in its earlier pleadings, Iran in its Hearing Memorial argues that the General Declaration, by virtue of its preambular language,[38] incorporates the fourth point of the Majlis Resolution, which called for the immediate seizure and transfer to Iran of all property and assets of the Shah and his family.[39] (Doc. 105, Iran's Hearing Memorial at 66-67.) As in earlier pleadings, Iran also points to the United States' November 11, 1980 acceptance "in principle" of the Majlis Resolution as the basis for ending the hostage crisis as further evidence that the United States, in Point IV, implicitly accepted the Iranian demand set out in the fourth condition of the Majlis Resolution.[40] (*Id.*)

Iran's assertion that the United States accepted the Majlis Resolution is unfounded. The United States refused Iran's repeated demand that the United States agree to provide for the immediate and unconditional return of the assets of the Pahlavi family. This refusal is clear from the ordinary meaning of the text in Point IV, from the negotiating history of Point IV, and from Iran's own conduct following the entry into force of the Accords.

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[38] The preamble to the General Declaration states that the Government of Algeria issued the General Declaration after "consult[ing] extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the resolution of the Islamic Consultative Assembly of Iran."

[39] Point four of the Majlis Resolution provided as follows:

> Restoration and reimbursement of all the properties of the deceased Shah and recognizing and validating all the proceedings of the Government of Iran in connection with its sovereignty for confiscation of all the properties of the deceased Shah and his close relatives whose properties, according to the provisions of the laws of Iran, belong to the Iranian Nation and edicting decree by the President of the United States of America confirming recognition and attachment of such properties, as well as taking all the administrative and legal proceedings required for transference of such properties and assets to Iran.

Majlis Resolution, ¶ 4. (Doc. 6, Statement of Defense at Exhibit 1.)

[40] In its Hearing Memorial, Iran similarly argues that the United States' acceptance of this condition within the context of Point IV has created an "obligation of result" on the part of the United States to return to Iran Pahlavi family assets allegedly taken from Iran's treasury. (Doc. 105, Iran's Hearing Memorial at 61-69.) Like its argument that the United States accepted the Majlis Resolution, this is contrary to the language of the Accords, the negotiating history, and Iran's conduct.

ILI U.S. Digest/8 443 1/8/02, 1:46 PM

* * * *

An analysis of the negotiating history as a supplementary means to interpret Point IV confirms this textual analysis. The United States made it absolutely clear throughout the negotiations that it did not—and could not—accept the demand spelled out in the fourth condition of the Majlis Resolution, and it is clear that Iran understood the United States' position.

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3. Claims against Iraq

The United States Government continues to be actively involved in the United Nations Compensation Commission ("UNCC"), which was established by the United Nations Security Council in 1991 to process claims and pay compensation for direct losses resulting from Iraq's invasion and occupation of Kuwait. In accordance with the Security Council mandate, compensation is paid to successful claimants from a special Compensation Fund, which is currently, and temporarily, allocated 25% of the revenues from sales of Iraqi oil under the terms of the Security Council's Oil-For-Food ("OFF") Resolutions. Under the terms of the latest OFF Resolution, passed in December 2000, the percentage should revert to its original level of 30% on June 6, 2001. The United States is one of nearly one hundred governments that have filed claims with the UNCC on behalf of individuals, corporations and government agencies. To date 2,950 of the 3,254 claims filed by the United States have been awarded a total of $658 million, being paid in installments as funds become available. A total of 247 U.S. claims worth approximately $568 million, primarily on behalf of U.S. corporations, are still pending.

Further information about the UNCC is available at *www.uncc.ch.*

ILI U.S. Digest/8 444 1/8/02, 1:46 PM

B. CLAIMS OF INDIVIDUALS

1. Claims by victims of the Nazi era and victims' heirs

Significant progress was made during 2000 in efforts to resolve outstanding claims by Holocaust survivors, other victims of the Nazi era and their heirs. Much of this progress grew out of negotiations undertaken by Stuart E. Eizenstat, beginning in 1995, at a time when he was Under Secretary of Commerce, and continued by him in his role as Under Secretary of State for Economic Affairs and the Secretary of State's Special Envoy on Property Restitution in Central and Eastern Europe and, after July 1999, as Deputy Secretary of the Treasury and Special Representative of the President and the Secretary of State for Holocaust Issues.

a. Settlement of claims against Swiss banks: *In re Holocaust Victim Assets Litigation*

On August 2, 2000, a proposed $1.25 billion settlement agreement of consolidated class action lawsuits filed in 1996 and 1997 against certain Swiss banks was approved by a U.S. District Court. *In re Holocaust Victim Assets Litigation*, 105 F.Supp.2d 139 (E.D.N.Y. 2000), (cases dismissed 2000 U. S. Dist. LEXIS 15644 (E.D.N.Y.-Aug. 9, 2000).) On November 22, 2000 the court adopted the Proposed Plan of the Special Master for distribution of the settlement funds. 2000 U.S. Dist. LEXIS 20817 (E.D.N.Y. 2000). The claims at issue were based on allegations that the Swiss banks knowingly retained and concealed the assets of holocaust victims, accepted and laundered illegally obtained Nazi plunder and transacted in the profits of slave labor. At a Fairness Hearing on the Settlement Agreement, held November 29, 1999, the United States supported the settlement, as noted by the court:

ILI U.S. Digest/8 445 1/8/02, 1:46 PM

> The United States, which participated actively in settlement discussions over a period of many months, through Deputy Treasury Secretary Eizenstat, has expressed its 'unqualified support for the parties' class action settlement' and endorsed it 'as fair, reasonable and adequate and unquestionably in the public interest.' Transcript of Fairness Hearing (Nov. 29, 1999) at 27 (comments of James Gilligan, U.S. Department of Justice, on behalf of the United States).

In re Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139, 148 (E.D.N.Y. 2000).

b. Claims against German companies arising from Nazi era

1) Claims settlement negotiations

In the Fall of 1998, the United States, through the efforts of Mr. Eizenstat, had also become engaged in an effort to help facilitate resolution of class action lawsuits filed in U.S. courts against German companies arising from the National Socialist era. On July 17, 2000, in Berlin, lawyers representing victims; lawyers for German companies; the governments of Germany, the United States, the State of Israel, Belarus, the Czech Republic, Poland, Russia and Ukraine; and the Conference on Jewish Material Claims Against Germany signed a Joint Statement on the Occasion of the Final Plenary Meeting Concluding International Talks on the Preparation of the Foundation "Remembrance, Responsibility and the Future" ("Joint Statement"). The document records agreement that the German Government and companies would establish a Foundation, "Remem-

ILI U.S. Digest/8 446 1/8/02, 1:46 PM

brance, Responsibility and the Future," ("Foundation") and capitalize it with DM 10 billion, to make payments to forced laborers and others who suffered at the hands of German companies during the Nazi era and World War II. The plaintiffs, in exchange, would voluntarily dismiss their lawsuits against German companies asserting such claims. Assuming consolidation of the pending federal lawsuits, the Joint Statement provides that payments from the Foundation would begin only after all lawsuits against German companies arising out of the National Socialist era and World War II, pending in U.S. courts, are dismissed with prejudice by the courts.

On the same day, Germany and the United States entered into an executive agreement in which Germany committed that the operation of the Foundation would be governed by principles agreed by the parties to the negotiations, and the United States committed to take certain steps to assist German companies in achieving "legal peace" in the United States for claims arising out of the Nazi era and World War II. (Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation 'Remembrance, Responsibility and the Future' ("U.S.-German Agreement" or "Foundation Agreement")). Specifically, the United States undertook 1) to file a Statement of Interest that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving claims asserted against German companies (as defined), when notified that such a claim arising from the National Socialist era and World War II has been asserted in a court in the United States (Article 2.1); 2) to use its best efforts with state and local governments, "in a manner it considers appropriate," to achieve the objectives of the agree-

ILI U.S. Digest/8 447 1/8/02, 1:46 PM

ment (Article 2.2); and 3) to "take appropriate steps to oppose any challenge" to Germany's sovereign immunity with respect to such claims (Article 3.4).

A law creating the Foundation became effective in Germany on August 12, 2000. The U.S.-German Agreement entered into force on October 19, 2000. Articles 1 through 3 of the Agreement are set forth below.

The full text of the Joint Statement and the U.S.-German Agreement as well as a Declaration of Mr. Eizenstat and a Statement by Secretary of State Madeline Albright describing these developments and the interests of the United States, which were filed in court as attachments to Statements of Interest of the United States pursuant to the Agreement, such as that discussed in b.(2) below, are available at *www.state.gov/s/l.*

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ARTICLE 1

(1) The parties agree that the Foundation "Remembrance, Responsibility and the Future" covers, and that it would be in their interests for the Foundation to be the exclusive remedy and forum for the resolution of, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II.

(2) The Federal Republic of Germany agrees to ensure that the Foundation shall provide appropriately extensive publicity concerning its existence, its objectives and the availability of funds.

(3) Annex A sets forth the principles that shall govern the operation of the Foundation. The Federal Republic of Germany assures that the Foundation will be subject to legal supervision by a German governmental authority; any person may request that the German governmen-

ILI U.S. Digest/8 448 1/8/02, 1:46 PM

tal authority take measures to ensure compliance with the legal requirements of the Foundation.

(4) The Federal Republic of Germany agrees that insurance claims that come within the scope of the current claims handling procedures adopted by the International Commission of Holocaust Era Insurance Claims ("ICHEIC") and are made against German insurance companies shall be processed by the companies and the German Insurance Association on the basis of such procedures and on the basis of additional claims handling procedures that may be agreed among the Foundation, ICHEIC, and the German Insurance Association.

ARTICLE 2

(1) The United States shall, in all cases in which the United States is notified that a claim described in article I(1) has been asserted in a court in the United States, inform its courts through a Statement of Interest, in accordance with Annex B, and, consistent therewith, as it otherwise considers appropriate, that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies as defined in Annex C and that dismissal of such cases would be in its foreign policy interest.

(2) The United States, recognizing the importance of the objectives of this agreement, including all embracing and enduring legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments.

ARTICLE 3

(1) This agreement is intended to complement the creation of the Foundation and to foster all-embracing and enduring legal peace for German companies with respect to the National Socialist era and World War II.

(2) This agreement shall not affect unilateral decisions or bilateral or multilateral agreements that dealt with the consequences of the National Socialist era and World War II.

(3) The United States will not raise any reparations claims against the Federal Republic of Germany.

ILI U.S. Digest/8 449 1/8/02, 1:46 PM

(4) The United States shall take appropriate steps to oppose any challenge to the sovereign immunity of the Federal Republic of Germany with respect to any claim that may be asserted against the Federal Republic of Germany concerning the consequences of the National Socialist era and World War II.

* * * *

2) Voluntary Dismissal: ***Nazi Era Cases Against German Defendants Litigation***

The day after the entry into force of the U.S.-German Agreement, the United States filed a Statement of Interest under Article 2(1) in *Nazi Era Cases Against German Defendants Litigation,* CV No. 98-4104 (M.D.L. No. 1337,2000). This proceeding consolidated cases involving claims against German companies arising from conduct occurring during the Nazi era, in the U.S. District Court for the District of New Jersey. Excerpts from the Statement of Interest are provided below. On November 13, 2000, the court granted requests for voluntary dismissal by plaintiffs in 49 cases in that litigation. *In re Nazi Era Cases Against German Defendants Litigation*, 198 F.R.D. 429 (D.N.J. 2000).

The full text of the Statement of Interest is available at *www.state.gov/s/l.*

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STATEMENT OF INTEREST OF THE UNITED STATES

* * * *

BACKGROUND

1. United States Policy on Holocaust Claims

The policy of the United States Government with regard to claims for restitution or compensation by Holocaust survivors and other vic-

ILI U.S. Digest/8 450 1/8/02, 1:46 PM

tims of the Nazi era is motivated by the twin concerns of justice and urgency. *See* Declaration of Stuart E. Eizenstat ("Eizenstat Decl."), attached as Exh. 1; ¶¶ 3, 29. No price can be put on the suffering that the victims of Nazi atrocities endured. But the moral imperative remains to provide some measure of justice to the victims of the Holocaust, and to do so in their remaining lifetimes. *Id.* ¶ 3. Today, 55 years after the Holocaust, the survivors are elderly and are dying at an accelerated rate. *Id.* ¶ 29. The United States believes, therefore, that concerned parties, foreign governments, and nongovernmental organizations should act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation, rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation. *Id.* ¶ 3.

The creation of the German Foundation "Remembrance, Responsibility, and the Future" (the "Foundation"), in favor of which most parties now seek to have this litigation dismissed, is an example of the successful implementation of this United States policy. *Id.* ¶¶ 28-30. The history of the negotiations that led to the Foundation's creation, a description of the benefits available through the Foundation and how the Foundation will operate, and the basis for the United States' conclusion that it would be in the United States' interests for the Foundation to be the exclusive remedy for all claims against German companies arising out of the Nazi era and World War II are set forth in this statement.

* * * *

The role played by the United States in this negotiation was unique. The Executive Agreement negotiated is not a government-to-government claims settlement agreement, *see generally* Eizenstat Decl. Exh. B, and the United States has not extinguished the claims of its nationals or anyone else. Instead, the intent of the United States' participation was to bring together the victims' constituencies on one side and the German Government and companies on the other to bring expeditious justice to the widest possible population of survivors, and to help facilitate legal closure. Eizenstat Decl. ¶ 14. Among these parties, the United States facilitated the essential arrangement by which the German side would establish a DM 10 billion foundation to compensate categories of Nazi era and World War II victims, and the class action representatives in pending United States litigation (as well as anyone else who received compensation through the Foundation) agreed to give up their claims,

ILI U.S. Digest/8 451 1/8/02, 1:46 PM

by voluntary dismissals with respect to plaintiffs in cases in United States courts. *Id.* The United States further contributed its own commitment to advise U.S. courts of its foreign policy interests, described in detail below, in the Foundation being treated as the exclusive remedy for World War II and Nazi era claims against German companies, and, concomitantly, in current and future litigation being dismissed. *Id.*

* * * *

Discussion

1. Dismissal of this Litigation Would Be in the United States' Foreign Policy Interests

The President of the United States has concluded that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the Nazi era and World War II, including without limitation those relating to compensation for slave and forced labor, "aryanization" or other confiscation of, damage to, or loss of property (including banking assets and insurance policies), subjection to medical experimentation, placement in children's homes, and other cases of personal injury. *See* Letter of President Clinton to Chancellor Schroeder, Dec. 13, 1999 (attached as Exh. 3); *see also* Eizenstat Decl. ¶ 28 and Exh. B at Art. 1(1). Accordingly, the United States believes that all asserted claims should be pursued through the Foundation instead of the courts. The United States' interests in supporting the Foundation are explained below.

First, it is an important policy objective of the United States to bring some measure of justice to Holocaust survivors and other victims of the Nazi era, who are elderly and are dying at an accelerated rate, in their lifetimes. Eizenstat Decl. ¶ 29. Over one hundred thousand Holocaust survivors, and tens of thousands of other Americans who were forced laborers during World War II, live in the United States. *Id.* As noted earlier, the United States believes the best way to accomplish this goal is through negotiation and cooperation.

The Foundation is an excellent example of how such cooperation can lead to a positive result. The Foundation will, without question, provide benefits to more victims, and will do so faster and with less uncertainty, than would litigation, with its attendant delays and legal hurdles.

ILI U.S. Digest/8 452 1/8/02, 1:46 PM

Moreover, the Foundation will employ standards of proof that are more relaxed than would be the case with litigation. Litigation, even if successful, could only benefit workers of the German companies subject to the jurisdiction of U.S. courts. By contrast, the Foundation will benefit all workers—from existing and defunct companies, from private and public companies. It will also benefit those in the other categories mentioned above—in fact, all who may have been injured by German industry. Even forced agricultural workers can be paid by the partner organizations. Indeed, as a result of the participation in the Foundation not only by the German Government and German companies that existed during the Nazi era, but also by German companies that did not exist during the Nazi era, the Foundation will be able to comprehensively cover slave and forced laborers and other victims of the Nazi era and World War II. Eizenstat Decl. ¶ 30.

It is true that no amount of money could truly compensate plaintiffs for the wrongs done to them. But the payments they will receive through the Foundation will serve as a recognition of their suffering and will enable them to live with less difficulty than would be the case without the payments. In addition, creation of the Foundation will allow creation of the Future Fund, which will be dedicated in part to efforts to ensure that crimes like the Holocaust never happen again, and will also fund projects that serve to benefit the heirs of victims that did not survive. Eizenstat Decl. ¶ 31; *see also* Statement of Secretary of State Madeleine K. Albright ("Albright Statement"), attached as Exh. 4, at ¶ 9.

The United States, together with the participating lawyers for the victims and all other parties to the negotiations, therefore believes that the Foundation is the best means to quickly bring some measure of justice to the plaintiffs before this Court. Indeed, the United States hopes that the creation of the Foundation will serve as an example to other nations and in other cases where resolution of claims by victims of the Nazi era for restitution and compensation has not yet been achieved.

Second, "establishment of this Foundation will strengthen the ties" between the United States and its important European ally and economic partner, Germany. Albright Statement ¶ 4; *see also* Eizenstat Decl. ¶ 33. One of the most important reasons the United States took such an active role in facilitating a resolution of the issues raised in this litigation is that it was asked by the German Government to work as a partner in helping to make the Foundation initiative a success. Eizenstat Decl. ¶

ILI U.S. Digest/8 453 1/8/02, 1:46 PM

33. Since 1945, the United States has sought to work with Germany to address the consequences of the Nazi era and World War II through political and governmental acts, beginning with the first compensation and restitution law in post-war Germany that was passed by U.S. occupation forces. In recent years, German-American cooperation on these and other issues has been very close, and the joint effort to develop the Foundation has helped solidify the close relationship between the two countries, a relationship which is "central to American interests in Europe." Albright Statement ¶ 4.

Germany today is a key to the security and prosperity of the broader North Atlantic Community. Eizenstat Decl. ¶ 34. Germany has been a partner of the United States in promoting and defending democracy for the last fifty years, and is vital to both the security and economic development of Europe. Germany has been a leader in efforts to create stability in Europe through expansion of NATO to include the former communist countries of Central Europe, and through the building of bridges between NATO and Russia. Germany has also been a leader in supporting integration of the European Union, and in the effort to assure that the former communist countries of Central and Eastern Europe continue their democratic development within a market economy. Our continued partnership with Germany is important to helping achieve these United States interests.

Third, the Foundation helps further the United States' interest in maintaining good relations with Israel and with Western, Central, and Eastern European nations, from which many of those who suffered during the Nazi era and World War II come. Eizenstat Decl. ¶ 35. As a result of the close cooperation between the United States and the participating Central and Eastern European governments, a large percentage of the money allocated will go to the too-long forgotten "double victims" of Nazism and Communism. Albright Statement ¶ 6. Some one million citizens of Central and Eastern Europe were forced into labor by the Nazis, and then lived for over four decades under the iron rule of Communist governments and were denied compensation from Germany until recent years. Eizenstat Decl. ¶ 35. The Foundation represents the first comprehensive effort to assist surviving laborers in these former Iron Curtain countries, and, indeed, in other European countries.

The Government of Israel, which also was directly involved in the negotiations to create the Foundation, will see many of its citizens ben-

ILI U.S. Digest/8 454 1/8/02, 1:46 PM

efit from the Foundation's programs and has recognized and indicated its appreciation for U.S. efforts in support of the Foundation. Moreover, "by bringing together the Central and Eastern European states and the State of Israel, the Foundation will begin a new relationship among nations and peoples who suffered so severely under Nazi terror." Albright Statement ¶ 7.

Fourth, as the President has said, dismissal of this litigation, which touches on the foreign policy interests of the United States, would be in the foreign policy interests of the United States. *See* Exh. 3 at 2. The overwhelming majority of plaintiffs, the defendants, victims' representatives, and various concerned governments are united in seeking dismissal of this litigation in favor of the remedy provided by the Foundation, and the United States strongly supports this position. The alternative to the Foundation would be years of litigation whose outcome would be uncertain at best, and which would undoubtedly last beyond the expected life span of the large majority of survivors. Ongoing litigation could lead to conflict among survivors' organizations and between survivors and industry, conflicts into which the United States and German governments would inevitably be drawn. There would likely be threats of political action, boycotts, and legal steps against corporations from Germany and other nations, setting back European-American economic cooperation. Eizenstat Decl. ¶ 36; *see also* Albright Statement ¶ 8.

In addition, although the resolution of this litigation is not part of a "settlement" in name, the German companies and German Parliament have insisted on dismissal of all pending litigation in the United States in which Nazi era and World War II claims are asserted against German companies as a precondition to allowing the Foundation to make payments to victims. Eizenstat Decl. ¶ 37. The United States strongly supports the creation of the Foundation, and wants its benefits to reach victims as soon as possible. Therefore, in the context of the Foundation, it is in the enduring and high interest of the United States to vindicate that forum by supporting efforts to achieve dismissal of (i.e., "legal peace" for) all Nazi era and World War II claims against German companies. *Id.*

Fifth, and finally, the Foundation is a fulfillment of a half-century effort to complete the task of bringing justice to victims of the Holocaust and victims of Nazi persecution. "[I]t is in the foreign policy interests of the United States to take steps to address the consequences of the

ILI U.S. Digest/8 455 1/8/02, 1:46 PM

Nazi era, to learn the lessons of, and teach the world about, this dark chapter in Germany's history and to seek to ensure that it never happens again." Albright Statement ¶ 9. Since its founding, the Federal Republic of Germany has made compensation and reconciliation for wrongs committed during the Nazi era an important part of its political agenda. Although no amount of money will ever be enough to make up for Nazi-era crimes, the German Government has created significant compensation, restitution, and pension programs for Nazi-era acts that have resulted in payments of nearly $100 billion in today's dollars. The Foundation adds another $4.3 billion to that total, and complements these prior programs. Eizenstat Decl. ¶38.

The United States does not suggest that these policy interests described above in themselves provide an independent legal basis for dismissal. Moreover, in this Statement, the United States takes no position on the merits of the underlying legal claims or arguments advanced by plaintiffs or defendants. Because of the United States' strong interests in the success of the Foundation, however, and because such success is predicated on the dismissal of this litigation, the United States recommends dismissal on any valid legal ground. In the context of a voluntary dismissal, the Court need not ultimately resolve the validity of the underlying claims and arguments advanced by the parties. As we explain in the next section, it is sufficient if the Court concludes that the requirements of Rule 23(e) of the Federal Rules of Civil Procedure are satisfied.

2. The Foundation Provides a Fair Remedy For Victims of the Nazi Regime and German Companies during the Nazi Era and World War II

Because many of the cases pending before the Court were filed as class actions, they may not be dismissed without the approval of the Court. *See* Fed. R. Civ. P. 23(e). Before approving the dismissal, the Court is to "inquire into the terms and circumstances" of the dismissal, and "ensure that it is not collusive or prejudicial." *Diaz v. Trust Territory,* 876 F.2d 1401, 1408 (9th Cir. 1989). Because no class has yet been certified, however, the court need not "perform the kind of substantive oversight required when reviewing a settlement binding on the class." *Id.* Rather, Rule 23(e) is satisfied if absent class members are provided

ILI U.S. Digest/8 456 1/8/02, 1:46 PM

such notice of the impending dismissal so as to avoid the potential prejudice from having relied on the pendency of a class action to protect their rights, and if the Court is satisfied that the interests of the class have not been conceded in order to further the interests of class representatives or counsel. *Id.* at 1408-09.

In the Executive Agreement, the German Government committed to ensure that the Foundation provides appropriately extensive publicity. *See* Executive Agreement…Art. 1(2). Of course, the Court will ultimately have to determine whether this "appropriately extensive publicity" provides adequate notice under Rule 23(e). However, it bears emphasis that the negotiators had those requirements in mind when they committed the Foundation to broad public notice of its existence, objectives, and the availability of funds. Indeed, the Foundation has already begun taking steps to ensure that such publicity is provided. *See* Eizenstat Decl. ¶ 24.

As to the question of possible abuse of the interests of absent class members, the Foundation will allow for potential payments to all class members, each of whom is eligible to apply under the same criteria as are any other applicants, including named class representatives. This is one manifestation of the vigorous representation of the interests of absent class members during the negotiations leading to creation of the Foundation. *See* Eizenstat Decl. ¶ 20. Indeed, far from sacrificing the interests of absent class members for their own, the class representatives are in fact sacrificing their own interests for the absent class members. While the class representatives and their counsel have been instrumental in helping to create a Foundation to which absent class members have equal opportunity to apply for payments, only the named representatives in the cases before this Court must dismiss their claims with prejudice before applying to the Foundation. *See* Joint Statement.… Other claimants, including absent class members, need not waive their claims until they receive a payment from the Foundation. *See* German Law § 16(2). There is no evidence to support a conclusion that absent class members' interests were sacrificed to collusive efforts.[5]

[5] As further evidence against such a hypothesis, counsel representing the victims are eligible to receive less, on a percentage basis, of the Foundation capital than the notably low percentage that attorneys in the recently-approved settlement between Holocaust victims and Swiss Banks can receive from that settlement fund. *See* Eizenstat Decl. ¶ 19; *In re Holocaust Victim Assets Litigation,* 105 F. Supp. 2d 139, 146 (E.D.N.Y. 2000).

ILI U.S. Digest/8 457 1/8/02, 1:46 PM

Although substantive consideration of the fairness of the dismissal is not required, *see Diaz,* 876 F.2d at 1408, the United States, together with all other participants in the Foundation negotiations, has reached the conclusion that the results of the negotiations as embodied in the Foundation are fair under all the circumstances. *See* Joint Statement.… The circumstances that lead the United States to this conclusion are described below.

Given the advancing age of the plaintiffs, it is of the highest importance that their claims are resolved quickly, nonbureaucratically, and with minimum expenditures on litigation. As noted earlier, survivors are dying at an accelerated rate, and the Foundation offers the victims of Nazi atrocities who are represented in this case a measure of justice for their past suffering, without additional time-consuming litigation that could delay any recovery beyond many class members' remaining lifetimes. Judge Edward Korman recently reached the same conclusion in approving a settlement between Holocaust survivors and Swiss banks. *See In re Holocaust Victim Assets Litigation,* 105 F. Supp.2d at 149. This is the very sort of outcome that U.S. policy seeks to achieve in matters of unresolved Holocaust era claims.

Other criteria important in evaluating the Foundation include its level of funding, allocation of its funds, payment system, and eligibility criteria. As to the level of funding, the words of a Holocaust survivor who spoke in favor of the Swiss Bank settlement, cited by Judge Korman in approving that settlement, have equal force here:

> I have no quarrel with the settlement. I do not say it is fair, because fairness is a relative term. No amount of money can possibly be fair under those circumstances, but I'm quite sure it is the very best that could be done by the groups that negotiated for the settlement. The world is not perfect and the people that negotiated I'm sure tried their very best, and I think they deserve our cooperation and…that they be supported and the settlement be approved.

In re Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 141. The allocation of funds was the subject of extensive negotiation, and was approved by all parties to the negotiations. *See* Joint Statement.…

ILI U.S. Digest/8 458 1/8/02, 1:46 PM

Similarly, the parties have pledged that Foundation payments should be made quickly and in a non-bureaucratic manner, *id.* at 4, and under relaxed standards of proof. Finally, through extensive effort, the parties to the negotiations ensured that the Foundation will provide a potential remedy for all who suffered at the hands of German companies during the Nazi era and World War II. *See* Eizenstat Decl. ¶ 20. With these agreements, the Foundation will be able to make speedy, dignified payments to many deserving victims—indeed, as noted earlier, many more than could possibly recover through litigation.

In considering the fairness of the Foundation, it is also important to consider the difficult legal hurdles faced by plaintiffs and the uncertainty of their litigation prospects. Although the United States takes no position here on the merits of the underlying legal claims advanced by the parties, and the Court need not ultimately resolve those questions in the context of a voluntary dismissal, it is beyond dispute that Plaintiffs in these cases face numerous legal hurdles in the defenses raised against their claims, such as justiciability, international comity, statutes of limitation, jurisdictional issues, and forum non conveniens, as well as difficulties of proof inherent in claims originating more than 50 years ago and the various potential practical and legal obstacles to certification of a class of heirs.[6] Recovery in litigation is therefore by no means assured. *Cf. In re Holocaust Victim Assets Litigation,* 105 F. Supp. 2d at 148-49.

CONCLUSION

The Foundation not only fulfills the foreign policy interests of the United States, but also provides benefits to the public interest that reach beyond the scope of any single litigation. In other countries, claims for restitution and compensation arising out of Nazi-era atrocities have yet to be resolved. The successful compromise reached in these negotiations, like the Swiss Bank settlement, can be expected to serve as an example of the advantages for all concerned when the legal and moral claims of

[6] In light of the particular difficulties presented by the claims of heirs of victims who did not survive, it is worth noting that at least 10 percent of the funds in the Future Fund will be dedicated to programs to benefit heirs and others.…

ILI U.S. Digest/8 459 1/8/02, 1:46 PM

Nazi-era victims are dealt with through dialogue, negotiation, and cooperation, instead of prolonged litigation and controversy.

The United States filed similar Statements of Interest on November 2, 2000 in *Winters v. Assicurazioni Generali S.p.A. Consolidated* (primarily insurance claims)[1] and in *In re Austrian and German Bank Holocaust Litigation* (primarily banking claims), both pending in the Southern District of New York.[2] These Statements of Interest are available at *www.state.gov/s/l*.

3) U.S. federal-state relations: *Gerling Global Reinsurance Corp. of America v. Quackenbush*

Even before the U.S.-German Agreement came into force, on September 28, 2000, the United States submitted a brief as *amicus curiae* supporting a preliminary injunction is-

[1] Plaintiffs moved to dismiss these suits voluntarily against most of the defendants pursuant to the Joint Statement, but excluded four defendants incorporated and headquartered in Switzerland which they believed did not qualify as "German companies" under the agreements. The court denied a motion by these "Swiss defendants" for an order declaring that they should be dismissed as German companies. *Winters, v. Assicurazioni Generali S.p.A. Consolidated,* and *Cornell v. Assicurazioni General S.p.A. Consolidated,* 2000 U.S.Dist.LEXIS 18193 (S.D.N.Y.).

[2] Settlement of Claims against Austrian banks was approved on January 12, 2000. *In re Austrian and German Holocaust Litigation,* 80 F. Supp. 2d 64 (S.D.N.Y. 2000), By Order of October 27, 2000, 2000 U.S.Dist. Lexis 2311 (S.D.N.Y.), the court appointed a Special Master to address certain questions related to a motion by plaintiffs for voluntary dismissal of ten consolidated class action cases. An eleventh case included in the consolidation named Austrian banks and thus was not part of the motion to dismiss. The Special Master filed his report on December 28, 2000, concluding that voluntary dismissal of the cases would not harm the rights of absent class members.

ILI U.S. Digest/8 460 1/8/02, 1:46 PM

sued in *Gerling Global Reinsurance Corp. of America v. Quackenbush*, 2000 U.S.Dist.LEXIS 8815 (E.D.Cal.).[3] The brief urges the Ninth Circuit to affirm a district court order enjoining the California Commissioner of Insurance from enforcing the California Holocaust Victim Insurance Relief Act ("HVIRA"). Among other things, HVIRA requires insurers that do business in California and that sold insurance policies to persons in Europe, directly or through a related company, that were in effect between 1920 and 1945, to file certain information about those policies with the Commissioner. The excerpts that follow clarify the United States undertakings, describe the California law at issue and provide the views of the United States on questions as to the statute's interference with the Constitutional grant to the federal government of the authority to regulate foreign commerce and intrusion upon the federal government's exclusive responsibility and authority to conduct the nation's foreign affairs.

The full text of the brief is available at *www.state.gov/s/l.*

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In view of the importance of the Foundation Agreement, we wish to correct some misunderstandings reflected in the brief of the Ameri-

[3] A Preliminary Injunction against the Florida Insurance Commissioner was issued by the U.S. District Court for the Northern District of Florida on November 11, 2000 in another case involving insurance companies, *Gerling Global Reinsurance Corp. of America v. Nelson*, 123 F. Supp. 2d 1298 (D.C.Fl 2000). In that case, the United States had not provided its views and the court did not address the U.S.-German Agreement but rather held that the Florida "Holocaust Victims Insurance Act, section 626.9543, Fla. Stat. (1999) cannot provide Florida with jurisdiction to compel production of information regarding the "non-payment of amounts owed under insurance policies issued in Germany to German Holocaust victims by German insurers having no contacts with the State of Florida." *Id.*

ILI U.S. Digest/8 461 1/8/02, 1:46 PM

can Insurance Association ("AIA") concerning the undertakings of the U.S. Government and the impact of the procedures established by the Agreement on existing legal remedies available to American citizens against private corporations. AIA states that "[t]he federal government…has committed to give affected insurers legal peace, including against state litigation and regulatory action," AIA Br. 1, and that the Foundation Agreement "imposes a duty on the United States to achieve 'all-embracing and enduring legal peace' for German companies." AIA Br. 2. The United States has committed to various unprecedented undertakings in the Agreement. As discussed, the United States has committed to file a Statement of Interest in private suits against German companies explaining that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims," Foundation Agreement, Art. 2(1), and has committed to "use its best efforts, in a manner it considers appropriate, to achieve the objectives" of the Agreement, Art. 2(2). It has not, however, undertaken a "duty…to achieve" legal peace for German companies against state litigation and regulatory action.

Nor does the Foundation Agreement itself preclude individuals from filing suit on their insurance policies in court. *Cf., e.g.,* AIA Br. at 2 (stating that the Agreement "creates on exclusive remedy and forum"); *id.* at 12 (stating that the Agreement "mandates that insurance claims that come within the scope of…ICHEIC 'shall be processed…on the basis of such procedures' ").

Although the Agreement obligates the German Foundation to process insurance claims against German companies according to ICHEI procedures, Foundation Agreement, Art. 1(4), it does not mandate that individual policyholders or beneficiaries bring their claims in that forum. And while the Agreement states that it is in the national interest of the United States that the Foundation be the exclusive forum for such claims, it does not "create" an exclusive remedy; rather, it specifically declares that "[t]he United States does not suggest that its policy interests concerning the Foundation in themselves

[4] The district court, which rendered its decision before the Agreement was finalized, also overestimated the Agreement's ultimate legal effect when it predicted that the Agreement would make the Foundation an "exclusive remedy" as a matter of U.S. law. Memorandum and Order: Preliminary Injunction at 17.

ILI U.S. Digest/8 462 1/8/02, 1:46 PM

provide an independent basis for dismissal" of private claims. Foundation Agreement, Annex B, ¶7.[4] As we discuss below, the premises underlying the Agreement and the California statutes are plainly different. But AIA is mistaken in asserting that the Foundation Agreement in "direct conflict" with California law (AIA Br. 4), if, by this, AIA means to suggest that the Agreement by its terms preempts the California statute.

* * * *

B. California Law Regarding Holocaust-Era Insurance Policies.

California has enacted several closely related statutes pertaining to insurance policies issued in Europe between 1920 and 1945. The statutory disclosure requirements are contained in the Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807 ("HVIRA"), enacted in October 1999. The statute mandates broad disclosures of information regarding all policies issued in Europe in that time period, including the names of policyholders and beneficiaries and a certification as to whether and how policy proceeds have been paid out. *See id.* at § 13804.

The disclosure requirement applies not only to policies issued by the insurer doing business in California, but also to any policy issued by any company with which the insurer is related or affiliated. The requirement applies regardless of the affiliate's contacts with California, and applies even to policies that predate the companies' relationship. *See id.* at §§ 13802 (b), 13804 (a). Section 790.15(b) (4) of the California Insurance Code defines affiliate broadly to include parents, subsidiaries, and subsidiaries of common parents.

Under the HVIRA, any insurer that fails to provide required information to the Commissioner of Insurance faces suspension of its license to do business in California. *See* Cal. Inc. Code § 13806.

The disclosure requirements of the HVIRA form part of a statutory framework establishing causes of action to recover on policies issued in Europe prior to 1945.[5] Section 354.5 of California's Code of Civil Procedure, adopted in 1998, grants state courts venue and jurisdiction over

[5] *See* Assembly Bill No. 600 (reproduced in the Addendum to Brief of Appellees American Insurance Association and American Reinsurance Co. at 33-34) (noting interrelationship of the HVIRA and the 1998 license suspension provisions, Cal. Ins. Code § 790.15, and jurisdiction provisions, Cal. Code Civ. Pro. § 354.5).

ILI U.S. Digest/8 463 1/8/02, 1:46 PM

any claim by a California resident based upon a pre-1945 insurance policy issued in Europe, if jurisdiction comports with constitutional limitations, Cal. Code Civ. Pro. § 354.5(b), and abolishes any statute of limitations defense to such claims, whether the plaintiff is a California resident or not, if the claim is brought by December 31, 2010, *id.* at § 354.5(c). That statute further provides that suits brought on these policies in California courts are "subject to California law" and that forum selection provisions in the policies are unenforceable. Cal. Stats. 1998, c. 43 (A.B. 1334), § 1(b).

Section 790.15 of the California Insurance Code, also adopted in 1998, requires the Commissioner of Insurance to suspend the license of any insurer if it, or one of its affiliates, fails to pay "any valid claim" on a policy issued to a person who was "a victim of persecution of Jewish and other peoples preceding and during World War II by Germany, its allies, or sympathizers." Cal Ins. Code, § 790.15(a), (b)(1). The statute defines "claims" to include claims that insurers refuse to pay because the records were lost or the policies confiscated by the Nazis or their allies. *Id.* at § 790.15(b)(3). The license suspension provision applies whether the denied claim is brought by a resident of California or by a non-resident.

Section 790.15 provides for a hearing before an administrative law judge on any accusation against an insurer, but allows the Commissioner to suspend an insurer's license prior to a hearing if the Commissioner determines that a suspension is necessary to protect the interests of Holocaust survivors. *See id.* at § 790.15(c). In determining whether to suspend an insurer's license, the Commissioner is directed to consider whether the insurer is participating in an "international commission" on Holocaust insurance claims and "whether the commission is making meaningful and expeditious progress toward paving claims to survivors and righting the historic wrong done to Holocaust victims." *Id.* at § 790.15(e). The insurer's authorization is to remain suspended until the insurer or its affiliate pays the claim. *Id.* at § 790.15 (a).

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ARGUMENT

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ILI U.S. Digest/8 464 1/8/02, 1:46 PM

C. Interference With The Federal Government's Ability To Speak With One Voice On Matters Of Foreign Affairs.

Independent of its prohibition on extraterritorial and discriminatory legislation, the dormant Foreign Commerce Clause prevents States from regulating commerce in a manner that "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.' " *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 451 (1979) (quoting *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 285 (1976)). A state statute "will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive." *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

Because the vast majority of Holocaust-era insurance policies were issued by European insurance companies that have never done business in the United States, regulation of these policies, by its nature, implicates international relations. As the Supreme Court has recognized, the regulation of foreign companies through extraterritorial legislation necessarily touches upon the "delicate field of international relations." *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21-22 (1963). Such foreign policy decisions must be made by the political branches of the Federal Government. *See id.* at 22 ("Congress…'alone has the facilities necessary to make fairly such an important policy decision'" (quoting *Benz v. Compania Naviera Hidalgo,* 353 U.S. 138, 147 (1957)). Indeed, because of the potential for conflict inherent in extraterritorial legislation, the Supreme Court has adopted a rule of construction that even "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 248 (1991) (quoting *Foley Bros. Inc. v. Filardo,* 336 U.S. 281, 285 (1949)). This rule "serves to protect against unintended clashes between our laws and those of other *nations* which could result in international-discord." *Arab American Oil* Co., 499 U.S. at 248.

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[7] The Commissioner contends, relying on *Barclays Bank PLC v. Franchise Tax Board,* 512 U.S. 298 (1994), that the Executive Branch's voice is irrelevant to the "one voice" inquiry. *See* Appellant's Opening Brief at 27-28. The Supreme Court rejected just such a misreading of the *Barclays* opinion in *Crosby v. National Foreign*

ILI U.S. Digest/8 465 1/8/02, 1:46 PM

California's approach also risks frustrating the President's ability to speak with one voice as "the sole organ of the nation in its external relations, and its sole representative with foreign nations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).[7] By enacting HVIRA, California has created its own policy in a particular area of foreign commerce—one which judges companies by their participation in international negotiations and imposes penalties on companies who are fully complying with foreign law. California has claimed for itself the power to judge the activities of foreign insurers in connection with international *compensation programs* and has threatened to suspend the license of any insurer if that insurer or one of its affiliates does not pay what California considers to be a "valid claim," as determined by an Administrative Law Judge or the Commissioner himself. Cal. Ins. Code § 790.15(a). If each State were free to impose burdens that diverge from the foreign policy interests of the nation as expressed by the President and to have its own foreign policy, it would, as the Supreme Court has noted, significantly diminish the President's "economic and diplomatic leverage" and, hence, his authority to negotiate agreements with foreign governments. *See Crosby v. National Foreign Trade Council,* 120 S. Ct. 2288, 2296 (2000).

The impact of California's laws on foreign relations is not merely hypothetical. Indeed, at the foundation of a Joint Economic Commission ("JEC") between the United States and Swiss governments, the governments issued a joint statement which referred to the "potentially disruptive and counterproductive effects" that "the threat of actual use of sanctions on a sub-federal level" would have on efforts to resolve Holocaust-era claims. *See* Joint Statement of the United States and Swiss Governments on the Occasion of the Inaugural Meeting Establishing the U.S.-Swiss Joint Economic Commission, January 29, 2000 (Winterthur SER 140). Deputy Secretary Eizenstat wrote the California Insurance Commissioner and informed him that "actions

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Trade Council, 120 S. Ct. 2288 (2000). The *Barclays* opinion merely illustrates that a clearly expressed congressional intent will prevail over Executive statements expressing a contrary opinion, *see Crosby,* 120 S. Ct. at 2300-01. In *Crosby,* the Court reaffirmed the relevance of the Executive's voice when the President is exercising his constitutional responsibility "to speak for the Nation with one voice in dealing with other governments." *Id.* at 2298, 2301.

ILI U.S. Digest/8 466 1/8/02, 1:46 PM

by California, pursuant to [the HVIRA], have already threatened to damage the cooperative spirit which the International Commission requires to resolve this important issue for Holocaust survivors." Letter from Stuart E. Eizenstat to Charles Quackenbush, dated November 30, 1999 (ER 2300). Indeed, both the German and Swiss governments have, in diplomatic communications with the State Department, stated that they are very disturbed by California's attempts to dictate the response of German and Swiss companies to the issue of Holocaust-era claims.

The California statute's impact on the Federal Government's ability to speak with one voice is particularly significant at this juncture. The German government and German companies have taken the position that no claims will be paid by the Foundation until all pending court suits against German companies are finally dismissed. The United States has undertaken to file a Statement of Interest in such private suits explaining that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims…and that dismissal of such cases would be in its foreign policy interest." [U.S.-German Foundation Agreement] at Art. 2(1). The success of the Agreement may well be determined in the next several months as private litigants voluntarily dismiss their claims (as contemplated by the Foundation Agreement) and as the courts consider such motions as well as motions addressing the viability of their claims. Especially at this crucial time, the California scheme to facilitate and expand private litigation is contrary to the Federal Government's diplomatic efforts abroad and the foreign policy interests it has identified in the Agreement, including the twin goals of promoting expeditious and equitable payments to Holocaust victims and legal closure and peace with respect to existing claims against German companies. After lengthy and difficult negotiations, the Executive Branch made the policy determination that it is preferable—both for the benefit of Holocaust victims (and their survivors) as a group, and for the relationship between the United States and Germany—that a large number of victims receive some compensation now, rather than that substantial additional time and money be expended in a (likely futile) effort to achieve absolute justice for each potential claimant. The California law proceeds from the opposite premise.

As noted above, we do not suggest that all disclosure requirements would inevitably violate principles of extraterritoriality. Similarly, not

ILI U.S. Digest/8 467 1/8/02, 1:46 PM

all disclosure requirements would impair the Federal Government's ability to speak with one voice in the same manner as the HVIRA. For example, when Congress, in a different context, addressed a possible role for state insurance regulators in gathering information on Holocaust-era insurance policies, it provided for a limited role that avoids the most troublesome features of the California law. In the U.S. Holocaust Assets Commission Act, Pub. L. 105-186, 112 Stat. 611 (1998), Congress established a Commission to address the disposition of certain Holocaust-era assets. The statute directed the Commission to "encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust related claims practices of all insurance companies, both domestic and foreign, doing business in the U.S. at any time after January 30, 1933" that issued an insurance policy to "any individual on any list of Holocaust victims." *Id.*, at § 3(a)(4)(A). The statute provides that the report should include, to the extent information is available, "the number of policies issued by each company" to Holocaust victims, "the value of each policy at the time of issue," "the total number of policies and the dollar amount that have been paid out," and the "total present day value of assets in the U.S. of each company." *Id.* at § 3 (a) (4) (B)

Congress only requested that the Commission, through state insurance commissioners, gather information "to the degree the information is available." *Ibid*. Congress did not impose reporting requirements under threat of sanctions and did *not* authorize states to impose such sanctions. Moreover, the information specifically identified by Congress concerned only companies doing business in the United States subsequent to 1933 and did not include highly personal information, such as the names and addresses of policy holders or beneficiaries, that would likely be the subject of privacy laws in the countries where the policies were written.

D. The McCarran-Ferguson Act Does Not Save The HVIRA.

Contrary to the Commissioner's contentions, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq., does not protect the HVIRA from scrutiny under the dormant Foreign Commerce Clause. Although the McCarran-Ferguson Act generally removes the dormant Commerce Clause's restriction on States' regulation of insurance, *see Western and Southern Life Ins. Co. v. State Bd. of Equalization,* 451 U.S. 648, 655

ILI U.S. Digest/8 468 1/8/02, 1:46 PM

(1981), that Act does not shield a State's attempt to regulate insurance extraterritorially. Nor does the Act empower the States to regulate insurance in a manner that discriminates against foreign insurers or otherwise interferes with the Federal Goverment's ability to conduct the nation's foreign relations.

In *FTC v. Travelers Health Ass'n,* 362 U.S. 293 (1960), the Court considered whether the McCarran-Ferguson Act immunized a Nebraska insurer from application of an FTC cease-and-desist order that prohibited the insurer from making misleading statements to prospective out-of-state buyers. *Id.* at 296. The Court addressed the general rule of the McCarran-Ferguson Act, which leaves the regulation of insurance to the States, and the exception, contained in section 1012(b), under which the FTC may regulate insurance matters not already regulated by the States.[8] The insurer argued that the FTC lacked authority because the insurer's out-of-state mailings were already subject to regulation by Nebraska. The Supreme Court rejected the insurer's argument and concluded that "Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *Id.* at 300. *See also id.* at 301 (noting that Senate conferees "repeatedly emphasized that the provision did not authorize state regulation of extraterritorial activities").

The Commissioner argues that *Travelers* involved only the FTC exception to the McCarran-Ferguson Act and that the decision casts no light on the general rule which leaves regulation of insurance to the States. *See* Appellant's Opening Brief, 36-42. But the Court's reasoning and the language of the statute do not support this distinction. The general rule is that "[t]he business of insurance…[is] subject to the laws of the…States which relate to the regulation…of such business." 15 U.S.C. § 1012(a). The FTC exception provides that the FTC Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012(b). Para-

[8] Under the FTC exception, the FTC can regulate insurers "to the extent that such business is not regulated by State law. 15 U.S.C. § 1012(b).

ILI U.S. Digest/8 469 1/8/02, 1:46 PM

graphs (a) and (b) are thus mirror images: the FTC Act applies unless the insurance business at issue is already regulated by the State as contemplated in paragraph (a). There is no apparent basis for the Commissioner's contention that the language of paragraph (b), "regulated by State law," means anything other than the "laws of the…States which relate to the regulation…of [insurance]," described in paragraph (a). The Court's holding in *Travelers* that the McCarran-Ferguson Act applies only to regulation of activity within the State thus applies to both the scope of the States' powers under paragraph (a) and to the scope of the FTC exception under paragraph (b).

The conclusion that the McCarran-Ferguson Act does not shield extraterritorial regulation applies with particular force here, where the State law has a discriminatory regulatory effect in foreign countries. Congress's purpose in enacting McCarran-Ferguson was to restore to the States the authority over insurance that they had been thought to possess prior to the Supreme Court's decision in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), which held that insurance contracts did constitute interstate commerce. *See Travelers,* 362 U.S. at 299-302. It was "not the intention of Congress…to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision" in *South-Eastern Underwriters. Travelers,* 362 U.S. at 300 (quoting H.R. Rep. No. 143, 79th Cong., 1st Sess., 3). Moreover, the rationale behind McCarran-Ferguson, "that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government," *id.* at 302, does not apply where a State's actions have regulatory effect in foreign countries or when a State's action interferes with the conduct of foreign affairs. *See Stephens v. National Distillers and Chemical Corp.,* 69 F.3d 1226, 1232-33 (2d Cir. 1996) (holding that the preemptive scope of the FSIA was not limited by the McCarran-Ferguson Act because the foreign policy concerns reflected in the FSIA were necessarily national in scope). *See also In re Insurance Antitrust Litigation,* 938 F.2d 919, 928 (9th Cir. 1991) (if extraterritorial regulation of insurance within the United States is forbidden, then, "[a] fortiori, regulation by the fifty states of foreign reinsurers is beyond the jurisdiction of the states"), *aff'd in part, rev'd in part, Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

ILI U.S. Digest/8 470 1/8/02, 1:46 PM

II. Plaintiffs' Claims Raise Substantial Questions as to Whether California's Holocaust-Era Insurance Statutes Intrude upon the Federal Government's Exclusive Responsibility and Authority to Conduct the Nation's Foreign Affairs.

The Supreme Court has long recognized that, in addition to the Constitution's specific grant to the Federal Government of the power to regulate foreign commerce, the Constitution more generally entrusts the Federal Government "with full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines v. Davidowitz,* 312 U.S. 52, 63 (1941). Contrary to the Commissioner's suggestion, the Constitution does not "allocate[] responsibility for certain aspects of foreign affairs" to the States. Appellant's Opening Brief at 18. As the Supreme Court has made clear, "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942).

The Framers of the Constitution recognized that the actions of a State could embroil the entire nation in conflict with another country. Recognition that "[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members," caused the Framers to propose a Constitution that provided for a single national voice over foreign political and commercial affairs, in order to preserve "[t]he peace of the whole." The *Federalist No. 80*, at 476 (Alexander Hamilton); *see also* The *Federalist No. 42*, at 264 (James Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations.").

In light of the "imperative[]…that federal power in the field affecting foreign relations be left entirely free from local interference," *Hines,* 312 U.S. at 63, the Supreme Court has held that state "regulations must give way if they impair the effective exercise of the Nation's foreign policy," *Zschernig v. Miller,* 389 U.S. 429, 440 (1968). The question is *not* simply whether federal law has affirmatively and explicitly preempted a state regulation: a state policy that disturbs foreign relations must give way "even in [the] absence of a treaty" or federal statute. *Id.* at 441. Nor is it a question of "balanc[ing] the nation's interest in a uniform foreign policy against the particular interests of a particular state"; rather, "there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed." *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 52 (1st Cir. 1999), *aff'd,* 120 S. Ct. 2288, 2296 (2000).

ILI U.S. Digest/8 471 1/8/02, 1:46 PM

Zschernig is illustrative. In that case, the Court struck down an Oregon probate law that prevented the distribution of estates to foreign heirs if, under foreign law, the proceeds of the estate were subject to confiscation. 389 U.S. at 431. The Court noted that application of the statute required state courts to engage in "minute inquiries concerning the actual administration of foreign law" and to judge the credibility and good faith of foreign counsels, *id.* at 435, with outcomes turning upon "foreign policy attitudes" regarding the cold war, *id.* at 437. Accordingly, the Court concluded that the statute had "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems." *Id.* at 441. The Court held that this "'kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government"—was "forbidden state activity." *Id.* at 436.

As we have discussed in relation to the "one voice" doctrine of the Commerce Clause,…the California statute impairs the ability of the United States to conduct the nation's foreign policy. The HVIRA was designed as an exercise of foreign policy "to encourage the development of a resolution to these issues through the international process or through direct action by the State of California." Cal. Ins. Code § 13801. By its structure it places pressure on European insurers to report to the State of California, rather than through internationally agreed channels. Unsurprisingly, the problems caused by the statute are not merely theoretical. Indeed, as noted above, the governments of both Germany and Switzerland have protested to the State Department California's attempt to regulate the conduct of German and Swiss insurers with respect to insurance policies written in those countries. *See Natsios,* 181 F.3d at 55 ("foreign government views, although not dispositive, are one factor to consider in determining whether a law impermissibly interferes with the Federal Government's foreign affairs power").

The purpose and impact of the statute are highlighted when the California regulatory scheme is viewed as a whole. For example, California allows the state Insurance Commissioner to waive the suspension if "the insurer has participated in good faith in an international commission on Holocaust survivor insurance claims, and…the commission is making meaningful and expeditious progress toward paying claims to survivors and righting the historic wrong done to Holocaust victims." Cal. Ins. Code § 790.15(e). In other words, the statute calls upon the Commissioner to make "minute inquiries" into the pace and practices of

ILI U.S. Digest/8 472 1/8/02, 1:47 PM

the international Holocaust commissions that the Federal Government seeks to foster. *Zschernig,* 389 U.S. at 435. The remedy for suspensions thus intrudes into foreign policy as much as the sanctions regime itself.

4) **Sovereign immunity and act of state: *Sampson v. Federal Republic of Germany and Claims Conference Article 2 Fund***

The United States also filed a brief as *amicus curiae* on October 30, 2000, in an appeal from a district court judgment in *Sampson v. Federal Republic of Germany and Claims Conference Article 2 Fund,* 975 F. Supp. 1108 (N.D. Ill. 1997). Jacob Sampson alleged that he was a Holocaust survivor who was enslaved by the Nazis in the concentration camp at Auschwitz, Poland, where the Nazis killed sixty members of Sampson's family. Sampson sought compensation from Germany by filing a claim in 1948 with a council established in Germany and, in the 1980s, by filing claims with funds established by Germany in cooperation with the Conference on Jewish Material Claims Against Germany, Inc. In 1996 he received a payment of DM 5000 and a DM 500 monthly payment from one of these funds, "the Article 2 fund." In the same year, Sampson, acting *pro se*, brought this suit, seeking compensation both for his enslavement by the Nazis and for actions subsequent to the war by the Federal Republic of Germany and the Claims Conference. The district court dismissed the suit, finding that the claims against Germany were barred by the Foreign Sovereign Immunities Act and that the claims against both Germany and the Claims Conference were barred by the act of state doctrine. On appeal, amicus curiae appointed by the Court on Sampson's behalf argued that Nazi Germany's violations of *jus cogens*

ILI U.S. Digest/8 473 1/8/02, 1:47 PM

during World War II constitute an "implied waiver" of Germany's sovereign immunity.

This brief supports the immunity to suit of Germany in this case under principles of sovereign immunity in force in the United States during the relevant time—1939 and 1945—and the Foreign Sovereign Immunities Act ("FSIA"); it also explains the United States policy of supporting settlement of these claims through the Foundation "Remembrance, Responsibility and the Future." The excerpts that follow set forth the United States views that the court has no jurisdiction and, in particular, should not recognize an exception to immunity under the FSIA based on an alleged violation of a principle of *jus cogens.* The case was pending at the end of 2000.

The brief is available in full at *www.state.gov/s/l.*

* * * *

ARGUMENT

The Federal Republic of Germany is Immune from the Jurisdiction of The United States Courts in this case.

A. Background Of U.S. Sovereign Immunity Practice.

Some background into the United States' practice concerning foreign sovereign immunity is useful to the analysis of this case. The United States has approached the question of foreign sovereign immunity in three distinct periods. In the first period (from about 1812 to 1952), the

ILI U.S. Digest/8 474 1/8/02, 1:47 PM

United States granted foreign sovereigns virtually "absolute" immunity from suit in United States courts. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (citing *The Schooner Exchange v. M'Fadden*, 11 U.S. (7 Cranch) 116, 136-37 (1812)). During this first period of sovereign immunity law, the courts deferred to the views of the Executive Branch on whether to exercise jurisdiction, and the State Department "ordinarily requested immunity in all actions against friendly foreign sovereigns." *Id.* at 486.

In 1952, United States practice concerning foreign sovereign immunity entered a second phase when the Executive Branch formally adopted the "restrictive" theory of immunity in the "Tate letter." *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711-15 (1976) (copy of the "Tate letter"). In that letter, the State Department announced that henceforth it would recommend to United States courts, as a matter of policy, that foreign states be granted immunity only for their sovereign or public acts *(jure imperii),* and not for their commercial acts *(jure gestionis). See Verlinden B.V.,* 461 U.S. at 486-87. As explained in the Tate letter, the adoption of the restrictive theory reflected the increasing acceptance of that theory by foreign states, as well as the need for a judicial forum to resolve disputes stemming from the "widespread and increasing practice on the part of governments of engaging in commercial activities." *Alfred Dunhill of London,* 425 U.S. at 714.

Foreign sovereign immunity practice entered its third (and current) phase when Congress enacted the FSIA, which became effective in January, 1977. Pub. L. No. 94-583, 90 Stat. 2891 (1976) *codified at* 28 U.S.C. §§ 1330, 1602, *et seq.* The FSIA, "[f]or the most part, codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden B.V.,* 461 U.S. at 488. It contains a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities," *Ibid.* The FSIA sets forth a general rule of foreign state immunity, 28 U.S.C. § 1604, and provides for specific exceptions to that immunity rule, *id.* §§ 1605-07. If the FSIA applies, it controls, since the Supreme Court has made unequivocally clear that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.'" *Saudi Arabia v. Nelson,* 507 U.S. 349, 355 (1993) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428 (1989)).

ILI U.S. Digest/8 475 1/8/02, 1:47 PM

B. Under the Law Applicable at the Time of the Challenged Conduct, Germany is Entitled to Immunity from Suit.

The conduct at issue in this appeal occurred between 1939 and 1945. Under the principles of sovereign immunity then in force, Germany is entitled to immunity from suit.

Although Amicus's arguments address the provisions of the FSIA, the FSIA was not enacted until 1976. Pub. L. No. 94-583, 90 Stat. 2891 (1976). Therefore, there is an antecedent question whether the FSIA applies "retroactively" to govern a foreign state's claim of immunity concerning conduct occurring prior to its date of enactment.

The United States has previously argued and two courts of appeals have held that the FSIA does not apply to conduct preceding the adoption of the restrictive theory of immunity. *See Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986). *But cf. Princz v. Federal Republic of Germany,* 26 F.3d 1166, 1170-71 (D.C. Cir. 1994) (questioning, without deciding, whether application of FSIA to pre-1952 conduct would be impermissibly retroactive).[4] Both the Second and Eleventh Circuits concluded that the FSIA affects the "substantive rights and liabilities" of foreign states by authorizing suits against foreign states that could not have been brought earlier. *See Jackson,* 794 F.2d at 1497-98 ("to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns"); *Carl Marks,* 841 F.2d at 27 (same). *See also* H.R. Rep. No. 94-1487, 94th Cong. 2d Sess, at 33, *reprinted* in 1976 U.S. Code Cong. & Ad. News 6604, 6632 (noting that ninety-day delay in the FSIA's effective date was "necessary in order to give adequate notice of the act and its detailed provisions to all foreign states").

If, as the Second and Eleventh Circuits have concluded, this case is governed by the principles of sovereign immunity that prevailed during the 1940's, Germany is immune from suit. As explained above, prior to 1952, the government of the United States and the federal judiciary

[4] As Amicus acknowledges, Amicus Br. at 9 n.6, this Court's decision in *Wolf v. Federal Republic of Germany,* 95 F.3d 536 (7th Cir. 1996), did not address the question of the FSIA's retroactive application because, as described by the Court, the claims asserted in *Wolf* concerned only conduct that post-dated 1952. *See id.* at 540.

ILI U.S. Digest/8 476 1/8/02, 1:47 PM

took the position that "foreign sovereigns and their public property are…not…amenable to suit in our courts without their consent." *Guaranty Trust Co. v. United States,* 304 U.S. 126, 134 (1938). *See also Alfred Dunhill of London,* 425 U.S. at 712 (Tate Letter, noting that the United States had previously followed the "classical or virtually absolute theory of sovereign immunity"). Amicus does not argue that under the absolute theory of sovereign immunity a foreign state would be subject to suit in U.S. courts for claims such as plaintiff's.

Moreover, the foreign policy of the Executive Branch does not support the exercise of jurisdiction over plaintiff's claims against Germany. The Court is not, in this case, left to its own devices to surmise the views of the Executive. *Cf. Verlinden B.V.,* 461 U.S. at 487-88 (noting that, prior to the FSIA, courts were required to discern the likely policy of the Executive Branch in cases in which the State Department made no filing). In the Foundation Agreement, the United States clearly stated that it would "take appropriate steps to oppose any challenge to the sovereign immunity of the Federal Republic of Germany with respect to any claim…concerning the consequences of the National Socialist era and World War II." Art. 3(4). The United States hereby affirmatively states, by way of this filing, that it opposes the assertion of jurisdiction by United States courts over claims against the Federal Republic of Germany concerning the consequences of the National Socialist era and World War II.[5]

For the foregoing reasons, under the absolute theory of sovereign immunity that prevailed at the time of Germany's challenged conduct,

[5] There is nothing inconsistent between the position here stated and the policy expressed in the Bernstein Letter, cited by Amicus, at pages 17-19, in its discussion of the act of state doctrine. The Bernstein case, *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954), concerned claims against Private German parties, rather than the German *government*. Moreover, the quotation relied upon by Amicus contains a statement specifically limiting its application to claims for "the restitution of identifiable property (or compensation in lieu thereof)." *Id.* In any event, to the extent that there might exist any conflict, it is the present policy of the Executive Branch that should govern. The policy of courts deferring to the Executive Branch in questions of sovereign immunity stemmed from the recognition that foreign sovereign immunity was a matter of comity among nations. *See Verlinden B.V.*, 461 U.S. at 486. The Executive Branch must, therefore, be able to adapt its policy to changes in the country's foreign relations.

ILI U.S. Digest/8 477 1/8/02, 1:47 PM

the district court lacked jurisdiction to hear plaintiff's claims against the Federal Republic of Germany.

C. Under The Applicable Provisions Of The FSIA, The German Government Is Immune From Suit On Plaintiff's Claims In United States Courts.

Assuming that the FSIA provides the proper basis for assessing the district court's jurisdiction, the Federal Republic of Germany is immune from this suit.

As explained above, the general rule of the FSIA is that "a foreign state shall be immune from the jurisdiction of the courts of the United States." 28 U.S.C. § 1604. The FSIA also provides various exceptions to that rule. 28 U.S.C. § 1605. Absent an exception, U.S. courts lack jurisdiction over the suit. *Saudi Arabia v. Nelson,* 507 U.S. at 355; *Amerada Hess,* 488 U.S. at 443. Amicus relies upon the "waiver" exception, 28 U.S.C. § 1605(a)(1), arguing that the Nazi regime's violations of *jus cogens* constituted a waiver by implication of Germany's sovereign immunity. *See* Amicus Br. at 10-17. That argument has been rejected by each of the courts of appeals that has considered it and should be rejected here as well.

1. Neither the Language nor the Legislative History of the FSIA Supports tn Expansive Construction of the Implied Waiver Exception to the Statute.

The FSIA provides that

> subject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. 1604. The exceptions in sections 1605 through 1607 focus on waiver, commercial activities, U.S. property rights, torts occurring in the United States (subject to exceptions), arbitration, a limited class of acts of international terrorism and certain maritime claims. There is no general exception to immunity for violations of international law. The

ILI U.S. Digest/8 478 1/8/02, 1:47 PM

exceptions to immunity in the FSIA are clear and specific, suggesting that a theory of constructive waiver based on violation of international law would be inconsistent with the intent of the statute to recognize immunity except in certain limited and identifiable situations.

The Supreme Court in *Amerada Hess* adopted this narrow construction of the exceptions to immunity. The Court observed that "Congress had violations of international law by foreign states in mind when it enacted the FSIA," 488 U.S. at 435, citing in particular section 1605(a)(3)'s denial of immunity when property rights are taken in violation of international law. The Court concluded that "[f]rom Congress' decision to deny immunity to foreign states in the class of cases just mentioned, we draw the plain implication that immunity is granted in those involving alleged violations of international law that do not come within one of the FSIA's exceptions." *Id.* at 436.[6] *See also Saudi Arabia v. Nelson,* 507 U.S. at 355.

The Supreme Court's narrow interpretation is further supported by a subsequent amendment to the FSIA in which Congress abrogated foreign states' immunity for specific acts of international terrorism. In 1996, Congress amended the FSIA to create an exception to sovereign immunity for torture, extrajudicial killing, aircraft sabotage and hostage taking, but limited the exception to suits brought by U.S. citizens against foreign governments identified by the Executive Branch as state sponsors of terrorism. Pub. L. No. 104-132, Title II, Subtitle B., § 221(a)(1), 110 Stat. 1214, 1241-42 (1996), adding 28 U.S.C. § 1605 (a) (7).[7] Like § 1605(a)(3)'s limited removal of immunity for violations of international law respecting *property* rights, § 1605(a)(7)'s limited exception for *certain* acts of international terrorism counsels strongly against a broad interpretation of § 1605(a)(1) under which all violations of *jus*

[6] The Supreme Court also observed that in passing the FSIA Congress had invoked its power to punish "Offenses against the Law of Nations," *Amerada Hess,* 488 U.S. at 436 (citing U.S. Const. Art. I, § 8, cl. 10). The Court took this as further indication that the omission of a general exception for violations of international law was intentional. *See ibid.*

[7] In amending the FSIA to permit suit for certain enumerated torts abroad by designated state sponsors of terrorism, Congress expressly declined to adopt a broader approach, originally passed by the House. *See* 142 Cong. Rec. 4570, 4586, 4591-93 (March 13, 1996) (§ 803 of H.R. 2703, as amended); 142 Cong. Rec. 4814-15, 4836, 4846 (March 14, 1996)

ILI U.S. Digest/8 479 1/8/02, 1:47 PM

cogens are construed, *ipso facto*, as implied waivers of immunity. *See Smith v. Socialist People's Libyan Arab Jamahiriya,* 101 F.3d 239, 244 (2d Cir. 1997) (noting that § 1605(a)(7) is "a carefully crafted provision that abolishes the defense [of sovereign immunity] only in precisely defined circumstances" and that this is "evidence that Congress is not necessarily averse to permitting some violations of *jus cogens* to be redressed through channels other than suits against foreign states in United States courts").

This Court and others have frequently observed that the implied waiver provision of § 1605(a)(1) in particular must be construed narrowly. *See Frolova v. Union of Soviet Socialist Republics,* 761 F.2d 370, 377 (7th Cir. 1985); *Smith v. Socialist People's Libyan Arab Jamahiriya,* 101 F.3d 239, 243 (2d Cir. 1997); *Foremost-McKesson. Inc. v. Islamic Republic of Iran,* 905 F.2d 438, 444 (D.C. Cir. 1990); *Joseph v. Office of the Consulate General of Nigeria,* 830 F.2d 1018, 1022 (9th Cir. 1987). In support of this conclusion, the courts have cited the narrow list of examples given by Congress in the legislative history of the implied waiver provision. Congress specifically referred to three circumstances that would constitute implied waivers—"where a foreign state has agreed to arbitration in another country," "where a foreign state has agreed that the law of a particular country should govern a contract," and "where a foreign state has filed a responsive pleading without raising the defense of sovereign immunity." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 18, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617. Although these examples are not exclusive, "courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity." *Frolova,* 761 F.2d at 377; *Princz v. Federal Republic of German*, 26 F.3d 1166, 1174 (D.C. Cir. 1994) (quoting same).

More particularly, as this Court noted in *Frolova,* the examples listed by Congress reflect that an implied waiver should not be found "without strong evidence that this is what the foreign state intended." 761 F.2d at 377. *See also id.* at 378 ("waiver would not be found absent a *conscious decision* to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so" (emphasis added)); *Princz,* 26 F.3d at 1174 ("the amici's *jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1)"); *Drexel Burnham Lambert v. Committee of Receivers for Galadari,* 12 F.3d 317, 326 (2d Cir. 1993) (waiver must be "unmistak-

ILI U.S. Digest/8 480 1/8/02, 1:47 PM

able" and "unambiguous"). Amicus's arguments in this case are inconsistent with the intentionality requirement of the implied waiver provision. Indeed, Amicus does not argue that a nation intentionally waives its immunity from suit when it violates *jus cogens* principles. Rather, Amicus argues that by engaging in such conduct a nation should be deemed to have forfeited its right to assert sovereign immunity. Whatever the attraction of that argument, Congress has not created such an exception. Whereas Congress has declared that a foreign state forfeits its immunity when it engages in certain classes of conduct,[8] Congress has not adopted a broad forfeiture of immunity for violations of *jus cogens.* It is not the role of the courts to do so.

In light of the above, it is not surprising that each of the three courts of appeals that have addressed the relationship of *jus cogens* to sovereign immunity has rejected the idea that conduct by a sovereign nation in violation of *jus cogens* norms constitutes an implied waiver of immunity. *See Smith,* 101 F.3d at 242-45; *Princz,* 26 F.3d at 1173-74; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718-19 (9th Cir. 1992). In each case, the court concluded that it is up to the political branches, and not the judicial branch, to determine that *jus cogens* violations should give rise to exceptions to foreign sovereign immunity. *See Smith,* 101 F.3d at 242; *Princz,* 26 F.3d at 1174-1175, n.1; *Siderman,* 965 F.2d at 719.[9]

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[8] A foreign state forfeits its immunity, for example, with respect to commercial activity, 28 U.S.C. § 1605(a)(2), the seizure of property in violation of international law, *id.* § 1605(a)(3), tortious acts committed in the United States, *id.* § 1605(a)(5), and acts of international terrorism by states designated by the Executive Branch, *id.* § 1605(a)(7).

[9] Amicus relies heavily on *Siderman* as its chief example of an application of the implied waiver provision to circumstances beyond those listed by Congress. *See* Amicus Br. at 12. *Siderman* held that a foreign sovereign's affirmative invocation of the jurisdiction of U.S. courts could be construed as an implied waiver of immunity from suit on related claims. 965 F.2d at 720-23. This holding, which has itself been criticized, *see Cabiri v. Republic of Ghana,* 165 F.3d 193, 202 (2d Cir. 1999), is at least far closer than this case to the examples identified by Congress, all of which "share a close relationship to the litigation process," *Smith*, 101 F.3d at 243. Significantly, Siderman specifically *rejected* the broader argument, urged here by Amicus, that the FSIA incorporates an exception for violations of *jus cogens. See* 965 F.2d at 718-19 ("The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.").

ILI U.S. Digest/8 481 1/8/02, 1:47 PM

2. The Jus Cogens *Doctrine Does Not Address, and Would Be a Highly Uncertain Guide To, Resolving Sovereign Immunity Issues.*

The arguments advanced by Amicus are also flawed as a matter of both logic and policy. As a matter of logic, Amicus conflates the substantive norms of conduct and the methods by which violations of those norms should be redressed. As a matter of policy, Amicus's argument would require the courts to engage in the difficult and politically sensitive task of determining what rules of conduct constitute *"jus cogens,"* a determination that is better left to the branches of government assigned responsibility for conducting the nation's foreign affairs.

Amicus argues, relying upon the dissenting opinion in *Princz,* that *jus cogens* norms rank higher than other principles of international law including the doctrine of sovereign immunity and that, in order to maintain consistency with international law, the FSIA should be interpreted to encompass violations of *jus cogens* among those claims for which foreign states have implicitly waived their immunity from suit in U.S. courts. *See* Amicus Br. at 13-17; *Princz,* 26 F.3d at 1183 (Wald, J., dissenting) ("the only way to reconcile the FSIA's presumption of foreign sovereign immunity with international law is to interpret § 1605(a)(1) of the Act as encompassing the principle that a foreign state implicitly waives its right to sovereign immunity in United States courts by violating *jus cogens* norms"). Amicus further argues that violations of *jus cogens* are not sovereign acts and thus not entitled to immunity. *See* Amicus Br. at 17.

However well-intentioned, these arguments are based upon a conceptual confusion between substantive and procedural principles of international law. Although *jus cogens* principles, unlike ordinary customary international law, are described as non-derogable (both as a matter of state practice generally and in the formation of treaties in particular), that description does not resolve how such principles are to be enforced. Even if all states are bound to respect *jus cogens* principles, they are not required to open their domestic courts to private litigation to resolve alleged *jus cogens* violations by other states. *See* Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz,* 16 Mich. J. Int'l L. 403, 421 (1995).

We have found no support for the proposition that the international consensus required to generate a principle of *jus cogens* necessarily im-

ILI U.S. Digest/8 482 1/8/02, 1:47 PM

plies a similar consensus that local judicial remedies for their violation are either appropriate or mandatory. Indeed, given that, to our knowledge, no state has recognized such an exception to sovereign immunity, plaintiffs' theory requires the untenable premise that there can be a principle of customary international law that no state supports.

Characterizing violations of *jus cogens* as "non-sovereign" acts similarly fails to resolve how *jus cogens* principles are to be enforced. Even if a state violates *jus cogens,* it is still clearly acting as a sovereign state. The key question for purposes of this case is whether the political branches in enacting the FSIA have chosen to deny immunity for this particular category of activity by sovereign states. To label that activity "sovereign" or "non-sovereign" for purposes of sovereign immunity is to state a conclusion rather than to provide the necessary analysis.

Indeed, there is an internal inconsistency in Amicus's argument. On the one hand, Amicus argues that the courts may assert jurisdiction over Sampson's claims because the challenged acts of the Nazi government were not the sovereign acts of the German state. Yet, Sampson's attempt to hold the present democratic government of the Federal Republic of Germany liable for the wrongs of the Nazi regime rests on the theory that the Federal Republic of Germany is the legal successor to the Nazi regime as the sovereign authority in Germany. *See* note 3 *supra.* Plaintiff cannot have it both ways.

A further problem in Amicus's argument is that *jus cogens* would provide a highly uncertain guide to implementing the FSIA's implied waiver exception. While in some cases, the political branches may affirmatively have recognized a principle as *jus cogens,* that would not be true of every case in which a *jus cogens* violation is asserted. As stated in one of the leading treatises on international law, *jus cogens* "is a comparatively recent development and there is no general agreement as to which rules have this character." *See* Oppenheim's International Law, ed. by R. Jennings and A. Watts, 9th ed. (1992), p. 7.

After World War II (and, in part, as a result of the Nuremberg proceedings), international law scholars began to develop a theory that peremptory legal norms might be binding upon all states and in all circumstances. In the view of these scholars, the key characteristic of such norms was that treaty provisions authorizing violations of *jus cogens* would therefore be considered void. *See* E. Schwelb, *Some Aspects of International Jus Cogens As Formulated By The International Law Commission,* 61 Am. J. Int'l L. 946, 949-963 (1967). This concept was accepted

ILI U.S. Digest/8 483 1/8/02, 1:47 PM

by the U.N. International Law Commission in the development of what became the Vienna Convention on the Law of Treaties.[10] *See* Restatement (Third) of the Law of Foreign Relations ("Restatement"), § 331 (1987); Zimmermann, *Sovereign Immunity and Violations Of International Jus Cogens—Some Critical Remarks,* 16 Mich. J. Int'l L. 433, 437-438 (1995). That text, however, does not establish the content of *jus cogens,* which remains highly uncertain. *See* Restatement § 331, comment e (doctrine of *jus cogens* is of such "uncertain scope" that a "domestic court should not on its own authority refuse to give effect to an agreement on the ground that it violates a peremptory norm"). Moreover, neither the International Law Commission nor the Vienna Convention suggests that *jus cogens* has any bearing on principles of sovereign immunity.

There is no practice in the United States or abroad clarifying the precise content of *jus cogens.* Case law in the United States discussing *jus cogens* is sparse and inconsistent, and commentators frequently note that the content of *jus cogens* is not agreed. *See* Restatement, § 102, Reporters Note 6.[11] In many cases, the political branches will not have pronounced on the issue whether a certain principle has attained *jus cogens* status. And, since no other country has adopted a *jus cogens* exception to sovereign immunity, there would be little if any international practice on which to rely. In these circumstances it is particularly doubtful that Congress silently intended the FSIA's implied waiver exception to incorporate violations of *jus cogens,* with no legislative guidance on how to apply that doctrine. The determination of what violations of international law will subject a foreign state to the domestic

[10] The United States has never ratified the Vienna Convention.

[11] Because of its lack of definition, the concept of *jus cogens* lends itself to exorbitant claims such as a right not to be "locally deported" (removed from the city limits). *See Klock v. Cain,* 813 F. Supp. 1430 (C.D. Cal. 1993). *See also Xuncax v. Gramajo,* 886 F. Supp. 162, 189 (D. Mass. 1995) (court was reluctant to stretch asserted *jus cogens* norm against cruel and inhuman or degrading treatment to encompass constructive expulsion); *Sablan v. Superior Court of the Commonwealth of the Northern Mariana Islands,* 1991 WL 258344, 2 N.M.I. 165 (N. Mariana Islands, 1991) (dissenting opinion) (right of self-government is so fundamental that it constitutes a peremptory norm); *see also Sablan v. Iginoef*, 1990 WL 291893, 1 N.M.I. 146 (N. Mariana Islands, 1990) (concurring opinion) (same); *Borja v. Goodman,* 1990 WL 291854, 1 N.M.I. 63 (N. Mariana Islands, 1990) (same).

ILI U.S. Digest/8 484 1/8/02, 1:47 PM

courts of the United States is a foreign policy question that must be reserved for the political branches of government, to which the Constitution entrusts the conduct of the nation's foreign affairs. *See Princz,* 26 F.3d at 1174-75, n.1.[12]

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c. Negotiations to settle claims against Austria and Austrian companies arising from Nazi era

A similar process is underway to resolve Nazi era claims against Austria and Austrian companies.

On October 6, 2000, the United States, Austria and representatives of the victims reached agreement on a Framework Concerning Austrian Negotiations Regarding Austrian Nazi Era Property/Aryanization Issues. In the Framework, the victims' representatives agreed to support the Austrian Reconciliation Fund, which would provide AS 6 billion to forced and slave laborers who worked on territory of present day Austria during the Nazi era. Austria agreed*, inter alia*, to make a contribution of AS 150 million to a fund which will be distributed to Holocaust survi-

[12] In *Princz,* the court correctly observed:

> We think something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government would have normal relations with the government of the day — unless disrupted by our courts, that is.

26 F.3d at 1174-1175, n.1.

ILI U.S. Digest/8 485 1/8/02, 1:47 PM

vors from Austria. That amount would be deemed as "final compensation" for claims for apartment and small business leases, household property and personal valuables and effects. In addition, Austria agreed to establish a fund to address all remaining property and aryanization issues. Negotiations on such a Fund would commence immediately following the conclusion of the labor agreement.

A Joint Statement to address the labor issues was signed on October 24, 2000 by the Governments of the Republic of Austria, the United States, Belarus, the Czech Republic, the Republic of Hungary, the Republic of Poland, and Ukraine, as well as the Platform "Humanitarian Action" and representatives of Austrian companies and a number of counsel for plaintiffs in lawsuits in U.S. courts. The Russian Federation signed in February 2001.) (Joint Statement on the Occasion of the Signing Ceremony of the Bilateral Agreements Relating to the Austrian Reconciliation Fund, Vienna, October 24, 2000.) The document welcomes and supports the establishment of the Austrian Fund for "Reconciliation, Peace and Cooperation" ("Reconciliation Fund"), funded with AS 6 billion contributed by Austria and Austrian companies, and states that, "based on the circumstances, all participants consider the overall result and the [proposed] distribution of the Reconciliation Fund funds to be fair to the victims and their heirs." The transfer of funds to the Reconciliation Fund is contingent on all pending claims as of October 24, 2000 covered by the Reconciliation Fund being dismissed with prejudice and an executive agreement between the United States and Austria entering into force.

An "Agreement between the Government of the United States of America and the Austrian Federal Government concerning the Austrian Fund 'Reconciliation, Peace and

ILI U.S. Digest/8 486 1/8/02, 1:47 PM

Cooperation'" ("U.S.-Austria Agreement") was signed the same day and entered into force pursuant to an exchange of diplomatic notes on December 1, 2000. The terms of the Agreement are similar but not identical to the U.S.-German Agreement. Austria agreed to "actively and expeditiously continue to pursue" discussions concerning restitution and compensation legislation enacted by Austria after World War II with a view to creating "suitable potential remedies" in agreement with the United States (Article 1.4). In addition to undertakings like those with Germany, the United States also undertakes to file a Statement of Interest in cases arising out of the Nazi era against Austria and Austrian companies where Austria, in agreement with the United States, establishes a suitable potential remedy (Article 2(2)). Articles 1 through 3 are set forth below.

The full text of the Joint Statement and the U.S.-Austria Agreement, as well as a statement by Secretary of State Albright, are available at *www.state.gov/s/l.*

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ARTICLE 1

(1) The parties agree that the Fund covers, and that it would be in their interest for the Fund to be the exclusive remedy and forum for the resolution of, all claims that have been or may be asserted against Austria and/or Austrian companies involving or related to the use of slave or forced labor during the National Socialist era or World War II and any other claims covered by the Fund.

(2) Austria agrees to ensure that the Fund shall provide appropriately extensive publicity concerning its existence, its objectives, and the availability of funds.

(3) Annex A sets forth the principles that shall govern the operation of the Fund. Austria assures that the Fund will be subject to supervision by an Austrian authority; any person may request that the Austrian

ILI U.S. Digest/8 487 1/8/02, 1:47 PM

authority take measures to ensure compliance with the legal requirements of the Fund.

(4) Austria agrees to actively and expeditiously continue to pursue discussions with interested parties, based on an agreed upon framework with such parties, concerning potential gaps and deficiencies in the restitution and compensation legislation enacted by Austria after World War II to address aryanization issues during the National Socialist era or World War II on the territory of present-day Austria with a view to creating, in agreement with the United States, suitable potential remedies in the meaning of Article 2 paragraph 2 and Article 3 paragraph 3 hereof. The United States Government will facilitate this process.

ARTICLE 2

(1) The United States shall, in all cases in which the United States is notified that a claim described in Article 1 (1) has been asserted in a court in the United States, inform its courts through a Statement of Interest, in accordance with Annex B, and consistent therewith, as it otherwise considers appropriate, that it would be in the foreign policy interest of the United States for the Fund to be the exclusive remedy and forum for resolving such claims against Austria and/or Austrian companies as defined in Annex C, and that dismissal of such cases would be in its foreign policy interest.

(2) The United States shall also, in all cases in which Austria, in agreement with the United States, establishes a suitable potential remedy for other claims against Austria and/or Austrian companies arising out of the National Socialist era or World War II, file a Statement of Interest, *mutatis mutandis*, as described in Article 2 (1).

(3) The United States, recognizing the importance of the objectives of this agreement, including all-embracing and enduring legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments.

ARTICLE 3

(1) This agreement is intended to complement the creation of the Fund and to foster all-embracing and enduring legal peace for Austria

ILI U.S. Digest/8 488 1/8/02, 1:47 PM

and Austrian companies with respect to any claims involving or related to the use of slave or forced labor during the National Socialist era or World War II and any other claims covered by the Fund.

(2) This agreement shall not affect unilateral decisions or bilateral or multilateral agreements that dealt with the consequences of the National Socialist era or World War II.

(3) The United States shall take appropriate steps to oppose any challenge to the sovereign immunity of Austria with respect to any claim that may be asserted against the Republic of Austria involving or related to the use of slave or forced labor during the National Socialist era or World War II and any other claims covered by the Fund and other claims arising out of the National Socialist era or World War II for which the United States and Austria agree that a suitable potential remedy has been provided.

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2. Private Korean national claims: *Kwan v. United States of America*

In September 2000 the United States filed a brief as appellee in *Kwan v. United States of America*, No. 00-1163 (3rd Cir. 2000) urging affirmance of a district court grant of the United States motion to dismiss. *Kwan v. United States of America*, 84 F. Supp. 2d 613 (E.D.Pa 2000). Plaintiffs in the suit seek to enforce an international agreement for military and economic assistance between the governments of the United States and the Republic of Korea ("ROK"), embodied in a March 1966 letter from United States Ambassador Winthrop G. Brown to the Republic of Korea's Minister of Foreign Affairs (the "Brown Commitment"). That letter, classified as "Secret" at the time it was issued,

ILI U.S. Digest/8 489 1/8/02, 1:47 PM

responded to the Republic of Korea's decision to deploy additional combat troops in the Republic of South Vietnam, and stated that the United States was prepared to furnish certain military and economic assistance to the ROK, including the payment of death and disability "gratuities" for ROK casualties suffered in Vietnam at double the rates that had recently been agreed to by the Joint US-ROK Military Committee. Total U.S. death and disability payments to the ROK for killed and injured ROK forces as agreed amounted to $10.5 million.

The plaintiffs are two ROK nationals seeking declaratory, injunctive and monetary relief on behalf of themselves and a class of ROK veterans of the Vietnam conflict and the members of the Korean National Assembly, for the alleged failure of the United States to abide by the terms of the Brown Commitment. Although the amended complaint also lists the ROK as a plaintiff, the ROK never authorized its participation in the case and plaintiffs conceded that the ROK is not a party to the appeal.

The district court granted the U.S. motion to dismiss on the grounds that the plaintiffs lacked standing because, among other things, the Brown Commitment did not confer any right on the individual plaintiffs to enforce its provisions and that plaintiffs' suit presents a nonjusticiable political question. On appeal the United States argued that the district court correctly dismissed the lawsuit because plaintiffs have no private right of action to enforce the Brown Commitment, plaintiffs' claims are not justiciable, and the United States has not waived its sovereign immunity from plaintiffs' claims for damages. By Order of the Third Circuit Court of Appeals dated November 22, 2000, the appeal was transferred to the Federal Circuit Court of Appeals and was pending at the end of 2000.

ILI U.S. Digest/8 490 1/8/02, 1:47 PM

The full texts of the brief and the attached Declaration of James G. Hergen are available at *www.state.gov/s/l.*

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ARGUMENT

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II. The District Court Correctly Dismissed This Lawsuit.

A. Plaintiffs Have No Private Right Of Action To Enforce The Brown Commitment.

1. Plaintiffs seek to enforce an international agreement through a private right of action against the United States. As this Court has recognized, "[b]ecause treaties are agreements between nations, individuals ordinarily may not challenge treaty interpretations in the absence of an express provision within the treaty or an action brought by a signatory nation." *United States ex rel. Saroop v. Garcia,* 109 F.3d 165, 167 (3d Cir. 1997).[3] Indeed, it is well established that "[i]nternational treaties are not presumed to create rights that are privately enforceable." *Goldstar (Panama)-S.A. v. United States*, 967 F.2d 965, 968 (4th Cir.), *cert. denied,* 506 U.S. 955 (1992); *see United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (en banc) ("treaties do not generally create rights that are privately enforceable in the federal courts"), *petitions for cert. filed,* No. 99-9768 (May 30, 2000) and No. 99-9770 (May 26, 2000); *see also United States v. Diekelman*, 92 U.S. 520, 524

[3] Although the Brown Commitment is an executive agreement rather than a treaty that requires the advice and consent of the Senate under Article II, Section 2 of the Constitution, executive agreements are subject to the same rules of interpretation that govern treaties. *See, e.g., Bank Melli Iran v. Pahlavi,* 58 F.3d 1406, 1408 (9th Cir.), *cert. denied,* 516 U.S. 989 (1995); *Air Canada v. U.S. Department of Transportation,* 843 F.2d 1483, 1486 (D.C. Cir. 1988).

ILI U.S. Digest/8 491 1/8/02, 1:47 PM

(1875); *Charlton v. Kelly*, 229 U.S. 447, 474 (1913); *Edye v. Robertson (Head Money Cases),* 112 U.S. 580, 598 (1884); *United States v. Davis*, 767 F.2d 1025, 1030 (2d Cir. 1985) ("even where a treaty provides certain benefits for nationals of a particular state--such as fishing rights—it is traditionally held that "any rights arising from such provisions are, under international law, those of states and…individual rights are only derivative through the states." (citations omitted)); *Canadian Transport Co. v. United. States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980) ("the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom").[4]

Thus, plaintiffs must demonstrate that the Brown Commitment confers on them a private right to enforce the Commitment against the United States. As the district court correctly recognized (J.A. 9), however, the Brown Commitment creates no private causes of action. The Brown Commitment formed part of a sensitive diplomatic dialogue between the United States and the government of the ROK during the heart of the Vietnam conflict; it was issued in response to the ROK's decision to deploy additional combat troops to Vietnam. The Brown Commitment was intended to ensure that "the integrity of Korea's defense is maintained and strengthened and that Korea's economic progress is further promoted," J.A. 78, not to confer private rights of action on individual ROK citizens.

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[4] The Court has no authority to supply a private right of action where one cannot be shown. As the Supreme Court has explained:

> [T]his Court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties, by just rules of interpretation, applied to the subject matter; and having found that, our duty is to follow it, so far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 71 (1821) (Story, J.).

ILI U.S. Digest/8 492 1/8/02, 1:47 PM

As the district court recognized, "[n]othing in the Brown Commitment authorizes payment of benefits from the United States directly to individual Korean veterans." J.A. 6; *see* J.A. 102, ¶ 19, (Declaration of James G. Hergen). Indeed, the text of the Brown Commitment simply lists various forms of government-to-government assistance that the United States was "prepared" to provide in recognition of the ROK government's contributions to the conduct of the Vietnam conflict, including certain death and disability "gratuities." J.A. 78-79. The United States accordingly has made payments under the Brown Commitment to the ROK government, not to individual ROK nationals. *See* J.A. 20.

In addition, the Brown Commitment was kept confidential at the time it was negotiated; each of its pages is marked *"SECRET." See* J.A. 78-81. It strains credulity to suggest that the parties intended to secretly confer private causes of action on ROK military personnel without in any way informing the purported beneficiaries.

In short, the indication by the United States in a secret agreement that it was "prepared" to provide certain death and disability "gratuities" to the ROK government cannot reasonably be interpreted to establish an individual, judicially enforceable right to obtain compensation from the United States. Indeed, the Brown Commitment is absolutely silent regarding dispute resolution, even as between the United States and the Republic of Korea, let alone with respect to individual ROK citizens.

Even if the Brown Commitment could plausibly be interpreted to confer private rights of action (and it cannot for the reasons discussed above) the Executive Branch's contrary interpretation of the agreement nonetheless would be entitled to great deference. *See, e.g., El Al Israel Airlines Ltd. v. Tsui Yuan Tseng,* 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty"); *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight"); *Kolovrat v. Oregon,* 366 U.S. 187, 194 (1961) (same); *More v. Intelcom Support Services. Inc.*, 960 F.2d 466, 471-72 (5th Cir. 1992) Restatement (Third) of the Foreign Relations Law of the United States § 326 comment b (1987). The Executive Branch's interpretation of the Brown Commitment to fore-

ILI U.S. Digest/8 493 1/8/02, 1:47 PM

close private rights of action is manifestly reasonable and warrants judicial deference.[5]

2. As the district court recognized (J.A. 9-11), plaintiffs' claims are not rendered any more viable by labeling them as claims under a contract rather than an international agreement. Plaintiffs alleged in their complaint that the government had violated certain "understandings and agreements" between the governments of the United States and the ROK. *See* J.A. 72, ¶ 14; J.A. 73, ¶ 19. But the only specific agreement that plaintiffs have identified is the Brown Commitment, and that agreement includes no judicially enforceable promises to the plaintiffs.

In addition, although treaties and international agreements such as the Brown Commitment are often characterized as "contracts between independent nations," they are to be interpreted in accordance with " 'the public law of nations' " *Santovincenzo v. Egan,* 284 U.S. 30, 40 (1931) (citation omitted), not domestic contract law. Indeed, the rights and remedies that exist for breaches of international agreements differ from those available under domestic law for breaches of commercial contracts. Special rules govern breaches of international agreements even where (unlike the agreement in this case) the underlying instrument creates a private right of action. *See generally* 28 U.S.C. § 1502 (establishing exception to jurisdiction of Court of Federal Claims for claims against the United States "growing out of or dependent upon any treaty entered into with foreign nations"); Restatement (Third) of the Foreign Relations Law of the United States §§ 902, 907 (1987).

3. Perhaps recognizing the difficulties of pursuing a private cause of action against the United States, plaintiffs sought to name the Republic of Korea itself as a plaintiff in their amended complaint. But the ROK has never been a party to this case; plaintiffs have never obtained the requisite governmental approval to pursue this action in the name of the ROK. *See* J.A. 15-16. Indeed, in July 1999, the Korean Ministries of

[5] The absence of a cause of action also supports the district court's conclusion that plaintiffs lack standing in this case. *See* J.A. 9; *cf. Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 97 n.2 (1998) ("The question whether *this* plaintiff has a cause of action under the statute, and the question whether *any* plaintiff has a cause of action under the statute are closely connected – indeed, depending upon the asserted basis for lack of statutory standing, they are sometimes identical, so that it would be exceedingly artificial to draw a distinction between the two.

ILI U.S. Digest/8 494 1/8/02, 1:47 PM

Foreign Affairs and Justice "officially confirmed" to the State Department that the Republic of Korea "is not a party to this lawsuit." J.A. 102, ¶ 20 (Declaration of James G. Hergen); *see* J.A. 14. Thus, ROK was never a party to the proceedings below. And, as plaintiffs concede (Pl. Br. 4 n.1), the ROK is not a party to this appeal.

Plaintiffs contend (Pl. Br. 11) that the Republic of Korea "has made an official protest or objection on behalf of Mr. Kwan and those similarly situated," relying on a diplomatic note from the Republic of Korea to the United States. *See* J.A. 82-83. As the district court correctly concluded (J.A. 12-13), however, the note is not an official protest. Indeed, [far from protesting any action by the United States, the [note] merely raises an issue for consideration between the two nations"—"whether the Brown Commitment contemplates payment for disability benefits as a result of injuries caused by Agent Orange." J.A. 13. The note thus "brings an emergent situation to the attention of the State Department with a request that the two nations discuss how the situation should be resolved." *Ibid.* The note does not protest any conduct of the United States.

In any event, even if the note constituted an official protest, it would not authorize plaintiffs to pursue this lawsuit. As explained above, the Brown Commitment creates no private right of action in favor of plaintiffs. Absent a cause of action, plaintiffs have no right to pursue relief against the United States under the Brown Commitment.

4. In addition to lacking any cause of action under the Brown Commitment, plaintiff Park has alleged no cognizable injury in fact that could support standing. In order to satisfy the case-or-controversy requirement of Article III, a plaintiff must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.' " *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (citations omitted). Here, Park alleges no injury arising out of his own military service that would be compensable under the Brown Commitment; he appears to be suing solely in his capacity as a member of the Korean National Assembly. *See* J.A. 70, ¶ 3; J.A. 73, ¶ 19. But Park's status as a legislator does not provide him with a legally cognizable interest in pursuing this lawsuit. *Cf. Raines v. Byrd,* 521 U.S. 811, 818-30 (1997) (holding that institutional injury alleged by Members of Congress in challenging validity of Line Item Veto Act was not sufficient to give rise to standing).

ILI U.S. Digest/8 495 1/8/02, 1:47 PM

B. Plaintiffs' Claims Are Not Justiciable.

The district court also correctly concluded that this suit presents a nonjusticiable political question. The political question doctrine is based on two key principles: the separation of powers among the three coordinate branches and the inherent limits of judicial competence. *See, e.g., Baker v. Carr,* 369 U.S. 186, 210 (1962).[6] Although "not 'every case or controversy which touches foreign relations lies beyond judicial cognizance,' " *State of New Jersey v. United States,* 91 F.3d 463, 46 9 (3d Cir. 1996) (quoting *Baker v. Carr,* 369 U.S. at 211), plaintiffs cannot properly inject the judiciary into this matter. To the extent that there is any dispute regarding the Brown Commitment, it is solely for the governments of the United States and the ROK to resolve.

As plaintiffs recognize, the government of the ROK has raised through diplomatic channels the issue of additional compensation under the Brown Commitment. *See* J.A. 73, ¶ 18 (Amended Compl.); J.A. 82-83. Under these circumstances, it would be improper for the judiciary to preempt the Executive Branch by imposing its own interpretation of the Brown Commitment on the United States. Indeed, "[c]ourts must take into account that international negotiations have their own distinctive time frames, and must be careful 'to avoid a fixing of our government's course' by premature interposition." *Adams v. Vance,* 570 F.2d 950, 954-55 (D.C. Cir. 1978) (citation omitted).

In any event, even after the Executive Branch renders its interpretation, plaintiffs' claims would still not be justiciable. As the district court explained, "[t]he commitment by Ambassador Brown was made on behalf of the United States to the government of the Republic of Korea and not to the individual Korean veterans." J.A. 20. And "[t]he structure of the agreement was that the Republic of. Korea would pay the death or disability gratuity to its veterans and the United. States would in turn make a payment to the Republic of Korea." *Ibid.* Thus, whether additional compensation should be paid to ROK veterans "is a matter to be settled between the veterans and the Korean governmental agency or department which oversees such matters." *Ibid.*

Moreover, "because in the past payments under the Brown Commitment were made directly to the Republic of Korea and not to the individual veterans, it is clear that issues between the two nations as to the amount of the payments was intended to be resolved by government

ILI U.S. Digest/8 496 1/8/02, 1:47 PM

to government negotiations." J.A. 20. As the district court recognized, that is a matter for the Executive Branch to resolve pursuant to its authority to conduct foreign relations. *See Harisiades v. Shaughnessy,* 342 U.S. 580, 589 (1952); *Oetjen v. Central-Leather Co.,* 246 U.S. 297, 302 (1918); *DKT Memorial Fund Ltd. v. Agency for International Development,* 887 F.2d 275, 291 (D.C. Cir. 1989) (area of "foreign affairs" is where "the Executive receives its greatest deference, and in which we must recognize the necessity for the nation to speak with a single voice"); *Holmes v. Laird,* 459 F.2d 1211, 1215 (D.C. Cir.), *cert. denied,* 409 U.S. 869 (1972).

Plaintiffs contend (Pl. Br. 16) that the Brown Commitment implicates "rights protected by a treaty" and that the case therefore is not subject to dismissal. As explained above, however, the Brown Commitment confers no judicially enforceable rights on the plaintiffs. And plaintiffs' reliance (Pl. Br. 18-19) on the "national treatment" provisions of a Treaty of Friendship, Commerce, and Navigation between the United States and the Republic of Korea is entirely misplaced. Those provisions ensure solely that Korean nationals are accorded no less favorable treatment in the United States than our own citizens in like circumstances. *See* J.A. 136 (Treaty of Friendship, Commerce and Navigation, U.S.-ROK, Nov. 28, 1956, art. XXII, 8 U.S.T. 2217, 2232 (entered into force Nov. 7, 1957)). But those provisions do not create special causes of action or standing that would permit nationals of foreign states to pursue claims in U.S. courts that could not be pursued by U.S. nationals. Just like any other litigant in federal court, the plaintiffs in this case must demonstrate a cause of action and present a justiciable claim for relief.[7]

Here, the Brown Commitment confers no private right of action, and plaintiffs' claims are not justiciable in any event. Accordingly, this suit was properly dismissed.

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[7] In any event, the cases that plaintiffs cite (Pl. Br. 16-17) involving violations of international agreements by States or state officials provide no basis for awarding compensation against the United States in this case, which involves only the federal government. *See Kolovrat v. Oregon,* 366 U.S. 187 (1961); *Fairfax's Devisee v. Hunter Is Lessee,* 11 U.S. (7 Cranch) 603 (1813) ; *Ware v. Hylton,* 3 U.S. (3 Dall.) 199 (1796).

ILI U.S. Digest/8 497 1/8/02, 1:47 PM

C. The United States Has Not Waived Its Sovereign Immunity From Plaintiffs' Claims For Damages.

In addition to lacking a cause of action and presenting a nonjusticiable political question, plaintiffs also have failed to identify any statute that waives the sovereign immunity of the United States from their claims for damages under an international agreement. It is axiomatic that Congress must expressly waive the sovereign immunity of the United States before the federal government can be sued, and that such waivers are construed strictly in favor of the United States. *See, e.g., Department of the Army v. Blue Fox. Inc.,* 525 U.S. 255, 260-61 (1999); *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

In the district court, plaintiffs (J.A. 58) invoked the Little Tucker Act, 28 U.S.C. § 1346 (a) *(2),* which authorizes suit against the United States for claims of no more than $10,000 "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort… ." As explained above, plaintiffs' claims are not properly viewed as contract claims, and the Little Tucker Act does not unequivocally authorize suit against the United States for violations of an international agreement. Indeed, Congress has made clear that the Court of Federal Claims lacks jurisdiction under the Tucker Act for claims under treaties,[8] and there is no basis for interpreting the Little Tucker Act any differently. If, however, the Court were to conclude that the district court had jurisdiction under the Little Tucker Act, then exclusive jurisdiction over this appeal would lie in the Federal Circuit. *See* 28 U.S.C. § 1295(a)(2).[9]

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[8] *See* 28 U.S.C. § 1502; *Hughes Aircraft Co. v. United States,* 534 F.2d 889, 903 n.17 (Ct. Cl. 1976) (noting that Section 1502 has been determined to encompass international executive agreements as well as treaties).

[9] This Court has jurisdiction to determine its own jurisdiction. *See Chabal v. Reagan,* 822 F.2d 349, 355 (3d Cir. 1987). If the Court concludes that it lacks jurisdiction over this appeal, it should not transfer the appeal to the Federal Circuit under 28 U.S.C. § 1631. It would not be "in the interest of justice" within the meaning of Section 1631 to transfer a case in which plaintiffs have no cause of action and cannot otherwise obtain the relief they seek. *See Campbell v. Office of Personnel Management,* 694 F.2d 305, 309 n.6 (3d Cir. 1982) (refusing to transfer appeal where the petitioner "could not prevail" on the merits); *see also Phillips v.*

ILI U.S. Digest/8 498 1/8/02, 1:47 PM

Plaintiffs (J.A. 58-59) also invoked the federal mandamus statute, 28 U.S.C. § 1361. But it is well established that the mandamus statute does not itself provide a waiver of sovereign immunity. *See, e.g., In re Russell,* 155 F.3d 1012, 1012 (8th Cir. 1998) (per curiam); *see also Washington Legal Foundation v. United States Sentencing Commission,* 89 F.3d 897, 901 (D.C. Cir. 1996) (collecting cases). And the statute applies to suits "in the nature of mandamus" against officers and employees of the United States, not suits for monetary relief against the United States itself. *See* 28 U.S.C. § 1361.

Finally, plaintiffs' reliance (J.A. 59) on *Bowen v. Massachusetts,* 487 U.S. 879 (1988), in the proceedings below was misplaced. *Bowen* involved the waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. § 702, which applies only to claims for relief "other than money damages." The Court in *Bowen* determined that the term "money damages" in Section 702 refers to "a sum used as compensatory relief to substitute for a suffered loss, as opposed to a specific remedy that attempts to give the plaintiff the very thing to which he was entitled." *Department of the Army v. Blue Fox, Inc.,* 525 U.S. at 255 (citing *Bowen,* 487 U.S. at 895, 897, 900); *see also Dia Navigation Co., Ltd. v. Pomeroy,* 34 F.3d. 1255, 1266-67 (3d Cir. 1994) Plaintiffs in this case seek to recover "compensatory relief to substitute for" the loss they suffered while serving in Vietnam. That is precisely the type of relief that falls outside the scope of 5 U.S.C. § 702.[10]

Seiter, 173 F.3d 609, 610-11 (7th Cir. 1999) (Posner, C.J.) ("A court is authorized to consider the consequences of transfer before deciding whether to transfer; that is implicit in the statute's grant of authority to make such a decision…and implies in turn that the court can take a peek at the merits, since whether or not the suit has any possible merit bears significantly on whether the court should transfer or dismiss it" (citation omitted)).

[10] In the proceedings below, the United States argued that plaintiffs' claims also are barred by the applicable statute of limitations. The district court did not reach that issue, and we do not raise the issue as an alternative basis for affirming the judgment below. We wish to preserve that defense, however, in the event that the judgment of the district court is not affirmed

ILI U.S. Digest/8 499 1/8/02, 1:47 PM

3. Claims under California law by World War II soldiers held as prisoners of war by Japan

Following enactment of section 354.6 of the California Code of Civil Procedure in 1999, a number of World War II soldiers from the United States and other countries held as prisoners of war by Japan filed lawsuits in California courts against Japanese companies for which they had been forced to work. The California statute provides state court jurisdiction over actions "to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed." A number of the defendants sought to remove the cases to federal courts. On May 23, 2000, the United States filed a Statement of Interest in one of the cases, *Heimbuch, et al. v. Ishihara Sangyo Kaisha, Ltd. et al., Civil Action No. 00-00604 (N.D.Cal.),* in support of defendants' opposition to a motion by plaintiffs for remand to state court.[4] The U.S. Statement argued that such claims are governed exclusively by federal law due to the 1951 multilateral peace treaty between Japan and most Allied states (including the U.S.), in which the United States expressly waived its own claims, and those of its nationals, against Japan and its nationals, arising from the prosecution of the war.

[4] The United States filed a similar Statement of Interest in the Superior Court of the State of California, Orange County, in *In re Japanese WWII POW Slave/Forced Labor Litigation,* Case No. 814430, urging dismissal of claims brought in that case.

ILI U.S. Digest/8 500 1/8/02, 1:47 PM

a. Testimony before U.S. Senate Judiciary Committee

Subsequently, Ronald J. Bettauer, Deputy Legal Adviser of the Department of State and David W. Ogden, Acting Assistant Attorney General, Civil Division, Department of Justice, testified on June 28, 2000, before the U.S. Senate Judiciary Committee concerning the U.S. position in the case.

The full texts of the two statements are available at *www.state.gov/s/l*.

Mr. Bettauer summarized the United States position as follows:

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Let me begin by expressing the Administration's and my own personal sympathy to the victims of Japanese wartime aggression, and our gratitude for those veterans who bravely served our country in the Pacific theater during World War II. We, and the American people, owe these veterans a great debt.

I intend to address briefly the 1951 Treaty of Peace with Japan, and why the State Department asked the Department of Justice to file a Statement of Interest in favor of removal of the lawsuits to federal court.

Article 4 (b) of the 1951 Treaty of Peace with Japan provides that, "[e]xcept as otherwise provided in the…Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war…." Thus, the Treaty settles all war-related claims of the U.S. and its nationals, and precludes the possibility of taking legal action in United States domestic courts to obtain additional compensation for war victims from Japan or its nationals—including Japanese commercial enterprises. This reading of the provision is in accord with basic principle of treaty interpretation set forth in the 1969 Vienna Convention on the Law of Treaties that "[a]

ILI U.S. Digest/8 501 1/8/02, 1:47 PM

treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

The language is clear and unequivocal language. That this language waived all claims is unambiguously supported by the negotiating history of the Treaty, by the broad security objectives the U.S. Government hoped to achieve with the Treaty, and by the extensive, often excruciatingly painful, deliberations that preceded the Senate's advice and consent to ratification of the treaty.

The overarching intent of those who negotiated, signed, and ultimately ratified this Treaty was to bring about a complete, global, settlement of all war-related claims, in order both to provide compensation to the victims of the war and to rebuild Japan's economy and convert Japan into a strong U.S. ally. It was recognized at the time that those goals could not have been served had the Treaty left open the possibility of continued, open-ended legal liability of Japanese industry for its wartime actions. In this regard, the negotiators and the U.S. Senate were extremely sensitive to the calamitous results of the continuing debts that had been imposed on Germany in the Treaty of Versailles. Another provision of the Treaty, Article 19(a), similarly closed off the possibility of claims being brought by Japanese nationals against the United States or its nationals arising out of both the war and the subsequent occupation of Japan.

Our longstanding position is not one that we have reached casually or lightly. We have thoroughly examined all of the legal arguments that have been advanced, and we have undertaken an exhaustive amount of historical research. Although we sympathize with those who have brought lawsuits and acknowledge that they suffered great injuries in the service of their country, we are convinced that the Treaty precludes these lawsuits, and that we have no legal basis upon which to approach Japan or its nationals for additional compensation for war claims.

Our decision to ask the Justice Department to file a Statement of Interest, which was specifically solicited by the federal district court, was based not only on our concern for upholding our international legal obligations, but also upon the fact that this Treaty is a duly ratified international agreement of the United States that is, therefore, the supreme law of the land. This Treaty was approved by the U.S. Senate by a strong two-thirds majority on March 20, 1952, and subsequently ratified by President Truman.

ILI U.S. Digest/8 502 1/8/02, 1:47 PM

The records of the hearings of the U.S. Senate, and the U.S. Senate Foreign Relations Committee, indicate that the Senate was well aware that Article 14(b) settled all war-related claims. In fact, the Senate heard testimony from several members of the public who were not pleased with that provision. The Senate gave its advice and consent by a vote of 66 to 10, without inserting a single reservation pertaining to war claims or Article 14(b) in its resolution of advice and consent. Let me emphasize, that the Senate's action occurred shortly after the termination of hostilities, when the horrific wounds of World War II were still fresh, emotions still raw, and the memories of the war's innumerable tragedies still vivid.

A large part of the Treaty was devoted to the issue of reparations. The scheme of the Treaty was that each state party would compensate its own nationals for their injuries, either out of confiscated Japanese public and private assets, or otherwise. To this end, the United States confiscated approximately 90 million dollars' worth of assets owned by Japan and Japanese private nationals (including Japanese companies), and used the proceeds to satisfy the monetary claims of U.S. nationals who were victims of Japanese aggression. Congress passed an amendment to the War Claims Act of 1948 to create new war claims programs that would [make awards to] American war victims, including slave and forced laborers, in amounts to be determined by a War Claims Commission, using the proceeds of liquidated Japanese assets. Congress, through its approval of the Treaty and the amendment of the War Claims Act, created an exclusive federal remedy for all American victims of the war.

Thus, when the United States filed its Statement of Interest on May 23 outlining why these lawsuits belong in federal court, we did so not only because of our international obligations and our foreign policy concerns, but because we believe our stance is true to the intent of the U.S. Congress that approved the ratification of this Treaty and created a comprehensive war claims compensation program. It is consistent with the broad, bipartisan consensus that existed in all branches of government in 1952, that this Treaty was in the overall best interests of the American people and that the reparations provisions were fair and reasonable.

For nearly 50 years, this Treaty has sustained our security interests and supported peace and stability throughout East Asia. We believe that the Treaty leaves no sound legal basis for the United States or its nationals to seek further monetary recovery against Japanese corporations, and that the Treaty remains the supreme law of the land.

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Mr. Ogden addressed a concern raised by Chairman Hatch:

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I appreciate the opportunity to appear before you to provide additional information concerning the United States' Statement of Interest in *Heimbuch, et al. v. Ishihara Sangyo Kaisha, Ltd. et al.,* a case brought by American prisoners of war of the Japanese against Japanese companies. Based upon the Chairman's letter to the Attorney General and my own discussions with Committee staff, I understand that the Chairman is seeking to ensure that the Justice Department is applying a consistent policy in its treatment of various World War II-related and prisoner of war-related matters, and in particular to assure that the Justice Department fulfilled its professional obligations and based its filing in *Heimbuch* on a sound, thorough legal and historical analysis. As I will explain, I believe the Department has been both consistent and diligent in its representation of the United States in this matter.

* * * *

I know that the Chairman is also concerned that, in contrast to the filing in *Heimbuch,* the United States did not file a Statement of Interest in *Gross v. Volkswagen* and *Rosenfeld v. Volkswagen,* litigation in the District of New Jersey involving the claims of individuals who were allegedly enslaved by German entities during the War. In a letter we have attached to our answers to the Committee's questions, I advised United States District Judge John W. Bissell that negotiations between representatives of the plaintiffs and representatives of Germany and German industry were ongoing over creation of a German foundation to compensate victims, and that those negotiations were then at a "very delicate" stage. As I explained, "as a result, we are reluctant to take action now that might interfere with achieving that objective, an achievement we believe the court would welcome." The Department also agreed to update the Court on the progress of the talks and "perhaps suggest a

ILI U.S. Digest/8 504 1/8/02, 1:47 PM

further schedule" for providing the United States' views. Thus, the government's decision not to submit its views to Judge Bissell was done in an effort to facilitate a consensual settlement of the case that might make resolution of the legal issues unnecessary.

The decision not to file a brief in *Gross* and *Rosenfeld* was made based upon the recommendation of the Department of State, which has been leading an effort by the United States government to facilitate such a resolution. Its responsibility is to determine the policy interests of the United States in this regard, and the Department of Justice deferred to its policy views with respect to declining to file a Statement of Interest in the district court.

b. Claims of allied prisoners: *In re World War II Era Japanese Forced Labor Litigation*

The *Heimbuch* and other pending cases in California were ordered consolidated on June 5 and 15, 2000 by the Panel on Multidistrict Ligitation. The United States filed a Statement of Interest in the consolidated case in August 2000, excerpted below. The U.S. Statement elaborated on views previously set forth in its *Heimbuch* Statement concerning the waiver of all claims of the United States and Allied nations against Japan in the 1951 Treaty of Peace and the preemption of state claims by the Treaty and the War Claims Act. The District Court dismissed all motions for remand to state courts of cases concerning prisoners of war who were United States or allied soldiers. *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 942 (N.D.Cal. 2000)("Order No. 4"). The court then dismissed these consolidated cases brought by Allied prisoners of war, concluding that the claims were barred by the 1951 Treaty of Peace with Japan. *Id*. at 948 .

The full text of the Statement of Interest is available at *www.state.gov/s/l.*

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The United States recognizes our country's great debt to all Americans who fought for the cause of freedom in the Second World War ("World War II"), and especially to those, such as plaintiffs in these actions, who endured horrific hardships as prisoners of war. There can be no dispute about the moral force behind plaintiffs' quest to redress the wrongs done to them. Despite our deep sympathy with and admiration for the plaintiffs, the United States is nonetheless compelled to file this Statement of Interest in order to explain that plaintiffs' claims are barred by international obligations entered into by the United States at the close of World War II.[1]

* * * *

BACKGROUND

I. The 1951 Treaty Of Peace With Japan

A. Treaty Provisions

Article 14(b) of the 1951 Peace Treaty states that, "[e]xcept as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war[.]" 3 U.S.T. 3169 (Exhibit 1). Likewise, under article 19(a) of the Treaty, Japan waived all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war and subsequent occupation, including, for example, claims against the United States, the manufacturers of the atomic and neutron bombs, and the individuals who ordered and performed the bombings of Japan.

[1] At the request of the United States Senate Judiciary Committee, the Department of Justice and the Department of State re-examined the arguments the Government raised in the Statement of Interest filed in *Heimbuch v. Ishihara Sangyo Kaisha, Ltd.*, Civil Action No. 00-00604 (WHA), and met with counsel for the plaintiffs. This Statement of Interest represents the results of that reconsideration and is submitted pursuant to 28 U.S.C. § 517.

ILI U.S. Digest/8 506 1/8/02, 1:47 PM

B. The Negotiation of the 1951 Peace Treaty

The Treaty was sponsored by the United States as one "that will work," one "which looks to the future, not the past" in order to achieve the goal of restoring "normal relations between Japan and the rest of the world." U.S. Dept. of State, *Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan,* at 33 (1951) (Statement of President Harry S. Truman) (hereafter "Record of Proceedings") (Exhibit 2). In providing for the resolution of all claims against Japan and its nationals arising out of World War II, the Treaty "recognizes the principle that Japan should make reparations to the countries which suffered from its aggression," without "saddl[ing] the Japanese people with a hopeless burden of reparations which would crush their economy in the years to come." *Id.* at 33-34. Ambassador John Foster Dulles, who was responsible for negotiating the Treaty on behalf of the United States, explained that the Treaty's compensation provisions reflected a resolution of various "conflicting considerations" in a manner "which gives moral satisfaction to the claims of justice and which gives material satisfaction to the maximum extent compatible with political and economic health in the Pacific area." *Id.* at 83 (Statement of John Foster Dulles).

* * * *

To ensure that all war claims, brought either by individuals or by governments, would be settled by the Peace Treaty, the U.S. suggested the addition of the waiver provision that later became Article 14(b) of the Peace Treaty. The U.S. justified this suggested addition with the following comment:

> The insertion of clause (d) is proposed for the reason that the treaty should settle and dispose of all claims of the Allied Powers and their nationals arising out of the war. If no waiver were provided, some Allied governments or Allied nationals might continue to press such claims against Japan after the coming into force of the treaty. Settlement of claims in the treaty assures that no Allied government or Allied national receives preferential treatment. The language of the waiver fol-

ILI U.S. Digest/8 507 1/8/02, 1:47 PM

> lows closely the language of Article 19 in which Japan waives claims against the Allied Powers.

Japanese Peace Treaty: Working Draft and Commentary Prepared in the Department of State, Washington, June 1, 1951, *reprinted in* Foreign Relations of the United States 1951, Vol. IV, Asia and the Pacific, at 1084 (1977) (Exhibit 9). Ultimately, the Peace Treaty provided, among other things, for the end of the American Occupation, a return of Japan to the family of nations, and reparations by Japan (through the asset-seizure mechanism) for damages caused by wartime aggressions. Although unequivocally requiring Japan to compensate Allied nations for war losses, the Peace Treaty recognized that full payment for all damages was impossible if a "viable economy" were to be created in Japan, *see* Peace Treaty, Article 14(a); S. Exec. Rep. No. 82-2, at 12, and that it was "the duty and responsibility of each [Allied] government to provide such compensation for persons under its protection as that government deems fair and equitable." *Id.* at 13.

C. The Senate Advice and Consent To The 1951 Treaty Of Peace With Japan

* * * *

The Senate Committee on Foreign Relations unanimously recommended that the Senate give its advice and consent to ratification of the Treaty. *See* S. Exec. Rep. No. 82-2, at 4. The Foreign Relations Committee warned that requiring payment of war claims "in any proportion commensurate with the claims of the injured countries and *their nationals"* would be "contrary to the basic purposes and policy of the free nations, the Allied Powers, and the United States in particular" in the Far East. *Id.* at 12 (emphasis supplied). The Committee described article 14(a) as containing "the unequivocal provision that Japan should pay reparations to the Allied Powers for the damage and suffering it caused during the War," but recognized that, "[a]t the same time, article 14(b) states that, except as otherwise provided, the Allied Powers waive *all* reparations and claims against Japan." *Id.* (emphasis supplied).

The Committee informed the Senate that the Treaty's "provisions do not give a direct right of return to individual claimants except in the

ILI U.S. Digest/8 508 1/8/02, 1:47 PM

case of those having property in Japan." *Id.* at 13; *see also* Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific: Hearings Before the Senate Comm. on Foreign Relations, 82nd Cong. 2nd Sess., at 144-45 (1952) (hereafter "Committee Hearings") (the Treaty's waiver provision "closes" and "locks" the gate on all avenues of recovery) (Exhibit 10). In recommending that the Senate give its advice and consent to ratification of the Treaty, the Committee emphasized Japan's willingness to "shoulder" reparations, and the unprecedented magnitude of reparations it had already paid. *See* S. Exec. Rep. No. 82-2, at 12, 14. It also noted that, "[b]ecause of the limited ability of Japan to pay its legitimate claims, our allies in the treaty waive their claims and those of their *nationals* in the same way we do." *Id.* at 13 (emphasis supplied).

The Committee held exhaustive public hearings in January 1952 on the specific issue of reparations claims. The records of these hearings confirm that the Senate was well aware that all individual claims were being waived by Article 14(b), and that such claims would be dealt with exclusively through legislation. *See* Committee Hearings, at 144-45. During the hearings, various objections and questions were raised concerning compensation for individual claims. In particular, objections were made to the waiver of these claims. One legislator even attempted to limit the effect of Article 14(b) by proposing a reservation to the Treaty stating that "nothing contained in this Treaty shall be construed to abrogate the…just and proper claims of private citizens of the United States." *See* 98 Cong. Rec. 2365, 2567-71 (1952) (Exhibit 11). In a memorandum, Adrian S. Fisher, the Legal Adviser for the U.S. Department of State, informed Secretary of State Acheson that this reservation was "in direct conflict with Article 14(b)," and that, if this reservation were added to the Treaty during the ratification process, "a renegotiation of the Treaty Article would unquestionably ensue." Memorandum to The Secretary from Mr. Fisher (the Legal Adviser), dated March 19, 1952, at 4, 5 (Exhibit 12).

The State Department instead recommended that Congress adopt the War Claims Commission's suggestion that Congress amend the War Claims Act of 1948 "to provide for the receipt, adjudication and payment of claims…resulting from mistreatment, personal injury, disability, or impairment of health caused by the illegal actions of any enemy government during World War R." Committee Hearings, at 147. Congress eventually accepted this invitation, and amended the War

ILI U.S. Digest/8 509 1/8/02, 1:47 PM

Claims Act to "create[]a domestic mechanism for distributing captured Japanese assets," which entitled members of the putative class "to detention benefits for the period of imprisonment in Japan." *Aldrich v. Mitsui & Co. (USA),* Case No. 87-912-Civ-J-12, slip op. at 3 (M.D. Fla. Jan. 20, 1988) (citing 50 U.S.C.App. § § 2004 & 2005 (1994)) (Exhibit 13).

The Senate gave its advice and consent to the Treaty on March 20, 1952, by a vote of 66 to 10, without adding a single reservation pertaining to war claims in its resolution of advice and consent. 98 Cong. Rec. 2594 (1952) (Exhibit 14). The Treaty was considered as part of a package with three additional security treaties relating to the Pacific region, reflecting the United States' view of the Treaty as an integral part of its political and foreign relations goals in that region. *See, eg.,* 98 Cong. Rec. 2327, 2361, 2450, 2462 (1952) (Exhibit 15). The Senate resolutions of its advice and consent for all of these treaties were adopted at the same time. *See* 98 Cong. Rec. at 2594.

D. Assets Seized Pursuant To The 1951 Peace Treaty

Under the Treaty, the government of Japan volunteered the use of property to provide reparations and compensation for "the damage and suffering" inflicted by Japan and its nationals "during the war." Treaty, Art. 14(a). Indeed, private Japanese nationals who had property or other assets located outside Japan paid a heavy price under the 1951 Peace Treaty to satisfy the requirements of this system. It is customary international practice for nations at war to freeze assets of enemy nationals and hold them in "trust," but it is also the custom to return such assets to their proper owners at the conclusion of hostilities. *See* James A. Gathings, *International Law and American Treatment of Alien Enemy Property,* v (1940) (Introduction written by Edwin Borchard).

Nonetheless, this seizure practice was legitimized in Article 14(a)(2) of the 1951 Peace Treaty.[4] Pursuant to that Article, assets valued at ap-

[4] "[E]ach of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of

(a) Japan and Japanese Nationals,

(b) persons acting for or on behalf of Japan or Japanese Nationals,

(c) entities owned or controlled by Japan or Japanese nationals."

Treaty, Art. 14(a)(2).

ILI U.S. Digest/8 510 1/8/02, 1:47 PM

proximately $4 billion located in Allied territory, were confiscated by Allied governments, and their proceeds distributed to Allied nationals in accordance with domestic legislation. *See* Comments on British Draft, Memorandum by the Officer in Charge of Economic Affairs in the Office of Northeast Asian Affairs (Hemmendinger) to the Deputy to the Consultant (Allison), April 24, 1951, *reprinted in* Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 1016 (1977) (Exhibit 16). Pursuant to Article 16, approximately $20 million worth of Japanese assets located in ex-enemy and neutral countries were liquidated and the proceeds distributed to Allied POWs and civil internees through the International Red Cross. *See* Aide-Memoire from the Department of State to the British Embassy, *reprinted in* Foreign Relations of the United States 1951, Vol. VI, Asia and Pacific, at 924 (1977) (Exhibit 17). The total value of Japanese owned assets located in U.S. territory (including the Philippines) was estimated in 1952 to be worth over $90 million. *See* Japanese Peace Treaty Negotiations, Feb. 5, 1952, *printed in* Executive Sessions of the Senate Foreign Relations Committee (Historical Series), Vol. IV, 82nd Cong., 2nd Session (1952), at 121-22 (1976) (Exhibit 18). Pursuant to the War Claims Act of 1948, these assets were seized by the Office of Alien Property (an office within the U.S. Department of Justice), liquidated, and the proceeds placed into a War Claims Fund, for ultimate distribution to prisoners of war and other claimants. As Ambassador Dulles explained:

> The United States gets, under this treaty, the right to use Japanese assets in this country to satisfy whatever claims Congress feels should be satisfied. We have taken under that provision approximately $90 million of Japanese assets in this country. Approximately $20 million have been used to take care of claims which have been approved by the Congress on behalf of internees, civilian and *prisoners of war,* and it remains for Congress to decide what it wants to do with the balance.

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[5] "As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and *those of its nationals* ... for the benefit of former prisoners and their families." Treaty, Art. 16 (emphasis supplied).

ILI U.S. Digest/8 511 1/8/02, 1:47 PM

Id. at 121 (emphasis supplied). Funds to pay reparations mostly were provided from the confiscation of assets of Japanese businesses, in accordance with United States and Allied policy.[5]

The Treaty specifies that the payment of reparations and other war-related claims under Articles 14 and 16 of the Treaty were to be a full and final settlement. Moreover, under Article 14(a)(2)(II)(c)(iv) of the Treaty, forfeiture of those assets which came into the jurisdiction of American courts as a consequence of the resumption of trade and financial relations following the war were excepted from forfeiture. "This provision strongly suggests an intention to leave Japan alone to rebuild its economy, a goal incompatible with plaintiff's unjust enrichment claim, notwithstanding the present economic strength of Japan." *Aldrich*, Case No. 87-912-Civ-J-12, slip op. at 3.

II. The War Claims Act

In a unanimously favorable report on the Treaty, the Senate Committee on Foreign Relations expressly recorded its decision that "the reparations provisions of the Treaty are eminently fair," and that it "is the duty and responsibility of each [Allied] government to provide such compensation for persons under its protection as that government deems fair and equitable, such compensation to be paid out of reparations that may be received from Japan or from other sources." S. Exec. Rep. No. 82-2, at 12-13. Consistent with the United States' "duty and responsibility" to provide such "compensation for persons under its protection as it deems fair and equitable," *id.,* Congress amended the War Claims Act of 1948, 50 U.S.C. App. §§ 2001-2017 (1994), to afford compensation to prisoners of war held in Japan. 50 U.S.C. App. § 2005(d) (1994).

The War Claims Act of 1948 had established a system of compensation for prisoners of war like plaintiffs and certain other victims of World War II. The Act established a War Claims Commission (now the Foreign Claims Settlement Commission), which initially was authorized to adjudicate claims "filed by any prisoner of war for compensation" for specified violations of the Geneva Convention of July 27, 1929, suffered while a prisoner of war, including claims for violations "relating to labor of prisoners of war." 50 U.S.C.App. § 2005 (1994). These claims covered inadequate food, inhumane treatment, and certain types of forced labor. The Act was prompted by Congress'

ILI U.S. Digest/8 512 1/8/02, 1:47 PM

desire "to facilitate the giving of immediate relief to those American citizens who were imprisoned by the enemy during the war." Amending the Trading with the Enemy Act, as Amended; to Create a Commision to Make an Inquiry and Report with Respect to War Claims; and to Provide For Relief For Internees in Certain Cases, S. Rep. No. 80-1742, at 7 (1948) (Exhibit 19).

Congress acknowledged that "the question of war claims…is too complex to be approached by the Congress on a piecemeal basis and that the subject in its entirety must be studied thoroughly before any intelligent action can be taken[.]" Amending the Trading with the Enemy Act; Creating a Commission to Make Inquiry and Report with Respect to War Claims; and Providing Relief for Internees in Certain Cases, H.R. Rep. No. 80-976, at 4 (1947) (Exhibit 20). Therefore, Congress charged the Commission with recommending types of claims to be accepted, adopting the procedures for considering claims, and establishing uniform standards for handling such claims. 50 U.S.C. App. § 2007 (1994); 94 Cong. Rec. 564-69 (1948) (Exhibit 21). Congress anticipated the Commission would ensure that "the claims…be handled in accordance with priorities, priorities to be established for, we will say, the veterans of Bataan and others who have suffered similarly, as being No. I for consideration." 94 Cong. Rec. at 567.

A proposal that would have allowed federal courts to adjudicate war compensation claims was rejected because of the complexity of the issues and the need to have the claims "classified by experts who are qualified so to do" in order to "get some rationality out of this situation [and] to determine the categories of claims that should be allowed." 94 Cong. Rec. at 564. There can be no doubt that Congress did not want claims within the Commission's jurisdiction to be adjudicated by the courts, because it barred even judicial review of the Commission's decisions "by mandamus or otherwise." 50 U.S.C. App. § 2010 (1994). Following ratification of the Treaty with Japan, and Congress' recognition of the Treaty's limitations on reparations, the War Claims Act further was amended to afford additional compensation to American prisoners of war held by the Japanese. 50 U.S.C. App. § 2005(d) (1994).

Consistent with its Congressional mandate, the War Claims Commission paid claimants who were prisoners of war in the hands of the Japanese a specific amount for each day of captivity of the war. Specifically, prisoners of war were paid $1 per day for each day the govern-

ILI U.S. Digest/8 513 1/8/02, 1:47 PM

ment by which they were held violated its obligation to furnish them the quantity of food to which they were entitled as prisoners under the Geneva Convention related to prisoners of war. Individuals also were paid $1.50 per day for each day they were used as forced labor or otherwise mistreated in violation of the Geneva Convention. *See* Foreign Claims Settlement Commission of the United States, Second Semiannual Report to the Congress (Exhibit 22). A person who was captured at Bataan and remained a prisoner of war for the duration of the war would have been paid approximately $3,103.50.[6] Adjusted for inflation using published Consumer Price Indexes for June 1951 (25.9%) and June 2000 (172.3%), the present day value of that amount is approximately $20,646. *See* Bureau of Labor and Statistics, Table Containing History of CPI-U U.S. All Items Indexes and Annual Percent Changes From 1913 to Present, *(http://stats.bls.gov/cpihome.htm).*

III. The Multidistrict Litigation

Pursuant to section 354.6 of the California Code of Civil Procedure,

> Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War 'forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. That action may be brought in a superior court of this state, which shall have jurisdiction over that action until its completion or resolution.

Cal. Civ. Pro. Code § 354.6.

[6] A total of 179,725 awards were made under the "dollar a day" program to members of the armed services who were held as prisoners of war during World War II and given inadequate food rations, and $ 49,935,899 was distributed. *Id.* Under the "$1.50 a day" program there were a total of 178,900 awards made, totaling $73,492,926. *Id.*

ILI U.S. Digest/8 514 1/8/02, 1:47 PM

The statute of limitations was extended to December 31, 2010. *Id.* Invoking this provision, several individual and class actions lawsuits were filed in California courts by plaintiffs seeking to recover from defendant Japanese companies damages for back wages and injuries allegedly suffered as prisoners of war during World War II. After many of those actions were removed to federal court, the Judicial Panel on Multidistrict Ligation transferred 18 cases to this Court in a June 5, 2000 Order. Five other cases were conditionally transferred to the Court. It is the United States' understanding that there are ten related cases pending in the Superior Courts of Orange and Los Angeles counties.

On March 24, 2000, the District Judge William H. Alsup requested the views of the United States *in Heimbuch, et al. v. Ishihara Sangvo Kaisha, Ltd., et al.,* Civil File No. C 00-00064 WHA, on whether federal law governs any claims by plaintiffs captured and imprisoned by Japan during World War II, where such claims are directed to private Japanese companies for whom plaintiffs allege they were forced to work as slaves, and whether removal of such claims to federal court is proper. On May 22, 2000, the United States filed a Statement of Interest asserting that the Treaty of Peace and the War Claims Act completely supplanted plaintiffs' claims.

STATEMENT

I. The 1951 Treaty Of Peace With Japan Waives All Claims Of United States And Allied Nationals Against Japan And Its Nationals

A. The Text of the Peace Treaty Expressly Waives Claims of U.S. and Allied Nationals Against the Japanese Government and Japanese Nationals for All War-Related Claims In Article 14(b)

Article 14(b) of the 1951 Peace Treaty states that, "[e]xcept as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." 33 U.S.T. 3169.[7] *See also* discussion infra at 25-26 (noting that the "except as

[7] It is well settled that the federal government's "power to espouse and settle claims of our nationals against foreign governments is of ancient origin and constitutes a well-established aspect of international law." *Belk v. United States*, 858

ILI U.S. Digest/8 515 1/8/02, 1:47 PM

otherwise provided" language in the Treaty refers to Articles 14(a)(1), 14(a)(2), 15, and 16). Article 14(b) does not waive claims only against the Government of Japan, but all claims, whether such claims are based on actions of the Government of Japan or actions of Japanese private nationals. The Peace Treaty defines "nationals" to include "juridical persons," and juridical persons includes business corporations. Nor is the waiver limited to claims that would fall within a strict definition of "reparations." The Treaty specifically waives *reparations* claims of the Allied Powers, and all other war-related claims of the Allied Powers and their nationals. The text of Article 14(b) also provides no indication that its drafters intended anything other than to extinguish the claims of private nationals.[8]

F.2d 706, 708 (Fed. Cir. 1988); *see also Dames & Moore v. Regan,* 453 U.S. 654, 679-80 (1981) ("the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries"); *Asociasion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984) ("Once it has espoused a claim, a sovereign has wide-ranging discretion in disposing of it. It may compromise it, seek to enforce it, or waive it entirely"), *cert. denied,* 470 U.S. 1051 (1985); *Ozanic v. United States,* 188 F.2d 228, 231 (2d Cir. 1951) ("the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations"). The Court's reasoning in *Dames & Moore v. Regan, supra,* strongly supports similar authority to settle claims of private citizens (even against private citizens of another nation) when there is a compelling public policy justification for doing so. *See also Ware v. Hylton,* 3 U.S. 199, 235-39 (1796) (holding that the United States' treaty with Great Britain ending the Revolutionary War invalidated a Virginia statute that had provided for the discharge of private debts owed to private British subjects); *United States v. The Schooner Peggy,* 5 U.S. 103, 110 (1801) ("if the nation has given up vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a cause for proper compensation").

[8] Consistent with the Vienna Convention on the Law of Treaties, the Supreme Court has indicated that courts should begin their analysis of the appropriate interpretation of a treaty with the text. *See Chan v. Korean Air Lines, Ltd.* 490 U.S. 122, 134 (1989); Vienna Convention on the Law of Treaties (1969), Article 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in the light of its object and purpose"). Although the United States has not ratified the Convention, it is generally "recognized as the authoritative guide to current law and practice." S. Exec. Doc. L., 92d Cong. 1st Sess. 1 (1971)

ILI U.S. Digest/8 516 1/8/02, 1:47 PM

As nationals of the United States and Allied countries, the prisoner of war plaintiffs before this Court clearly fall within the express terms of Article 14(b)'s waiver of claims. Plaintiffs are suing the American subsidiaries of Japanese national business corporations. Moreover, their claims arose "in the course of the prosecution of the war."[9] Plaintiffs allege, for example, substantial and active participation by the Japanese Government in subjecting POWs to forced labor.[10] *See* Deposition of Alfred Berest at 20, 23 (agreeing that he had been constantly under the control of the Japanese military" and stating belief that the camp where he was interned was controlled by Japanese soldiers) (filed in *Heimbuch, et al. v. Ishihara Sangyo Kaisha Ltd., et al.,* N.D. Cal. Civil Action No. 00-0064); Deposition of William R. Lowe, at 30 (noting that Japanese soldiers with weapons guarded the camp where he was interned) (filed in *Heimbuch, supra*).

[9] The phrase "in the course of the prosecution of the war" is not a specific term of art under the laws of war. Nor is the phrase defined by the Geneva Convention of 1929 concerning the treatment of prisoners of war, as plaintiffs seem to suggest in various filings. *See* Geneva Convention of July 27, 1929, Relative to the Treatment of Prisoners of War (Exhibit 23). Everything known about the drafting of the Peace Treaty and the phrase "in the course of the prosecution of the war" indicates that it was intended to have a very broad scope. The phrase first appeared in a proposed revision to Article 19(a) of the U-S.-U.K. draft of the Treaty. *See* Japanese Peace Treaty: Working Draft and Commentary Prepared in the Department of State, Washington, June 1, 1951, *reprinted in* Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 1093-94. Article 19 (a) is a reciprocal provision to Article 14(b) that waives all claims by Japan and its nationals against the U.S. and its nationals. The revision was proposed by the United Kingdom along with the alternative phrase "or in the exercise or purported exercise of belligerent rights." *Id.* The United States preferred the language in "the course of the prosecution of the war" because it was broader and more comprehensive in scope. *Id.* The phrase was later inserted into Article 14(b).

[10] Article 28 of the Geneva Convention of 1929 provides that "[t]he detaining Power shall assume entire responsibility for the maintenance, care, treatment and payment of wages of prisoners of war working for the account of private persons." Article 31 of the Convention also provides that "[l]abor furnished by prisoners of war shall have no direct relation with war operations" and prohibits the "use [of] prisoners for manufacturing and transporting arms or munitions of any kind, or for transporting material intended for combatant units." The War Claims Act specifically compensated American prisoners of war for Japanese violations of these and other provisions of the Geneva Convention. *See* discussion *supra* at 9, 12-13.

ILI U.S. Digest/8 517 1/8/02, 1:47 PM

Indeed, the conduct that forms the basis of plaintiffs' claims was the direct result of laws and policies toward POWs adopted by the Government of Japan to aid its war effort. The wartime Japanese economy was an integral part of Japan's mobilization for "total war." *See* Dower, 529-30. "The complexities of mobilizing an industrialized nation for total war required them [the military] to take Japan's other vested interests into partnership. They enlisted the aid of the leaders of big business, whose expertise was crucial in exploiting the resources of the Japanese Empire and in designing and building new weaponry." Meirion and Susie Harries, *Sheathing the Sword: The Demilitarization of Japan,* 4 (1987). By the late 1930s, industry, commerce and finance in Japan were dominated by an interlocking series of monopolistic combines called *zaibatsu. Id.* at 5. The *zaibatsu* rose to positions of prominence by collaborating closely with the military. *See* Dower, at 529-30. "The zaibatsu factories were called upon to provide equipment, their shops to provide transport, their banks for finance, and their overseas branches were useful bases for intelligence-gathering." Harries, at 53. The military and *zaibatsu* cooperated to create an economy devoted to the pursuit of the war, and it is clear from plaintiffs' complaints and statements that the very purpose of pressing prisoners of war into forced labor was to shore up industrial support for this total war effort.

The language of the Peace Treaty thus indicates that plaintiffs' claims against defendants were waived and settled in 1951. To read Article 14(b)'s provision as not applying to U.S. and Allied prisoners of war would not only be contrary to the express language of the agreement, but would also require an impermissible judicial amendment to the Peace Treaty. *See Chan v. Korean Air Lines, Ltd.,* 490 U.S. 122, 134 (1989) ("where the [treaty] text is clear, as it is here, we have no power to insert an amendment"); *Victoria Sales Corp. v. Emery Air Freight, Inc.,* 917 F.2d 705, 707-08 (2d Cir. 1990) (where "the text of a treaty is clear, a court shall not, through interpretation, alter or amend the treaty") (citing *Chan,* 490 U.S. at 134). The Court, in short, must be "governed by the text—solemnly adopted by the governments of many separate nations[.]" *Chan,* 490 U.S. at 134. The claims of U.S. and Allied nationals in these lawsuits, therefore, should be dismissed.

B. The Negotiating, Drafting, and Ratification History of the Peace Treaty Evidence an Intent to Expunge All Individual Claims Against Japan and its Nationals Through Article 14(b)

ILI U.S. Digest/8 518 1/8/02, 1:47 PM

It is well-established that the "clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.' " *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 180 (1982) (quoting *Maximov v. United States,* 373 U.S. 49, 54 (1963)).[11] In the case of the 1951 Peace Treaty, no contrary intent or expectations undermining the clear text are evident in the historical record. Instead, a review of the negotiating and drafting history, as well as the legislative record of the Senate's advice and consent, reveals that the Peace Treaty was intended to waive all claims of U.S. and Allied nationals against Japan and Japanese nationals without exception.

As indicated previously, the Allied governments, particularly the United States, were concerned that imposing heavy burdens on the Japanese economy could result in a weak Japan and, as a result, continued dependence on American aid and an expansion of Soviet influ–ence.…Thus, in furtherance of critical national security and other interests, the United States and the other Allied Powers sought to achieve a peace that would permit Japan to recover economically, and join Western nations. *Id.* Waiving reparations and other claims against the Government of Japan and Japanese nationals was intended to advance this policy goal. *Id.* It is in this context that John Foster Dulles drafted and negotiated Article 14(b)'s waiver provision.

The provision waiving all claims of Allied nationals against Japan and its nationals appeared in the earliest drafts of the Peace Treaty. Specifically, following the circulation of a joint U.S.-U.K. draft in May 1951,[12] the U.S. suggested the following addition to Article 15 (which is now Article 14):

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[11] Generally, drafting history should be consulted only to "elucidate a text that is ambiguous." *Chan*, 490 U.S. at 134. *See also* Vienna Convention on the Law of Treaties, Article 32 ("Recourse may be had to supplementary means of interpretation, including the prepatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable").

[12] The United States Government circulated a provisional draft of the treaty on March 23, 1951. During this period, the United Kingdom was also circulating its own draft. The two countries eventually produced a joint U.S.-U.K. draft on May 3, 1951.

ILI U.S. Digest/8 519 1/8/02, 1:47 PM

> Except as otherwise provided in the present Treaty, reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals (including juridical persons) arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war (including claims arising out of the treatment accorded by Japan to prisoners of war and civilian internees), and claims of the Allied Powers for direct military costs of occupation shall be deemed to be satisfied out of the Japanese assets subject to their respective jurisdiction in accordance with the foregoing and out of assets received from the Japanese home islands during the occupation.

See Japanese Peace Treaty: Working Draft and Commentary Prepared in the Department of State, Washington, June 1, 1951, *reprinted in* Foreign Relations of the United States 1951, Volume VI, Asia and the Pacific, at 1082.[13] In proposing the provision, the United States explained that it was intended to "settle and dispose *of all claims* of the Allied Powers and their nationals arising out of the war." *Id.* at 1084 (emphasis supplied).

The language proposed by the United States in connection with the May draft was streamlined and consolidated with Article 14 in a June draft of the treaty. Despite the changes, the provision still made

[13] The clause "including claims arising out of the treatment accorded by Japan to prisoners of war and civilian internees" was apparently omitted in connection with the adoption of Article 16 of the Treaty. Specifically, in response to the May draft, the Australian government stated that it "has already made known its views to the United States Government as to Japan's liability for reparations, sufficient at least to ensure payment of compensation to former prisoners of war who suffered ill treatment over a long period of time at Japanese hands ... [T]he Australian Government is of the view that there should be an equitable distribution among the Allied powers of the stocks of monetary gold and bullion which were in the possession of the Japanese Government at the termination of hostilities, and of Japanese assets in neutral and ex-enemy countries." *Id.* at 1084. The United Kingdom and Canada shared Australia's view; however, New Zealand and the United States were adamantly opposed. *Id.* 1084-1086. Following consultations in London on June 12, 1951, the "United Kingdom agreed not to press its proposal for the distribution of Japanese owned gold as reparations,

ILI U.S. Digest/8 520 1/8/02, 1:47 PM

clear that the Allied governments intended to waive the claims of their nationals against Japan and Japanese nationals through the treaty:

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

See Revised United States-United Kingdom Draft of a Japanese Peace Treaty, June 14, 1951, reprinted in Foreign Relations of the United States 1951, Volume VI, Asia and the Pacific, at 1127 (1977) (Exhibit 2 5).

The understanding that Article 14(b) waived all claims is clearly evidenced by the subsequent statements and actions of the Treaty's signatories. For example, the Dutch initially balked at signing the Treaty precisely because it waived all the claims of its nationals.

* * * *

Consistent with Dulles' understanding, the legislative record of the treaty ratification process also demonstrates that the U.S. Government was fully aware that the Peace Treaty was waiving all war-related claims

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while the United States agreed that Japanese assets in neutral and ex-enemy countries should be turned over to the International Committee of the Red Cross to distribute for the benefit of members of the armed forces who had suffered undue hardships while prisoners of war in Japan." Robert A. Fearey, "Summary of Negotiations Leading Up to the Conclusion of the Treaty of Peace With Japan," Sept. 18, 1951, *reprinted in,* Foreign Relations of the United States 1951, Volume VI, Asia and the Pacific, at 1118 (Exhibit 24). Thus, Article 16 provides a special source of funds to make individual payments to prisoners of war, but it in no way suggests any limitation on Article 14(b)'s broad waiver or that prisoners of war were to retain the right to pursue additional compensation through actions against the Japanese government or its nationals.

A subsequent diplomatic exchange between the Dutch and Japanese Governments confirms that the parties intended claims of "prisoners of war and civilian internees" to be covered by the waiver, despite the omission of this clause from the final version of Article 14(b). *See* discussion infra (noting Dutch concerns that the claims of Dutch civilian internees would be extinguished by the Treaty).

ILI U.S. Digest/8 521 1/8/02, 1:47 PM

of U.S. and Allied nationals against Japan and its nationals. During public hearings on the Treaty's ratification, for example, the Senate heard from Roy G. Allman, an attorney in Washington, D.C. who had practiced law for several years in China. Allman specifically objected to the waiver of individual claims, saying that Article 14(b) was one of the "weasel clauses" of the treaty, what he considered "illegal acts of this government against its own nationals by waiving the claims of Americans." Committee Hearings, at 134. He stated, "[t]his prevents these citizens from filing a claim against the Japanese Government *or its nationals*. It forever shuts them off." *Id.* (emphasis supplied). He then presented the Senate Foreign Relations Committee with a list of claims based on property loss in China totaling $34 million. *Id.* Senator Hickenlooper, who questioned Allman at length, responded:

> I will say to you, Mr. Allman, that I have been interested somewhat in this particular provision of the treaty, and I raised substantial objection to the failure to protect the rights of American citizens whose property had been arbitrarily seized or confiscated by the Japanese.…I am frank to say what can be done about it at this moment I don't know. The impracticability of overturning this treaty at the moment is very apparent to you, I am sure—I mean the difficulties involved.

Id. at 142.

* * * *

The historical record simply does not support the claim that the Treaty's drafters or signatories intended to exempt U.S. and Allied prisoners of war from 14(b)'s broad waiver of claims. On the contrary, everything that is known about the United States' goals for both the occupation of Japan and the peace settlement indicate that the United States considered the rebuilding of Japan's economy an overriding priority....This goal would not have been served had the Peace Treaty left open the possibility that Japanese corporations would be subject to a multitude of lawsuits such as those advanced by the plaintiffs here; particularly since Japanese nationals had already paid a heavy price when

ILI U.S. Digest/8 522 1/8/02, 1:47 PM

their assets in the United States and elsewhere were seized and sold off in settlement of war claims pursuant to the Treaty. *See* Memorandum from General Headquarters of Supreme Command of Allied Powers to the Department of the Army, pt. 1, at ¶ 7 (Dec. 14, 1948) (noting that the Japanese had "contributed reparations…to an extent never before even remotely approached in modern times") (Exhibit 31); discussion *supra* at 11. The United States fully recognized the possibility that the Japanese someday might be in a better economic position to allow them to pay reparations. Nevertheless this country and its Allies determined in 1951 that a full and lasting peace required that all claims by the Allied governments and its nationals be fully and finally settled in the Treaty of Peace. *See* discussion *supra* at 6 (summarizing Dulles' statement); Treaty, Article 14(a)(2)(II)(c)(iv) (exempting from seizure any property that came within the jurisdiction of the Allies after September 2, 1945); *see also Aldrich* Case No. 87-912-Civ-J-12, slip op. at 3 (explaining that the Treaty and its history "strongly suggests an intention to leave Japan alone to rebuild its economy, a goal incompatible with plaintiff[s'] unjust enrichment claim[s], notwithstanding the present economic strength of Japan."). This interpretation, understood by those who drafted and ratified the Treaty in 1951, remains binding on the United States and its court's today. Accordingly, the claims of U.S. and Allied nationals in these lawsuits should be dismissed.

C. No Other Provision in the Treaty Exempts the Claims of U.S. or Allied Prisoners of War from Article 14(b)'s Waiver

As indicated previously, Article 14(b) of the 1951 Peace Treaty states that, "[e]xcept as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war[.]" The phrase "[e]xcept as otherwise provided in the present Treaty" refers to the following provisions:

> Article 14(a)(1), Which obligated Japan to enter into negotiations with Allied Powers whose territories Japan occupied during the war, for the ultimate purpose of contributing Japan's services to assist with the rebuilding of those countries;

> Article 14(a)(2),which allowed the Allied Powers to liquidate assets located in their territories which were owned by either Japan or Japanese nationals, and use the proceeds in settlement of their war-related damages;
>
> Article 15, which obligated Japan to return to the Allied Powers and their nationals any property or interests in property that were located in Japan;
>
> Article 16, which provided for the seizure and liquidation of Japanese-owned assets in neutral or formerly hostile countries, the proceeds from which would be distributed to prisoners of war and their families through the International Committee for the Red Cross.

None of the above-listed provisions, nor any other provision in the Peace Treaty, allows for a claim to be brought by U.S. or Allied national against Japanese nationals based on their war-related misconduct.

1. Article 26 does not provide a basis to avoid the broad waiver in Article 14(b)

Article 26 of the Treaty does not provide a basis to avoid the broad waiver in Article 14(b). Article 26 states that, "[s]hould Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty." To the extent there is an argument that any other treaty might provide "greater advantages" than the Peace Treaty, such a determination rests solely in the hands of the United States.

* * * *

2. Article 16 does not provide a basis to avoid Article 14(b)'s broad waiver

Article 16 also does not provide a basis to avoid Article 14(b)'s broad waiver. To be sure, Article 16 required Japan to "transfer its assets

ILI U.S. Digest/8 524 1/8/02, 1:47 PM

and those of its nationals…to the International Committee of the Red Cross" to "distribute the resultant fund to appropriate national agencies, for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable."[22] This Clause was viewed as "an expression of [Japan's] desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of Japan." *See* Treaty, Article 16.

By its express terms, however, Article 16 does not provide a right of action against the Japanese Government or their nationals. *See* S. Exec. Rep. No. 82-2, at 13. Nor does it modify or limit the waiver in Article 14. As the text of Article 16 indicates, seized assets were distributed by the Red Cross to the Allied governments directly for payment to their nationals. For domestic and political reasons the United States never claimed any of the proceeds from those assets. In reviewing the Treaty, the Senate Foreign Relations Committee explained:

> Japan also agrees that its property in neutral and ex-enemy countries shall be transferred to the International Red Cross to be used for the benefit of former prisoners of war and their families. The purpose of this provision is to distribute these funds on an equitable basis so as to make some compensation for the hardships which were suffered by individual soldiers as a result of the Japanese violations of the Geneva convention relating to prisoners of war. The United States has indicated that because our citizens, who suffered as prisoners of war under the Japanese, have already received some compensation out of Japanese assets, equity dictates that comparable indemnification shall first be made to the citizens of other countries, before further compensation is made to Americans.

[22] This provision was inserted at the request of Australian, British, and Canadian officials who had expressed a desire to obtain "something ... if possible" for those who had "suffered greatly" as prisoners of the Japanese. *See* Memorandum by Mr. Robert A. Fearey of the Office of Northeast Asian Affairs, Canberra, February 17, 1951, *reprinted in* Foreign Relations of the United States 1951, Volume VI, Asia and the Pacific, at 886 (1977) (Exhibit 41); *see also* discussion, *supra* note 13.

ILI U.S. Digest/8 525 1/8/02, 1:47 PM

S. Exec. Rep. No. 82-2, at 12-13. *See also* Letter from Howard A. Cook, Chief, Public Services Division, to Leila L. Gosnell, Feb. 2, 1955 (Exhibit 42) (responding to question concerning Japan's payments to the International Committee of the Red Cross on behalf of former prisoners of war).

D. The United States Has Consistently Maintained That Article 14(b) Expressly Waives the Claims of U.S. and Allied Nationals Against Japan and its Nationals Without Exception, and its Views Are Entitled to Great Weight

Consistent with the express language, history, and overall structure of the Treaty, the United States has repeatedly maintained that the claims of United States nationals against Japan and its nationals arising out of World War II were fully and finally settled under Article 14(b) of the Treaty of Peace with Japan.[23] In the United States' view, no provision in the Peace Treaty contains an exception from Article 14(b)'s waiver for U.S. and Allied prisoners of war that were forced into labor while imprisoned in Japan during World War II. The Peace Treaty instead gave the United States and its Allies the right to seize and dispose of substantial assets of Japan and its nationals for transfer to the victims of the war. The United States used those assets to provide compensation to American prisoners of war through the War Claims Act. Thus, the Treaty and the War Claims Act supplant plaintiffs' claims.

As the U.S. Supreme Court has instructed, the United States' interpretation of the Peace Treaty is entitled to "great weight." *See Kolovrat v. Oregon,* 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight"); *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. at 184-85

[23] *See* Letter from Barbara Larkin, Assistant Secretary, Legislative Affairs, to the Honorable Orrin Hatch, United States Senator (Jan. 18, 2000); Letter from Robert C. Reis, Director, Office for Japanese Affairs, to Clarine 1. Johnson (April 4, 1996); Letter from Steven R. Ratner, Attorney-Advisor for East Asian and Pacific Affairs, to Frank R. Mace (April 25, 1988); Letter from W. Tapley Bennet, Jr., Assistant Secretary, Legislative Affairs, to the Honorable Peter W. Rodino, U.S. Congressman (Aug. 3, 1984) (collectively Exhibit 43). *See also* Statement of Interest of United States on Plaintiffs' Motion to Remand, at 4 (filed in *Heimbuch v. Ishihara Sangyo Kaisha, Ltd.*, Civil Action No. 00-0064 WHA).

ILI U.S. Digest/8 526 1/8/02, 1:47 PM

(same). Substantial deference is due in part because, "when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice." *See United States v. Li,* 206 F.3d at 67 (Selya, J., concurring). The sole voice and "organ of the federal government in the field of international relations" is the President of the United States. *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 320 (1936). *Accord Department of Navy v. Egan,* 484 U.S. 518, 529 (1988) (the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive' ") (quoting *Haig v. Agee,* 453 U.S. 280, 293-94 (1981)); *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 705-06 n. 18 (1976) ("the conduct of [foreign policy] is committed primarily to the Executive Branch"); *United States v. Louisiana,* 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in dealing with foreign nations").[24] The President commands all the political authority of the United States when acting in this field. *See Curtiss-Wright Export Corp.,* 299 U.S. at 320.

Deference to the United States' interpretation of its treaties also stems from the judiciary's realization that, while courts "are well equipped to resolve questions of domestic law," they "venture into unfamiliar territory" when interpreting treaties negotiated with foreign governments. *More v. Intelcom Support Services, Inc.,* 960 F.2d 466, 472 (5th Cir. 1992). The Supreme Court has recognized not only "the limits of [its] own capacity to determine precisely when foreign nations will be offended by particular acts…but consistently acknowledged that the 'nuances' of the 'foreign policy of the United States…are much more the province of the Executive Branch and Congress than' of [the] Court." *Crosby v. National Foreign Trade Council,* 2000 WL 775550 *11 (June 19, 2000) (to be reported at 120 S.Ct. 2288) (internal citations omitted). As a result, "[m]atters which are vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [are] largely immune from judicial inquiry or interference." *Harisiades*

[24] *Cf.* L. Henkin, *Foreign Affairs and the Constitution* 167 (1972) (noting that the President is responsible for enforcing and executing international agreements, a responsibility that necessarily "involves also the obligation and authority to interpret what the treaty requires").

ILI U.S. Digest/8 527 1/8/02, 1:47 PM

v. Shaughnessy, 342 U.S. 580, 588-89 (1952). *Accord, Regan v. Wald* 468 U.S. 222, 242 (1984).

Finally, the United States' interpretation of its treaty obligations is often accorded great deference by courts because of important prudential considerations, particularly if there is a "potentiality of embarrassment from multifarious pronouncements by various departments on one question" and if there is an "unusual need for unquestioning adherence to a political decision already made." *Baker v. Carr,* 396 U.S. at 217 (outlining the factors to be considered in determining whether a case presents a non-justiciable political question). In this case, the Peace Treaty, along with a bilateral security agreement the United States entered into with Japan on the same day the Peace Treaty was signed, forms the very basis of U.S.-Japan relations, and has been the very cornerstone of our country's foreign policy and regional security in East Asia and the Pacific for the past 50 years. If individual plaintiffs were allowed to impose their interpretation of the Treaty on a piece-meal basis through litigation, and if the Japanese government considered the United States to be in violation of the Japan Peace Treaty as a result, this could have a potentially serious negative impact on U.S.-Japan relations.[25]

II. The State Claims Are Preempted By The Treaty And The War Claims Act

Article VI of the U.S. Constitution provides that "the Laws of the United States…and all Treaties made…shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the…Laws of any State to the Contrary notwithstanding." U.S. Const. art VI, cl. 2 (emphasis added). As the Supreme Court recently reiterated in *Crosby v. National Foreign Trade Council*, 2000 WL 75550 (June 19, 2000), a fundamental principle of the Supremacy Clause is that the Federal government has the power to preempt state law, "even without an express provision of preemption." *Id.* at *6. State law must yield when "Congress intends federal law to 'occupy the field.'" *Id.* (quoting *Cali-*

[25] While the United States believes that the text of Article 14(b) is clear, to the extent the Court finds any ambiguity, the Court should defer to the Government's interpretation for the reasons explained. *See also* Curtis A. Bradley, "Chevron Deference and Foreign Affairs," 86 Va. L. Rev. 649 (2000).

ILI U.S. Digest/8 528 1/8/02, 1:47 PM

fornia v. ARC America Corp., 490 U.S. 93, 100 (1989).[26] "And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute," or where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citing *Hines v. Davidowitz,* 312 U.S. 52, 66-67 (1941)). Applying this analysis to the claims pending before this Court, it is clear that Section 354.6 of the California Code of Civil Procedure must yield to the 1951 Peace Treaty with Japan and the War Claims Act. *See also* United States Statement of Interest, *Heimbuch*, *supra,* at 12-14.

As a preliminary matter, it is well-settled that "state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement." *United States v. Pink,* 315 U.S. 203, 230-31 (1942). Under our federal scheme of government, the United States possesses authority over foreign relations and, therefore, a unique interest in foreign relations not shared by California or any other state. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 423-25 (1964); *Curtiss-Wright Export Co.,* 299 U.S. at 316. If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted, and there would be "great potential for disruption and embarrassment" of the United States in the international arena. *Zschernig v. Miller,* 389 U.S. 429, 435 (1968). Accordingly, when a state legislates in an area that involves international relations, the Court should be more ready to conclude that the state law is preempted, contrary to the ususal presumption against preemption. *See Crosby v. National Foreign Trade Council*, *supra,* at * 9, 11.

The comprehensive scope of the Peace Treaty's waiver of claims, as well as the remedial scheme created by the War Claims Act, demonstrates that the federal government has occupied the field with respect to prisoner of war claims against the Japanese and "left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 229-30 (1947); *United States v. Locke,* — U.S. — , 120 S. Ct. 1135, 1149 (2000); *Worth v. Universal Pictures, Inc.,* 5 F. Supp. 2d 816, 820 (C.D. Cal. 1997).

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[26] An international treaty to which the United States is a party is the "supreme law of the land" and may preempt state law claims as fully as an act of Congress. U.S. Const. Art. VI, ¶ 2; *see also Missouri v. Holland*, 252 U.S. 416, 434-35 (1920); *In re Aircrash in Bali, Indonesia,* 684 F.2d 1301, 1307-08 (9th Cir. 1982); *Air France v. Saks,* 470 U.S. 392, 406 (1985).

ILI U.S. Digest/8 529 1/8/02, 1:47 PM

Indeed, through its extinguishment of rights under the Peace Treaty, its enactment of the comprehensive reparations scheme set forth in the War Claims Act, and its rejection of the courts as forums for such claims, "Congress clearly evidenced its intent to completely preempt claims brought by American prisoners of war against Japan and its nationals."[27] *Tenney v. Mitsui & Co., Ltd.,* Case No. CV-99-11545, slip op. at 5 (C.D. Cal. Feb. 24, 2000) (J. Marshall) (Exhibit 44). Where, as here, "the federal government, in the exercise of its superior authority in [the field of foreign relations], has enacted a complete scheme of regulation…states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law." Hines, 312 U.S. at 66 (Pennsylvania alien registration law preempted by subsequently enacted federal law, even though federal act did not contain express preemption provision); *see also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (state law preempted where Congress enacted "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it"); *Beveridge v. Lewis*, 939 F.2d 859, 862 (9th Cir. 1991) ("Congress may implicitly occupy a field through pervasive regulations that leave no room to supplement").

Moreover, even if there were not such clear intent to occupy the field, the application of state law sought by plaintiff would nonetheless be preempted because it directly conflicts with clear federal law, *see Rice,* 331 U.S. at 229-30, and the President's authority "to speak for the United States among the world's nations[.]" *See Crosby, supra,* at *9. Allowing state law causes of action based on World War II claims against Japanese nationals *would* impede "the accomplishment and execution of the full purposes and objectives" of the federal government in negotiating and ratifying the Treaty. *See Hines*, 312 U.S. at 67. As discussed above, the United States, intended to, and did, resolve all war-related claims arising out of the conduct of Japan and its nationals during World

[27] Since Congress opted for a federal administrative remedy, it is indisputable that allowing state courts to hear such claims would be antithetical to congressional intent. *Nebenzal v. Re,* 407 F.2d 717, 719 (D.C. Cir. 1968) ("the legislative history of the [War Claims] Act ... evidences Congress' intention to leave entirely to the Commission the disposition of such claims"), *cert. denied,* 395 U.S. 920 (1969).

ILI U.S. Digest/8 530 1/8/02, 1:47 PM

War II in the Treaty. The resolution expressly extended to claims by former prisoners of war. *See* Treaty, Art. 16. The state law claims plaintiffs attempt to assert are precisely those claims that the federal government settled when it ratified the Treaty and accepted the benefits of the Treaty's provisions. Because allowing these state law claims would create a direct conflict with Treaty, they are preempted.

CONCLUSION

The purpose of the 1951 Treaty of Peace with Japan was to restore Japan's sovereignty, engage Japan as a functioning democratic market economy in the face of communist threat, and settle all claims against the Government of Japan and Japanese nationals, while also settling any potential Japanese claims against the Allies and their nationals. None of these purposes could have been achieved had the Treaty left open the possibility of future war reparations or other war-related claims such as those advanced by the plaintiffs in the cases pending before the Court. For this reason, except as otherwise provided for in the Treaty, the Treaty specifically was drafted to waive all claims of the Allied Powers and their nationals, against both Japan and its nationals, that arose out of the conduct of the Second World War. At the same time, the Treaty ensured that Japan and its nationals forfeited an unprecedented amount of assets to compensate the victims of World War II. To that end, the Treaty's waiver of reparations and other claims which the Allied Powers and their nationals may have had against Japan and its nationals, along with the remedial scheme set up both by the Treaty and the War Claim Act, provide a comprehensive compensation program which preempts plaintiffs' state law claims in this action.

Accordingly, the United States respectfully submits that the claims raised by the plaintiffs should be dismissed.

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c. Claims of Non-allied prisoners

Order No. 4, discussed above, did not address motions to dismiss in cases brought by plaintiffs who were not members of the armed forces of the United States or its allies, stating that their claims raised other issues and required further consideration. *In re World War II Era Japanese Forced*

ILI U.S. Digest/8 531 1/8/02, 1:47 PM

Labor Litigation, 114 F. Supp. 2d 939, 942 (N.D. Cal. 2000). On December 6, 2000, the United States filed a Statement of Interest on these non-Allied cases, urging that the cases be dismissed as well because their claims also are preempted by federal action, as discussed in the excerpts in B.3.b. above. The excerpts below from the Statement explain the framework created in 1951 by the United States to settle all war claims against Japan and its nationals, regardless of the nationality of the claimant.

The full text of the Statement of Interest is available at *www.state.gov/s/l.*

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BACKGROUND

The Allies were painfully aware of the nature and extent of Japanese war crimes committed against Chinese nationals. The Japanese occupation of Manchuria dated back to 1931, and the practice of the Japanese occupation forces repeatedly had been condemned by the Allies. *See, e.g.,* John W. Dower, *War Without Mercy: Race and Power in the Pacific War,* 38 (1986) (discussing U.S. State Department condemnation of the bombing of civilian targets in China in 1930s). At the International Military Tribunal for the Far East (the "Tokyo trials"), prosecutors presented voluminous evidence concerning the use of opium trafficking in the 1930s to raise money for the Japanese war effort, the infamous "Rape of Nanking" of 1937, and the use of countless Chinese and other Asians as slave laborers before and during World War II. *See The Tokyo Judgment: The International Military Tribunal for the Far East, 29 April 1946-12 November 1948,* 386-438 (Dr. B.V.A. Röling & Dr. C.F. Ruter, eds. 1977). The Allies also were aware that approximately half of all Japanese-owned assets abroad were located in China. *See* Tetsuo Ito, *Japan's Settlement of the Post-World War II Reparations and*

ILI U.S. Digest/8 532 1/8/02, 1:47 PM

Claims, 37 Japanese Ann. of Int'l L. 38, 47 (1994). Thus, any meaningful settlement of the issue of Japanese reparations had to address the issue of Chinese war claims.

At the same time, it was China that presented the biggest obstacle to a comprehensive settlement, since by 1949 it had become impossible to determine which political entity legally represented China. By that time, the People's Republic of China had been established in Beijing, and Chiang Kai-Shek's Nationalist forces had retreated to the island of Taiwan, where it established governance as the Republic of China. *See* Marius B. Jansen, *Japan and China: From War to Peace, 1894-1972,* 443-44 (1975); *see also The China White Paper: August 1949* (originally issued as United States Relations with China With Special Reference to the Period 1944-1949), 311-23 (1967). The U.S. Government continued strongly to support the Chinese Nationalists, particularly after Chinese Communist forces launched a major offensive into North Korea in November 1950. *See* William Whitney Stueck, Jr., *The Road to Confrontation: American Policy Toward China and Korea, 1947-1950,* 3-5 (1981). Great Britain, by contrast, favored recognition of the People's Republic of China. *See* Memorandum of Conversation, by the Deputy Director of the British Commonwealth and Northern European Affairs (Satterthwaite), Washington, March 30, 1951, *reprinted in* Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 953-54 (Exhibit 2); Memorandum of Conversation, by the Deputy to the Consultant (Allison), Washington, April 5, 1951, *reprinted in id.* at 964-67 (Exhibit 3).

Since there was no consensus among the Allies as to whether the People's Republic of China or the Republic of China properly should be a party to the 1951 Treaty, neither Chinese entity was invited to the San Francisco Peace Conference, with the understanding that Japan would be left to decide which government it would recognize. *See* Telegram from the Secretary of State to the United States Political Adviser to SCAP (Sebald), Washington, May 16, 1951, *reprinted in id.* at 1044-45 (Exhibit 4); Draft Joint Statement of the United Kingdom and United States Governments, June 19, 1951, *reprinted in id.* at 1134 (Exhibit 5). However, the Senate Foreign Relations Committee later would inform Japanese officials that the U.S. Senate's approval of the 1951 Treaty was conditioned on the understanding that the Japanese Government only would conduct diplomatic relations with the Republic of China. *See* Memorandum by the Consultant to the Secretary (Dulles) to the Secre-

ILI U.S. Digest/8 533 1/8/02, 1:47 PM

tary of State, Washington, Dec. 26, 1951, *reprinted in id.* at 1467-68 (Exhibit 6); *see also Note Verbale* (Ex. 1).

Korea presented a different but equally complicated set of problems. As Korea had been under the colonial occupation of Japan since 1910, "the view of the United States and Japanese governments was that, as part of the Japanese empire, Korea had fought against the Allies during the Pacific War and therefore was not eligible for reparations." *See* Sung-Hwa Cheong, *The Politics of Anti-Japanese Sentiment in Korea: Japanese-South Korean Relations under American Occupation, 1945-1952,* 47 (1991); *see also* U.S. Dep't of State Publications, *Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan,* 84 (1951) (Exhibit 7). Indeed, many of the claims of Koreans were not considered World War II claims, *per se,* but "losses associated with colonial rule." Cheong, *supra,* at 54

Korea nevertheless was recognized as having "a special claim on Allied consideration." *Id.* The United States realized that, as was the case with regard to all other Allied war claims, "any reparations which might be paid to the Koreans by the Japanese would in fact come from the United States taxpayers." Memorandum of Conversation, by the Officer in Charge of Korean Affairs (Emmons), Washington, Jan. 17, 1951, *reprinted in* Foreign Relations of the United States 1951, Vol. VII, Korea and China, Part 1, at 97 (summarizing remarks of Dean Rusk, Assistant Secretary for Far Eastern Affairs) (Exhibit 8). Thus, it was crucial to resolve, to the greatest extent possible, the issue of Korean claims against Japan arising out of both the war and the colonial occupation; in fact, "[t]he American effort to open a dialogue between the two nations began even before the final draft of the [1951] Treaty was published." Cheong, *supra,* at 100. Dulles initially favored Korea's full participation as a signatory to the 1951 Treaty. *See* Memorandum of Conversation, by Mr. Robert A. Fearey of the Office of Northeast Asian Affairs, Tokyo, April 23, 1951, *reprinted in* Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 1007 (1977) (Exhibit 9). However, the British Government so strongly opposed the idea that it eventually was abandoned. *See generally* Cheong, *supra,* at 77-98.

As a result of these complications, in the end no Chinese or Korean political entities signed the 1951 Treaty. In these circumstances, Article 14(b) of the Treaty, providing for waiver of all Allied claims against Japan and its nationals, does not cover the PRC, Taiwan, or North or South Korea. However, the Allies inserted several provisions into the

ILI U.S. Digest/8 534 1/8/02, 1:47 PM

Treaty that provided for some form of compensation to these countries. More importantly, the Treaty obligated Japan to enter into bilateral agreements with these entities on terms similar to those provided in the Treaty.

Article 26 of the Treaty obligated Japan to enter into a war-claims settlement with a Chinese political entity within three years. Article 21 of the Treaty stated that China would be entitled to the benefits of Articles 10 and 14(a). In Article 10, Japan renounced all rights and interests in China, and Article 14(a) provided for the seizure and liquidation of assets located in Chinese territory. This was extremely significant because, as stated above, almost half of all Japanese-owned assets abroad were located in China.

…Within those three years, Japan did in fact conclude a bilateral treaty of peace with the Republic of China (Taiwan), on substantially the same terms as are provided for in the 1951 Treaty. Treaty of Peace Between the Republic of China and Japan, April 28, 1952, 1858 U.N.T.S. 38 (Exhibit 13). The situation with regard to the People's Republic of China is slightly different for reasons explained in detail in the Government of Japan's *Note Verbale.* As noted above, any similar resolution with the People's Republic of China was rendered virtually impossible by U.S. insistence that Japan not deal with Chinese Communists. Nonetheless, both the People's Republic of China and the Government of Japan have made several public statements to the effect that the issue of war claims was set aside as part of the normalization of relations between the two nations. *See Note Verbale* (Ex. 1).

Article 2 of the Treaty required Japan to recognize Korea's independence and renounce all claim to Korea. Article 21 specifically stated that Korea would be entitled to certain benefits under the Treaty. Article 4(a) obligated Japan to resolve all claims between Korea and Japan through "special arrangements between the two governments," and Article 4(b) provided for the Korean Government's seizure of all Japanese-owned assets in Korea. *See* Statement of U.S. Position on Interpretation of Article 4 of the Japanese Peace Treaty With Respect to Korean-Japanese Claims Settlement, *reprinted in* Documents on Korean-American Relations 1943-1976, at 146-147 (1976) (Exhibit 14) ("Documents on Korean-American Relations"). This was a significant step towards the resolution of Korean claims as these assets were, by all accounts, substantial. By the end of World War II, Japan and its nationals had acquired 5 billion dollars' worth of assets in Korea, almost 85 percent of all property in Korea. Cheong, *supra,* at 48. When Japanese

ILI U.S. Digest/8 535 1/8/02, 1:47 PM

nationals were repatriated from Korea by U.S. forces in 1945, they were allowed to take with them only 1000 yen each and whatever they could carry. *Id.* The remainder of the Japanese assets were frozen by U.S. authorities until October 12, 1948, when about 90 percent of all such vested property was transferred to the newly-established Republic of Korea. *Id.* at 48-54.

Japan and the Republic of Korea (South Korea) entered into an agreement as contemplated in Article 4(a) of the Treaty in 1965 following years of protracted negotiations in which the United States heavily was involved. *See* Agreement on the Settlement of Problems Concerning Property and Claims and On Economic Cooperation Between Japan and the Republic of Korea, June 22, 1965, 8473 U.N.T.S. 258 (Exhibit 15); *see also generally* Cheong, *supra,* at 99-118 (discussing U.S. role in the negotiations). The terms of this agreement were greatly influenced by the fact that Korea already had received substantial compensation under Article 4(b) of the 1951 Treaty, as discussed above. Cheong, *supra,* at 117; *see also* Documents on Korean-American Relations (Ex. 14). The Japan-ROK agreement is part and. parcel of the framework created by the United States in 1951. A similar agreement between Japan and North Korea is currently under negotiation, in furtherance of Japan's obligations under Article 4(a) of the 1951 Treaty.[3]

DISCUSSION

The Claims Of The Non-Allied Plaintiffs Are Preempted By The Treaty Of Peace And The Federal Government's Power To Make Foreign Policy

A. The Claims Of The Non-Allied Plaintiffs Are Preempted By The 1951 Treaty Of Peace

State law is preempted where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress and the President. *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2294 (2000) (citing *Hines v. Davidowitz,* 312 U.S. 52, 66-67 (1941)). Although Article 14(b) of the Treaty did not extinguish claims of

[3] Japan's obligations under Article 4(a) run independently of its Article 26 obligations, and are not subject to the three-year limitation.

ILI U.S. Digest/8 536 1/8/02, 1:47 PM

nationals of countries not party to the Treaty, the United States national policy evidenced by the text and negotiating history of the Treaty demonstrates an intent on the part of the U.S. Government to occupy, in the United States, the entire field of war claims against Japan and its nationals. *Tenney v. Mitsui & Co., Ltd.* Case No. CV-99-11545, slip op. at 5 (C.D. Cal. Feb. 24, 2000) (J. Marshall) (Exhibit 16). Litigation of these war claims under the California statute would frustrate the manifest intent of the Executive Branch and Congress to settle once and for all the issue of war claims against Japan and its nationals, regardless of the nationality of the claimant. For that reason, Cal. Civ. Proc. Code §354.6 is preempted by operation of the Supremacy Clause. *See Kolovrat v. Oregon,* 366 U.S. 187, 190 (1961); *National Foreign Trade Council,* 120 S. Ct. at 2294 (citing *California v. ARC America Corp.,* 490 U.S. 93,101 (1989)).[4]

The United States, specifically John Foster Dulles, the lead U.S. negotiator, was the driving force behind the decision to waive all Allied claims against Japan in the 1951 Treaty. The United States Senate gave its advice and consent to the Treaty on March 20, 1952, by a vote of 66 to 10. The comprehensive scope of the Peace Treaty's waiver of claims, as well as the remedial scheme created by the War Claims Act, the mechanism the United States created to compensate American POWs, demonstrates that the federal government has occupied the field with respect to prisoner of war claims against the Japanese and has left no room for the States to supplement it. *United States v. Locke,* 120 S. Ct. 1135, 1149 (2000); *Worth v. Universal Pictures, Inc.,* 5 F. Supp. 2d 816, 820 (C.D. Cal. 1997).

The 1951 Treaty created the framework for bringing closure to World War II claims against Japan and its nationals. In drafting the Treaty, the Allies took pains not only to address settlement of their own war-related claims with Japan, but those of non-signatory nations as well. As discussed above, the Allies inserted several provisions into the Treaty that provided for some form of compensation to these countries. *See* Treaty, Articles 2, 4, 10, 14 and 21. In addition, the Treaty obligated Japan to

[4] An international treaty to which the United States is a party is the "supreme law of the land" and may preempt state law claims as fully as an act of Congress. U.S. Const. Art. VI, ¶2; *see also Air France v. Saks,* 470 U.S. 392, 406 (1985); *Missouri v. Holland,* 252 U.S. 416, 434-35 (1920); *In re Aircrash in Bali, Indonesia,* 684 F.2d 1301, 1307-08 (9th Cir. 1982).

ILI U.S. Digest/8 537 1/8/02, 1:47 PM

enter into bilateral agreements with these entities on terms similar to those provided in the Treaty. *Id.,* Articles 4 and 26. The Allies' intent was to effect as complete and lasting a peace with Japan as possible in order to allow Japan as a nation to rebuild its economy and become a stable force and strong ally in Asia. *See* Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific, S. Exec. Rep. No. 82-2, at 2-3 (Exhibit 17); *Aldrich v. Mitsui & Co. (USA),* Case No. 87-912-Civ-J-12, slip op. at 3 (M.D. Fla. Jan. 20, 1988) (Exhibit 18). To that end, the United States actively facilitated and encouraged Japan's efforts to enter into peace treaties and/or claims settlement agreements with non-signatory nations such as China, Korea, Burma and Indonesia.

However, the international community, led by the United States, recognized that full payment for all damages was impossible if a "viable economy" were to be created in Japan. *See* Treaty, Article 14(a); S. Exec. Rep. No. 82-2, at 12 (Ex. 17). It therefore was understood and accepted that it would be "the duty and responsibility of each government to provide such compensation for persons under its protection as that government deem[ed] fair and equitable." S. Exec. Rep. No. 82-2, at 13 (Ex. 17). Although the Treaty unequivocally required Japan to compensate signatory as well as non-signatory nations for war losses, the Treaty's waiver provisions placed the burden of ensuring that individual claimants were compensated back on the home governments of those citizens. The United States responded to this call by seizing Japanese assets, placing them into the War Claims Fund established pursuant to the War Claims Act, 28 U.S.C. §§ 2001-2017, and distributing them through the War Claims Commission. Congress rejected an alternative proposal that would have allowed federal courts to adjudicate war compensation claims. 94 Cong. Rec. at 564 (1948) (Exhibit 19). Congress even barred judicial review of the War Claims Commission's decisions "by mandamus or otherwise." 50 U.S.C. App. § 2010 (1994). It was not the intent of the President and Congress to preclude Americans from bringing their war-related claims against Japan and Japanese nationals in U.S. courts, but allow federal or state courts to serve as a venue for the litigation of similar claims between third-parties. Such a result would be at odds with the overarching purpose and application of the Treaty.

The federal government, "in the exercise of its superior authority in [the field of foreign relations], has enacted a complete scheme of regulation" to address World War II related claims against Japan and its nation-

ILI U.S. Digest/8 538 1/8/02, 1:47 PM

als. *Hines*, 312 U.S. at 66. California cannot now "inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, [that] federal law." *Id.; see also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983); *Beveridge v. Lewis*, 939 F.2d 859, 862 (9th Cir. 1991). Because Cal. Civ. Proc. Code § 354.6 interferes with long-standing foreign policy judgements centering around the 1951 Peace Treaty, it necessarily is preempted. *United States v. Pink*, 315 U.S. 203, 230-31 (1942) ("state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement"); *Hines*, 312 U.S. at 66; *Bethlehem Steel Corp. v. Board of Comm'rs of the Dep't of Water and Power of the City of Los Angeles*, 276 Cal. App. 2d 221, 225-26 (1969). If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted, and there would be "great potential for disruption or embarrassment" of the United States in the international arena. *Zschernig v. Miller*, 389 U.S. 429, 435 (1968). In this instance, it goes beyond the "potential" for embarrassment. The Government of Japan affirmatively has stated that it could disrupt U.S. relations with Japan. *See Note Verbale* (Ex. 1).

* * * *

CONCLUSION

As this Court noted in its September 21, 2000 Opinion (Order No. 4), the fundamental goal of the United States in negotiating the 1951 Treaty was "to settle the reparations issue once *and for all"* because "it was well understood that leaving open the possibility of future claims would be an unacceptable impediment to a lasting peace." 114 F. Supp. 2d at 946 (emphasis added). However, rather than allowing that peace to last, California is attempting to overturn a United States foreign policy decision made decades ago that has served U.S. security interests in Asia and supported peace and stability in the region for over 50 years. California also is creating a system that will place U.S. courts in the position of interpreting treaties and agreements between foreign powers affecting the rights of non-nationals with respect to events that occurred outside the United States over 50 years ago. In the process, California potentially will be jeopardizing relations between the United States and

ILI U.S. Digest/8 539 1/8/02, 1:47 PM

Japan and Japan and its Asian neighbors. For the reasons stated above', Cal. Civ. Proc. Code § 354.6 impermissibly intrudes on the foreign policy powers of the federal government and is preempted by the 1951 Treaty of Peace with Japan.

Accordingly, the United States respectfully submits that the claims raised by the plaintiffs should be dismissed.

4. Legislation to compensate American victims of terrorism

As discussed in Chapter 3.B.2. above, on October 28, 2000, the President signed into law the Victims of Trafficking and Violence Prevention Act of 2000 (Pub. L.106-386, 114 Stat. 1464). Sections 2002 and 2003 provide new authorities to compensate American victims of terrorism and their families. Section 2002 specifically provides for payment by the United States of certain anti-terrorism judgments against Cuba and Iran. Excerpts from President Clinton's October 28, 2000 Statement on Signing the Act provided in 3.B.2. above describe the effect of this and other aspects of the law. The Office of Foreign Assets Control, Department of Treasury, issued regulations on November 22, 2000, specifying procedures for persons to establish eligibility for payments authorized under Section 2002. 65 Fed.Reg. 70382 (November 22, 2000).

Section 2002 also provides that the President may waive any provision of paragraph 28 U.S.C. § 1610(f)(1) in the interest of national security.[5] Section 1610(f)(1) provides for attachment of property in which financial transactions are

[5] Section 1610(f)(1) was added by section 117 of Public Law 105-277 (October 21, 1998). Section 117(d) of that statute allowed the President to "waive the requirements of this section in the interest of national security." The President exercised that authority in a Determination to Waive Requirements Relating to Blocked Property of Terrorist-List States, 63 Fed. Reg. 599201 (October 21, 1998).

ILI U.S. Digest/8 540 1/8/02, 1:47 PM

prohibited or regulated by, inter alia, the International Emergency Economic Powers Act, to satisfy judgments in aid of execution of a judgment relating to a claim relying on the exception to sovereign immunity provided in § 1605(a)(7) discussed in 5. below. The President exercised this waiver authority on the date of the signing, October 28, 2000. A statement by the Office of the White House Press Secretary of the same date explains as follows:

CONTINUED WAIVER OF LAW ALLOWING JUDICIAL ATTACHMENT OF DIPLOMATIC PROPERTIES

The United States continues to fight against terrorism in all its forms. We have taken and will continue to take strong measures against nations that have sponsored terrorism. We have also supported efforts to obtain justice on behalf of victims of terrorism. The Victims of Trafficking and Violence Protection Act of 2000, signed by the President today, will provide much deserved compensation to American victims of terrorism and their families. This legislation is a measure of the United States Government's commitment to the victims of terrorism, to deter future acts of terrorism, and to defend the United States from its evils.

The struggle to defeat terrorism is not helped, however, by putting into effect provisions that would permit individuals who win court judgments against nations on the State Department's terrorism list to attach diplomatic and certain other properties. Attachment of diplomatic properties runs counter to other provisions of U.S. law and in some instances our treaty obligations and could result in retaliation, placing our embassies and citizens overseas at grave risk. It also would undermine our ability to use blocked properties as leverage in foreign policy disputes. This loss of leverage would be especially harmful to our ability to negotiate with successor or transition governments that may emerge in the future.

Under the law, the President can waive the attachment provision to protect the national security interest of the United States. President Clinton has signed the Victims of Trafficking and Violence Protection Act of

ILI U.S. Digest/8 541 1/8/02, 1:47 PM

2000 and, in the interests of protecting America's security, has exercised the waiver authority that was first used in 1998.

The Administration is working to achieve justice for victims of terrorism, without undermining our ability to protect our interest and conduct foreign relations, including the fight against terrorism, around the world.

5. U.S. litigation by American victims of terrorism

The judgments in favor of American victims of terrorism that the new legislation discussed immediately above will pay have arisen in several cases under a 1996 amendment to the Foreign Sovereign Immunities Act (28 U.S.C. § 1605(a)(7)). Section 1605(a)(7) provides an exception to sovereign immunity in certain circumstances in courts in the United States for claims of damages against a foreign state designated as a state sponsor of terrorism under 50 U.S.C. App. § 2405(j) or 22 U.S.C. § 2371. The claims must be for personal injury or death that was caused by an official act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in 18 U.S.C. § 2339A) for such an act. Judgments obtained under this exception include *Flatow v. The Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998), *Cicippio et al. v. the Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.C.D.C. 1998) and *Alejandre et al. v* .Fla. 1997).

The difficulty had been in finding assets to satisfy such judgments. Under the Foreign Sovereign Immunities Act, property of a foreign state in the United States is immune from attachment or execution, unless an exception under sections 1610 or 1611 of Title 28 provides otherwise. As discussed below, during 2000 the United States argued that

ILI U.S. Digest/8 542 1/8/02, 1:47 PM

no exception to these constraints applied in two cases where attempts had been made to attach Iranian property prior to enactment of the new legislation providing for payment by the United States. In addition, assets of countries designated as state sponsors of terrorism are often subject to regulation under the International Emergency Economic Powers Act and the Trading with the Enemy Act, in many cases rendering them not subject to attachment. In litigating these issues, the United States has made clear that it does so

> to protect its own interests in this matter and to advise the Court of its legal obligations with respect to the writs of attachment under both U.S. law and international agreements. In articulating those legal obligations, the United States does not appear on behalf of Iran and expressly condemns the acts that brought about the judgment in th[e] case.

Cicippio, Memorandum of Points and Authorities at 3 (discussed in 5.b. below).

a. Effort to attach Iran's Foreign Military Sales Fund: *Flatow v. The Islamic Republic of Iran*

In *Flatow v. The Islamic Republic of Iran*, supra, judgment was entered for plaintiff against the Islamic Republic of Iran for the wrongful death of his daughter Alisa, who was killed in a 1995 terrorist bombing of a tourist bus in Gaza. In response to plaintiff's most recent effort to execute that judgment, on June 6, 2000, the Court found that Iran's Foreign

ILI U.S. Digest/8 543 1/8/02, 1:47 PM

Military Sales Fund ("FMS Fund") was immune from attachment. 2000 U.S.Dist. LEXIS 8910 (D.D.C.). Other writs of attachment in *Flatow* on accounts and property belonging to Iran had previously been quashed. 76 F. Supp. 2d 16 (D.D.C. 1999), 76 F. Supp. 2d 28 (D.D.C. 1999, and 74 F. Supp. 2d 18 (D.D.D.C. 1999), and 67 F. Supp. 2d 535 (D.Md. 1999). Excerpts below from the United States Memorandum of Points and Authorities, filed March 22, 2000 in support of its motion to quash the writ of attachment on the FMS Fund, set forth the arguments of the United States that the writ at issue is barred by the "law of the case" quashing earlier writs, and that, in any event, the writ is barred by sovereign immunity. The Memorandum also argued that the writ was improperly obtained and served.

The full text of the Memorandum, with attachments, is available at *www.state.gov/s/l.*

* * * *

BACKGROUND

Plaintiff's February 23, 2000 writ of attachment ("Feb. 23 writ") focuses on the Iran Foreign Military Sales program account, and any "related" accounts. *See* Feb. 23 Writ of Attachment (Tab A). The Foreign Military Sales ("FMS") program is governed by the Arms Export Control Act, 22 U.S.C. §§ 2751 *et seq.*, under which the President and the Department of Defense ("DoD") enter into agreements with eligible foreign governments and international organizations to sell them defense articles and defense services. Declaration of A. Robert Keltz ("Keltz Decl.") at ¶ 4 (Tab B). Sales under the FMS program are made to further the security objectives of the U.S. and the purposes and principles of the United Nations Charter. 22 U.S.C. § 2751; Keltz Decl. at ¶ 4. Sales can be either from DoD stocks or from procurements whereby the U.S. government enters into contracts with companies and suppliers to supply

ILI U.S. Digest/8 544 1/8/02, 1:47 PM

goods and services to the FMS customer. *Id.* The terms and conditions for every FMS sale are contained in the Letter of Offer and Acceptance ("LOA"), which sets out the obligations of the U.S. and the FMS customer. *Id.* at ¶ 6.

The FMS Trust Fund account, as referred to in the Keltz Declaration ("FMS Fund"), contains funds on deposit in the United States Treasury. *Id.* at ¶ 7. The account is credited with receipt from FMS customers, which are earmarked by law for use in carrying out specific purposes and programs. *Id.*

At the U.S. Treasury, the corpus of the FMS Fund represents the total aggregation of balances for *all* FMS customer. *Id.* at ¶ 9. At the country or customer level, there are 183 separate accounts used by DoD to separately account for each FMS customer's deposits, other collections or deposits, payment of customer-related bills, refunds and adjustments. *Id.*

As payments are received, the U.S. deposits them in the foreign customer's FMS fund account. The U.S. subsequently makes disbursements from the customer's account to pay for all of the obligations incurred by the U.S. for each LOA for that customer. *Id.* at ¶ 10.

At the end of the 1970's, Iran had one of the largest FMS programs with the United States. In 1978 and into 1979, Iran was, however, behind in making the required payments under the program. In February 1979, the Iranian program was restructured, with Iran canceling orders for major weapons systems and other items it purchased through the FMS program. On November 4, 1979, the U.S. Embassy and hostages were taken in Iran. On November 19, 1979, Iranian officials repudiated Iran's foreign obligations. Since then, the U.S. has continued to credit the Iran FMS program account with funds received from diversions (*i.e.*, sales to others) and to debit it for disbursements for termination and other costs. *Id.* at ¶ 11.

In 1981, Iran filed billions of dollars of claims against the U.S. before the Iran-U.S. Claims Tribunal arising out of its FMS program. The United States filed a $817 million counterclaim against Iran for its failure to safeguard the security of certain equipment, as it was required to do pursuant to the terms of the parties' agreement. These claims continue to be actively litigated before the Tribunal. *Id.* at ¶ 12.

The current cash balance in Iran's FMS program account is about $400 million. It is unknown how much, if any, of that amount will be owed to Iran by the United States until the claims before the Tribunal are resolved. *Id.* at ¶ 13.

ILI U.S. Digest/8 545 1/8/02, 1:47 PM

Meanwhile, disbursements and accounting adjustments are still being made from the Iran FMS program account for 11 FMS cases, including some of Iran's largest (F-14As, Spruance Destroyers). *Id.* at ¶ 14. Thus, there is a near-term need to continue to make disbursements from the Iran FMS program account to pay for items procured from U.S. contractors, ongoing storage charges, and contracted reconciliation work necessary to close out Iran's FMS contracts. *Id.* at ¶ 15. Pending determination of the writ of attachment, the Iran FMS program account has been ordered frozen by DoD, and these monthly payments to contractors — ranging from $1,000 to $400,000 monthly in the last year — are not being made. *Id.* at ¶¶ 15-16.

ARGUMENT

A. Law of the Case Precludes Attachment of Property Identified in Plaintiff's Feb. 23 Writ of Attachment.

This Court's decision to quash plaintiff's November 18, 1998 writ ("Nov. 18 writ") purporting to attach "any money, property, or credits" of Iran — including "all credits held by the United States to the benefit of the Islamic Republic of Iran" — is dispositive here. In quashing the earlier writ, the Court emphatically held that there was no waiver of sovereign immunity permitting such a writ to operate against the United States. *See* November 15, 1999 Memorandum Opinion ("Mem. Op.") at 7. But plaintiff has returned, this time seeking a subset of the universe he sought only months before, namely Iranian "property, accounts, trust, credits or assets of any type whatsoever" held by the Department of Defense. *See* Feb. 23 Writ at 2.

It goes without saying that any property "held by the Defense Department" is "held by the United States." Furthermore, the account identified by plaintiff in the recent writ, namely the "Foreign Military Sales Account," is actually held in the U.S. Treasury, though it is controlled by, and the accounting is performed by, the Department of Defense.[3] *See* Keltz Decl. at ¶ 9. (With respect to the FMS Fund, the U.S. Treasury does not maintain sub-accounts identified by country. *Id.*).

[3] Attachment of any other "property, accounts, trust, credits or assets of any type" held by the Department of Defense besides the FMS account is, by its very definition in the Feb. 23 writ, similarly barred by sovereign immunity.

ILI U.S. Digest/8 546 1/8/02, 1:47 PM

Accordingly, the Feb. 23 writ is entirely repetitive of plaintiff's Nov. 18 writ. The principle of "law of the case," which exists to ensure that "the same issue presented a second time in the same case in the same court should lead to the same result," *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir.1996)(en banc), demands that plaintiff's repetitive writ be quashed.

B. Sovereign Immunity Bars Plaintiff's Writ

Even if the Court were to find its Nov. 18, 1998 Order did not dispose of the repetitive Feb. 23 writ, the analysis and rationale guiding this Court's decision are nonetheless applicable, and controlling, here.

It is well-established, both in Supreme Court precedent and in this Court's recent opinion, that suits against the United States are barred absent an "unequivocally expressed" waiver of sovereign immunity. *See* Mem. Op. at 4 *(Flatow v. Islamic*, *Republic of Iran*, 74 F. Supp. 2d 18, 20-21 (D.D.C. 1999), *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999), *Lane v Pena*, 518 U.S. 187, 192 (1996), *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992)). This jurisdictional prerequisite applies equally to attachment and garnishment actions in which the United States or its agents are alleged to hold or control funds, property, or credits of another. *See Department of the Army v. Blue Fox*, 525 U.S. at 263-64; *FHA v. Burr*, 309 U.S. 242, 243-44 (1940); *Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 21 (1846); *Naukirchen v. Wood County Head Start, Inc.*, 53 F.3d 809, 811 (7th Cir. 1995); *Automatic Sprinkler Corp. v. Darla Environmental Specialists*, 53 F.3d 181, 182 (7th Cir. 1995); *Arizona v. Bowsher*, 935 F.2d 332, 334 (D.C. Cir. 1991); *Hawkins Bros. & Co. v. Morgenthau*, 85 F.2d 677, 681 (App. D.C. 1936).

For the purposes of sovereign immunity, the relevant inquiry is whether funds or property are in the possession or under the control of the U.S. government, and not whether they may be subject to ownership claims by another party. *See e.g.*, *Arizona v. Bowsher*, 935 F.2d at 334 ("trust fund" established in Treasury to hold money owed to others not subject to suit). If the relevant funds are held by the government and are those "as to which the United States ha[s]…the power of control and disposition," *Hawkins Bros. v. Morgenthau*, as F.2d at 681, they are considered U.S. funds for garnishment purposes, and sovereign immunity bars their attachment. *See Buchanan v. Alexander*, 45 U.S. at 20-21 ("so long as money

ILI U.S. Digest/8 547 1/8/02, 1:47 PM

remain[s] in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury").[4]

Because the United States controls the Iran FMS program account, as well as any other property held by the Department of Defense, the government is immune from any garnishment writ unless plaintiff can identify a statutory waiver of immunity. In its November 15, 1999 memorandum opinion, this Court held that none of the provisions of the Foreign Sovereign Immunity Act identified as putative waivers by plaintiff actually constituted statutory consent necessary to abrogate sovereign immunity. *Id.* at 9-14. No new waiver has been enacted into law since this Court quashed plaintiff's Nov. 18 writ, and therefore plaintiff's new writ seeking funds and property from the U.S. government is as unenforceable as its earlier one.

Because sovereign immunity bars this action, not only must the plaintiff's writ be quashed, but nether the United States nor the Secretary of Defense is subject to discovery relating to Iranian property they purportedly control. Federal sovereign immunity is an immunity from suit, not simply a defense to liability on the merits, *see FDIC v. Meyer*, 510 U.S. 471, 475 (1994), and therefore frees the government from the burdens of discovery or trial. *See In re Sealed Case 99-3091*, 192 F.3d 995, 999 (D.C. Cir. 1999).

* * * *

b. Effort to attach bank accounts: *Cicippio et al. v. the Islamic Republic of Iran*

In a similar case, the United States filed motions in August 2000 to quash writs of attachment against certain bank ac-

[4] Of course, if the relevant funds or property are not in U.S. government control or custody, serving a writ of garnishment on the government would be a useless exercise. *See*, *e.g.*, D.C. Code Ann. 16-546 (1981) ("attachment shall be levied…by serving a writ of attachment…and a notice that any property or credits of the defendant *in [the garnishee's] hands* are seized by virtue of the attachment"); *U.S. v Thornton*, 672 F.2d 101, 105 (D.C. Cir. 1982). Accordingly, any garnishment against a government agent is, by definition, barred by sovereign immunity unless there is an appropriate statutory waiver.

ILI U.S. Digest/8 548 1/8/02, 1:47 PM

counts issued in an effort to satisfy a judgment against Iran. *Cicippio et al. v. the Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998). The judgment was for $65 million in damages for tortious injuries suffered by three male United States citizens and the spouses of two of them, in the course of the men's terrorist kidnapping, imprisonment and torture by agents of Iran during the period 1985-1991 in Beirut, Lebanon. The following excerpts of the U.S. Memorandum of Points and Authorities submitted in support of these motions, dated August 16, 2000, explain the origin and legal status of the accounts and provide the views of the United States on the immunity of the accounts, which consist of Iran's diplomatic and consular funds and funds derived from the lease of Iran's diplomatic and consular property. The funds are also blocked pursuant to the Executive Order and Iran Assets Control Regulations implementing that Executive Order.

The full text of the Memorandum, with attachments, is available at *www.state.gov/s/l.*

* * * *

ARGUMENT

The bank accounts at issue cannot be attached because they are blocked pursuant to the Iran Assets Control Regulations ("IACR") which expressly prohibit attachment of blocked funds. 31 C.F.R. § 535.203 (e). In addition, because the funds in the bank accounts are diplomatic and consular funds and funds derived from the lease of Iran's diplomatic and consular property, attachment would be inconsistent with the United States' obligations under the Vienna Conventions to protect diplomatic and consular property. These obligations remain even where diplomatic relations between two countries have been severed. Third, again because the original funds in the bank accounts are diplomatic and consular funds, there is

ILI U.S. Digest/8 549 1/8/02, 1:47 PM

no applicable exception under the Foreign Sovereign Immunities Act ("FSIA") that would authorize overriding the usual immunity from attachment granted to a foreign government's noncommercial assets. *See* 28 U.S.C. §§ 1609, 1610. Lastly, with regard to the account in the custody of the Office of Foreign Missions ("OFM"), *i.e.*, the Second Account, attachment is prohibited by the terms of the Foreign Mission Act. *See* 22 U.S.C. § 4308 (f).

All of these prohibitions remain in place even after the 1998 amendment to the FSIA purporting to allow attachment of, *inter alia*, blocked property, since the President signed a waiver of the provisions of the amendment on October 21, 1998. *See* Attachments E-G.

I. The Bank Accounts Are Blocked Accounts Exempt From Attachment Under The Iranian Assets Control Regulations

The bank accounts at issue in this case were and remain blocked by Executive Order 12170, 44 Fed. Reg. 65729 (1979) issued pursuant to the International Emergency Powers Act ("IEEPA"), 50 U.S.C. §§ 1701 *et seq*. Newcomb Decl. ¶ 5; 31 C.F.R. § 535.201. With regard to attachment of blocked property, the regulations issued pursuant to the executive order state that

> [u]nless licensed or authorized pursuant to this part *any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void* with respect to any property in which on or since the effective date there existed an interest of Iran.

31 C.F.R. § 535.201 (e) (emphasis added). This language unequivocally voids the writs of attachment at issue here. More generally, the executive order and regulations prohibit *any* dealing in blocked property of the Government of Iran unless authorized by the Treasury Department. 31 C.F.R. § 535.201.

Although the Court need go no further than the plain language of the executive order and regulations before voiding the writs of attachment, it should be noted that giving force to these prohibitions avoids improper infringement on or interference with the President's powers in the area of foreign policy. As the Supreme Court has recognized, blocking is an important foreign policy tool that provides a critical "'bargain-

ILI U.S. Digest/8 550 1/8/02, 1:47 PM

ing chip' to be used…when dealing with a hostile country." *Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981). As explained by the Supreme Court in that case:

> This Court has previously recognized that the congressional purpose in authorizing blocking orders is 'to put control of foreign assets in the hands of the President….' Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency.

Id. The Court went on to uphold a Presidential order nullifying previously authorized prejudgment attachment on blocked Iranian property, writing that:

> it is difficult to accept petitioner's argument [that the President did not have such power] because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this 'bargaining chip' through attachments, garnishments, or similar encumbrances on property. Neither the purpose the statue was enacted to serve nor its plain language supports such a result.

Id. at 673-74; *cf. Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2296 (2000) (state law that resulted in "less economic and diplomatic leverage" of President was preempted by federal law) (citing *Dames*, 453 U.S. at 673).

The Supreme Court's admonition is particularly pertinent to the current circumstances. The United States originally blocked all property in which the Government of Iran had an interest in response to the 1979 hostage crisis. *See* Executive Order 12170. The controversy between Iran and the United States over their respective diplomatic and consular properties has not been resolved and is now the subject of a claim brought by Iran before the Iran-United States Claims Tribunal. Carpenter Decl. ¶ 17. Continued blocking of Iran's property, including the bank accounts, by the United States is important to preserving the United States' position and its rights with regard to its

ILI U.S. Digest/8 551 1/8/02, 1:47 PM

own diplomatic and consular property in Iran.[7] *Id.* Moreover, given that the dispute between these two sovereign countries is before an international tribunal, involvement by this Court in effecting a seizure or attachment of any of the property at issue would be particularly inappropriate. *See Adams v. Vance*, 570 F. 2d. 950, 955 D.C. Cir. 1978) (courts must be wary of intruding into foreign affairs to, among other things, " '…avoid fixing of our government's course' by premature interposition") (quoting *Nielsen v. Secretary of Treasury*, 424 F.2d 833, 855 (D.C. Cir. 1970)). For these reasons, this Court should enforce 31 C.F.R. § 535.203 (e) and quash the writs of attachment delivered to Bank of America.

II. Attachment Would Be Contrary To The Principles Of The Vienna Conventions Regarding Treatment Of Diplomatic And Consular Property

Attachment of the bank accounts in issue, in addition to being foreclosed by Executive Order 12170, would be contrary to U.S. obligations to protect and respect diplomatic and consular property pursuant to the Vienna Conventions on Diplomatic and Consular Relations. Article 45 (a) of the Vienna Convention on Diplomatic Relations provides that, "[i]f diplomatic relations are broken off between two States…(a) the receiving State must, even in the case of armed conflict, respect and protect the premises of the mission, together with its property and archives." T.I.A.S. 7502, 23 U.S.T. 3227 (1961). Article 27 of the Vienna

[7] As Mr. Carpenter discusses in his declaration (¶ 18), the United States' management of the Iranian diplomatic and consular property in the present case is consistent with its management of Vietnamese property under similar circumstances. As in the present case, the United States blocked and took custody of Vietnamese diplomatic and consular real property and accounts, renovated and rented out the real properties, and deposited the rental proceeds back into blocked accounts. *Id.* These assets were faithfully maintained by the United States for over 20 years. Eventually, a global agreement was reached with Vietnam involving both the real properties and the accounts. *Id.* As Mr. Carpenter states, the excellent condition in which the United States had maintained the Vietnamese property provided leverage for obtaining an advantageous settlement for the United States, and funds in the blocked accounts that the United States had been maintaining were used by Vietnam to compensate the United States for property it was unable to return. *Id.* Such an advantageous settlement would probably not have been reached if the accounts had been encumbered or reduced to pay off unrelated court judgments.

ILI U.S. Digest/8 552 1/8/02, 1:47 PM

Convention on Consular Relations contains the same obligation with respect to consular premises and property. T.I.A.S. 6820, 21 U.S.T. 77 (1967).

Thus, the United States has an international legal obligation under the Vienna Conventions to protect foreign missions, consular premises, and their property in the United States in the event that diplomatic relations between the United States and a foreign country, such as Iran, are severed. The International Court of Justice has described the obligations codified by these treaties as "vital for the security and well-being of the complex international community"and held that "scrupulous[]" respect for these obligations is "essential" to the ordered progress of international relations. *Case Concerning U.S. Diplomatic and Consular Staff in Tehran (Judgment)*, 1980 I.C.J. 3, 43. Additionally, the President explained in the context of signing the 1999 appropriations bill which amended the Foreign Sovereign Immunity Act, *see infra* at Part V, that attachment and execution against foreign diplomatic and consular property "would place the United States in breach of its international treaty obligations" and "would put at risk the protection we enjoy at every embassy and consulate throughout the world by eroding the principle that diplomatic property must be protected regardless of bilateral relations." Statement by the President on Omnibus Appropriations Act, at 7-8 (Oct. 24, 1998) ("Statement by President"), *reprinted at* 1998 WL 743759.

Certainly, the "property" which the United States has an interest in protecting pursuant to the Vienna Conventions includes the diplomatic and consular funds left behind by Iran upon the severance of relations between the two countries, and funds from the lease of Iran's diplomatic and consular real properties. *See* Carpenter Decl. ¶ 16. Accordingly, under the Vienna Conventions, the funds are immune from attachment to satisfy a civil judgment. *See Liberian Eastern Timber Corp. v. Government of the Rep. of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987) ("*LETCO*") (Article 25 of the Vienna Convention on Diplomatic Relations prohibits attachment of embassy bank account); *Foxworth v. Permanent Mission of the Rep. of Uganda to the United Nations*, 796 F. Supp. 761, 763 (S.D.N.Y. 1992) (attachment of bank account of Uganda's permanent mission to United Nations would conflict with U.S. obligations under Vienna Convention on Diplomatic Relations). The funds are immune from attachment for the additional reason that, in the instant case, the United States uses the funds to meet its obligations under the Vienna

ILI U.S. Digest/8 553 1/8/02, 1:47 PM

Conventions to protect the diplomatic and consular real estate that is also now in the United States' custody.

In addition to interfering with the United States' ability to comply with its obligations under the Conventions, attachment of the bank accounts would impair the United States' ability to obtain reciprocal compliance from Iran. The United States continues to block the Iranian property at issue so as to be able to use the property as a "bargaining chip" in negotiations with Iran, including negotiations over U.S. diplomatic and consular property in Iran. Carpenter Decl. ¶¶ 16-17. Allowing attachment of this property will interfere with the United States' ability to negotiate on this issue.

The obligations of the Vienna Conventions cannot be construed narrowly because, in the final analysis, international legal obligations are observed on the basis of reciprocity. In the present circumstances, the United States has an interest in protecting the diplomatic and consular property pursuant to the Vienna Conventions, and, as found by the President, *see infra*, it is in the national security interest of the United States to protect such property from attachment and execution. The Court should respect these determinations.[8]

III. The Bank Accounts Are Exempt From Attachment Under The Foreign Sovereign Immunities Act

The FSIA, in conjunction with a Presidential waiver of certain of its provisions as authorized by the 1999 appropriations bill, *see infra* Part V, also prohibits attachment of the Bank of America accounts. Under the FSIA, the property of a foreign state in the United States is immune from attachment or execution, unless otherwise provided by one of the statute's enumerated exceptions. 28 U.S.C. § 1609; *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 20 (D.D.C. 1999). Here — in the light of the President's decision to waive the provisions of 28 U.S.C. § 1610 (f) (1) (A), *see infra* Part V — the FSIA does not provide an

[8] With regard to the proper interpretation of the Vienna Conventions, the United States notes that, in construing treaties, the courts must give great weight to the interpretation given the treaty by the Executive Branch. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).

ILI U.S. Digest/8 554 1/8/02, 1:47 PM

exception allowing attachment or execution of the bank accounts; the accounts are therefore immune from attachment under the statute.

The exception contained in 28 U.S.C. § 1610 (a) (7) does not allow attachment of the bank accounts in issue. Section 1610(a)(7) states, "[t]he property in the United States of a foreign state…used for a commercial activity in the United States, shall not be immune from attachment…if…the judgment relates to a claim for which the foreign state is not immune under [28 U.S.C. § 1605(a)(7)]." Assuming disputed property actually belongs to a "foreign state," as the United States has argued,[9] it is the foreign state's own activities, not those of the United States, that determine whether particular property is "used for a commercial activity" within the meaning of section 1610(a). As the Supreme Court stated in discussing the waiver of jurisdictional immunity in the FSIA in *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992), actions are "commercial" within the meaning of the FSIA "when *a foreign government acts*, not as a regulator of a market, but in the manner of a private player within it" (emphasis added). "The issue is whether the particular actions that *the foreign state performs*…are the type of actions by which a private party engages in 'trade and traffic or commerce[.]'" *Id.* (emphasis added). Although the Court was not addressing the precise issue involved here, this language suggests that it would hold that only the actions of the foreign state itself could operate to waive immunity. This interpretation comports with the rationale behind the FSIA's exceptions to jurisdictional immunity and attachment and execution immunity — a foreign state should be found to have waived these immunities only when *it* has taken some action outside the realm of sovereign actions and itself acts as a private party.

The operative inquiry in the instant case, therefore, is not whether the United States used the accounts at issue for a commercial activity, but whether the original funds were used by *Iran* for commercial activi-

[9] In *Flatow*, the court disagreed with the United States' characterization of the First Account as Iranian property which was "blocked" and regulated by the Iranian Assets Control Regulations. *Flatow*, 76 F. Supp. 2d at 24. Rather, the court found that the "First Account is more properly characterized as United States property, which is immune from attachment by virtue of the doctrine of sovereign immunity." *Id.* (citing *Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 21 (1846), and other cases); *supra* note 6. Accordingly, the court did not reach the issue of whether the FSIA provided for attachment of the First Account.

ILI U.S. Digest/8 555 1/8/02, 1:47 PM

ties. The original Iranian accounts from which the funds still in the Bank of America account were transferred were diplomatic and consular accounts.[10] Newcomb Decl. §§ 8, 11. Such diplomatic and/or consular accounts are in general immune from attachment under the FSIA. *See LETCO*, 659 F. Supp. at 610 (holding the fact that the embassy account was used for some "incidental" or "auxiliary commercial purposes" did not cause the entire account "to lose its mantle of sovereign immunity") (refusing to follow *Birch Shipping Corp. v. Embassy of the United Rep. of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980)); *but see Birch Shipping Corp.*, 507 F. Supp. at 512.[11] Because Iran did not use the original funds which are now located in the bank accounts for a commercial activity, the FSIA forbids attachment of these accounts.[12]

Even were the activities of the United States relevant for purposes of determining whether the "commercial activity" exception contained in section 1610(a)(7) was met, the exception still would not apply to the bank accounts in issue. As the District Court recently found in the *Flatow* case with respect to the Second Account, this account was licensed by the Treasury Department to the State Department's OFM for the payment of maintenance and repair expenses relating to diplomatic properties of the Government of Iran. *See infra* at Part IV. The United States' use of the funds in the Second Account to preserve and protect diplomatic properties, pursuant to the United States' responsibilities under the Foreign Missions Act, "is more properly characterized as sovereign than commercial." *Flatow*, 76 F. Supp. 2d at 24.

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[10] Any funds relating the National Iranian Navy accounts were withdrawn pursuant to settlement agreement in February 1996. Newcomb Decl. ¶ 11.

[11] *Birch* may be distinguished from *LETCO* and from the present case because, in *Birch*, the embassy admitted that the embassy account was used solely to pay salaries and "incidental purchases and services." 507 F. Supp. at 312.

[12] The United States has never acted as an agent for Iran with respect to the real properties for which the bank accounts were established. Indeed, Iran objected to the leases of the real properties and sought to have them teriminated in the Iran-U.S. Claims Tribunal. In denying Iran's request, the Tribunal noted the United States' position that Iran's diplomatic and consular property had been leased at various periods since 1983, "in order to prevent their falling into an irreversible state of disrepair." *See Islamic Republic of Iran v. United States. Case Nos. A4/A7/A5 (I:F and III)*; Dec. 129-A4/A7/A15-FT, at 1-2 (June 23, 1997, Iran-United States Claims Tribunal) (Attachment H hereto).

ILI U.S. Digest/8 556 1/8/02, 1:47 PM

Moreover, construing the FSIA's "commercial activity" attachment exception to apply to the bank accounts would make little sense as a matter of statutory construction, in light of Congress's provision for potential attachment of these accounts under 28 U.S.C. §1610(f)(1)(A). As discussed below, because the accounts are regulated pursuant to the IEEPA, Executive Order 12170, and IACR, section 1610(f)(1)(A) contemplates that the accounts may be subject to attachment, absent Presidential waiver of the requirements of this provision. *Infra* at Part V. Thus, if the President decided not to exercise his authority to waive the requirements of section § 1610(f)(1)(A) — a situation which does not present itself in the instant case[13] — a construction of section 1610 (a)(7) that "permit[s] the attachment of blocked Iranian accounts…would render Section 1610(f)(1)(A) superfluous." *Flatow*, 76 F. Supp. 2d at 24. As the *Flatow* court noted, it is "unlikely that Congress enacted two separate provisions of the same statute in order to achieve the same result. That is, if blocked accounts were already subject to attachment under Section 1610(7), Congress would have had no need to enact an entirely new provision, Section 1610(f)(1)(A), to authorize the attachment of these very same funds." *Id.*

In sum, the accounts at issue include diplomatic and consular funds, plus the rental proceeds from the lease by the United States of the diplomatic and consular real properties, generated to provide additional funds for maintenance and upkeep on the real properties in furtherance of the United States' international obligations to protect the property. In these circumstances, the funds have not been used by *Iran* for a commercial purpose, and are immune from attachment under the FSIA.

IV. The Foreign Missions Act Explicitly Prohibits Attachment Of The Second Account Because It Constitutes Property Being Held By The Office Of Foreign Missions For The Use Of A Foreign Mission

Finally, the "Second" Bank of America Account is also subject to the prohibition against attachment of property held by OFM set out in

[13] On the same day that the President signed Public Law No. 105-277, which amended the FSIA to include, *inter alia*, the provision found at 28 U.S.C. § 1610(f)(1)(A), he also signed a waiver pursuant to the authority conferred on him by the amending waiver pursuant to the authority conferred on him by the amending section. Accordingly, the requirements of § 1610(f)(1)(A) are currently inoperative due to Presidential waiver. *Infra* at Part V.

ILI U.S. Digest/8 557 1/8/02, 1:47 PM

the Foreign Missions Act, 22 U.S.C. §§ 4301, *et seq.* Section 4305 (c) of the Foreign Missions Act authorized OFM to "protect and preserve any property of [a] foreign mission" if that mission has ceased conducting diplomatic, consular and other governmental activities and has not designated a protecting power (or other agent) approved by the Secretary to be responsible for the property of that foreign mission. 22 U.S.C. § 4305 (c). OFM has control over Iran's diplomatic and consular property, including the funds in the Second Account, according to this provision. Carpenter Decl. ¶¶ 4, 14, 15. Another provision of the Foreign Missions Act, section 4308 (f), prohibits the attachment of or execution upon such mission property being held by the Department of State. Specifically, 22 U.S.C. § 4308 (f) provides that

> [a]ssets of or under the control of the Department of State, wherever situated, which are used by or held for the use of a foreign mission *shall not be subject to attachment, execution*, injunction, or similar process, whether intermediate or final.

(emphasis added). The funds at issue are solely funds of the Iranian mission being held by the United States as a response to Iran's breach of its obligations under Vienna Conventions. The sole use of the funds made by the United States is to preserve and maintain other mission property. For these reasons, the funds fall within the exception of section 4308 (f) and are immune from attachment.

V. The 1998 Amendment To The Foreign Sovereign Immunities Act Allowing Attachment of Blocked Property In Certain Circumstances Is Inapplicable Here Because The President Has Waived The Effect Of The Amendment.

The Omnibus Appropriations Bill for Fiscal Year 1999 (Public Law No. 105-277), signed by the President on October 21, 1998, *supra* at Parts II and III, contains, among other things, the appropriations for the Treasury Department. A provision of this enactment amends the FSIA to provide that certain property, including property blocked pursuant to IEEPA, may now be subject to attachment. Pub. L. No. 105-277, § 101(h), Title I, § 117 ("Section 117") (Attachment E hereto, at 1199-1201). In pertinent part, Section 117 provides that,

ILI U.S. Digest/8 558 1/8/02, 1:47 PM

> [n]otwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. § 4308(f)),…any property with respect to which financial transactions are prohibited or regulated pursuant to…sections 202 and 203 of [IEEPA]…shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state…claiming such property is not immune under [28 U.S.C. §] 1605 (a) (7).

See Attachment E, at 1199; *see also* 28 U.S.C. § 1610(f)(1)(A). This new provision would, absent other action, allow attachment of certain property, including property blocked pursuant to IEEPA and/or held by the State Department's OFM pursuant to 22 U.S.C. § 4305(c), in cases where a foreign state has been found liable for certain terrorist actions.

In a signing statement addressing the entire 1999 appropriations bill, the President explained that, by allowing attachment and execution against foreign diplomatic and consular property,

> section 117 would place the United States in breach of its international treaty obligations. It would put at risk the protection we enjoy at every embassy and consulate throughout the world by eroding the principle that diplomatic property must be protected regardless of bilateral relations. Absent my authority to waive section 117's attachment provision, it would also effectively eliminate use of blocked assets of terrorist states in the national security interests of the United States, including denying an important source of leverage. In addition, section 117 could seriously affect our ability to enter into global claims settlements that are fair to all U.S. claimants, and could result in U.S. taxpayer liability in the event of a contrary claims tribunal judgment.

Statement by President, at 7-8, *reprinted at* 1998 WL 743759.

For these reasons, on the same day he signed Section 117 into law, the President executed a waiver of the requirements of Section 117 pur-

ILI U.S. Digest/8 559 1/8/02, 1:47 PM

suant to express congressional authority. *See Flatow*, 76 F. Supp. 2d at 25-27 (holding that Section 117 did not allow attachment of same Bank of America accounts). Subsection (d) of Section 117 provides that "[t]he President may waive the requirements of this section in the interest of national security." *See* Attachment E, at 1201. The President's waiver pursuant to Section 117 (d) stated that allowing attachment and execution on certain property of terrorist-list states, including property blocked pursuant to IEEPA, "would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions." Attachment F; *see also* Statement by the Press Secretary (Oct. 21, 1998) (Attachment G hereto). The President's waiver applies to all of the substantive provisions of Section 117, Attachment F; *Flatow*, 76 F. Supp. 2d at 26, and is not subject to judicial review, *see Dalton v. Specter*, 511 U.S. 462, 476 (1994) ("How the President chooses to exercise the discretion Congress has granted him is not a matter for [judicial] review.")

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CHAPTER 9

Diplomatic Relations, Continuity and Succession of States

A. STATUS OF FEDERAL REPUBLIC OF YUGOSLAVIA

1. Succession to Socialist Federal Republic of Yugoslavia in the United Nations

Following the break-up of the Socialist Federal Republic of Yugoslavia ("SFRY"), the Federal Republic of Yugoslavia (Serbia-Montenegro) ("FRY") asserted that it was the continuation of or sole successor to the SFRY in a number of contexts, including in international organizations (in an effort to succeed to the membership of the SFRY) and in relation to SFRY assets and liabilities. Other successor states of the SFRY contested the FRY's claim as the continuity of the SFRY, themselves applied as new members to the United Nations and other international organizations, and called upon the FRY to apply as a new member on the same basis. As explained in the excerpts from State telegram 224771 below, while supporting the general principle of automatic succession to treaties by successor states, the United States position was that the FRY did not represent the continuity of the SFRY and as such was required to apply for new memberships in international organizations. A number of other states joined in this view.

The full text of the telegram is available at *www.state.gov/s/l.*

ILI US Digest/9 561 1/8/02, 1:47 PM

* * * *

3. On November 1, 2000, the UN General Assembly approved by acclamation Resolution 55/23 (plenary), admitting the FRY as a new member of the UN. This resolution followed the unanimous recommendation of the Security Council. The USG and the four other successor states to the former Socialist Federal Republic of Yugoslavia (SFRY) were among the 71 co-sponsors of the resolution in the UNGA. The consequences of this decision are several.

UNITED NATIONS AND SPECIALIZED AGENCIES

4. Background: The former SFRY, an original member of the UN, no longer holds any claim to UN membership. The admission of the FRY ends the anomalous situation whereby the SFRY, a state that no longer existed, continued to hold a seat in the UN under the name "Yugoslavia." The new member state will officially be called "Federal Republic of Yugoslavia," but will be seated behind a placard bearing the name "Yugoslavia." While this is the same placard used by the SFRY, there is no question that the FRY is a new member state, not the continuation of the SFRY. The flag of the SFRY has been removed from the UN Plaza, and the FRY flag now flies in its stead.

5. Policy: As a member of the UN, the FRY is now eligible to participate in or be elected to all subsidiary and ad hoc bodies of the UNGA, and in ECOSOC and its subsidiaries. Also, as a member of the UN, the FRY is eligible to join all UN specialized agencies, although in some of the specialized agencies, there is a formal application process.

6. FRY participation in the subsidiary and ad hoc bodies, including, inter alia, the UN Children's Fund (UNICEF), the UN Development Program (UNDP), the UN Environmental Program (UNEP), and the Commission on Human Settlements (HABITAT), flows automatically from FRY membership in the UN. No further actions are required.

7. With respect to FRY membership in the UN-related specialized agencies, *e.g.,* the World Health Organization (WHO), the International Civil Aviation Organization (ICAO), the Food and Agricultural Organization (FAO), posts are requested to keep department informed of the status of the FRY applications in advance of any action. As was the case in relation to its UN application, the FRY must apply for membership on

ILI US Digest/9 562 1/8/02, 1:47 PM

the same basis as the other successors to the SFRY, *i.e.,* as a new member. We expect the FRY to continue to take reasonable and appropriate steps to resolve outstanding successor state issues of assets and liabilities, following the positive steps of recent weeks.

TREATY-BASED PROCEEDINGS

8. Background: The USG has generally supported the principle of automatic succession to treaties (including multilateral treaties) by states where their predecessor state was a party. The result had been that the USG has viewed the FRY as a party to treaties to which the SFRY was a party, including the Non-Proliferation Treaty, the Genocide Convention, the Covenant on Civil and Political Rights, etc. However, the USG position was that the FRY could not participate in meetings of the parties of such treaties until it confirmed in acceptable terms (*i.e.,* without claiming to be the continuation of the SFRY, rather than simply one of the successor states to the SFRY) that it is a party to the treaty. The USG has received assurances from FRY President Kostunica that the FRY has abandoned its legal position that it is the continuation of the SFRY; these assurances have been manifested in the FRY's application to the UN as a new member state and to the Organization for Security and Cooperation in Europe ("OSCE") as a new participating state.

9. Policy: The USG continues to regard the FRY as bound by the treaty commitments of the SFRY and its predecessor states but, under customary international law, the FRY should take steps to notify other governments and depositaries of multilateral treaties that it accepts these treaty obligations. The other former SFRY republics made similar notifications previously. The USG will encourage the FRY to do so [by separate telegram]. Pending formal action by the FRY, however, the USG will continue to operate on the understanding that the FRY does intend to be bound by these treaty commitments and, on a provisional basis, the USG will not oppose FRY participation in treaty-based proceedings.

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2. Establishment of diplomatic relations with FRY

In a letter to President Kostunica dated November 12, 2000, President Clinton indicated that the United States was pre-

ILI US Digest/9 563 1/8/02, 1:47 PM

pared to establish diplomatic relations with the FRY. President Kotunica responded in a letter to President Clinton dated November 17. An exchange of notes on the same day established diplomatic relations between the United States and the FRY at 1600 hours Belgrade time on November 17, 2000. The United States notes are set forth in full:

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THE WHITE HOUSE
Washington

November 12, 2000

Dear Mr. President:

In recognition of the progress made in discussions by our representatives in the weeks since your election as President of the Federal Republic of Yugoslavia, the United States is prepared to proceed with the immediate establishment between our two states of diplomatic relations with permanent missions.

I look forward to your response agreeing to the establishment of diplomatic relations and to the renewed development of cordial and productive relations between the Federal Republic of Yugoslavia and the United States.

Sincerely,
s/Bill Clinton

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* * * *

The Department of State has the honor to confirm to the Ministry of Foreign Affairs of the Federal Republic of Yugoslavia that diplomatic relations were established between the United States of America and the Federal Republic of Yugoslavia upon the exchange of Presidential letters in Belgrade at 1600 hours local time on November 17, 2000.

Department of State
Washington, November 17, 2000.

ILI US Digest/9 564 1/8/02, 1:47 PM

B. SUCCESSION OF STATES AS POLITICAL QUESTION: *767 Third Avenue Associates, v. Consulate General of the Socialist Federal Republic of Yugoslavia*

The United States filed an *amicus curiae* brief supporting appellees in an appeal from a district court judgment in *767 Third Avenue Associates v. Consulate General of the Socialist Federal Republic of Yugoslavia*, No. 99-9011 (2d Cir.) on January 31, 2000. The excerpts from that brief set forth below provide the United States views that any decision on the allocation of liability of successor states to the Socialist Federal Republic of Yugoslavia ("SFRY") for debts under a contract entered into by the SFRY is a political question that can only be determined by the executive branch and that the district court opinion should be reversed to the extent its decision to suspend rather than dismiss the case would place impermissible limits on executive branch authority to determine political questions. The Court of Appeals affirmed the district court's finding that the case raised nonjusticiable political questions and remanded to the district court with instructions to dismiss. *767 Third Avenue Associates v. Consulate General of the Socialist Federal Republic of Yugoslavia,* 218 F.3d 152 (2d Cir. 2000).

The full text of the amicus brief is available at *www.state.gov/s/l.*

INTEREST OF THE UNITED STATES

This action arises in the aftermath of the dissolution of the former Socialist Federal Republic of Yugoslavia (the "SFRY"). Since 1992, the United States has taken the position that the SFRY has ceased to exist, that there is no state representing the continuation of the SFRY,

ILI US Digest/9 565 1/8/02, 1:47 PM

and that five successors have arisen—the Federal Republic of Yugoslavia (Serbia and Montenegro) ("FRY (S&M))" the Republic of Slovenia ("Slovenia"), the Republic of Croatia ("Croatia"), the Republic of Bosnia-Herzegovina ("Bosnia-Herzegovina"), and the Former Yugoslav Republic of Macedonia ("FYROM") (collectively, the "Successor Defendants").

Plaintiffs 767 Third Avenue Associates, Carlyle Limited Partnership-XI, Melvyn Kaufman, and Robert Kaufman (collectively, "Plaintiffs") seek to recover damages for alleged non-payment of rent and breaches of leases held by the Consulate General of the Socialist Federal Republic of Yugoslavia (the "former SFRY Consulate"), the Yugoslav Press and Cultural Center (the "former SFRY Cultural Center"), and the Yugoslav Chamber of Economy (the "former SFRY Chamber of Economy") (collectively, the "former SFRY Defendants"). The district court abstained from deciding the case on the ground that the extent of the Successor Defendants' succession to assets and liabilities of the former SFRY is a non-justiciable political question. However, the district court did not dismiss the case outright, but "suspended" the case for an indeterminate period and suggested that the court could resolve the political question if the Executive Branch did not reach a timely resolution politically.

The United States participates in this appeal to support application of the political question doctrine to the claims asserted against the Successor Defendants, without the limitations articulated by the district court. The United States takes no position as to whether Plaintiffs should recover for non-payment under the leases. However, liability, if any exists, cannot attach to the Successor Defendants in the absence of a political determination, which has not yet been made, regarding successor state liability for the private debts of the former SFRY. Any judgment against the Successor Defendants, whether jointly or individually, would constitute a political decision that is reserved to the Executive Branch, and would thus purport to determine non-justiciable political questions. While the district court correctly held that the political question doctrine barred any current determination of liability of the Successor Defendants, or apportionment of liability among them, it impermissibly limited the scope of the political question doctrine by suggesting that a court could usurp the Executive Branch's authority on state succession matters at a later point. Therefore, the United States urges this Court to affirm the district court's acknowledgment that the

ILI US Digest/9 566 1/8/02, 1:47 PM

claims against the Successor Defendants are barred by the political question doctrine, without the limits placed on that doctrine by the district court.

In contrast to Plaintiffs' claims against the Successor Defendants, adjudication of the claims against the former SFRY Defendants would not, in and of itself, implicate political questions concerning successor states because it would not involve the court in an allocation of assets or liabilities as among the successors. The question remains whether the claims should proceed against the former SFRY Defendants. In the district court, the United States represented that it had no policy-based objection to those claims proceeding, and suggested that, in a situation such as this, the courts have jurisdiction to determine the amount, if any, of the predecessor state's liability, with judgment, if any, entered only against the predecessor state. (JA 528-30).* The United States noted that, in the corporate context, an action against a dissolved entity for activities arising prior to its dissolution abated at common law, although such an action may proceed where authorized by the laws under which the entity was created. *See Oklahoma Natural Gas Co. v. Oklahoma*, 273 U.S. 257, 259 (1927). However, there is no federal statute applicable to foreign states in comparable circumstances and no cases have been located under international law that address this issue in the context of state dissolution. (JA 528-29). The district court determined that the action should not proceed against the former SFRY Defendants (with the defense, if any, being conducted by one or more of the Successor Defendants), because, in its view, the management of such proceedings would present practical and political problems of the same nature as proceedings allocating assets and liabilities of the former SFRY among the Successor Defendants. *767 Third Avenue Assocs. v. Consulate General of the Socialist Federal Republic of Yugoslavia*, 60 F. Supp. 2d 267, 274 (S.D.N.Y. 1999). The United States does not press the point further in this Court.

* * * *

* "JA__" refers to the Joint Appendix filed by the parties in this action.

ILI US Digest/9 567 1/8/02, 1:47 PM

STATEMENT OF THE CASE

A. Political Framework

In the early part of this decade, the SFRY suffered increasing political crisis that ultimately led to dissolution. Since 1992, the United States has taken the position that the SFRY has ceased to exist and that no state represents the continuation of the SFRY. (JA 378). While the FRY(S&M) has attempted to maintain that it represents the continuation of the SFRY, this position has been rejected by the United States, the United Nations, and the international community generally. (JA 378-79). Slovenia, Croatia, Bosnia-Herzegovina, and FYROM have been formally recognized by the United States as independent states. The FRY(S&M) has not been formally recognized as a state by the United States. (JA 378).

With respect to assets and liabilities of the former SFRY, the United States' position is that each of the Successor Defendants constitutes a successor with interests in property of the former SFRY. (JA 379). Allocation of this property among the successors is a matter of great sensitivity. *(Id.).* The policy of the United States has been to encourage successors to *agree* among themselves regarding such allocation, which has been considered within the framework of an international conference process. *(Id.)* The United States continues to support the international process as the means to pursue resolution of these succession issues, which have not been resolved to date.*

* * * *

* It should be noted that during the pendency of these international negotiations, none of the Successor Defendants has as yet had access to United States-based assets of the former SFRY. Upon dissolution of the SFRY, in accordance with United Nations Security Council Resolutions and Presidential Executive orders issued under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701 et *seg.,* the United States instituted a comprehensive program of economic sanctions against the FRY (S&M). Under this program, all United States-based property and interests in property of the FRY (S&M), and of the former SFRY, in existence on or

ILI US Digest/9 568 1/8/02, 1:47 PM

ARGUMENT

Point I

The District Court Correctly Declined To Determine The Liability Of The Successor Defendants

In *Baker v. Carr,* 369 U.S. 186 (1962), the Supreme Court set forth the factors for determining the presence of non-justiciable political questions:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

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before December 27, 1995 are "blocked," 31 C.F.R. § 585.301, and may not, without a Government license, be "transferred, paid, exported, withdrawn, or otherwise dealt in." 31 C.F.R. § 585.201(a), (b); *see generally Beogradska Banka v. Interenergo, Inc.,* No. 97 Civ. 2065 (JGK), 1998 WL 661481, *4-5 (S.D.N.Y. Sept. 24, 1998); *Federal Republic of Yugoslavia v. Park-71st Corporation,* 913 F. Supp. 191, 193 n.2 1995). Such assets are expected to remain blocked until there is a political resolution of, *inter alia,* the successors, rights and responsibilities with respect to assets and liabilities of the former SFRY. *See* Statement by James B. Foley, Deputy Spokesman on Yugoslav State Succession, 1997 WL 14464578 (Sept. 30, 1997); *see also* Presidential Determination No. 96-7, 61 Fed. Reg. 2887 (Dec. 27, 1995) (permitting certain unblocking of FRY (S&M) assets, but stating that all property in existence on or before December 27, 1995, will remain blocked "until provision is made to address claims or encumbrances, including the claims of the other successor states of the former Yugoslavia").

ILI US Digest/9 569 1/8/02, 1:47 PM

369 U.S. at 217. Non-justiciability is distinct from lack of subject matter jurisdiction: Non-justiciability refers to instances where, although there may be subject-matter jurisdiction, "the court will not proceed because the matter is considered unsuited to judicial inquiry or adjustment. " *Id*. at 196. Where one or more of the Baker factors are present, the political question doctrine counsels against judicial resolution of the issue.

In *Can v. United States,* 14 F.3d 160 (2d Cir. 1994), this Court made clear that state succession presents political questions. *Can* addressed a claim by a self-styled class of citizens of the Republic of South Vietnam who sought to be named successors-in-interest to assets of the former Republic of South Vietnam in the United States. This Court concluded that the claim was nonjusticiable because the determination of title to the assets of the former South Vietnam was "inextricably intertwined with the question of state succession and sovereignty," and the settlement of claims to those assets clearly involved "decisions constitutionally committed to the executive branch." *Id*. at 165. The *Can* decision stressed the lack of judicial authority to deal with issues of state succession, both as to power and to property: "[T]he determination of title is…beyond judicial competence…. The courts have no standards for judging a claim of succession to a former sovereign, even where that succession is only to property rather than to government power. The recognition of any rights of succession to a foreign sovereign's power or property is in the first instance constitutionally committed to the executive branch of government, not to the judiciary." *Id*. at 162-63.

Several cases in the Southern District of New York have applied the principles enunciated by *Can* to dismiss claims to United States-based assets of the former SFRY. *See Beogradska Banka,* 1998 WL 661481 (sic) (action by FRY (S&M) bank to collect debt obligation would be dismissed on political question grounds if defendant demonstrated that debt sought to be collected was asset of former SFRY); *Jugobanka A.D. Belgrade v. Sidex Int'l Furniture Corp.,* 2 F. Supp. 2d 407 (S.D.N.Y. 1998) (action by FRY (S&M) bank to collect debt obligation was dismissed on political question grounds where debt sought to be collected was asset of former SFRY); *Park 71 Corp.,* 913 F. Supp. 191 (sic) (action raising competing claims to diplomatic property by successor states to former SFRY dismissed on political question grounds).

Similar considerations apply to the question of liability of successors for the debts of a former state. As in the case of successor claims to assets, liability for and allocation of debts among successors present

ILI US Digest/9 570 1/8/02, 1:47 PM

issues for which there are no identifiable judicial standards. There is no rule of law or international custom that requires a successor state to accept responsibility for the extra-territorial debts of its predecessor to private parties, or that determines how liability should be apportioned when there is more than one successor state that agrees to accept liability. The Foreign Sovereign Immunities Act does not impute contract liability to successor states that have not signed or expressly assumed a contract, nor waived immunity on their own behalf. *See Yucyco, Ltd. v. Republic of Slovenia*, 984 F. Supp. 209, 215-16 (S.D.N.Y. 1997 (non-signatory to contract cannot be defendant in action for breach absent assumption or assignment of contract). Moreover, while a change in government leaves statehood unaffected, and has no effect on that state's international rights and obligations, *see*, *e.g.*, *KMW Int'l v. Chase Manhattan Bank, N.A.*, 606 F.2d 10, 16-17 (2d Cir. 1979); Restatement (Third) of Foreign Relations Law ("Restatement"), § 208, Note 2, where one state succeeds another, and/or one or more new states are created, there is no rule of international law that provides for automatic assumption by successor states of contracts entered into by the dissolved predecessor state. *Yucyco,* 984 F. Supp. at 217-18 (citing, *inter alia,* Restatement §§ 208, 210).* Here, the appropriate share of each successor state in such liabilities, and indeed whether successors will be held directly accountable at all, for such debts incurred by the former sovereign, is simply not susceptible to judicial determination and can be decided only in the

*Regarding succession of states, the Restatement sets forth some general standards that contemplate certain succession rights and responsibilities. *See* Restatement §§ 208-210. For instance, under section 208 of the Restatement, "[w]hen a state succeeds to another state *with respect to particular territory,* the capacities, rights, and duties of the predecessor state *with respect to that territory* terminate and are assumed by the successor state, as provided in §§ 209-10." *id.* (emphasis added). However, this section does not address extra-territorial "capacities, rights and duties," which ordinarily terminate "[w]hen the state ceases to exist…" Restatement § 208, comment a. Moreover, under § 209 of the Restatement, "[s]ubject to agreement between predecessor and successor states, responsibility for… rights and obligations under [the predecessor's] contracts remain with the predecessor state…. [subject to certain exceptions.]" 11 Restatement § 209(2). While comment f to that section suggests that it may be unfair for a new state to repudiate contracts of its predecessor, the comment does not call for a successor to assume those contractual obligations unless one of the exceptions applies, *see* § 209 (2) (a)- (c), which is not the case here. *See* Restatement 209, comment f.

ILI US Digest/9 571 1/8/02, 1:47 PM

political arena. Thus, issues of whether and how former SFRY liabilities will be apportioned to the five successors present a non-justiciable political question. *See, e.g., Yucyco,* 984 F. Supp. at 217 (absent controlling agreement, treaty, or other instrument of allocation, claim against Slovenia for "equitable share" of guarantee made by former SFRY dismissed on political question grounds); *Yucyco, Ltd. v. Republic of Croatia,* No. 96 Civ. 5559 (DC), 1997 WL 728173, at *1 (S.D.N.Y. Nov. 19, 1997) (same decision as to Croatia); *compare Sage Realty Corp. v. Jugobanka, D.D.,* No. 95 Civ. 0323 (RJW), 1998 WL 702272 (S.D.N.Y. Oct. 8, 1998) (landlord's claim against FRY(S&M) bank for unpaid rent raises no political question and implicates no issues of state succession).

Of course, once successor liability is addressed by the political branches of government through international negotiation, any resulting agreements can be interpreted and enforced by the judiciary. *See Yucyco,* 984 F. Supp. at 217 n.17; Restatement § 209, Note 6 (citing *Ottoman Public Debt Case,* 1 R. Int'l Arb. Awards 529 (1925); *Virginia v. West Virginia,* 220 U.S. 1 (1911); *see also Japan Whaling Ass'n v. American Cetacean Society,* 478 U.S. 221, 230 (1986) (courts have authority to construe treaties and executive agreements). It should be noted that, in international negotiations addressing such issues in recent years, successor states have not pressed the "clean slate" (*i.e.,* no responsibility) theory, but have instead agreed to negotiated assumptions of liability. *See* Hubert Beemelmans, *State Succession in International Law: Remarks on Recent Theory and State Praxis,* 15 B.U. Int'l L.J. 71, 114 (1997). Indeed, some of the successors to the former SFRY have entered into such agreements with some international entities, including the IMF, in order to become internationally creditworthy. *Id*. at 113; *see also id*. at 83-84 & n.46; *see generally* Carsten Thomas Ebenroth and Matthew James Kemner, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards,* 17 U. Pa. J. Int'l Econ. 753, 791-93, 796-803 (Fall 1996). However, as there is not yet any agreement that would cover alleged debts of the former SFRY to private parties such as Plaintiffs, there is not at this time any agreement for a court to enforce as against the Successor Defendants.

The district court correctly recognized, 60 F. Supp. 2d at 272-76, that the issue of whether any or all of the Successor Defendants in this action may be held responsible for former SFRY debts, and, if so, on what basis, is a non-justiciable political question that is yet to be resolved. Because allocation of liabilities of the former SFRY raises po-

ILI US Digest/9 572 1/8/02, 1:47 PM

litical questions that have not been settled, it would be inappropriate for any judgment to be entered directly against the Successor Defendants, either jointly or individually. Any judgment against the Successor Defendants would have the effect of allocating debts among successor states and would involve the judiciary in the fundamentally political question of state succession to assets and liabilities.

This is so even if a court were merely to hold the successor states jointly liable for former SFRY debts without further allocation. A judgment even in this form would constitute a conclusion that the successor states are to be held directly liable for commercial debts of the former SFRY, a political determination that has not yet been made. Moreover, to the extent such a judgment were to be interpreted as imposing joint and several liability, it would enable Plaintiffs to enforce the judgment against a subset of the successor states or even one successor alone. Under this scenario, debts would likely be allocated based on the availability of executable assets, rather than on the ultimate political settlement concerning division of assets and liabilities. By entering such a Judgment, the court would be usurping the political powers reserved to the Executive Branch.

POINT II

The District Court Improperly Limited The Scope Of The Political Question Doctrine

After determining that non-justiciable political questions could not be avoided if any part of the case proceeded, the district court nonetheless did not dismiss the action. Instead, the district court adopted principles of abstention generally applied where a federal court is asked to defer to a state forum. *See 767 Third Avenue Assocs.,* 60 F. Supp. 2d at 279-82 (citing *Quackenbush v. Allstate Insurance* Co., 517 U.S. 706 (1996)). The district court concluded that abstention, rather than dismissal, was appropriate: "Just as comity in the federalism context requires deference to state processes and efforts to establish coherent policies on matters of substantial public concern, so does comity in the international context (in conjunction with separation of powers principles) require deference to international and executive branch processes and efforts to establish coherent policies on matters of substantial public concern." *Id*. at 280. In reaching this conclusion, the district court analogized the political question doctrine to the doctrine of "primary jurisdiction," which recognizes that where

ILI US Digest/9 573 1/8/02, 1:47 PM

concurrent jurisdiction lies with a government agency and the judiciary, it may be appropriate to defer to the government agency in the first instance. *Id*. at 281 (citing *Messenger v. Building Contractors Ass'n Inc.,* 703 F. Supp. 320, 324 (S.D.N.Y. 1989)).

While the district court acknowledged that the resolution of issues regarding the assets and liabilities of the former SFRY must be answered on political grounds by the political branches of government, it erroneously suggested that those issues could nonetheless be reviewed by a court if the political determination was unduly delayed, and even set forth a number of factors for the court to consider in determining whether the "delay has become too lengthy to justify continued delay of adjudication." *Id*. at 177. For example, the district court concluded it could take jurisdiction where "political efforts to resolve the outstanding succession issues have collapsed, and when the United States has failed to recognize the futility of awaiting a non-existent international resolution of those issues." *Id*. at 278. This inappropriately limits the political question doctrine by suggesting that a court could decide the case at some later date if the Executive did not act in what the court would consider to be a timely manner. *Id.*

Such a conclusion finds no support in the rationale or history of the political question doctrine, and cannot be squared with the reservation of these issues to the Executive Branch or with the other Baker factors. The political question doctrine is an absolute doctrine involving government structure and the separation of powers. It is not a choice-of-forum question or an equitable principle to be freely and flexibly administered by the courts. Future justiciability is not a "judgment call" for the Court, *see* 60 F. Supp. 2d at 281 n.3, but must be predicated upon a decision from the political branches of government recognizing or endorsing a specific allocation of rights and responsibilities of the successors to the former SFRY, *Can*, 14 F. 3d at 162.*

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*Indeed, settlement of international claims can be difficult and lengthy, particularly in the context of state dissolution. For instance, the issue of succession to United States-based assets belonging to South Vietnam that were frozen upon that country's effective dissolution in 1975 was not resolved until January 28, 1995. *See* Agreement Between the Government of the United States of America and the Government of the Socialist Republic of Vietnam Concerning the Settlement of Certain Property Claims, 1995 WL 79523. However, the passage of twenty years did not alter the political character of that determination or justify the judiciary attempting its own solution. *Can,* 14 F.3d at 163-64.

ILI US Digest/9 574 1/8/02, 1:47 PM

As a component of the recognition of foreign sovereigns, the methods by which the United States ultimately resolves successor states' claims to assets, and successor states' liability for debts, must be answered on political grounds by the political branches of government, and are thus "outside the competence" of courts. *Can,* 14 F.3d at 163 (quoting *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955)). The present policy of the United States is to encourage the successors to the former SFRY to reach an internationally negotiated settlement of these issues. Until those negotiations succeed, or until allocation of assets and liabilities is settled politically in some other way, claims raising these issues are simply unsuitable for judicial resolution. The United States urges this Court to reject any suggestion to the contrary made by the district court.

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ILI US Digest/9 576 1/8/02, 1:47 PM

CHAPTER 10

Immunities and Related Issues

A. SOVEREIGN IMMUNITY

1. Immunity in Case involving Employment Relationship: *Rajaa al Mukaddam v. Permanent Mission of Saudi Arabia to the United Nations*

The United States filed a Statement of Interest on September 1, 2000, in *Rajaa al Mukaddam v. Permanent Mission of Saudi Arabia to the United Nations*, 99 Civ. 3354 (S.D.N.Y.), providing its views on the parameters of the immunity from suit of the Kingdom of Saudi Arabia under the Foreign Sovereign Immunities Act ("FSIA") and the Vienna Convention on Diplomatic Relations ("VCDR") in the circumstances of the case. Plaintiff Mukaddam, a U.S. citizen employed by the Permanent Mission of Saudi Arabia to the United Nations, filed a civil suit against the Mission alleging sexual harrassment and gender discrimination under Title VII of the Civil Rights Act of 1964 and under New York State employment laws. The Saudi Mission moved to dismiss the complaint on the grounds, inter alia, of sovereign immunity.

Excerpts below from the Statement of Interest explain that decisions on sovereign immunity under the terms of the FSIA are made exclusively by the courts, not the execu-

ILI US Digest/10 577 1/8/02, 1:47 PM

tive branch. It also provides the standards to be used by the court in determining whether this case, involving an employment relationship, falls under the commercial activity exception to the FSIA. The United States also explained its view that Article 7 of the VCDR, providing that missions may "freely appoint" members of its staff, does not alter the applicable standards under the FSIA and that the United States position on the meaning and effect of Article 7 in this context should govern. At the same time, the United States noted that the VCDR, as applied by Art. V § 15 of the UN Headquarters Agreement, as well as the Convention on Privileges and Immunities of the United Nations, may well limit the availability of discovery and enforcement of remedies in this case. On September 7, 2000, the District Court issued a Memorandum Opinion finding jurisdiction over the claims under the commercial activity exception to immunity under the FSIA but striking plaintiff's jury demand, finding no right to jury trial in an action against a foreign state. *Mukaddam v. Permanent Mission of Saudia Arabia to the United Nations*, 111 F. Supp.2d 457 (S.D.N.Y. 2000).

The full text of the Statement of Interest is available at *www.state.gov/s/l.*

STATEMENT OF INTEREST OF THE UNITED STATES

* * * *

ARGUMENT

I. The Foreign Sovereign Immunities Act Provides The Relevant Standards For Determining Sovereign Immunity

A. The Foreign Sovereign Immunities Act

The FSIA provides a comprehensive framework for determining whether courts in this country may exercise jurisdiction over a foreign

state. *Republic of Argentina v. Weltover*, 504 U.S. 607, 610 (1992). "Under the Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the states, unless one of several statutorily defined exceptions applies." *Id*. at 610-11 (quoting 28 U.S.C. 1604). "The FSIA thus provides the 'sole basis' for obtaining jurisdiction over a foreign sovereign in the United States." *Id.* at 611 (citing *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 439 (1989)).

The FSIA largely codifies the "restrictive theory" of sovereign immunity, which was first endorsed by the State Department in 1952. *Saudi Arabia v. Nelson*, 507 U.S. 349, 359 (1993); *Weltover*, 504 U.S. at 612.[4] "Under the restrictive, as opposed to the 'absolute, theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (jure imperii), but not as to those that are private or commercial in character (jure gestionis) Nelson, 507 U.S. at 359-60.

The restrictive theory of sovereign immunity was not initially enacted into law, and its application proved difficult. Initial responsibility for deciding questions of sovereign immunity fell primarily upon the State Department, which then made "suggestions" of immunity to the courts. Consequently, foreign states often placed diplomatic pressure on the State Department in attempts to obtain immunity. Moreover, some nations did not make immunity requests through the State Department, leaving the decision solely with the courts, which had only the guidance of prior State Department decisions. Thus, a system developed where "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear, nor uniformly applied." *Verlinden,* 461 U.S. at 487-88.

To remedy this situation, in the FSIA Congress removed decisions over foreign sovereign immunity from the Executive Branch and placed

[4] Prior to 1952, the United States generally granted foreign sovereigns absolute immunity from suit. This practice was changed, and the restrictive theory adopted, by the so-called "Tate Letter," a letter from Jack B. Tate, Acting Legal Adviser, Department of State, to acting Attorney General Philip B. Perlman, dated May 19, 1952. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 487 & 487 n.9 (1983).

them in the hands of the judiciary. 28 U.S.C. § 1602. The legislative history of the FSIA makes clear that these determinations were given to the judiciary to free the Government from case-by-case diplomatic pressures, to clarify applicable standards, and to assure that decisions are made on purely legal grounds, under procedures that ensure due process. *Verlinden,* 461 U.S. at 488 (quoting H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (Sept. 9, 1976), at 7, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (the "FSIA House Report")).

B. The Commercial Activity Exception to Foreign Sovereign Immunity

In this action, plaintiff asserts jurisdiction under the "commercial activity" exception to foreign sovereign immunity. Under Section 1605(a)(2) of the FSIA, a foreign state is not immune from jurisdiction where "the action is based upon a commercial activity carried on in the United. States by the foreign state," 28 U.S.C. § 1605(a)(2) "Commercial activity" is described as:

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d).

There is no provision of the FSIA which defines "commercial." *Weltover*, 504 U.S. at 612. However, "[t]he FSIA was not written on a clean slate…. [and] [t]he meaning of 'commercial' is the meaning generally attached to that term under the restrictive theory of immunity at the time the statute was enacted." *Id.* at 612-13. The FSIA House Report discusses the definition of "commercial activity" at some length. The passages of particular relevance to the present case are as follows:

> As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical.

ILI US Digest/10 580 1/8/02, 1:47 PM

* * * *

> Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

* * * *

> Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

FSIA House Report at 16, 1976 U.S.C.C.A.N. 6614-15.

The Second Circuit has not addressed the FSIA's commercial activity exception in the context of employment in this country by a mission, consulate, or other foreign government office. However, three other Circuits have addressed the question in situations similar to the one at issue here, and these decisions are instructive.

The issue was first considered by the Seventh Circuit in *Segni v. Commercial Office of Spain,* 835 F.2d 160 (7th Cir. 1987). In *Segni,* the Seventh Circuit considered a breach of employment contract claim brought by an Argentine national who had been terminated by the Commercial Office of Spain. As an initial matter, the Seventh Circuit considered it "too simple" to view the employment contract as merely a purchase of services, and hence commercial in nature. *Id.* at 165. In this regard, the Seventh Circuit noted that such a definition would conflict with the legislative history of the FSIA, which defined certain employment relationships, notably the hiring of diplomats and civil servants, as falling within the governmental, and not commercial sphere. *Id.* (citing *Broadbent v. Organization of American States,* 628 F.2d 27 (D.C. Cir. 1980) (employees of an international organization hired as civil servants fell outside of the definition of "commercial activity" in the legislative history)).

ILI US Digest/10 581 1/8/02, 1:47 PM

The Seventh Circuit also, however, refused to accept at face value the defendant's characterization of Segni's work as "diplomatic activity" merely because his work was for a government office and ultimately had the purpose of furthering the policy interests of Spain. *Id*. at 164. Instead, the Seventh Circuit examined the employment activities at issue to determine whether they were in fact governmental, as defined by the FSIA House Report, or private. *Id*. at 165. This examination led the Court to conclude that Segni's employment relationship with the Government of Spain was commercial in nature, and therefore subject to jurisdiction under the FSIA:

> An examination of the nature of his activities indicates that he cannot be considered either as a civil servant or a diplomatic officer. He had no role in the creation of the government policy or its administration; rather, he simply carried it out. There is no indication in the record that he was so supervised or monitored by the Commercial Office, or so privy to its political deliberations, as to be considered a part of the Spanish Government, as a civil servant or diplomat would be. In that regard, it is of little consequence that Segni was permitted to elect to contribute to Spanish Social Security. Such a subsidiary term cannot render an otherwise essentially commercial contract a governmental one for FSIA purposes.

Id.

The Ninth Circuit was the next to address the definition of "commercial activity" in the context of employment by a foreign government's office in this country, in *Holden v. Canadian Consulate,* 92 F.3d 918 (9th Cir. 1996). In *Holden,* the Canadian government had closed its Consulate in San Francisco, but kept open a small satellite office, which it chose to staff with a person who was younger and less experienced than the plaintiff. *Id*. at 920. Plaintiff brought suit against the Canadian Consulate, claiming wrongful termination due to age and sex discrimination. Upon reviewing the legislative history, and the decision in *Segni,* the Ninth Circuit stated it too would "adopt the standard suggested by the legislative history, that is, employment of diplomatic, civil service or military personnel is governmental and the employment of other per-

ILI US Digest/10 582 1/8/02, 1:47 PM

sonnel is commercial." *Id*. at 921. As with *Segni,* however, the Ninth Circuit was not content merely to accept labels placed upon the employment by the parties, but instead required a detailed evaluation of the nature of plaintiff's work to determine whether she was in fact a civil servant or a diplomat. (There was no allegation that plaintiff was part of Canada's military service). *Id.*

With respect to civil service status, the Court affirmed the District Court's conclusion that Holden was not a civil servant, based on the fact that she had not competed through examination prior to being hired, was not entitled to tenure, was not provided the same benefits as foreign service officers, and was not provided with the same protections afforded to the Canadian civil service. *Id.* With respect to diplomatic status, the Court noted that Holden, unlike Segni, had been notified as part of the Consulate's staff. *Id*. at 922. However, the Court again did not find this dispositive, but looked to whether Holden was involved in policy making, or was privy to governmental policy deliberations, whether she engaged in any lobbying activity or legislative work for Canada, and whether she could speak for the government. *Id*.

Finding that her job did not include any of these functions, and that, as an American, Holden was not allowed in the Consulate unless in the company of a foreign service officer, the Court concluded that she could not be considered a diplomat. *Id.*

Based on all of these factors, the Ninth Circuit concluded that Holden's employment relationship was analogous to that of a marketing agent, was not uniquely governmental, and as such, was "commercial activity" subject to the jurisdiction of the federal court under the FSIA. *Id.*

Finally, earlier this year, in *El-Hadad v. United Arab Emirates,* 216 F.3d 29 (D.C. Cir. 2000), the D.C. Circuit addressed the question of sovereign immunity under the FSIA in the context of employment at a diplomatic mission. In *El-Hadad,* the plaintiff was an Egyptian national challenging his termination as an auditor for the United Arab Emirates ("UAE") Embassy in Washington, D.C. *Id*. at 32. Prior to his employment at the UAE Embassy, plaintiff had worked in the UAE for the UAE Government. *id.*

Following the approaches of the Seventh Circuit in *Segni* and the Ninth Circuit in Holden, and the legislative history of the FSIA, the D.C. Circuit made clear that employment of mission personnel is neither *per se* commercial, nor *per se* exempt, but rather, that a detailed factual inquiry is necessary to determine whether the employment at

ILI US Digest/10 583 1/8/02, 1:47 PM

issue constituted commercial activity. *Id*. at 33. Focusing on whether El-Hadad was a civil servant (as there was apparently no allegation that he was a diplomat or in the military), the D.C. Circuit set forth a number of non exclusive factors to be considered in the circumstances before the Court. *Id.* at 33-34. These factors included (1) how the UAE's own laws defined its civil service, and how El-Hadad fit in that definition; (2) whether the employment relationship was truly contractual or whether it was based solely on the civil service laws of the UAE; (3) the relationship between El-Hadad's employment in the mission to the United States, and El-Hadad's previous employment in the UAE; (4) the nature of El-Hadad's work; and (5) the relevance of El-Hadad's nationality, which was not the nationality of the UAE, the employing country. *Id*. at 34.

In evaluating the relevance of El-Hadad's nationality, which was not that of the employing country, the D.C. Circuit addressed an issue raised by the legislative history that has caused some confusion, namely whether the employment of United States citizens and third-country nationals by a foreign sovereign in this country necessarily constitutes "commercial activity," even where the employee could also be considered "diplomatic, civil service or military personnel" who should be exempt from that definition. *See* FSIA House Report at 16 (appearing to contrast "diplomatic, civil service and military personnel" with "American citizens or third country nationals"); *El-Hadad,* 216 F.3d at 33.

In *Broadbent,* 628 F.2d at 35, the D.C. Circuit held that the employment of civil servants by an international organization should not be considered "commercial activity," notwithstanding that all of the employees were "third-country nationals" with respect to the international organization, and thus would arguably fall within the definition of "commercial activity" defined in the legislative history. *Id*. In *Broadbent,* the D.C. Circuit also opined, however, that third-country nationality would be dispositive in a case involving a sovereign state, i.e., that a foreign state could never be immune with respect to the hiring of third-party nationals, even as diplomats, civil servants, or military personnel. *Id*. at 34.

In *El-Hadad,* the D.C. Circuit noted that the *Broadbent* holding was grounded in the understanding that an international organization does not have citizens of its own, and therefore excepting third-country citizens from the definition of governmental activities giving rise to immunity would swallow up the rule that countries are immune with respect to the hiring of diplomatic, civil service, and military personnel. *Id.* (citing *Broadbent,* 628 F.2d at 34). In *El-Hadad,* that Court then went

ILI US Digest/10 584 1/8/02, 1:47 PM

on to conclude that the portion of the *Broadbent* opinion stating that the opposite would hold for employment by foreign sovereigns was dicta, and that Congress could not have meant to make the citizenship of an employee the determinative factor with respect to immunity, although it could be considered in answering the question of whether the employee at issue was, in fact, a diplomat, civil servant, or military hire. *El-Hadad,* 216 F.3d at 33.

The conclusion in *El-Hadad* that a plaintiff's citizenship may be considered in defining employment status, but should not be dispositive of the existence of "commercial activity," comports with the conclusions reached by other courts considering this issue. *See Zveiter v. Brazilian National Superintendency of Merchant Marine,* 833 F. Supp. 1089 (S.D.N.Y. 1993) (foreign sovereign's employment of American secretary is "commercial activity" subjecting foreign sovereign to jurisdiction under the FSIA; distinguishes international organization employment cases but does not hinge decision on nationality of plaintiff), *suppl. decision* 841 F. Supp. 111 (S.D.N.Y. 1993) (dual citizenship of plaintiff did not change outcome); *see also Segni,* 835 F.2d at 165 n.6 (noting that Segni was not a citizen of employing country, but declining to determine importance of this factor beyond observing that a person hired by his own government to work abroad should have a somewhat lesser expectation of suing his homeland in his host nation's courts than a person locally hired). *Compare Elliott v. British Tourist Authority,* 986 F. Supp. 189, 194 (S.D.N.Y. 1997) (employment of marketing executive by tourism agency wholly owned by Great Britain was "commercial activity;" while Court assumed plaintiff was an American citizen and that his lack of British citizenship would place him outside of the scope of " 'noncommercial' employment of civil servants," question of sovereign immunity did not appear to turn on plaintiff's citizenship), *aff'd,* 172 F. 3d 37 (TABLE) (unpublished decision at 1999 WL 38836 (2d Cir. 1999)); *Alonso v. Saudi Arabian Airlines Corp.,* No. 98 Civ. 7781 (SAS), 1999 WL 244102, *2 (S.D.N.Y. April 23, 1999) (assuming that employment of American citizen by foreign state was commercial where employer was Saudi Arabian-owned commercial airline).

C. Standards To Be Applied To This Action

The three Circuits to consider issues similar to those presented here have all arrived at the same analytical framework, with each concluding

ILI US Digest/10 585 1/8/02, 1:47 PM

that the case ultimately should be decided according to whether a plaintiff genuinely was a member of the "diplomatic service" or the "civil-service" of the foreign state.[5] The United States agrees that this is the appropriate approach. Moreover, the United States agrees with the D.C. Circuit's conclusion in *El-Hadad* that the citizenship of the plaintiff, *i.e.,* whether the plaintiff is a citizen of the employing country, an American citizen, or a third-party national, should not be dispositive of immunity, but is a factor to be considered, to the extent it sheds light on plaintiff's status as a diplomat or civil servant.

This approach harmonizes the statements made in the legislative history of the FSIA with the purpose of the "commercial activity" exception, which, under the theory of restrictive immunity, is intended to exempt truly governmental activities from jurisdiction, while ensuring that commercial activities of a sovereign remain subject to judicial scrutiny.

Reserving immunity for those situations in which the employee is truly a diplomat or civil servant also makes practical sense, as those categories of individuals are more likely to have other meaningful avenues of redress or protection within the employing country and it would be reasonable to expect that those categories of individuals, and their employers, would expect employment disputes to be settled without resort to United States courts.

With respect to this action, there is no dispute that the plaintiff was not a diplomat, but there remains a question as to whether she was genuinely a member of the Saudi Arabian civil service. In the United States' view, this question should be answered by the District Court after applying relevant factors of the type set forth in *Segni, Holden*, and *El-Hadad.* In addition to the factors set forth in those cases, the United States would also emphasize as an additional factor the location where the plaintiff was hired. If an employee is hired in the sending state and sent abroad, it is more likely that the individual is in the civil service of the foreign state, and that a United States court should not take jurisdiction in the case. On the other hand, where the employee is locally hired, the court

[5] The question of military service did not arise in those cases, and is not relevant to this action. It should be noted that at least one District Court has concluded that employment of an American citizen in a foreign sovereign's military does not constitute "commercial activity." *Friedar v. Israel,* 614 F. Supp. 395, 398-400 (S.D.N.Y. 1985).

ILI US Digest/10 586 1/8/02, 1:47 PM

may presume that this is not the usual method used to hire members of the civil service, absent a showing otherwise by the foreign state. If a foreign state asserts that a locally hired non-sending state national (i.e., an American or third country national) is a civil servant (or a diplomat), the foreign state should bear the burden of demonstrating this fact, and that the claim thus falls outside the commercial activity exception.

II. The Vienna Convention does not alter the Applicable Standards under The FSIA

The FSIA explicitly operates "[s]ubject to existing international agreements to which the United States is a party," 28 U.S.C. § 1609. The diplomatic and consular immunities of foreign states recognized under various treaties are thus unaltered by the FSIA. *767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire,* 988 F.2d 295, 297 (2d Cir. 1993).

The Saudi Mission contends that regardless of whether its employment of plaintiff would constitute "commercial activity" under the FSIA, this suit is nonetheless barred by Article 7 of the Vienna Convention, which provides that a diplomatic mission shall have the right to "freely appoint" the staff of the mission. As described below, the United States does not agree with this position. "Treaties are contracts between sovereigns, and as such, should be construed to give effect to the intent of the signatories," *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996), and the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Kolovrat v. Oregon,* 366 U.S. 187, 194 (1961). *See also Sumitomo Shoji Am., Inc. v. Avagliano,* 457 U.S. 176, 184-5 (1982). Therefore, the United States' position on the meaning and effect of Article 7 of the Vienna Convention in this context should govern.

The Vienna Convention, which in large measure codifies the customary international law on diplomatic privileges and immunities, was opened for signature in 1961, and entered into force for the United States in December 1972. *Id*. at 300. Article 7 of the Vienna Convention provides:

> Subject to the provisions of Articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. In the case of military, naval

ILI US Digest/10 587 1/8/02, 1:47 PM

> or air attaches, the receiving State may require their names to be submitted beforehand, for its approval.

Id. Pursuant to Article 1 (c) of the Vienna Convention, "members of the staff of the mission" are defined as the "members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission." *Id*. In the case of representatives to the United Nations, the "receiving state" for these purposes is the United States. Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26-Nov. 21, 1947, 61 Stat. 3416 (the "UN Headquarters Agreement"), Art. V, sec. 15. The "sending state" in this instance is Saudi Arabia.

Saudi Arabia argues that authority to "freely appoint" mission staff under Article 7 carries with it authority freely to discharge such staff, and that decisions to discharge are immune from legal challenge by virtue of this provision of the Vienna Convention. This interpretation of Article 7 would give foreign missions complete discretion in employment practices regarding mission staff, including with respect to United States citizens and third-party nationals, and all locally engaged staff.

The United States takes a different view of the meaning and purpose of Article 7. The "freely appoint" language must be read in the context of the surrounding provisions, several of which are expressly referenced in Article 7. For example, under Article 4 of the Vienna Convention, the sending state is obliged to obtain prior approval, or "agrément," from the receiving state of its choice for head of the mission. No such prior approval is required for other mission staff, who by contrast may be "freely appointed." Several other provisions referenced in Article 7 place limitations on the ability of the sending state to "freely appoint" mission staff. Thus, the receiving state may place restrictions on the nationality of persons it will accept as diplomatic agents, *see* Article 8; it may declare members of the mission *persona non grata,* including prior to their arrival, *see* Article 9; and it may restrict the mission to a reasonable size, *see* Article 11. It is subject to limitations of this kind that the sending state may otherwise "freely appoint" members of the mission.

The restrictions on appointment of mission staff contained in surrounding Vienna Convention provisions thus address certain prerogatives of the receiving state regarding the acceptability of certain mission mem-

ILI US Digest/10 588 1/8/02, 1:47 PM

bers. The authority granted in Article 7 to "freely appoint" mission staff stands in contrast to these prerogatives, and is to be interpreted in this light. In the United States' view, Article 7 was intended only to make clear that the receiving state should not impose additional restrictions on the acceptance of mission personnel, such as requiring local staff to be hired from an "approved" list, and is wholly irrelevant to the question of application of local labor and employment laws to diplomatic missions and mission personnel. In short, the authority granted in Article 7 to appoint mission staff freely and without objection from the host state says nothing about immunity from claims by such staff. That issue is governed by principles of sovereign immunity, not by the Vienna Convention.

The United States acts consistently with the views herein in defending cases in foreign courts involving conditions of employment or discharge at its diplomatic and consular missions in other countries. *See* Declaration of Linda Jacobson, dated August 30, 2000 ("Jacobson Decl."), at ¶¶ 3-5, 7. The United States generally considers such cases commercial in nature, and does not broadly assert sovereign immunity, nor rely on Article 7 of the Vienna Convention, to avoid them.[6] *Id.* ¶¶ 4, 7. Many other governments share the practice of defending such suits in local courts on the merits, not on sovereign immunity. *Id.* ¶ 5. This widespread practice would make no sense if Article 7 were recognized to provide absolute immunity from employment-based claims at diplomatic missions.

Notwithstanding the above, it should be noted that the Vienna Convention, as applied by Art. V, sec. 15 of the UN Headquarters Agreement, as well as the Convention on Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946, *United States accession,* April 29, 1970, 21 U.S.T. 1418 (the "General Convention"), may well limit the conduct of proceedings in this case. For example, Article 24 of the Vienna Convention states that "[t]he archives and documents of the mission shall be inviolable at any time and wherever they may be." *Id. See also* General Convention, Art. V, sec. 11 (detailing privileges and immunities of representatives of member states). Similarly, under Articles 31 (2) and 37 (2) of

[6] The United States may assert sovereign immunity in certain instances. For example, if an entire diplomatic or consular mission has been closed, or if the specific circumstances of the case implicate governmental operations of the mission, the United States may argue that such a decision is sovereign in nature. *Id.* ¶ 6. The United States may also argue that it cannot be compelled to reinstate an employee, as such a remedy impairs both sovereign and diplomatic immunities. *Id.*

ILI US Digest/10 589 1/8/02, 1:47 PM

the Vienna Convention, and Article V, sec. 11 of the General Convention, the head of a mission, and diplomatic and administrative staff, cannot be obliged to give testimony. Thus, absent a waiver of these immunities by Saudi Arabia, plaintiff's ability in this action to obtain document and deposition discovery, and trial testimony, may be quite limited.

The nature and the extent of the remedies available to plaintiff may also be circumscribed by the diplomatic status of the Saudi Mission. For instance, Article 22 of the Vienna Convention, reciting principles of mission inviolability, and Article 25 of the Vienna Convention, stating the obligation of the host state to accord full facilities for the performance of mission functions, would preclude the Court from entering injunctive relief, including reinstatement. *See generally 767 Third Avenue Associates,* 988 F.2d at 297-300 (mission inviolability did not prevent action for damages for failure to pay back rent, but precluded eviction from premises). Such limits on specific remedies which would compel the foreign state to hire or retain a particular person are consistent with the position taken by the United States in foreign countries. *See* discussion above, at 20 & 20 n.6.

The above-discussed limitations do not, however, address the central question of immunity from suit. Such immunity, in the circumstances presented, is not governed by the Vienna Convention, and may only be determined under the FSIA.

2. Immunity as Judgment Debtor: *Glencore Denrees Paris v. Department of National Store Branch 1 (Vietnam)*

On June 30, 2000, the United States filed a letter in *Glencore Denrees Paris v. Department of National Store Branch 1 (Vietnam),* 99 Civ. 8607 (S.D.N.Y.), responding to the District Court's request for the Government's views on the propriety of separately naming the Socialist Republic of Vietnam as a judgment debtor in the action. The letter provides the view of the Department of State that decisions on sovereign immunity under the terms of the Foreign Sovereign Immunities Act are made exclusively by the courts, not the executive branch, and summarizes the governing legal standards applicable in this case under the

ILI US Digest/10 590 1/8/02, 1:47 PM

Foreign Sovereign Immunities Act upon which such a decision should be made. On July 6, the District Court issued an Order setting forth its intention to remove the Socialist Republic of Vietnam as a judgment debtor, finding that the entry of judgment against it was, inter alia, in derogation of the Foreign Sovereign Immunities Act. *Glencore Denrees Paris v. Department of National Store Branch 1 (Vietnam)*, 2000 U.S.Dist. LEXIS 9387 (S.D.N.Y.). Petitioners' motion for reconsideration was denied. *Glencore Denrees Paris et al. v. Department of National Store Branch 1 (Vietnam) et al*., 2000 U.S.Dist. LEXIS 17901 (S.D.N.Y.). Other aspects of this litigation are discussed under chapter 10.C.2. below.

The full text of the letter is available at *www.state.gov/s/l.*

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Dear Judge Buchwald:

I write in response to Your Honor's letter dated June 9, 2000 and the telephone inquiry from your Honor's Chambers on June 22, 2000, requesting that the United States consider addressing the propriety of separately naming the Socialist Republic of Vietnam as a judgment debtor in this action. The United States understands the Court may have a particular concern with respect to the applicability of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611. We have not reviewed the papers submitted in support of the default judgment in this action, and take no position with respect to any factual contentions that may be asserted therein. However, in response to the Court's inquiry, we submit the following summary of the governing legal standards under the FSIA.

"The FSIA provides the 'sole basis for obtaining jurisdiction over a foreign sovereign in United States,'" *Commercial Bank of Kuwait v. Rafidain Bank,* 15 F.3d 238, 240 (2d Cir. 1994) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 439 (1989)). In enacting the FSIA, Congress made clear its intent to remove decisions over foreign sovereign immunity from the Executive Branch and place

ILI US Digest/10 591 1/8/02, 1:47 PM

them in the hands of the judiciary. 28 U.S. C. § 1602. The Department of State has advised the diplomatic community that, in light of the passage of the FSIA the Department of State is not in a position to make decisions on sovereign immunity and that such decisions will be made exclusively by the courts. Under the FSIA, foreign states have the responsibility of addressing their jurisdictional and other defenses, including claims of sovereign immunity, to the court before which the matter is pending.

"Under the FSIA, a 'foreign state shall be immune from the jurisdiction of the courts of the United States and of the states' unless one of several statutory exceptions applies." *Commercial Bank,* 15 F.3d at 240-41 (quoting 28 U.S.C. § 1604). One of those exceptions involves agreements to arbitrate and the confirmation of arbitral awards. Under Section 1605(a)(6) of the FSIA, foreign states will not be immune from the confirmation of an arbitral award in certain specified circumstances, including where the award is governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards. 28 U.S.C. § 1605(a)(6). The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201 *et seq.,* is an international agreement falling within the scope of Section 1605(a)(6). *See Creighton Limited v. Government of the State of Qatar,* 181 F.3d 118, 123-24 (D.C. Cir. 1999).

The FSIA contains the exclusive procedures for service on a foreign state, and thus the exclusive means of obtaining jurisdiction over such foreign state. *See* H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (Sept. 9, 1976), at 23-24, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610 (the "FSIA House Report"). The procedures for serving a foreign state are set out in 28 U.S.C. § 1608(a). Service upon a foreign state is only effective where there is strict compliance with the terms of 28 U.S.C. §1608(a). *Transaero, Inc. v. La Fuerza Aera Boliviana,* 30 F.3d 148, 154 (D.C. Cir. 1994); *Finamar Investors Inc. v. Republic of Tadjikistan,* 889 F. Supp. 114, 117 (S.D.N.Y. 1995); *Gray v. Permanent Mission of People's Republic of Congo,* 443 F. Supp. 816, 820-21 (S.D.N.Y.), *aff'd,* 580 F.2d 1044 (2d Cir. 1978).[1] Section 1608(a) precludes the service

[1] This differs from service upon an agency or instrumentality of a foreign state, which is governed by 28 U.S.C. § 1608(b), and which may be effected by technically faulty service that nonetheless gives adequate notice of the action. *See Transaera*, 30 F.3d at 153-54; *Finamar Investors*, 889 F. Supp. at 117.

ILI US Digest/10 592 1/8/02, 1:47 PM

method of mailing papers to a diplomatic mission of a foreign state, in order to avoid inconsistency with Article 22 of the Vienna Convention on Diplomatic Relations (which provides that such premises are inviolable). *See Alberti v. Empresa Nicaraquense De La Carne,* 705 F.2d 250 (7th Cir. 1983) (citing FSIA House Report, 1976 U.S.C.C.A.N, at 6625).

The FSIA also contains the exclusive procedures for obtaining a default judgment against a foreign state. Specifically, the FSIA provides:

> No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.…

28 U.S.C. § 1608(e). This section is intended to provide foreign sovereigns with the same protections from default judgments that the federal government enjoys under Fed. R. Civ. P. 55(e). *Commercial Bank,* 15 F.3d at 242. This means that when a foreign sovereign defaults, the district court must determine whether the plaintiff's allegations are supported by evidence before entering a default judgment. *Id.* This does not require an evidentiary hearing if one would ordinarily not have been held, nor require the court to demand more or different evidence than it would ordinarily receive, so long as the district court is satisfied with the evidence submitted. *Id.* Once entered, a copy of the default judgment must be sent to the foreign state in the manner prescribed for service in the FSIA, namely 28 U.S.C. § 1608.

The Socialist Republic of Vietnam is a foreign state within the meaning of the FSIA, 28 U.S.C. § 1603(a). Therefore, the propriety of separately naming the Socialist Republic of Vietnam as a judgment debtor in this action should be determined under the above-described standards.

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CROSS-REFERENCE

Sampson v. Federal Republic of Germany and Claims Conference Article 2 Fund, discussed in **8.B.1.b.4.**

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ILI US Digest/10 593 1/8/02, 1:47 PM

B. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

1. Exemption from State Taxes in Hawaii

On April 26, 2000, Governor Benjamin Cayetano of Hawaii signed legislation, H.B. 1691, ensuring that all eligible diplomatic and consular personnel will be exempt from state taxes in Hawaii. In support of that legislation, Gilda Brancato, Attorney-Adviser in the Office of Diplomatic Law, Office of the Legal Adviser, U.S. Department of State, had submitted a memorandum on February 4, 2000, to Senator Jonathan Chun, Majority Floor Leader of the Hawaii Senate, on treaty tax exemption for diplomatic and consular missions, set forth below.

The full text is available at *www.state.gov/s/l.*

DIPLOMATIC AND CONSULAR TAX EXEMPTION UNDER THE VIENNA CONVENTIONS ON DIPLOMATIC AND CONSULAR RELATIONS

The United States Government is under a treaty obligation to provide tax exemption to eligible diplomatic and consular missions and their personnel. Treaty exemption extends to national, state, and local taxes on purchases, including Hawaii's excise (GET) and hotel (TAT) taxes. Forty-nine States comply with this treaty obligation, including States with vendor taxes such as Arizona, California, and New Mexico. Hawaii remains the lone State not to grant tax exemption. Hawaii has taken the position that its taxes are not exempt because the GET and TAT are levied on the vendor and not required to be passed on to the consumer.

The obligation to extend tax exemption to diplomatic and consular missions and personnel is contained in the multilateral Vienna Convention on Diplomatic Relations, the multilateral Vienna Con-

ILI US Digest/10 594 1/8/02, 1:47 PM

vention on Consular Relations, and certain bilateral consular relations treaties. These treaties grant foreign missions and their personnel exemption from all dues and taxes, with certain exceptions. The Vienna Conventions prescribe a broad grant of tax exemption but allow "indirect taxes of a kind normally incorporated in the price of goods or services" (Tab A). The long-standing position of the Department of State under the Vienna Conventions is that a tax on sales that is separately stated or readily identifiable and customarily passed on to the consumer is not an "incorporated" tax and is therefore exempt. This position is consistent with the general principle enshrined in the Vienna Conventions that the conduct of diplomatic relations should be tax-free. This principle is woven into the fabric of the Vienna Conventions, for example, Vienna Diplomatic Convention Article 23 exempting the premises of the mission; Article 28 exempting the income of the mission; Article 34 granting tax exemption to the diplomatic agent, with specified exceptions; Article 36 granting customs duty exemption; and Article 37 granting tax exemption to families and mission support staff.

While there are technical distinctions between sales taxes and excise taxes, such as the legal incidence of the tax, sales and excise taxes are identical in fundamental respects. Both taxes are customarily separately stated and always readily identifiable, assessed on the value of the good or service transferred, and uniformly borne by the buyer. Both taxes uniformly burden the budget of the exempt diplomatic or consular mission and its personnel.

As quoted in tax publications issued by the State of Hawaii, "the GET can be likened to retail sales taxes imposed by [several] states plus the District of Columbia" (Tab B). Hawaii's excise and transient accommodation taxes are separately stated or readily identifiable taxes customarily paid by the buyer. Although the law does not require that the tax be passed on to the consumer, it uniformly is. Indeed, Hawaii law prohibits a vendor from representing that it is absorbing the tax (Tab C).

Many States assess taxes on purchases that are levied on the seller or on a combination of the seller and buyer (hybrid taxes). Examples of vendor taxes include Arizona's Transaction Privilege Tax and New Mexico's Gross Receipts Tax. In both States the tax is imposed on the seller for the privilege of conducting business and is not required to be itemized or passed on to the consumer. Both States grant exemption to

ILI US Digest/10 595 1/8/02, 1:47 PM

foreign mission personnel, in Arizona pursuant to a letter from tax authorities and in New Mexico by legislation (Tab D).

Hawaii's GET and TAT may also be compared with gasoline taxes levied at the federal and State level. Gasoline taxes are excise taxes that are legally levied on the business, typically on the importer or refiner— far up the chain of distribution. Gasoline taxes may be considered more upstream than either the GET or TAT. Moreover, gasoline taxes are not normally separately itemized on an invoice or receipt. Nevertheless, gasoline taxes are exempt at the federal level and in most States in the United States under governing treaties. So too are federal manufacturer and retailer excise taxes associated with the sale of vehicles, which are vendor taxes exempted under IRS Revenue Rulings for diplomatic personnel (Rev. Rul. 73-198) and consular personnel (Rev. Rul. 98-24) (Tab E).

Hawaii's taxes are uniformly understood to be exempt by the international community in Hawaii (Tab F). If the United States Government expects to continue to enjoy tax exemption with respect to its substantial diplomatic and consular operations world-wide, we must uniformly offer it here. Foreign nations rightly expect the United States to reciprocate their grant of tax exemption. Many foreign governments are aware that Hawaii refuses to honor tax exemption, several have written irate letters, and some have expressly threatened to retaliate by withdrawing tax privileges from a United States consulate situated within their borders (Tab G). Hawaii's isolated refusal to recognize diplomatic tax exemption renders us vulnerable to charges of treaty violation and undercuts our credibility and negotiating position, causing disproportionate troubles abroad. It also weakens Hawaii's standing as an East-West bridge in the community of nations.

We hold foreign governments to the position we maintain under the Vienna Conventions. Consistent with the Foreign Missions Act, 22 U.S.C. 4301 et seq., and reciprocity, foreign governments receive tax exemption here only if our missions and personnel receive comparable privileges in the foreign country. The mechanism for sales and hotel tax exemption in the United States is simple and straight-forward: presentation of a Department of State tax exemption card, which entitles the bearer to the exemptions stated on the card. Exemptions are for official or individual purchases, and a minimum purchase requirement or other limitation may be contained on the card, on the basis of reciprocity. Administering diplomatic and consular tax exemption would not be dif-

ILI US Digest/10 596 1/8/02, 1:47 PM

ficult in Hawaii. Precedent exists for exemption from the GET for sales of tangible personal property to the federal Government.

Treaties are binding upon the States under the Supremacy Clause of the Constitution. The federal government, however, is responsible for ensuring treaty compliance. If each of the fifty States reinterpreted our diplomatic treaty obligations, the goal of treaty compliance would be elusive. Each of the States would then be conducting its own foreign policy, a result at odds with the Constitution, and potentially chaotic.

The federal government is also responsible for treaty interpretation. The United States Supreme Court has recognized that "although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji, Inc. v. Avagliano,* 457 U.S. 176, 184-85 (1982). *Accord, Kolovrat v. Oregon,* 366 U.S. 187, 194 (1961); *767 Third Avenue Associates v. Permanent Mission of Zaire*, 988 F.2d 295, 301-02 (2d Cir. 1993); *Demjanjuk v. Petrovsky,* 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied,* 455 U.S. 1007 (1982); *United States v. Conners,* 606 F.2d 269 (10th Cir. 1979); *Dupree v. United States,* 559 F.2d 1151, 1155 (9th Cir. 1977); *United States v. Guinand,* 688 F. Supp. 774, 775 (D.D.C. 1988). *See United States v. County of Arlington,* 669 F.2d 925, 934 (4th Cir.), *cert. denied,* 459 U.S. 801 (1982). *Cf. In re Air Disaster at Lockerbie, Scotland on December 21, 1988,* 928 F.2d 1267, 1280 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991).

Additionally, the tax-exemption position of the Department under the Vienna Conventions is long-standing and applied by the Department both here and abroad. The Supreme Court has emphasized that "the consistent application of the Agreement by the Executive Branch (is) a factor which alone is entitled to great weight." *O'Connor v. United States,* 479 U.S. 27, 33 (1986), *citing Sumitomo, supra.*

Importantly, courts have expressly recognized the expertise of the State Department in interpreting the Vienna Diplomatic and Consular Conventions and bilateral treaties with diplomatic or consular provisions. In *DuPree*, the United States Court of Appeals for the Ninth Circuit, interpreting the provisions of a bilateral Consular Convention with Mexico and the Vienna Consular Convention, adopted the position of the federal executive and ruled that: "of course, in the interpretation of treaties and Conventions, the opinions of the Executive Branch are entitled to much weight. *Factor v. Laubenheimer,* 290 U.S. 276,

ILI US Digest/10 597 1/8/02, 1:47 PM

295 (1933); *see* L. Henkin, *Foreign Affairs and the Constitution,* 167 n.128 (1972)". 559 F.2d at 1154-55. *See Permanent Mission of Zaire*, 988 F.2d at 302. Again, in *Guinand*, the United States District Court, interpreting Article 39 of the Vienna Diplomatic Convention, adopted the position outlined by the State Department's Legal Adviser: "the Court, though not bound by the State Department's interpretation of the Vienna Convention finds that it is entitled to great weight.…" 688 F. Supp. at 775.

As noted above, courts have similarly recognized the expertise of the State Department in interpreting diplomatic tax-exemption provisions in bilateral treaties. For example, in *Finland v. Town of Pelham,* the State court of New York, construing a bilateral treaty, accorded great weight to the State Department's interpretation. The Court stated:

> The United States of America contends that the taxation of this property 'adversely affects its foreign policy.' Our Federal Government, through the Departments of State and Justice, speaks out strongly against non-uniform interpretation of the tax-exemption clause in this treaty. It asks that the States and their municipalities be required to respect the expressed intentions of and practical interpretations by the two Governments involved. We regard the interpretations and implementation, accorded this treaty by the two signatory Governments, as compelling factors in determining what they intended by their treaty. A duly-executed treaty is the supreme law of the land and State and local Laws must yield to its provisions. Flowing from this principle is the canon of construction requiring a liberal and expansive interpretation of treaties, including, as in this case, tax exemptions provided for by treaty although not specifically granted under local law.
>
> The Supreme Court of the United States has warned 'that rules of international law should not be left to divergent and perhaps parochial state interpretations,' emphasizing in its opinion the serious consequences

ILI US Digest/10 598 1/8/02, 1:47 PM

> and dangers of permitting interpretive conflicts to arise…. 270 N.Y.S.2d 661, 664-65 (citations omitted).

Finally, drawing on treaty practice, the courts have recognized the expertise of the Department of State in yet another diplomatic law context: in interpreting the diplomatic and consular property provision of the Foreign Sovereign Immunities Act (which has language similar to that contained in bilateral-treaty tax-exemption provisions). In this context, the United States Court of Appeals for the Fourth Circuit, while acknowledging that the statute does not specify:

> what property is or is not 'used for purposes of maintaining a diplomatic or consular mission,' the views of the Department concerning the scope of this phrase, though not conclusive, are entitled to great weight. The Department is charged with maintaining our missions abroad and with dealing with foreign missions here. It has expertise for determining whether property is used for maintaining a mission. Only if its views are manifestly unreasonable should they be rejected. *United States v. Arlington, supra,* 669 F.2d at 934.

* * * *

2. Immunity of Employee of Taipei Economic and Cultural Representative Office

In a letter of March 24, 2000 to the Office of the State Attorney in Vero Beach, Florida, Linda Jacobson, Assistant Legal Adviser for Diplomatic Law and Litigation, U.S. Department of State, provided an analysis of "official acts" jurisdictional immunity available to an employee of the

ILI US Digest/10 599 1/8/02, 1:47 PM

Taipei Economic and Cultural Representative Office in Miami, Florida.

The full text of the letter is available at *www.state.gov/s/l.*

* * * *

I am writing in response to your inquiry concerning…an employee of the Taipei Economic and Cultural Representative Office ("TECRO," formerly known as "CCNAA," the "Coordination Council for North American Affairs", *see* Executive Order No. 13014 of August 15, 1996, and the Taiwan Relations Act, 22 U.S.C. § 3301 *et seq*.["TRA"]) in Miami, who has been charged with…[an offense] and has asserted jurisdictional immunity from the…charge.

As background, in 1979 the U.S. Government established diplomatic relations with the People's Republic of China (PRC), and recognized the PRC Government as the sole legal government of China. Both the U.S. and the PRC agreed that the people of the United States would maintain cultural, commercial and other unofficial relations with the people on Taiwan. The TRA provides the legal framework for the conduct of these unofficial relations. It provides, *inter alia,* that programs, transactions, and other relations conducted or carried out by the President or any agency of the U.S. Government with respect to Taiwan shall, in the manner and to the extent directed by the President, be conducted and carried out by or through the American Institute in Taiwan (AIT). AIT was established at the direction of Congress and is under contract to the Department of State to carry out the functions specified in the TRA.

Taiwan has established TECRO as AIT's counterpart organization in the United States. TECRO has its U.S. headquarters in Washington, D.C., and other offices (Taipei Economic and Cultural offices, or "TECO's") in major cities around the United States, including Miami. The unofficial relations between the people of the United States and the people on Taiwan are carried out through these organizations.

The jurisdictional immunities of TECRO employees in the United States are set forth in the "Agreement on Privileges, Exemptions and Immunities Between the American Institute in Taiwan and the Coordi-

ILI US Digest/10 600 1/8/02, 1:47 PM

nation Council for North American Affairs" ("'Agreement") (copy attached). Under article 2(b) of the Agreement, persons must be notified to and accepted by AIT if they are to enjoy the benefits of the Agreement. AIT has confirmed to us that…[the employee]was duly notified and accepted as a TECRO employee, and that he is, therefore, covered under the Agreement. Article 5(e) of the Agreement provides that:

> Designated employees of each sending counterpart organization shall be immune from suit and legal processes relating to acts performed by them within the scope of their authorized functions, unless such immunity be specifically waived by the sending counterpart organization.

Under this provision, …[the employee] has immunity from the…charge only if his conduct occurred "within the scope of his authorized functions." (It bears emphasis that this type of "official acts immunity" is not peculiar to TECRO. Similar immunity attaches to a significant number of other foreign government officials who work in this country as well.) In United States practice, the federal government does not dictate the result when official duty questions arise. Rather, such issues are left to the courts, which will make the appropriate determination based on their application of governing laws to the facts and circumstances of the particular case.

To determine whether…[the employee] is entitled to immunity, the Florida court would presumably first wish to examine the functions of TECRO in the United States. TECRO's functions and those of AIT, its counterpart United States entity, are addressed generally in the Taiwan Relations Act. In particular, section 7 of the TRA authorizes the provision of consular services by AIT; section 10 contemplates that Taiwan's counterpart entity, TECRO, will perform comparable functions in the U.S. In practical terms, TECRO employees in the United States perform functions much like those provided by the consular officials of foreign governments with which the United States maintains formal consular relations. The traditional consular functions are enumerated in article 5 of the Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. 6820 (1963)("VCCR"). The VCCR sets a standard for immunity that is similar to that contained in the Agreement (i.e., "official acts" immunity). VCCR, article 43 provides that "consular officers… shall not be

ILI US Digest/10 601 1/8/02, 1:47 PM

amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions."

In the consular context, courts have adopted the following analytical framework. The court first determines whether the performance of a recognized consular function is implicated in the case. If the alleged act …does implicate the performance of a legitimate consular function in some way, then the court assesses whether the particular act at issue was performed in the course and scope of the exercise of that function. In making this assessment, the court determines: 1) whether there is a logical nexus between the act and the consular function, and 2) whether the act can reasonably be considered part of the course of action appropriate to the performance of the function. It is also important to recognize, however, that a consular or TECRO employee's acts may be inconsistent with local penal law but still warrant a finding of jurisdictional immunity.

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C. INTERNATIONAL ORGANIZATIONS

1. Privileges and Immunities of UN Diplomat and Wife: *Begum v. Saleh*

In *Begum v. Saleh*, 99 Civ. 11834 (S.D.N.Y.), the plaintiff, a domestic servant, sought damages for allegedly abusive working conditions from an accredited diplomat, attached to the Bahrain Mission to the United Nations, and his wife. The Department of State certified the level of privileges and immunities to which the diplomat and his wife were entitled, including immunity from civil jurisdiction in the United States. Excerpts from the United States Statement of Interest, on March 31, 2000, provide

ILI US Digest/10 602 1/8/02, 1:47 PM

its views that such determinations concerning the diplomatic status of the defendant are binding on the court and that the case should be dismissed because the defendants were entitled to immunity. The United States explained that under the UN Headquarters Agreement and the Convention on Privileges and Immunities of the United Nations, diplomats accredited to the United Nations and their dependents are entitled to the same immunity from civil jurisdiction in the United States as the United States accords diplomats under the Vienna Convention on Diplomatic Relations. The case was settled by the parties and dismissed.

The full text of the Statement is available at *www.state.gov/s/l*.

ARGUMENT

1. Mr. and Mrs. Saleh Have Immunity From This Action

A. Applicable Treaties

The United States has entered into a number of treaties that establish its obligation to accord diplomatic immunity to Mr. Saleh, as Bahrain's resident representative to the United Nations, and to his wife, Mrs. Saleh. These treaties are the United Nations Charter, 59 Stat. 1031 (1945) (the "UN Charter"), the Headquarters Agreement, the Convention on the Privileges and Immunities of the United Nations, and the Vienna Convention. These treaties have the same force of law as statutes, for "[u]nder our constitutional system, statutes and treaties are both the supreme law of the land, and the Constitution sets forth no order of precedence to differentiate between them." *United States v. Palestine Liberation Organization, 695* F. Supp. 1456, 1464 *(S.D.N.Y. 1988) (citing* U.S. Const., art. VI, cl. 2).

ILI US Digest/10 603 1/8/02, 1:47 PM

The UN Charter was ratified by the President of the United States, with the advice and consent of the Senate, on August 8, 1945, and came into force on October 24, 1945. *See* UN Charter, Intr.; S.J. Res. 144, P.L. 80-357, 61 Stat. 756 (1947). Article 105(2) of the UN Charter provides that "Representatives of the members of the United Nations… shall enjoy such privileges and immunities, as are necessary for the independent exercise of their functions in connection with the Organizations." *Id.* The UN Charter thus provides the framework for the privileges and immunities to be provided to, among others, representatives of its member states. As demonstrated below, the specific parameters of those privileges and immunities as to various classes of individuals are set forth in the Headquarters Agreement and the General Convention.

Several months after the UN Charter was ratified, the United States invited the United Nations to establish its permanent seat in the United States, and, on December 14, 1946, the General Assembly of the United Nations resolved to locate its permanent headquarters in New York City. As a consequence, in 1947, the United States and the United Nations negotiated and signed the Headquarters Agreement. S.J. Res. 144, 61 Stat. 756. This agreement establishes the seat of the United Nations in New York city, and regulates the relationship between the United States and the United Nations.

As host country to the United Nations. the United States assumed specific obligations concerning the Members of the United Nations. These obligations, which are set forth in the Headquarters Agreement, include the provision that:

> [Representatives of Member States] shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as [the United States] accords to diplomatic envoys accredited to it.

Art. V, sec. 15.

The General Convention[4] extends and elaborates the protections accorded to representatives of members of the United Nations by, among

[4] The General Convention was approved by the United Nations Assembly in February 1946, and was initially submitted to the Congress for approval in 1947 along

ILI US Digest/10 604 1/8/02, 1:47 PM

other things, enlarging the classes of representatives entitled to diplomatic privileges and immunities and specifying certain of those immunities. Thus, Article IV, section 11(b) of the General Convention provides:

> Representatives of Members to the principal and subsidiary organs of the United Nations… shall, while exercising their functions and during their journey to and from the place of meeting, enjoy the following privileges and immunities:
>
> (a) immunity from personal arrest or detention and from seizure of their personal baggage
>
> (b) inviolability for all papers and documents;
>
> * * * *
>
> (g) such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy….

Id.

Thus, under both the Headquarters Agreement and the General Convention, representatives to the United Nations are entitled to those privileges and immunities accorded by the United States to diplomats accredited to the United States. The privileges and immunities to which diplomats accredited to the United States were entitled were, at the time the above treaties were negotiated, governed by customary international law. Customary international law had for centuries recognized that the absolute independence and security of diplomatic envoys was essential

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with the Headquarters Agreement. *See* Sen. Rep. No. 559, 80th Cong., 1st Sess., at 3 (1947) ("1947 Senate Report"); Letter of Transmittal from Richard Nixon to the United States Senate, dated Dec. 19, 1969 ("1969 Transmittal Letter"), at 1, *reprinted in* Message from the United States Transmitting a Copy of the Convention on Privileges and Immunities of the United Nations, 91st Cong., 1st Sess. (1969). However, the House of Representatives took no action on the General Convention at that time. After resubmission to the Senate in 1969, *see id.* the United States accepted the General Convention on April 29, 1970, with two reservations conforming certain aspects of the immunities granted by the General Convention to the Headquarters Agreement. General Convention, U.S. Reserv.

to fulfillment of their critical role in international relations, and that full diplomatic immunity was a necessary guarantor of that independence. *See generally 767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire,* 988 F.2d. 295, 299-300 (2d Cir.), *cert. denied,* 510 U.S. 819 (1993). The customary international law on diplomatic privileges and immunities was codified by the Vienna Convention, which was opened for signature in 1961, and which entered into force for the United States in December 1972.[5] *Id*. at 300. Article 31 of the Vienna Convention provides, in relevant part:

> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction [with three exceptions not relevant here]…. [6]
>
> 2. A diplomatic agent is not obliged to give evidence as a witness.

Id. In addition, Article 37 of the Vienna Convention provides, in relevant part:

> The members of the family of a diplomatic agent forming part of his household shall, if they are not

[5] While the United States had not yet ratified the Vienna Convention in 1970, the time the General Convention was adopted, the United States was well aware of the Vienna Convention provisions regarding diplomatic immunities, which were understood to represent accepted practice under customary international law. Eileen Denza, *Diplomatic Law* 1-3 (1976).

[6] The exceptions to Article 31 immunity are:

> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

Art. 31, sec. 1. None of these exceptions are relevant to this action. *Tabion v. Mufti,* 73 F.3d 535 (4th Cir. 1996), *aff'g,* 877 F. Supp. 285 (E.D. Va. 1995).

ILI US Digest/10 606 1/8/02, 1:47 PM

> nationals of the receiving State, enjoy the privileges and immunities specified in Article 29 to 36.

Id. The Vienna Convention thus provides diplomats and their household family members with "absolute immunity from criminal prosecution and protection from most civil and administrative actions brought in the 'receiving state,' *i.e.,* the state where they are stationed." *Tabion,* 73 F.3d at 537. In the case of representatives to the United Nations, the "receiving state" for these purposes is the United States. Headquarters Agreement, Art. V, sec. 15.

B. The History and Interpretation of the United Nations Treaties Confirm That Diplomatic Immunities are Applicable Here

"Treaties are contracts between sovereigns, and as such, should be construed to give effect to the intent of the signatories." *Tabion,* 73 F.2d at 537 (citations omitted). As the Second Circuit has explained, "[t]he basic aim of treaty interpretation is to ascertain the intent of the parties who have entered into agreement, in order to construe the document in a manner consistent with that intent." *Maximov v. United States,* 299 F.2d 565, 568 (2d Cir. 1962) (citations omitted), *aff'd,* 373 U.S. 49 (1963).

Where the parties to a treaty have spoken on its meaning, the court's role in interpreting such treaty is particularly circumscribed. "Although not conclusive, the meaning attributed to treaty provisions *by* the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Kolovrat v. Oregon,* 366 U.S. 187, 194 (1961). Moreover, " '[w]hen the parties to a treaty both agree to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, [the court] must, absent extraordinarily strong contradictory evidence, defer to that interpretation.' " *767 Third Avenue,* 988 F.2d at 301-02 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano,* 457 U.S. 176, 184-5 (1982)).

In this action, the treaties at issue are the UN Charter, the Headquarters Agreement, and the General Convention. These international agreements contain the fundamental provisions that have been construed and implemented for more than fifty years to realize the broad objectives set forth in the United Nations Charter. As demonstrated below, the United States and the international community have consistently interpreted and applied these provisions in the same way, and have agreed that these treaties provide the same level of immunity to representatives

ILI US Digest/10 607 1/8/02, 1:47 PM

to the United Nations as the United States provides to diplomats accredited to the United States, as codified in the Vienna Convention.

As an initial matter, as explained in the House of Representatives Report that accompanied S.J. Res. 144, the Joint Resolution authorizing the President to bring into effect the Headquarters Agreement, the operation of the United Nations headquarters is inextricably linked with the question of immunity. H.R. Rep. No. 1093, 80th Cong., 1st Sess., at 8 (1947) ("1947 House Report"). Under Article 105 of the UN Charter, *inter alia,* representatives to the United Nations shall enjoy in all nations "such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." *Id.* (quoting UN Charter, art. 105). "The host nation, however, is under special responsibility to assure that the arrangements made suffice for the efficient functioning of the United Nations. The host nation also is in a special relationship in that it is more deeply involved domestically in the nature of the arrangements and the manner of their working." *Id.* The Headquarters Agreement sets forth the agreements on these matters between the United Nations and the United States as host country. *Id.* [7]

[7] Before the United States and the United Nations worked out the Headquarters Agreement, the level of privileges and immunities accorded to United Nations representatives and personnel was governed by the International Organizations Immunities Act, 22 U.S.C. §§ 288 *et seq,* ("IOIA"), which provides only functional immunity for representatives of international organizations. The IOIA was passed in December 1945 for the general purpose of defining the privileges and immunities of international organizations in the United States, several of which were already in operation at that time. 1947 Senate Report, at 3. While it was hoped that the IOIA would cover the requirements of the United Nations, *id.,* the functional immunity provided thereunder was apparently not sufficient to meet the needs of the United Nations. These needs are addressed by the Headquarters Agreement and the General Convention, both of which must be viewed as amending any inconsistent provisions in the IOIA with respect to the United Nations. *Id. See also* Letter from Ernest A. Gross, Legal Adviser, United States Department of State to Lawrence H. Smith, Chairman, Subcommittee No. 6 on International Organizations and International Law of the Committee on Foreign Affairs, April 28, 1948, *reprinted in* Committee on Foreign Affairs, *Structure of the United Nations and the Relations of the United States to the United Nations,* 80th Cong., 2d Sess., 509 (1948) ("1948 Legal Adviser Letter") (IOIA was enacted by United States on own initiative, and it was to be anticipated that, after gaining experience with United Nations issues, the final arrangements for United Nations immunities might differ from those in the IOIA).

ILI US Digest/10 608 1/8/02, 1:47 PM

One of the special arrangements between the United States and the United Nations in the Headquarters Agreement is that certain classes of representatives of member states of the United Nations, namely, resident representatives, will be entitled in the United States, "'to the same privileges and immunities,' as are accorded to diplomatic envoys accredited to the United States, subject, however, to 'corresponding conditions and obligations.'" Thus, the House Report notes, a limited group of the more important representatives to the United Nations *will receive the same diplomatic status as their colleagues in Washington who are accredited to the United States Government.*" *Id*. at 11 (emphasis added). *See also* 1947 Senate Report, at 4 (same). As the House Report makes clear, while the UK Charter did not specify a requirement of diplomatic status for resident representatives of its members, in the Headquarters Agreement, "[t]he United States and the United Nations have come to an agreement that diplomatic status is the necessary formula here…. The premise of the agreement is that the sum total of the privileges necessarily approximates that of diplomatic status, and the committee accept this view." 1947 House Report, at 11-12.

The provision ultimately codified as Article V, section 15 in the Headquarters Agreement was thus always understood to provide diplomatic immunity to resident representatives of members of the United Nations, as opposed to the more limited functional immunity set forth in the IOIA. In this context, the phrase "subject to corresponding conditions and obligations" found in Article V, section 15 only makes sense if it refers to corresponding conditions and obligations of other diplomats accredited to the United States. This understanding is confirmed in the 1948 letter from the Legal Adviser of the Department of State to a Congressional Subcommittee:

> The background in the negotiation of section 15 of the headquarters agreement indicates that the phrase "subject to corresponding conditions and obligations" was inserted by way of compromise to meet a desire on the part of the United States that persons covered by section 15 were not to receive privileges and immunities broader than those accorded to diplomatic envoys accredited to the President of the United States, and that like diplomatic envoys, such persons might be found personnae non gratae and made subject to recall.

1948 Legal Adviser Letter, at 511. This understanding of the phrase "subject to corresponding conditions and obligations" was quoted with approval by the International Law Commission, a body of international legal experts commissioned by the United Nations, in a discussion of the practice of the United Nations concerning, among other things, the status, privileges, and immunities of representatives of its members. 1967 *International Law Commission Yearbook,* Vol. II, at 154, 177-78.

The history and interpretation of the General Convention further supports the understanding that, since entry into force of the Headquarters Agreement, resident member state representatives to the United Nations have always been entitled to diplomatic immunities, subject only to corresponding conditions and obligations attendant on other diplomats. As discussed above…, Article IV, section 11 of the General Convention extends diplomatic privileges and immunities to non-resident representatives to the United Nations. The legislative history accompanying this extension of privileges and immunities confirms that such immunities were already in force with respect to resident representatives, such as Mr. Saleh, under Article V, section 15 of the Headquarters Agreement, and approves their extension to additional classes of representatives.

For instance, the Executive Report submitted by the Senate Committee on Foreign Relations in support of ratifying the General Convention, describes the following situation when the Headquarters Agreement, but not the General Convention, was in effect in the United States:

> With regard to representatives of members, currently only resident representatives of permanent missions to the United Nations have full diplomatic immunities. Nonresident representatives enjoy only functional immunities; that is, immunities with respect to their official acts. Under the [General Convention], these nonresident representatives will also be entitled to full diplomatic immunities.

Executive Rep. No. 91-17, 91st Cong., 2d Sess., at 3 (1970) ("1970 Executive Report"). The Department of State took the same view. *See* Letter of Submittal from Secretary of State William P. Rogers to the President, dated Nov. 6, 1969, at 1, *reprinted in* Message from the United States Transmitting a Copy of the Convention on Privileges and Immunities of the United Nations, 91st Cong., 1st Sess. (1969) (under existing

ILI US Digest/10 610 1/8/02, 1:47 PM

law, resident diplomatic officials attached to permanent missions to the United Nations are entitled to the privileges and immunities enjoyed by members of diplomatic missions in Washington; the General Convention would extend diplomatic privileges to non-resident representatives).[8]

Finally, like the United States and the International Law Commission, the United Nations views the treaties at issue here as conferring diplomatic immunities upon representatives of its members consistent with those set forth in the Vienna Convention. This is explicitly stated with respect to Article V, section 15 of the Headquarters Agreement in the 1983 *United Nations Juridical Yearbook:*

* * * *

> It follows from Article V, section 15, of the Headquarters Agreement that the relevant provisions of general *international* law on the question of privileges and immunities also apply to the resident representatives to the United Nations and their staffs. international law *concerning this* question is codified in the 1961 Vienna Convention on Diplomatic Relations.

Id. at 222. *See also* 1986 *United Nations Juridical Yearbook,* at 327 (reprint of letter from the United Nations to the deputy permanent representative of a member state confirming that the Vienna Convention is applicable to permanent missions to the United Nations by virtue of Art. V. sec. 15 of the Headquarters Agreement).

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[8] As the United States has ratified the General Convention, resident representatives such as Mr. Saleh, and his household family members, are also entitled to the diplomatic privileges and immunities provided by Article IV, section 11. These privileges and immunities are largely duplicative of the privileges and immunities accorded to permanent representatives under the Headquarters Agreement. While the applicable privileges and immunities in the General Convention are set forth with more detail than those in the Headquarters Agreement, the legislative history discussed herein confirms that they are in essence the same. However, to the extent any portion of the General Convention could be regarded as conflicting with, or potentially narrowing, any provision of the Headquarters Agreement, the applicable provision of the Headquarters Agreement would control. Headquarters Agreement, Art. IX, sec. 26; 1948 Legal Adviser Letter, at 511.

In addition, the United Nations attributes the same interpretation to Article IV, section 11 of the General Convention attributed by the United States, namely, that this also provides diplomatic immunity, extended to a larger class of people than those covered by the Headquarters Agreement. *See* 1976 *United Nations Juridical Yearbook,* at 224-29. Indeed, the United Nations has explicitly rejected the notion that the immunity language of Article IV, section 11 is limited to the official functions of representatives to the United Nations, notwithstanding the use of the phrase "while exercising their functions and during their journey to and from the place of meeting…":

> In the view of the Secretary-General, to interpret those words so as to limit them to times when the person concerned is actually doing something as part of his functions as a representative, for example speaking in a United Nations meeting, leads to absurd and meaningless results, making such an interpretation wholly untenable. The only reasonable interpretation is the "broad" one, namely to regard the words concerned as describing the whole period during which the person involved discharges his responsibilities.

Id. at 228. The *Yearbook* further explains: "In other words, 'while exercising,' means during the entire period of presence in the State…." *Id.*

In sum, because the United States and the United Nations agree to an accepted interpretation of the applicable conventions, and because there is no evidence of a contrary interpretation advanced by any of the United Nations members, or the international community, this Court should defer to the interpretation of the treaty parties. Thus, as Mr. Saleh has been certified by the United States to be entitled to the privileges and immunities specified by Article V, section 15 of the Headquarters Agreement, and Article IV, section 11 of the General Convention, he is entitled to the same privileges and immunities accorded to diplomatic envoys accredited to the United States, subject only to the same corresponding conditions and obligations that those diplomats are subject to, which are now found in the Vienna Convention. This includes immunity for Mr. Saleh and his household family members from the civil jurisdiction of this Court under Articles 31 and 37 of the Vienna Convention.

ILI US Digest/10 612 1/8/02, 1:47 PM

In accordance with the above, courts in this district have uniformly declined to proceed with actions against representatives to the United Nations entitled to diplomatic immunity, particularly when the Department of State has certified that immunity should be accorded. *See Fireman's Ins. Co. v. Onwualia,* No. 94 Civ. 0095 (PKL), 1994 WL 706994, *3 (S.D.N.Y. Dec. 19, 1994); *York River House v. Pakistan Mission to the United Nations,* No. 90 Civ. 2071 (PNL), 1991 WL 206286, *1 (S.D.N.Y. Sept. 27, 1991); *Arcaya,* 145 F. Supp. at 468, 472-473. *See also 767 Third Avenue,* 988 F.2d at 297-98, 302-03 (same provisions of United Nations' immunity in the UN Charter, Headquarters Agreement and General Convention that address immunity of representatives require the United States to accord United Nations mission with inviolability under the Vienna Convention). The same result should occur here.

II. Respecting Defendants' Diplomatic Immunities does not Present a Constitutional Issue

According the appropriate level of immunity to Mr. and Mrs. Saleh does not present a constitutional issue. There is no doubt that international agreements are subject to constitutional limitations. *Reid v. Covert,* 354 U.S. 1, 17-18, 40-41 (1957). However, the existence of a constitutional right does not always carry with it a guaranteed entitlement to a judicial remedy. *See LaFontant v. Aristide,* 844 F. Supp. 128 (E.D.N.Y. 1994) (dismissing on grounds of head-of-state immunity an action alleging constitutional, statutory, and common law civil rights claims arising from alleged murder.) Moreover, the treaties that are at issue here do not conflict with the Constitution. Nothing in the UN Charter, the Headquarters Agreement, the General Convention or the Vienna Convention authorizes involuntary servitude, or any other practice forbidden by the Constitution. To the contrary, the Vienna Convention provides in no uncertain terms that despite their immunity, diplomats are under an obligation to follow the laws of the receiving State. *Tabion,* 877 F. Supp. at 293 (citing Vienna Convention, Art. 41).

While a diplomat's obligations to respect the laws of a host country cannot be judicially enforced, the United States takes very seriously allegations of abuses of diplomatic privilege, and has both formal and informal means of obtaining compliance through the diplomatic process. Wood Decl., ¶ 7. As a formal matter, in certain circumstances, not

ILI US Digest/10 613 1/8/02, 1:47 PM

present here, the State Department may request that the sending state waive the immunity of the diplomat.[9] The General Convention makes clear that "[p]rivileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice…." General Convention, Art. IV, sec. 14. If a waiver is not granted by the sending state, the United States also has the option — in consultation with the United Nations, as the United Nations is technically the "receiving" entity, *see* 1986 *United Nations Juridical Yearbook*, at 320-21 — to ask that such diplomat be removed from the country. *See* Headquarters Agreement, Article IV, sec. 13 (in case of abuse of privileges and immunities in activities outside a representative's official capacity, the United States retains the ability to exercise customary removal procedure applicable to diplomatic envoys accredited to United States); General Convention, United States Reservation No. 2 (same); Vienna Convention, art. 9(1) (procedure for declaring diplomat persona non grata). *See also* 1970 Executive Report, at 10 (testimony of Ambassador Charles W. Yost, U.S. Permanent Representative to the United Nations regarding the United States' right to expel United Nations representatives); Wood Decl., ¶ 12. These are examples of the "corresponding conditions and obligations" attendant upon the privileges and immunities of representatives to the United Nations and diplomats accredited to the United States.

Moreover, short of formal measures, which are not always appropriate, the State Department can examine a complaint and, if warranted, mediate that dispute through the mission to the United Nations. Wood Decl., ¶ 8. Indeed, in many instances, bringing the matter to the mission's

[9] For example, where law enforcement authorities have investigated allegations and a prosecutor has notified the Department of State that a criminal case would be prosecuted but for the immunity, Department of State. regulations call for the Department to request that the sending state waive the immunity of the diplomat. Wood Decl., ¶ 11. As noted above (at 3, n.3), the United States is not aware of any request by a criminal prosecutor with respect to this case, and has not requested a waiver at this time. Wood Decl., 11 n.l.

ILI US Digest/10 614 1/8/02, 1:47 PM

attention, and focusing on it as a diplomatic matter, may ultimately induce voluntary compliance. Wood Decl., ¶ 9. *See also 767 Third Avenue,* 988 F.2d at 303 (noting that diplomatic efforts and pressure were extraordinarily successful at getting Zaire to pay back rent owed by its mission).

III. Failure of the United States to Respect Diplomatic Immunities Could Have Serious Consequences in the International Community

As this lawsuit illustrates, diplomatic immunities can prevent persons allegedly wronged by those entitled to such immunities from obtaining court review of their allegations. The United States takes seriously allegations of abuse of diplomatic privileges, and does not intend to downplay the potential negative consequences to individuals that can result from the requirement that the United States uphold its international obligations in this regard. Indeed, as discussed above (at 21-22), the State Department's diplomatic powers provide a means to attempt to mitigate such effects where appropriate. However, even in the face of potential adverse effects, the diplomatic immunities of United Nations representatives must be respected because they are vital to the conduct of peaceful international relations. Respecting diplomatic obligations is a fundamental component of harmony and comity in the international community. Wood Decl., ¶ 13. The importance of standing behind these universal norms of international law "is even more true today given the global nature of the economy and the extent to which actions in other parts of the world affect our own national security." *Boos v. Barry,* 485 U.S. 312, 323 (1988). The conduct of the United States with respect to the United Nations and representatives of its members in this country is a particularly visible portion of the international relations of the United States. Wood Decl., ¶ 14. The United Nations observes the degree and manner of the United States' compliance with its diplomatic obligations, and a failure by the United States to abide by its international responsibilities can damage the relationship between the United States and the United Nations. Wood Decl., ¶ 15.

It should also be noted that, as a leading scholar an diplomatic law has explained, "the real sanction of diplomatic law is reciprocity. Every State is both a sending and a receiving State. Its own representatives abroad are hostages and even in minor matters their treatment will depend on what the sending State itself accords." Eileen Denza, *Diplomatic Law* 2 (1976). This is equally true for representatives of other countries accred-

ILI US Digest/10 615 1/8/02, 1:47 PM

ited to this country, and for representatives of other countries that are present here because they are accredited to the United Nations. *See 767 Third Avenue*, 988 F.2d at 296 (applying diplomatic protections under the Vienna Convention to Permanent united Nations Mission of the Republic of Zaire). In this context, the reason to respect diplomatic immunity is not "a blind adherence to a rule of law in an international treaty, uncaring of justice at home, but that by upsetting existing treaty relationships American diplomats abroad may well be denied lawful protection of their lives and property to which they would otherwise be entitled." *Id*.

These concerns are central to this case. If the United States is prevented from carrying out its international obligations to protect the privileges and immunities of representatives to the United Nations, adverse consequences may well occur. Wood Decl., at ¶ 16. At a minimum, the United States may hear objections for failing to honor its obligations not only from the Bahrain Mission, but also from other United Nations member countries whose representatives derive diplomatic immunity from the same sources relied upon by Mr. and Mrs. Saleh in this action, and from the United Nations itself. *Id.* Indeed, a ruling by this Court limiting the diplomatic immunities of representatives to the United Nations in this country could, if applied generally, lead to erosion of the necessary and respected protections accorded by diplomatic immunities. Wood Decl., ¶ 17. As noted by the Second Circuit in *767 Third Avenue,* "Recent history is unfortunately replete with examples demonstrating how fragile is the security for American diplomats and personnel in foreign countries; their safety is a matter of real and continuing concern*."* 988 F.2d at 301.

* * * *

2. Immunity to Attachment of UN Escrow Account: *Glencore Denrees Paris v. Department of National Store Branch 1 (Vietnam)*

On May 26, 2000, the United States filed a Statement of Interest in *Glencore Denrees Paris v. Department of National Store Branch 1 (Vietnam),* 99 Civ. 8607 (S.D.N.Y.), providing its view that the court should vacate a restrain-

ILI US Digest/10 616 1/8/02, 1:47 PM

ing notice served by petitioners on an escrow account held by Banque Nationale de Paris established to implement the United Nations' Iraq Oil-for-Food Programme. The excerpts below set forth the United States argument that the attachment sought by the restraining notice is prohibited by Iraqi Sanctions Regulations and violates the privileges and immunities of the United Nations enjoyed by the escrow account. The District Court vacated the Restraining Notice and declined to grant a stay pending appeal. *Glencore Denrees Paris v. Department of National Store Branch 1 (Vietnam)*, 2000 U.S.Dist. LEXIS 8331 (S.D.N.Y. June 14, 2000).

The full text of the Statement of Interest is available at *www.state.gov/s/l*. Other aspects of this litigation are discussed in 10.A.2. above.

BACKGROUND

A. The Iraq Sanctions Program

Pursuant to the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1706, the President of the United States has broad powers to "block" the assets of foreign governments and their nationals, and to prohibit economic transactions by or with designated foreign nationals or foreign countries, in order to deal with "any unusual or extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States…." 50 U.S.C. § 1701(a). The "congressional purpose in authorizing blocking orders is 'to put control of foreign assets in the hands of the President…'" *Dames & Moore v. Regan,* 453 U.S. 654, 673 (1981) (quoting *Propper v. Clark,* 337 U.S. 472, 493 (1949)).

On August 2, 1990, immediately after Iraq invaded Kuwait, President Bush declared a national emergency and invoked his authority under

ILI US Digest/10 617 1/8/02, 1:47 PM

the Constitution and the laws of the United States, including the IEEPA and the National Emergencies Act ("NEA"), 50 U.S.C. §§ 1601-1651, to block, "[a]ll property and interests in property of the Government of Iraq, its agencies, instrumentalities and controlled entities and the Central Bank of Iraq that are in the United States, that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, including their overseas branches." Exec. Order No. 12722, 55 Fed. Reg. 31803 (1990). Congress declared its support for the President's freeze of Iraqi assets in the Iraq Sanctions Act of 1990, Pub. L. No. 101-513, §§ 586-586J, 104 Stat. 1979, 2047-55.

On August 2, 1990, the United Nations Security Council also condemned the Iraqi invasion of Kuwait and demanded that Iraq unconditionally withdraw. Resolution 660 (Aug. 2, 1990). Shortly thereafter, pursuant to Resolution 661 (Aug. 6, 1990), the United Nations Security Council also implemented a program of economic sanctions against Iraq. This included a call for all member States to, among other things, prevent the import of commodities and products originating in Iraq, *id.* ¶ 3(a), and to withhold funds and other financial and economic resources from Iraq, with the exception of certain payments for medical or humanitarian purposes, and food for humanitarian purposes, *id.* ¶ 4. Pursuant to the United Nations Participation Act, 22 U.S.C. § 287c (the "UNPA"),[1] as well as the IEEPA and the NEA, President Bush issued Executive order No. 12724, imposing the sanctions called for by Resolution 661. Exec. Order No. 12724, 55 Fed. Reg. 33089 (1990).

Executive Order Nos. 12722 and 12724 have been implemented by OFAC through the Iraqi Sanctions Regulations. *See* 56 Fed. Reg. 2112 (1991), *codified at* 31 C.F.R. §§ 575.101-575.901. Pursuant to the Executive Orders and the Sanctions Regulations, any property or interest in property of the Government of Iraq that is within the United States, or within the possession or control of any United States person, is considered "blocked property," *see* 31 C.F.R. § 575.301, and may not, with-

[1] The UNPA authorizes the President to implement measures that the Security Council adopts under Article 41 of the United Nations Charter. Specifically, whenever the Security Council calls upon the United States to act with respect to a UN Resolution:

> the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit,

ILI US Digest/10 618 1/8/02, 1:47 PM

out authorization from OFAC, be "transferred, paid, exported, withdrawn or otherwise dealt in." 31 C.F.R. 575.201(a).

Parties seeking to transfer blocked property must obtain authorization to do so from OFAC, *see* 31 C.F.R. 575.201(a); 31 C.F.R. § 575.801 (licensing procedure). Unauthorized transfers of blocked property and interests in property, as defined by the Sanctions Regulations, are null and void. 31 C.F.R. § 575.202. Thus, "'[t]he judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property.'" *Federal Republic of Yugoslavia v. Park-71st Corp.,* 913 F. Supp. 191, 193 n.2 (S.D.N.Y. 1995) (quoting *Clark v. Propper*, 169 F.2d 324, 327 (2d Cir. 1948) (citations omitted), *aff'd, Propper v. Clark*, 337 U.S. 472 (1949)). *See generally Dames & Moore,* 453 U.S. at 669-674 (discussing Presidential powers under IEEPA).

B. The Oil-for-Food Programme and the United Nations Escrow Account

In 1996, in recognition of the humanitarian needs of the Iraqi people, the United Nations Security Council established an exception to the international Iraqi sanctions regime by creating the Oil-for-Food Programme. *See generally* Resolution 986 (April 14, 1995); Memorandum of Understanding Between the United Nations and the Government of Iraq, dated May 20, 1996 (the "MOU").[2] Under the Programme, *inter alia*, Iraq may sell approved quantities of petroleum and petroleum products, with the proceeds to be used solely to purchase food, medicine and other supplies to meet the humanitarian needs of the Iraqi people. Resolution 986, ¶¶ 1, 8. The Programme operates through the Escrow Account established by the United Nations for the sole purposes of the Programme, into which proceeds from Iraq's petroleum sales are depos-

> in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof, or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States.

22 U.S.C. § 287c.

[2] The United Nations provided these documents to the Court as attachments to the United Nations' letter to the Court, dated May 12, 2000 (the "May 12 Letter").

ILI US Digest/10 619 1/8/02, 1:47 PM

ited, and from which payments for humanitarian supplies are made. Resolution 986, ¶¶ 1, 7, 8.

To implement the Oil-For-Food Programme, a special committee of the United Nations Security Council established by Resolution 661 (the "661 Committee") adopted specific procedures to be followed with respect to, *inter alia*, the Escrow Account. *See* Procedures to be Employed By the Security Council Committee Established By Resolution 661 (1990) Concerning the Situation Between Iraq and Kuwait In The Discharge Of Its Responsibilities As Required By Paragraph 12 of Security Council Resolution 986 (1995), dated August 8, 1996 (the "661 Committee Procedures").[3] In addition, the United Nations entered into an Agreement for Banking Services Pursuant to Security Council Resolution 986 (1995) with Banque Nationale de Paris, S.A. ("BNP") (the "Banking Agreement"), pursuant to which the Escrow Account is established at BNP, and BNP provides banking services in connection with the Programme. *See* May 12 Letter, at 2.[4] In accordance with the 661 Committee Procedures, payment to eligible suppliers[5] for humanitarian goods sold to Iraq is made through letters of credit issued by BNP against funds in the Escrow Account. 661 Committee Procedures ¶ 35. The United States understands that under the Banking Agreement, BNP may not issue a letter of credit unless there are sufficient available funds in the Escrow Account to cover the letter of credit, BNP is authorized to identify and segregate in the Escrow Account the funds with which it is to pay any particular letter of credit, and BNP is reimbursed for payments under these letters of credit only from funds in the Escrow Account. May 12 Letter, at 2; Banking Agreement ¶¶ 2.3.3 (a), 2.3.6.

To ensure that the Programme would be as effective as possible, the United Nations took steps to protect the funds in the Escrow Account from being diverted to purposes other than those set forth in Resolution 986. To that end, the Escrow Account is denominated by the United Nations as enjoying "the privileges and immunities of the United Na-

[3] The United Nations provided this document to the Court as an attachment to the May 12 Letter.

[4] The United States understands that BNP will provide relevant portions of the Banking Agreement to the Court.

[5] The 661 Committee reviews all contracts and determines whether specific suppliers are eligible for payment from the Escrow Account. *See* 661 Committee Procedures ¶¶ 26-38.

ILI US Digest/10 620 1/8/02, 1:47 PM

tions." Resolution 986 ¶ 15. in addition, the Resolution calls upon member States to "take any steps that may be necessary under their respective domestic legal systems" to assure protection of the petroleum and petroleum products subject to the Resolution, and to ensure that "the proceeds of the sale are not diverted from the purposes laid down in this resolution." *Id.* ¶ 14.

The Sanctions Regulations implement the Programme in the United States by, among other things, authorizing licensing by OFAC on a case-by-case basis, to permit United States persons to purchase Iraqi-origin petroleum and petroleum products from the Government of Iraq, with payments for such products to be made only by transfer to the Escrow Account, 31 C.F.R. §§ 575.522; 575.523, and authorizing OFAC to issue licenses on a case-by-case basis to permit the sale and export of certain humanitarian aid for the benefit of the Iraqi population, 31 C.F.R. §§ 575.522; 575.525.

Under the Sanctions Regulations, OFAC has issued a license to BNP (the "BNP License"), permitting BNP to, among other things, open and maintain the Escrow Account, and administer the Escrow Account in accordance with the sanctions Regulations, the Banking Agreement, Resolution 986, the MOU, other relevant United Nations Security Council Resolutions and guidance issued by the United Nations pursuant to Resolution 661. BNP License, at 2.[6] The BNP License limits BNP 's authority to make payments from the Escrow Account to payments made in conformity with the Programme. *Id.* In addition, the BNP License requires that all parties to the BNP License comply with all regulations, rulings, orders and instructions issued by the Secretary of the Treasury pursuant to section 203 of the IEEPA and section 5 of the UNPA, *id*. at 1 ¶ 2. The BNP License is expressly made subject to the terms of Executive Order Nos. 12722 and 12724, and the Sanctions Regulations. *Id*. at 1 ¶ 4.

C. The Restraining Notice

In this action, Glencore has obtained a default judgment in the total amount of $5,948,110.30, plus post-judgment interest, against the Vietnam Judgment-Debtors. Affidavit of Jeremy J. 0. Harwood, dated

[6] The United States understands that BNP will provide a copy of the BNP License to the Court.

ILI US Digest/10 621 1/8/02, 1:47 PM

May 11, 2000 ("Harwood Aff."), ¶ 7 and Exh. 3. The default judgment stems from this Court's recognition and enforcement of two arbitration awards issued by the ICC International Court of Arbitration in favor of Glencore and against the Vietnam Judgment-Debtors, Harwood Aff. ¶¶ 3-7 and Exhs. 1-3.

On or about April 18, 2000, Glencore served the Restraining Notice upon BNP. The Restraining Notice directs BNP to refrain from paying or transferring any funds or property in its possession belonging to the Vietnam Judgment-Debtors or to Vinafood. Harwood Aff. ¶ 8 and Exh. 4.[7] While it does not appear that Vinafood is a judgment-debtor in this action, Glencore alleges that "[o]n information and belief, Vinafood is merely an instrumentality, agent and/or alter ego of the Republic of Vietnam[,]" Harwood Aff. ¶ 12, and as such, can be held responsible for the debts owed by the Vietnam Judgment-Debtors. *See* Glencore's Memorandum of Law in Response to the Motion by Banque Nationale de Paris to Vacate the Restraining Notice, dated May 11, 2000 ("Glencore Opp. Mem."), at 10 n.2.

On or about April 27, 2000, BNP moved to vacate the Restraining Notice. BNP asserts that Vinafood is the beneficiary of several letters of credit issued in Vinafood's favor by BNP as part of the Oil-for-Food Programme, and that this is the only connection between BNP and the Vietnam Judgment-Debtors or Vinafood. Declaration of Isolde Novakovic, dated April 27, 2000 ("Novakovic Decl."), ¶ 4 and Exh. C. BNP contends that its obligations to pay Vinafood under these letters of credit are not subject to attachment because (1) the letters of credit are not the property of the Vietnam Judgment-Debtors, or any one of them, Movant's Memorandum of Law in Support of Its Motion to Vacate Petitioner's Restraining Notice, dated April 27, 2000 ("BNP Mem."), at 8-9; (2) restraining a bank from honoring conforming drafts under a letter of credit contravenes New York law and undermines. the proper functioning of letters of credit, *id*. at 9-14; and (3) the Restraining Notice unfairly exposes BNP to potential liability for failure to honor conforming drafts under its letters of credit, *id*. at 15-16. BNP also contends

[7] At the same time it served the Restraining Notice, Glencore also apparently served BNP with an Information Subpoena and Questions and Answers in Connection with an Information Subpoena, to which BNP apparently responded on or about May 1, 2000. Harwood Aff. ¶ 8, 9 and Exhs. 4 and 5.

ILI US Digest/10 622 1/8/02, 1:47 PM

that, in this particular case, it is particularly important that the Restraining Notice be vacated, as any attachment of these particular letter of credit payments could negatively impact on the Oil-for-Food Programme, and thus disrupt the United Nations humanitarian program. *Id*. at 14.

On or about May 17, 2000, Vinafood joined in BNP's motion and requested compensatory damages from Glencore. *See* Memorandum of Law of the Vietnam Northern Food Corporation In Support of its Joinder in the Motion By Banque Nationale de Paris to Vacate Petitioners' Restraining Notice and In Support of its Request for Damages For Wrongful Restraint, dated May 17, 2000 ("Vinafood Mem."). Vinafood contends that the Restraining Notice is improper because (1) Vinafood is not an agency or instrumentality of the Government of Vietnam, is not the alter ego of the Vietnam Judgment-Debtors and is not responsible for their debt, Vinafood Mem. at 9, (2) even if Vinafood is considered to be an agency or instrumentality of the Government of Vietnam, the Restraining Notice is invalid under the Foreign Sovereign Immunities Act, *id*. at 15, and (3) Vinafood is not subject to this Court's jurisdiction, *id.* at 17.

For the reasons discussed herein, the United States agrees that the Restraining Notice should be vacated.

ARGUMENT

I. All Interests In and Proceeds From the Account are Blocked and may not be Attached

As discussed above … pursuant to the Executive Orders and Sanctions Regulations, all interests in property of the Government of Iraq that are in the United States or are in the possession or control of a United States person are "blocked," *see* 31 C.F.R. § 575.301, and may not, without authorization from the United States, be "transferred, paid, exported, withdrawn or otherwise dealt in." 31 C.F.R. 575.201(a).… As the seller of the petroleum and petroleum products, the sales of which fund the account, and the "account party" (i.e., the party that received the humanitarian supplies for which payment is due) under the letters of credit, Iraq has property interests in the Escrow Account that fall within the terms of the Sanctions Regulations, meaning funds from the Escrow Account cannot be transferred without OFAC's authorization. *See*, *e.g.*, *Consarc Corp. v. Iraqi Ministry,* 71 F.3d 909, 914-916 (D.C. Cir. 1995)

ILI US Digest/10 623 1/8/02, 1:47 PM

and *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 701-02 (D.C. Cir. 1994) (upholding blocking of funds that Iraqi bank had deposited with Bank of New York to secure letters of credit and upholding blocking of goods under contract to be sold to Iraq).

A ruling permitting Glencore to attach blocked property would contravene the President's authority under IEEPA and his exercise of that authority through the Sanctions Regulations. Moreover, in this particular case, a ruling permitting attachment would interfere with an important United Nations humanitarian program that is specifically licensed by OFAC to operate within the sanctions program. As discussed above… in connection with the Oil-for-Food Programme, the United Nations and the international community, including the United States, have carved out a targeted exception to the sweeping sanctions against Iraq, aimed at addressing the humanitarian needs of the Iraqi people.

* * * *

II. The Escrow Account is Entitled to the Privileges and Immunities of The United Nations and is Immune from Attachment

While the Restraining Notice purports to attach payments due from BNP under letters of credit, the letters of credit at issue are intended to be drawn solely against funds in the Escrow Account held by the United Nations. Therefore, the Restraining Notice should also be vacated as an improper incursion on the priveleges and immunities of the United Nations

The United States has entered into treaties that establish its obligation to accord certain privileges and immunities to the United Nations. These treaties include the United Nations Charter, 59 Stat. 1031 (1945) (the "UN Charter") and the Convention on Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946, *United States accession,* April 29, 1970, 21 U.S.T. 1418 (the "General Convention"). These treaties have the same force of law as statutes of the United States. *Foxworth v. Permanent Mission of the Republic of Uganda to the United Nations,* 796 F. Supp. 761, 762 (S.D.N.Y. 1992).

The UN Charter was ratified by the President of the United States, with the advice and consent of the Senate, on August 8, 1945, and came into force on October 24, 1945. *See* UN Charter, Intr.; S.J. Res. 144, P.L.

ILI US Digest/10 624 1/8/02, 1:47 PM

80-357, 61 Stat. 756 (1947). Article 105(1) of the UN Charter provides that "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." *Id*. The UN Charter thus provides the framework for the privileges and immunities to be provided to the United Nations. More specific parameters of those privileges and immunities with respect to property of the United Nations are set forth in the General Convention:

> The United Nations, its property and assets wherever located and by whomever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood, that no waiver of immunity shall extend to any measure of execution.

Art. II, sec. 2.

> The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomever held, shall be immune from search, requisition, confiscation, expropriation, and any other form of interference, whether by executive, administrative, judicial or legislative action.

Art. II, sec. 3. *See also* International Organizations Immunities Act ("IOIA"), 22 U.S.C. §§ 288a(b) and (c) (granting certain immunities to international organizations, including the United Nations).

In Security Council Resolution 986, the United Nations expressly affirmed that the Escrow Account "enjoys the privileges and immunities of the United Nations." *Id*. ¶ 15. Moreover, in this action, by the May 12 Letter, the United Nations has confirmed its interests in the Escrow Account, and has made clear that it does not waive the immunities to which the Escrow Account is entitled. In particular, the United Nations points out that (1) the United Nations is the account holder of the Escrow Account; (2) the letters of credit at issue are intended to be funded exclusively from the Escrow Account; and (3) BNP may not issue a letter of credit unless there are sufficient available funds in the

ILI US Digest/10 625 1/8/02, 1:47 PM

Escrow Account to cover the letter of credit, is entitled to identify and segregate in the account the funds with which it will pay any particular letter of credit, and may be reimbursed for its payments under these letters of credit only from funds from the Account. *See* May 12, 2000 Letter, at 3; Banking Agreement ¶¶ 1.3.2; 1.4; 2.3.3(a); and 2.3.6. Therefore, any diversion of, or interference with, BNP's payments on letters of credit under the Oil-For-Food Programme would necessarily interfere with the use of funds from the Escrow Account, and thus encroach on the privileges and immunities of the United Nations. In other circumstances, courts have respected the privileges and immunities of the United Nations in bank accounts held by it, *see, e.g., Matter of L.L.M. v. A.J.J.M.,* 69 N.Y.2d 924 (N.Y. 1987) (affirming denial of petition of contempt order against garnishee bank; assets of United Nations Staff Pension Fund held by bank as drawee-payor are immune from seizure); *Shamsee v. Shamsee,* 428 N.Y.S.2d 33, 36 (2d Dep't 1980) (assets of United Nations Pension Fund are immune from sequestration), *aff'd,* 53 N.Y.2d 739 (N.Y. 1981), *cert. denied,* 454 U.S. 893 (1981). The Escrow Account, as an account held by the United Nations, is likewise immune from the attachment sought. The United States urges this Court to recognize this immunity and vacate the Restraining Notice.

E. OTHER ISSUES OF STATE REPRESENTATION

1. Location of diplomatic and consular buildings

a. Location outside "mixed-use diplomatic" areas

The Embassy of the Republic of Azerbaijan filed an application with the Government of the District of Columbia Foreign Missions Board of Zoning Adjustment on July 26, 2000, regarding its desire to locate its chancery in a primarily residential zoning district. The Department of State Office of Foreign Missions provided comments on behalf of the Secretary of State in support of the application on October 6, excerpted below, addressing several of the statu-

ILI US Digest/10 626 1/8/02, 1:47 PM

tory criteria governing such Board determinations and providing the Department's views on the interpretation of section 206(b)(2)(B) of the Foreign Missions Act, 22 U.S.C. §4306(b)(2)(B), concerning location of chanceries outside areas zoned "mixed-use diplomatic."

The full text of the letter is available at *www.state.gov/s/l.*

* * * *

First, with respect to the criterion set forth in 22 U.S.C. §4306(d)(1), we have determined that favorable BZA action on the present application would fulfill the international obligation of the United States to facilitate the acquisition of adequate and secure premises by the Government of Azerbaijan for its diplomatic mission in Washington. This factor is particularly compelling in this case in view of the reciprocal implementation of this treaty by Azerbaijan as detailed below.

Second, after consultation with Federal agencies authorized to perform protective services, we have determined, pursuant to 22 U.S.C. §4306(d)(6), that there exist no special security requirements relating to parking requirements in this case. I have also, after similar consultation, and pursuant to 22 U.S.C. §4306(d)(4), determined that the subject site and area are capable of being adequately protected.

Finally, pursuant to 22 U.S.C. §4306 (d) (6), there is a substantial federal interest in this project. In 1999 the Department of State concluded a Bilateral Agreement on Diplomatic and Consular Properties with the Government of Azerbaijan granting reciprocal property rights to both countries. In the agreement, in addition to reciprocal ownership rights, the Azerbaijan Government agreed to the U.S. Government's request to purchase five properties adjacent to the U.S. Embassy in Baku from which the occupants had a clear view of the U.S. Embassy compound. The properties, which were purchased for security purposes, included two apartment buildings with tenants whom the Azerbaijan Government agreed to resettle. The resettlement issue was more difficult to resolve than originally anticipated and it took the active and sustained involvement of Ambassador Pashayev in Washington, the Foreign Ministry and Mayor's Office in Baku, and the Azerbaijan court system to settle the matter in favor of the United States. We understand the efforts

ILI US Digest/10 627 1/8/02, 1:47 PM

of the Azerbaijan Government on behalf of the U.S. Embassy also engaged the attention of the President of Azerbaijan.

In short, the Government of Azerbaijan and its Embassy in Washington have strongly and effectively supported the Department's efforts to obtain appropriate and secure facilities for our Embassy in Baku. The Azerbaijan Embassy, which has waited seven years for the right to purchase a chancery property, now has selected a site appropriate for its needs and has asked for our assistance. We feel the federal interest is compelling in this case and strongly urge the BZA to approve the Embassy's request.

On a separate matter also pertaining to the federal interest, we are aware that there is a significant issue concerning the location of chanceries in the District of Columbia that involves an interpretation of the Foreign Missions Act. The Department's views are addressed in the attachment.

* * * *

ATTACHMENT

Proper Interpretation Of Foreign Missions Act Section 206(b)(2)(B)

The Department of State notes the clarification made by the National Capital Planning Commission that a Commission staff field investigation conducted in June 2000 showed that the area in which the Azerbaijan chancery is proposed to be located meets the original standards used by the Commission in mapping the Diplomatic-Overlay. That is, the area meets the one-third/two-thirds formula [for ratio of nonresidential to residential uses]. The Department underscores further that it is the long-standing position of the United States Government (including the Department of Justice) that, in accordance with Section 206(b)(2)(B) of the Foreign Missions Act (FMA), chanceries are permitted to locate in any area in the District of Columbia "determined on the basis of existing uses, which includes office or institutional uses, *including but not limited to any area zoned mixed-use diplomatic* or special purpose, subject to disapproval by the District of Columbia Board of Zoning Adjustment in accordance with this section [section 206(d)] (emphasis added)."

ILI US Digest/10 628 1/8/02, 1:47 PM

Thus chanceries may locate outside of the Diplomatic-Overlay, and outside of areas meeting the one-third/two-thirds formula, provided that the Foreign Missions Board of Zoning Adjustment (FM-BZA) determines, on a case by case basis, that the area is appropriate for chancery location "on the basis of existing uses, which includes office or institutional uses (emphasis added)."

Put another way, the FMA does not state that chanceries may locate "in any other area… limited to any area zoned mixed-use diplomatic…." Rather the FMA states precisely the contrary: "a chancery shall also be permitted to locate… in any other area, determined on the basis of existing uses,… *including but not limited to* any area zoned mixed-use diplomatic (emphasis added.)

Accordingly, the one-third/two-thirds formula used to map the D-Overlay may not be considered a prerequisite for chancery location. Indeed, use of the formula to preclude a chancery location would run afoul of FMA section 206(b)(3). That provision states a rule of non-discrimination: "the limitations and conditions applicable to chanceries shall not exceed those applicable to other office or institutional uses in that area."

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On December 5, 2000, the Board of Zoning Adjustment determined not to disapprove the application, with certain conditions addressing community concerns that had been raised. In so doing, the Board examined the threshold statutory requirement of whether a chancery location, as a general matter, is appropriate "on the basis of [other] existing uses" in the area and then addressed six statutory criteria: 1) International obligations of the United States to facilitate the acquisition of diplomatic premises; 2) historic preservation; 3) adequacy of parking; 4) security; 5) the municipal interest; and 6) the Federal interest.

The full text of the Decision is available at *www.state.gov/s/l.*

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* * * *

DETERMINATION AND ORDER

The embassy of the Republic of Azerbaijan filed an application with the Foreign Mission Board of Zoning Adjust (Board) to locate a chancery in an R-1-A zoning district. After public hearing, the Board determined not to disapprove the application, provided that the Embassy complies with certain conditions that address community concerns, including limiting large social function at the chancery, providing additional off-site parking for such functions and restricting changes to the exterior of the subject property to ensure compatibility with nearby residential uses.

* * * *

DETERMINATION

The Board's adjudication of an application to locate a chancery is governed by Federal statute, namely the Foreign Missions Act, 22 U.S.C. § 4301 et seq. ("The Act"). It is also codified as D.C. Code § 5-1201 et seq. Within the Act, the provisions found at 22 U.S.C. § 4306, D.C. Code § 5-1206, specifically control the Board's review of such matters. Under these provisions the Board must subject the relevant facts pertaining to an application such as Azerbaijan's to a two-step test.

As a first step, under 22 U.S.C. § 4306(b)(2), D.C. Code § 5-1206 (b)(2), the Board must determine whether the area of the proposed chancery location is an area deemed acceptable for such location under the statute. Depending upon the zoning classification of the site in question, one of two separate subsections of the above provision will apply: § 4306(b)(2)(A) or (b)(2)(B); D.C. Code § 5-1206 (b)(2)(A) or (b)(2)(B). The first subsection, (b)(2)(A), applies to areas zoned medium-high or high-density residential. Proposed chancery locations in such areas are automatically deemed acceptable by operation of law, *id.,* subject to the criteria contained in §4306(d). Proposed locations in "any other area" of the District are controlled by the second subsection, (b)(2)(B). In these areas, this Board must first determine, as a threshold matter, whether a chancery location, as a general matter, is appropriate "on the basis of [other] existing uses" in the area. 22 U.S.C. § 4306 (b)(2)(B), D.C. Code § 5-1206 (b)(2)(B). The present application, by virtue of its location, is subject to this threshold inquiry.

If the proposed location passes this first test pertaining to area's general appropriateness for chancery location, the focus of the Board's inquiry then shifts to the specific factual merits of the application at

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hand, under the Act's provisions at 22 U.S.C. § 4306(d); D.C. Code § 5-1206 (d). Such specifics might include: the nature and size of the proposed chancery operation; number of employees and vehicles involved; the specific configuration of the subject site in relation to neighboring residential uses and the potential negative impact thereon, if any; the nature and extent of construction or renovation that the chancery is proposing to undertake, if any; and any other unique, site-specific factual attributes that may apply. Under the Act, the Board's weighing of these specific merits is to be based solely upon the six chancery use set forth at 22 U.S.C. § 4306(d)(1)(6); D.C. Code § 5-1206(d)(1)(6).

It should be noted that, in contrast to the first statutory test discussed above, this second test involves a review by the Board which the Act stipulates be in the nature of a disapproval process rather than one of approval. 22 U.S.C. § 4306(b)(2)(B); D.C. Code § 5-1206 (b)(2)(B). In other words, once the Board has determined, under the first test, that the subject area is appropriate for chancery location as a general matter, the specific chancery proposal in question gains a presumption of appropriateness which may be overcome only in the event the Board can identify from the record specific grounds for disapproval.

The present chancery application will now be analyzed according to the Act's two-fold test just described.

Appropriateness of the Area In General

By both written submission and oral testimony at the hearing, several persons in opposition to the Azerbaijan application assert that the area in question is inappropriate under the Act for chancery location.…

At the heart of the arguments advanced by the Office of Planning and the other opposing persons and organizations are issues revolving around the Diplomatic or "D-overlay" District. The Application's opponents contend that, since the subject site falls outside, albeit just outside, the boundaries of the D-overlay as it is mapped at this location, the Board has no choice under the first of the two tests mentioned but to determine that the site fails to qualify under § 4306(b)(2)(B) as acceptable chancery location based upon other uses existing in the area. In specific, OP stresses that the ratio of nonresidential to residential uses today existing within square 2122 falls short of the 1/3-to-2/3 ratio which was the prerequisite for inclusion in the D-Overlay District. It was uncontested during the proeedings that the subject site indeed does not fall within the

ILI US Digest/10 631 1/8/02, 1:47 PM

mapped "D-overlay," although much of the subject zoning square itself does in fact lie within it. No authoritative reason was presented to the Board explaining why in mapping square 2122, the Zoning Commission should have departed from its standard procedure of calculating and mapping the nonresidential/residential ratio on the basis of a complete square.

Notwithstanding the status of the D-overlay as it relates to this site, the Applicant and the Department of State for their part contended, in oral presentations and written submissions, that the absence of the D-overlay here could not automatically be seen as compelling the Board's determination that the subject site was *per se,* inappropriate for any sort of chancery location. The Department's representative, Mr. Mlotek, argued during his presentation that treating the D-overlay as dispositive as to the first of two tests discussed above (i.e., the inquiry under §4306(b)(2)(B)) would be inconsistent with the Act. Mr. Mlotek emphasized this view constituted the longstanding position not only of the Department of State, but also the United States Government as a whole, having been adopted by the Department of Justice. Likewise, he noted, this Board, along with the District's Corporation Counsel, had also concurred in this view in the past. Accordingly, he argued, the absence of the overlay from a given site could, at very most, be regarded by this Board as a guide as to the appropriateness of that area for chancery location based upon "existing uses". Under the Act, Mr. Mlotek concluded, the authority to determine whether existing uses in an area make that area appropriate or inappropriate for chancery location rests solely with this Board, to be exercised on a case-by-case basis. Such authority could not, he contended, be exercised by the Zoning Commission or any other body, through promulgation of a map or otherwise. Applicant's counsel, Ms. Giordano, argued in a similar vein.

In resolving these opposing positions, the Board must act in accordance with its precedent and with what the Board believes is the clearly correct construction of the provisions contained in § 4306(b)(2)(B). As this Board determined in Application No. 14820 (the Application of Taiwan), a chancery location outside the D-overlay is not precluded as a matter of law, regulation, or policy. The question of the appropriateness of such a location is to be determined by this Board in each case. In the present case, we find that the proposed location is appropriate, given the abundant presence of other nonresidential uses both within square 2122 itself as well in the immediately surrounding area.

ILI US Digest/10 632 1/8/02, 1:47 PM

As regards the subject square itself, we find that by any reasonable application of the well-known 1/3-2/3 ratio, that square wold qualify for inclusion into the D-overlay if it were being remapped today. In this regard the following factors are material and dispositive.

First, as testified by the Department of State, and as is confirmed by the Department's official, published *Diplomatic List*, the building registered as the chancery of the Vatican, formally known as the Apostolic Nunciature, is the sole and exclusive diplomatic office maintained by the Vatican in the District. While some of the mission's staff do clearly reside in the building, this fact does not support the opponents' conclusion that the majority of the Nunciature's square footage is in fact utilized for residential purposes. Without challenges from any party, the Department of State testified that the large reception areas of the building were utilized as the principal location for the mission's official meetings and functions. Such uses cannot reasonably be seen as related or ancillary to the building's residential uses. They are clearly official and hence nonresidential in nature.

Second, as a matter of law, the Vatican's chancery is entitled, without any further approval by any party, to be utilized immediately for nonresidential use in its entirety. *See 22* U.S.C. § 4306(h)(2). …

* * * *

…[t]he Board also notes that, even if in this case the land use within square 2122 fell short of the 1/3 nonresidential ratio, the Board would have difficulty concluding that the existing uses in the area were so exclusively residential as to preclude a chancery location. This difficulty would arise by virtue of the many other substantial, nonresidential uses in the near vicinity that were identified above, including the Belgian, Finnish, and Norwegian chanceries, together with the Naval Observatory and National Cathedral complexes.

Determination Relating to the Specific Proposal

As the second of the two tests established in the statute, Section 206(d) of the Foreign Missions Act, 22 U.S.C.A. § 5306(d), D.C. Code § 5-1206(d), establishes six criteria upon which the Board must base its determinations regarding the specific merits of a particular chancery location, once the first test regarding the area's general appropriateness has been met. The chancery use criteria are also set forth in 11 DCMR § 1001. After extensive public hearings and having carefully

ILI US Digest/10 633 1/8/02, 1:47 PM

and fully reviewed the record, the Board has determined [not to disapprove the Application.]

* * * *

b. Enforceability of agreed conditions on embassy operations

In another Decision of the D.C. Board of Zoning Adjustment, issued January 5, 2000, the Board addressed the issue of enforceability of agreed conditions on embassy operations in an application by the Republic of Benin. The Board also rejected an argument that it should disapprove the chancery application because the neighborhood was already "saturated" with chanceries. A challenge to the Board decision filed by neighbors of the planned site in federal district court, *2120 Kalorama Rd, Inc. v. District of Columbia Foreign Missions Act-Board of Zoning Adjustment and the United States of America* (Civil Action 00-1568(WBB)) was pending at the end of 2000.

The full text of the Board Decision, approving an application for the Embassy of the Republic of Benin, is available at *www.state.gov/s/l.*

* * * *

DETERMINATION AND ORDER

The Adel Partnership filed an application with the Foreign Missions- Board of Zoning Adjustment (Board) on behalf of the Embassy of the Republic of Benin to locate a chancery in a mixed-use diplomatic

ILI US Digest/10 634 1/8/02, 1:47 PM

zoning district. After public hearing, the Board determined not to disapprove the application provided Embassy complies with certain agreed-upon conditions that address community concerns, including maintaining the historic and residential character of the neighborhood and parking and traffic.

* * * *

5. The Municipal Interest

Under 11 DCMR § 1001.7, the Board must "consider the municipal interest, as determined by the Mayor." The Mayor of the District of Columbia has delegated authority to the Office of Planning to determine the municipal interest for purposes of Section 206 of the Foreign Missions Act. *See* Mayor's Order 83-106 (Apr. 28, 1983). The Office of Planning questioned whether the proposed chancery was in the municipal interest, but did not make a recommendation as to the Board's determination with respect to the municipal interest.

Based upon its analysis of traffic and neighborhood impacts, the Office of Planning expressed strong concerns that the application does not meet the criteria for location of a chancery in a D/R-1-B district. The Office of Planning concerns with respect to historic preservation, maintenance of the proposed chancery, and parking and traffic have been addressed above in sections 2 and 3 of the Board's determination and will not be repeated here. The Office of Planning also raised the concern that the Sheridan-Kalorama area has become "saturated" with chanceries, such that the proposed new chancery would have a significant adverse impact on its residential character.

The Office of Planning concurs with ANC ID that the subject property is "essentially a residential use area." Councilmember David A. Catania also considered the Sheridan-Kalorama neighborhood as essentially a residential use area. Section 1104.1(t) of the Comprehensive Plan, Policies in Support of the Residential Neighborhood Objective, states District of Columbia policy to

> Discourage the location of new chanceries and the expansion of existing chanceries in any area that is essentially a residential use area, consistent with section 206(b)(2) of the Foreign Missions Act, approved August 24, 1982 (96 Stat. 286, D.C. Code 5-1206(b)(2).

ILI US Digest/10 635 1/8/02, 1:47 PM

There is an inherent tension in this policy, which on the one hand seeks to discourage the location of chanceries in essentially residential use areas and, on the other, recognizes that under Section 206(b)(2) of the Foreign Missions Act, chanceries are permitted to locate in any area zoned mixed-use diplomatic, subject to disapproval by the Board in accordance with the Section 206(d) chancery use criteria. While the Board cannot, consistent with Section 206(b)(2) of the Foreign Missions Act, disapprove this application to locate a chancery in a mixed-use diplomatic district on the grounds that the area that is essentially a residential use area, the Board has included in this order numerous conditions designed to maintain the premises in a manner consistent with the residential character of the neighborhood.

These conditions include requirements and restrictions relating to landscaping and maintenance, interior and exterior lighting, draperies and shades, deliveries and pick-up, storage and collection of trash, parking, social functions, resident caretaker services, security systems, brick fencing, telecommunications equipment and antennas, and historic preservation. In addition, the Embassy of the Republic of Benin plans to retain a property management company to look after both the new chancery and the Cathedral Avenue chancery annex. The Office of Planning was not aware of the Embassy's plans to retain a resident caretaker and property management company until the December 8, 1999 hearing, and indicated at the hearing that these plans, if carried out, would overcome one of its major objections with respect to the application.

* * * *

The Office of Planning also raised concerns about the enforceability of the conditions under which the Embassy has agreed to operate and which the Board has included in its order. For example, while acknowledging that the Embassy's proposed shuttle system is a reasonable solution to the parking issue, the Office of Planning points out that long-term monitoring is required to ensure that the new chancery can actually provide adequate parking.

Ronald S. Mlotek, Chief Legal Counsel, and Richard C. Massey, Office Director for Real Estate of the State Department's Office of Foreign Missions, addressed the question of enforcement. The State Department has taken the position that the Board can impose conditions, whether agreed-upon or not, in its determinations under the Foreign Missions Act. Under Section 206(g) of the Foreign Missions Act, 22

ILI US Digest/10 636 1/8/02, 1:47 PM

U.S.C.A. § 4306(g), D.C. Code § 5-1206(g), "The Secretary [of State] shall require foreign missions to comply substantially with District of Columbia building and related codes in a manner determined by the Secretary to be not inconsistent with the international obligations of the United States." When the Board includes conditions in its order on a chancery application, the State Department considers those conditions enforceable in the same manner and to the same extent as the building and related codes of the District of Columbia.

The State Department outlined the procedures that should be followed in the event of a violation or other community concern. The complaining party should first contact the pertinent embassy to discuss the matter. If that fails, the next step would be to request the relevant District of Columbia agency to investigate the matter and certify to the State Department that a violation has occurred. The State Department will then take up the matter diplomatically with the foreign mission. In the case of exigent circumstances, complaints should be referred directly to the State Department.

* * * *

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2. Communications with Diplomatic and Consular Missions

a. Employment of foreign domestic employees

By circular diplomatic note to Chiefs of Mission in the United States dated June 19, 2000, the Secretary of State provided guidance on a change in requirements concerning foreign domestic employees. Under the new guidance, every employee must enter into a contract which must contain certain terms, including in particular a provision for payment of minimum or prevailing wages, whichever is higher.

The full text of the note is available at *www.state.gov/s/l*.

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ILI US Digest/10 637 1/8/02, 1:47 PM

The Secretary of State presents her compliments to Their Excellencies and Messieurs and Mesdames the Chiefs of Mission and has the honor to refer to the circular diplomatic note dated May 20, 1996, regarding the employment of personal servants, attendants, and domestic workers who are in the United States in nonimmigrant A-3 visa status, a copy of which is enclosed.

The Department wishes to inform the missions of a change in the requirements for the employment of domestic employees. Every prospective employer is required to offer a written contract of employment to the domestic employee (housekeeper, handyman, cook, gardener, babysitter, caretaker or other attendant). The contract must be in English and, if the domestic employee does not understand English, in a second language that he or she understands. Two copies of the contract should be signed by both parties with one for the employer and one for the domestic employee.

Domestic employees applying for an A-3 visa to enter the United States must provide a copy of the signed contract with their visa application.

Members of the diplomatic and consular community who wish to hire domestic employees who are already in the United States in A-3 visa status are also required to offer a written contract of employment. When a request for a renewal or an extension of an A-3 visa is made, a copy of the current contract should accompany the request sent to the Department.

The employment contract is required to assist the employer and the employee in establishing a good faith employment relationship. Both parties to the contract are expected to carry out the terms of the contract. The contract should include the following:

- Description of duties…
- Hours of work…
- Minimum wage…
- Transportation to and from the United States…
- Other terms of employment…
- Record keeping…

The Department also wishes to remind the embassies that all personal employees must be notified by the mission to the Office of Protocol upon arrival and departure (including abandonment) of employment or transfer to a new employer.

If an employer seeks to replace an employee or add to his/her existing domestic staff, the A-3 visa may be denied if there is reason to

ILI US Digest/10 638 1/8/02, 1:47 PM

believe that the employer has failed to fulfill his/her obligations to a former or current employee, such as to pay a fair wage. Domestic employees will be provided with a copy of the enclosed information sheet when obtaining their visas. The sheet informs them, in general terms, of their customary and legal rights while in the United States, including protection from abuse. The sheet also provides a complaint telephone number, 1-888-428-7581, in the event the domestic employee believes his or her rights are not being observed.

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b. Voluntary cooperation with 2000 census

By circular note to Chiefs of Mission in the United States dated February 14, 2000, the Secretary of State solicited voluntary cooperation in the 2000 census.

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The Secretary of State presents her compliments to Their Excellencies and Messieurs and Mesdames the Chiefs of Mission and has the honor to inform them that in accordance with the requirement of the United States Constitution that a census be taken every 10 years, the 22nd census will be conducted as of April 1, 2000.

The purpose of the census is to count all of the persons who have a "usual residence" (the place where a person lives and sleeps most of the time) in the United States, without regard to a person's legal status or citizenship. Specifically excluded from the census are foreign travelers who have not established a residence in the United States.

The Bureau of the Census, between March 13th and 15th, will have census questionnaires delivered to all households throughout the United States, including the residences of members of the diplomatic community. The questionnaires should be answered and mailed by April 1, 2000 in the postage paid envelope provided in the census package.

All information provided in response to the questionnaire, in accordance with U.S. Law (13 United States Code 9), is confidential and

ILI US Digest/10 639 1/8/02, 1:47 PM

completed questionnaires may only be seen by duly sworn census employees.

The Department recognizes that participation by members of the diplomatic community in the census is voluntary. At the same time, the Department solicits the full cooperation of all diplomatic missions, their members, and families in complying with the procedures for taking the 2000 census so that the count will be as accurate and complete as possible.

In the normal course of administering the census, the Bureau of the Census will follow-up with all households in the United States from which it has not received a response. The period of follow-up is from April 27th through approximately July 7th. Members of the diplomatic community who have not responded may receive a follow-up telephone call or a visit from a census taker. The Department wishes to provide the same guidance as above with respect to the follow-up, that is, participation by members of the mission is encouraged, but it is voluntary.

ILI US Digest/10 640 1/8/02, 1:47 PM

CHAPTER 11

Trade, Commercial Relations, Investment and Transportation

A. TRANSPORTATION BY AIR

1. International Civil Aviation Organization: Disagreement between U.S. and EU Member Countries

a. U.S. Application and Memorial

On March 14, 2000, following extensive negotiation efforts among the parties, the United States filed an Application and Memorial with the Council of the International Civil Aviation Organization submitting a disagreement between the United States and EU member countries for settlement by the Council. The excerpts from the Memorial below provide the position of the United States that the Respondent EU countries, in adopting and undertaking to apply in their territories European Council Regulation (EC) No. 925/1999, violated their international obligations under the Chicago Convention and its Annex 16. The United States argued that the European Council, acting unilaterally and with discriminatory intent, adopted the regulation at issue, which limits registration and operation in Respondents' territories of aircraft that are in full compliance with the most stringent international noise stan-

ILI US Digest/11 641 1/8/02, 1:47 PM

dards and impermissibly conditions imposition of the restrictions on the nationality of the aircraft through its implementing provisions.

The full text of the Memorial is available at *www.state.gov/s/l.*

* * * *

(e) Statement of Law

A principal objective of the Chicago Convention is to allow international air transport services to be "established on the basis of equality of opportunity and operated soundly and economically." Chicago Convention, preamble paragraph 3. This objective may be achieved only if States do not discriminate on the basis of nationality and they do not deviate from international standards. The prohibition against discriminating on the basis of the nationality of aircraft is most clearly set out in Articles 11 and 15 of the Convention. Those Articles prohibit States from relying upon the State of registration of aircraft as a basis for discriminating, either in the context of promulgating laws affecting international civil aviation or in permitting access to their public airports. *See* Chicago Convention Articles 11 and 15.[4]

Under the Convention, States also undertake "to collaborate in securing the highest practicable degree of uniformity in regulations… in all matters in which such uniformity will facilitate and improve air navigation." Chicago Convention Article 37. Unquestionably, noise regulations fall within the category of matters requiring such collaboration. Nevertheless, the Convention anticipates that there will be times when it is necessary for a contracting State to adopt regulations or

[4] Article 17 of the Convention provides that "aircraft have the nationality of the State in which they are registered." Accordingly, "nationality" and "state of registration" are used interchangeably in this Memorial.

ILI US Digest/11 642 1/8/02, 1:47 PM

practices differing from the international standards. Accordingly, Article 38 of the Convention sets out guidelines for States deviating from the international standard, including the obligation to notify ICAO immediately.

In adopting a discriminatory, design-based standard, Respondents have disregarded this framework and have violated the Convention. The Convention provides no defense to the Respondents' violation of the prohibition on discriminating on the basis of aircraft nationality. However, if a contracting State meets the standards of Article 38 and must adopt noise certification requirements stricter than, or in addition to, the international standard, there is a procedure for it to do so. It must, however, give notice to ICAO of that difference, in accordance with Article 38 of the Chicago Convention. Respondents have failed to give such notice.[5]

A. *The Regulation Violates Articles 11 and 15 of the Convention by Discriminating on the Basis of Aircraft Nationality.*

Articles 11 and 15 of the Chicago Convention prohibit States from discriminating among aircraft on the basis of nationality in allowing access to their airports and airspace or in applying their laws relating to operation and navigation of aircraft. Article 11 provides:

> Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.

[5] The procedure for notifying differences under Article 38 is expressly limited to departures from international standards and procedures. *See* Article 38 (Departures from international standards and procedures). Clearly, States cannot violate the provisions of the Convention, such as the non-discrimination provisions of Articles 11 and 15, and invoke an Article 38 notice as a defense.

ILI US Digest/11 643 1/8/02, 1:47 PM

Article 15 provides, in pertinent part:

> Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States.

The regulation is inconsistent with Article 11 of the Convention, because it distinguishes among aircraft, granting or denying the ability to operate within Respondents' territory, based upon the nationality of the aircraft. *See* Regulation, Article 3. For example, under the regulation, a targeted aircraft that transfers registries after May 4, 2000, will be excluded from Respondents' airports, but not if both the old and new registries were in Respondents' states. Thus, the Respondents will inquire into the past and present nationalities of aircraft and will discriminate against aircraft with similar noise levels, depending upon their nationalities at specified times.

Under the regulation, a targeted aircraft's transfer of registries between the United States and Canada would result in an aircraft losing its right to operate into Respondents' airports, whereas, a similar aircraft transferred between two Respondent States could continue to operate into any of Respondents' airports. *See* Regulation, Article 3. Consequently, a U.S. registered targeted aircraft sold to, and re-registered in, a third country after May 4, 2000, would not be permitted to operate into Respondents' airports after April 1, 2002.

Moreover, pursuant to Article 15, contracting States may not invoke a condition to deny access to its airports by aircraft of foreign registry, unless those conditions are applicable on a uniform basis to national aircraft. The regulation violates that provision, because it constitutes a condition on access to Respondents' airports that is not applied on a uniform basis to aircraft of all nationalities. The regulation targets certain design standards and denies access to its airports by targeted aircraft not on a Respondent's registry, in situations where access would be permitted for aircraft that were on any of Respondents' registries. For example, targeted aircraft of Respondents' registries may be transferred freely among those registries and continue to operate into any of Respondents' airports. However, if a U.S. airline purchased a targeted aircraft from an airline of any Respondent after

ILI US Digest/11 644 1/8/02, 1:47 PM

May 4, 2000, the aircraft could not operate into any of Respondents' airports after April 11, 2002.

THE DISCRIMINATORY NATURE OF THE REGULATION IS DEMONSTRATED BY ITS DISPARATE IMPACT ON U.S. INTERESTS

As established above, the regulation discriminates explicitly on the basis of aircraft nationality, in violation of Articles 11 and 15 of the Convention. However, impermissible discrimination also has been interpreted, in the context of civil aviation, to include disparate impact, in addition to direct discrimination. *See* Award on the First Question, U.S./U.K. Arbitration Concerning Heathrow Airport User Charges (November 1992), at pages 324-26. Unpublished (on file in the Office of the Legal Adviser, U.S. Department of State) (hereinafter "Award") (*See* Attachment 8).[6]

In the U.S./U.K. Arbitration, the arbitral tribunal rejected the argument that the disputed pricing structure was non-discriminatory because, objectively, airlines of each side were subject to the same rate schedule. Rather, the Tribunal found "nothing in Article 10(2) [user charges provision of the bilateral agreement] or, indeed, in Article 15 of the Chicago Convention on which it is based, to support the proposition that discrimination need be assessed only by reference to "overt" behavior, "which may, in fact, mask actual discrimination, when other operational factors are taken into account…."[7] Award, ch. 8, at 324-25, para 7. *See* Attachment 9. The Tribunal further concluded that "an examination of potentially discriminatory practices requires more than a superficial comparison of the schedule of charges on a flight by flight basis; rather, it

[6] Discussed in S.M. Witten, "The U.S.-U.K. Arbitration Concerning Heathrow Airport User Charges," 89(l) *Am. Jrnl. All. Law* 174-192 (1995) and J. Skilbeck, "'The U.S./U.K. Arbitration Concerning Heathrow Airport Charges," 44(l) *The International and Comparative* Law *Quarterly,* pp. 171-179 (1995).

[7] In the Heathrow Arbitration, the arbitral tribunal also considered whether the U.K.'s failure to monitor "whether the operation of the sharply differentiated peak/off-peak charging system [for landing fees) was in practice working inequitably, to the detriment of the U.S. airlines, by reason of British Airways having some advantage, that was denied to Pan Am/TWA in relation to re-scheduling flights out of terminal peak hours." Award, ch. 6, at 207, para 11.2.37 *(See* Attachment 8).

ILI US Digest/11 645 1/8/02, 1:47 PM

mandates a closer inquiry into the overall effect of charges and related rules….” *Id*. at 326.

Given the clear evidence in the legislative history of the regulation of the EU intent to target U.S. hushkitted aircraft, and the effect of the regulation on U.S. interests, Respondents’ violation of the non-discrimination provisions of the Chicago Convention is established by the disparate impact the regulation has on U.S. interests.

B. *Respondents Have Failed to Comply with Article 38 of the Chicago Convention.*

The Respondents have failed to comply with the requirements of Article 38 of the Convention, because they have adopted a regulation inconsistent with international standards, without immediately notifying ICAO of the differences between their own practice and that established by the international standard. Pursuant to Article 37 of the Convention, States undertake:

> to collaborate in securing the highest practicable degree of uniformity in regulations… in relation to aircraft… in all matters in which such uniformity will facilitate and improve air navigation.

Pursuant to Article 38:

> Any State which finds it impracticable to comply in all respects with any such international standard or procedure… or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard.

ICAO’s global standards for aircraft noise certification appear in Volume I of Annex 16 to the Chicago Convention. Those standards dictate that the noise evaluation measure for subsonic jet aeroplanes “shall be the effective perceived noise level.” Annex 16, Volume I, Standard 3.2.1.1. *(See* Attachment 9). This measurement is to be in EPNdB (Ef-

ILI US Digest/11 646 1/8/02, 1:47 PM

fective Perceived Noise level in decibels) as described in Appendix 2 to Annex 16, Volume 1. Thus, ICAO's Chapter 3 standards are based on the acoustic performance of the aircraft. The standards include procedures and guidelines for noise measurement, testing, and certification. *See* Annex 16, Volume 1, Chapter 3 (Attachment 9).

The EC regulation sets out noise standards based upon whether the aircraft has been modified to meet Chapter 3 standards and whether it has been recertificated. In conjunction with these tests, the regulation references specific design standards. Annex 16 does not establish noise standards based on whether aircraft have been modified or based upon any aircraft design specifications.[8] Thus, the standards that the Respondents are bound to implement constitute differences from the international standards set out in Annex 16.

There can be no question but that the promulgation of noise standards constitutes a matter in which uniformity would facilitate and improve air navigation, within the meaning of Article 37. ICAO has, in fact, long been the recognized forum for setting international noise certification standards for aircraft. Whereas, the Respondents, through the EU, have acknowledged their regulation as a new environmental standard for aircraft;[9] nevertheless, they have failed to comply with the requirement of Article 38 to notify their difference to ICAO.

The regulation already has been challenged in Europe as an unjustified departure from international standards and the High Court of Justice in the United Kingdom supported that challenge. In the case of *Regina v. Secretary of State for the Environment, Transport and Regions, ex parte Omega Air Limited* (UK High Court of Justice November *25, 1999) (hereinafter referred to as the "Omega"* case at Attachment 11), the

[8] Annex 16, Chapter 3 relies exclusively on aircraft performance levels. Similarly, Chapter 2 of Annex 16, volume 1, adopted in 1977, also relied on aircraft performance for purposes of determining which aircraft might be restricted under that standard. However, Chapter 2 also made reference to aircraft engine by-pass ratio, but solely in the context of exempting such aircraft from the noise standards. *(See* Attachment 9) The provision did not establish a precedent for restricting aircraft that meet the international noise standard.

[9] The European Union published in its web page, at www.eurunion.org/news/press/1999, under "The European Union Press Releases, on March 29, 1999, as EU PR 14/99, a press release advising that "This legislation places the EU at the forefront of elaborating the most stringent environmental standards for aircraft which is the normal responsibility of ICAO." *See* Attachment 10 ("Press Release").

ILI US Digest/11 647 1/8/02, 1:47 PM

High Court of Justice noted serious questions as to the validity of the regulation. The applicant in that case, an Irish company engaged in trading in aircraft and engine refurbishment, re-engined a number of Boeing 707 aircraft with engines having a by-pass ratio (BPR) of less than three. The applicant sought the court's referral to the European Court of Justice (ECJ) for annulment of Council Regulation EC No. *925/1999,* with respect to its restrictions linked to engine by-pass ratio. The Court noted that the regulation would prevent Omega's re-engined aircraft from being operated in the EU, thus making them commercially nonviable for potential customers. *Omega* at 4.

The *Omega* Court generally found in favor of the Applicant, referring to the ECJ questions relating to the validity of the regulation. *Omega* at 33. In reaching that conclusion, the Judge made a preliminary finding that the international standard for aircraft noise is based on decibel levels and the regulation fails adequately to explain its reliance on by-pass ratio. *Id*. at 17. Reviewing both ICAO standards and Article 2 of the WTO Agreement on Technical Barriers to Trade, which establishes rules against technical barriers to trade, the Judge determined that the regulation requires explanation for moving from a decibel level related test to a by-pass ratio method. *Id*. at 13-17. Further, the Judge noted the need for some rationale in support of the specific by-pass ratio chosen. *Id*. at 17. The Judge noted "his own view" that the regulation seems wholly defective for these reasons. *Id*. at 17.

In accordance with ICAO procedures, the State of Registry of an aircraft relies upon Annex 16 noise evaluation standards in granting or validating noise certification of an aircraft. An aircraft that complies with requirements that are at least equal to the Annex 16 standards must be certificated. Annex 16, Volume 1, Standard 1.2

C. *Respondents Violated Annex 16, Volume 1, Standard 1.5*

The EC regulation also violates the Respondents' obligation, set forth in Annex 16, to recognize the noise certifications of other States, so long as the other State's certification standards at least meet the standards in Annex 16. The obligation of contracting States to recognize the noise certification of other contracting States is set out in Annex 16:

ILI US Digest/11 648 1/8/02, 1:47 PM

> Contracting States shall recognize as valid a noise certification granted by another Contracting State provided that the requirements under which such certification was granted are at least equal to the applicable Standards specified in this Annex.

Annex 16, Volume I, Standard 1.5. (*See* Attachment 9). The EC regulation compels Respondents to prohibit operation into their territories by some U.S. registered aircraft that have been granted noise certification in accordance with ICAO Standards; whereas, Annex 16, Volume 1, Standard 1.5 obligates Respondents to open their airports to all aircraft so certificated. Thus, the EC regulation's imposition of additional tests (including whether the aircraft has been recertificated, modified, or transferred between registries) in the context of regulating noise, for purposes granting access into Respondents' airports, violates Annex 16, Volume 1, Standard 1.5.

The obligation of a State to recognize a noise certification means that the State into which the certificated aircraft seeks to operate cannot deny access to its airspace or airports on the basis of some additional noise based requirement. Except to the extent that a State has, in accordance with the requirements of the Convention, notified a difference to ICAO, the obligation States incur under Annex 16, Volume 1, Standard 1.5 may not be qualified or modified through legislation or administrative regulations enacted by the individual State. *See British Caledonian Airways Ltd v. Bond,* 665 F.2d 1153, 1161 (D.C. Cir. 1981) (interpreting Article 33 of the Convention, which employs language equivalent to that in Standard 1.5 recognizing certification granted by other States party to the Chicago Convention) *(See* Attachment 12).

In the *British Caledonian* case, the British airline was joined by Swissair, Balair AG, Lufthansa, and Alitalia in challenging an order issued by the FAA prohibiting the operation of all Model DC-10 airplanes within the airspace of the United States, including aircraft registered in other countries. The order, which addressed an apparent safety hazard, was issued following a DC-10 crash that killed 271 people and following findings by the U.S. National Transportation Safety Board (NTSB) to justify grounding the aircraft.

The matter came before U.S. courts on the argument that FAA violated U.S. law, the predecessor to 49 U.S.C. § 40105(b)(A), which obligated the FAA Administrator to comply with U.S. international obliga-

ILI US Digest/11 649 1/8/02, 1:47 PM

tions. The airlines argued, and the court found, that absent the Administrator raising the question of whether the foreign governments that had certificated the DC-10s had failed to observe the minimum safety standards referred to in Article 33 and set forth in Annex 8, the FAA could not, consistently with Article 33, question the airworthiness judgment of the country of registry. 665 F.2d at 1162.[10]

Notably, the EU rule is not predicated on any finding that the targeted aircraft, whether modified in the United States or elsewhere, fail to meet the standards of Chapter 3 of Annex 16, Volume 1. Neither has any Respondent challenged the targeted aircraft's compliance with international standards. To the contrary, the regulation implicitly recognizes the targeted aircraft's compliance with Chapter 3 standards, by permitting some of the targeted aircraft to continue operating in the Respondents' territories without restriction. Furthermore, Respondents have consistently recognized U.S. aircraft noise certification, including Chapter 3 noise certification of U.S. hushkitted and re-engined aircraft, in accordance with their obligation to do so under Standard 1.5 of Annex 16, Volume 1. *(See* Attachment 9).

The EC regulation creates two classes of aircraft within Annex 16, Volume 1, Chapter 3. While the aircraft in both classes comply with the noise requirements in that Chapter, one class could be registered and operated in Respondents' territories after April 2002, whereas the other class could not. These classifications are based upon criteria that have no relevance to the standards in Annex 16, including: whether the aircraft has been recertificated, whether the aircraft has been operated in Respondents' territories, and where the aircraft has been registered. These classifications are incompatible with the requirements of Annex 16.[11]

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[10] The *British Caledonian* case involved a violation of Article 33 of the Convention; whereas, the present disagreement concerns a violation of Standard 1.5 of Annex 16 to the Convention. While the Convention provides no justification for non-compliance with provisions of the Convention itself, the Convention does provide justification and procedures for non-compliance with standards and the Annexes in Articles 37 and 38. Accordingly, if the Respondents had appropriate justification, and followed Article 38 procedures for notifying differences, their noncompliance with Standard 1.5 of Annex 16 would not constitute a breach.

[11] *See generally* ICAO Document C-Min 156/16 19/3/99 Council - 156th Session, Summary Minutes of the Sixteenth Meeting (The Council Chamber, Friday 19 March 1999, at 1000 hours) at p.8, para 23 (comments of D/LEB) (Attachment 13).

ILI US Digest/11 650 1/8/02, 1:47 PM

For these reasons, the EC regulation differs in particular respects from international standards and, therefore, Respondents were obligated, under Article 38 of the Convention, to give immediate notice to ICAO of the differences between their practice and the international performance-based standard, once the EC regulation became law on May 4, 1999.

Furthermore, by assuming an obligation to exclude from their airports, on the basis of noise, aircraft certificated by the United States as compliant with applicable international noise standards, Respondents violate their obligation under Annex 16, Volume 1, Standard 1.5 to recognize the noise certifications of other States.

D. *Suspension of the Regulation Neither Excuses Respondents' Breach nor Justifies Delay of a Review*

The regulation, although not yet applied, has been incorporated into law and represents a binding undertaking of the Respondents. In that regard, the Respondents stand in violation of Article 82 of the Convention, which provides, in pertinent part:

The contracting States accept this convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings. The regulation constitutes a set of obligations and understandings undertaken by Respondents that are inconsistent with Articles 11, 15, and 38 and Annex 16 of the Convention. Therefore, the Respondents presently are in breach of the Convention.

Even before its application, the regulation has caused significant harm to operators of U.S. aircraft as well as to U.S. manufacturers of hushkits and targeted engines. This harm is suffered because the regulation forces U.S. airlines and U.S. aircraft to anticipate, in all decisions relating to acquisition, modification, positioning, operation, maintenance, and disposition of aircraft, the discriminatory limitations on their access to Respondents' airports. U.S. airlines are being prevented from making the decisions most appropriate for their purposes, even among options that would comply with all applicable international standards.

Furthermore, there is no just reason for delaying a legal review of the regulation. Just as was found in the *Omega* decision, the parties to this dispute and all States affected by the regulation "should be able to act with certainty in regard to the legal efficacy of the Regulation." *Omega*

ILI US Digest/11 651 1/8/02, 1:47 PM

at 6. (Attachment 11). The judge in *Omega* discussed, in this context, the case of *The Queen v. Secretary of State for Health, ex parte Imperial Tobacco Limited* [ECJ 1991], where the European Court of Justice held, in light of existing uncertainty as to whether a particular directive could be made legally effective, that the Court "should be prepared to grant declaratory relief in respect of the intention and obligation of the Government of the United Kingdom to implement the requirements of the directive…" *Imperial Tobacco,* EuLR page 5 82, *quoted in Omega* at 4-5. Likewise here, Respondents are obligated to implement the Regulation, which is now law, and thus, this matter is ripe for review.

* * * *

(g) Report of Negotiation

Negotiations to settle the present disagreement have taken place between the parties but have not been successful. Protracted negotiations have failed to bring the parties near to agreement, despite engagement at the highest levels.

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b. U.S. Response to Preliminary Objections

On September 15, 2000, the United States filed a Response to the Preliminary Objections Presented by the Member States of the European Union, raised in a Statement dated July 18, 2000. The excerpts below set forth the United States position on the following objections raised by Respondents: 1) that the United States failed to meet the jurisdictional requirement for negotiations prior to initiating dispute resolution under Article 84 of the Convention on International Civil Aviation, done in Chicago, December 7, 1944, and the ICAO Rules for the Settlement of Differ-

ILI US Digest/11 652 1/8/02, 1:47 PM

ences; 2) that U.S. claims were not first litigated in local courts in Europe; and 3) that the ICAO Council lacks authority, even after finding a party has violated the Convention and its Annexes, to create new obligations requiring the party to cease its unlawful conduct and comply with its legal obligations. On November 16, 2000, following oral presentations, the ICAO Council issued a Decision dismissing the first and second preliminary objection and joining the third to the merits, while inviting the Parties to continue their negotiations. Decision of the ICAO Council on the Preliminary Objections in the Matter "United States and 15 European States (2000)."

The full texts of the U.S. Response and the ICAO Council Decision are available at *www.state.gov/s/l.*

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II. ARGUMENT

1. The Negotiations

The Respondents argue first that the U.S. Application and Memorial should be dismissed for failure of the United States to attempt to resolve this dispute by proper negotiations. Preliminary Objections at ¶¶9 *et seq.* To support this argument, the Respondents assert that "none of the questions of interpretation and application of the Convention raised by the U.S. in its Memorial have been discussed." *Id*. at 19. The Respondents are wrong as a matter of fact, but they also misstate the applicable legal standard for pre-filing negotiations.

1.1 The history of the negotiations.

The Respondents' history of negotiations with the United States, as set forth in Annex I to the Preliminary Objections, is incomplete and

inaccurate in material respects. In addition, substantial portions, including details of the Respondents' unacceptable settlement proposals, are irrelevant to the Council's decision. The history of diplomatic negotiations relating to this dispute is over three years long and includes innumerable written and oral communications. Because of both the frequency of these communications and the different levels of formality at which they occurred, it would be virtually impossible to set out a complete history. Consequently, the following describes only a limited number of communications, which are more than sufficient to rebut the Respondents' allegations. The communications establish not only that negotiations to settle the dispute had taken place between the parties and that these negotiations were not successful (the applicable legal standard), but also that the dispute could not be settled by negotiation.

* * * *

1.2 The negotiations addressed the details of the U.S. claims.

As demonstrated above, the United States identified during pre-filing negotiations with the Respondents the various concerns raised by the Regulation, including the violations of the Convention and its Annex 16 that form the basis of the U.S. claim. In these communications, the United States: complains that the Regulation deviates from international standards, including its improper reliance on a design standard; challenges the Regulation for its discrimination based on the state of registry of aircraft; and declares that the Regulation has the effect of rejecting noise certifications granted to U.S. registered aircraft. Those communications are a small sampling of the U.S. pleas to the Respondents to comply with their international obligations and the Respondents' refusal to reverse their unlawful action. It is thus clear that the Respondents were made abundantly aware of the relevant bases for the U.S. concerns. It is equally clear that the factual allegations forming the essential underpinning of the Respondents' first grounds for challenging the Council's jurisdiction in this matter are incorrect and without substance.

1.3 The Respondents applied the wrong standard.

In addition to making inaccurate allegations of fact to support their claim of inadequate negotiations, the Respondents also apply the wrong legal standard for negotiations, to the extent they assert that a State may

ILI US Digest/11 654 1/8/02, 1:47 PM

not initiate a proceeding under Article 84 unless the dispute "cannot be settled by negotiation." This standard, found in Article 84, is the threshold for the Council deciding a dispute.[3] In contrast, the standard for initiating an Article 84 proceeding is far lower. As set out in Article 2 of the Rules, all that is required to file an application and memorial under Article 84 is "A statement that negotiations to settle the disagreement had taken place between the parties but were not successful."[4] Thus, the Convention and the Rules for the Settlement of Disputes address two different junctures in the dispute resolution process with two different standards for negotiations: (1) to initiate an Article 84 proceeding, an applicant may be asked to prove that negotiations were held, but were unsuccessful; and (2) before the Council will decide the dispute, the applicant may be asked to prove that the dispute could not be resolved by negotiations.[5] The negotiations that took place in advance of the U.S. filing would satisfy either standard.

* * * *

1.4 Negotiations need not cover specific legal claims.

The Respondents assert that "negotiations should… relate to the legal issues dividing the parties… and should lead to properly articu-

[3] Article 84 provides: "If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council."

[4] Respondents suggest there is some deficiency in the U.S. Memorial relative to the requirement for prefiling negotiations. Preliminary Objections at 114. In fact, Section (g) of the U.S. Memorial meets the applicable requirements in the Rules.

[5] The bifurcation of standards between when a case may be initiated and when the Council should agree to decide it is consistent with the objective of the Convention to have the Council readily available to facilitate resolution of a wide range of disputes among contracting parties to the Convention, balanced with a recognition that the 33 member Council is an unwieldy judicial body. *See, eg.,* Article 54 of the Convention, requiring the Council to "consider any matter relating to the Convention which any contracting State refers to it." Article 54(n). The Rules reinforce the goal of informal resolution of disputes by authorizing the Council to invite disputants in an Article 84 proceeding to engage in direct negotiations at any time in a proceeding prior to rendering of a decision, if the Council believes that negotiations have not been exhausted. Article 14(1).

ILI US Digest/11 655 1/8/02, 1:47 PM

lated legal claims." Preliminary Objections at ¶12. To the contrary, as stated by the Permanent Court of International Justice:

> [n]egotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiation.

The Mavrommatis Palestine Concessions, 1924 P.C.I.J. Series A, No. 2 at 13. In determining the adequacy of pre-filing negotiations, the International Court of Justice and the Permanent Court before it also have considered whether a reasonable probability exists that further negotiations would lead to a settlement. *See, e.g., Mavrommatis,* 1924 P.C.I.J. Series A, No. *2* at 13; *South West Africa,* Preliminary Objections, 1962 I.C.J. 319, 344-46.

If the Council deems it appropriate to evaluate the probability of settlement at the time the United States filed its Application and Memorial, then the Council should heed the wisdom of the Court in *Mavrommatis,* which emphasized that the parties to the disagreement were in the best position "to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation." *See Mavrommatis,* 1924 P.C.I.J. Series A, No. 2 at 15. In this regard, the Council should note that the Applicant filed the present proceeding after three years of extensive, but unsuccessful, negotiations. The Council should further note the entrenched positions of each side – the United States sought unconditional relief from the unlawful Regulation, while the Respondents insisted on leveraging an agreement with the United States on new aircraft noise standards to be adopted by ICAO in exchange for a limited and conditional suspension of the Regulation.

2. THE LOCAL REMEDIES RULE

The Respondents also argue that the U.S. claims are inadmissible due to the failure of U.S. persons harmed by the Regulation to exhaust

ILI US Digest/11 656 1/8/02, 1:47 PM

local remedies. In its pleadings, the Respondents devote considerable time to proving the existence of the local remedies rule, but fail to sustain their burden of showing that the rule applies in this case. *See Elettronica Sicula S.p.A (ELSI Case),* 1989 I.C.J. 15 at ¶¶49-63. Undisputedly, the local remedies rule exists; however, it does not apply to the present claims arising from direct injuries to the United States under the Convention and its Annex 16.

Any analysis of this issue should begin with a comprehensive statement of the local remedies rule (which Respondents failed to provide in their Preliminary Objections). According to the case of *Ambatielos,* upon which Respondents rely, application of the rule:

> means that the State against which an international action is brought for *injuries suffered by private individuals* has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State.

Ambatielos, 12 Rep. Int'l Arb. Awards 83, 118-19 (1956) (emphasis added). Historically, the rule is considered only in connection with a State's responsibility for an unlawful act committed on its territory against a foreign national, where the State committing the unlawful act refuses to compensate the victim. *Case Concerning the Air Services Agreement of March 27, 1946* (*United States v. France*), 54 I.L.R. 304 at ¶ 28 (Dec. 9, 1978) (hereinafter the *"Change-of-Gauge Arbitration').* In general terms, the rule limits the admissibility of claims put forward by a State on behalf of its injured nationals to prevent the substitution of an international proceeding for the ordinary process of appeal. *See* Lauterpacht, *International Law* (1970) vol. I at 397.

* * * *

2.1 The Respondents' legal authority is inapposite.

The cases relied upon by the Respondents in their argument all fall within the scope of the cited rule, because they are diplomatic protection cases. In these cases, a State pursued claims on behalf of its nationals, generally to obtain compensation for injury to the nationals caused by

ILI US Digest/11 657 1/8/02, 1:47 PM

acts attributable to the foreign State. *See* G. Schwarzenberger and E. Brown, *A Manual of International Law* at 144 (6th ed. 1976) (explaining that the rule is relevant only when a State is adopting as its own a claim of one of its nationals); T. Meron, "The Incidence of the Rule of Exhaustion of Local Remedies," 35 Brit.Y.B. Int'l L. 83, 87-88 (1959) (hereinafter "Meron").

* * * *

Unlike the cases discussed by the Respondents, the present case involves a direct injury to the United States distinct from any potential claims for compensation that U.S. nationals might pursue in local courts in Europe. The rule does not require the Applicant to pursue recourse under the legal system of another State or of any other economic community or regional body to which the Applicant does not belong. *See Change-of-Gauge Arbitration,* 54 I.L.R. at ¶ 6.7. The U.S. claims at issue, which may be resolved only by binding and generally applicable declarations relating to the interpretation and application of the Convention and its Annex 16, could not be brought in local courts in Europe by any individual or class of U.S. nationals.

2.2 The Respondents fail to distinguish claims for direct injury to a State.

While the relevant case law distinguishes between cases of diplomatic protection and cases involving a claim for a direct injury to a State distinct from the claims of its nationals, the Respondents fail to recognize that distinction and would apply the local remedies rule in error to the U.S. claims. *See* M. Shaw, *International Law,* (4th ed. 1997) at 567-68; Brownlie at 496.[10] A State's claim for breach of an international agreement under which no rights accrue directly to private persons is a claim for a direct injury to which the local remedies rule does not apply. *See, e.g., Change-of-Gauge Arbitration,* 54 I.L.R. at ¶ 31.

[10] *See also* the *Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 3,* 44-45, where the Court recognized the claim relating to the taking of diplomatic hostages as a claim for direct injury to the United States and made no reference to local remedies.

ILI US Digest/11 658 1/8/02, 1:47 PM

It has been recognized that cases may contain elements of both diplomatic protection claims and direct injury claims. In such cases, if the "real objects and interests" underlying the claim are the interests of the State, then the claim may be characterized as one for a direct injury to the State. C. Amerasinghe, *Local Remedies in International Law* 108-14, 128-129 (1990). Making this determination requires consideration of which elements are preponderant in the claim. Meron, 35 B.Y.I.L. at pp. 84-86. Meron focuses on two factors to determine the predominant elements of a claim: (1) the subject of the dispute and (2) the nature of the claim. *Id*. at 86-87. Once classified, the determination should be applied to the case as a whole; the case should not be divided. *Id*. at 84-86, quoted in Amerasinghe at 124-25.

Applying the above standards to the pending U.S. claims compels the conclusion that the Council confronts a claim of direct injury to the United States. Nonetheless, the Respondents allude to concerns expressed by the United States about its airlines and manufacturers as a basis for suggesting this is a diplomatic protection claim and invoking the local remedies rule. Preliminary Objections at ¶ 20. Most often, situations involving a direct injury to a State due to another States' treaty violation also will result in consequential harm to private persons. This does not change the nature of the claim, especially in situations such as the present where the applicant claims no damages, but merely requests a decision on the interpretation and application of a treaty. Brownlie at 501. The fact that a State may be acting to protect those in need of protection does not transform the claim to one of diplomatic protection. *See* Meron, 35 Brit.Y.B. Int'l L. at 86.

In considering this relationship, the Council should find instructive the *Change-of-Gauge Arbitration,* 54 I.L.R. 304. That case arose under the air services agreement between the United States and France when France denied the right of Pan Am, a U.S. airline, to "change gauge" in London (i.e., use an aircraft on the segment between the United States and London that was larger than the aircraft used on the segment between London and Paris). France argued that the airline in question, Pan Am, was required to exhaust local remedies before the United States could pursue a claim. The arbitral tribunal found the local remedies rule inapplicable, because the bilateral agreement under which the United States made its claim conferred rights to conduct air services between States, not to private parties, and the obligations

ILI US Digest/11 659 1/8/02, 1:47 PM

at issue concerned the conduct of air transport services, not the treatment accorded particular foreign nationals. *Change-of-Gauge Arbitration,* 54 I.L.R. at ¶ 31.

Even though the dispute in the *Change-of-Gauge Arbitration* arose over actions taken by French government officials against a particular U.S. airline, the arbitral tribunal recognized that the essential issue in the U.S. claim was the interpretation and application of the bilateral agreement, not the harm to Pan Am. *Change-of-Gauge Arbitration,* 54 I.L.R. 304; *see also* Amerasinghe, *Local Remedies in International Law* (1990) at 108-14 (considering whether the State is really protecting its own interests), and 128-129 (suggesting that the "real objects and interests" underlying a claim determine applicability of the local remedies rule).

A second case directly on point, also concerning an air services agreement, is the *U.S.-U.K. Arbitration concerning Heathrow Airport User Charges,* Award on the First Question, 102 I.L.R. 215 (1992) (hereinafter the *"Heathrow Arbitration").* In that case, the arbitral tribunal addressed the applicability of the local remedies rule to a U.S. claim that the U.K. had violated provisions in the U.S.-U.K. air services agreement relating to airport user charges. *Id*. at ch. 3. The tribunal applied the *ELSI Case* test, considering whether the U.S. claim was "distinct and independent" from the claims of its nationals. *Heathrow Arbitration,* 102 I.L.R. at ch. 3,¶ 6.9. Underlying its determination that the United States was pursuing rights distinct and independent of those of its airline, the tribunal found that: (1) the subject matter of the dispute was the alleged violation of a treaty that created rights and obligations between the States concerned; (2) the treaty concerned the conduct of air services, which is a State prerogative; and (3) the treaty was a comprehensive code for operation of air services and its component parts, such as the user charges article, could not be severed. *Heathrow Arbitration,* 102 I.L.R. at ch. 3, ¶ 6.11. The *Heathrow Arbitration* tribunal also noted the importance of the U.S. interest in the interpretation and application of the treaty in the future, when the identity of affected nationals may change. *Heathrow Arbitration,* 102 I.L.R. at ch. 3, ¶ 6.11. These factors highlighted the significant differences between any potential private claims of U.S. airlines and the direct claims of the United States. The tribunal determined that the predominant element in the dispute was the direct interest of the United States itself and, therefore, the local remedies rule was not applicable. *Heathrow Arbitration* at ch. 3, ¶¶ 6.18-6.19.[11]

ILI US Digest/11 660 1/8/02, 1:47 PM

The *Change-of-Gauge Arbitration* and the *Heathrow Arbitration* are directly on point with the present dispute, because the United States again seeks to protect its rights under an agreement providing for rights related to the conduct of air services, including, in this case, the right of its airlines to be free from discrimination based upon their State of registration; the right of its airlines to operate free from unilateral noise standards that are inconsistent with the requirements of the Convention and Annex 16; and the right to have its aircraft noise certifications respected by all other parties to the Convention. Unquestionably, Respondents' infringements of these rights have caused economic harm to private U.S. companies; however, the U.S. claim here is far broader than the interests of any particular U.S. nationals. The present dispute effectively may be resolved only through an interpretation of the Convention and its Annex 16 that will firmly establish future international norms relating to unilateral State actions in the area of aircraft noise standards, as well as other areas.

The Applicant is pursuing its rights in strict accordance with the provisions of the Convention, which identifies the ICAO Council as the forum with jurisdiction in the first instance over cases such as the present. The United States is entitled to hold the Respondents to their obligations under the Convention and its Annexes, vindicating the relevant principles. of international law through the present case, without any obligation to pursue any local remedies. *See South West Africa Cases,* 1966 I.C.J. 6 at 32-33; *see also Corfu Channel Case,* 1949 I.C.J. 4 at 36; *see generally,* Brownlie at 474-75. Litigation in local courts in Europe, as suggested by the Respondents, would constitute a piecemeal approach to interpreting the Convention and could lead to its fragmentation, instead of its uniform enforcement, as sought by the United States.

2.3 The Respondents fail to prove the availability of effective remedies.

Even assuming *arguendo* that the U.S. claims were diplomatic protection claims to which the local remedies rule applied, the Respondents

[11] The *Heathrow Arbitration* tribunal also found that the conduct of HMG prior to the U.S. request for arbitration, including its express agreement to arbitration, provided an alternative basis for denying application of the rule. *Heathrow Arbitration,* 102 I.L.R. at ch. 3 ¶¶6.20, 6.22.

still would bear the burden of proving that effective remedies are available in local courts in Europe. *See ELSI Case,* 1989 I.C.J. at ¶ 63; Shaw at pp. 567-68; *Finnish Ships Arbitration,* 2 Rep. Int'l Arb. Awards 1479 (1934); 7 I.L.R. 231. This requires that local courts are open to the aggrieved persons and offer effective redress. *See* Brownlie at 499. Consequently, where the local legal system cannot redress the wrong, the rule does not apply and there is no obligation to turn to local courts. A. Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* at 110 (and cases cited therein).

By this action, the United States seeks to establish the inconsistency of the Respondents' actions, as codified by the Regulation, with the Convention and its Annex 16 and obtain effective relief. The United States expects not merely to establish the unlawfulness of the Regulation, but also to obtain interpretations of the Convention and Annex 16 that will bind the Respondents and guide others in any future attempts unilaterally to regulate international aircraft noise standards. The result should benefit not only U.S. airlines and manufacturers currently harmed by the Regulation, but all airlines that operate air transport services into Europe and all manufacturers of airframes, aircraft engines, and other aeronautical equipment affecting the noise performance of aircraft. The Respondents have not even attempted to argue that local courts in Europe could provide these remedies to the Applicant or to private U.S. companies. They could not possibly succeed in any attempt, because resolution of the dispute requires a ruling on the interpretation and application of the Convention that will have international standing adequate to ensure the global uniformity of ICAO standards. Only ICAO can offer such relief.

To prove that effective remedies are available in local courts in Europe, the Respondents reference EC Treaty provisions for challenging the validity of regulations, concluding that the U.S. challenge to the Regulation requires consideration of the relationship between the treaty obligations of the EC Member States and EC law, and therefore, "is a matter for interpretation by the European Court of Justice (or Court of First Instance)." Preliminary Objections at ¶ 24. On this basis, the Respondents would fail to carry their burden, because neither the EC Treaty nor the relationship between Member States and EC law has any relevance to the present dispute.

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3. The Requested Relief

Following its clearly articulated legal claims under the Convention and its Annex 16, the U.S. Memorial requests Council determinations that the Respondents have violated their legal obligations and seeks Respondents' cessation of their unlawful conduct and their compliance with their legal obligations. In their Preliminary Objections, the Respondents challenge the relief requested by the Applicant, arguing that while the Council may determine whether a contracting party has violated the Convention, the Council may not "create new obligations" beyond those existing under the Convention and its Annexes (Preliminary Objection at ¶¶ 30, 34, and 45.) Thus, it is the Respondents' position that the Council lacks authority to enter rulings determining that the Respondents have obligations to cease their unlawful conduct and to comply with the provisions of the Convention and its Annex 16. This position not only is unsubstantiated, but it would deprive the Council of powers essential to perform its duties and is inconsistent with the Convention and the Rules. Without doubt, the Council has the requisite authority to grant appropriate relief in this case, such as that requested in the U.S. Memorial.

3.1 The Respondents' argument is unsubstantiated.

The Respondents cite two sources of authority for their argument: (1) ICAO Council precedent (Preliminary Objections at ¶38); and (2) *Gabcikovo-Nagymaros Project,* 1997 I.C.J. at ¶¶ 133, 136. Preliminary Objections at ¶¶ 39-40. These sources do not support the Respondents' arguments.

To begin, there is no ICAO Council precedent relevant to determining the scope of the Council's authority to order relief, because the Council never has decided the merits of a case brought under Article 84. Therefore, it is entirely unclear how the Respondents reach the conclusion that the U.S. request deviates from the Council's past practice. *See* Preliminary Objections at ¶ 42. In fact, the only relevant "subsequent practice" would be the requests for relief of past applicants under Article 84. On this basis, the Council would have to determine that past practice supports the U.S. requests for relief, because, for example, the Memorial filed under Article 84 in 1957 by the Government of Pakistan requested the Council:

ILI US Digest/11 663 1/8/02, 1:47 PM

> (5) To direct the Government of India to immediately rescind their illegal decision aforesaid and not to impede in any manner the overflights of Pakistan aircraft over the territory of India….
>
> (7) To direct that the Government of India should adequately compensate and indemnify Pakistan for the losses and injury suffered by it as a result of the arbitrary, unilateral and illegal decision of the Government of India in breach of its international obligations…
>
> (8) The Council may assess and award costs to Pakistan and direct Government of India to bear it and pay the same to Pakistan.

Memorial of the Government of Pakistan in *Pakistan v. India (1971)* reprinted in 1971 I.C.J. Pleadings, Appeal Relating to the Jurisdiction of the ICAO Council at 97. Thus, past practice under Article 84 undercuts, rather than supports, the Respondents' argument.

Neither does the referenced decision of the International Court of Justice help the Respondents. The *Gabcikovo-Nagymaros Project* case did involve a refusal of the Court to order performance of an agreement relating to construction of a system of locks. Contrary to Respondents' assertions, however, the Court's actions were not tied to any perceived lack of authority to grant such relief, but rather, to the Court's conclusion that specific performance was not appropriate, because the parties to the treaty had not fully implemented it for years and the need for the construction work may have been overtaken by events. *Gabcikovo-Nagymaros Project,* 1997 I.C.J. 7, 76-77 at ¶¶ 133, 136. Furthermore, the Respondents' quotation from, and discussion of, that case suggests that parties to a dispute are obligated to negotiate over how a disputed treaty should be implemented. Preliminary Objections at ¶¶ 39, 40. The quotation is misleading, because it was not a general statement of law with any application to the present case, but rather the Court's interpretation of a specific treaty provision, which was the subject of a dispute between Hungary and Slovakia, requiring

ILI US Digest/11 664 1/8/02, 1:47 PM

the parties to the treaty to "enter into negotiations on the modalities for [the] execution [of a judgment of the Court]." *See Gabcikovo-Nagymaros Project,* 1997 I.C.J. at 12, ¶ 2, quoting the text of the agreement between Hungary and Slovakia.

Finally, contrary to the Respondents' allegations, the Court in that case did determine that the parties should: (1) take all necessary measures to ensure achievement of the objectives of the disputed treaty; (2) establish a "joint operational regime;" and (3) pay compensation for damages sustained. *Gabcikovo-Nagymaros Project,* 1997 I.C.J. at 82-84, ¶ 155. Thus, the relief granted by the Court in that case reaffirms the established law of reparation and suggests a scope of authority far greater than that which the Applicant asks the ICAO Council to exercise here.

3.2 The Respondents would deprive the Council of powers essential to perform its duties.

The Convention empowers and authorizes the Council to decide disagreements between contracting parties to the Convention through binding and enforceable decisions subject to appeal, in certain situations, to the International Court of Justice. If the Council, nonetheless, were deprived of the power to grant appropriate relief, then it could not, as a practical matter, resolve most disputes, consistent with the intention of the Convention. Typically, a violation of the Convention would be associated with harm to nationals of the injured State. Absent Council authority to determine the obligations of parties violating the Convention, States would be left to exercise their rights under general principles of customary international law, including taking countermeasures, thereby escalating, rather than resolving, the dispute. *See, Change-of-Gauge Arbitration,* 54 I.L.R. at 337-38 (discussing the right to take countermeasures). Certainly this was not the intention of the drafters of the Convention.

* * * *

3.3 The Respondents' position is inconsistent with the Convention and the Rules.

The Council's authority to grant appropriate relief under Article 84 flows from the language, purpose, structure, and spirit of the Convention and the Rules for the Settlement of Differences promul-

ILI US Digest/11 665 1/8/02, 1:47 PM

gated thereunder. This is evidenced by the language of Article 87, which refers to airlines failing to conform to final decisions rendered by the Council. This reference to conforming to a final decision indicates that the Council's decision must entail some obligation beyond a mere finding of treaty violation. Similarly, Article 88 of the Convention refers to contracting States "found in default" under the provisions of the Convention Chapter XVIII on Disputes and Default.[15] Again, the reference to "default" indicates an intention that the Council acting under Article 84 could establish specific duties with which a party found to have violated the Convention would be obligated to comply.

A review of the Rules for the Settlement of Differences also compels the conclusion that the Council has authority to grant the requested relief. Absent Council authority to grant appropriate relief where a State has violated the Convention, it would be senseless to require applicants under Article 84 to state "[t]he relief desired by action of Council on the specific points submitted." Rules, Article 2(g). Similarly, it would be pointless for the Rules to require a Committee, appointed by the Council under Article 6 of the Rules to conduct a preliminary examination, to prepare a report including "findings of facts and the recommendations of the Committee." Rules, Article 13(2). In this context, the reference to "recommendations" can only refer to recommendations on appropriate corrective measures.

The American Law Institute has stated that, "[u]nder international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury." Restatement (Third) of the Foreign Relations Law of the United States § 901 (1987). This position is further bolstered by the efforts of the International Law Commission (hereinafter "ILC"), which, in its draft Articles on State Responsibility, provide that each State injured by an internationally wrongful act is entitled to seek cessation and

[15] Article 86 of the Convention provides that, in certain cases, appeals of Council decisions may be taken to the Permanent Court of International Justice (now the International Court of Justice), which unquestionably has authority to determine the existence of a party's duties to cease unlawful actions andcomply with its legal obligations.

ILI US Digest/11 666 1/8/02, 1:47 PM

reparation.[16] The ILC's comments on the draft Articles conclude that international bodies are normally able to determine that internal legal acts violate international law and further to declare the duty of making reparations, which may require invalidation or annulment of the internal legal acts. *See* Third Report on State Responsibility, I.L.C. (52nd Sess.), U.N. Doc A/CN.4/507/Add. I at 6, ¶ 127 (June 15, 2000). The arbitral tribunal in the *Rainbow Warrior Arbitration* stated:

> The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued.

Rainbow Warrior Arbitration (*New Zealand v. France*), 20 Rep. Int'l Arb. Awards 217, 270, ¶114 (30 April 1990).

Accordingly, the authority to determine the existence of a duty to cease unlawful behavior and comply with the Convention and its Annexes—powers that the Respondents would deny the Council—is essential to a proper application of the Convention and the Rules. It would be extraordinary for the ICAO Council, which is expressly authorized to issue binding decisions on disagreements relating to the interpretation and application of the Convention and its Annexes, to be denied authority under the Convention to declare the duty of a State acting unlawfully to cease its wrongful actions and comply with the Convention and its Annexes. There is no basis for reaching such an extraordinary conclusion.

[16] *See* draft Articles on State Responsibility, Articles 41, 42. The text of the draft articles provisionally adopted by the Drafting Committee is found in U.N. Doc. A/CN.4/L.569, and is discussed in the Third Report on State responsibility, I.L.C. Fifty-Second Session, U.N. Doc A/CN.4/507 at 42,¶94 (March 15, 2000)(available on U.N. Website).

ILI US Digest/11 667 1/8/02, 1:47 PM

2. Convention for the Unification of Certain Rules for International Carriage by Air

On September 6, 2000, the President of the United States transmitted to the Senate for advice and consent to ratification the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal May 28, 1999. Excerpts below from the report of the Department of State submitting the Convention to the President and the President's Letter of Transmittal to the Senate explain the history of United States participation in instruments related to transportation of passengers and cargo by air and the advantages to the United States of the Convention.

The transmittal documents, including the report of the Department of State, are available at *www.access.gpo.gov/congress/cong006.html.*

◆

THE WHITE HOUSE, *September 6, 2000.*
To the Senate of the United States:

I transmit herewith, for Senate advice and consent to ratification, the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal May 28, 1999 (the "Convention"). The report of the Department of State, including an article-by-article analysis, is enclosed for the information of the Senate in connection with its consideration of the Convention.

I invite favorable consideration of the recommendation of the Secretary of State, as contained in the report provided herewith, that the Senate's advice and consent to the Convention be subject to a declaration on behalf of the United States, pursuant to Article 57(a) of the Convention, that the Convention shall not apply to international carriage by air performed and operated directly by the United States for noncommercial purposes in respect to its functions and duties as a sovereign

ILI US Digest/11 668 1/8/02, 1:47 PM

State. Such a declaration is consistent with the declaration made by the United States under the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Warsaw October 12, 1929, as amended (the "Warsaw Convention") and is specifically permitted by the terms of the new Convention.

Upon entry into force for the United States, the Convention, where applicable, would supersede the Warsaw Convention, as amended by the Protocol to Amend the Warsaw Convention, done at Montreal September 25, 1975 ("Montreal Protocol No. 4"), which entered into force for the United States on March 4, 1999. The Convention represents a vast improvement over the liability regime established under the Warsaw Convention and its related instruments, relative to passenger rights in the event of an accident. Among other benefits, the Convention eliminates the cap on carrier liability to accident victims; holds carriers strictly liable for proven damages up to 100,000 Special Drawing Rights (approximately $135,000) (Special Drawing Rights represent an artificial "basket" currency developed by the International Monetary Fund for internal accounting purposes to replace gold as a world standard); provides for U.S. jurisdiction for most claims brought on behalf of U.S. passengers; clarifies the duties and obligations of carriers engaged in code-share operations; and, with respect to cargo, preserves all of the significant advances achieved by Montreal Protocol No. 4.

I recommend that the Senate give early and favorable consideration to this Convention and that the Senate give its advice and consent to ratification, subject to a declaration that the Convention shall not apply to international carriage by U.S. State aircraft, as provided for in the Convention.

WILLIAM J. CLINTON

ILI US Digest/11 669 1/8/02, 1:47 PM

DEPARTMENT OF STATE,
Washington, June 23, 2000.

The PRESIDENT,
The White House.

* * * *

BACKGROUND

1. The Warsaw Convention (1929) and The Hague Protocol (1955)

The Convention represents the culmination of more than four decades of efforts by the United States, initially to increase, and later to eliminate, the meager and arbitrary limits of liability (approximately $8,300 per passenger) applicable when passengers are killed or injured in international air carrier accidents and the harm was not due to the carrier's willful misconduct. The liability limits were set first in 1929 by the Warsaw Convention which provides limitations on liability and uniform liability rules applicable to international air transport of passengers, cargo and mail. The United States has been a party to the Warsaw Convention since 1934.

Efforts by the United States in the early 1950s to raise the limits of liability succeeded only in doubling the original Warsaw Convention liability limit to $16,600, as codified in the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at the Hague September 28, 1955 ("The Hague Protocol"). In response to the inadequacy of that limit, the United States considered a form of accident insurance legislation in conjunction with considering ratification of The Hague Protocol. The proposed legislation fixed various levels of compensation based upon the type of injury sustained by the passenger. The cost of the insurance would have been built into international carrier ticket prices. The Hague Protocol was sent to the Senate for its advice and consent to ratification, but when the insurance legislation package failed, due largely to the inadequacy of the proposed liability limits, The Hague Protocol was withdrawn.

2. The Montreal Inter-carrier Agreement (1966)

Failure of the insurance legislation domestically, coupled with increasing dissatisfaction with the Warsaw liability limits, even as increased

ILI US Digest/11 670 1/8/02, 1:47 PM

by The Hague Protocol, led the United States, in 1965, to submit a notice of denunciation of the Warsaw Convention. However, before it went into effect, the United States withdrew this notice of denunciation in consideration of a private voluntary agreement negotiated under the auspices of the International Air Transport Association (IATA) that was signed by all major foreign and U.S. carriers serving the United States (the "Montreal Inter-carrier Agreement"). The Montreal Inter-carrier Agreement ensured that accident victims on flights to or from the United States are compensated for up to $75,000 of proven damages, whether or not the negligence of the carrier was the cause of the accident. In time, all foreign carriers operating services to or from the United States accepted the terms of the Montreal Inter-carrier Agreement.

5. The 1975 Montreal Protocols

At the 1975 diplomatic conference, called primarily to deal with cargo issues, the key substantive provisions of the [1971] Guatemala City Protocol [which, inter alia, recognized the right of States to supplement passenger recoveries through state legislated insurance plans] were incorporated into Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by The Hague Protocol and the Guatemala City Protocol, done at Montreal September 25, 1975 ("Montreal Protocol No. 3"). In translating the Guatemala City Protocol provisions into the Montreal Protocol No. 3, the only change in content was the replacement of the gold standard with the currency conversion formula based on "Special Drawing Rights" (hereinafter referred to as "SDR," which is an artificial 'basket' currency developed by the International Monetary Fund for internal accounting purposes).

Also negotiated at the same diplomatic conference as Montreal Protocol No. 3 was the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by The Hague Protocol, done at Montreal September 25, 1975 ("Montreal Protocol No. 4"). Among other things, this Protocol eliminated the outmoded cargo documentation provisions of the Warsaw Convention, thereby facilitating the applica tion of electronic commerce to international air cargo. For example, Montreal Protocol No. 4 eliminated the need for consignors of cargo to complete detailed air waybills prior to consigning goods to a carrier. In place of such detailed air way-

ILI US Digest/11 671 1/8/02, 1:47 PM

bills, consignors could use simplified electronic records to facilitate shipments.

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Following the signing of Montreal Protocol No. 3, and consistent with its provisions, the United States considered domestic legislation that would have established a Supplemental Compensation Plan providing for a $200,000 insurance based supplement to the Montreal Protocol No. 3 carrier liability limit for passengers (increasing total recovery to approximately $300,000). An effort in 1981 to achieve Senate advice and consent to U.S. ratification of that Protocol, along with Montreal Protocol No. 4, was unsuccessful due in large part to concerns about accepting any limits on passenger recoveries. Similarly, a subsequent effort to achieve Senate advice and consent to ratification of Montreal Protocol No. 3 in conjunction with a new Supplemental Compensation Plan that contained no liability limits also did not garner the necessary support in the Senate.

6. The IATA and ATA Inter-carrier Agreements (1997)

In the face of the failure of governmental efforts to modernize the liability regime for passengers, the Department of Transportation facilitated communications among U.S. and foreign carriers, under the auspices of the IATA and the Air Transport Association (ATA) to develop private voluntary agreements under which carriers would waive the passenger liability limits of the Warsaw Convention and its related instruments (the "Warsaw liability limits"). In February 1997, the Department of Transportation approved a set of two IATA and one ATA inter-carrier agreements, all of which, at a minimum, waived the Warsaw liability limits in their entirety. Because these agreements waived the Warsaw liability limits for participating carriers, they effectively superseded the 1966 Montreal Inter-carrier Agreement, by which carriers had merely waived the limits on liability up to $75,000 per passenger.

As of June 1, 2000, 122 international carriers, representing more than ninety percent of the world's air transport industry, have signed the IATA Inter-carrier Agreement on Passenger Liability (IIA), which waives the Warsaw liability limits. Most of the carriers signing the IIA also signed the second IATA agreement, which requires carriers to pay up to

ILI US Digest/11 672 1/8/02, 1:47 PM

100,000 SDR (approximately $135,000) to accident victims, regardless of carrier negligence. Consequently any accident victim having a claim against a carrier that was party to this second IATA agreement would have an absolute right to recover up to 100,000 SDR of proven damages. The ATA agreement, signed by a number of U.S. carriers, describes the manner in which carriers agree to implement the two IATA agreements. In addition to waiving the Warsaw liability limit for passenger injuries and accepting 100,000 SDR of strict liability, airlines signatory to the ATA agreement also agree, subject to application law, that compensation for passenger injuries may be determined by reference to the law of the domicile or permanent residence of the passenger. Meanwhile, at governmental levels, a number of States adopted domestic laws or regulations to address their growing dissatisfaction with the Warsaw liability limits.

7. Montreal Protocol No. 4 and Cargo Operations

Until 1988, nothing had been done in the United States to modernize the rules relating to the air cargo industry. Accordingly, following Senate advice and consent to ratification, given on September 28, 1998, the United States accomplished its objective of modernizing rules for the international air-cargo industry by ratifying Montreal Protocol No. 4, which entered into force for the United States on March 4, 1999.…In accordance with the provisions of Montreal Protocol No. 4, the United States also became bound by the provisions of The Hague Protocol when it ratified Montreal Protocol No. 4. The passenger liability limitations contained in The Hague Protocol, although objectionable to the United States decades earlier, no longer were an obstacle, because they were effectively superseded by the IATA and ATA Intercarrier Agreements, by which most major international scheduled carriers had waived those limits.

8. The 1999 International Conference on Air Law

The IIA and Montreal Protocol No. 4 together represented a reasonable interim fix, but not a long-term solution, to the problem of creating a modernized uniform liability regime for international air transportation. Work on that larger task commenced at the International Civil Aviation Organization (ICAO) in 1997 and was completed at the May

ILI US Digest/11 673 1/8/02, 1:48 PM

1999 International Conference on Air Law in Montreal at which the convention was negotiated and open for signature.

ICAO had long recognized the need for a new convention to replace the patchwork of liability regimes around the world. At present, carriers are subject to vastly different liability regimes, depending upon the treaties to which their governments are parties and the private inter-carrier agreements that they have signed. In addition, differences in size and financial strength of the world's carriers, as well as differences in the objectives and legal systems of ICAO member States, have complicated any effort to achieve international consensus on modernization. Despite these differences, the Convention adopted on May 28, 1999 in Montreal represents a success with respect to all key U.S. policy objectives. It was immediately signed by 52 countries, including the United States.

The Convention requires ratification, acceptance, approval or accession by thirty States before it enters into force. Upon entry into force, the Convention will take precedence over the Warsaw Convention and any of its amendments and related instruments, and as a practical matter will supersede the private inter-carrier agreements, when the State or States relevant in a particular accident are party to the new Convention. For the United States, the new Convention, following U.S. ratification and entry into force, would supersede the Warsaw Convention, as amended, for flights between the United States and Foreign States also party to the Convention and for international flights having their origin and destination in the United States (round-trips).

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B. North American Free Trade Agreement

1. Claim by Canada against American Company

On March 25, 1999, Pope and Talbot Inc., a U.S. corporation, submitted a claim against the Government of Canada for breach of certain obligations in relation to investments, set forth in Chapter 11 of the North American Free Trade Agreement, signed at Washington, Ottawa and Mexico December 8, 11, 14 and 17, 1992; entered into force January 1, 1994 ("NAFTA"). At issue is treatment of Pope and

ILI US Digest/11 674 1/8/02, 1:48 PM

Talbot Inc.'s investment, Pope & Talbot Ltd., under Canada's implementation of a Softwood Lumber Agreement entered into by Canada and the U.S. in 1996. Pope and Talbot Ltd. is a Canadian corporation that harvests and manufactures softwood lumber in British Columbia primarily for export to the United States. The claim is currently pending before a Tribunal constituted by the Secretary-General of the International Centre for Settlement of Investment Disputes for this purpose. The Tribunal has issued four Awards in the case to date: 1) rejecting Canada's preliminary motion to dismiss the claim as falling outside the scope and coverage of NAFTA chapter eleven *(Pope & Talbot, Inc. v. Government of Canada* (Jan. 26, 2000) (Award in Relation to the "Measures Relating to Investment" Motion)); 2) refusing Canada's motion to strike certain paragraphs of the Statement of claim for failure adequately to define the scope of the dispute and failure to follow procedural prerequisites *(Pope & Talbot, Inc. v. Government of Canada* (Feb. 24, 2000)(Award in Relation to the "Harmac Motion")); 3) dismissing Pope and Talbot's claims under Articles 1106 and 1110 and Canada's claim of estoppel. *(Pope & Talbot, Inc. v. Government of Canada* (June 26, 2000) (Interim Award)); and 4) rejecting Canada's motion to dismiss what Canada characterized as a new claim based on imposition of a "super fee" *(Pope & Talbot, Inc. v. Government of Canada* (August 7, 2000) (Award Concerning the Motion by Canada Respecting the Claim Based Upon Imposition of the "Super Fee")). Texts of these awards are available in the International Claims and Investment Disputes database at *www.state.gov/s/l.*

Both the United States and Mexico made submissions on questions of interpretation pursuant to Article 1128 of the NAFTA. Excerpts from the five United States submissions

ILI US Digest/11 675 1/8/02, 1:48 PM

in this case, dated April 7, May 25, July 24, November 1, and December 1, 2000 (including the November 9, 1999 submission of the United States in *Metalclad Corporation v. The United Mexican States* ((ICSID Case No. ARB(AF)/97/1) attached to the April 7 submission) are set forth below. They address certain issues concerning permissible amendments to claims, national treatment, minimum standard of treatment, performance requirements and expropriation but take no position on how the interpretive positions apply to the facts of the case.

The full text of the submissions is available in the International Claims and Investment Disputes database at *www.state.gov/s/l.*

SUBMISSION OF THE UNITED STATES OF AMERICA (APRIL 7, 2000)

* * * *

National Treatment

2. One question that has arisen in this case is the purpose and scope of Article 1102, the national treatment provision. Article 1102 paragraphs (1) and (2) provide that each Party shall accord to investors, and investments of investors, of another Party "treatment no less favorable than that it accords, in like circumstances, to its own investors [or investments] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

3. The national treatment provision was designed to prohibit discrimination on the basis of nationality. *See* U.S. Statement of Administrative Action at 589, in Message from The President of the United States Transmitting North American Free Trade Agreement, Text of Agreement, Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No. 103-159, Vol. 1 (1993) ("Articles

ILI US Digest/11 676 1/8/02, 1:48 PM

1102 and 1103 set out the basic non-discrimination rules of 'national treatment' and 'most-favored-nation treatment."). Article 1102 paragraphs (1) and (2) were not intended to prohibit all differential treatment among investors or investments. Rather, they were intended only to ensure that Parties do not treat entities that are "in like circumstances" differently based on their NAFTA Party nationality.

4. Nothing in Article 1102 paragraphs (1) and (2) requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any national investor or any investment of a national. The relevant comparison is not between the treatment that a Party accords to an investment of an investor of another Party and the best treatment that it accords to the investments of its nationals (or between the treatment that it accords to an investor of another Party and the best treatment that it accords to investors that are its nationals). The appropriate comparison is between the treatment accorded a foreign investment or investor and a national investment or investor in like circumstances. This distinction is important and was intended by the Parties. Thus, a NAFTA Party may adopt measures that draw distinctions among entities without necessarily violating Article 1102.

5. The national treatment obligation does not, as a general matter, prohibit a Party from adopting or maintaining measures that apply to or affect only a part of its national territory. Any suggestion to the contrary misconstrues the obligation to provide "national treatment"—whose object and purpose are to prevent nationality-based discrimination—as an obligation to provide "nationally uniform treatment." The Parties, all of whom are geographically, politically and economically diverse nations, did not intend such a result.

6. Nothing in Article 1102 constitutes a general prohibition against the adoption or maintenance of measures that apply differently to investments located or operating in different places, or of measures that apply differently to products depending on where they are grown or harvested. Such measures do not inherently discriminate on the basis of nationality. The fact that a location-specific measure affects enterprises operating or goods produced in different locations in its territory differently does not alone establish the discrimination that Article 1102 prohibits.

7. The NAFTA Parties did not intend Article 1102 to foreclose the use of location-based regulatory measures simply because such

ILI US Digest/11 677 1/8/02, 1:48 PM

measures have the effect of advantaging some investors and disadvantaging other investors, including those from other NAFTA Parties. The United States, for example, limits business activities in certain environmentally sensitive areas and imposes additional limitations on emissions from manufacturing operations in areas where air pollution is more serious.

8. For the foregoing reasons, an investor or investment that operates within the territory covered by a location-specific measure may not be in circumstances "like" those of an investor or investment that does not operate within that territory. An investor cannot rest his claim under Article 1102 solely on the fact that an enterprise operating in another part of the country receives a different or greater benefit or is subject to a different or lesser burden.

Performance Requirements

9. Article 1106 identifies two categories of performance requirements and, separately for each category, sets forth an exhaustive list of the specific performance requirements prohibited. The Article prescribes different prohibitions for each category.

10. The first category is described in Article 1106(1). It encompasses seven specific requirements, commitments, or undertakings that a Party may not impose or enforce in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment in its territory.

11. The second category is described in Article 1106(3). It provides that a Party may not condition the receipt of an advantage, in connection with an investment, upon compliance with any of four specifically listed requirements.

12. Article 1106(5) states explicitly and clearly that Article 1106(l) applies only to the seven performance requirements specifically listed in Article 1106(l) and Article 1106(3) applies only to the four performance requirements specifically listed in Article 1106(3).

13. In determining whether a Party may condition the receipt or continued receipt of an advantage upon compliance with a particular performance requirement, the pertinent provision is Article 1106(3) and the pertinent performance requirements are exclusively the four listed in that article. Article 1106(l) can play no role in that determination.

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Expropriation

14. We note that the Investor in this case raises certain issues with respect to expropriation. The United States has addressed certain of these issues in its submission in the *Metalclad* case. We invite the Tribunal to consult that document, which is attached, for an explanation of the position of the United States on the meaning of the phrase "measure tantamount to expropriation."

Dated: Wasington, D.C., April 7, 2000

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***METALCLAD CORPORATION V. THE UNITED MEXICAN STATES* (ICSID CASE NO. ARB(AF)/97/1)**
Submission of the Government of the United States of America (November 9, 1999)

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NAFTA Coverage of Actions of Local Governments, Including Municipalities

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3. One question that was addressed in oral argument was whether, as a general rule, the actions of local governments, including municipalities, are subject to the NAFTA standards. The United States believes that there is no general exclusion from the NAFTA standards for local government action. At the hearing, an argument that local government actions are generally not subject to these standards was made based on Article 105 of the NAFTA, which does not use the term "local governments" in describing the extent of the obligations set forth in the Agreement. According to this argument, the NAFTA Parties deliberately excluded the term "local governments" from Article 105 to signal a departure from otherwise applicable customary international law, which provides that a State is liable for the acts of all its political subdivisions, including local governments. Again under this line of argument. Article 201(2) ("unless otherwise specified, a reference to a state or province includes local governments of that state or province")

ILI US Digest/11 679 1/8/02, 1:48 PM

means that it is only when state or provincial governments are specifically mentioned in a particular obligation that the obligation covers local governments' acts.

4. However, the United States believes that there is no such general exclusion from NAFTA standards for the actions of local governments. Rather, the U.S. intended, and we believe the Parties intended, that, except where specific exception was made, the actions of local governments would be subject to the NAFTA standards. We made this clear in our Statement of Administrative Action submitted to the U.S. Congress with the text of the Agreement and proposed implementing legislation. In that Statement, the U.S. Government explains that NAFTA Article 105 "makes clear that state, provincial and local governments must, as a general rule, conform to the same obligations as those applicable to the three countries' federal governments, subject to the same exceptions." U.S. Statement of Administrative Action 4, in Message from The President of the United States Transmitting North American Free Trade Agreement, Text of Agreement. Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No. 103-159, Vol. 1 (1993) (attached).

5. The Canadian Statement on Implementation expresses a view that mirrors the United States' understanding that local government measures are generally subject to the NAFTA standards. Its description of Article 1101 explains that Chapter 11's section A (which sets forth the substantive obligations of the Parties) "covers measures by a Party (i.e., any level of government in Canada)." Canada Gazette, Pt. 1, at 148, Jan. 1, 1994 (attached).

6. Moreover, the ordinary meaning of the provisions at issue is in line with the United States' position. Article 105 provides that "[t]he Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments." Article 201(2), part of the NAFTA Chapter entitled "General Definitions," plainly defines any reference to a state or province to include the local governments of that state or province. Absent any treaty language to the contrary, the natural meaning of these provisions, taken together, is that Article 105's reference to states and provinces includes a reference to their local governments.

7. The context of these provisions further supports the United States' view. Other provisions in the NAFTA, both in Chapter 11 and elsewhere

ILI US Digest/11 680 1/8/02, 1:48 PM

in the Agreement, make clear that local government measures, including municipal measures, are subject to the NAFTA standards. For example, Article 1108(1)(a)(iii) specifically exempts existing local government measures from the reach of Articles 1102, 1103, 1106 and 1107. If the argument proposed at the hearing were correct, no exemption would be necessary because these articles would not address the actions of local governments at all. Other chapters have similar exclusions reinforcing this point. *See, e.g.,* Article 1206(1)(a)(iii); Article 1409(1)(a)(iii).

8. In sum, contemporaneous statements of the Parties' intent, together with the ordinary meaning of the relevant provisions taken in their context, establish that the actions of local governments, including municipalities, are subject to the NAFTA standards.

The Meaning of "Measure Tantamount to Expropriation"

9. With respect to the Tribunal's question as to the meaning of the term "tantamount to expropriation" in NAFTA Article 1110(1), we do not believe that the Tribunal need address the question, as doing so is not required to resolve the issues in the case. We urge the Tribunal to limit its rulings to matters that are necessary to the resolution of the claim and that have been fully briefed and argued by the parties to the dispute. However, to respond to the Tribunal's request, it is the position of the United States that the phrase "take a measure tantamount to ... expropriation" explains what the phrase "indirectly ... expropriate" means: it does not assert or imply the existence of an additional type of action that may give rise to liability beyond those types encompassed in the customary international law categories of "direct" and "indirect" nationalization or expropriation. We believe that this conclusion is consistent with the positions taken by both the disputants in this case.

10. The United States Government believes that it was the intent of the Parties that Article 1110(1) reflect customary international law as to the categories of expropriation. The United States Government reflected that position in its Statement of Administrative Action, transmitted to the Senate during the process of concluding the NAFTA. *See* Statement of Administrative Action 140 (attached). Neither of the other Parties has ever expressed a view contrary to this United States public statement of intent. The customary international law of expropriation recognizes only two categories of expropriation: direct expropriation, such as the compelled transfer of title to the property in question; and indirect expro-

ILI US Digest/11 681 1/8/02, 1:48 PM

priation, *i.e.,* expropriation that occurs through a measure or series of measures even where there is no formal transfer of title or outright seizure. To conform to these rules of customary international law, Article 1110(1) must be read to provide that expropriation may only be either direct, on one hand, or indirect through "a measure tantamount to nationalization or expropriation of such an investment," on the other.

11. The context in which the phrase "tantamount to expropriation" is found confirms that it was not intended to create a new category of expropriation. If Article 1110 had been meant to create a wholly new, third category of expropriation, thereby departing radically from customary international law, the Parties would surely have included language providing guidance on what circumstances, other than either direct or indirect expropriation, were meant to be covered. Instead, there are no standards for determining when such a new category would be applicable. It is extremely unlikely that the Parties would have exposed themselves to potentially significant liability for an entirely now category of expropriation without such guidance. As they did not provide the necessary standards, the only reasonable conclusion is that the Parties did not intend an expansion of the two categories of expropriation currently recognized under customary international law.

12. Furthermore, a separate meaning for the term "take a measure tantamount to ... expropriation" is not required or even supported by the fact that the phrase is redundant in light of the provision's previous reference to "indirect[] expropriat[ion]." In fact, its redundancy mirrors the construction of another passage in Article 1110. Article 1110(1) addresses the circumstances under which Parties may "nationalize or expropriate," even though the term "nationalize" is redundant since it is a type of expropriation. *See. e.g., State Responsibility,* [1959] 2 Y.B. Int'l L. Comm'n 1. 13, U.N. Doc. A/CN.4/119 (labeling "the practice ... of carrying out acts of expropriation on a wide scale and impersonally" as a "type or form of expropriation ... commonly referred to as 'nationalization ...) (attached); B.A. Wortley, *Expropriation in Public international Law 36* (1977) ("Nationalization differs in its scope and extent rather than in its juridical nature from *other types* of expropriation.") (emphasis added) (attached). As the term "nationalize" is but a subset of the broader term "expropriate," similarly, the phrase "take a measure tantamount to expropriation" is simply an elaboration of what "indirectly ... expropriate" means, notwithstanding the presence in both instances of the disjunctive "or." The similar repetition of other concepts in the terms

ILI US Digest/11 682 1/8/02, 1:48 PM

of Article 1110(1) suggests that this redundancy results, not from an intent to create a new category of expropriation, but rather from an abundance of caution taken to ensure that the two categories of expropriation, direct and indirect, that are recognized under customary international law would be covered. Thus, while perhaps not artful, these redundant usages in Article 1110(1) do not reflect a deviation from customary international law.

13. The preparatory work of the NAFTA confirms this conclusion. The NAFTA's expropriation provision was modeled on the expropriation provision of the bilateral investment treaties ("BITs") that the United States had concluded with many countries. All of the forty-five BITs signed by the United States contain similar language on expropriation, although their exact phrasing has varied over time. *See, e.g.,* U.S. Bilateral Investment Treaties (BITs), *at* http:/www. state. gov/www/issues/economic/7treaty. html (providing several BIT texts); Investment Treaties in the Western Hemisphere, at http:/www.sice.oas.org/bitse.stm (same); Trade & Related Agreements, *at* http:/www.mac.doc.gov/tcc/treaty.htm (same). Despite the variations in expression, the scope of protection provided by the BlTs has remained the same, and all of these different formulations have been understood to incorporate the customary international law definition of expropriation, not to expand upon it. *See, e.g.,* State Department *Description of the United States Model Bilateral Investment Treaty (BIT): Hearing Before the Senate Comm. on Foreign Relations,* 102d Cong., 2d Sess. 61, 63 (1992) ("Article III incorporates into the Treaty the highest international law standards for expropriation and compensation.") (attached). Article 1110(1) should likewise be recognized as a further effort to capture that customary international law concept of "expropriation," not as an unprecedented departure from the BITs.

14. Thus, Article 1110 addresses measures that directly expropriate and measures tantamount to expropriation that thereby indirectly expropriate. This is the only possible interpretation of the terms of the provision consistent with the Parties' intent and the ordinary meaning of the terms in light of the provision's context, as confirmed by reference to the preparatory work. Therefore, NAFTA claimants may not seek damages under Article 1110 for actions beyond those contemplated in the customary international law concepts of direct and indirect expropriation.

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SECOND SUBMISSION OF THE UNITED STATES OF AMERICA (MAY 25, 2000)

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National Treatment

2. Application of the national treatment provision of NAFTA Chapter 11 should be undertaken in two stages. A Tribunal should ask (i) whether a Party has accorded less favorable treatment to investors or investments on the basis of nationality, and, if so, (ii) whether the investor or investment accorded less favorable treatment was "in like circumstances" with domestic investors or investments accorded more favorable treatment.

3. The objective of the national treatment provision is to prohibit discrimination against foreign investors and investments, in law and in fact, on the basis of nationality. Implementation of the national treatment provision requires a comparison of a measure's treatment of domestic investors and their investments with that of their counterparts from other NAFTA Parties. If the measure, whether in law or in fact, does not treat foreign investors or investments less favorably than domestic investors or investments on the basis of nationality, then there can be no violation of Article 1102 and a Tribunal should proceed no further. Only if presented with some evidence of less favorable treatment on the basis of nationality should a Tribunal examine the question of which investors are "in like circumstances."

4. The phrase "in like circumstances" ensures that comparisons are made with respect to investors and investments on the basis of characteristics that are relevant for purposes of the comparison. The objective is to permit the consideration of all relevant circumstances, including those relating to a foreign investor and its investments, in deciding to which domestic investors and investments they should appropriately be compared, while excluding from consideration those characteristics that are not relevant to such a comparison.

5. The circumstances relevant to the comparison will vary by case. The relevant inquiry is not limited to whether investors or investments produce the same product: merely because investors or investments pro-

ILI US Digest/11 684 1/8/02, 1:48 PM

duce the same products does not mean they are "in like circumstances." For example, the fact that producers of such products are located in different geographical or political regions may also be germane to the question of whether they are in like circumstances.

Expropriation

6. NAFTA Article 1110(8) does not imply that a nondiscriminatory regulatory measure of general application necessarily constitutes an expropriation merely because it adversely affects an investment. Article 1110(8) simply clarifies that such a measure could not constitute an expropriation "solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt." The provision is included "for greater certainty," a phrase repeatedly used in the NAFTA not to create or limit a right or obligation but to reflect an understanding that the scope of a particular right or obligation is already implied in other provisions of the text. *See, e.g.,* NAFTA arts. 1102(4), 1405(4), 1416, annexes 308.1(4), 1001.1a-2(l).

7. Similarly, Article 2103 does not support the argument that a nondiscriminatory regulatory measure of general application necessarily constitutes an expropriation merely because it adversely affects an investment. Article 2103 does not exclude all taxation measures from the ambit of expropriation claims, thereby implying that other similar measures would be actionable. Rather, Article 2103(6) explicitly states that Article 1110 "*shall apply* to taxation measures " subject to certain limitations. (Emphasis added).

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THIRD SUBMISSION OF THE UNITED STATES OF AMERICA (JULY 24, 2000)

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2. Compliance with each of the NAFTA's procedural requirements for submitting a claim to arbitration is necessary for a Chapter 11 tribunal to have jurisdiction over the claim. A tribunal has no authority under the NAFTA to permit amendment of a pleading to assert a claim over

ILI US Digest/11 685 1/8/02, 1:48 PM

which the tribunal lacks jurisdiction, whether for failure to meet procedural prerequisites or other reasons.

3. It is fundamental in international arbitration that no claim may be amended so as to bring into consideration matters outside the jurisdiction of a tribunal. This is reflected in the UNCITRAL Model Law. *See, e.g., Analytical Commentary, Report of the Secretary General.* UNCITRAL. 18th Sess., [1985] 16 UNCITRAL Y.B. 104, 128. at ¶ 5. U.N. Doc. A/CN.9/264 ("[T]here is one important point in respect of which the arbitral tribunal has no discretion at all: The amendment or supplement must not exceed the scope of the arbitration agreement. This restriction… seems self-evident in view of the fact that the jurisdiction of the arbitral tribunal is based on, and given within the limits of, that agreement.");[1] Howard M. Holtzmann & Joseph E. Neuhaus, A *Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 649 (1989) ("One absolute limit on amendments that is not stated in Article 23(2)…is that an amendment cannot expand the dispute to matters beyond the scope of the arbitration agreement, which is the source of the arbitral tribunal's jurisdiction.

4. This bedrock principle is also reflected in the rules of each of the arbitration regimes contemplated by NAFTA Article 1120(l). Article 20 of the UNCITRAL Arbitration Rules provides that "a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement." The ICSID Convention states: "Except as the parties otherwise agree, the Tribunal shall… determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute *provided that* they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre." ICSID Convention art. 46 (emphasis added); *accord* ICSID Arbitration Rules art. 40(1). In similar fashion, Article 48(1) of the ICSID Arbitration (Additional Facility) Rules states that "a party may present an incidental or additional claim or counter-claim," again *"provided that* such ancillary claim is within the scope of the arbitration agreement of the parties." (Emphasis added.)

[1] The United States notes that the Canadian federal Commercial Arbitration Act, which is based on the UNCITRAL Model Law, expressly recognizes the authoritative nature of the Secretariat's analytic commentary. Commercial Arbitration Act, R.S.C., ch. 34.6, art. 4(2)(b) (1985) (Can.).

ILI US Digest/11 686 1/8/02, 1:48 PM

5. Section B of Chapter 11 provides that "[t]he applicable arbitration rules *shall* govern the arbitration except to the extent modified by this Section." NAFTA art. 1120(2) (emphasis supplied). Each of the above-mentioned rules, including, most pertinently for this arbitration, Article 20 of the UNCITRAL Arbitration Rules, is clear – a claim properly before an arbitral tribunal may not be amended to include an additional or incidental claim that is outside the scope of the parties' consent to arbitration. Therefore, determining whether such an amendment is permissible necessarily requires an examination of the arbitration agreement between the parties.

6. In the case of NAFTA Chapter 11, an agreement to arbitrate is formed by the consent given by each State Party "to submission of a claim to arbitration in accordance with the procedures set out in this Agreement" and the investor's corresponding consent to arbitrate in accordance with those procedures. NAFTA art. 1122(1); *see id* art. 1121 (1)(a); *id*. art. 1121(2)(a). As Article 1122(2) makes clear. the exchange of consents contemplated by the Chapter constitutes a valid agreement to arbitrate under each of the ICSID New York and Inter-American Conventions (as those terms are defined in Chapter 11).

7. The *content* of the agreement to arbitrate under Chapter 11 clearly includes the procedural prerequisites for submitting a claim to arbitration. *See* NAFTA art. 1122(1) (stating consent to arbitrate "in accordance with the procedures set out in this Agreement"). The procedural requirements in question are principally set forth in Section B of Chapter 11, which "establishes a mechanism for the settlement of investment disputes." NAFTA art. 1115. (Other procedures applicable to Chapter 11 claims are found elsewhere in the NAFTA. *See, e.g.,* NAFTA art. 2103(6)). No Chapter 11 claim may be submitted unless the prerequisites for submitting a claim to arbitration specified in the NAFTA have been satisfied. *See Waste Management, Inc. v. United Mexican States,* ARB(AF)/98/2 ¶¶ 16-17 (June 2, 2000) (Award) <http://www.worldbank.org/icsid/cases/awards.htm> (tribunals must ensure prerequisites of Chapter 11 are fulfilled because Parties consented to arbitration only in accordance with the procedures set forth in Section B of Chapter 11). The Parties did not consent in advance, through the NAFTA, to the automatic supplementation of the scope of arbitrations unless the procedural prerequisites of Chapter 11 are satisfied for any new claims. In any Chapter 11 arbitration, the respondent Party's positions with respect to selection of an arbitral panel, place of arbitration, and procedures for the arbitration are premised on the scope of the arbitration being as originally presented to it by the investor. The supplementa-

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tion of an arbitration through new claims, after a tribunal is empaneled and the arbitral procedures are agreed upon by all disputants, could well prejudice the respondent Party.

8. Thus, under fundamental principles recognized by each of the arbitration regimes contemplated by the NAFTA, a Chapter 11 tribunal confronted with a new claim may not permit amendment unless that claim is properly within the tribunal's jurisdiction in all respects.

FOURTH SUBMISSION OF THE UNITED STATES OF AMERICA (NOVEMBER 1, 2000)

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Minimum Standard of Treatment

2. Article 1105(l) requires a NAFTA State Party to accord to "investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." Thus, the obligation of Article 1105(l), by its plain terms, is to provide "treatment *in accordance with international law.*"

3. "[F]air and equitable treatment" and "full protection and security" are provided as examples of the customary international law standards incorporated into Article 1105(1). The plain language and structure of Article 1105(1) require those concepts to be applied as and to the extent that they are recognized in customary international law. They are not to be applied in a subjective and undefined sense without reference to international custom.

4. The plain language of Article 1105(l) is reinforced by the historical context of the words "fair and equitable." The most direct antecedent to the use of "fair and equitable treatment" in international investment agreements is the OECD Draft Convention on the Protection of Foreign Property ("OECD Draft Convention"), which was first pro-

[1]*See* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, BILATERAL INVESTMENT TREATIES IN THE MID-1990S 54 (1998) ("The use of the standard of fair and equitable treatment in BITs dates from the OECD 1967 Draft Convention on the Protection of Foreign Property.").

ILI US Digest/11 688 1/8/02, 1:48 PM

posed in 1963 and revised in 1967.[1] The commentary to Article I of the OECD Draft Convention, which incorporated the standard of "fair and equitable treatment," noted that: "The phrase 'fair and equitable treatment'… indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nations…. The standard required conforms in effect to the 'minimum standard' which forms part of customary international law."[2]

5. In addition, in 1984, the OECD's Committee on International Investment and Multinational Enterprises surveyed the OECD member States on the meaning of the phrase "fair and equitable treatment." The committee confirmed that the OECD's members—the world's principal developed countries—continued to view the phrase as referring to principles of customary international law.[3] Thus, from its first use in investment agreements, "fair and equitable treatment" was no more than a shorthand reference to elements of the developed body of customary international law governing the responsibility of a State for its treatment of the nationals of another State. It is in this sense, moreover, that the United States incorporated "fair and equitable treatment" into its 4 various bilateral investment treaties ("BITs").[4]

6. In the ensuing years, as international investment treaties incorporating variants of the OECD Draft Convention's formulation of "fair and equitable treatment" became more common, an academic debate emerged concerning the meaning of the phrase as it appears in

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[2] OECD, 1967 Draft Convention on the Protection of Foreign Property, *reprinted in 7* INT'L L. MATERIALS 117, 120 (1968).

[3] OECD, COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES, INTERGOVERNMENTAL AGREEMENTS RELATING TO INVESTMENT IN DEVELOPING COUNTRIES 136 at 12 Doc. No. 84/14 (May 27, 1984) ("According to all Member countries which have commented on the point, fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated.…").

[4] *See, e.g.,* Message from the President of the United States Transmitting Treaty Between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, Signed at Washington on September 29, 1999, S. Treaty Doc. 105-35 (May 23, 2000) ("Paragraph 3 sets out a minimum standard of treatment based on standards found in customary international law.").

ILI US Digest/11 689 1/8/02, 1:48 PM

those agreements without express reference to customary international law.[5] The prevalent view was that, in such circumstances, the phrase should be viewed as having its traditional meaning as a reference to the international minimum standard of treatment.[6] A few scholars contended that the requirement of "fair and equitable" treatment announced a new, undefined conventional standard distinct from customary international standards – a subjective standard that left it to arbitrators to determine in each case whether "in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable."[7]

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[5] *See* RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 59 (1995) ("Some debate has taken place over whether reference to fair and equitable treatment is tantamount to the minimum standard required by international law or whether the principle represents an independent, self-contained concept."); *see also* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, BILATERAL INVESTMENT TREATIES IN THE MID- 1990s 53-54 (1998) (noting debate); UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, KEY CONCEPTS IN INTERNATIONAL INVESTMENT ARRANGEMENTS AND THEIR RELEVANCE TO NEGOTIATIONS ON INTERNATIONAL TRANSACTIONS IN SERVICES 12-13 (1990) (same); Mahmoud Salem, *Le développement de la protection conventionelle des investissements étrangers,* 113 J. DROIT INT'L 579, 607-08 (1986) (same).

[6] *See* Swiss Department of Foreign Affairs, *Mémoire,* 36 ANN. SUISSE DE DROIT INT'L 174, 178 (1980) ("On se réfère ainsi au principe classique du droit des gens selon lequel les Etats doivent mettre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du 'standard minimum' international, c'est-á-dire leur accorder un minimum de droits personnels, procéduraux et économiques."); *see also* PAUL E. COMEAUX & N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INT'L LAW 106 (1996) (standard U.S. BIT provision on fair and equitable treatment "relies upon already-existing requirements of international law, which binds each state to 'international minimum standards' of treatment even when there is no BIT in place."); UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS & INTERNATIONAL CHAMBER OF COMMERCE, BILATERAL INVESTMENT TREATIES 1959-1991 at 9 (1992) ("fair and equitable treatment ... is a general standard of treatment that has been developed under customary international law").

[7] F.A. Mann, *British Treaties for the Promotion and Protection of Investments, in* FURTHER STUDIES IN INTERNATIONAL LAW 234, 238 (1990); *see also* UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, KEY CONCEPTS IN INTERNATIONAL INVESTMENT ARRANGEMENTS AND THEIR RELEVANCE TO NEGOTIATIONS ON INTERNATIONAL TRANSACTIONS IN SERVICES 12-13 (1990).

ILI US Digest/11 690 1/8/02, 1:48 PM

7. Against this backdrop, the drafters of Chapter Eleven excluded any possible conclusion that the parties were diverging from the customary international law concept of fair and equitable treatment. Accordingly, they chose a formulation that expressly tied fair and equitable treatment to the customary international minimum standard rather than to some subjective, undefined standard. Article 1105(l)'s provision for "treatment in accordance with international law, *including* fair and equitable treatment" (emphasis supplied) clearly states the primacy of customary international law.[8] Finally, a further indication that this was the Parties' intent may be found in Canada's Statement on Implementation of the NAFTA, which unequivocally notes that Article 1105(l) "provides for a minimum absolute standard of treatment, *based on long-standing principles of customary international law.*"[9]

8. The international minimum standard is an umbrella concept incorporating a set of rules that have crystallized over the centuries into customary international law in specific contexts. The relevant principles are part of the customary international law of state responsibility for injuries to aliens.[10] Unlike national treatment, the international minimum standard is an absolute, rather than relative, standard of international law that defines the treatment a State must accord aliens regardless of the treatment the State accords to its own nationals.[11]

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[8] *See* DOLZER & STEVENS, *supra* n.5, at 60 ("[I]n the North American Free Trade Agreement (NAFTA), the fair and equitable standard is explicitly subsumed under the minimum standard of customary international law.").

[9] Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation, in* CANADA GAZETTE 68, 149 (1994) (emphasis supplied).

[10] A number of rules traditionally grouped under the heading of state responsibility for injury to aliens address the relationship between States and natural persons of foreign nationality. Such rules are not relevant here.

[11] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, BILATERAL INVESTMENT TREATIES IN THE MID-1990s 53 & n.58 (1998)

ILI US Digest/11 691 1/8/02, 1:48 PM

FIFTH SUBMISSION OF THE UNITED STATES OF AMERICA (DECEMBER 1, 2000)

* * * *

2. After the United States filed its Fourth Submission on November 1, 2000, the tribunal in the NAFTA Chapter Eleven case of *S.D. Myers, Inc. v. Government of Canada* rendered a partial award in which it addressed, *inter alia,* Articles 1105 and 1102. Though that decision does not constitute binding precedent, *see* NAFTA art. 113 6(1) ("[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case"), it deserves comment as one of the few final awards in a Chapter Eleven arbitration.

3. The United States does not take a position here on any aspect of the *S.D. Myers* award's analysis and application of the NAFTA not addressed below. However, the United States disagrees with the *S.D. Myers* panel majority's treatment of Article 1105(l). The panel majority incorrectly defines the scope of Article 1105(l) and incorrectly links Article 1102 to Article 1105(l).

4. The *S.D. Myers* panel majority correctly finds that Article 1105(l) incorporates certain rules of customary international law. *S.D. Myers, Inc. v. Government of Canada* (Nov. 12, 2000) (Award) ¶ 262. After noting this essential point, two of the arbitrators inexplicably ignore the logical consequences of this conclusion by suggesting that a violation of standards that do not arise out of customary international law—*i.e.,* the standards of Article 1102—may establish a breach of Article 1105(l). *Id*, ¶¶ 266-68.

5. As the United States noted in its Fourth Submission, Article 1105(l) requires that Parties accord investments of another Party the international minimum standard of treatment, which is an umbrella concept incorporating a set of rules that have crystallized over the centuries into customary international law in specific contexts. *See* United States' Fourth Submission at ¶ 8. National treatment and most-favored-nation treatment, however, are not such customary international law obligations. Rather, these are treaty obligations binding on the NAFTA Parties only by virtue of the Parties' agreement to the NAFTA. Thus, concluding that Article 1102 has been breached does not establish a breach of Article 1105(l). To the extent that the *S.D. Myers* panel majority suggests otherwise, it is incorrect.

ILI US Digest/11 692 1/8/02, 1:48 PM

6. The sole authority offered by the two arbitrators who formed the majority on this point is a citation to Professor Mann. They quote Mann's statement that:

> "[I]t is submitted that the right to fair and equitable treatment goes much further than the right to most-favored-nation and to national treatment…. so general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that provisions of the Agreements affording substantive protection are not more than examples of specific instances of this overriding duty."

S.D. Myers Award ¶ 265 (quoting F.A. Mann, *British Treaties for the Promotion and Protection of Investments, 52* BRIT. Y.B. INT'L L. 241, 243 (1981)).

7. Reliance on this citation by the panel majority on this point is misplaced. First, Mann's statement is that of an academic arguing for what he thinks should be the appropriate construction of the terms "fair and equitable treatment" in British investment treaties; it does not purport to be a statement of accepted principles of treaty law, still less of principles so universally accepted by States that they have crystallized into rules of customary international law. Second, Mann provides no support for his construction of the terms in British investment treaties. Third, as demonstrated in the United States' Fourth Submission at ¶¶ 6-7, the drafters of Chapter Eleven specifically excluded Mann's thesis by selecting language in Article 1105(l) that clearly stated fair and equitable treatment to be a subset of customary international law, not an overarching duty that subsumes all other instances of substantive protection.

8. The ED. *Myers* award itself acknowledges that modem commentators might consider Professor Mann's statement on fair and equitable treatment to be "an overgeneralisation." *S.D. Myers* Award ¶ 266. The *S.D. Myers* arbitrators who formed the majority on this point should not have relied on authority so at variance with the NAFTA's clear direction that "fair and equitable treatment" be construed to require compliance only with customary international law obligations. Determining that alleged violations of other NAFTA provisions, whether found within

ILI US Digest/11 693 1/8/02, 1:48 PM

or without Section A of Chapter Eleven, are caught within the ambit of Article 1105(l) would increase the scope of that provision and of Chapter Eleven as a whole far beyond that contemplated by the NAFTA Parties.

9. In short, *S.D. Myers* arbitrator Chiasson was correct in concluding, as recorded in the award, as follows:

> [A] finding of a violation of Article 1105 must be based on a demonstrated failure to meet the fair and equitable requirements of international law. Breach of another provision of the NAFTA is not a foundation for such a conclusion. The language of the NAFTA does not support the notion espoused by Dr. Mann insofar as it is considered to support a breach of Article 1105 that is based on a violation of another provision of Chapter 11.

S.D. Myers Award ¶ 267.

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2. NAFTA Arbitration Awards

The awards issued by the tribunals established to arbitrate claims arising under NAFTA may contribute to the development of the international law of state responsibility for injuries to aliens in the area of investor-State dispute settlement. While not binding precedent, to the extent that they are well reasoned, they may be a persuasive source for other tribunals and for scholars. In 2000 final awards were issued in *Waste Management, Inc. v. United Mexican States*, Case No. ARB(AF)/98/2, (June 2, 2000) (Arbitral Award) and *Metalclad Corporation v. The United Mexican States*, Case No. ARB(AF)/97/1), (August 30, 2000) (Award). These follow the first dispute under NAFTA to be resolved by award on the merits, *Robert Azinian, et al. v. The United*

ILI US Digest/11 694 1/8/02, 1:48 PM

Mexican States, Case No. ARB(AF)/97/2, (November 1, 1999)(Award).

The text of these awards is available in the International Claims and Investment Disputes database at *www.state.gov/s/l.*

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CROSS REFERENCES:

Protocol Relating to the Madrid Agreement concerning the International Registration of Marks in **4.A.2.a.**

Gerling Gobal Reinsurance Corp. of America v. Quackenbush as Commissioner of Insurance of the State of California, in **8.B.l.b.(3)**

ILI US Digest/11 695 1/8/02, 1:48 PM

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CHAPTER 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

1. U.S.-Mexico Treaty on Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles

On October 18, 2000, the United States Senate gave advice and consent to ratification of the Treaty between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles, signed at Washington on June 9, 2000. (The Treaty was brought into force on January 17, 2001.) Excerpts below from the report of the Department of State to the President, submitting the Treaty for transmittal to the Senate, explain the importance of the Treaty. The Treaty was transmitted to the Senate for advice and consent on July 27 (S. Treaty Doc. 106-39 (2000)).

The treaty documents, including the report from the Department of state, are available at *www.access.gpo.gov/congress/cong006.html.*

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DEPARTMENT OF STATE
Washington, July 5, 2000.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Treaty between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 Nautical Miles (the "Treaty"). The Treaty was signed in Washington on June 9, 2000. I recommend that the Treaty be transmitted to the Senate for its advice and consent to ratification.

The Treaty defines the limits within which each Party may exercise its sovereign rights over the seabed and subsoil of the continental shelf, in the area in the western Gulf of Mexico beyond the limits of their respective exclusive economic zones (EEZs), in the area known as the "Western Gap," for the purpose of exploring the shelf and exploiting its natural resources, particularly oil and gas.

The boundaries separating the exclusive economic zones of the Parties were established in the Treaty on Maritime Boundaries between the United States of America and the United Mexican States, signed at Mexico City May 4, 1978, which entered into force November 13, 1997 ("1978 Treaty").

The Treaty is the culmination of negotiations that followed the 1978 Treaty's entry into force. It achieves the U.S. objectives of delimiting a boundary consistent with the approach taken in previous U.S.-Mexico boundary treaties, while at the same time adequately addressing issues of oil and natural gas reservoirs in the area covered under the Treaty. In recommending Senate advice and consent to the ratification of the 1978 Treaty establishing the EEZ maritime boundary, the Senate Foreign Relations Committee noted:

> the untapped reserves of crude oil and natural gas in the Gulf of Mexico along the 200 nautical mile boundary and the technological advances that have made it more likely that U.S. companies will recover these oil and gas deposits … Delimitation of the western gap has become increasingly important to U.S. interests as petroleum exploration has moved into deeper waters.

ILI US Digest/12 698 1/8/02, 1:48 PM

The Committee urged the Administration "to commence negotiations on the western gap without delay, once this treaty enters into force." (Sen. Exec. Rpt. No. 105-4, pages 5-6, Oct. 22, 1997.)

Breadth of the Continental Shelf

Mexico and the United States are parties to the 1958 Geneva Convention on the Continental Shelf (the "1958 Convention"). Article 1 of the 1958 Convention provides that the continental shelf of a coastal State extends beyond a depth of 200 meters to "where the depth of superjacent waters admits of the exploitation of the natural resources" of the shelf. The 1982 United Nations Convention on the Law of the Sea, to which Mexico is a party and which the United States considers reflects customary international law in this respect, provides a more scientifically-based definition of the continental shelf. Article 76 provides that the continental shelf of a coastal State comprises the greater of either the area in which the seabed and subsoil of the submarine areas extend beyond a country's territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or the area to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Under both definitions, the coastal State has exclusive control over the exploration and exploitation of the natural resources, including oil and gas, of the continental shelf.

With respect to areas beyond 200 nautical miles from coastal baselines, the 1958 Convention and the 1982 United Nations Convention on the Law of the Sea provide that certain criteria must be met to qualify as continental shelf. During the negotiations, both sides agreed that all of the seabed and subsoil of the submarine areas beyond the 200-mile EEZ limit in the Western Gulf of Mexico meet the legal requirements described in both Conventions.

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Continental shelf boundary

Article I describes the continental shelf boundary between the United States and Mexico in the Western Gulf of Mexico beyond 200 nautical miles as geodetic lines connecting the listed 16 turning and ter-

ILI US Digest/12 699 1/8/02, 1:48 PM

minal points. In keeping with the methodology used in previous U.S.-Mexico maritime boundary treaties, this line represents an equidistant line drawn from the respective U.S. and Mexican coastal baseline, including the baselines of islands.

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In addition to the provisions typically found in maritime boundary delimitation agreements, the Treaty contains a new set of provisions contained in Articles IV and V dealing with the subject of possible oil or natural gas (hereinafter, "petroleum") reservoirs that may extend across the continental shelf boundary (hereinafter, "transboundary reservoirs"). These provisions, among other things, create a framework by which the Parties can exchange information to help determine the possible existence of transboundary reservoirs. Should any transboundary reservoir be identified, the Parties commit to address the equitable and efficient development of any such reservoirs.

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2. Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean

On September 5, 2000 the United States signed the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and Final Act (the "Convention"). The Convention, signed by approximately two dozen parties, is designed to conserve and manage tuna and tuna-like species throughout a large part of the Pacific Ocean. The Convention defines more clearly than previous international agreements how coastal and distant water fishing states should cooperate in order to regulate fishing for highly migratory species.

ILI US Digest/12 700 1/8/02, 1:48 PM

Because Taiwan operates the second largest fishing fleet in the region and the sixth largest in the world, the United States, as well as many other delegations, viewed incorporating Taiwan into the Convention as essential to the overall future effectiveness of the management regime. Taiwan's international legal status, however, precludes it from being able to become party to any of the recent international fisheries treaties, such as the UN Fish Stocks Agreement. Its participation in other existing regional fisheries management organizations has largely been limited to that of an observer or a "cooperating party."

The compromise reached in the Convention permits "fishing entities" for the first time to participate in a regional fisheries agreement. Article 9, Establishment of the Commission, provides in relevant part:

"2. A fishing entity referred to in the Agreement [for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks], which has agreed to be bound by the regime established by this Convention in accordance with the provisions of Annex 1, may participate in the work, including decision-making, of the Commission in accordance with the provisions of this article and Annex 1."

The Convention does not define the term "fishing entity" although it is generally understood by the negotiators to refer to Taiwan. The Convention distinguishes a fishing entity from other participants in three ways. Annex I to the Convention provides that a fishing entity can join the regime but only after the Convention enters into force. Second, the Annex provides for a separate dispute resolution

ILI US Digest/12 701 1/8/02, 1:48 PM

mechanism to adjudicate disputes between a fishing entity and Contracting Parties to the Convention. Third, the head of the delegation for Taiwan signed a separate instrument at the conclusion of the Conference in which Taiwan expressed its intent among other things to be bound by the Convention and to participate in the work of the Commission in accordance with the terms of the Convention. Relevant portions of that instrument, "Arrangement for the Participation of Fishing Entities" state:

"The Conference HEREBY INVITES Chinese Taipei, as a fishing entity, and Chinese Taipei HEREBY DECLARES its intent:

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(b) subject to the fulfillment of its domestic legal requirements, to agree to be bound by the regime established by the Convention in accordance with article 9, paragraph 2, of the Convention, and to participate in the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean in accordance with the Convention."

The full text of the Convention is available at *www.state.gov/s/l.*

3. Rights and Freedoms of International Community in Navigation

The United States has been engaged for a number of years in a worldwide effort to preserve the internationally recognized rights and freedoms of the international community in navigation, and thereby maintain the balance of in-

ILI US Digest/12 702 1/8/02, 1:48 PM

terests reflected in the 1958 Convention on the Territorial Sea and the Contiguous Zone and the 1982 United Nations Convention on the Law of the Sea. In its approaches to individual governments, the United States has stressed that it is not singling out particular countries in this worldwide effort.

The full text of State Department telegrams referenced below is available at *www.state.gov/s/l.*

a. Non-compliance of certain straight baselines

In a diplomatic note of August 28, the United States provided its views on the non-compliance of certain straight baselines drawn by Thailand along its coast (set forth in Department of State Telegram State 162460, August 24, 2000).

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…[The United States]…has the honor to refer the Government of Thailand to the announcements of the Office of the Prime Minister of June 12, 1970, August 11, 1992 and August 17, 1992 which establish straight baselines in four areas off portions of the coast of Thailand in the Gulf of Thailand and near the Strait of Malacca and claim the waters landward of the baseline as internal waters.

The United States wishes to recall that both the United States and Thailand are party to the 1958 Convention on the Territorial Sea and the Contiguous Zone.

The United States additionally wishes to recall that, while the United States is not yet a party to the 1982 United Nations Convention on the Law of the Sea, as announced in the President's United States Ocean Policy Statement of March 10, 1983, the United States will exercise and assert its navigation and overflight rights in a manner that is consistent

ILI US Digest/12 703 1/8/02, 1:48 PM

with the balance of interests reflected in the 1982 Convention and accepts the non-seabed mining provisions of the Convention as declarative of customary international law including the principles that underlie proper and legal establishment of baselines.

The United States notes that the rules for drawing baselines are contained in Articles 3-13 of the 1958 Convention. Article 3 states that "except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast." Paragraph one of Article 4 states that straight baselines may be drawn only in two specific geographic situations. That is "in localities where the coastline is deeply indented and cut into," or "if there is a fringe of islands along the coast in its immediate vicinity." Articles 1-11 and 13-14 of the 1982 Convention reaffirm these rules.

The United States wishes to recall that the purpose of authorizing straight baselines is to allow the coastal state, at its discretion, to enclose those waters, which as a result of their interrelationship with the land, have the character of internal waters. By using straight baselines, a state may also eliminate complex patterns, including enclaves, in its territorial sea, that would otherwise result. Properly drawn straight baselines do not result in extending the limits of the territorial sea significantly seaward from those that would result from the use of normal, low-water line baselines. Moreover, the use of straight baselines in a manner that prejudices international navigation, overflight, and communications runs counter to the balance of interests reflected in the 1958 and 1982 Conventions.

With regard to straight baselines justified on the basis of fringing islands along the coast in the immediate vicinity, the United States has taken the position that such a fringe of islands must meet all of the following requirements:

- The most landward point of each island lies no more than 24 miles from the mainland coastline;

- Each island to which a straight baseline is to be drawn is not more than 24 miles apart from the island from which the straight baseline is drawn; and

- The islands as a whole, mask at least 50 percent of the mainland coastline in any given locality.

Additionally, the United States has taken the position that, to be consistent with the 1958 Convention's Article 4, paragraph 2 and Article 7(3) of the 1982 Convention, straight baseline segments must:

ILI US Digest/12 704 1/8/02, 1:48 PM

- Not depart to any appreciable extent from the general direction of the coastline, by reference to general direction lines which in each locality shall not exceed 60 miles in length;

- Not exceed 24 miles in length; and

- Result in sea areas situated landward of the straight baseline segments that are sufficiently closely linked to the land domain to be subject to the regime of internal waters.

The United States wishes to inform the Government of Thailand that after analyzing the four areas of straight baselines established by the Government of Thailand's 1970 and 1992 announcements, the United States has concluded that two of the areas do not meet the international legal criteria set forth above:

The United States believes that the straight baselines claimed in Area 1, which is situated along Thailand's southeast coast in the northeast part of the Gulf of Thailand near the Cambodia-Thailand land boundary, meet the international criteria. The straight baselines enclose Ko Chang and Ko Kut Islands and numerous smaller islands, and the water depths landward of the islands are relatively shallow. The seven straight baseline segments range in lengths from 3.2 to 20 miles. One baseline diverts from the general direction of the coast, but serves to bring the straight baseline system back to the coast. None of the islands is more than 24 miles from the coast and the island system can be considered as fringing the mainland coast. Thus, the straight baselines in Area 1 meet the geographic criteria in international law. Similarly, the United States believes that the baselines in Area 3, which is a 125-mile stretch of coastline facing the northern entrance to the Strait of Malacca, also meet the international criteria.

Area 2 is in the Western Gulf of Thailand. In this approximately 100-mile stretch, the coastline is relatively smooth with slight indentations and a sprinkle of offshore islets and rocks. At its southern extent, the coast creates an L shape with several medium sized islands. Only in this area might a few straight baseline segments be valid. The first five segments in Area 2 are connected to rocks and small islets and not a fringe of islands. Segment 6-7 is over 33 miles long and connects a small islet to Ko Tao, a small island about 40 miles from the mainland. From Ko Tao straight baselines are drawn to Hin Bao, a small islet also about 40 miles from the coast and then to Ko Phangan and to Ko Samui. In total, the United States believes that the Government of Thailand has claimed about 3,000 square nautical miles (10,290

ILI US Digest/12 705 1/8/02, 1:48 PM

square kilometers) in Area 2 as internal waters that should, under international law have the legal status as either high seas, exclusive economic zone or territorial sea.

Area 4 is a continuation of Area 2's baselines in the southeastern part of the Gulf of Thailand. Along this 230-mile stretch, Thailand's coastline is not deeply indented nor are there a fringe of islands in the immediate vicinity. The baseline segments range from 65.3 miles to close to 100 miles and only a few small islets situated between 20 and 30 miles from the coast serve as basepoints. In total, in Area 4, the United States believes that the Government of Thailand has claimed as internal waters an area approximately 8,400 square nautical miles (28,812 square kilometers) that should properly have the legal status of either territorial seas, exclusive economic zone or high seas.

In sum, it is the view of the United States that the various straight baseline segments noted above drawn by the government of Thailand do not meet the criteria contained in the 1958 and 1982 Conventions and, therefore, have no basis in international law. In view of the foregoing, the government of the United States reserves its rights and the rights of its nationals in this regard.

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b. Legislative infringement on navigation and other maritime rights

On June 28, the United States delivered a diplomatic note concerning the infringement on navigation and other maritime rights by legislation enacted by the Government of Seychelles (set forth i n Department of State Telegram State 11976, June 22, 2000).

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…[The United States]…has the honor to refer the Government of Seychelles to the Maritime Zones Act of 1999, which purports to delimit the maritime zones of Seychelles in conformity with the 1982 United

ILI US Digest/12 706 1/8/02, 1:48 PM

Nations Convention on the Law of the Sea (UNCLOS). The Embassy recalls American Embassy Victoria's note no. 37, dated July 8, 1982, that protested similar provisions of the Maritime Zones Act of 1977.

The Government of the United States notes that Sections 16(2) and 16(4) of the law require warships, nuclear-powered ships and ships carrying any nuclear or radioactive substances or materials to provide prior notice to and obtain prior approval from the Government of Seychelles before such vessels transit in the territorial sea and archipelagic waters of Seychelles. Section 17(3) further provides that it is prejudicial to the peace, good order and security of Seychelles, and therefore inconsistent with innocent passage, for a foreign warship to transit its archipelagic waters and territorial sea without prior notice to and authorization from the Government of Seychelles. Section 17(2)(m) additionally provides that any act of pollution in the territorial sea or archipelagic waters calculated or likely to cause damage or harm to seychelles, its people, resources or environment qualifies as an activity that is prejudicial to peace, good order and security of Seychelles, and is therefore inconsistent with innocent passage. In this regard, Sections 23 and 24 of the law apply to "foreign ships" and do not exclude warships and thus appear to grant criminal jurisdiction over foreign warships and their crews for acts that are prejudicial to the peace, good order or security of Seychelles.

The United States wishes to recall that articles 17 to 26 and Article 52 of UNCLOS, to which Seychelles is a Party and which the United States accepts as declarative of customary international law, provide that the ships of all states enjoy the right of innocent passage through the territorial sea and archipelagic waters of a coastal state. Innocent passage is a navigational right that may be exercised without requirement to provide prior notification to or obtain permission from the coastal state. This right applies to all ships (including warships), regardless of flag, type, means of propulsion, cargo, destination, armament, or purpose of voyage. Passage is considered to be prejudicial to the peace, good order or security of the coastal state if a foreign ship engages in one of twelve specific activities listed in Article 19(2) of UNCLOS, including any act of willful and serious pollution contrary to UNCLOS. Mere passage of a warship is not included in the list of activities contained in Article 19(2). It is therefore the firm belief of the United States that Sections 16 and 17 of the law impermissibly restrict the right of innocent passage and are therefore inconsistent with international law, including UNCLOS.

ILI US Digest/12 707 1/8/02, 1:48 PM

The United States also wishes to recall that, pursuant to Article 21 of UNCLOS, a coastal state may adopt laws and regulations relating to innocent passage. However, Article 24 makes clear that a coastal state may not hamper innocent passage except in accordance with UNCLOS.

May a coastal state, through its laws or guidelines, impose requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage. Under Article 30 of UNCLOS, if a warship does not comply with the laws and regulations of the coastal state concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal state may require the warship to leave the territorial sea immediately.

To the extent Sections 23 and 24 of the law authorize criminal enforcement jurisdiction over warships and their crews, they violate the universally recognized immunities accorded such vessels and persons under international law. The embassy would be pleased to receive confirmation that these sections do not apply to foreign warships or their officers and crewmembers.

The United States notes that Section 15 of the law appears to limit navigational freedoms in the exclusive economic zone and the superjacent waters and airspace over the continental shelf to the freedom of navigation and the freedom of overflight. The United States would further note that section 25(1)(d) prohibits within the exclusive economic zone or on the continental shelf the construction, maintenance or operation of any artificial island, offshore terminal, installation or other structure or device.

The United States wishes to recall that, within the exclusive economic zone, a coastal state has sovereign rights for the purpose of exploring, exploiting, conserving, and managing the living and non-living natural resources of the water column and the sea-bed and its subsoil. The coastal state also has jurisdiction with regard to the protection and preservation of the marine environment, marine scientific research and the establishment and use of artificial islands, installations and structures for economic purposes. Similarly, the coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. The coastal state also has jurisdiction over the establishment and use of artificial islands, installations and structures on the continental shelf for economic purposes, and the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.

To the extent Section 25 purports to assert exclusive jurisdiction over all artificial islands, installations or structures in the exclusive eco-

ILI US Digest/12 708 1/8/02, 1:48 PM

nomic zone and on the continental shelf, including those that do not have an economic purpose, it is inconsistent with international law.

The United States also wishes to recall that pursuant to Articles 56 and 78 of UNCLOS, a coastal state's rights and jurisdiction within the exclusive economic zone are subject to the rights and duties of other states as provided for in international law. The rights specifically preserved for the ships and aircraft of all states in the exclusive economic zone and the superjacent waters of the continental shelf are the freedom of navigation and overflight, and other internationally lawful uses of the sea related to those freedoms.

To the extent Section 15 of the law limits other internationally lawful uses of the sea related to the freedoms of navigation and overflight, such as those associated with the operation of ships and aircraft and submarine cables and pipelines, it is not in conformity with international law.

Accordingly, the United States reaffirms its 1982 protest and is obliged to continue to reserve its rights and those of its nationals.

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CROSS-REFERENCE

Convention on the Establishment of an Inter-American Tropical Tuna Commission, in **4. A.2.c.**

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CHAPTER 13

Environment and Other Transnational Scientific Issues

A. ENVIRONMENT

1. Emissions Targets: U.S. Compliance-Related Issues

The United States is a party to the 1992 Framework Convention on Climate Change. The Convention imposes on all Parties general commitments to address climate change, including reporting requirements; it also requires specified developed countries to adopt measures to address climate change and to report on the anticipated effect of such measures on their respective emissions of greenhouse gases, with the non-binding aim of returning such emissions to 1990 levels by the year 2000. At the first meeting of the Parties to the Convention, the Conference of the Parties ("COP") determined that the Convention's commitments were not adequate. Many Parties believed that the non-legally binding nature of the Convention's emissions "aim" was the reason Parties (including the United States) would not succeed in returning their emissions to 1990 levels by the year 2000 and, in any event, the "aim" did not extend beyond the year 2000. Some Parties, including the United States, also considered that the emissions "aim" was inadequate because it did not include developing country Parties. The COP decided to negotiate a follow-on agreement to set forth emissions limitation and reduction commitments to apply after 2000.

The COP, at its third session ("COP 3"), adopted the resulting Kyoto Protocol, which would obligate specific de-

ILI US Digest/13 711 1/8/02, 1:48 PM

veloped countries to individual legally binding emissions targets during the period 2008-2012. The U.S. target specified in the Protocol is to reduce emissions 7% below 1990 levels. The Protocol is not in force. While the United States signed the treaty, the Clinton Administration expressed disappointment with the results on developing countries and stated that it would not send the Protocol to the Senate for advice and consent to ratification until it had achieved "meaningful participation" of "key" developing countries. Although the Kyoto Protocol was precise in setting emissions targets, it left a number of important areas for elaboration by the COP, including, *e.g.*, rules for emissions trading, for the use of carbon sinks, and relating to compliance. Although, technically, such elaboration could be carried out by the Parties to the Protocol following its entry into force, it was anticipated that a number of countries, including the United States, would not be in a position to ratify the Protocol unless the key rules were elaborated in advance. Specifically concerning compliance, Article 18 of the Protocol calls upon the Parties to approve procedures and mechanisms to determine and address cases of non-compliance with the Protocol. During the early COP discussions on compliance, several issues emerged, such as: what commitments should be covered by the regime; whether the regime should have both facilitative and enforcement elements; whether the regime should lead to any binding consequences and, if so, what they should be and which cases of non-compliance they should attach to; what precise institutional structure was necessary to perform the required functions (including whether different bodies were needed for facilitative and enforcement aspects); and linkages between compliance and other aspects of the Protocol, including its mechanisms (e.g., emissions trading). Parties were invited to submit views on these and other issues by January 31, 2000. The U.S. submission contains

ILI US Digest/13 712 1/8/02, 1:48 PM

general views on a range of issues, as well as a text containing specific proposed elements of a compliance regime.

The full text of the submission is available at *www.state.gov/s/l.*

COMPLIANCE-RELATED ISSUES: SUBMISSION OF THE UNITED STATES (1 /31/00)

General

- The United States welcomes this opportunity to submit views that supplement previous U.S. submission's and interventions in a number of areas that are either directly or indirectly related to the compliance regime under the Kyoto Protocol. Many of these views address linkages between compliance and other aspects of the Protocol, such as mechanisms.
- The submission also contains a text containing proposed elements of a compliance regime (see attachment). The text generally follows the topic headings contained in the co-chairs' elements paper from [Conference of the Parties ("COP")] 5.
- In general, we see a substantial convergence of view among Parties in areas such as:
  - objectives/nature of the regime;
  - coverage of the regime;
  - the need for both facilitative and enforcement elements;
  - functions of the regime's institution(s);
  - certain outcomes of the regime; and
  - identification of legal issues concerning procedure and institutions.
- The more controversial issues appear to revolve around:
  - whether the regime should result in any mandatory outcomes;
  - if so, which ones; and
  - the precise institutional structure necessary to perform the required functions.
- In working toward the COP 6 deadline, Parties should give priority to the critical elements of the regime, such as outcomes and the major aspects of procedures and institutions. The Parties should

ILI US Digest/13 713 1/8/02, 1:48 PM

consider whether any of the more technical issues related to procedure and institutions (such as details regarding, e.g., length of term on a body) could appropriately be decided at a later time.

* * * *

Linkages with Kyoto Mechanisms

- Many Parties have commented on the need to examine, and appropriately address, the linkages between the compliance regime and the Kyoto mechanisms.
- The *first linkage area* involves the eligibility requirements for the various Kyoto mechanisms. Article 6 denies the ability to acquire [Joint Implementation ("JI")][1] units to a Party not in compliance with is obligations under Articles 5 and 7. Proposals on emissions trading and [Clean Development Mechanism ("CDM")][2] make similar linkages between mechanism eligibility and noncompliance with Articles 5 and 7.
- An issue that arises is the substantive one of what kind/level of inconsistency with obligations under Articles 5 and 7 should trigger the full or partial loss of access to Kyoto mechanisms.
- In the U.S. view, loss of mechanism eligibility (as opposed to non-compliance with Articles 5 and 7 generally) should be linked directly to the environmental integrity of the mechanisms. As such, a Party should lose full or partial access (depending on the mechanism in question) to a mechanism when it is in non-compliance with the inventory- and registry-related obligations in Articles 5 and 7.
- Recognizing that Article 5.2 is an inventory-related obligation (and would therefore be relevant to mechanism eligibility), a second issue is what role "adjustments" play in determining non-compliance with Article 5.2. Article 5.2 provides that, where IPCC methodologies are not used for estimating emissions and removals, "appropriate adjustments shall be applied" according to methodologies agreed upon by the [Conference of the Parties

[1] Article 6 provides for "joint implementation," under which Parties with emissions commitment can use climate-friendly projects in other such Parties to help comply with such commitments.

[2] The Clean Development Mechanism, established under Article 12, is a means by which Parties with emissions commitments can use climate-friendly projects in developing countries to help comply with such commitments.

ILI US Digest/13 714 1/8/02, 1:48 PM

serving as the meeting of the parties to the Protocol ("COP/moP")] at its first session.

- In the U.S. view, the application of adjustments will prevent a Party from being in non-compliance with Article 5.2, provided:
  - the Parties can agree upon methodologies that result in adjustments that are sufficiently conservative so as to provide appropriate assurance that inventory estimates are not underestimated; and
  - that particularly egregious cases of not following IPCC methodologies (with egregiousness being based on quantitative criteria) be considered cases of noncompliance with obligations under Article 5.2.
- The focus on inventory- and registry-related obligations under Articles 5 and 7 would only be relevant to mechanism eligibility requirements (and would be included in mechanism rules); the assessment generally of whether a Party is in non-compliance with Articles 5 and 7 would not be limited to inventory- and registry-related obligations.
- However, the role that adjustments play in determining non-compliance with Article 5.2 would be relevant not only to mechanism eligibility requirements, but also to a general assessment of whether a Party were in non-compliance with Articles 5 and 7.
- (The U.S. submission on Articles 5/7/8 will provide more specificity in this regard, including with respect to how egregiousness would be defined in quantitative terms.)
- The ***second linkage area*** is who reviews which aspect of compliance related to the mechanisms:
  - At the end of a commitment period, an Article 8 expert review team (as well as the compliance entity, if the screening rules direct a case there) will have the target formula before it in reviewing compliance with Article 3.1 targets.
  - The formula provides that emissions (based on estimation under Article 5 and reporting under Article 7, including any adjustments under Article 5.2) cannot be larger than:
    - original assigned amount, plus/minus
    - tonnes from sinks, plus/minus
    - tonnes from emissions trading, plus/minus
    - tonnes from JI, plus
    - tonnes from CDM, plus/minus

ILI US Digest/13 715 1/8/02, 1:48 PM

    - tonnes from banking.
  - The question arises whose job it is to determine whether an Annex I Party can count the tonnes it is claiming from sinks, trading, JI, and CDM.
  - For sinks, there is no sinks-specific body under the Protocol, so an Article 8 expert review team (and subsequently the compliance entity, if there is a compliance issue) will have the ability to review the use of sinks, i.e., whether they meet the rules under Articles 3.3 and Article 3.4.
  - For each Kyoto mechanism, there are two issues: whether the Party in question qualifies under the mechanism's eligibility requirements to use the tonnes it seeks to use; and whether the particular tonnes in question are usable.
    - Article 8 expert review teams will be responsible for reviewing whether an Annex I Party qualifies to use the [Assigned Amount Units ("AAUs"), Emission Reduction Units ("ERUs"), or Certified Emissions Reductions (CERs")] in question (with the compliance entity subsequently addressing compliance issues, in accordance with the screening criteria).
- In terms of the validity of particular tonnes:
  - The validity of CERs will be determined by the relevant CDM institutions, not by Article 8 expert review teams or the compliance entity.
  - The question of whether particular ERUs meet Article 6 criteria, in particularly the additionality requirement under Article 6.1.b., would not be reviewed by Article 8 expert review teams (or subsequently by the compliance entity). Additionality would be presumed if the host country were in compliance with Articles 5 and 7. If the host country had been found not to be in compliance with Articles 5 and 7, a specialized audit process under Article 6/8 would be responsible for verifying ERUs.
- The *third linkage area* involves the issue whether the compliance regime should provide for any kind of distinct treatment (for example, with respect to timing, body) for addressing alleged failures to meet mechanism eligibility requirements.
- In the U.S. view, alleged failures to meet mechanism eligibility requirements should be accorded distinct treatment within the compliance regime:

ILI US Digest/13 716 1/8/02, 1:48 PM

- The distinct treatment should be in the form of timing, rather than body. Alleged failures should be reviewed under an expedited process, while respecting due process.
- In terms of the body, it appears that such cases can be handled by the same body that addresses target issues (i.e., the more enforcement-oriented second component). While there might be sound arguments for a distinct body to address such cases, we believe these arguments are outweighed by the interest in avoiding any unnecessary proliferation of compliance bodies.

Linkages with Reporting under Article 7

- Beyond the indirect linkages between compliance and Article 7 through the mechanism eligibility requirements, there are several direct linkages between the compliance regime and Article 7:
  - First, the requirements under Articles 7.1 and 7.2 are directly related to compliance (with Article 7.1 calling for the "necessary supplementary information for the purposes of ensuring compliance with Article 3..." and Article 7.2 calling for "supplementary information necessary to demonstrate compliance with ... commitments" under the Protocol).
  - Second, because an assessment of compliance with Article 3.1 depends upon complete and accurate reporting, Article 7 needs to be elaborated in a legally binding manner.
  - Third, reporting requirements under Article 7 need to be structured in such a way (i.e., in as quantified and standardized a manner as possible) that ascertaining compliance therewith (and with Article 3.1 targets) is reasonably straightforward.
  - Finally, many Parties have stressed the importance of effective domestic enforcement regimes in realizing implementation of the Protocol's quantified targets. The United States proposes the following elements as part of the reporting requirements under Article 7.2:
  - a descripiton of the relevant domestic compliance and enforcement programs a Party has in place to meet its commitments under Article 3.1 of the Protocol, including the legal authority for such programs, how they are implemented, and what resources are devoted to implementation;

ILI US Digest/13 717 1/8/02, 1:48 PM

- a description of the effectiveness of the above programs, including a summary of actions to identify, prevent, address, and enforce against cases of non-compliance with domestic law (e.g., inspections, investigations, audits, notices of violation, administrative actions for voluntary and involuntary compliance, judicial enforcement actions, penalties and sanctions); and
- a description of how information related to domestic compliance/enforcement (e.g., rules on compliance and enforcement procedures, actions taken) is made public.

ATTACHMENT: ELEMENTS OF THE COMPLIANCE REGIME: SUBMISSION OF THE UNITED STATES (1/31/00)

General Provisions

- The objectives of the compliance procedure are:
  - to promote effective implementation of the Protocol; to prevent non-compliance with obligations under the Protocol; and to address cases of non-compliance, should they arise.
- (The nature of, and principles governing, the compliance regime will be reflected in the design of the regime. These include concepts such as credibility, predictability, due process, etc.)
- (Similarly, the coverage of various aspects of the compliance regime will be reflected in the provisions governing those aspects.)

Coverage

- The compliance regime will apply to all commitments in or under the Protocol, except where expressly provided that a particular aspect of the regime only applies to a particular commitment(s), e.g., Component 2.

Functions

- The Compliance Entity will function as a supplement to other compliance-related institutions and bodies under the Protocol. For example:
  - Article 8 expert review teams will, in the first instance, review national communications and annual inventories. Key issues will be a Party's implementation of any mechanism

ILI US Digest/13 718 1/8/02, 1:48 PM

eligibility requirements and of Article 3.1 commitments. If the assessment raises a question of implementation, a Party will have an opportunity to cure, if appropriate (for example, by submitting missing data or by applying applicable adjustments). Article 8 teams will refer their reports to the compliance entity, as discussed below.

  - CDM institutions will decide on the issuance of CERs, i.e., whether reductions from particular projects meet the Article 12 requirements.
  - Regarding ERUs from JI, if the host country had been found not to be in compliance with Articles 5 and 7, a specialized audit process under Article 6/8 would be responsible for verifying ERUs.
  - The compliance entity will function without prejudice to more traditional State-to-State dispute settlement option under Article 19.
- The Compliance Entity will have the following functions:
  - to decide which references will be pursued, in accordance with agreed criteria;
  - to provide advice and facilitate assistance to individual Parties;
  - to address allegations that a Party is failing to meet the eligibility requirements of one or more mechanisms under Articles 6, 12, and 17;
  - to determine whether an allegation of non-compliance is founded; and
  - to determine appropriate outcomes or, where a mandatory outcome is concerned, to apply such outcome.

Compliance Body(ies)

- The Compliance Entity will be a standing entity.
- It will have two Components.
- Before a question reaches either Component for substantive handling, a process will be needed to screen referred questions of implementation, in accordance with agreed criteria to be adopted at COP 6.
  - Screening will apply to questions of implementation contained in Article 8 review team reports, as well as other referrals (see below).

ILI US Digest/13 719 1/8/02, 1:48 PM

  - Screening will be done both in terms of whether a question will be pursued at all (screening out, for example, *de minimis* and unmeritorious questions) and, if so, to which of the two Components of the system the question will be sent.
- Whether the screening process should be handled by one or both of the two Components, or otherwise, needs to be further considered.
- *Component I* will provide, or provide for, advice and facilitate assistance to individual Parties and otherwise handle questions of implementation whose treatment can potentially lead to outcomes of a non-mandatory nature, such as advice, assistance, recommendations, warnings. The potential coverage of Component I is very broad, including all aspects of Protocol implementation, by both Annex I and non-Annex I Parties.
- *Component 2* will handle questions of implementation that warrant treatment of a more judicial nature (i.e., more enforcement-oriented) and that can potentially lead to pre-agreed outcomes of a mandatory nature. The coverage of Component 2 is focused on Article 3.1 commitments, including:
  - determining whether a Party's alleged non-compliance with Article 3.1 is founded, with pre-agreed outcomes of non-compliance specified below; and
  - determining whether a Party's alleged failure to meet mechanism eligibility requirements is founded, with pre-agreed outcomes of failure to meet such requirements specified in the rules/guidelines for the particular Kyoto mechanisms.
- Component I will be composed of a limited number of Party representatives.
- The composition of Component 2 will need to be further considered, given its quasijudicial, more adversarial character.
- The composition of both Components should contain an appropriate balance of representation; Component 2 in particular should have a larger proportional representation from Annex I Parties, because it is these Parties that are subject to Article 3 commitments. Composition issues should be decided at COP 6.
- Concerning requisite expertise, membership on Component I would require a certain level of technical expertise in order to assess implementation problems and promote solutions. Com-

ILI US Digest/13 720 1/8/02, 1:48 PM

ponent 2, as a more judicial body, would require legal expertise and technical expertise (whether directly or through access to such expertise), given the many ways in which assessing implementation of targets and mechanism eligibility requirements could involve technical issues.

- The precise expertise requirements of membership, the length of membership of the Compliance Entity's various components, and the frequency of meetings of the Compliance Entity's various components could be decided either at COP 6 or subsequently.

Initiation of the Process (References)

- References are to be distinguished from actual initiation of the compliance process:
  - There will be several sources for references of questions of implementation (see below).
  - However, the decision whether a particular question will be pursued will be made by the compliance entity itself, based on agreed criteria to be decided at COP 6.
- Concerning references:
  - Any Party or group of Parties may refer an issue concerning its own implementation. The agreed criteria noted above will provide broad scope for such self-referred issues to be pursued.
  - Article 8 expert review teams will refer their reports concerning implementation by Annex I Parties. The agreed criteria will determine which questions of implementation merit further treatment and by which Component.
  - A Party or group of Parties may refer an issue with respect to implementation of another Party under certain circumstances. Again, the agreed criteria will determine which questions of implementation merit further treatment and by which Component, I or 2.
- Concerning initiation of the compliance process, the screening process will determine whether a referred question will be pursued and, if so, to which of the two Components the question will be sent. Such screening decisions will be made in accordance with agreed criteria and will involve limited discretion. The criteria will, inter alia:

ILI US Digest/13 721 1/8/02, 1:48 PM

- provide broad scope for self-referred issues to be pursued;
- provide for the screening out of *de minimis* and unmeritorious questions; and
- limit initiation of Component 2 to those cases specified herein (i.e., related to Article 3.1 commitments *and* mechanism eligibility requirements).

* * * *

Procedure

- "Procedure" refers to both the general way in which the compliance regime will operate and the more specific "rules of procedure" governing the operation of the Compliance Entity's various components.
- In terms of the way in which the regime will operate:
  - References will be received from various sources, e.g., reports from Article 8 expert review teams, some of which may indicate questions of implementation; and Parties with respect to either their own implementation or another Party's implementation, pursuant to the rules on references noted above.
  - The screening process will determined, based on agreed criteria, whether a question of implementation that has been referred to it warrants further treatment and, if so, whether it is to be pursued by Component I or Component 2.
  - Component 1, as described above, has discretion to apply various outcomes (e.g., assistance, warnings) appropriate to the issue at hand. Consideration by Component I of a question of implementation cannot lead to imposition of consequences specifically reserved to Component 2.
  - Component 2 will address Article 3.1 issues, including the use of Kyoto mechanisms in meeting Article 3.1. Its jurisdiction will include mechanism eligibility requirements.
    - From a procedural standpoint, mechanism eligibility issues should be handled in an expedited manner, while respecting due process.

ILI US Digest/13 722 1/8/02, 1:48 PM

- Substantive criteria will dictate the forwarding of questions for further treatment. In addition, a procedural voting requirement (e.g., consensus, majority voting) may be necessary in case of disagreement on the application of the criteria to the forwarding of questions for further treatment.
- Concerning Component 1, its relatively informal nature will not likely require detailed rules of procedure. However, a voting requirement may still be necessary in terms of making decisions concerning, e.g., warnings, recommendations.
- Component 2, having a more judicial function with the ability to apply serious outcomes, will require more rules to deal with added complexities and to incorporate due process. Among the issues that will need to be addressed, some in advance and others subsequently, include those relating to:
  - Structure: composition of the body/branch; selection of members; length of membership
  - Decision-making: quorum and voting rules avoidance of conflict of interest; contents of decisions
  - Information: types of evidence or information that can be used; how and under what circumstances, including information other than that provided by expert review teams and by Parties, can be used; which Parties/groups can file briefs or make arguments before the body/branch; transparency
  - Other aspects of due process: hearings; ability of the Party in question to reply to factual or legal contentions raised; burden of proof, standard of review; possible appeals *(see* below under *Role of the COP/moP)*
  - Timing: time limits for filings/decisions
- As noted above, the procedures for Component 2 should be developed in a way That *streamlines* the timing for decisions related to mechanism eligibility.

Role of the COP/moP

- At a minimum, the COP/moP will receive reports from the Compliance Entity.
- It should be further considered whether the COP/moP should play any other role at the end of the compliance process (and, if so, what).

ILI US Digest/13 723 1/8/02, 1:48 PM

  - It would not appear necessary for the COP/moP to play any role regarding outcomes of Component 1, at least not in terms of hearing an "appeal."
  - The issue would be whether a mandatory outcome emerging from Component 2 should be capable of being "appealed" to the COP/moP. If the COP/moP were to have such a role, it should not have to approve the outcomes from Component 2; such outcomes should stand unless affirmatively overridden by the COP/moP.

Outcomes, Generally

- The compliance regime may result in four categories of potential outcomes:
  - One category includes outcomes that are purely facilitative in nature, such as incentives, advice, assistance, or the arrangement thereof
  - A second category includes outcomes that are beyond facilitative, yet stop short of legally requiring a Party to take or refrain from a particular action, for example, warnings, publication of non-compliance or potential non-compliance.
  - A third category includes loss of access to a Kyoto mechanism as the result of failure to meet that mechanism's eligibility requirements, for example, loss of access to emissions trading if a Party does not maintain the required registry.
  - A fourth category includes outcomes that are mandatory, i.e., that require a particular result as a result of non-compliance with a specific Protocol obligation.
- Application of the first two categories of responses by the compliance entity is discretionary.
- Application of the third category will flow from the rules in the decisions governing mechanisms under Articles 6, 12, and 17.
- Application of the fourth category will flow from the agreed mandatory outcomes resulting from particular Protocol violations, as contained below.

Mandatory Outcomes

- Mandatory outcomes will relate to non-compliance with Article 3.1 of the Protocol.

ILI US Digest/13 724 1/8/02, 1:48 PM

- There will be a [X-month] period at the end of a commitment period known as a "true-up period."
- During a true-up period, a Party may cure any overage it may have with respect to the previous commitment period by utilizing Articles 6, 12, and/or 17.
- [further consideration of voluntary fund used to remain in compliance]
- To the extent that a Party continues to have an overage after the expiry of the true-up period:
  - Its assigned amount for the subsequent commitment period will be reduced by a number of tonnes equal to [1.3] the number of tonnes by which it exceeded its assigned amount.
  - It may not transfer assigned amount under Article 17 in the subsequent commitment period (i.e., the period following the true-up period) until it demonstrates that it will have an AAU surplus in that period.
  - In addition, there should be a mandatory procedural outcome when a Party operating under Article 4 is found to be in non-compliance with Articles 5 and 7. Specifically, the result set forth in Article 4.5 of the Protocol (i.e., individual responsibility to meet levels of emissions in the Article 4 agreement) should apply. The reason is that, when one Party operating under Article 4 is not measuring/reporting properly, such inaccurate or missing information cannot be allowed to taint the entire Article 4 arrangement. Where one Party has inaccurate or missing information, each Article 4 Party needs to be responsible for its own level of emissions set out in the burden-sharing agreement.

Other Issues

- The compliance regime is without prejudice to Article 19 of the Protocol.
- Any modifications to the compliance regime must be made by consensus of the Parties to the Protocol.

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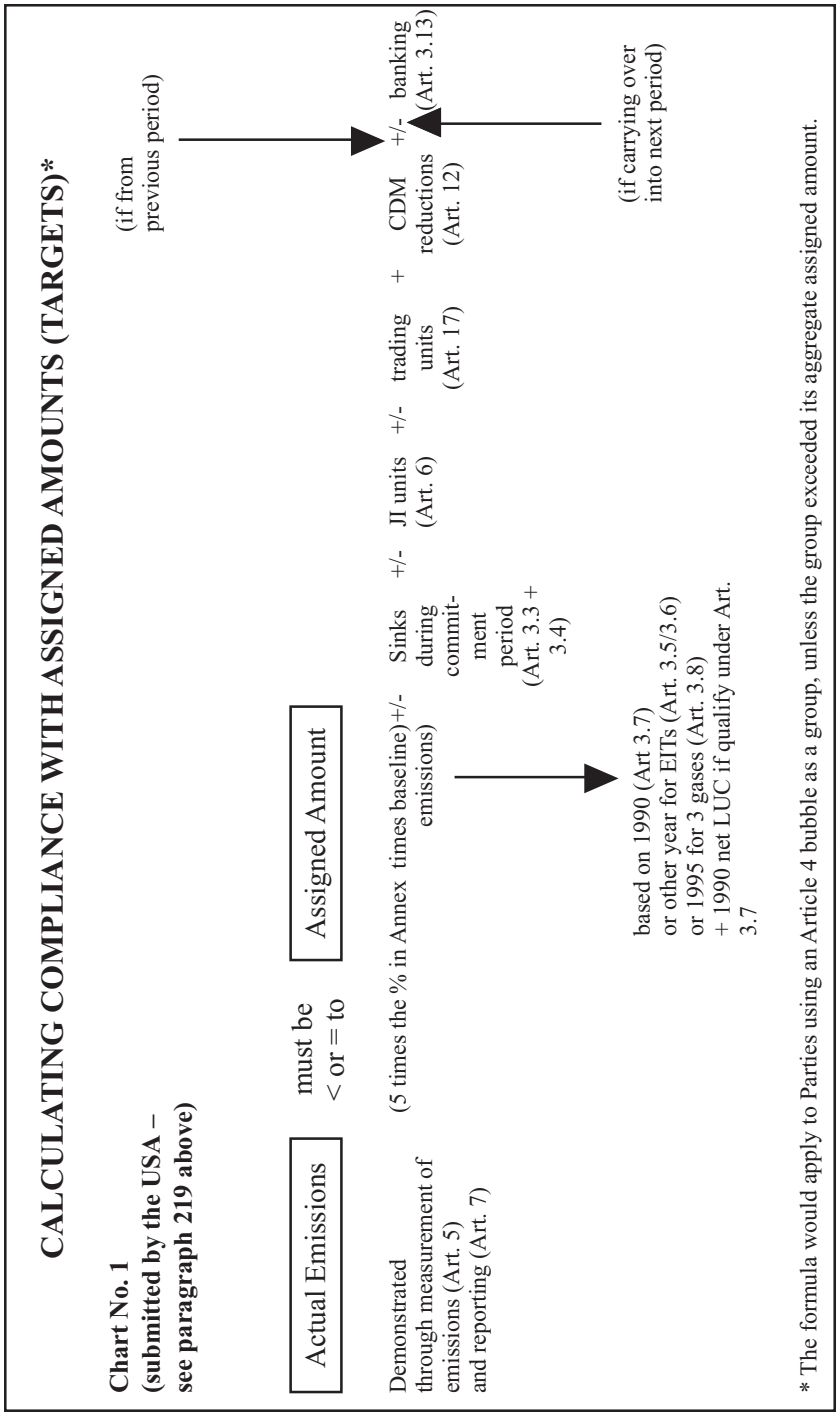

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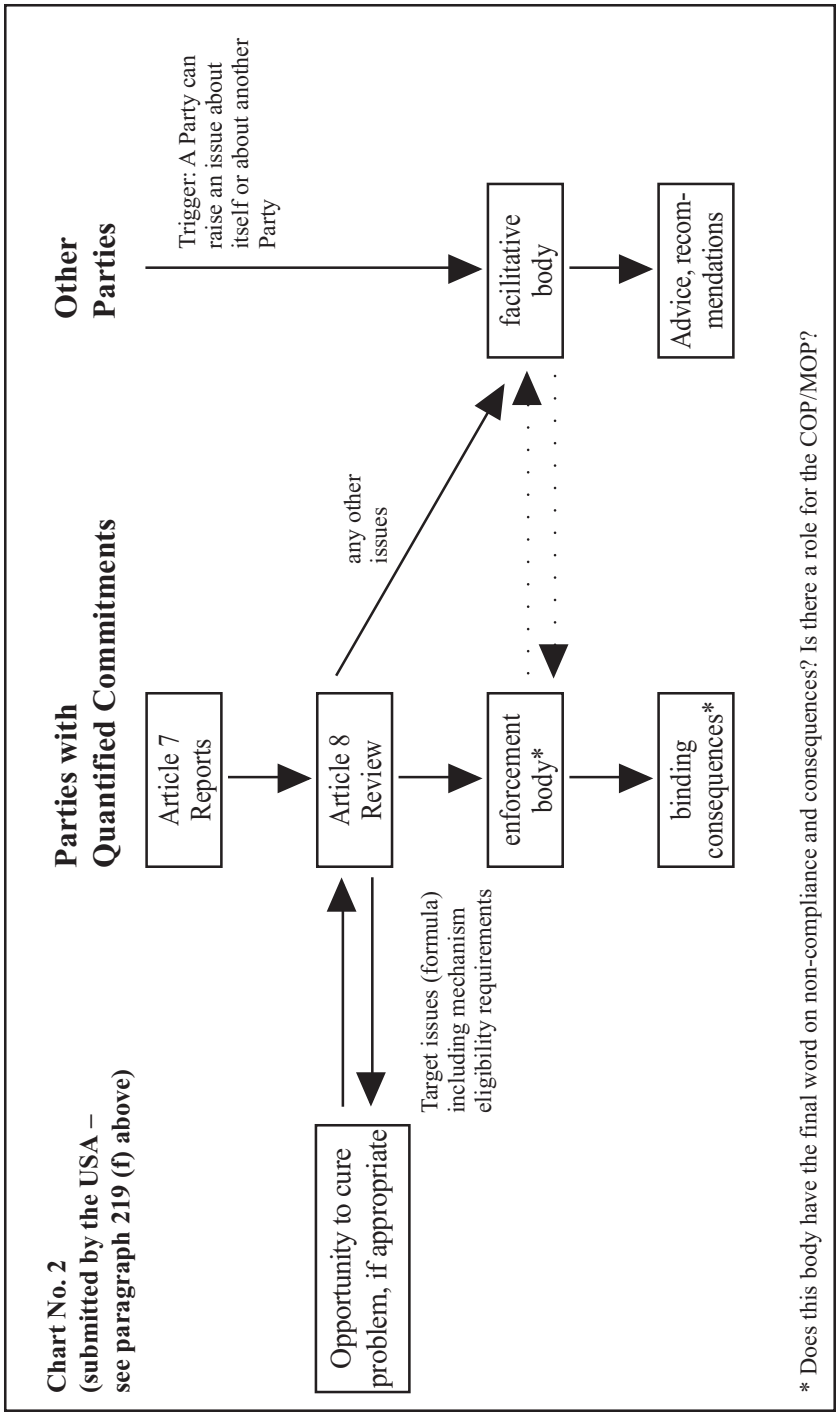

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2. United Nations Convention to Combat Desertification in Countries Experiencing Drought, Particularly in Africa

a. Transmittal of the Desertification Convention to the Senate for advice and consent

On November 13, 2000, the President ratified the United Nations Convention to Combat Desertification in Countries Experiencing Drought, Particularly in Africa, with Annexes, adopted at Paris, June 17, 1994, and signed by the United States on October 14, 1994. The Convention was transmitted to the Senate for advice and consent on August 2, 1996 (S. Treaty Doc. 104-29 (1996)), and received advice and consent to ratification on October 18, 2000. Excerpts below from the Report of the Department of State to the President submitting the Convention for transmittal to the Senate explain its significance in the view of the United States.

The full texts of the treaty documents, including the report of the Department of State, are available at *www.access.gpo.gov/congress/cong006/html.*

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DEPARTMENT OF STATE,
Washington, June 21, 1996.

The PRESIDENT,
The White House.

I have the honor to submit to you, with a view to transmittal to the Senate for its advice and consent to ratification, the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, with Annexes, adopted at Paris June 17, 1994, and signed by the United States on October 14, 1994.

The purpose of the Convention is to combat desertification (i.e., land degradation) and mitigate the effects of drought on arid, semiarid,

ILI US Digest/13 728 1/8/02, 1:48 PM

and dry sub-humid lands through effective action at all levels, including local, national, regional, and global levels, particularly in Africa. The central objectives of the Convention are to promote the sustainable use of drylands world-wide, but especially in Africa, to make more efficient use of aid resources, thereby helping to solve Africa's and other affected regions' chronic hunger problems. In particular, the Convention addresses a fundamental cause of famine and food insecurity in Africa, by stimulating more effective partnership between governments, local communities, non-governmental organizations (NGOs) and aid donors, and by encouraging the dissemination of information derived from new technology (e.g., early warning of impending drought) to farmers.

Desertification affects about one-sixth of the world's population and about one-quarter of the total land area of the world. Over a million hectares of Africa, 73 percent of its drylands, are affected. Another 1.4 million hectares are affected in Asia. Dryland degradation is an underlying cause of recurrent African famine (as during the great Sahelian drought of 1971-73 and 1984-85). The United Nations Environment Programme (UNEP) estimates that desertification costs the world $42 billion a year, and the human cost is higher. The livelihoods of more than a billion people—almost a fifth of the entire population of the globe—are now at risk. Mass starvation, civil conflict, the relocation of millions of refugees—social crises arising from the dangerous convergence of poverty and dwindling natural resources—are a fundamental challenge to the international community. By focusing on desertification issues now, the United States and the international community may reduce the level of emergency relief, civil conflicts and outflows of refugees later; and by taking a leading role on desertification issues, the United States can strengthen its partnerships throughout Africa and other affected regions.

The Department of State's support for this Convention is based on both global and Africa-specific considerations. At the global level, the Convention will stimulate cooperation on technical issues such as climate prediction and on dryland management. For Africa and other affected developed areas, it will encourage and support a more effective anti-desertification effort drawing on "lessons learned" from past aid failures and aided by new technologies such as satellite early warning systems. The Convention also gives new recognition to the essential roles of both village-level and NGO participation in policy planning and implementation.

ILI US Digest/13 729 1/8/02, 1:48 PM

The Convention contains four basic types of commitments:

– those of all Parties to adopt an integrated approach to desertification and to strengthen international cooperation;
– those of Parties affected by desertification (which includes the United States) to have strategies to address desertification and to promote public awareness in this regard;
– those of developing-country Parties affected by desertification to prepare substantial National Action Programs that identify causes of, and measures to address, such desertification; and
– those of developed-country Parties to provide support for developing-country efforts to combat desertification.

The Convention contains four Regional Implementation Annexes addressing Africa, Asia, Latin America and the Caribbean, and the Northern Mediterranean Region. They set forth in detail how the Convention is to be implemented in those regions, in particular within the context of National Action Programs. With respect to implementation of the Convention in Africa, to which the Convention assigns a priority, each participating African country is to coordinate the preparation, negotiation, and implementation of a National Action Program and may involve, as appropriate, other Parties and relevant intergovernmental and non-governmental organizations.

The Convention's provisions governing the adoption of additional Regional Implementation Annexes gives the United States the option to make entry into force for the United States of a subsequent Regional Implementation Annex or of an amendment to a Regional Implementation Annex subject to its express consent to be bound. Therefore, I recommend that the United States include the following declaration at the time of deposit of its instrument of ratification:

> In accordance with Article 34(4), the United States declares that, with respect to the United States, any additional regional implementation annex or any amendment to any regional implementation annex shall enter into force only upon the deposit of its instrument of ratification, acceptance, approval or accession with respect thereto.

Following the model of many other international environmental agreements to which the United States is a party, the Convention estab-

ILI US Digest/13 730 1/8/02, 1:48 PM

lishes a Conference of the Parties, a Secretariat, and a subsidiary body for scientific and technological advice. In addition, it calls for the Conference of the Parties to designate a "Global Mechanism" which, while not itself a funding source, is to inventory and provide advice on possible sources of, and innovative approaches to, such funding.

The United States has strongly supported the Convention's innovative approach to combating dryland degradation. The Department of State believes it will help Africans and others to make better use of fragile resources without requiring increased development assistance. African governments are counting on U.S. continued support for the Convention. One hundred and fifteen States signed the Convention during the period it was open for signature. To date, thirty-one States have indicated their consent to be bound. The Convention will enter into force on the ninetieth day after the deposit of the fiftieth instrument of ratification, acceptance, approval, or accession. Early ratification by the United States will demonstrate to the rest of the world the U.S. commitment to combating desertification and is likely to encourage the participation necessary for effective implementation of the Convention. Ratification of the Convention is consistent with U.S. foreign policy and economic and environmental interests.

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b. Understandings of the United States

In giving advice and consent to ratification to the Desertification Convention, and following consultations with the Department of State, the Senate added four Understandings to the one originally proposed by the Department of State. (*See* S. Exec. Rept. 106-25, 2000). The five Understandings included in the Instrument of Ratification signed by the President are as follows:

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VI. TEXT OF THE RESOLUTION OF RATIFICATION

* * * *

(a) UNDERSTANDINGS. — The advice and consent of the Senate is subject to the following understandings, which shall be included in the instrument of ratification to the Convention and shall be binding on the President:

> (1) FOREIGN ASSISTANCE. — The United States understands that, as a "developed country," pursuant to Article 6 of the Convention and its Annexes, it is not obligated to satisfy specific funding requirements or other specific requirements regarding the provision of any resource, including technology, to any "affected country," as defined in Article 1 of the Convention. The United States understands that ratification to the Convention does not alter its domestic legal processes to determine foreign assistance funding or programs.
>
> (2) FINANCIAL RESOURCES AND MECHANISM. — The United States understands that neither Article 20 nor Article 21 of the Convention impose obligations to provide specific levels of funding for the Global Environment Facility, or the Global Mechanism, to carry out the objectives of the Convention, or for any other purpose.
>
> (3) UNITED STATES LAND MANAGEMENT. — The United States understands that it is a "developed country party" as defined in Article 1 of the Convention, and that it is not required to prepare a national action program pursuant to Part III, Section 1, of the Convention. The United States also understands that no changes to its existing land management practices and programs will be required to meet its obligations under Articles 4 or 5 of the Convention.

ILI US Digest/13 732 1/8/02, 1:48 PM

(4) LEGAL PROCESS FOR AMENDING THE CONVENTION. — In accordance with Article 34(4), any additional regional implementation annex to the Convention or any amendment to any regional implementation annex to the Convention shall enter into force for the United States only upon the deposit of a corresponding instrument of ratification, acceptance, approval or accession.

(5) DISPUTE SETTLEMENT. — The United States declines to accept as compulsory either of the dispute settlement means set out in Article 28(2), and understands that it will not be bound by the outcome, findings, conclusions or recommendations of a conciliation process initiated under Article 28(6). For any dispute arising from this Convention, the United States does not recognize or accept the jurisdiction of the International Court of Justice

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CHAPTER 14

Private International Law

CONVENTION ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF FOREIGN CIVIL JUDGMENTS

On June 29, 2000, Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, U.S. Department of State, testified on ongoing negotiations of a Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments before the Subcommittee on Courts and Intellectual Property of the House of Representatives Committee on the Judiciary. Although the United States has consistently led efforts supporting the negotiation of such a Convention by the Hague Conference on Private International Law, certain issues, particularly those related to efforts to create uniform rules of jurisdiction, have raised significant challenges to completion of the negotiations. Mr. Kovar's testimony explains how the Convention would work, describes some of the major obstacles currently being encountered in the negotiations, discusses critical issues of electronic commerce and intellectual property and provides views on future progress.

The testimony is available at *www.sate.gov/s/l.*

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The Department is leading U.S. efforts at the Hague Conference on Private International Law to negotiate a Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments.[1] The Hague project — which was undertaken at the initiative of the United States — would create harmonized rules of jurisdiction in international civil cases as well as common rules for enforcing abroad the resulting judgments. A successful convention would level the international playing field for American litigants and fill a major gap in the legal infrastructure of the global marketplace.

Although international commerce, trade, and communications are accelerating at a breathtaking pace, and the growth of the Internet promises to make boundaries less and less relevant for commerce, the judicial settlement of transnational disputes remains largely confined to national territories. There is no effective regime for coordinating and enforcing the work of national courts in resolving transnational legal disputes. If this widening gap between the global marketplace and the isolated national court systems is not addressed, it could well slow progress and inhibit growth in trade.

The Hague Convention negotiations, if successfully concluded, hold out the promise of addressing this important need. In this testimony, we will provide some history and background to the Hague negotiations, including how the Convention would work, describe some of the major obstacles facing our delegation, explain how we are addressing the critical issues of electronic commerce and intellectual property, and give some sense of what we think the road ahead looks like.

BACKGROUND

The recognition and enforcement of judgments from one jurisdiction to another has long been understood as a fundamental requirement for fully integrated markets. Thus, the framers of the U.S. Constitution included the Full Faith and Credit Clause to ensure that judgments from one state would be enforceable in every other. In the same way, as part of their movement toward a unified market several European countries concluded a convention in 1968 to provide recognition and enforcement

[1] The U.S. delegation includes members from the State and Justice Departments, as well as distinguished advisers from private practice and academia, including representatives of the American Bar Association, the Association of Trial Lawyers of America, and the Maritime Law Association.

ILI US Digest/14 736 1/8/02, 1:48 PM

of each other's judgments. This convention, called the Brussels Convention, became a required ticket of admission to the Common Market and then the European Union. The Brussels Convention scheme was extended to non-EU countries in Europe in 1988 through a companion instrument called the Lugano Convention.

For many countries the enforcement of foreign judgments is not a matter of general law but is addressed through treaties. The United States is not a party to any convention or bilateral agreement on the recognition and enforcement of foreign judgments. We made an effort to conclude a treaty with the United Kingdom in the 1970s, but it was ultimately blocked by the U.K. insurance industry, which was nervous about the enforcement of U.S. tort judgments against them in U.K. courts.

By contrast with the practice of most countries, however, the United States has led the way in enforcing foreign country judgments on the basis of comity. The Supreme Court embraced this approach over 100 years ago in the case of *Hilton v. Guyot,* 159 U.S. 113 (1895). Judgments from countries with reliable legal systems are now predictably enforceable in federal and state courts in the United States under the common law or under the Uniform Foreign Money Judgments Act. Although the Supreme Court in *Hilton* suggested that it was appropriate also to require a showing of reciprocity in the country where the judgment was rendered, this requirement is no longer a part of most state law.

Thus, while U.S. courts are perceived as the most open in the world to the recognition and enforcement of foreign civil judgments in the absence of a treaty obligation to do so, the ability of U.S. judgment holders to enforce their judgments abroad is much more problematic. Even in those countries that will, in principle, enforce foreign judgments in the absence of a treaty, the reach of U.S. long-arm jurisdiction, what they perceive to be "excessive" jury awards, and punitive damages are sometimes considered reasons not to enforce U.S. judgments. U.S. litigants deserve the same opportunity to have their judgments enforced abroad as that enjoyed by foreign litigants in the United States.

THE NEGOTIATIONS

The successful negotiation at the Hague Conference of a convention on jurisdiction and the recognition and enforcement of foreign civil judgments would be a huge step toward an international regime for enforcing foreign court judgments. The negotiations, which have been underway since 1996, involve more than 45 countries from around the

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world, including virtually all major U.S. trading partners. The Hague Conference is well known here for producing the Conventions on Service of Process and the Taking of Evidence Abroad, Abolishing the Requirement of Legalization, and International Child Abduction to which we are a party. Moreover, the Hague Intercountry Adoption Convention is currently being considered by the House and Senate for advice and consent to ratification and implementing legislation, and has solid support from the adoption community. The Hague Conference has traditionally been a professional and non-political forum of experts in the area of conflict of laws.

If successful, the Hague Jurisdiction and Judgments Convention would establish a regime governing jurisdiction to sue defendants from party states in tort and contract, and would improve predictability in the enforcement of the resulting judgments. This requirement that the Convention create uniform rules of jurisdiction comes as a surprise to many Americans. It reflects both the approach of the Brussels Convention and a deep-seated feeling among many other delegations that they do not wish to enforce U.S. judgments unless we make our jurisdiction practices consistent with their view of what constitutes appropriate international rules. Since litigants from most developed countries have no substantial difficulties enforcing judgments in the United States, their governments believe they have substantial negotiating leverage over us. This would perhaps not be the case if our states included reciprocity requirements in their law.

Agreeing on a rigid set of jurisdictional rules poses special difficulties for the United States. Because the Due Process Clause puts limits on the extension of jurisdiction over defendants without a substantial link to the forum, the United States is unable to accept certain grounds of jurisdiction as they are applied in Europe under the Brussels and Lugano Conventions. For example, we cannot, consistent with the Constitution, accept tort jurisdiction based solely on the place of the injury, or contract jurisdiction based solely on place of performance stated in the contract.

At the same time, civil law attorneys (and their clients) are profoundly uncomfortable with jurisdiction based on doing business or minimum contacts, which they find vague and unpredictable. They feel strongly that certain aspects of U.S. jurisdictional practice must be restricted under the Convention. Although this divide has been partially bridged by agreement to permit some grounds of jurisdiction under na-

ILI US Digest/14 738 1/8/02, 1:48 PM

tional law to continue outside the Convention, critical choices and hard negotiations remain. If the Convention is to regulate jurisdiction in international litigation it must bridge vast differences in approach toward general and specialized jurisdiction among the various countries involved. It must also provide strong and clear benefits to outweigh the inevitable concerns about giving up some current litigation options in international cases.

Apart from jurisdiction, agreement must also be reached on how to handle a huge array of issues raised by this sweeping and ambitious project. Some of the issues include: concurrent filings in the courts of more than one state; forum non conveniens; provisional and protective measures; punitive, non-compensatory and "excessive" damages; a lack of fairness or impartiality in the judgment court; and scope of application to government litigation.

The fifth negotiating session in October 1999 produced a preliminary draft text, and the original schedule called for a final negotiating session this coming fall. However, after extensive consultations with industry and consumer groups, the private bar, and with government litigators,[2] the Department of State concluded that this text is not close to being ratifiable in the United States and cannot be an effective vehicle for final negotiations.

Acutely aware of the need for more time, in May we successfully requested the Hague Conference to extend the negotiations for another year or more, and to split the final session into two parts. We also secured a commitment from other delegations to make a renewed effort to seek real compromises on these difficult issues by meeting informally before the next session in June 2001 to try to achieve new drafts. Frankly, if other delegations do not begin to show more flexibility on many key

[2] We have consulted with the American Bar Association, the Association of Trial Lawyers of America, the American Law Institute, the American Corporate Counsel Association, the American Society of International Law, several consumer organizations, the Maritime Law Association, trade associations and industry groups, bar associations in Chicago and New York, federal agencies with substantial litigation interests, and leading practitioners and academics. At the same time there are other groups — such as state litigating agencies and attorneys general and the banking industry — with which we have not yet been able to meet directly on the convention.

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provisions, we will be unable to achieve a convention that could attract sufficient support in the United States.

ELECTRONIC COMMERCE AND INTELLECTUAL PROPERTY ISSUES

When the Hague Convention negotiations were first proposed by the United States in 1992, and when they began four years later, no one predicted the immensely difficult issues that would suddenly arise from the explosion of electronic commerce. You will hear a great deal about these issues today.

Recognizing that revising rules of jurisdiction applicable to the Internet raised issues that had not yet been explored, the Hague Conference held a roundtable workshop in Geneva in September 1999, then called a special experts meeting in Ottawa last February devoted only to electronic commerce issues raised by the draft Convention. Because the issues relate to commercial electronic transactions, the Department of State specifically sought the assistance of the Department of Commerce with this phase of the discussions. The Ottawa session provided an opportunity for interested business and consumer groups to engage delegations and begin to educate them about the special litigation problems that arise from commerce on the Internet. A follow-on meeting in Ottawa is now planned for early next year.

Similarly, the special litigation issues raised by international patent, trademark, and copyright litigation, including through the Internet, call for experts to consider carefully the potential effects of the current draft on international litigation involving intellectual property (IP) rights. Under the Brussels Convention, and reflected in the current draft of the Convention, jurisdiction over certain types of claims involving registered intellectual property rights is limited to the country of registration. This requirement has led to major clashes of interpretation among Brussels Convention parties, and those concerns have in turn been raised over the Hague draft. Recognizing these difficulties, the Hague Conference has asked the World Intellectual Property Organization (WIPO) to convene a meeting of experts to address the problems of jurisdiction in international litigation involving IP rights. The Department of Commerce, especially the Patent and Trademark Office, is providing assistance with this aspect of the discussions.

There is no consensus on the electronic commerce and intellectual property issues in the United States or elsewhere, and the Department

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believes we must take an extremely careful and deliberate approach in the Hague negotiations. We do not have firm views on the proper outcome of these provisions, and are seeking to consult as widely as possible and ensure that all the various interests are heard. We hope very much that effective solutions will emerge that will enable the Convention to move forward to a successful conclusion.

THE ROAD AHEAD

A carefully conceived and properly balanced Hague Convention would represent a tremendous opportunity for many American litigants, and we are trying vigorously to reach the right balance of provisions to enable us to achieve a convention to which the United States could become a party. However, given the strong litigation orientation of our society and the differences between our established jurisdiction practices and those of many of the other participating countries at the Hague, the Convention negotiations present special challenges. When you add the enormous uncertainties raised by the growth of trade and commerce on the Internet, and the complex choices for intellectual property litigation, the obstacles can seem overwhelming. Nevertheless, the promise is great, and we hope that we can ultimately succeed.

In the months ahead we will continue to reach out to as many groups, associations, and experts as we can from the private and public sector to make them aware of the draft Convention and seek their views on the opportunities and difficulties it presents for us. It is only by understanding as clearly as possible the litigation issues raised that we can be in a position to attempt to achieve a balance of provisions that could allow us to ratify and implement the final Convention.

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CROSS-REFERENCES:

Hague Convention on International Child Abduction, in **2.B.1.**
Hague Convention on Intercountry Adoption, in **2.B.3.**
Issues concerning electronic commerce, in **4.A.2.b.**

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CHAPTER 15

Sanctions

1. Amendment to Iranian Sanctions Regulations

On May 3, 2000, the Office of Foreign Assets Control of the U.S. Department of the Treasury amended the Iranian Sanctions Regulations, 31 CFR Part 560, to authorize the importation into the United States of, and dealings in, certain foodstuffs intended for human consumption and carpets, and related transactions.

The full text of the modified regulations is published at 65 Fed. Reg. 25,642-44 (May 3, 2000), which explains the amendment as follows:

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On March 17, 2000, Secretary of State Madeline K. Albright announced that economic sanctions against Iran would be eased to allow Americans to purchase and import carpets and food products such as dried fruits, nuts, and caviar from Iran. To implement this policy, the Treasury Department's Office of Foreign Assets Control ("OFAC") is amending the Iranian Transactions Regulations, 31 CFR part 560 (the "Regulations"), to authorize, by general license, the importation into the

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United States of, and dealings in, certain Iranian-origin foodstuffs and carpets and related transactions.

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2. Foreign Narcotics Kingpin Sanctions Regulations

On July 5, 2000, the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury issued Foreign Narcotics Kingpin Sanctions Regulations, 31 CFR Part 598, to implement the Foreign Narcotics Kingpin Designation Act, Pub. L. No. 106-120, title VIII , 113 Stat. 1606 (1999). The Act provides authority for the application of sanctions to significant foreign narcotics traffickers and their organizations operating worldwide.

The full text of the new regulations is published at 65 Fed. Reg. 41334 (July 5, 2000). As described in the Federal Register notice:

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Section 805(b) of the Act blocks all property and interests in property within the United States or within the possession or control of any United States person, which are owned or controlled by significant foreign narcotics traffickers, as identified by the President, or foreign persons designated by the Secretary of the Treasury, in consultation with the Attorney General, the Director of Central Intelligence, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, and the Secretary of State, because they are found to be:

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(1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a significant foreign narcotics trafficker or foreign persons designated by the Secretary of the Treasury pursuant to section 805(b) of the Act;

(2) Owned, controlled, or directed by, or acting for or on behalf of, a significant foreign narcotics trafficker or foreign persons designated by the Secretary of the Treasury pursuant to section 805(b) of the Act; or

(3) Playing a significant role in international narcotics trafficking.

Significant foreign narcotics traffickers and persons coming within any of the above three categories are referred to as specially designated narcotics traffickers.

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3. Amendments to Regulations Relating to North Korea

a. Foreign Assets Control Regulations

On June 19, 2000, OFAC amended the Foreign Assets Control Regulations, 31 C.F.R. Part 500, to add § 500.586, authorizing new transactions involving property in which North Korean nationals have an interest, including certain exportation to North Korea, new investment, and brokering transactions.

The full text of the new regulations is published in 65 Fed. Reg. 38,165 (June 19, 2000), which includes the following explanation:

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On September 17, 1999, the President announced his decision to ease economic sanctions against North Korea in order to improve over-

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all relations with North Korea, to support the Agreed Framework, and to encourage North Korea to continue to refrain from testing long-range missiles. Accordingly, the Office of Foreign Assets Control is amending the Foreign Assets Control Regulations, 31 CFR part 500 (the "FACR"), to add § 500.586, authorizing new transactions involving property in which North Korean nationals have an interest. The effect of this amendment is that transactions involving such property coming within the jurisdiction of the United States or into the possession or control of persons subject to the jurisdiction of the United States after June 19, 2000 or in which an interest in North Korea or a national thereof arises after that time, are authorized by general license. Newly authorized transactions include, but are not limited to, exportation to North Korea, new investments, and brokering transactions (except as otherwise restricted under regulations administered by other federal agencies, *e.g.*, the Export Administration Regulations). Importations from North Korea require notification to and approval from the Office of Foreign Assets Control for purposes of compliance with Chapter 7 of the Arms Export Control Act. Property blocked as of June 16, 2000, remains blocked. Reports due under general or specific license must still be filed covering activities prior to the effective date of this rule.

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b. Department of Commerce Bureau of Export Administration Regulations

The Department of Commerce Bureau of Export Administration ("BXA") likewise amended the Export Administration Regulations ("EAR") to provide that most items subject to the EAR designated as EAR99 may be exported or reexported to North Korea without a license and to change the licensing policy for certain items on the Commerce Control List (CCL) destined to North Korean civil

ILI US Digest/15 746 1/8/02, 1:48 PM

end-users from a policy of denial to case-by-case review. The BXA regulation added certain categories of items to the CCL for which a license will be required to North Korea. This easing of sanctions does not affect U.S. anti-terrorism or nonproliferation export controls on North Korea. The full text of the new regulations is published in 65 Fed. Reg. 38,148 (June 19, 2000), which describes the new regulations as follows:

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On September 17, 1999, the President announced his decision to ease sanctions against North Korea. The United States is taking this action, which is consistent with the 1994 Agreed Framework and the 1999 Perry Report, in order to pursue improved overall relations.

Under this new policy, most items subject to the EAR designated as EAR99 may be exported or reexported to North Korea without a license. In addition, BXA is changing the licensing policy for certain items on the Commerce Control List (CCL) destined to North Korean civil end-users from a policy of denial to case-by-case review.

This regulation adds certain categories of items to the CCL for which a license will be required to North Korea. Consequently, this regulation identifies certain Export Control Classification Numbers (ECCNs) that are controlled for anti-terrorism (AT) reasons to North Korea only. These new ECCNs do not refer to any column on the Country Chart and therefore exporters are not required to consult the Country Chart in Supplement No. 1 to part 738 to determine licensing requirements for these entries.

This easing of sanctions does not affect U.S. anti-terrorism or nonproliferation export controls on North Korea, including end-user and end-use controls maintained under the Enhanced Proliferation Control Initiative. This does not relieve exporters or reexporters of their obligations under General Prohibition 5 in § 736.2(b)(5) of the EAR which provides that, "you may not, without a license, knowingly export or reexport any item subject to the EAR to an end-user or end-use that is

ILI US Digest/15 747 1/8/02, 1:48 PM

prohibited by part 744 of the EAR." BXA strongly urges the use of Supplement No. 3 to part 732 of the EAR, "BXA's "Know Your Customer" Guidance and Red Flags" when exporting or reexporting to North Korea.

This rule does not affect the export license denial policy imposed under the Arms Export Control Act, as amended, and the Export Administration Act of 1979, as amended, in place against Changgwang Sinyong Corporation and its subunits, successors, and affiliated companies, and certain sectors of North Korean government-related activity, set forth in 63 FR 24585 (May 4, 1998) and more recently in 65 FR 20239 (April 14, 2000). This license denial policy requires BXA to deny license applications submitted for exports to Changgwang Sinyong Corporation and related entities listed above. This entity is not on the Entity List (*see* Supp. No. 4 to part 744) and does not appear on the list of projects in Supp. No. 1 to part 740 which have the effect of triggering a license requirement for items subject to the EAR (e.g., including all items classified as EAR99).

Although the Export Administration Act (EAA) expired on August 20, 1994, the President invoked the International Emergency Economic Powers Act and continued in effect the EAR, and, to the extent permitted by law, the provisions of the EAA in Executive Order 12924 of August 19, 1994, as extended by the President's notices of August 15, 1995 (60 FR 42767), August 14, 1996 (61 FR 42527), August 13, 1997 (62 FR 43629), August 13, 1998 (63 FR 44121), and August 10, 1999 (64 F.R. 44101).

4. Special Treatment of Agricultural Commodities, Medicines and Medical Devices

On April 28, 1999, President Clinton announced that the United States would generally exclude agricultural commodities, medicines and medical devices from future Executive Branch sanctions for which he had discretionary authority to do so. In late 1999 OFAC generally implemented this policy throughout its regulations. *See generally* 31 C.F.R. Parts 538 (Sudan), 550 (Libya), 560 (Iran).

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In 2000, Congress enacted the Trade Sanctions Reform and Export Enhancement Act, Title IX of Pub. L. No. 106-387, 114 Stat. 1549, 1549A-67 (2000) to effectively eliminate unilateral U.S. sanctions on agricultural commodities, medicines and medical devices, except in limited circumstances, in order to open up overseas markets for U.S. products. The Act requires the President to terminate such sanctions by February 25, 2001 and imposes certain new procedural requirements on the President before a new unilateral agricultural sanction or unilateral medical sanction may be imposed. The Act also limits U.S. commercial financing for agricultural exports to Cuba; imposes new limitations on travel to Cuba; and prohibits the use of United States foreign assistance for exports to Cuba and commercial exports to Iran, Libya, North Korea, or Sudan. The Act, however, provides for a limited Presidential waiver to the United States foreign assistance ban. In signing the Act into law, the President expressed his concerns about the legislation as set forth below.

The full text of the Signing Statement is available at 36 WEEKLY COMP. PRES. Doc. 2651 (Nov. 6, 2000).

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I am … concerned that language in this Act restricts Presidential ability to initiate certain new agricultural and medical trade sanctions and maintain old ones, as congressional approval of such sanctions will now be required. This could disrupt the ability of the President to conduct foreign policy, and could provide potential targets of U.S. actions with time to take countermeasures. The bill permits exports of U.S. farm and medical products to Cuba, but constrains these trade opportunities by barring the U.S. Government, and severely limiting U.S. private banks, from providing financing assistance to Cuba. In addition, the legislation

ILI US Digest/15 749 1/8/02, 1:48 PM

purports to restrict the President's ability to authorize certain travel-related activities in Cuba. We are concerned that this provision could be read to impose overly rigid constraints on our ability to conduct foreign policy and respond to immediate humanitarian and operational concerns including, inter alia, protecting American lives, ensuring upkeep of American diplomatic installations, and assisting in both Federal and State prosecutions in the United States in which travel to Cuba may be required. We do not think that Congress intended to curtail such activities by this legislation. Accordingly, my Administration will interpret this provision, to the extent possible, as not infringing upon such activities.

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5. Office of Foreign Assets Control

Information on current sanctions programs administered by the Office of Foreign Assets Control of the Department of the Treasury is available at *www.treas.gov/ofac/*. Information on certain export restrictions imposed under current sanctions programs and administered by the Bureau of Export Administration is available at *www.bxa.doc.gov/*.

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CROSS-REFERENCES

Sanctions against Iran in **8.A.2.** and **8.B.5**.

Sanctions against Iraq, in **8.A.3** and **10.C.2.**

New visa restrictions against certain persons supporting the Revolutionary United Front in Sierra Leone, in **1.B.**

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CHAPTER 16

Use of Force and Arms Control

1. Convention on Certain Conventional Weapons: Amended Mines Protocol

In December 2000, the United States participated in the Second Annual Conference of Parties to the Amended Mines Protocol to the Convention on Certain Conventional Weapons, 35 I.L.M. 1206, S. Treaty Doc. 105-1 (1997) ("CCW"), and a Preparatory Conference for the 2001 Review Conference of States Parties to the CCW, held in Geneva, Switzerland. In interventions on December 11 and 12, Edward Cummings, Assistant Legal Adviser of the U.S. Department of State and Head of the U.S. Delegation, provided the position of the United States that the Amended Mines Protocol ("AMP") will result in a substantial decrease in civilian casualties caused by the indiscriminate use of mines and provided specific proposals for strengthening the Protocol to further its purposes. On December 14, 2000, in an intervention to the First Preparatory Conference of the 2001 Review Conference of States Parties to the CCW, Mr. Cummings introduced a United States proposal to expand the scope of the Convention to apply in non-international armed conflict. Excerpts from the three interventions are provided below.

The full text is available at *www.itu.int/missions/US/CCW.*

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ILI US Digest/16 751 1/8/02, 1:48 PM

Intervention of December 11, 2000, to the Second Annual Conference of Parties to the Amended Mines Protocol:

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The principal goal of this conference must be the same as the main goal of the Protocol itself: to address the main humanitarian issues related to mines, booby traps and other devices — indeed, to work together to enhance the protection of civilian populations against the indiscriminate use of all landmines. Achievement of this goal is necessary if the CCW is to continue to serve its intended function and remain both a dynamic instrument in the law of armed conflict and an effective vehicle to advance the cause of humanitarian protection. To the extent that this conference achieves this goal, we can expect the circle of adherents to the Protocol to increase and for the protection of civilians to be strengthened.

The wide participation at this Conference confirms a crucial fact: the Amended Mines Protocol remains an essential part of the strategy to deal with the threat of indiscriminate use of landmines. In this connection, it bears noting at the outset that the Protocol's value has not been obviated by the adoption of the Ottawa Convention on the prohibition of anti-personnel mines. This protocol can attract the adherence of all States, including those able and unable to accept a total prohibition of [anti-personnel landmines ("APL")] at this time. It provides a vital measure of protection for the civilian population with respect to the possible use of APL by those States which find it necessary to retain that option. The Amended Mines Protocol covers a variety of weapons not covered by the Ottawa Convention, including anti-tank mines, booby-traps and other devices, the systems for the recording and marking of minefields, and the protection of peacekeeping forces and humanitarian missions from the danger of mines.

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Intervention of December 12, 2000, to the Second Annual Conference of Parties to the Amended Mines Protocol:

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ILI US Digest/16 752 1/8/02, 1:48 PM

Certain provisions of the Protocol as it exists apply specifically to anti-personnel mines, such as the requirement that all anti-personnel mines be detectable and that all remotely-delivered anti-personnel mines be equipped with self-destruction and self-deactivation features. These provisions are designed to minimize the risk to the civilian population, to peacekeeping forces, and to humanitarian missions from non-detectable and long-lived anti-personnel mines. We believe these same concepts can and should be applied to mines other than anti-personnel mines as well. Thus, we are proposing that the 2001 Review Conference consider the following:

— First, we are proposing a requirement that all landmines be constructed or modified so as to be detectable by commonly available means. The Protocol requires a metallic signature equivalent to that of 8 grams or more of iron for anti-personnel mines; our proposal adopts the same standard for detectability of mines other than anti-personnel landmines. Why make such mines detectable? We believe that detectability of anti-vehicle mines would have a significant military value, decreasing casualties among peacekeepers and friendly military forces. Detectability of anti-vehicle mines would have little if any impact on the anti-tank mines' utility in blocking, turning or channeling enemy mechanized forces. From a humanitarian perspective, we believe such a requirement would greatly facilitate the detection and clearance of anti-vehicle mines on roads used by civilian traffic. The ICRC reported in September of this year, at a meeting in Nyon, that although the number of civilian casualties associated with anti-vehicle mines is less than AP mines, there are major effects in terms of denial of humanitarian assistance to vulnerable populations, as a result of anti-vehicle mining. The ICRC pointed out also that disruption of normal food distribution can persist long after a conflict has ended as result of anti-vehicle mining.…

— Second, we are proposing a requirement that all remotely-delivered anti-vehicle mines be equipped with self-destruction capabilities with back-up self-deactivation features. Long-lived remotely-delivered anti-vehicle mines pose serious risks to the civilian population, since they could remain active and unmarked on roads used by civilians long after they had served the military purpose for which they were laid. Once again, the use of self-destruction and self-deactivation features makes sense from a military point of view as well, in that it minimizes civilian casualties without compromising legitimate military uses and reduces risks to one's own forces.

ILI US Digest/16 753 1/8/02, 1:48 PM

— Third, the Protocol currently requires that all remotely-delivered anti-personnel mines be equipped with a self-destruction device that operates within 30 days with a dependability of 90 percent and with self-deactivation features ensuring, within 120 days at a dependability of 99.9 percent, that the mine is no longer capable of functioning as a mine. These features are designed to reduce the risk to civilians and friendly military forces caused by the use of long-lived mines that remain a threat long after the military purpose for which they were laid has been served. We believe that these specifications can be improved. We also believe they can be applied to all landmines without degrading legitimate military requirements and that they are technically realistic and practical.

Thus, our third proposal to strengthen the Protocol is to increase the technical specifications so that self-destruction features operate within 30 days at a dependability of 95 percent and self-deactivation features ensure, within 120 days, the non-operability of the mine at a dependability of 99.99 percent. Such improvements would further reduce the risk to the civilian population from the use of such mines.

We should note, in this context, that the AMP already contains a number of restrictions on landmines that apply to anti-vehicle as well as AP mines. These include prohibitions on anti-detector devices in Article 3(5) and certain types of anti-handling devices in Article 3(6) and certain restrictions on the use of remotely-delivered mines in Article 6(3).

— Fourth, the United States is proposing a reasonable and balanced compliance mechanism to deal with legitimate complaints related to the misuse of mines, booby-traps and other devices. Let me make clear that the proposal of the United States is limited, non-intrusive and includes procedural protections to accommodate national security and constitutional concerns and to counter abuse. Allow me also to point out some specific aspects of our proposal and note in particular that this differs in important respects from article 8 of the Ottawa Convention.

One, to be bound by the proposed compliance annex, a State Party would have to declare its intention to be bound by it. In other words, it would be an optional mechanism for Parties, unlike the Ottawa Convention's integral article 8 procedure.

Two, this proposed mechanism deals solely with allegations concerning the use of mines, booby-traps and other devices; it does not apply, for instance, to stockpiles of such weapons.

ILI US Digest/16 754 1/8/02, 1:48 PM

Three, it specifies quite clearly the authority of on-site inspection teams, including what kind of equipment may be brought to a country for such purposes.

Four, the procedural protections to which such teams' authority is subject provides a State Party with some guarantees against the compromise of legitimate legal and military interests. For example, it would enable a State to determine whether certain sensitive areas are unconnected with the fact-finding mission. It would enable the Party to determine whether certain constitutional obligations limit the mission's authority. It would enable a State to determine whether the conduct of actual military operations would be left unprotected.

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Intervention of December 14, 2000 to the 2001 Review Conference of States Parties to the Convention on Certain Conventional Weapons:

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On behalf of the U.S. delegation, I would like to take the opportunity of this intervention first to introduce our proposals to expand the scope of the Convention to apply in non-international armed conflict….

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Mr. Chairman, last month marked the 20th anniversary of the conclusion of the Convention on Conventional Weapons. It has become an important part of the regime dealing with the conduct of armed conflict, including the four 1949 Geneva Conventions on the Protection of the Victims of War and the 1899 and 1907 Hague Conventions Respecting the Laws and Customs of War on Land. This vital regime of treaties, the results of a century of law-making, is founded on a recognition of military realities and humanitarian principles we all share. They are designed to further our common goal of reducing the suffering caused by armed conflicts and providing protections to the victims of war. But for all the undoubted progress which has been made during the last 100 years in developing the law in this area, the difficulty of preserving humanitar-

ILI US Digest/16 755 1/8/02, 1:48 PM

ian values in time of war is as or even more acute at the turn of this century than it was at the turn of the last.

That difficulty is apparent in all armed conflicts, international and internal. And the fact is that the distinction between the types of conflicts matters little to the victims of war itself. Yet there are distinctions in the humanitarian protections afforded victims — distinctions which turn on how a conflict is characterized. This is the case even after the adoption of Additional Protocol II to the 1949 Geneva Conventions on internal armed conflicts. Indeed, the comparative paucity of substantive treaty law on humanitarian protection applicable in internal armed conflicts is significant. We believe that the extension to internal conflicts of more of the principles and rules for the protection of the civilian population from the effects of hostilities would offer a significant advance without unduly restricting legitimate security requirements of a State to combat rebellion within its territory.

The substantive treaty law of internal armed conflict also lacks adequate provisions for the protection of lawful and unlawful combatants. Yet the logic which lies behind the unnecessary suffering principle, a founding principle of the law of armed conflict and this Convention, is equally applicable to internal conflicts. We believe this conference is in a position to underscore the applicability of this important humanitarian principle to such situations. Further, we believe there is good reason to clarify the applicability to internal armed conflicts of more of the provisions on weapons and methods of warfare which apply in international conflicts. As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has forcefully written:

> "… elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot be inhumane and inadmissible in civil strife."

Indeed, the trend in treaty making just in the last 10 years bears this view out. Most of the more recent treaties concerned with both weaponry and the conduct of war — the Chemical Weapons Convention of

ILI US Digest/16 756 1/8/02, 1:48 PM

1993, the Amended Mines Protocol of 1996, the Rome Statute of 1998 and the Second Protocol to the 1954 Hague Convention Protecting Cultural Property in armed conflict concluded just last year — have clear-cut applicability in internal armed conflict. This conference is now in the position to reinforce and extend this important development.

The last century of law making on international armed conflict, beginning with the 1899 Hague Peace Conference, had among its reference points principles articulated in a code developed in the context of a non-international armed conflict. What has become known as the Lieber code of 1863 set down rules of war for combatants during the American Civil War — an internal armed conflict in which more than 600,000 Americans died. That code for the conduct of internal armed conflict became an important basis for efforts to codify the law of *international* armed conflict in the 20th century. As the 21st begins, the achievement of humanitarian goals in armed conflict, regardless of how it is characterized, should be one of our highest priorities and one to which this conference makes a meaningful contribution.

…Our proposal is straightforward, rooted in both customary international law and the precedent of the Amended Mines Protocol. In fact, the language of our proposal is substantively identical to the language of paragraphs two through six of Article 1 of the Amended Mines Protocol. It is, in part, similar to the language of Additional Protocol II to the Geneva Conventions and the 1999 Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict.…

As the ICRC paper distributed by the Secretariat notes, there are a number of options for expanding the scope of the Convention. The ICRC suggests that the best way forward would be to adopt a new protocol. We believe that it would be more appropriate, as well as consistent with Article 8 of the Convention, to amend Article 1 of the Convention itself. First, Article 8 of the Convention envisions that new protocols will address "categories of conventional weapons not covered by the existing annexed Protocols." Expanding the scope of the Convention does not fall neatly within this framework. Second, by amending the Convention itself, all Parties would be bound by the same substantive rule, once they accede to an amended Convention. This will be particularly important in the case of new parties to the Convention. New Parties would ratify an amended Convention, making automatic the application of the Protocols to which they accede in internal armed conflict.

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2. War Powers

On October 2, 2000 the Supreme Court denied a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in *Campbell, v. Clinton*, 531 U.S. 815 (2000). In that case, 31 members of Congress had brought suit against the President of the United States in federal district court seeking a declaration that the military air operations in Kosovo, initiated on March 24, 1999, violated Congress' power under the Constitution to "declare War" and the War Powers Resolution, 50 U.S.C.§1541 *et seq*. The district court dismissed the suit for lack of standing and the court of appeals affirmed, concluding that congressmen must rely on the broad range of legislative authority available to them in this area rather than the courts. 203 F.3d 19, 23 (D.C.Cir. 2000). The United States filed a Brief as Respondent in opposition to the writ for certiorari in July 2000. In its brief, excerpted below, the United States argued that no further review is warranted because the claims are moot since the military air operations have concluded and petitioners lack standing to sue.

The full text of the brief is available at *www.usdoj.gov/osg.*

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STATEMENT

Petitioners are 31 Members of the United States House of Representatives. They brought suit in federal district court against the President of the United States seeking a declaration that the military air operations in Kosovo initiated on March 24, 1999, violated Article I, Section 8, Clause 11 of the Constitution, which confers on Congress the power to "declare War," and the War Powers Resolution, 50 U.S.C. 1541 *et seq.* The district court dismissed the suit on the ground that petitioners lack standing to sue. Pet. App. 55a-79a. The court of appeals affirmed. *Id.* at Ia-54a.

1. In early 1998, Serbia in the Federal Republic of Yugoslavia (FRY) launched a violent crackdown against ethnic Albanians in Kosovo. Pet. App. 59a. On March 21, 1999, Ambassador Richard Holbrooke made a final diplomatic effort to resolve the conflict. *Id.* at 60a. That effort was unsuccessful. *Ibid*. On March 23, 1999, the Senate passed a concurrent resolution providing that "the President of the United States is authorized to conduct military air operations and missile strikes in cooperation with our NATO allies against the Federal Republic of Yugoslavia." S. Con. Res. 21, 106th Cong., 1st Sess. (1999); *see* 145 Cong. Rec. S3118 (daily ed. Mar. 23, 1999). On March 24, 1999, the North Atlantic Treaty Organization (NATO) began a series of air strikes on the FRY. Pet. App. 60a-61a. The NATO campaign included air operations conducted by United States military forces. *Ibid*. On March 26, 1999, and again on April 7, 1999, President Clinton submitted reports to the Congress regarding the military air operations. *Id*. at 61a-62a.

On April 28, 1999, the United States House of Representatives voted on four measures relevant to the present case. The House of Representatives defeated a joint resolution that would have declared a state of war between the United States and the FRY. Pet. App. 62a (citing H.R.J. Res. 44, 106th Cong., 1st Sess. (1999)); *see* 145 Cong. Rec. H2427, H2440-H2441 (daily ed. Apr. 28, 1999). By a tie vote of 213 to 213, the House of Representatives defeated a concurrent resolution previously passed by the Senate (*see* p. 2, *supra*) that would have expressly authorized the President to conduct military air operations and missile strikes against the FRY. Pet. App. 62a (citing S. Con. Res. 21, 106th Cong., 1st Sess. (1999)); *see* 145 Cong. Rec. H2441, H2451-H2452 (daily ed. Apr. 28, 1999). The House of Representatives defeated a concurrent resolution that would have directed the

ILI US Digest/16 759 1/8/02, 1:48 PM

President "to remove United States Armed Forces from their positions in connection with the present operations against the [FRY]." Pet. App. 62a-63a (quoting H.R. Con. Res. 82, 106th Cong., 1st Sess. (1999)); *see* 145 Cong. Rec. H2414, H2426-H2427 (daily ed. Apr. 28, 1999). And the House of Representatives passed a bill (never acted on by the Senate) to prohibit the use of Defense Department funds for deployment of United States ground forces to the FRY without specific congressional authorization. Pet. App. 63a (citing H.R. 1569, 106th Cong., 1st Sess. (1999)); *see* 145 Cong. Rec. H2400, H2413-H2414 (daily ed. Apr. 28, 1999).

On May 20, 1999, Congress passed a law that provided emergency supplemental appropriations for the conflict in the FRY. *See* 1999 Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, §§ 2002, 2005-2006, 113 Stat. 79-80; Pet. App. 63a. On June 10, 1999, the President announced the termination of air strikes in Kosovo. 35 Weekly Comp. Pres. Doc. 1074-1077. On June 21, 1999, after NATO's Secretary General announced the official termination of the NATO air campaign. Secretary of Defense William Cohen announced the redeployment of over 300 United States aircraft back to their home bases. Pet. App. 35a.

2. Petitioners are 31 Members of the United States House of Representatives who voted against the proposed declaration of war and authorization of military operation. During the pendency of the bombing campaign, petitioners filed suit in the United States District Court for the District of Columbia, naming as the defendant the President of the United States. Their complaint alleged that the President had violated the War Powers Clause of the Constitution and the War Powers Resolution by authorizing air strikes in the FRY for a period of more than 60 days without congressional authorization. Pet. App. 3a, 64a. Petitioners sought an order declaring that the United States air strikes were unlawful and that the President was required to withdraw United States forces from the FRY by May 25, 1999 (60 days after the President's initial report to Congress regarding the air campaign). *Id.* at 55a-56a, 64a-65a.

On June 8, 1999, two days before the President announced the termination of United States air strikes, the district court dismissed the complaint on the ground that petitioners lack standing to sue. Pet. App. 55a-79a. The court explained that "[t]he dispute over standing in this case centers on whether plaintiffs, suing in their capacities as members of the House of Representatives, have alleged a particularized

ILI US Digest/16 760 1/8/02, 1:48 PM

and personal injury sufficient to establish their interest in this litigation." *Id*. at 69a. It concluded that under the applicable precedents of this Court, "the injury of which plaintiffs complain—the alleged 'nullification' of congressional votes defeating the measures declaring war and providing the President with authorization to conduct air strikes—is not sufficiently concrete and particularized to establish standing." *Id*. at 73a.

3. The court of appeals affirmed. Pet. App. 1a-54a.

a. In holding that petitioners lack standing to sue, the court of appeals placed primary reliance on *Raines v. Byrd*, 521 U.S. 811 (1997), in which this Court concluded that individual Members of Congress did not have standing to bring a constitutional challenge to the Line Item Veto Act. Pet. App. 4a. The court of appeals emphasized in particular the availability of alternative means by which Members of Congress may seek to influence United States foreign policy. The court explained:

> Congress certainly could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign; indeed, there was a measure—albeit only a concurrent resolution—introduced to require the President to withdraw U.S. troops. Unfortunately, however, for those congressmen who, like [petitioners], desired an end to U.S. involvement in Yugoslavia, this measure was *defeated* by a 139 to 290 vote. Of course, Congress always retains appropriations authority and could have cut off funds for the American role in the conflict. Again there was an effort to do so but it failed; appropriations were authorized. And there always remains the possibility of impeachment should a President act in disregard of Congress' authority on these matters.

Id. at 10a. The court of appeals concluded that because "Congress has a broad range of legislative authority it can use to stop a President's war making, … under [*Raines*] congressmen may not challenge the President's war-making powers in federal court." *Id*. at 11a (citation omitted).

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ARGUMENT

Petitioners' claims are moot because the military air operations that are the subject of this action have concluded. Moreover, the court of appeals correctly held that petitioners lack standing to sue, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Article III, Section 2 of the Constitution restricts the jurisdiction of the federal courts to "Cases" and "Controversies." "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). A case is moot when the issues presented have no continuing adverse impact and there is no effective relief that a court may grant. *See O'Shea v. Littleton*, 414 U.S. 488, 496 (1974).

As Judge Randolph's concurring opinion explains (*see* Pet. App. 22a, 35a-38a), straightforward application of established principles makes clear that petitioners' claim is moot. Petitioners brought this action to challenge the legality of the United States' participation in the NATO air campaign in the FRY. *Id*. at 3a. Petitioners acknowledge (Pet. 21) that the air campaign that was the subject of their lawsuit ended over a year ago. Petitioners' claim for declaratory relief is therefore moot.

Contrary to petitioners' contention (Pet. 21), this case does not fall within the exception of mootness for matters "capable of repetition, yet evading review." *See Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Armed conflicts (as demonstrated by the conflicts in Vietnam and Korea) are not inherently of such short duration as to evade judicial review. Nor is there any reason to conclude that the individual petitioners in this case are likely to cast votes in circumstances analogous to those presented here.[1]

2. a. As the court of appeals correctly recognized, this Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997), makes clear that petitioners lack standing to sue. This Court has "consistently held that a plaintiff raising only a generally available grievance about government—claim-

[1] Petitioners contend (Pet. 24) that most future United States military actions can be expected to end within 60 days. As Judge Randolph's concurring opinion explains, however, "[a]ccepting that prediction as accurate dooms [petitioners'] case," since it suggests that future disputes regarding presidential compliance with the 60-day provision of the War Powers Resolution are unlikely to arise. Pet. App. 37a.

ILI US Digest/16 762 1/8/02, 1:48 PM

ing only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992). The Court's decision in *Raines* makes clear that the same principle applies when a Member of Congress invokes the jurisdiction of the federal courts. *See* 521 U.S. at 830 (holding that the challenge to the Line Item Veto Act should be dismissed because the plaintiff Members of Congress "do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing").

In *Raines*, this Court held that the plaintiff Members of Congress could not establish standing to challenge the Line Item Veto Act based on an asserted diminution of their voting power. *See* 521 U.S. at 821-826. As the court of appeals correctly held, petitioners' asserted injury cannot meaningfully be distinguished from the claims in *Raines*. Petitioners assert that the President violated the Constitution and the War Powers Resolution by initiating and continuing the Kosovo air campaign without obtaining adequate congressional approval. They claim "irreparable harm" resulting from a deprivation of their "right and duty … to commit this country to war, or to prevent, by refusing their assent, the committing of this country to war," as well as a "complete[] nullifi[cation of] their vote against authorizing military air operation and missile strikes." C.A. App. 9. Like the injury alleged in *Raines*, the harms asserted here are quintessential "institutional injur[ies]" that "damage[] all Members of Congress and both Houses of Congress equally," and that are claimed only on the basis of petitioners' official status as legislators. *See Raines*, 521 U.S. at 821. As in *Raines*, moreover, petitioners remain free to utilize the legislative process to vindicate their policy objectives. Compare *Raines*, 521 U.S. at 829 (noting that "Members of Congress … may repeal the [Line Item Veto] Act or exempt appropriations bills from its reach") with Pet. App. 11a (observing that "Congress has a broad range of legislative authority it can use to stop a President's war making".[2]

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[2] Petitioners also contend (Pet. 12) that the court of appeals' decision conflicts with the prior decision of the District of Columbia Circuit in *Chenoweth v. Clinton*. 181 F.3d 112 (1999), cert. denied, 120 S. Ct. 1286 (2000). An intra-circuit conflict typically provides no basis for invoking this Court's review. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957). In any event, no true conflict exists, since the court in *Chenoweth* also held that the plaintiff Representatives lacked standing. *See* 181 F.3d at 113-117.

b. Petitioners' reliance (Pet. 9-13) on *Coleman v. Miller*, 307 U.S. 433 (1939), is misplaced. In *Coleman*, 21 (out of 40) state senators brought a mandamus action in the Kansas Supreme Court. *Id*. at 436. The gravamen of their suit was that the State's Lieutenant Governor, as presiding officer of the Senate, had improperly cast a tie-breaking vote in support of the ratification of a proposed amendment to the United States Constitution. *Id*. at 435-436. The state supreme court entertained the suit on the merits, concluded that the Lieutenant Governor was authorized to cast the deciding vote, and held on that basis that the proposed amendment had been properly ratified by the Kansas Legislature. *Id*. at 437. The plaintiffs then sought review in this Court, which held that "at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision." *Id*. at 446; *see Raines*, 521 U.S. at 822-823 (summarizing *Coleman*).

In *Raines*, this Court held that "*Coleman* stands (at most) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." 521 U.S. at 823 (citation omitted).[3] The plaintiffs in *Raines*, by contrast, could "not allege[] that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Id*. at 824. While acknowledging that the Line Item Veto Act might in some sense reduce the "effectiveness" of the plaintiffs' votes on future appropriations bills (*see id*. at 825), the Court explained that "[t]here is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here. To uphold standing here would require a drastic extension of *Coleman*. We are unwilling to take that step." *Id*. at 826.

Like the petitioners in *Raines* (and unlike the plaintiffs in *Coleman*), petitioners cannot claim that they comprised all or part of a legislative majority that would have enacted (or defeated) a specific legislative

[3] The Court in *Raines* reserved the question whether the analysis in *Coleman* would apply to a suit brought by federal legislators. *See* 521 U.S. at 824-825 n.8.

ILI US Digest/16 764 1/8/02, 1:48 PM

measure but for the action of the President. Petitioners emphasize (Pet. 9) that the House of Representatives failed to pass a declaration of war and failed to authorize United States air strikes. But the defeat of those concurrent resolutions did not constitute a legislative command to cease all military actions in Kosovo. Indeed, on the same day that it failed to pass those resolutions, the House of Representatives defeated a measure that purported to require the President to "remove United States Armed Forces from their positions in connection with the present operations against the Federal Republic of Yugoslavia." Pet. App. 63a (citing H.R. Con. Res. 82, *supra*). Congress subsequently appropriated funds to carry out the military campaign in Kosovo. *See* Pet. App. 10a, 63a; p. 3, *supra*. The President did not "nullify" any congressional vote by spending appropriated funds to conduct the Kosovo air campaign.

As Judge Randolph observed, petitioners' "real complaint is not that the President ignored their votes," but "that he ignored the War Powers Resolution." Pet. App. 30a. The injury that petitioners allege is nothing more than the "wholly abstract" diminution of legislative power that can be asserted whenever the Executive Branch is alleged to have acted in violation of applicable statutes. *Raines*, 521 U.S. at 829. Under this Court's decision in *Raines*, petitioners' attempt to assert a generalized institutional injury based on Presidential actions funded by Congress was properly dismissed for lack of standing. To recognize standing in this case would vest individual Members of Congress with unfettered access to the courts to challenge the validity of any Executive Branch action they believe to be unlawful—a result severely at odds with the separation of powers principles that underlie Article III standing requirements.

3. Petitioners also contend (Pet. 13-20) that this case raises important questions of constitutional law regarding the allocation of responsibility between Congress and the President for the development of United States military policy. This case is an unsuitable vehicle for resolution of those questions, however, since (as the courts below correctly held) petitioners' suit does not satisfy requirements of Article III. For the same reason, there is no merit to petitioners' suggestion (Pet. 25) that "[t]his Court should resolve the disagreement between Judges Silberman and Tatel [in their separate concurring opinions to the Court of Appeals decision] as to whether the issues presented in this case are justiciable." Independent of their comments concerning justiciability, Judge Silberman and Judge Tatel agreed that petitioners lack standing to bring this case.

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ILI US Digest/16 766 1/8/02, 1:48 PM

Table of Cases

** An asterisk denotes cases in courts and fora, including the International Court of Justice, other than U.S. federal and state courts.*

A

Adams *v.* Vance (1978), 496, 552
Ademaj, United States *v.,* 42
Adras *v.* Nelson (1990), 132
AFL-CIO *v.* Kahn (1979), 327*n*
Afroyim *v.* Rusk (1967), 19
Aguinda *v.* Texaco, Inc. (2000), 412–414
Air Canada *v.* U.S. Department of Transportation (1988), 491*n*
Air Courier Conference of America *v.* American Postal Workers' Union (1991), 315
Air Crash at Agana, Guam (1997), *In re,* 152–160
Aircrash in Bali, Indonesia (1982), *In re,* 529*n,* 537*n*
Air Disaster at Lockerbie, Scotland on December 21, 1988 (1991), *In re,* 597
Air France *v.* Saks (1985), 529*n,* 537*n*
Alberti *v.* Empresa Nicaraquense De La Carne (1983), 593
Aldrich *v.* Mitsui & Co. (1988), 510, 523, 538
Alejandre *v.* Fla. (1997), 542
Alfred Dunhill of London, Inc. *v.* Cuba (1976), 475, 477, 527
Allen-Bradley Local No. 1111 *v.* Wisconsin Employment Relations Bd. (1942), 334
Alonso *v.* Saudi Arabian Airlines Corp. (1999), 585
Alvarez-Machain *v.* Sosa, 398–412
Alvarez-Machain *v.* United States (1992), 399, 401*n,* 403, 404, 411
Ambatielos case*, 657
Amekrane *v.* United Kingdom* (1987), 406*n*
Anderson *v.* Creighton (1987), 410
Ardestani *v.* INS (1991), 193, 196
Argentine Republic *v.* Amerada Hess Shipping Corp. (1989), 475, 478, 479, 579, 591

Arizonans for Official English *v.* Arizona (1997), 762
Arizona *v.* Bowsher (1991), 547
Arlington, United States *v.*, 599
Armco, Inc. *v.* Hardesty (1984), 326
Arnett *v.* Kennedy (1974), 201
Asani *v.* INS (1998), 128
Asociasion de Reclamantes *v.* United Mexican States (1984), 516*n*
Atlanta Gas Light Company *v.* Federal Energy Regulatory Commission (1998), 137
Attorney General *v.* Eichmann* (1962), 406*n*
Attwell *v.* LaSalle Nat. Bank (1979), 435
Austin *v.* Healey (1993), 191, 192
Austrian and German Bank Holocaust Litigation (2000), *In re,* 460
Automatic Sprinkler Corp. *v.* Darla Environmental Specialists (1995), 547

B

B. Altman *v.* United States (1912), 212*n*
B. d. B. *v.* The Netherlands* (1989), 394
Baker *v.* Carr (1962), 214*n,* 402*n,* 496, 528, 569–570
Banco Nacional de Cuba *v.* Sabbatino (1964), 335*n,* 529
Bank Melli Iran & Bank Mellat *v.* Shams Pahlavi, 442
Bank Melli Iran *v.* Pahlavi (1995), 491*n*
Barayagwiza *v.* Prosecutor* (2000), 264
Barbera, Messegue and Jabardo *v.* Spain* (1994), 395
Barclays Bank PLC *v.* Franchise Tax Bd. (1994), 321–322, 324*n,* 326*n,* 465*n*
Begum *v.* Saleh (2000), 602–616
Belk *v.* United States (1988), 515–516*n*
Bennett *v.* Horseferry Road Magistrate's Court* (1993), 404*n*
Benson *v.* McMahon (1888), 212
Benz *v.* Compania Naviera Hidalgo (1957), 465
Beogradska Banka *v.* Interenergo, Inc. (1998), 569*n,* 570
Bernstein *v.* N. V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij (1954), 477*n*
Bethlehem Steel Corp. *v.* Board of Comm'rs. (1969), 330*n,* 539
Bevc *v.* INS (1995), 130
Beveridge *v.* Lewis (1991), 530, 539
Birch Shipping Corp. *v.* Embassy of the United Rep. of Tanzania (1980), 556

ILI US Digest/Table of Cases 768 1/8/02, 1:49 PM

Bivens *v.* Six Unknown Named Agents (1971), 410–411
Blondin *v.* Dubois (1999), 97*n,* 99, 102, 104, 105–115
Board of Trustees *v.* Mayor & City Council (1989), 331
Boos *v.* Barry (1988), 615
Borja *v.* Goodman (1990), 484*n*
Bovio *v.* United States (1993), 212
Bowen *v.* Massachusetts (1988), 499
Boyle *v.* United Techs. Corp. (1988), 334
Brady *v.* Maryland (1963), 394*n,* 396
British Caledonian Airways Ltd. *v.* Bond (1981), 649–650
Broadbent *v.* Organization of American States (1980), 581, 584, 585
Buchanan *v.* Alexander (1846), 547, 555
Building & Constr.Trades Council *v.* Associated Builders (1993), 329, 332

C

Caban *v.* Mohammed (1979), 12, 14
Cabiri *v.* Republic of Ghana (1999), 481*n*
California *v.* ARC America Corp. (1989), 528–529, 537
Campbell *v.* Clinton (2000), 758
Campbell *v.* Office of Personnel Management (1982), 498*n*
Camps Newfound/Owatonna, Inc. *v.* Town of Harrison (1997), 322*n,* 327
Canadian Transport Co. *v.* United States (1980), 492
Can *v.* United States (1994), 201, 214*n,* 570, 574
Cardan *v.* United States of America (2000), 312–317
Cariolan v,. INS (1977), 130
Carl Marks & Co., Inc. *v.* Union of Soviet Socialist Republics, 476
Casablanca case (France v. Germany)* (1916), 404*n*
Case Concerning Diplomatic and Consular Staff in Tehran* (1980), 553, 658*n*
Chabal *v.* Reagan (1987), 498*n*
Chae Chan Ping *v.* United States (1889), 10
Chamber of Commerce *v.* Reich (1996), 327*n*
Change of Gauge Arbitration (France v. U.S.)*, 657, 658, 659–660, 661, 665
Chan *v.* Korean Air Lines, Ltd. (1989), 516*n,* 518, 519*n*
Chaparro-Alcantara, United States *v.,* 42
Charlton *v.* Kelly (1913), 212, 492

ILI US Digest/Table of Cases 769 1/8/02, 1:49 PM

Chen *v.* INS (1999), 130
Chenoweth *v.* Clinton (1999), 763*n*
Cheung *v.* United States (2000), 190–203
Chuen *v.* Esperdy (1960), 200
Cicippio *v.* The Islamic Republic of Iran (1998), 542, 543, 548–560
Civil *v.* INS (1998), 130
Clark *v.* Jeter (1988), 15
Clark *v.* Propper (1948), 619
Coleman *v.* Miller (1939), 764
Commercial Bank of Kuwait *v.* Rafidain Bank (1994), 591, 592, 593
Committee of Citizens *v.* Reagan (1988), 407
Commonwealth Edison Co. *v.* Montana (1981), 333*n*
Complete Auto Transit, Inc. *v.* Brady (1977), 321*n*
Conners, United States *v.* (1979), 597
Consarc Corp. *v.* Iraq Ministry (1994), 624
Consarc Corp. *v.* Iraq Ministry (1995), 623
Container Corp. *v.* Franchise Tax Bd. (1983), 324, 465
Contractors Ass'n *v.* Secretary of Labor (1971), 327*n*
Cooley *v.* Board of Wardens (1851), 324
Corfu Channel case*, 661
Cornell *v.* Assicurazioni General S.p.A. Consolidated (2000), 460*n*
County of Arlington, United States *v.,* 597, 599
Creighton Limited *v.* Government of the State of Qatar (1999), 592
Croll *v.* Croll (1999), 110
Crosby *v.* National Foreign Trade Council (2000), 319–340, 342, 465–466*n,* 466, 527, 528, 529, 530, 536, 551
Cuban American Bar Ass'n *v.* Christopher (1995), 132*n*
Curtiss-Wright Export Corp., United States *v.* (1936), 466, 527, 529

D

Dalton *v.* Specter (1994), 560
Dames & Moore *v.* Regan (1981), 212, 335, 516*n,* 551, 617, 619
Davis, United States *v.* (1985), 492
Davis *v.* Passman (1979), 401*n*
Debab *v.* INS (1998), 130
De Giacomo (1874), *In re,* 211
Demjanjuk *v.* Petrovsky (1985), 597
Department of Navy *v.* Egan (1988), 527
Department of the Army *v.* Blue Fox, Inc. (1999), 498, 499, 547

ILI US Digest/Table of Cases 770 1/8/02, 1:49 PM

Desir *v.* Ilchert (1988), 129
Dia Navigation Co., Ltd. *v.* Pomeroy (1994), 499
Diaz *v.* Trust Territory (1989), 456
Diekelman, United States *v.* (1875), 491–492
DKT Memorial Fund *v.* Agency for International Development (1989), 497
Dombo Beheer B. V. *v.* The Netherlands* (1993), 393
Dowty Woodville Polymer, Ltd., United States *v.* (1997), 194
Drexel Burnham Lambert *v.* Committee of Receivers for Galadari (1993), 480–481
Dupree *v.* United States (1977), 597

E

Edye *v.* Robertson (Head Money Cases) (1884), 492
EEOC *v.* Arabian American Oil Co. (1991), 465
El Al Israel Airlines Ltd. *v.* Tsui Yuan Tseng (1999), 493
Elettronica Sicula S.p.A. (ELSI) case*, 657, 660, 662
El-Hadad *v.* United Arab Emirates (2000), 583–585, 586
Elliott *v.* British Tourist Authority (1997), 585
Erlenbaugh *v.* United States (1972), 195
Escobedo *v.* United States (1980), 212
Estate of Ferdinand E. Marcos (1992), *In re,* 400, 401*n,* 403, 408
Estrada-Posadas *v.* INS (1991), 130
Extradition of Cheung (1997), *In re,* 190
Extradition of Mackin (1981), *In re,* 208
Extradition of Manzi (1989), *In re,* 216

F

Factor *v.* Laubenheimer (1933), 199, 597–598
Faddoul *v.* INS (1994), 129
Fairfax's Devisee *v.* Hunter is Lessee (1813), 497*n*
FDIC *v.* Meyer (1994), 548
Federal Housing Administration *v.* Darlington, Inc. (1958), 197
Federal Republic of Yugoslavia *v.* Park-71st Corp. (1995), 569*n,* 570, 619
Feder *v.* Evans-Feder (1995), 107*n*
Fernandez *v.* Phillips (1925), 212
FHA *v.* Burr (1940), 547
Field *v.* Clark (1892), 212*n*

ILI US Digest/Table of Cases 771 1/8/02, 1:49 PM

Filartiga *v.* Pena-Irala (1980), 382, 400
Finamar Investors Inc. *v.* Republic of Tadjikistan (1995), 592
Finland *v.* Town of Pelham, 598–599
Finnish Ships Arbitration* (1934), 662
Fireman's Ins. Co. *v.* Onwualia (1994), 613
First National City Bank *v.* Banco Nacional de Cuba (1972), 201
Fisher *v.* INS (1996), 129
Flatow *v.* Islamic Republic of Iran (1998), 542, 547, 554, 555, 556, 557, 560
Flatow *v.* The Islamic Republic of Iran (1998), 543–548
Florida Power and Light Company *v.* Lorion (1985), 136
Foley Bros. *v.* Filardo (1949), 465
Fong Yue Ting *v.* United States (1893), 9, 10, 192
Foremost-McKesson *v.* Islamic Republic of Iran (1990), 480
Foxworth *v.* Permanent Mission of the Republic of Uganda to the United Nations (1992), 553, 624
France, United States *v.** (Change-of-Gauge arbitration) (1978), 657, 658, 659–660, 661, 665
Friedar *v.* Israel (1985), 586*n*
Friedrich *v.* Friedrich (1996), 98, 99, 100, 101, 103, 104, 111, 112*n,* 137*n*
Friends of Earth *v.* Consolidated Rail Corp. (1985), 193
Frolova *v.* Union of Soviet Socialist Republics (1985), 480
FTC *v.* Travelers Health Ass'n (1960), 469–470

G

Gabcikovo-Nagymoros Project* (1997), 663–665
Galvan *v.* Press (1954), 10
Ganjour *v.* INS (1986), 130
Garcia *v.* INS (1993), 132
Garza, United States *v.* (1995, 1999), 389, 396
Garza *v.* United States (1996), 389
Gerling Global Reinsurance Corp. of America *v.* Nelson (2000), 461*n*
Gerling Global Reinsurance Corp. of America *v.* Quackenbush (2000), 460–473, 695
Germany *v.* United States (LaGrand)* (2000), 26, 33, 41, 43–93
Gerstein *v.* Pugh (1975), 212
Ghaly *v.* INS (1995), 130
Ginsberg, United States *v.* (1917), 9, 17–18
Glenore Denrees Paris *v.* Department of National Store Branch 1 (Vietnam) (2000), 590–593, 616–626

ILI US Digest/Table of Cases 772 1/8/02, 1:49 PM

Glucksman *v.* Henkel (1911), 212
Goldstar (Panama) S.A. *v.* United States (1992), 316, 491
Gonzalez *v.* Reno, 115–141
Grant *v.* Jamaica, 392*n*
Gray *v.* Permanent Mission of People's Republic of Congo (1978), 592
Greene *v.* United States (1996), 192, 196
Grin *v.* Shine (1902), 210, 211
Gross *v.* Volkswagen, 504, 505
Guaranty Trust Co. *v.* United States (1938), 477
Guinand, United States *v.* (1988), 597

H
Haig *v.* Agee (1981), 400, 411, 527
Harisiades *v.* Shaughnessy (1952), 10, 497, 527–528
Harlow *v.* Fitzgerald (1982), 410
Hartford Fire Ins. Co. *v.* California (1993), 470
Hartooni *v.* INS (1994), 130
Hawkins Bros. & Co. *v.* Morgenthau (1936), 547
Heckler *v.* Matthews (1984), 17, 18
Heimbuch *v.* Ishihara Sangyo Kaisha, Ltd. (2000), 500, 504, 505, 506*n,* 515, 517, 529
Helvering *v.* Stockholms Enskilada Bank (1934), 195
Hilao *v.* Estate of Marcos (1996), 411
Hilton *v.* Guyot (1895), 737
Hines *v.* Davidowitz (1941), 471, 529, 530, 536, 539
Holden *v.* Canadian Consulate (1996), 582, 583, 586
Holmes *v.* Laird (1972), 497
Holocaust Victim Assets Litigation (2000), *In re,* 445–446, 457*n,* 458–459
Howard-Arias, United States *v.* (1982), 402*n*
Huaman-Cornelio *v.* Board (1992), 130
Hughes Aircraft Co. *v.* United States (1976), 498*n*
Hughes *v.* Alexandria Scrap Corp. (1976), 327, 328, 329–330, 330*n*
Humanitarian Law Project *v.* Reno (2000), 409
Hunt *v.* Washington State Apple Advertising Comm'n. (1977), 322*n*

I
Illinois *v.* Gates (1983), 212
In re _____. *See name of party*

ILI US Digest/Table of Cases 773 1/8/02, 1:49 PM

Insurance Antitrust Litigation (1991), *In re,* 470
INS *v.* Cardoza-Fonseca (1987), 129–130
INS *v.* Elias-Zacarias (1992), 129, 131, 141
INS *v.* Pangilinan (1988), 18
Iran, United States *v.** (1985), 432*n,* 433
Iranian Customs Administration *v.* United States* (1985), 432*n*
Iran *v.* Mohammed Reza Pahlavi and Farah Diba Pahlavi, 437*n*
Iran *v.* Shams Pahlavi, 441
Iran *v.* United States* (1984), 432*n*
Iran *v.* United States* (1986), 432*n*
Iran *v.* United States* (1988), 432*n*
Islamic Republic of Iran *v.* Ashraf Pahlavi (1981), 437–438
Islamic Republic of Iran *v.* Shams Pahlavi, 438, 441
Islamic Republic of Iran *v.* United States* (1997), 556*n*

J

Jackson *v.* People's Republic of China (1986), 476
Janakakis-Kostun *v.* Janakakis (2000), 93–105, 111
Japanese WWII POW Slave/Forced Labor Litigation (2000), *In re,* 500*n,* 505
Japan Line, Ltd. *v.* County of Los Angeles (1979), 465
Japan Whaling Ass'n *v.* American Cetacean Society (1986), 572
Jean *v.* Nelson (1984), 131, 132
Jespers *v.* Belgium* (1981), 396
Jolis* (1933-34), *In re,* 404*n*
Jones, United States *v.* (2000), 160–162, 216
Jones *v.* United States (1890), 201
Joseph *v.* Office of the Consulate General of Nigeria (1987), 480
Jota *v.* Texaco (2000), 412–414
Jugobanka A.D. Belgrade *v.* Sidex Int'l Furniture Corp. (1998), 570

K

Kahn Lucas Lancaster, Inc. *v.* Lark Int'l, Ltd. (1999), 191
2120 Kalorama Rd, Inc. *v.* District of Columbia Foreign Missions Act–Board of Zoning Adjustment and the United States of America, 634
Kamla Prasad *v.* INS (1995), 130
Kear *v.* Hilton (1983), 405*n*
Kleindienst *v.* Mandel (1972), 10
Klock *v.* Cain (1993), 484*n*

ILI US Digest/Table of Cases 774 1/8/02, 1:49 PM

KMW Int'l *v.* Chase Manhattan Bank, N.A. (1979), 571
Knauff *v.* Shaughnessy, United States ex rel. (1950), 132
Kolovrat *v.* Oregon (1961), 493, 497*n,* 526, 537, 554*n,* 587, 597, 607
Kraft General Foods *v.* Iowa Department of Revenue (1992), 322
Krishna *v.* Krishna (1997), 111
K.S.B. Tech Sales Corp. *v.* North Jersey Dist. Water Supply Comm'n (1977), 329*n*
Kwan *v.* United States of America (2000), 317, 345, 489–499

L
LaFontant *v.* Aristide (1994), 613
LaGrand case*. *See* Germany *v.* United States (2000)
Land, Island and Maritime Frontier Dispute* (1992), 52
Landon *v.* Plasencia (1982), 132
Lane *v.* Pena (1996), 547
LaShawn A. *v.* Barry (1996), 547
Lehr *v.* Robertson, 4, 12, 14, 15, 16
Leng May Ma *v.* Barber (1958), 132, 133
Li, United States *v.* (2000), 491, 527
Liberian Timber Corp. *v.* Government of the Rep. of Liberia (1987), 553
Locke, United States *v.* (2000), 529, 537
Lo Duca *v.* United States (1996), 192
Lombera-Camorlinga, United States *v.* (2000), 23, 24–25, 42–43, 56*n*
Lopez-Smith *v.* Hood (1997), 212
Lorisme *v.* INS (1997), 129
Louisiana, United States *v.* (1960), 527
Lui Kin-Hong, United States *v.* (1997), 206, 215
Lujan *v.* Defenders of Wildlife (1992), 495, 763
Lujan *v.* Nat'l Wildlife Fed'n (1990), 315
Lujan *v.* Nat'l Wildlife Fed'n (1992), 315

M
M.A. *v.* INS (1990), 130
Mackin, United States *v.* (1981), 196*n*
Martinez *v.* City of Los Angeles (1998), 400, 401*n,* 411
Matta-Ballesteros *v.* Henman (1990), 316
Matter of Acosta (1985), 130
Matter of Laipenieks (1993), 129
Matter of Lazaro Gonzalez, 136

ILI US Digest/Table of Cases 775 1/8/02, 1:49 PM

Matter of L.L.M. *v.* A.J.J.M. (1987), 626
Matter of Mogharrabi (1987), 130
Mavrommatis Palestine Concessions* (1924), 656
Maximov *v.* United States (1962), 607
Maximov *v.* United States (1963), 519
McCulloch *v.* Sociedad Nacionale de Marineros de Honduras (1963), 465
McKeeve, United States *v.* (1997), 334
Messenger *v.* Building Contractors Ass'n Inc. (1989), 574
Metalclad Corporation *v.* The United Mexican States* (1999), 676, 679–683, 694
Michelin Tire Corp. *v.* Wages (1976), 321, 465
Mikhael *v.* INS (1997), 130
Mikhailevitch *v.* INS (1998), 129
Miller *v.* Albright (1998), 2*n,* 5, 11–12, 15*n,* 16, 17
Minnesota *v.* Block (1981), 597
Mississippi Band of Choctaw Indians *v.* Holyfield (1989), 13*n*
Missouri *v.* Holland (1920), 529*n,* 537*n*
Mitchell, United States *v.* (1983), 498
Mitev *v.* INS (1995), 130
More *v.* Intelcom Support Services, Inc. (1992), 317, 493, 527
Mullane *v.* Central Hanover Bank Trust (1950), 435

N

Nai Fook Li, United States *v.* (2000), 23–24, 25–43, 56*n*
National City Bank *v.* Republic of China (1955), 575
National Foreign Trade Council *v.* Baker (1998), 318
National Foreign Trade Council *v.* Natsios (1999), 318, 471
Natural Resources Defense Council *v.* Patterson (1998), 315
Naukirchen *v.* Wood County Head Start, Inc. (1995), 547
Nazi Era Cases Against German Defendants Litigation (2000), *In re,* 450–460
Nebenzal *v.* Re (1968), 530*n*
Neely *v.* Henkel (1901), 215
Nguyen *v.* Immigration and Naturalization Service (2000), 1–19
Nicaragua *v.* United States* (1984), 52*n*
Nielsen *v.* Secretary of Treasury (1970), 552
Nishimura Ekiu *v.* United States (1892), 10
N-M-A- (1998), *In re,* 130

ILI US Digest/Table of Cases 776 1/8/02, 1:49 PM

Nordic Village, Inc., United States *v.* (1992), 547
Noriega, United States *v.* (1997), 407
North Carolina *v.* Rice (1971), 316
Ntakirutimana *v.* Reno (2000), 203–216
Nunez-Escudero *v.* Tice-Menley (1995), 97, 99, 103, 104

O
OC-16* (2000), 26, 32, 35, 41, 42
Oceanic Steam Navigation Co. *v.* Stranahan (1909), 11
O'Connor *v.* United States (1986), 597
Oetjen *v.* Central Leather Co. (1918), 201, 497
Oklahoma Natural Gas *v.* Oklahoma (1927), 567
Oklahoma Tax Comm'n *v.* Jefferson Lines, Inc. (1995), 330
O'Shea *v.* Littleton (1974), 762
Ottoman Public Debt Case* (1925), 572
Ozanic *v.* United States (1951), 516*n*

P
Pacific Gas & Elec. Co. *v.* State Energy Resources Conservation & Dev. Comm'n. (1983), 530, 539
Pakistan *v.* India*, 664
Palestine Liberation Organization, United States *v.* (1988), 603
Paraguay *v.* United States*, 26, 32, 35, 41
Parham *v.* Hughes (1979), 15
Pasquini *v.* Morris (1983), 139
Persinger *v.* Iran (1984), 157
Phillips *v.* Seiter (1999), 498–499*n*
Pink, United States *v.* (1942), 212*n,* 471, 529, 539
Plyer *v.* Doe (1982), 10
Polovchak *v*. Meese (1985), 126
Pope & Talbot, Inc. *v.* Government of Canada* (2000), 674–694
Powers *v.* Ohio (1991), 11
Preiser *v.* Newkirk (1975), 762
Princz *v.* Federal Republic of Germany (1994), 476, 480, 481, 482, 485
Propper *v.* Clark (1949), 617, 619
Prosecutor *v.* Jean-Paul Akayesu*, 252–253
Prosecutor *v.* Simic, Simic, Tadic, Todorovic, and Zaric* (2000), 255–271
Prosecutor *v.* Tadic* (1999), 393

ILI US Digest/Table of Cases 777 1/8/02, 1:49 PM

Prosecutor *v.* Tihomir Blaskic* (1997), 266, 269, 271

Q

Quackenbush *v.* Allstate Insurance Co. (1996), 573
Quilloin *v.* Wallcott (1978), 4

R

Rainbow Warrior Arbitration (New Zealand *v.* France)* (1990), 667
Raines *v.* Byrd (1997), 495, 761, 762, 763, 764, 765
Rajaa al Mukaddam *v.* Permanent Mission of Saudi Arabia to the United Nations (2000), 577–593
Ramirez-Osorio *v.* INS (1984), 132
Re Argoud* (1964), 404
Reeves, Inc. *v.* Stake (1980), 327, 329, 330*n*
Regan *v.* Wald (1984), 528
Regina *v.* Secretary of State for the Environment, Transport and Regions, ex parte Omega Air Limited* (1999), 647–648, 651–652
Reid *v.* Covert (1957), 613
Republic of Argentina *v.* Weltover (1992), 555, 579, 580
Rice *v.* Santa Fe Elevator Corp. (1947), 529
Roadway Express, Inc. *v.* Piper (1980), 196
Robert Azinian, *v.* The United Mexican States*, 694–695
Robinson (1997), *In re,* 115
Rodriguez *v.* Rodriguez (1999), 111
Rogers v. Bellei (1970), 5, 8–9
Rosenfeld *v.* Volkswagen, 504, 505
Russell (1998), *In re,* 499
Rydder *v.* Rydder (1995), 99

S

S. *v.* Ebrahim* (1991), 404*n*
Sablan *v.* Iginoef (1990), 484*n*
Sablan *v.* Superior Court of the Commonwealth of the Northern Mariana Islands (1991), 484*n*
Sage Realty Corp. *v.* Jugobanka, D.D. (1998), 572
Salameh, United States *v.,* 42
Sampson *v.* Federal Republic of Germany and Claims Conference Article 2 Fund (1997), 473–485, 593
San Diego Building Trades Council *v.* Garmon (1959), 327

ILI US Digest/Table of Cases 778 1/8/02, 1:49 PM

Sangha *v.* INS (1997), 131
Santovincenzo *v.* Egan (1931), 494
Saroop *v.* Garcia, United States ex rel. (1997), 200, 491
Saudi Arabia *v.* Nelson (1993), 475, 478, 479, 579
Schreiber, United States *v.* (1999), 191
Schweiker *v.* Chilicky (1988), 411
Scott *v.* Sanford (1857), 8*n*
S.D. Myers, Inc. *v.* Government of Canada (2000), 692–694
Sealed Case 99-3901 (1999), *In re,* 548
Segni *v.* Commercial Office of Spain (1987), 581, 582, 583, 585, 586
767 Third Avenue Associates *v.* Consulate General of the Socialist Federal Republic of Yugoslavia (2000), 565–575
767 Third Avenue Assocs. *v.* Permanent Mission of the Republic of Zaire (1993), 587, 590, 597, 606, 607, 613, 615, 616
Shamsee *v.* Shamsee (1980), 626
Shaughnessy *v.* United States ex rel. Mezei (1953), 10, 132, 133
Sheikh *v.* Cahill (1989), 115
Siderman de Blake *v.* Republic of Argentina (1992), 401*n,* 481
Sierra Club *v.* Morton, 314
Smith *v.* Socialist People's Libyan Arab Jamahiriya (1997), 480, 481
South-Central Timber Development, Inc. *v.* Wunnicke (1984), 329, 330, 331
South-Eastern Underwriters Assn., United States *v.* (1944), 470
Southern Pac. Co. *v.* Arizona (1945), 321
Southern Pac. Terminal Co. *v.* ICC (1911), 762
South West Africa cases* (1996), 656, 661
Spatola *v.* United States (1991), 192
Stafoff, United States *v.* (1923), 197, 198
State of New Jersey *v.* United States (1996), 496
Steel Co. *v.* Citizens for a Better Environment (1998), 494*n*
Steffen *v.* Severing (1997), 112*n*
Stephens *v.* National Distillers and Chemical Corp. (1996), 470
Stockè *v.* Germany* (1991), 265
Stuart, United States *v.* (1989), 214
Students Challenging Regulatory Agency Procedures, U.S. *v.* (1973), 314
Sumitomo Shoji Am., Inc. *v.* Avagliano (1982), 107, 493, 519, 526, 554*n,* 587, 597, 607
Superville, United States *v.,* 42

ILI US Digest/Table of Cases 779 1/8/02, 1:49 PM

T

Tabacchi *v.* Harrison (2000), 109–110
Tabion *v.* Mufti (1996), 587, 606*n,* 607, 613
Tahan *v.* Duquette (1992), 97, 103, 111, 114
Tenney *v.* Mitsui & Co., Ltd. (2000), 530, 537
Terlinden *v.* Ames (1902), 199–200, 210, 211, 214
The Amiable Isabella (1821), 492*n*
Then *v.* Melendez (1996), 200
The Queen *v.* Secretary of State for Health, ex parte Imperial Tobacco Limited* (1991), 652
The Schooner Exchange *v.* McFadden (1812), 401, 475
The Schooner Peggy, United States *v.* (1801), 516*n*
Thornton, U.S. *v.* (1982), 548*n*
Transaero, Inc. *v.* La Fuerza Aera Boliviana (1994), 592
Triestman *v.* United States (1997), 201
Trojan Techs., Inc. *v.* Pennsylvania (1990), 329*n*
Trop *v.* Dulles (1958), 6
Turner *v.* Frowein (1998), 110

U

United States ex rel. Knauff *v.* Shaughnessy (1950), 132
United States ex rel. Saroop *v.* Garcia (1997), 200, 491
United States *v.* Ademaj, 42
United States *v*. Arlington, 599
United States *v.* Chaparro-Alcantara, 42
United States *v.* Conners (1979), 597
United States *v.* County of Arlington, 597, 599
United States *v.* Curtiss-Wright Export Corp. (1936), 466, 527, 529
United States *v.* Davis (1985), 492
United States *v.* Diekelman (1875), 491–492
United States *v.* Dowty Woodville Polymer, Ltd. (1997), 194
United States *v.* France* (1978) (Change-of-Gauge arbitration), 657, 658, 659–660, 661, 665
United States *v.* Garza (1995, 1999), 389, 396
United States *v.* Ginsberg (1917), 9, 17–18
United States *v.* Guinand (1988), 597
United States *v.* Howard-Arias (1982), 402*n*
United States *v.* Iran* (1985), 432*n,* 433
United States *v.* Jones (2000), 160–162, 216

ILI US Digest/Table of Cases 780 1/8/02, 1:49 PM

United States *v.* Li (2000), 491, 527
United States *v.* Locke (2000), 529, 537
United States *v.* Lombera-Camorlinga (2000), 23, 24–25, 42–43, 56*n*
United States *v.* Louisiana (1960), 527
United States *v.* Lui Kin-Hong (1997), 206, 215
United States *v.* Mackin (1981), 196*n*
United States *v.* McKeeve (1997), 334
United States *v.* Mitchell (1983), 498
United States *v.* Nai Fook Li (2000), 23–24, 25–43, 56*n*
United States *v.* Nordic Village, Inc. (1992), 547
United States *v.* Noriega (1997), 407
United States *v.* Palestine Liberation Organization (1988), 603
United States *v.* Pink (1942), 212*n,* 471, 529, 539
United States *v.* Salameh, 42
United States *v.* Schreiber (1999), 191
United States *v.* South-Eastern Underwriters Assn. (1944), 470
United States *v.* Stafoff (1923), 197, 198
United States *v.* Stuart (1989), 214
United States *v.* Superville, 42
United States *v.* The Schooner Peggy (1801), 516*n*
United States *v.* Verdugo-Urquidez (1990), 9, 411
United States *v.* Wiltberger (1820), 192–193
United States *v.* Wong Kim Ark (1898), 3, 8, 9
U.S.-U.K. Arbitration Concerning Heathrow Airport User Charges (Heathrow Arbitration) (1992), 660–661
U.S. *v.* Students Challenging Regulatory Agency Procedures (1973), 314
U.S. *v.* Thornton (1982), 548*n*

V

Valentine *v.* United States ex rel Neidecker (1936), 186, 209, 210–211
Verdugo-Urquidez, United States *v.* (1990), 9, 411
Verlinden B. V. *v.* Central Bank of Nigeria (1983), 475, 477, 579*n,* 580
Vermont Yankee Nuclear Power Company *v.* NRDC (1978), 137
Victoria Sales Corp. *v.* Emery Air Freight (1990), 518
Vincenti (1920), *In re,* 403
Virginia *v.* West Virginia (1911), 572

W

Walsh (1998), *In re,* 110, 111

ILI US Digest/Table of Cases 781 1/8/02, 1:49 PM

Walsh *v.* Walsh (2000), 99, 102
Ware *v.* Hylton (1796), 497*n,* 516*n*
Washington Legal Foundation *v.* United States Sentencing Commission (1996), 499
Waste Management, Inc. *v.* United Mexican States* (2000), 687, 694
Weinberger *v.* Rossi (1982), 198
Western and Southern Life Ins. Co. *v.* State Bd. of Equalization (1981), 468–469
White *v.* Massachusetts Council of Construction Employers (1983), 328, 329–330, 330*n*
Williams *v.* Insurance Co. (1839), 201
Williams *v.* Lynagh (1987), 395*n*
Williams *v.* Taylor, 388
Wiltberger, United States *v.* (1820), 192–193
Winters *v.* Assicurazioni Generali S.p.A. Consolidated (2000), 460
Wisconsin Department of Industry, Labor and Human Relations *v.* Gould, Inc. (1986), 327, 328, 329, 330
Wisniewski *v.* United States (1957), 763*n*
Wolf *v.* Federal Republic of Germany (1996), 476*n*
Wong Kim Ark, United States *v.* (1898), 3, 8, 9
World War II Era Japanese Forced Labor Litigation (2000), *In re,* 505–540
Worth *v.* Universal Pictures, Inc. (1997), 529, 537

X

Xuncax *v.* Gramajo (1995), 484*n*

Y

York River House *v.* Pakistan Mission to the United Nations (1991), 613
Youngstown Sheet Tube Co. *v.* Sawyer (1952), 212
Yucyo, Ltd. *v.* Republic of Croatia (1997), 572
Yucyo, Ltd. *v.* Republic of Slovenia (1997), 571, 572
Yugoslavia *v.* Belgium*, 91

Z

Zassenhaus *v.* Evening Star Newspaper Co. (1968), 158–159
Zenith Radio Corp. *v.* Hazeltine Research Inc. (1969), 435
Zepeda-Melendez *v.* INS (1984), 130
Zschernig *v.* Miller (1968), 471, 472, 473, 529, 539

ILI US Digest/Table of Cases 782 1/8/02, 1:49 PM

Zveiter *v.* Brazilian National Superintendency of Merchant Marine (1993), 585

ILI US Digest/Table of Cases 783 1/8/02, 1:49 PM

ILI US Digest/Table of Cases 784 1/8/02, 1:49 PM

Index

A
Abortion, 353
Act of State Doctrine, 290, 439–440
Administrative Procedure Act, 313–315, 499
Adoption
    Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, 121, 141–150, 363, 738
    Intercountry Adoption Act (2000), 147
    paternal rights, 14, 362–363
Africa, U.N. Convention to Combat Desertification in Countries Experiencing Drought, 728–733
Aggression, crime of, 286–290
Agreement between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders, 190
Agreement Between United States of American and European Community Renewing a Programme of Cooperation in Higher Education and Vocational Education and Training, 310–311
Agreement on Privileges, Exemptions and Immunities Between the American Institute in Taiwan and the Coordination Council for North American Affairs, 600–601
Agreement Relating to Amending Annexes I and IV of the Treaty Concerning Pacific Salmon, 294, 295
Agricultural commodity exclusion from U.S. trade sanctions programs, 748–750
Air transport
    cargo standards, 671–672, 673
    Chicago Convention non-discrimination requirement, EU–U.S. disagreement, 641–667
    Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 218
    Convention for the Unification of Certain Rules for International Carriage by Air (1929) (Warsaw Convention), 668–674
        Guatemala City Protocol (1971) to, 671

ILI US Digest/Index 785 1/8/02, 1:49 PM

Hague Protocol (1955) to, 670–671
Montreal Protocols (1975) to, 671–672, 673
Convention for the Unification of Certain Rules for International Carriage by Air (1999), 668–674
Convention on International Civil Aviation (1944), 641–656
Inter-carrier Agreements on Passenger Liability, 670–671, 672–673
International Civil Aviation Organization, 641–667
jurisdiction over offenses committed against children aboard aircraft, 363–364
local remedies rule, 656–662
Montreal Inter-carrier Agreement, 670–672
noise regulation, 641–643, 646–651, 661
passengers, liability for, 669, 670–671, 672–674
stolen aircraft, treaties on, 170
taking of civil depositions abroad in crash investigation, 152–160
Alaska
market-participant exceptions to Commerce Clause, 329
role in international agreements, 294, 295
Albania extradition treaty, 185*n*
Alien Registration Act, 334
Aliens
asylum requests
child custody claims and, 115–141
child's capacity to request, 125–126, 138–140, 141
due process rights in, 131–133
eligibility for, in U.S., 128–131
Immigration and Nationality Act on, 133–140
persecution as basis for, 128–131, 141
Congressional authority in U.S., 9–11
constitutional rights, 131–133
federal authority to regulate, in U.S., 334
smuggling of, to U.S., 23–24, 222, 223
suspension of entry
Presidential Proclamation 7359, 19–21
transfer of, for law enforcement purposes, 184–185
Alien Tort Claims Act, 374, 375, 382, 398–412
standing of individual to seek remedy, 400–402
USG actions in pursuit of legitimate foreign policy not covered by, 402

ILI US Digest/Index 786 1/8/02, 1:49 PM

American Convention on Human Rights, 32*n,* 408
American Declaration of the Rights and Duties of Man, 408
capital punishment as violation of, 389–392
American Institute in Taiwan, 600–602
Antigua and Barbuda, 179
extradition treaty, 186*n*
Anti-Terrorism and Effective Death Penalty Act, 388
Arbitration
Award on the First Question, U.S./U.K. Arbitration Concerning Heathrow Airport User Charges (1992), 645
enforcement of awards
attachment of UN escrow account, 621–626
Convention on the Recognition and Enforcement of Arbitral Awards, 592
sovereign immunity and, 592
ICAO disagreement, E.U.-U.S., 641–667
Iran-United States Claims Tribunal, 429–444
local remedies rule, 656–662
NAFTA provisions, 685–688, 692–693, 694–695
claim against U.S. company, 674–694
scope of authority of international bodies to grant awards, 665–667
Argentina extradition treaty, 165–166, 179, 186*n*
Arms Export Control Act, 544, 748
Arms trade
Arms Export Control Act, 544, 746, 748
North Korean Export Administration Regulations, 747–748
Assurances and guarantees of non-repetition as remedy, 65–73
Asylum
child custody claim and application for child's asylum, 115–141
child's capacity to request, 125–126, 138–140, 141
due process rights, 131–133
eligibility for, in U.S., 128–131
Immigration and Nationality Act provisions, 133–140
persecution as basis of request for, 128–131, 141
Australia extradition treaty, 179, 186*n*
Austria
claims of Nazi era victims and victims' heirs, 485–489
extradition treaty, 180, 186*n*

ILI US Digest/Index 787 1/8/02, 1:49 PM

Award on the First Question, U.S./U.K. Arbitration Concerning Heathrow Airport User Charges (1992), 645
Azerbaijan, Republic of, location of diplomatic buildings, 626–634

B
Bahamas extradition treaty, 186*n*
Bahrain, immunity of diplomatic personnel, 602–616
Barbados, 179
    extradition treaty, 186*n*
Belgium extradition treaty, 186*n*
Belize
    extradition treaty, 166, 185*n,* 186*n*
    stolen vehicle treaty, 169–170
Benin, Republic of, location of embassy, 634–636
Bilateral investment treaties, 683
Biosafety Protocol to the Convention on Biodiversity, 222
Bolivia extradition treaty, 165–166, 178, 179, 186*n*
Bosnia extradition treaty, 185*n*
Brazil
    extradition treaty, 178
    OAS prisoner transfer treaty, 171
Brussels Convention, 737, 738, 740
Bulgaria extradition treaty, 185*n*
Burma
    extradition treaty, 185*n*
    Federal Burma Act, 334–338
    Massachusetts-Burma law regulating state procurement, 319–340, 342
    U.S. condemnation of human rights violations in, 320–321
Burundi, crimes against humanity in, 246–247

C
California
    claims of World War II soldiers against Japanese corporations in courts of, 500–506, 514–531
    Holocaust Victim Insurance Relief Act, 460–473
Cambodia, crimes against humanity in, 244–245
Canada
    Agreement Relating to Amending Annexes I and IV of the Treaty Concerning Pacific Salmon, 294, 295

ILI US Digest/Index 788 1/8/02, 1:49 PM

claim against American company under NAFTA, 674–694
extradition treaty, 185*n*
Northeastern Interstate Forest Fire Protection Compact, 296
status of diplomatic mission employees, 582–583
Treaty between the United States and Canada Relating to the Skagit River and Ross Lake in the State of Washington and the Seven Mile Reservoir on the Pend D'Oreille River in British Colombia (1984), 296
U.S.-Canada Treaty on the Execution of Penal Sentences, 37
Capital punishment
alleged human rights violations in judicial procedure in case of, 389–396
Anti-Terrorism and Effective Death Penalty Act, 388
extradition denial based on possibility of, 166, 180
extrajudicial, summary or arbitrary, 397–398
international practice, 391, 392, 396–397
juvenile offenders, 384
Vienna Convention on Consular Relations and, 63, 64, 73
as violation of American Declaration of the Rights and Duties of Man, 390–392
Census, 639–640
Chanceries. *See* Consular offices and personnel; Diplomatic missions
Chemical Weapons Convention, 756–757
Chicago Convention. *See* Convention on International Civil Aviation (1944)
Child Citizenship Act (2000), 16*n*
Children
in Armed Conflict, Protocol on, 355–360
capacity to make legal decisions, 112–115, 121–122, 124–126, 135–136, 141
Child Citizenship Act (2000), 16*n*
consular protection of citizen children abroad, 117–119
custody claim from Cuban father and third-party application for child's asylum, 115–141
Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 121
Intercountry Adoption Convention, 141–150

ILI US Digest/Index 789 1/8/02, 1:49 PM

international abduction
child's capacity to testify, 112–115, 121–122, 124–125, 138–139, 141
grave risk exception to return, 94, 95–100, 102–104, 105–106, 107–112, 121
Hague Convention on Civil Aspects of International Child Abduction, 93–95, 120, 121, 137-138*n*
habitual residence of child, 96, 97–99, 101–102, 105, 108–111, 118, 120
order of return from U.S., 93–105
order of return from U.S. denied, 105–115
reciprocity among nations in matters of, 120–121, 137–138
relations with non-Hague countries in matters of, 120–121, 138*n*
jurisdiction over offenses committed against children aboard ships or aircraft, 363–364
of multinational families, international law framework for, 121
naturalization of foreign-born, of unwed U.S. citizen, 1–19
prohibitions on trafficking and sale of, 225–230, 355–357, 360–364
questioning and detention of juveniles, 383–384
U.N. Convention on the Rights of the Child, 134–135, 355, 356, 361
Optional Protocols to
Involvement of Children in Armed Conflict, 354, 356, 357–360
Sales of Children, Child Prostitution and Child Pornography, 354, 356, 360–364
U.N. Refugee Children Guidelines, 135, 138–139
Chile extradition treaty, 185*n*
China, People's Republic of
bombing of Chinese Embassy in Belgrade, 421–429
apology by U.S. for accidental bombing, 425
appropriations law and, 421, 423–424
compensation issues, 428
ex gratia payment by U.S. for deaths and injuries, 428–429
payment to China for, 421–424
payment to U.S. for damage to property in China, 424–425

ILI US Digest/Index 790 1/8/02, 1:49 PM

consular notification in detention of foreign national, remedies for failure of, 23–42
judicial assistance in criminal matter in, 160–162
settlement of World War II war claims against japan, 532–540, 535
U.S.-China consular convention, 23–24, 25–31, 33–35, 39–40, 161, 162
U.S.-Hong Kong extradition treaty, 190–203
U.S.-Taiwan relations, 533–534, 600
Citizenship (U.S.)
Child Citizenship Act (2000), 16*n*
Constitution and, 8–9
deference to Congressional authority in, 9–11, 17–18
of foreign-born child of foreign mother and U.S. citizen father, 47
of foreign-born child of unwed U.S. citizen, 1–19
jus soli/jus sanguinis principles, 5
Puerto Rican citizens, 340–341, 344–345
statutory authority, 8–11, 17–18
Civil Rights of Institutionalized Persons (1980), 378–379
Civil service employees, definitional issues in sovereign immunity cases, 581–587
Colombia
extradition treaty, 179, 183–184, 186*n*
Panama Canal Treaty and, 312–317
Congo, Democratic Republic of, 248
extradition treaty, 185*n*
Consolidated Appropriations Act (2000), 421–422
Constitution, U.S.
Article I, 9, 293–294, 295–296, 342–343, 759
Article II, 147, 173, 293, 345, 491*n*
Article III, 192, 316, 762, 763, 765
Article IV, 342–343
Article VI, 294–295, 386, 528
on assistance to foreign governments in recovery of assets, 439–440
on authority to enter into treaties, 38–39, 201–202
on citizenship, 8–9
on diplomatic immunity issues, 613–615
Due Process Clause, 1, 738
equal protection component, 1, 2–17

ILI US Digest/Index 791 1/8/02, 1:49 PM

Eighth Amendment, 373
Fifth Amendment, 1, 373
Foreign Commerce Clause, 319–320, 321–333, 465, 466, 468–469
market-participant exceptions, 321–333
Fourteenth Amendment, 5, 8, 9
Fourth Amendment, 373
Full Faith and Credit Clause, 736
Interstate Commerce Clause, 323, 331–332
Puerto Rican status legislation and, 345–346
requirement of treaty for extradition and, 208–209, 210–212
Sixth Amendment, 383
Supremacy Clause, 294–295, 319–320, 333, 386, 528–529, 537, 597
Tenth Amendment, 386
War Powers Clause, 760
Consular functions
notification of consul in detention of foreign nationals in U.S.
Chinese nationals, case in U.S., 23–43
German nationals, case at ICJ, 43–93
Mexican national, case in U.S., 24–25
Paraguay national, case at ICJ, 26–27, 32*n,* 41, 42
protection of citizen children abroad, 117–119
in taking of depositions in Korea, 153–160
Consular offices and personnel
census compliance, 639–640
foreign domestic employees, 637–639
immunity and privileges, 601–602
exemption from state taxes, 594–599
implications of Puerto Rican sovereignty, 344–345
interpretation of consular conventions, 39
location of buildings, 626–637
See also Diplomatic missions and personnel; Vienna Convention on Consular Relations
Continental shelf
Convention on the Law of the Sea, 699
Geneva Convention on, 699
rights of coastal states, 708–709
U.S.-Mexico Treaty on Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 2000 Nautical Miles, 697–700

ILI US Digest/Index 792 1/8/02, 1:49 PM

Contract law
jurisdiction rules in private international law, 738
liability of successor states, 570–573
treaty law and, 494
Control and seizure of assets
attachment of UN escrow account, 616–626
to compensate victims of terrorism, 540–541
attachment of diplomatic property, 541–543
attachment of Iranian funds, 543–560
diplomatic property, 552–553
Executive Branch authority, 550–551
Foreign Narcotics Kingpins Sanctions Regulations, 744–745
International Emergency Economic Powers Act, 617–618
Iranian Sanctions Regulations, 743–744
Iran-United States Claims Tribunal, 429–444
of Iraq, 618
North Korean sanctions program, 745–746
provisions of Treaty of Peace with Japan, 510–512, 524–525, 526, 538
Convention Against Illicit Traffic in Narcotic Drugs, United Nations, 407
Convention Against the Taking of Hostages, International, 218
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 372–388
Convention Against Transnational Organized Crime, 221–225
Convention Between the United States and Mexico for the Solution of the Problem of Chamizal, 294
Convention Between the United States of America and the United Mexican States for the Recovery and Return of Stolen or Embezzled Vehicles and Aircraft, 170
Convention for the Suppression of Terrorist Bombings, International, 218–219
Convention for the Suppression of the Financing of Terrorism, International, 216–221
Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 218
Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 218
Convention for the Unification of Certain Rules for International Carriage by Air (1929)(Warsaw Convention), 669

ILI US Digest/Index 793 1/8/02, 1:49 PM

Guatemala City Protocol (1971) to, 671
Hague Protocol (1955) to, 670–671
Montreal Protocols (1975) to, 671–672, 673
Convention for the Unification of Certain Rules for International Carriage by Air (1999), 668–674
Convention on Certain Conventional Weapons, 755–757
landmine control, 751–755, 757
Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Organization for Economic Cooperation and Development, 232–233
Convention on International Civil Aviation (1944)
non-discrimination provisions, U.S.–U.K. disagreement on, 641–646, 648–652, 661
notification of departure from standards, 642–643, 646–648, 651
requirements for negotiations, 652–656
Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments, 735–741
Convention on Privileges and Immunities of the United Nations (General Convention), 578, 589–590, 603, 604–605, 607, 610–611, 612, 613, 614, 624, 625
legislative history, 604–605*n*
Convention on Road Traffic, International (1949), 295
Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 700–702
Convention on the Elimination of All Forms of Racial Discrimination, International, 347–350
Convention on the Establishment of an Inter-American Tropical Tuna Commission, 305–308
Convention on the Law of the Sea, United Nations, 699, 703–704, 706–709
Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, 218
Convention on the Recognition and Enforcement of Arbitral Awards, 592
Convention on the Rights of the Child, United Nations, 134–135, 355, 356
Involvement of Children in Armed Conflict, Protocol on, 354, 356, 357–360
Sale of Children, Child Prostitution and Child Pornography, Protocol on, 354, 356, 360–364

ILI US Digest/Index 794 1/8/02, 1:49 PM

Convention on the Territorial Sea and the Contiguous Zone, 703
Convention on the Transfer of Sentenced Persons, 295
Convention Relating to the Status of Refugees, 381
Conventions, Hague. *See* Hague Conventions
Conventions, Inter-American. *See* Inter-American Conventions
Conventions, International. *See* International Conventions
Coordination Council for North American Affairs, 600
Copyright issues, private international law, 740
Corporate social responsibility, 364–368
    conditions in privately-managed prisons, 387
Costa Rica
    Inter-American Tropical Tuna Commission, 307
    stolen vehicle treaty, 169–170
Countermeasures, 68, 417, 665
Crimes against humanity
    accountability mechanisms, 239–243
    in Burundi, 246–247
    in Cambodia, 244–245
    claims of Nazi era victims and victims' heirs, 445–489
    in East Timor, 245–246
    in Indonesia, 245–246
    International Criminal Court jurisdiction, 276–277
    in Iraq, 247
    prevention, 248–249
    in Rwanda, 203–204, 242
    sexual crimes as, 241–242, 251–255
    in Sierra Leone, 243–244
    See also War crimes
Crime of aggression, definition, 286–290
Croatia extradition treaty, 185*n*
Cuba
    Elian Gonzalez case, 115–141
    extradition treaty, 185*n*
    trade restrictions, 749–750
    travel restrictions, 749, 750
Customary international law
    aggression, crime of, 286–288
    assurances and guarantees of non-repetition, 66, 69
    consular and diplomatic relations, 27, 39, 118, 587, 605-606

ILI US Digest/Index 795 1/8/02, 1:49 PM

expropriation, 681–683
international humanitarian law, 246
judicial assistance, 154, 156–158, 161
jurisdiction, 282–284
liability of state for political subdivisions, 679
prolonged arbitrary detention, 412
rape as crime, 251
remedies, 665
rules of war, 757
succession of states, 563
support of states, 483
transborder arrest, 408–409
treatment of investments, minimum standard under NAFTA, 688–693
United Nations Law of the Sea as codifying, 699, 704, 707
Vienna Convention on Consular Relations as codifying, 118
Vienna Convention on Diplomatic Relations as codifying, 587, 605–606
Cyprus
extradition treaty, 180, 186*n*
mutual legal assistance treaty, 166
Czech Republic extradition treaty, 185*n*

D

Death penalty. *See* Capital punishment
Declaration on Fundamental Principles and Rights at Work, 369
Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 373
Denmark extradition treaty, 186*n*
Deportation
for law enforcement purposes, 184–185
prohibited if likelihood of torture, 379, 380–381, 387–388
Diplomatic missions and personnel
bombing of Chinese Embassy in Belgrade, 421–429
apology by U.S. for accidental bombing, 425
appropriations law and, 421, 423–424
compensation issues, 428
ex gratia payment by U.S. for deaths and injuries, 428–429

ILI US Digest/Index 796 1/8/02, 1:49 PM

payment to China for, 421–424
payment to U.S. for damage to property in China, 424–425
census compliance, 639–640
compensation to U.S. for attack on embassy in China, 424–425
foreign domestic employees, 637–639
immunities and privileges
compensation for victims of terrorism and, 541–542, 549–550
exemption from state taxes, 594–599
importance of, in international law, 615
of personnel, 602–616
certification of, by Department of State, 602, 613
in employment relationships, 540–553
of UN mission, 606–607
protection from enforcement of awards, 540–553
location of embassy buildings, 626–637
protection of diplomatic property
Bilateral Agreement on Diplomatic and Consular Properties with the Government of Azerbaijan, 627–628
during cessation of diplomatic relations, 552–553
Foreign Missions Act obligations, 557–558
Foreign Sovereign Immunities Act provision, 599
See also Consular offices and personnel; Vienna Convention on Diplomatic Relations
Diplomatic protection
claims for a direct injury to state distinguished from, 658–661
International Law Commission on, 419
Diplomatic relations
cessation of, protection of diplomatic and consular property during, 552–553
succession of states, 561, 563–564
Disarmament, gender equality and, 354
District of Columbia, location of diplomatic and consular buildings, 626–637
Dominica extradition treaty, 185*n*
Dominican Republic
extradition treaty, 179, 185*n*
stolen vehicle treaty, 169–170
Drug trade, 164, 167, 232

ILI US Digest/Index 797 1/8/02, 1:49 PM

Foreign Narcotics Kingpins Sanctions Regulations, 744–745
U.N. Convention Against Illicit Traffic in Narcotic Drugs, 407
Due process
alleged violation of, in capital punishment case, 392–396
enforcement of decrees of foreign judiciary, 442
equal protection component, 1
objection to extradition based on requesting country's lack of, 215–216
rights in asylum application, 131–133

E
East Timor
crimes against humanity in, 245–246
United Nations Transitional Administration in East Timor for United States Forces Operating in East Timor, 308–310
Economic globalization
corporate social responsibility, 364–368
gender discrimination and, 354
social development and, 369–372
Economic sanctions
agricultural and medical commodity exceptions, 748–749
current programs, 750
Executive Branch authority, 749–750
for extradition treaty noncompliance, 187–188
Federal Burma Act, 334–338
Iranian Sanctions Regulations, 743–744
Iraq sanctions program, 617–621
Massachusetts-Burma law regulating state procurement, 319–340
North Korean Export Administration Regulations, 746–748
North Korean Foreign Assets Control Regulations, 745–746
Trade Sanctions Reform and Export Enhancement Act (2000), 749–750
UN escrow account, 616–626
Ecuador
evaluation of impartiality of court, 412–414
extradition treaty, 185*n*
Inter-American Tropical Tuna Commission, 307
prisoner transfer treaty, 171

ILI US Digest/Index 798 1/8/02, 1:49 PM

Egypt
extradition treaty, 185*n*
mutual legal assistance treaty, 166
Electronic commerce
private judicial settlement, 736, 740–741
U.S.-European Union cooperation, 301–305
El Salvador
extradition treaty, 185*n*
Inter-American Tropical Tuna Commission, 307
Embassies. *See* Consular offices and personnel; Diplomatic missions
Employees of consular and diplomatic missions
civil service status, 581–582, 581–587
foreign domestic workers, 637–639
immunity of missions to civil action by, 577–593
Ententes, role of individual U.S. states in, 295–296
Environmental protection
Biosafety Protocol to the Convention on Biodiversity, 222
compliance with emissions targets, 711–725
Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 700–702
Framework Convention on Climate Change, 711–725
International Law Commission on transboundary damage, 420
in territorial or archipelagic waters, 707
United Nations Convention to Combat Desertification in Countries Experiencing Drought, Particularly in Africa, 728–733
Equality of arms, 392–396
Eritrea
Ethiopian war, atrocities in, 247–248
Ethiopia peace agreement (2000), 311–312
Estonia extradition treaty, 185*n*
Ethiopia
Eritrean war, atrocities in, 247–248
Eritrea peace agreement (2000), 311–312
European Community, 301
Agreement Between United States of American and, Renewing a Programme of Cooperation in Higher Education and Vocational Education and Training, 310–311
European Council Regulation 925 (1999), 641–642, 648, 654, 662

ILI US Digest/Index 799 1/8/02, 1:49 PM

European Court of Human Rights, 393–394
European Court of Justice, 648, 652
jurisdiction, 662
European Union
allocation of competence within, 301–302, 303–304, 307–308
Convention on the Establishment of an Inter-American Tropical Tuna Commission, 305–308
electronic commerce, 301–305
as party to treaties, 296–297, 300–308
rules of private international law, 736–737
trademark law, 297–301
U.S. filing on discriminatory practice in aviation, 641–667
Evidence
authority of International Criminal Tribunal for the Former Yugoslavia to compel evidence from SFOR, 255–271
child's capacity to testify, 112–115
equality of arms in judicial procedure, 393–396, 394*n*
judicial assistance in criminal matter in China, 161
probable cause standard for extradition, 181–182, 212–213
suppression of, in violation of consular notification requirement, 23–42
taking of civil depositions abroad, 152–160
use of unadjudicated crimes as, 392, 395*n*
Executive Branch
in blocking of foreign assets, 550–551
deference to, in FSIA interpretation, 599
deference to, in treaty interpretation, 38–39, 493–494, 526–528, 597–599
determination of remedy for violation of international law, 403
in extradition process, 191–192
foreign policy authority, 201–202
Presidential Proclamation No. *7359,* 19–21
war powers, 758–765
Executive orders
on attempts by Iran to recover assets in U.S. (No.12284), 435, 439*n,* 441*n*
blocking of Iranian assets (No.12170), 435, 550, 551–552, 557
Burma economic sanctions, 334, 335, 336
human rights treaty compliance (No. 13107), 376

ILI US Digest/Index 800 1/8/02, 1:49 PM

international emergency economic powers (No. 12924), 748
Iraq sanctions program (No. 12724), 619, 621
seizure of Iraq assets (No. 12722), 619, 621
Taiwan relations (No. 13014), 600
Export Administration Act (1979), 748
Export Administration Regulations, 746–748
Expropriation
bilateral investment treaties, 683
customary international law, 681–683
measures tantamount to, in NAFTA, 679, 681–683, 685
taxation and, 685
Extradition
denial of
capital punishment possibility as basis for, 166, 180
for crimes not listed by treaty, 181, 188
for extraterritorial offenses, 182
for insufficiency of evidence, 181–182
for military offenses, 182
of nationals of requested state, 165–166, 177–181, 185–186
non bis in idem doctrine, 182
for politically motivated requests, 182–183
for political offenses, 182
possibility of torture in requesting state as basis for, 176, 379, 380–381
statute of limitations issues, 180–181
dual criminality approach, 165, 181
due process rights in requesting state and, 215–216
extraditable offenses, 165, 181
foreign prosecution in absence of, 178
to Hong Kong, 190–203
International Crime Control Act provisions, 188–190
International Criminal Court and, 172–173
judicial infrastructure for, 183
obstacles to, 177, 183–184
probable cause standard for, 181–182, 189*n,* 208, 212–213
procedures, 175–176, 189, 191–192
duration, 177*n*
requests and actions, 176–177
statutory authority for, 174*n,* 205–206, 210–212

ILI US Digest/Index 801 1/8/02, 1:49 PM

statutory requirement for treaty for, 188–189, 193–194
surrender of person to International Criminal Tribunal for Rwanda, 203–216
temporary surrender to requesting state, 165
treaties, 163, 164–166, 173–184
absence of, 184, 188–190
constitutional requirement for, to accomplish surrender, 208–209, 210–212
inadequacies of, 186–190
interpretation of, 199
sanctions for noncompliance, 187–188
statutory requirement for, 175, 188–189, 193–194
with sub-sovereign government (Hong Kong), jurisdictional issues, 190–203
transfer of persons outside of, 184–185
Extrajudicial, summary or arbitrary execution, 397–398

F

Federal Aviation Administration prohibition of DC-10 aircraft in U.S. airspace, 649–650
Fiji extradition treaty, 185*n*
Finland extradition treaty, 186*n*
Foreign affairs
California Holocaust era victim compensation plan as intrusion upon, 465–468, 471–473
Executive Branch authority, 526–527
to impose economic sanctions, 749–750
federal authority, 319–340, 341–344, 471, 472
"one voice" standard, 324–326, 465–468
Puerto Rican status, 340–344, 345–346
USG action in pursuit of legitimate foreign policy, 402
war powers, 758–765
Foreign Assets Control Regulations, 540, 743, 744, 745–746
Foreign Assistance Act (1961), 347
Foreign Corrupt Practices Act (1997), 232–233, 237–238
Foreign Missions Act, 550
location of buildings, 628–629, 630–634
prohibition on seizure of diplomatic property, 557–558
tax exemption provisions, 597

ILI US Digest/Index 802 1/8/02, 1:49 PM

Foreign Narcotics Kingpins Sanctions Regulations, 744–745
Foreign Service Act, 155
Foreign Sovereign Immunities Act, 230
1998 Amendments, 230, 557, 558–560
claims of victims of Nazi era and, 473–485
decision as to applicability by judiciary, 577–578, 579–580, 591–592
deference to Department of State in interpretation of, 599
diplomatic and consular property, 553, 554–557, 599
exceptions to immunity, 478–481, 548
agreements to arbitrate and confirmation of arbitral awards, 592
in claims against state sponsors of terrorism, 542–543, 547–548, 549–550, 554–557, 558–560
commercial activity, 555
case law, 580–585
definition, 555, 580
efforts to attach Iranian funds, 554–557
employment relationships, 577–578, 580–590
jus cogens violations and, 479–480, 481–485
for seizure of diplomatic property, 230, 554–557, 558–560
U.S. Presidential waiver of, 230, 554, 557, 559
waiver by sovereign, 478–481, 548
jurisdiction in U.S. courts, 475, 579
on liability of successor states, 571
protections from default judgments, 593
relevance of treaties, 587–590
service upon a foreign state, 592–593
sovereign as judgment debtor, 590–593
Framework Convention on Climate Change, 711–725
France
Change of Gauge Arbitration, 657, 658, 659–660
extradition treaty, 178, 180, 186*n*
Inter-American Tropical Tuna Commission, 307, 308
international child abduction case, 105–115
mutual legal assistance treaty, 166

G
Gambia extradition treaty, 185*n*

ILI US Digest/Index 803 1/8/02, 1:49 PM

Gender discrimination
disarmament issues and, 354
economic globalization and, 354
international efforts, 351–355
in naturalization of out-of-wedlock child, 12–17
General Convention of United Nations. *See* Convention on Privileges and Immunities of the United Nations
Geneva Convention
on the Continental Shelf, 699
Relative to the Treatment of Prisoners of War, 517*n*
Germany
claims of Nazi era victims and victims' heirs, 445–485
California Holocaust Victim Insurance Relief Act, 460–473
sovereign immunity issues, 473–485
consular notification case in ICJ, 33*n,* 41, 43–93
extradition treaty, 178, 186*n*
Ghana extradition treaty, 185*n*
Greece
extradition treaty, 185*n,* 186*n*
international child abduction case, 93–105
mutual legal assistance treaty, 166
Grenada extradition treaty, 186*n*
Guatemala
extradition treaty, 185*n*
stolen vehicle treaty, 169–170
Guatemala City Protocol (1971), 671
Guyana extradition treaty, 185*n*

H

Hague Agreement Concerning the International Deposit of Industrial Designs, 300
Hague Conference on Private International Law, 736, 737–741
Hague Conventions
on Civil Aspects of International Child Abduction, 93–95, 120, 121, 137–138, 137*n*
Central Authority for U.S. under, 117–118
on child's capacity to testify, 112–115, 121–122
grave risk exception, 94, 95–100, 102–104, 105–106, 107–112, 121

ILI US Digest/Index 804 1/8/02, 1:49 PM

habitual residence of child, 96, 97–99, 101–102, 105, 108–111, 118, 120
on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 121
on Protection of Children and Cooperation in Respect of Intercountry Adoption, 121, 738
implementation and ratification in U.S., 141–150, 363
on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 152
Haiti
extradition treaty, 185*n*
national of, in U.S., accused of torture, 383
Hawaii, tax exemptions for diplomatic and consular personnel and missions in, 594–599
Holocaust Assets Commission Act (1998), 468
Honduras extradition treaty, 185*n*
Hong Kong
extradition treaty, 179, 186*n*
status of Hong Kong as sub-sovereign government, 190–203
Hong Kong Policy Act, 191, 197–198
Human rights
alleged violation of American Declaration of the Rights and Duties of Man in capital punishment case, 389–396
American Convention on Human Rights, 32*n,* 408
capital punishment as violation of, 391–392, 396–397
Civil Rights of Institutionalized Persons (1980), 378–379
consular notification in detention of foreign national, 35, 74–78
corporate responsibility, 364–368
Country Reports on Human Rights Practices, 347
Declaration on Fundamental Principles and Rights at Work, 369
distinguished from consular rights, 75–76
in employment, 369–370
evaluation of impartiality of foreign court, 412–414
Executive Order (U.S.) creating interagency working group on compliance with human rights treaties, 376
extrajudicial, summary or arbitrary executions, 397–398
in foreign occupation, 353–354
gender equality, 351–355

ILI US Digest/Index 805 1/8/02, 1:49 PM

government responsibility to prevent persecution, 397–398
of institutionalized persons, 378–379, 383–385
International Covenant on Civil and Political Rights, 391, 394, 397, 408–409
International Covenant on Economic, Social and Cultural Rights, 371
International Religious Freedom Act (1998), 355
persecution, U.S. immigration law, 128–131
prolonged detention, 411–412
racial discrimination, 347–351
religious freedom, 355
right to food and housing, 370–372
sexual orientation non-discrimination, 353
terrorism and, 238–239
torture, 176, 372–388
transborder arrest as violation of, 407–412
U.N. Convention on the Rights of the Child, 134–135, 355, 356
Optional Protocols to
Involvement of Children in Armed Conflict, 354, 356, 357–360
Sale of Children, Child Prostitution and Child Pornography, 354, 356, 360–364
Universal Declaration on, 366, 370–371, 391, 408, 409
U.S. condemnation of human rights violations in Burma, 320–321
Hungary
extradition treaty, 186*n*
Gabcikovo-Nagymaros Project case, 664–665

I

Iceland extradition treaty, 185*n*
Illegal Immigration and Immigrant Responsibility Act (1996), 387–388
Illicit enrichment, 238
Immigration
child custody claim from foreign father and application for child's asylum, 115–141
Congressional authority in U.S., 9–11
Illegal Immigration and Immigrant Responsibility Act (1996), 387–388
protection for victims of trafficking, 225–230

ILI US Digest/Index 806 1/8/02, 1:49 PM

suspension of entry (Presidential Proclamation 7359), 19–21
See also Aliens; Immigration and Nationality Act
Immigration and Nationality Act
adoption provisions, 148
on foreign-born children of unwed U.S. citizens, 1–17
Sections:
201, 3, 4, 5
205, 3–4, 6
208, 123, 126, 127, 128–131, 133–134, 136–137, 138–140
212(f), 19–21
309, 1, 6–9
320, 16*n*
Immunity
Agreement on Privileges, Exemptions and Immunities Between the American Institute in Taiwan and the Coordination Council for North American Affairs, 600–601
diplomatic and consular, 382–383
attachment of diplomatic property to compensate victims of terrorism, 541–560
customary international law, 587, 606
employee of Taipei Economic and Cultural Representative Office, 599–602
UN diplomatic personnel, 602–616
UN escrow account, 616–626
International Law Commission on diplomatic protection, 419
of international organizations, 415
International Organizations Immunities Act, 608*n,* 609, 625
of international peacekeeping personnel from subpoena by international tribunal, 268–271
sovereign
attempts by Iran to recover assets in U.S. and, 439–440
claims of victims of Nazi era against Austria, 489
claims of victims of Nazi era against Germany, 450, 473–485
exemption from state taxes, 594–599
international terrorism and, 479–480
as judgment debtor, 590–593
jus cogens violations and, 479–480, 481–485
mandamus statute, 499

ILI US Digest/Index 807 1/8/02, 1:49 PM

prior to Foreign Sovereign Immunities Act, 476–478
private Korean national claim against U.S., 490, 498–499
restrictive theory, 475, 579
of Taiwanese employees, 599–602
in UN mission employment relationships, 577–593
U.S. history and practice, 474–475, 578–580
See also Foreign Sovereign Immunities Act
India extradition treaty, 179, 186*n*
Indonesia, crimes against humanity in, 245–246
Insurance industry
claims of Nazi era victims and victims' heirs, 449, 460–473
federal and state regulation, 468–470
stolen vehicles treaties, 170
Intellectual property
Hague Agreement Concerning the International Deposit of Industrial Designs, 300
International Bureau of the World Intellectual Property Organization, 298, 299
internet issues, 740
Madrid Agreement Concerning the International Registration of Marks (1891), Protocol to, 297–301
rules of private judicial settlement, 740–741
trademark registration, 298, 300
Inter-American Commission on Human Rights, alleged violation of American Declaration of the Rights and Duties of Man in death penalty case, 389–396
Inter-American Conventions
Against Corruption, 231–238
on Mutual Assistance in Criminal Matters with Related Optional Protocol, 166, 167–169
on Serving Criminal Sentences Abroad, 171–172
Inter-American Court of Human Rights
consular notification case, 26, 27, 32, 35, 41, 42
jurisdiction, 32*n*
Inter-American Juridical Committee, 403*n*
Inter-American Tropical Tuna Commission, 307
Inter-carrier Agreement on Passenger Liability, 672–673
Intercountry Adoption Act (2000), 147

ILI US Digest/Index 808 1/8/02, 1:49 PM

International Bureau of the World Intellectual Property Organization, 298, 299
International Civil Aviation Organization
authority to provide relief, 653, 663–667
liability regime, 673–674
requirements for negotiations, 652–656
U.S. filing alleging EU discriminatory practice, 641–667
International Commission of Holocaust Era Insurance Claims, 449
International Convention Against the Taking of Hostages, 218
International Convention for the Suppression of Terrorist Bombings, 218–219
International Convention for the Suppression of the Financing of Terrorism, 216–221
International Convention on Road Traffic (1949), 295
International Convention on the Elimination of All Forms of Racial Discrimination, 347–350
International Court of Justice, 290, 553
consular notification cases, 26, 27, 32–33, 32*n,* 33*n,* 35, 41, 42
claim by Germany against U.S., 43–93
claim by Paraguay against U.S., 26–27, 32*n,* 35, 41, 42
International Criminal Court and, 290
jurisdiction and authority, 32*n,* 66–68, 82–85, 87–88
protection of diplomatic property when relations severed, 553
timeliness of requests for action to, 88–91
International Covenant on Civil and Political Rights, 391, 394, 397, 408–409
International Covenant on Economic, Social and Cultural Rights, 371
International Crime Control Act (proposed, 1998), extradition provisions, 188–190
International Criminal Court
crimes of sexual violence, 253
definition of crime of aggression, 286–290
International Court of Justice and, 290
jurisdiction, 274, 275, 279–286
prohibition on cooperation with, 172–173
signing by U.S., 292–293
United Nations referrals to, 274, 275, 285–286
U.S. armed forces subject to, 249–250, 278
U.S. policy, 272–279

ILI US Digest/Index 809 1/8/02, 1:49 PM

International Criminal Tribunal for Rwanda, 203–216, 242, 252–253, 271, 287
International Criminal Tribunal for the Former Yugoslavia, 83, 241, 252, 287, 393, 756
authority to compel evidence from SFOR, 255–271
International Emergency Economic Powers Act, 230, 334–335, 541, 543, 550, 557, 559, 560, 617–619, 621, 624, 748
International Law Commission, 416–420, 610, 611
on *jus cogens,* 483–484
mandate, 64–65
on satisfaction for breach of obligation, 64–66, 68, 70–71, 666-667
on U.N. Headquarters Agreement, 609–610
U.S. comments on 2000 Report of, 416–420
International Monetary Fund, Special Drawing Rights, 671
International organizations
definition, 415–416
immunity of UN diplomatic personnel, 602–616
immunity to attachment of UN escrow account, 616–626
legal personality, 415
succession of Federal Republic of Yugoslavia to membership in, 561
surrender of individual in U.S. to International Criminal Tribunal for Rwanda, 203–216
as treaty participants, 296–308
See also Supranational organizations
International Organizations Immunities Act, 608*n,* 609, 625
International Religious Freedom Act (1998), 355
Internet. *See* Electronic commerce
Iran
effort to attach Iranian funds by victims of terrorism, 543–560
recovery of assets in U.S., 429–444
sanctions program, 230, 743–744, 749
Iran-United States Claims Tribunal, 429–444, 545, 551
Iraq
blocking of assets, 617–618, 623–624
compensation claims against, for invasion of Kuwait, 444
crimes against humanity in, 247
extradition treaty, 185*n*

ILI US Digest/Index 810 1/8/02, 1:49 PM

Oil-for-Food Programme, 444, 617, 619–622, 624
sanctions program, 617–621, 623–624
travel restrictions, exceptions to, 118–119
Iraq Sanctions Act (1990), 618
Ireland extradition treaty, 180, 186*n*
Israel
compensation plan for Nazi era victims and victims' heirs, 454–455
extradition treaty, 178, 179, 186*n*
Italy extradition treaty, 180, 186*n*

J
Jamaica extradition treaty, 186*n*
Japan
alleged enslavement of World War II prisoners by corporations of, 500–505
claims of allied prisoners, 505–531
claims of non-allied prisoners, 531–540
extradition treaty, 179, 186*n*
Inter-American Tropical Tuna Commission, 307
Treaty of Peace, 501–503, 505, 506–512, 515–531
war claims by Asian nationals against, 532–540
Jordan extradition treaty, 184, 186*n*
Judgment debtor, immunity as, 590–593
Judicial assistance
in criminal matter in China, 160–162
letters rogatory
P.R.C. rules, 161, 162
Vienna Convention on Consular Relations on, 161
mutual legal assistance treaties, 163, 164, 166–169
request for, 161, 162
at International Criminal tribunal for Former Yugoslavia, 255–271
service of process in foreign countries, 150–152
taking of civil depositions abroad, 152–160
travel of foreign officials in matters of, 158
See also Evidence; Service
Judicial procedure
alleged violation of right to fair trial and due process in capital punishment case, 389–390, 392–396

ILI US Digest/Index 811 1/8/02, 1:49 PM

consular notification claim as right of defense, 57–58, 78–80
equality of arms in, 392–396
evaluation of impartiality of foreign court, 412–414
procedural default, 44, 62–63
prolonged detention, 411–412
Jurisdiction
Convention on International Civil Aviation, 652–656, 662
delegation of, 283–284
electronic commerce issues, 740–741
Inter-American Court of Human Rights, 32*n*
International Civil Aviation Organization, 663–667
International Court of Justice, 32*n,* 66–68
International Criminal Court, 249–250, 274, 275, 278, 279–285
international intellectual property rights, 740
NAFTA arbitration rules, 685–688, 692–693, 694–695
over disputes arising under Vienna Convention on Consular Relations, 32*n*
rules of private international law, 736, 737–739
service and, 435
in state succession cases, 569–570, 574
of United Nations International Tribunal, 213–215
in United States
claims of World War II soldiers against Japanese corporations, 500
Constitutional provisions, 738
for extradition to Hong Kong, 190-203
Foreign Sovereign Immunities Act, 476, 477, 478, 578-579, 592-593
over alien for torture committed abroad, 382
over civil tort actions by alien, 399–400
over offenses committed aboard ship or aircraft, 363–364
procedural default, 44, 62–63
Jus cogens, 419, 473-474, 478, 479–480, 481–485

K

Kenya extradition treaty, 185*n*
Kidnapping
state-sponsored transborder arrest, 398–412
Treaty to Prohibit Transborder Abductions, 405

ILI US Digest/Index 812 1/8/02, 1:49 PM

Kiribati extradition treaty, 185*n*
Korea
judicial assistance in obtaining evidence, 152–160
post-World War II war claims against Japan, 534, 535–536
private national Vietnam War claim against U.S., 489–499
U.S.-Korea Consular Convention, 156–157
Kyoto Protocol, 711–725

L
Latvia extradition treaty, 185*n*
Law enforcement
actions under color of law, 377
corporate social responsibility, 368
human rights violations in
investigation and prosecution in U.S., 377–379
prolonged detention, 411–412
transborder arrest, 398–412
use of excessive force, 374, 377
international cooperation, 224
Convention against Transnational Organized Crime, 221–225
Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 218
Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 218
Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Organization for Economic Cooperation and Development, 232–233
extradition treaties, 163, 164–166
Inter-American Convention Against Corruption, 231–238
Inter-American Convention on Mutual Assistance in Criminal Matters with Related Optional Protocol, 166, 167–169
International Convention for the Suppression of the Financing of Terrorism, 216–221
mutual legal assistance treaties, 166–169
stolen vehicle treaties, 169–170
treaties for, 164
questioning and detention of juveniles, 383–384
restraint procedures, 384–385
Lesotho extradition treaty, 185*n*

ILI US Digest/Index 813 1/8/02, 1:49 PM

Letters rogatory, 394*n*
rules of People's Republic of China, 161, 162
Vienna Convention on Consular Relations on, 161
Liberia
extradition treaty, 185*n*
suspension of entry of immigrants from, 19
Libya
sanctions regulations, 749
travel restrictions, exceptions to, 118–119
Liechtenstein extradition treaty, 185*n*
Lithuania extradition treaty, 185*n*
Local government
NAFTA coverage of action of, 679–681
status of Hong Kong as sub-sovereign government, 190–203
See also State law (U.S.)
Local remedies rule, 656–662
Lugano Convention, 737, 738
Luxembourg extradition treaty, 180, 185*n*

M

Macedonia extradition treaty, 185*n*
Madrid Agreement Concerning the International Registration of Marks (1891), 298
Protocol Relating to, 297–301
Malawi extradition treaty, 185*n*
Malaysia extradition treaty, 179, 186*n*
Malta extradition treaty, 185*n*
Maritime operations
Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 700–702
innocent passage of vessels, 707–708
jurisdiction over offenses committed against children aboard ships, 363–364
limits of territorial sea, 703–706
navigational rights of warships, 707, 708
rights and freedoms of international community in navigation
in Seychelles, 706–709
Thailand territorial waters, 702–706

ILI US Digest/Index 814 1/8/02, 1:49 PM

rights of coastal states, 708–709
U.S.-Mexico Treaty on Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 2000 Nautical Miles, 697–700
Massachusetts-Burma law regulating state procurement, 319–340, 342
Mauritius extradition treaty, 185*n*
McCarran-Ferguson Act, 468–470
Mexico
consular notification case, 24–25, 32*n*
Convention between the United States and Mexico for the Solution of the Problem of Chamizal, 294
extradition treaty, 178, 179, 186*n*
Inter-American Tropical Tuna Commission, 307
mutual legal assistance treaty, 394*n*
stolen vehicle treaty, 170
transborder arrest case, 398–412
U.S.-Mexico Treaty on Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 2000 Nautical Miles, 697–700
U.S.-Mexico Treaty on the Execution of Penal Sentences, 37
Military action
Chemical Weapons Convention, 756–757
compensation for bombing of Chinese Embassy in Belgrade, 421–429
conscription and recruitment, 357–358, 359–360
Convention on Certain Conventional Weapons, 751–757, 755–757
Amended Mines Protocol to, 751–755, 757
landmine control, 751–755, 757
humanitarian protection treaties, 756
Involvement of Children in Armed Conflict, Protocol on, 355–360
navigational rights of warships, 707, 708
U.N. Transitional Administration in East Timor for United States Forces Operating in East Timor, 308–310
War Claims Act (1948), 503, 505, 511, 512–514, 528–531
war powers, 758–765
See also War crimes
Military personnel
denial of extradition for military offense, 182
employment of American citizen in foreign military, 586*n*

ILI US Digest/Index 815 1/8/02, 1:49 PM

jurisdiction of International Criminal Court and, 249–250, 278, 280*n*
Monaco extradition treaty, 185*n*
Montreal Inter-carrier Agreement (1966), 670–671, 672
Montreal Protocols (1975), 671–672
Mutual legal assistance
basis for denial of requests for, 167, 168
Central Authority, 169
distribution of forfeited assets, 168
evidence, use of information by requesting state as, 169
goals, 166–167
International Criminal Court and, 173
Mexico-U.S. treaty, 394*n*
in tax offense cases, 168
treaties, 163, 164, 166–169

N
National Emergencies Act, 618
Nationality
dual, 344–345
extradition of nationals of requested state, 165–166, 177–180, 185–186
International Law Commission on, 419
jurisdiction of International Criminal Court, 281–282
Nationalization
definition, 682
NAFTA provisions, 682
Naturalization. *See* Citizenship
Nauru extradition treaty, 185*n*
Netherlands extradition treaty, 180, 186*n*
New Zealand extradition treaty, 186*n*
Nicaragua, Inter-American Tropical Tuna Commission, 307
Nigeria
extradition treaty, 185*n*
mutual legal assistance treaty, 164, 166
North American Free Trade Agreement (NAFTA)
actions of local governments and, 679–681
arbitration regime, 685–688, 692–693, 694–695
claim by Canada against American company, 674–694
expropriation provisions, 679, 681–683, 685

ILI US Digest/Index 816 1/8/02, 1:49 PM

fair and equitable treatment rules, 688–691, 693–694
national treatment provisions, 676–678, 684–685
performance requirements, 678
North Atlantic Council, 259
Northeastern Interstate Forest Fire Protection Compact, 296
North Korea
Export Administration Regulations, 746–748
Foreign Assets Control Regulations, 745–746
trade restrictions, 749
Norway extradition treaty, 186*n*

O

Office of Foreign Assets Control (OFAC), 438, 618–619, 621, 623–624, 743–746, 748, 749
Oregon
foreign heirs under probate law of, 472
role in international agreements, 294, 295
Organ harvesting, 362
Organization for Economic Cooperation and Development
Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 232–233
Draft Convention on the Protection of Foreign Property, 688–689
Organization of American States
Charter, 406–407
Convention Against Corruption, 231–238
immunity of diplomatic personnel, 382–383
Inter-American Commission on Human Rights, 389–396
Inter-American Court of Human Rights, 26, 27, 32, 35, 41, 42
Inter-American Juridical Committee, 403*n*
mutual legal assistance treaty, 163, 167–168
treaty on serving criminal sentences abroad, 171–172

P

Pakistan
extradition treaty, 185*n*
India aviation dispute, 663–664
Panama
extradition treaty, 185*n*
Inter-American Tropical Tuna Commission, 307

ILI US Digest/Index 817 1/8/02, 1:49 PM

stolen vehicle treaty, 169–170
Panama Canal Treaty (1977), 312–317
Papua New Guinea extradition treaty, 185*n*
Paraguay
consular notification case at ICJ, 26–27, 32*n,* 35, 41, 42
extradition treaty, 165–166, 179, 186*n*
prisoner transfer treaty, 171
Patent law
Internet issues, 740
rules of private international law, 740
Persecution
government responsibility to prevent, 397–398
as requirement for asylum, 128–131, 141
Peru
evaluation of impartiality of court, 412–414
extradition treaty, 185*n*
immunity of delegation to Inter-American Commission on Human Rights, 382–383
Philippines extradition treaty, 179, 186*n*
Poland extradition treaty, 186*n*
Political crimes, refusal of extradition for, 182
Portugal extradition treaty, 185*n*
Prisoners in U.S., rights of, 378–379
monitoring mechanisms for protecting, 385
in privately operated institutions, 387
questioning and detention of juveniles, 383–384
restraint procedures, 384–385
Prisoner transfer, 37
Agreement between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders, 190
consent of parties to, 172
Convention on the Transfer of Sentenced Persons, 295
Inter-American Convention on Serving Criminal Sentences Abroad, 171–172
translation of documentation for, 172
treaties for serving of sentence abroad, 37, 171–172
Private international law
concept of "service," 435*n*

ILI US Digest/Index 818 1/8/02, 1:49 PM

Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments, 735–741
current shortcomings, 736
Hague Conference, status of negotiations, 736, 737–740, 741
historical development, 736–737
jurisdictional rules, 737–739
U.S. judicial practice, 737, 738, 741
electronic commerce issues, 740–741
Hague Conference on, 736, 737–741
intellectual property issues, 740–741
intercountry adoption, 141–150, 363
international child abduction, 93–115, 123, 137–138
Property rights
Bilateral Agreement on Diplomatic and Consular Properties with the Government of Azerbaijan, 627–628
Foreign Sovereign Immunities Act provisions, 599
Protection of nationals
consular protection of citizen children abroad, 117–119
remedies for failure of consular notification in criminal justice process
China nationals, case in U.S., 23–42
Germany nationals, case in ICJ, 43–93
right to be informed of criminal charges, 76–77
right to legal representation, 77
Protocol Against the Smuggling of Migrants by Land, Sea and Air, 221–223
Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 297–301
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 221–222
Public health
abortion law and practice, 353
institutionalized populations, 378–379
right to adequate standard of living, 371
Puerto Rico
citizenship issues, 340–341, 344–345
Constitutional issues, 345–346
foreign relations issues, 340–344, 345–346
status of, 340–346
trade regulation, 344

ILI US Digest/Index 819 1/8/02, 1:49 PM

R

Racial discrimination, 347–351
in law enforcement, 378
Rape, 241–242
definition, 252, 253–254
as war crime, crime against humanity, genocide, 241–242, 251–255
Reciprocity
as basis for Vienna Conventions on Diplomatic and Consular Relations, 58, 75–76, 554
provision of consular services, 119
regarding reunification of children with parents, 119, 137
Refugees
Convention Relating to the Status of, 381
eligibility for asylum in U.S., 128–131
Regional economic integration organization, 303, 304, 307, 308
Religious freedom, 355
Remedy
apology as, for failure to provide consular notification, 58, 65
assurances and guarantees of non-repetition, 65–73
Council of the International Civil Aviation Organizaion, 653, 663–667
in criminal justice system for failure to provide consular notification, 30–38, 40–42, 57–58
International Law Commission on, 65–66, 68, 70–71, 666–667
for state-sponsored transborder arrest, 402–406
suppression of evidence, for violation of consular notification requirement, 23–42
Romania
extradition treaty, 185*n*
mutual legal assistance treaty, 166
Russia, mutual legal assistance treaty, 163, 166, 187
Rwanda, 242
International Criminal Tribunal for, 242, 252–253, 271, 287
extradition to, 203–216

S

San Marino extradition treaty, 185*n*
Saudi Arabia, immunity in case involving UN mission employment relationships, 577–593

ILI US Digest/Index 820 1/8/02, 1:49 PM

Sea, Law of the
rights and freedoms of international community in navigation
in Seychelles, 706–709
Thailand territorial waters, 702–706
U.S.-Mexico Treaty on Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 2000 Nautical Miles, 697–700
Seizure of assets. *See* Control and seizure of assets
Serbia-Montenegro extradition treaty, 185*n*
Service
definition, 435–436
Foreign Sovereign Immunities Act on, 592–593
Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 152
jurisdiction and, 435
objection to service by mail by foreign government, 150–152
Sexual abuse and violence
protection of children, 360–361, 362
See also Rape
Sexual orientation, 353
persecution based on, 398
Seychelles
extradition treaty, 185*n*
maritime rights in, 706–709
Sierra Leone
crimes against humanity in, 243–244
extradition rules, 185*n*
suspension of entry of immigrants from, 19–21
Singapore extradition treaty, 185*n*
Slovakia, Gabcikovo-Nagymaros Project case, 664–665
Slovak Republic extradition treaty, 185*n*
Slovenia extradition treaty, 185*n*
Solomon Islands extradition treaty, 185*n*
Smuggling of migrant, 24, 222, 223
South Africa
extradition treaty, 166, 185*n*
mutual legal assistance treaty, 166
South Korea extradition treaty, 179, 186*n*
Sovereign immunity. *See* Immunity, sovereign

ILI US Digest/Index 821 1/8/02, 1:49 PM

Sovereignty
dual nationality and, 344–345
maritime rights of coastal states, 708–709
Puerto Rico, 340–345
right to determine rules of evidence, 156, 157, 158
standing of individual to seek remedy for violation of, 400–402, 406–407
transborder arrest as violation of, 400–402
reparations for, 405–406
Spain
extradition treaty, 186*n*
Inter-American Tropical Tuna Commission, 307
Special Drawing Rights, 671
Sri Lanka extradition treaty, 166, 179, 185*n*
St. Kitts and Nevis extradition treaty, 179, 186*n*
St. Lucia extradition treaty, 179, 186*n*
St. Vincent and Grenadines extradition treaty, 179, 186*n*
Standing
under Alien Tort Claims Act, 400–402
of individual to complain of state-sponsored transborder arrest, 410–411
of individual to seek remedy for violation of national sovereignty, 400–402, 406–407
lawsuit by members of Congress against Executive Branch for violation of war powers in Kosovo, 760–761, 762–764, 765
private Korean national claim against U.S., 490
private right of enforcement of international agreement, 33, 312–317, 401, 491–495
State responsibility
claims by American victims of terrorism, 540–560
codification, 418–419
compensation for bombing of Chinese Embassy in Belgrade, 421–429
compensation for Nazi era victims and victims' heirs
claims against Austria and Austrian companies, 485–489
claims against German companies, 445–485
countermeasures, 417
definition of "injured state," 418
enforcement of decrees of foreign judiciary, 442

ILI US Digest/Index 822 1/8/02, 1:49 PM

private Korean national Vietnam War claim against U.S., 489–499
reparations for breach of obligations, 417–418
unilateral acts of state, 419–420
U.S. obligation to assist Iran in recovery of assets, 429–444
World War II prisoner claims against Japanese companies, 500–540
States of U.S., legal authority
capital punishment, 63, 396–397
in conflict with federal interest in compensation plan for Nazi era victims and victims' heirs, 460–473
diplomatic and consular tax exemption, 594–599
doctrine of procedural default, 44, 62–63
ententes, role in, 295–296
insurance industry regulation, 468–470
international agreements, role in, 293–296, 342–343
national treaty obligations and, 295, 386, 528–531, 536–539, 680
prisoner transfer treaty and, 295
regulating international trade, 319–340, 465, 466, 468–469
in U.S. treaty practice, 293–296
See also Local government
Statute of limitations, extradition denial based on, 180–181
Stolen vehicle treaties, 169–170
Succession of states
diplomatic relations, 563–564
Federal Republic of Yugoslavia, 561–575
to membership in international organizations, 561–563
as political question, 565–567, 569–575
successor liability, 566–567, 568, 569–573
to treaties, 563
Sudan trade restrictions, 749
Supranational organizations
as members of international organizations, 297, 300–301
as treaty participants, 296–308
Suriname extradition treaty, 185*n*
Swaziland extradition treaty, 185*n*
Sweden extradition treaty, 186*n*
Switzerland
claims of Nazi era victims and victims' heirs against Swiss banks, 445–446, 458, 466–467

ILI US Digest/Index 823 1/8/02, 1:49 PM

extradition treaty, 180

T

Taipei Economic and Cultural Representative Office, 599–602
Taiwan
Agreement on Privileges, Exemptions and Immunities Between the American Institute in Taiwan and the Coordination Council for North American Affairs, 600–601
American Institute in Taiwan, 600–602
Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 701–702
post-World War II war claims, 533–534, 535
Taipei Economic and Cultural Representative Office, 599–602
Taiwan Relations Act, 600, 601
Tanzania extradition treaty, 185*n*
Taxes/taxation
discrimination against foreign commerce, 322, 322*n,* 323–324, 324*n,* 326, 326*n*
exemptions for diplomatic and consular personnel, 594–599
expropriation and, 685
OAS mutual legal assistance treaty and, 168
Telecommunications. *See* Electronic commerce
Terrorism
Anti-Terrorism and Effective Death Penalty Act, 388
definition, 218, 219–220
exception to sovereign immunity in certain U.S. cases, 479–480, 540–543
attachment of Iranian funds, 543–560
human rights and, 238–239
International Convention for the Suppression of Terrorist Bombings, 218–219
International Convention for the Suppression of the Financing of, 216–221
victim compensation, 226, 229, 540–560
attachment of diplomatic property for, 541–542
Texas, international agreements, 294
Thailand
extradition treaty, 179, 186*n*

ILI US Digest/Index 824 1/8/02, 1:49 PM

limits of territorial sea, 703–706
Tonga extradition treaty, 185*n*
Tort law, jurisdiction over civil tort actions by alien, 399–400
Torture
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 372–388
Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 373
definition, 380
denial of extradition based on risk of, 176, 379, 380–381
extradition or prosecution of persons accused of, 383
prosecution of non-citizen for, 381–382
support for victims of, 375–376
Torture Victims Protection Act, 374, 375
Torture Victims Relief Act, 375
U.S. constitutional statutory protections against, 373
withholding of deportation based on risk of, 380–381, 387–388
Torture Victims Protection Act, 374, 375
Torture Victims Relief Act, 375
Trade
agricultural and medical commodity exceptions from U.S. sanctions programs, 748–750
California Holocaust Victim Insurance Relief Act, 460–473
claim by Canada against American company under NAFTA, 674–694
Export Administration Regulations, 746–748
federal authority to regulate, 319–340
market-participant exceptions to Commerce Clause, 326–433
Massachusetts-Burma law regulating state procurement, 319–340, 342
North Korean Export Administration Regulations, 746–748
Puerto Rican authority to regulate, 344
role of U.S. states in regulating international trade, 319–340, 465, 466, 468–469
See also Electronic commerce
Trademark law
Madrid Agreement, Protocol Relating to, 297–301
rules of private international law, 740

ILI US Digest/Index 825 1/8/02, 1:49 PM

Trade Sanctions Reform and Export Enhancement Act (2000), 749–750
Trading with the Enemy Act, 229, 513, 543
Trafficking in persons, 225–230
    Protocol Against the Smuggling of Migrants by Land, Sea and Air, 24, 222–223
    Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 222, 223–224
    Sale of Children, Child Prostitution and Child Pornography, Protocol on, 360–362
    transfer of organs for profit, 362
    Victims of Trafficking and Violence Prevention Act (2000), 225–230
Transfer of prisoner(s). *See* Prisoner transfer
Translation services
    in prisoner transfer, 172
    probable cause standard for extradition, 213
Travel restrictions
    exceptions for minors, 118–119
    travel of foreign officials in matters of judicial assistance, 158
    on travel to Cuba, 749, 750
Treaties
    authority to enter into, 38–39, 201–202, 293–294, 342–343, 345–346
    automatic succession to, principle of, 563
    bilateral investment treaties, 683
    compliance regime for environmental agreements, 711–725
    conditional ratification, 386
    contract law and, 494
    for enforcement of foreign judgments, 737
    extradition, 163, 164–166, 173–176, 183–184
        absence of, 184, 188–190
        constitutional requirement for, to accomplish surrender, 208–209, 210–212
        Hong Kong as treaty partner for, 190–203
        inadequacies, 186–190
        interpretation, 199
        transfer of persons outside of, 184–185
    international law enforcement cooperation, 163–164
    interpretation of, 516*n,* 518, 519*n,* 526–528

ILI US Digest/Index 826 1/8/02, 1:49 PM

deferences to Executive Branch interpretations, 38–39, 493–494, 526–528
limitations of judiciary in, 527
mutual legal assistance, 163, 164, 166–169
obligations of states of the U.S., 295, 385–386, 528–531, 536–539, 680
private right of enforcement, 312–317, 491–495
Puerto Rico's authority to enter into, 341, 345–346
reservations to, 146, 171–172, 217, 221, 385–386, 420, 503, 509–510, 605*n,* 614
role of individual U.S. states, 293–296
self-executing, 38–39
on serving criminal sentences abroad, 171–172
state claims preempted by, 528–531, 536–539
stolen vehicle, 169–170
succession to, of Federal Republic of Yugoslavia, 561, 563
supranational organizations as parties to, 296–308
understandings to, 172–173, 217, 220, 235
See also Vienna Convention on the Law of Treaties; specific treaty
Treaty between the United States and Canada Relating to the Skagit River and Ross Lake in the State of Washington and the Seven Mile Reservoir on the Pend D'Oreille River in British Colombia (1984), 296
Treaty of Friendship, Commerce, and Navigation between the United States and the Republic of Korea, 497
Treaty of Peace with Japan, 501–503, 505, 506–512, 515–531
claims of non-party nations preempted by, 533–535, 536–539
Treaty to Prohibit Transborder Abductions, 405
Trinidad and Tobago extradition treaty, 179, 186*n*
Turkey extradition treaty, 186*n*
Tuvalu extradition treaty, 185*n*

U

Ukraine, mutual legal assistance treaty, 166
UNCITRAL arbitration rules, 686–687
Uniform Monetary Judgments Act, 737
United Arab Emirates, status of diplomatic mission employees, 583–585
United Kingdom
arbitration concerning Heathrow Airport user charges, 645, 660–661

ILI US Digest/Index 827 1/8/02, 1:49 PM

extradition treaty, 185*n*
United Nations
attachment of escrow account, 616–626
Charter, 406–407, 603–604, 607, 608, 609, 624, 625
Articles:
2(4), 289
39, 289
41, 618–619*n*
105, 625
Commission on Human Rights, 238, 350–351, 370, 375, 392, 397–398
Compensation Commission, 444
Committee Against Torture, 372
Convention on Privileges and Immunities of the United Nations (General Convention), 578, 589–590, 603, 604–605, 604–605*n,* 607, 608*n,* 610–611, 612, 613, 614, 624, 625
Conventions. *See specific Convention*
General Assembly Resolutions *55/23 (2000),* 562
Headquarters Agreement, 578, 588, 589, 603, 604, 605, 607–612, 613, 614
High Commissioner for Refugees, 135, 138–139
immunity of diplomatic personnel, 602–616
Security Council
authority to create *ad hoc* tribunals, 213–215
and International Court of Justice, 290
Iraq Oil-for-Food Programme, 444, 617, 619–622, 624
Iraq sanctions program, 618–619
referrals to International Criminal Court, 275, 285–286
Resolutions:
660 (1990), 618
661 (1990), 618, 620
955, 204–205
986 (1995), 619, 620–621, 625–626
1031, 259
1088, 259
1272 (1999), 308–310
1315, 243
3314, 288
non-binding if not adopted under Chapter VII, 406*n*

ILI US Digest/Index 828 1/8/02, 1:49 PM

succession of Federal Republic of Yugoslavia to membership, 561–563
Transitional Administration in East Timor for United States Forces Operating in East Timor, 308–310
United Nations Participation Act, 618–619*n,* 619
Universal Declaration on Human Rights, 366, 370–371, 391, 408, 409
Uruguay extradition treaty, 186*n*
U.S.-Mexico Treaty on Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 2000 Nautical Miles, 697–700

V
Vanuatu, Inter-American Tropical Tuna Commission, 307
Vatican chancery, 633
Venezuela
extradition treaty, 185*n*
Inter-American Tropical Tuna Commission, 307
OAS prisoner transfer treaty, 171
Victim compensation
claims of World War II soldiers against Japanese corporations, 500–505
claims of allied prisoners, 505–531
claims of non-allied prisoners, 531–540
for Nazi era victims and victims' heirs, 445–473
claims against Austria, 485–489
sovereign immunity and, 473–485
private Korean national claim against U.S., 489–499
provisions of Treaty of Peace with Japan, 507–512, 515–531
provisions of War Claims Act (1948), 512–514
for victims of terrorism, 226, 229, 540–543
Victims of Trafficking and Violence Prevention Act (2000), 225–230, 540, 541–542
Vienna Convention on Consular Relations, 549
Articles:
5, 59–60, 118, 161, 601–602
26, 34
27, 552–553
36, 28, 39, 41, 43, 44–45, 48, 50*n,* 56, 57–58, 59–60, 61–62, 63–64, 72–73, 74, 77, 78, 79–80
37, 49*n,* 118

ILI US Digest/Index 829 1/8/02, 1:49 PM

55, 154
capital punishment and, 41, 63, 64, 73
codifying customary international law, 118
on exemption from state taxes, 594–595, 597
on foreign defendant's right to consular notification, 23–26, 28, 30–35, 37–38, 39, 40–42, 43, 44, 55–56, 57–64, 67–68, 72–73, 77–78
human rights law and, 74, 75–76
on immunity of consular personnel, 601–602
on protection of citizen minors, 118
reciprocity as basis of, 58, 75–76
rights of individuals under, 33, 34
on satisfaction for breach of obligation, 63–68, 71–72
Vienna Convention on Diplomatic Relations, 549
Articles:
7, 578, 587–590
22, 590, 593
23, 595
24, 589
25, 553, 590
28, 595
31, 589–590, 606, 612
34, 595
36, 595
37, 589–590, 595, 606–607, 612
39, 598
41, 154
45, 552
codifying customary international law, 587, 606
on exemption from state taxes, 594–595, 597, 598
on immunity of diplomatic missions in employment relationships, 577, 578, 587–590
on immunity of diplomatic personnel, 603, 605, 606–607, 611, 612
on protection of diplomatic property, 553–554
Vienna Convention on the Law of Treaties
Articles:
20, 386
27, 385–386
28, 386

ILI US Digest/Index 830 1/8/02, 1:49 PM

31, 432–433, 434*n*
32, 434*n*
on binding non-parties, 282
on interpretation of treaty, 432–433, 434*n,* 501–502, 516*n,* 519*n*
on reservations, 386, 420
Vietnam, Socialist Republic of
attachment of UN escrow account, 616–626
immunity as judgment debtor, 590–593
naturalization of child born in, of unwed U.S. citizen, 1–2, 8–19
state succession cases, 570
Violence Against Women Act (1994), 227

W
War Claims Act (1948), 503, 505, 511, 512–514, 528–531
War crimes
accountability mechanisms, 239–243
alleged enslavement of World War II prisoners by Japanese corporations, 500–505
claims of allied prisoners, 505–531
claims of non-allied prisoners, 531–540
authority of International Criminal Tribunal for the Former Yugoslavia to compel evidence, 255–271
definition of crime of aggression, 286–290
in Eritrean-Ethiopian conflict, 247–248
International Criminal Court jurisdiction, 249–250, 276–277, 278
rape as, 251–255
War Powers Resolution, 758, 759, 765
Warsaw Convention, 669, 670, 671, 672
Washington state, role in international agreements, 294, 295, 296
Wisconsin, market-participant exceptions to Commerce Clause, 328–329
Women
abortion law and practice, 353
gender equality, 351–355
naturalization of illegitimate child, 4–5, 6, 8, 12
rape as war crime, 251–255
trafficking in, 223–224, 225–230, 251
Victims of Trafficking and Violence Protection Act (2000), 225-229
Violence Against Women Act (1994), 227

ILI US Digest/Index 831 1/8/02, 1:49 PM

World Intellectual Property Organization, 740

Y

Yugoslavia, Federal Republic of, 83, 91, 241
- compensation for bombing of Chinese Embassy in Belgrade, 421–429
- as continuity of Socialist Federal Republic of Yugoslavia, 561–575
- U.S. military action in Kosovo, 758–765
- *See also* International Criminal Tribunal for the Former Yugoslavia

Z

Zambia extradition treaty, 185*n*

Zimbabwe extradition treaty, 179

ILI US Digest/Index 832 1/8/02, 1:49 PM