Digest of United States Practice in International Law

2003

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Editors

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Preface

I welcome this volume of the *Digest of United States Practice in International Law* for the calendar year 2003, following the successful publication of the volumes for 2000, 2001, and 2002 and, most recently, 1989–1990. We await the volumes for 1991–1999 with anticipation, and the regular publication for the calendar year 2004 and all subsequent years.

The Institute is very pleased to work with the Office of the Legal Adviser to make these volumes available for the use of the international legal community.

Don Wallace, Jr.
Chairman
International Law Institute

Introduction

It is with great pride and pleasure that I write to introduce the annual edition of the *Digest of United States Practice in International Law* for 2003.

The year 2003 witnessed a number of significant developments in the field of international law. The military campaign to oust Saddam Hussein and his regime in Iraq and the continuing effort to locate Osama bin Laden and his supporters gave rise to many important legal issues, including those related to the lawful use of force, the response to international terrorism, and compliance with international humanitarian law. Beyond Iraq and Afghanistan, of course, many other situations affecting international security and stability generated complicated and sensitive issues for the world community and its lawyers. The continuing conflict in Israel, Gaza, and the West Bank; North Korea's efforts to produce nuclear weapons; and evolving situations in Sierra Leone, Burma, and Libya are a few examples.

The year was also marked by a series of significant cases and decisions in domestic courts and international tribunals related to international law and practice. The International Court of Justice in The Hague handed down its decision on preliminary measures in the *Avena* case brought by Mexico under the Vienna Convention on Consular Relations, as well as its judgment in the *Oil Platforms* case (Iran v. United States). By agreement the *Lockerbie* case (Libya v. United States) before the ICJ was discontinued. Ongoing litigation in our domestic courts concerned fundamental issues arising under two important U.S. statutes, the Alien Tort Statute of 1789 and the 1976 Foreign Sovereign Immunities Act. Other cases began to address issues related to the status and rights of detainees in Guantanamo and the United States. Significant decisions were

rendered in several cases by NAFTA tribunals. And the United States made several major submissions in government-to-government and interpretative cases pending before the Iran-United States Claims Tribunal. We were also active in bringing and defending claims under the dispute resolution mechanisms of the WTO.

The *Digest* documents important aspects of these and many other notable developments in our courts and legislatures, in domestic litigation, and in non-confrontational contexts, as well as U.S. positions and actions in international fora, concerning consular and diplomatic privileges and immunities, environmental protection, resolution of investment disputes, treaty practice, private international law, international organizations, cultural property, human rights and refugee protection, trade and investment, law of the sea, international claims and state responsibility, and international crime, among other subjects. The range of topics addressed in this *Digest* is broad indeed.

This is the fifth volume to be published since we resurrected the *Digest* project in 2001. During this short period, our co-editors have prepared and published volumes covering 1989–90, 2000, 2001 and 2002, and are now on the verge of completing the multi-volume set covering 1991–1999, when publication of the *Digest* was suspended. Like its predecessor volumes, the current *Digest* reflects the continuing commitment of the Office of the Legal Adviser to provide current information and documentation reflecting our practice in various arenas of international legal endeavor.

This series continues, of course, a long and distinguished tradition of publication that extends as far back as 1877, when John Cadwalader, Assistant Secretary of State, produced his one volume *Digest of the Published Opinions of the Attorneys-General, and of the Leading Decisions of the Federal Courts, with Reference to International Law, Treaties and Kindred Subjects*. Subsequent versions were published by Dr. Francis Wharton (*A Digest of the International Law of the United States Taken from Documents Issued by Presidents and Secretaries of State*, 3 volumes, 1886); John Bassett Moore (*A Digest of International Law as Embodied in Diplomatic Discussions, Treaties and Other International Agreements, International Awards, the Decisions of Municipal*

Courts and the Writings of Jurists, 8 volumes, 1906); Judge Green Haywood Hackworth (*Digest of International Law*, 8 volumes covering 1906–1940); and Marjorie Whiteman (*Digest of International Law*, 15 volumes, covering 1940–1969). The Office of the Legal Adviser continued this tradition in annual *Digest* volumes beginning in 1973 under the editorship of Arthur Rovine and, later, Marion Nash Leich, shifting to a cumulative approach for the years 1981–1988.

The structure and organization of the current volume is not significantly changed from the 2002 *Digest*. As before, we continue to seek to include documents prepared by other departments and agencies of the United States Government in order to make this volume as comprehensive and useful as possible. We continue our efforts to make the full text of documents retrievable by electronic means when only excerpts have been included here and the texts are not otherwise readily accessible. Comments and suggestions from readers are always welcome to assist in this effort.

The *Digest* remains, in the truest sense, a collaborative undertaking involving the sustained effort of many dedicated members of the Office of the Legal Adviser. Among the many volunteers whose significant contributions to the current volume deserve to be acknowledged are Damir Arnaut, Gilda Brancato, Hal Burman, Hal Collums, Katherine Gorove, Duncan Hollis, Andrew Keller, Melanie Khanna, Jeff Klein, Richard Lahne, Mary McLeod, Steve McCreary, David Newman, Ash Roach, Heather Schildge, George Taft, John Schnitker, and Wynne Teel. We particularly thank our former student intern Anna Conley, now in private practice, for volunteering to draft the international civil litigation section of Chapter 15. Once again, a very special note of thanks goes to the Office's Assistant Law Librarian, Joan Sherer, whose technical assistance is invaluable. Staff support from intern Ryika Hooshangi and paralegal Tricia Smeltzer has been essential. The co-editors of the *Digest*, Sally Cummins and David Stewart, continue to bring commendable enthusiasm, leadership, guidance, and stamina to this monumental project. They have been the real stars of this project for the last four years.

Our collaboration with the International Law Institute continues to be the cornerstone of this effort. The Institute's Director

of Publishing, Peter Whitten, and its Chairman, Prof. Don Wallace, Jr., again have our sincere thanks for their superb support and guidance.

William H. Taft, IV
The Legal Adviser
Department of State

Note from the Editors

With this *Digest of United States Practice in International Law* for calendar year 2003, we are pleased to publish the fifth volume in the series since we resumed publication with *Digest 2000*. As this volume goes to press, we are also in the final stages of preparing the manuscript for the 1991–1999 cumulative digest. That multi-volume set, together with the 1989–1990 volume published in 2002, will complete coverage of the period when publication of the *Digest* was suspended.

We want to add our thanks to those of the Legal Adviser for the assistance of those in the Office of the Legal Adviser and from other offices and departments in the U.S. Government who made this cooperative venture possible. Once again, we thank our colleagues at the International Law Institute, Peter B. Whitten and Professor Don Wallace, Jr., for their valuable support and guidance.

This volume continues the organization and general approach adopted for *Digest 2000*. In order to provide broad coverage of significant developments as soon as possible after the end of the covered year, we rely in most cases on the text of relevant documents introduced by relatively brief explanatory commentary to place the document in context.

Each year we refine the organization and presentation based both on the nature of the materials to be covered in the volume and on experience from the previous year. Our general practice is to limit entries in each annual *Digest* to material from the relevant year, leaving it to the reader to check for updates, particularly in court cases. In this 2003 volume we are making an exception to that rule to note certain significant rulings by the U.S. Supreme Court as this volume went to press. The substance of relevant 2004 Supreme Court decisions will still, however, be addressed in *Digest 2004*.

As in previous volumes, our goal is to assure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. Many documents are available from multiple public sources, both in hard copy and from various online services. A number of government publications, including the Federal Register, Congressional Record, U.S. Code, Code of Federal Regulations, and Weekly Compilation of Presidential Documents, as well as congressional documents and reports and public laws, are available at *www.access.gpo.gov*. We draw your attention to two specific sites: Senate Treaty Documents, containing the President's transmittal of treaties to the Senate for advice and consent, with related materials, are available at *www.gpoaccess.gov/serialset/cdocuments/index.html*. Senate Executive Reports, containing, among other things, the Senate Committee on Foreign Relations reports of treaties to the Senate for vote on advice and consent, are available at *www.gpoaccess.gov/serialset/creports/index.html*. In addition, the Library of Congress provides extensive legislative information at *http://thomas.loc.gov*. The government's "official web portal" is *www.firstgov.gov*, with links to a wide range of government agencies and other sites; the State Department's home page is *www.state.gov*. While court opinions are most readily available through commercial online services and bound volumes, some materials are available through links to individual federal court web sites provided at *www.uscourts.gov/links.html*. The official Supreme Court web site is maintained at *www.supremecourtus.gov*.

For many documents we have provided a specific internet cite in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily available elsewhere, we have placed them on the State Department website, at *www.state.gov/s/l/c8183.htm*. We apologize for the recent delay in keeping that site up to date occasioned by meeting statutory requirements for document preparation for government websites.

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

and other academics, government lawyers, and private practitioners. We welcome suggestions from readers and users.

Sally J. Cummins
David P. Stewart

Chapter 1

Nationality, Citizenship and Immigration

A. NATIONALITY AND CITIZENSHIP

1. Child Citizenship Act

a. Age limitation for gaining citizenship

On April 7, 2003, the U.S. Court of Appeals for the Seventh Circuit concluded that persons who were 18 years old or over when the Child Citizenship Act of 2000 was enacted did not benefit from its provisions regarding acquisition of U.S. citizenship by children born outside the United States of non-U.S. citizens. The court of appeals let stand a decision of the Board of Immigration Appeals ("BIA") that petitioner was a removable alien. *Gomez-Diaz v. Ashcroft*, 324 F.3d 913 (7th Cir. 2003). Petitioner in the case argued that he was a citizen of the United States pursuant to the act despite the fact that he was an adult on its effective date. The Seventh Circuit rejected Gomez-Diaz' argument:

> The Child Citizenship Act of 2000, Pub. L. No. 106–395, 114 Stat. 1631, revised the manner in which children of non-citizens born outside the United States are eligible to become U.S. citizens. The CCA amended section 320 of the INA to grant automatic United States citizenship to children who are born outside of the United States when all three of the following conditions have been fulfilled:

> (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
> (2) The child is under the age of eighteen years.
> (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

8 U.S.C. § 1431(a). Section 104 of the new law provided that this amendment "shall . . . apply to individuals who satisfy the requirements of section 320 . . . , as in effect on [the new law's] effective date [February 27, 2001]." . . .

b. Effect of citizen-grandparent death

The Immigration and Nationality Act ("INA") § 322(a)(2)(B) provides that the alien child of a U.S. citizen may acquire U.S. citizenship if the child also "has" a U.S. citizen grandparent who meets certain physical presence requirements. On April 17, 2003, the Bureau of Citizenship and Immigration Services, U.S. Department of Homeland Security ("BCIS"), issued guidance on the ability of an alien child to satisfy citizenship eligibility requirements based on citizenship of a grandparent even if the grandparent is deceased.

The full text of the guidance, excerpted below, is available at *http://uscis.gov/graphics/lawsregs/handbook/PolMemo94pub.pdf*.

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* * * *

INA Section 322 provides for the expedited naturalization of the alien child of a citizen, if the alien child is "residing outside of the United States" and meets the relevant requirements of Section 322. One requirement is that the citizen parent must have "been physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years." INA § 322(a)(2)(A), 8 U.S.C. § 1433(a)(2)(B). If the

citizen parent cannot meet this requirement, the alien child may still qualify if the citizen parent's *own* citizen parent can meet the physical presence requirement. *Id.* § 322(a)(2)(B), 8 U.S.C. § 1433(a)(2)(B).

The question has arisen whether the citizen parent's citizen parent must be alive in order for the alien child to qualify for naturalization under Section 322. . . .

* * * *

Effective immediately, [a]ssuming an alien child meets all other requirements of Section 322, an alien child remains eligible after the death of the citizen parent's own citizen parent, so long as the citizen parent's own citizen parent met the physical presence requirement in Section 322(a)(2)(B) at the time of death.

c. Children born out of wedlock

On September 26, 2003, the BCIS issued guidance on the eligibility of children born out of wedlock for derivative U.S. citizenship under §§ 320 and 322 of the INA.

The full text of the guidance, excerpted below, is available at *http://uscis.gov/graphics/lawsregs/handbook/PolMemo98pub.pdf.*

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* * * *

Section 320 provides for automatic citizenship of the alien child of a citizen, if the alien child is residing in the United States and meets the relevant requirements of Section 320. INA Section 322 allows for the naturalization of a child of a citizen who regularly resides outside the United States. The child must meet the definition of "child" found in Section 101(c)(1) of the Act or the requirements applicable to adopted child under INA Section 101(b)(1). The child must have at least one United States citizen parent, whether by birth or naturalization.

* * * *

. . . Assuming an alien child meets all other requirements of Section 320 and 322, an alien child who was born out of wedlock and has not been legitimated is eligible for derivative citizenship when the mother of such a child becomes a naturalized citizen.

2. Waiver of oath of allegiance requirement for naturalization

On June 30, 2003, BCIS issued a memorandum setting forth procedures to implement § 1 of Pub. L. No. 106–448, 114 Stat. 1939 (2000). Section one amended § 337 of the INA to provide for a waiver of the oath of renunciation and allegiance for the naturalization of aliens having certain disabilities and, in cases in which a waiver is granted, to deem the attachment requirement of § 316 of the INA to have been met. Prior to the amendment, enacted November 6, 2000, certain aliens with disabilities could not become U.S. citizens because they could not personally execute the oath of allegiance required by INA § 337 and there was no statutory provision for waiver of the oath requirement. (Because the oath is a fundamental and essential part of the naturalization process, it was not subject to the reasonable accommodation provisions of § 504 of the Rehabilitation Act.) As explained in the memorandum,

> . . . [t]o fulfill the oath requirement [for naturalization], an applicant must understand that he or she is (1) becoming a citizen of the United States, (2) foreswearing allegiance to his or her country of nationality, and (3) personally and voluntarily agreeing to a change in status. Certain disabled applicants were precluded from naturalization because they could not personally express intent or voluntary assent to the oath requirement.
>
> To remedy this problem, Public Law 106–448 . . . authorizes the Attorney General to waive the attachment requirement under section 316(a) and the oath requirement under section 337 of the [Immigration and Nationality] Act for any individual who has a

> developmental or physical disability or mental impairment that makes him or her unable to understand, or communicate an understanding of, the meaning of the oath. . . .

The procedures require submission of a written medical evaluation of the applicant and permit, in certain circumstances, a designated representative to complete the naturalization examination on behalf of a disabled applicant.

The full text of the memorandum is available at *http://uscis.gov/graphics/lawsregs/handbook/PolMem96Pub.pdf.*

3. Revocation of U.S. Citizenship

a. Office of Special Investigations: cooperation with Belarus

On January 21, 2003, the Office of Special Investigations, U.S. Department of Justice, announced the signing of the Memorandum in Cooperation between the Department and the Prosecutor's Office of the Republic of Belarus in the investigation of World War II-era Nazi cases.

The press release, excerpted below, is available at *www.usdoj.gov/opa/pr/2003/January/03_crm_026.htm.*

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* * * *

. . . The Memorandum will enable the Justice Department Criminal Divsiion's office of Special Investigations (OSI) to gain long-sought access to captured Nazi documents and other evidence in Belarus.

* * * *

OSI is the Justice Department unit responsible for identifying, investigating, and taking legal action to denaturalize and deport former participants in Nazi persecution living in the United States. Seventy-one individuals who assisted in Nazi persecution have been stripped of U.S. citizenship and 57 such persons have been

removed from the United States since OSI began operations in 1979. In addition, more than 160 suspected Nazi persecutors have been blocked from entering the country.

b. Ineligibility under Displaced Persons Act

In *United States v. Dailide*, 316 F.3d 611 (6th Cir. 2003), the U.S. Court of Appeals upheld a decision by the U.S. District Court for the Northern District of Ohio denying collateral challenges to that court's order of January 29, 1997, revoking Dailide's citizenship and canceling his certification of naturalization. 953 F. Supp. 192 (N.D. Ohio 1997). Dailide was a former member of the Lithuanian Saugumas, a police organization that aided the Nazis in exterminating the Jewish population of Vilnius during World War II. As explained in the Sixth Circuit opinion,

> . . . Dailide's immigration process, like that of all aliens seeking entry in 1950, consisted of three steps. First, he had to qualify as a refugee with the International Refugee Organization (IRO). . . . Second, he had to receive a determination of displaced person status from the Displaced Persons Commission (DPC). Finally, he had to apply for and receive a visa from the United States Department of State. . . . Once lawfully admitted under a visa, he could apply for naturalization after five years.

In response to a questionnaire in applying for displaced person status, Dailide stated that he had been a "practitioner forester" during the war and that he had never been a member of a police service.

Count I of the complaint charged Dailide with "assisting in persecution," in violation of the Constitution of the IRO and Count IV charged him with material misrepresentation, in violation of the Displaced Persons Act of 1948, Pub. L. No. 80–774, 62 Stat. 1009, *as amended*, June 16, 1950, Pub.

L. No. 81–555, 64 Stat. 219 ("DPA") and of 8 U.S.C. § 1427. The court of appeals explained:

> Section 1427 is the naturalization statute under which Dailide was granted citizenship in 1955. It required that all aliens first be "lawfully admitted" into the country. In its definition of "lawfully admitted," the DPA incorporated the definition of "refugees and displaced persons" from the Constitution of the IRO . . . [which] provided that the following persons would not be eligible for refugee or displaced persons status:
>
> * * * *
>
> 2. Any . . . persons who can be shown:
> a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
> b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

On appeal, Dailide argued, among other things, that the DPA did not apply to him because it expired three years prior to his naturalization and that the district court lacked a factual basis for its denaturalization order because of failure to establish that he had made misrepresentations in his application for a visa.

In affirming the district court, the Sixth Circuit found on these two issues that the DPA applied to Dailide "because it was in effect when he entered the country, even though it was abrogated before he was naturalized" and that "a finding of misrepresentation is unnecessary for revocation of citizenship because [8 U.S.C.] § 1451 does not condition denaturalization on misrepresentation if the certificate of naturalization was otherwise 'illegally procured.'" Here, according to the court of appeals, "[t]he district court held that, although Dailide complied with all administrative procedures, he had never been "lawfully admitted" because he was statutorily ineligible to receive a visa in the first place

under the DPA because of his Nazi past." The court of appeals agreed that, because Dailide "was not legally entitled to a visa under the DPA when he received it, then [he] was never " 'lawfully admitted' under § 1427. Hence, citizenship was 'illegally procured' under § 1451. . . ."

c. Lack of voluntary expatriating act

In *Breyer v. Ashcroft*, 350 F.3d 327 (3d Cir. 2003), the court of appeals affirmed a district court judgment that Breyer was a U.S. citizen despite serving in the Death's Head Battalion in the *Waffen SS* during World War II. The court found that Breyer, who joined at age seventeen, was not a voluntary member of the Nazi military unit and therefore had not relinquished his U.S. citizenship on that basis.

The United States sought to denaturalize Breyer on the ground that his service as an armed SS guard at Buchenwald and Auschwitz made his citizenship illegally procured. In the course of the litigation, which commenced in 1992, however, the Third Circuit found Breyer to be entitled to citizenship by birth, based on the U.S. citizenship of his mother. *Breyer v. Meissner*, 214 F.3d 416 (3d Cir. 2000). The Third Circuit noted that in 1925, at the time of Breyer's birth, derivative citizenship to foreign-born children was limited to those whose fathers were U.S. citizens. Nevertheless, in 1994 the statute was amended to grant citizenship retroactively to all foreign-born children of U.S. citizens who had previously resided in the United States. 8 U.S.C. § 1401. The statute did not extend the retroactive grant to anyone who "was excluded from, or who would not have been eligible for admission to, the United States under the Displaced Persons Act of 1948." In its 2000 decision, the Third Circuit found that limitation unconstitutional:

> Because fathers were entitled to pass citizenship to children who would be ineligible under the Displaced Person's Act, it was unconstitutionally discriminatory to deny mothers the ability to pass citizenship to their

children, even when the children would not be entitled to naturalization.

As a result, the question presented in the 2003 decision "was whether Breyer had lost that citizenship as a result of his wartime activities by, in effect, voluntarily renouncing his citizenship." Excerpts below from the opinion provide the Court's analysis in concluding that he had not. Footnotes have been omitted.

. . . United States citizenship obtained either by birth or legitimate naturalization cannot be lost unless the citizen voluntarily renounces his citizenship. *Vance v. Terrazas*, 444 U.S. 252, 261, 62 L. Ed. 2d 461, 100 S. Ct. 540 (1980); *see also Afroyim*, 387 U.S. at 268. By statute, certain expatriating acts, if proven, are presumptively voluntary. *See* 8 U.S.C. § 1481(b). This presumption may be rebutted by showing, by a preponderance of the evidence, that the expatriating act was involuntary. Id. However, the party claiming a loss of nationality has occurred, in this case the United States, bears the burden of proving by a preponderance of the evidence that the citizen voluntarily performed the act with the intent to relinquish his citizenship. 444 U.S. at 268; 8 U.S.C. § 1481(b). Evidence that the citizen voluntarily committed expatriating acts "may be highly persuasive . . . in the particular case of a purpose to abandon citizenship." 444 U.S. at 261 (citing *Nishikawa v. Dulles*, 356 U.S. 129, 139, 2 L. Ed. 2d 659, 78 S. Ct. 612 (1958) (Black, J., concurring)).

* * * *

During his service with the *Waffen SS*, Breyer had no knowledge that he was a United States citizen by virtue of his mother's citizenship. And there is no reason that he should have known that he might be granted citizenship retroactively more than a half century later. Nevertheless, the previous [Third Circuit] panel suggested that it was possible for Breyer to voluntarily renounce his citizenship despite that lack of knowledge, if his actions "constituted a voluntary and unequivocal renunciation of any

possible allegiance to the United States of America." *Breyer*, 214 F.3d at 431.

* * * *

On remand, the District Court addressed only whether Breyer voluntarily served in the *Waffen SS* after his eighteenth birthday. Breyer joined the *Waffen SS* when he was seventeen years old and, under the Nationality Act of 1940—the law governing expatriation at the time of Breyer's wartime activities—a citizen could not expatriate himself by military service or oaths of loyalty before his eighteenth birthday. Nationality Act of 1940 § 403(b), 54 Stat. 1137, 1170. Accordingly, the District Court held—and the government does not contest—that Breyer could not have expatriated himself by his actions before he turned eighteen. *Breyer*, 2002 U.S. Dist. LEXIS 17869, 2002 WL 31086985, at *14. The question then becomes whether he had done so by voluntarily remaining in the *Waffen SS* and swearing an oath of allegiance to the Third Reich after his eighteenth birthday. The District Court concluded that Breyer's service was not voluntary subsequent to his eighteenth birthday and therefore was not expatriating as a matter of law. *Id.* Central to this conclusion was the District Court's finding that even those persons who voluntarily enlisted were obligated to remain in the *Waffen SS* for the duration of the war. 2002 U.S. Dist. LEXIS 17869, [WL] at *10.

* * * *

. . . [I]t is clear that the District Court considered the critical issue of whether Breyer voluntarily relinquished his citizenship by analyzing the specific actions and circumstances related to his service in the *Waffen SS* for evidence of voluntariness or intent to abandon his United States citizenship.

* * * *

Historically, mandatory military service has been treated as presumptively involuntary. "Conscription into the Army of a foreign government of one holding dual citizenship is sufficient to establish prima facie that his entry and service were involuntary." *Lehmann v. Acheson*, 206 F.2d 592, 594 (3d Cir. 1953) (citing

Perri v. Dulles, 206 F.2d 586 (3d Cir. 1953)) . . . For the most part, however, courts have made clear that this presumption of duress can be overcome. . . .

At the same time, evidence that the claimant would have enlisted without being required to do so can tip the balance in the government's favor. . . . The ultimate question remains whether, on balance, the expatriating action was voluntary, and the party claiming loss of nationality bears the burden of proving this by a preponderance of the evidence. 8 U.S.C. § 1481(b). . . .

Breyer was not involuntarily conscripted into the *Waffen SS*. The District Court found that Breyer's enlistment was voluntary, although he was not free to leave once he joined. *Breyer*, 2002 U.S. Dist. LEXIS 17869, 2002 WL 31086985, at *10. Therefore, the critical question is whether Breyer voluntarily remained in the *Waffen SS* after his eighteenth birthday. . . .

We think that Breyer's demonstrated inability to secure release from the *Waffen SS* and his subsequent desertion can be, for the reasons discussed, sufficient to defeat the presumption that his continued military service was voluntary.

* * * *

B. PASSPORTS

1. Passport Restrictions

a. Travel to Iraq

On July 14, 2003, Secretary of State Colin L. Powell revoked the restriction on use of U.S. passports for travel to, in, or through Iraq. 68 Fed. Reg. 43,246 (July 21, 2003). The restriction, originally imposed in February 1991, had most recently been renewed on February 25, 2003, 68 Fed. Reg. 8,791 (Feb. 25, 2003) and then modified effective April 16, 68 Fed. Reg. 18,722 (Apr. 16, 2003) and again effective May 9, 68 Fed. Reg. 26,371 (May 15, 2003). The restriction was imposed and renewed "pursuant to authorities provided in 22 U.S.C. § 211a, Executive Order 11,295, and 22 CFR 51.73."

The April modification was made by Secretary Powell "in light of U.S. national interests in facilitating the provision of humanitarian and other critical services in support of the Iraqi people" and exempted from the passport restriction "certain persons providing humanitarian and other critical services in support of the Iraqi people." The May 2003 modification was made to broaden further the exemptions, again in light of the "U.S. national interest to continue to facilitate the humanitarian and reconstructive activities taking place in Iraq." This modification exempted the following categories of persons from the restriction:

> (1) persons resident in Iraq since February 1, 1991; (2) professional reporters and journalists on assignment there; (3) persons conducting humanitarian activities, as defined in 31 CFR Section 575.330; (4) persons conducting activities within the scope of a U.S. Government contract or grant, including employees of subcontractors and other persons hired to conduct such activities; (5) personnel of the United Nations and its agencies; [and] (6) U.S. Government personnel on official U.S. Government assignment in Iraq, including Members of Congress and their staffs on official business there.

b. Travel to Libya

On November 17, 2003, Secretary of State Colin L. Powell extended the restriction on the use of U.S. passports for travel to, in, or through Libya. 68 Fed. Reg. 65,981 (Nov. 24, 2003). By its terms, the restriction will expire at midnight November 24, 2004. At the end of 2003 the restrictions were still in place, pending the three-month review announced in the Federal Register notice.

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On December 11, 1981, pursuant to the authority of 22 U.S.C. 211a and Executive Order 11,295 (31 FR 10603), and in

accordance with 22 CFR 51.73(a)(3), all United States passports were declared invalid for travel to, in, or through Libya unless specifically validated for such travel. This restriction has been renewed yearly because of the unsettled relations between the United States and the Government of Libya and the possibility of hostile acts against Americans in Libya. The American Embassy in Tripoli remains closed, thus preventing the United States from providing routine diplomatic protection or consular assistance to Americans who may travel to Libya.

In light of these events and circumstances, I have determined that Libya continues to be a country "where there is imminent danger to the public health or physical safety of United States travellers" within the meaning of 22 U.S.C. 211a and 22 CFR 51.73(a)(3).

Accordingly, all United States passports shall remain invalid for travel to, in, or through Libya unless specifically validated for such travel under the authority of the Secretary of State.

. . . The Department of State will review this restriction every three months while it remains in effect.

C. IMMIGRATION AND VISAS

1. Documentation of Nonimmigrants under the Immigration and Nationality Act: Suspension of TWOV and ITI programs

On August 2, 2003, the Department of State and the Department of Homeland Security suspended the visa and/or passport waiver provisions of section 41.2(i) of title 22 of the Code of Federal Regulations, commonly known as the Transit Without Visa ("TWOV") and the International-to-International ("ITI") programs. 68 Fed. Reg. 46,948 and 68 Fed. Reg. 46,926 (Aug. 7, 2003), respectively. Under the TWOV and ITI programs, passengers traveling from between points outside the United States with a stop for transit purposes within the United States were not required to have a visa to enter the United States for transit purposes. The Federal Register notice invited comments on the action. At the end of 2003 the suspension was still in place.

Excerpts below from the Federal Register notice explain the action taken.

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* * * *

Pursuant to section 212(d)(4) of the Immigration and Nationality Act, 8 U.S.C. 1182(d)(4)(C), the Secretary of Homeland Security (previously the Secretary's authority under this section was exercised by the Attorney General) and the Secretary of State, acting jointly, may waive the visa and/or passport requirements for aliens proceeding in immediate and continuous transit through the United States. Therefore, aliens from many nations who desire to travel through the United States in transit from one country to another without the need of obtaining a visa may do so under the Transit Without Visa (TWOV) and International to International (ITI) procedures permitted under the provisions of 22 CFR 41.2(i).

Why Is It Necessary To Suspend the TWOV and ITI Programs?

The waiver of passport and/or visa requirements permitted by these programs precludes the prescreening of participating aliens prior to their arrival at a port of entry in the United States. Because these aliens do not have to apply for a visa and be interviewed by a consular officer, there is no opportunity for U.S. authorities to determine prior to their arrival at the U.S. border whether a participating alien's travel is legitimate and whether the alien poses any threat to the United States. In view of the current intelligence of a possible terrorist threat specific to these programs, the Secretaries of State and Homeland Security have determined that the programs immediately be suspended while they evaluate the security risks involved in these programs over the next 60 days. During the 60 day review period, DHS and the Department of State will be reviewing comments and taking other steps to develop plans that will ensure security. DHS and the Department of State have received specific, credible intelligence, including intelligence from the FBI and the CIA, that certain terrorist organizations have identified the visa and passport exemptions of the TWOV and ITI programs as a means to gain access to the United States, or to gain access to aircraft en route to or from the United States,

to cause damage to infrastructure, injury, or loss of life in the United States or on board the aircraft. Consequently, upon the signing of this rule and the signing of a similar rule by the Secretary of Homeland Security (see the Department of Homeland Security rule published elsewhere in this issue of the Federal Register) the TWOV and ITI programs immediately will be suspended. The suspension of these programs will require aliens seeking to transit the United States to be in possession of valid passports and visas unless the passport and/or visa requirements may be waived under other provisions of Part 41 and such a waiver has been obtained.

2. U.S. Visitor and Immigrant Status Indicator Technology Program

On December 30, 2003, Tom Ridge, Secretary of Homeland Security, signed regulations to implement the U.S. Visitor and Immigrant Status Indicator Technology program ("US-VISIT"). 69 Fed. Reg. 468 (Jan. 5, 2004). As described in the Federal Register, the program "is designed to improve overall border management through the collection of arrival and departure information on foreign visitors and immigrants who travel through our nation's air, sea and land ports." Excerpts below summarize the legal basis and legal effect of the new regulations. Another Federal Register notice published on the same date listed air and sea ports of entry designated for US-VISIT inspection at the time of alien arrival, as well as one air port and one sea port for US-VISIT inspection at time of alien departure. 69 Fed. Reg. 482 (Jan. 5, 2004). Executive Order 13,323, of December 30, 2003, delegating the President's authority to promulgate the regulations and referenced below, is available at 69 Fed. Reg. 241 (Jan. 2, 2004).

The Department of Homeland Security (Department or DHS) has established the United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT) in accordance with several Congressional mandates requiring that the Department create an

integrated, automated entry exit system that records the arrival and departure of aliens; that equipment be deployed at all ports of entry to allow for the verification of aliens' identities and the authentication of their travel documents through the comparison of biometric identifiers; and that the entry exit system record alien arrival and departure information from these biometrically authenticated documents. This rule provides that the Secretary of Homeland Security or his delegate may require aliens to provide fingerprints, photographs or other biometric identifiers upon arrival in or departure from the United States. The arrival and departure provisions are authorized by sections 214, 215 and 235 of the Immigration and Nationality Act (INA).

* * * *

What Is the Statutory Authority for the Entry Exit System Component of the US-VISIT Program and for the Collection of Biometric Identifiers From Aliens?

The principal law that mandates the creation of an automated entry exit system that integrates electronic alien arrival and departure information is the Immigration and Naturalization Service Data Management Improvement Act of 2000 (DMIA), Public Law 106–215 (2000), 114 Stat. 339, codified as amended at 8 U.S.C. 1365a. DMIA amended previous legislative requirements for an entry exit system that would record the arrival and departure of every alien who crosses the U.S. borders. See section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C, Public Law 104–208 (1996), 110 Stat. 3009–558, codified in scattered sections of 8 U.S.C. (later amended by DMIA). . . .

In addition, section 217(h) of the Visa Waiver Permanent Program Act of 2000 (VWPPA), Public Law 106–396 (2000), 114 Stat. 1637, codified as amended at 8 U.S.C. 1187(h), requires the creation of a system that contains a record of the arrival and departure of every alien admitted under the Visa Waiver Program (VWP) who arrives and departs by air or sea. The requirements of DMIA effectively result in the integration of this VWP arrival/departure information into the primary entry exit system component of the US-VISIT program.

In late 2001 and 2002, Congress passed two additional laws affecting the development of the entry exit system, in part, in response to the events of September 11, 2001. Section 403(c) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act), Public Law 107–56 (2001), 115 Stat. 353, codified as amended at 8 U.S.C. 1379, required the Attorney General and the Secretary of State jointly, through the National Institute of Standards and Technology (NIST), and in consultation with the Secretary of the Treasury and other appropriate Federal law enforcement and intelligence agencies, and in consultation with Congress, to develop and certify a technology standard, including appropriate biometric identifier standards, that can be used to verify the identity of visa applicants and persons seeking to enter the United States pursuant to a visa and to do background checks on such aliens. In developing the entry exit system required by DMIA, section 414(b) of the USA PATRIOT Act directed the Attorney General and the Secretary of State to "particularly focus on the utilization of biometric technology; and the development of tamper-resistant documents readable at ports of entry." 8 U.S.C. 1365a note.

The legislative requirements for biometric identifiers to be utilized in the context of the entry exit system were significantly strengthened with passage of the Enhanced Border Security and Visa Entry Reform Act of 2002 ("Border Security Act" or EBSVERA), Public Law 107–173 (2002), 116 Stat. 553, codified in scattered sections of 8 U.S.C. . . .

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The US-VISIT program requirements that foreign nationals provide biometric identifiers when they seek admission to the United States are further supported by the Department's broad authority to inspect aliens contained in section 235 of the INA, 8 U.S.C. 1225. Pursuant to section 215(a) of the INA, the President also has the authority to regulate the departure of aliens, as well as their arrival. President Bush has issued Executive Order titled Assignment of Functions Relating to Arrivals In and Departures From the United States delegating his authority to promulgate

regulations governing the departure of aliens from the United States. In accordance with section 215 and with this new Executive Order, the Secretary of Homeland Security, with the concurrence of the Secretary of State, has the authority to issue this rule which requires certain aliens to provide requested biometric identifiers and other relevant identifying information as they depart the United States. For nonimmigrant aliens, the Department may also make compliance with the departure procedures a condition of their admission and maintenance of status while in the country under INA, section 214.

Many other provisions within the INA also support the implementation of the US-VISIT program, such as the grounds of inadmissibility in section 212, the grounds of removability in section 237, the requirements for the VWP program in section 217, the electronic passenger manifest requirements in section 231, and the authority for alternative inspection services in sections 286(q) and 235 of the INA and section 404 of the Border Security Act. These are but a few of the most significant provisions that support US-VISIT from among numerous other immigration and customs statutes.

* * * *

What Changes Does This Interim Rule Make?

Through an amendment to 8 CFR 235.1(d), the Department may require aliens who are arriving at United States air and sea ports of entry to provide fingerprints, photographs, or other biometric identifiers to the inspecting officer. The Department will collect fingerprints and photographs from aliens applying for admission pursuant to a nonimmigrant visa upon their arrival at air and sea ports of entry and upon departure if they exit through certain locations. Departure inspection will be conducted through pilot programs at a limited number of departure ports, identified by notice in the Federal Register. The rule exempts: (i) Aliens admitted on A-1, A-2, C-3 (except for attendants, servants or personal employees of accredited officials), G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5 or NATO-6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be

subject to the rule, (ii) children under the age of 14, (iii) persons over the age of 79, (iv) classes of aliens the Secretary of Homeland Security and the Secretary of State jointly determine shall be exempt, and (v) an individual alien the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines shall be exempt. Although the biometric requirements in this rule will initially only apply to nonimmigrant visa-holders who travel through designated air and sea ports, the Department anticipates expanding the program, through separate rulemaking to include other groups of aliens and more ports in order to eventually have the capability to verify the identities of most foreign national travelers through biometric comparisons as envisioned by the USA PATRIOT Act and the Border Security Act.

At amended 8 CFR 235.1(d)(ii), the rule states that failure by an alien to provide the requested biometrics necessary to verify his or her identity and to authenticate travel documents may result in a determination that the alien is inadmissible under section 212(a)(7) of the INA for lack of proper documents, or other relevant grounds in section 212 of the Act.

New rule 8 CFR 215.8 states that the Secretary of Homeland Security may establish pilot programs at up to fifteen air or sea ports of entry, designated through notice in the Federal Register, through which the Secretary may require aliens who are departing from the United States from those ports to provide fingerprints, photographs, or other biometric identifiers, documentation, and such other such evidence as may be requested to determine an alien's identity and whether he or she has properly maintained his or her status while in the United States.

This rule also amends 8 CFR 214.1(a) to state that if a nonimmigrant alien is required under section 235.1(d) to provide biometric identifiers, the alien's admission is conditioned on compliance with any such requirements. Similarly, if the alien is required to provide biometrics and other information upon departure pursuant to 8 CFR 215.8, the nonimmigrant alien's failure to comply may constitute a failure of the alien to maintain the terms of his or her immigration status.

* * * *

3. Cuba

a. Visas for Cuban nationals

On September 22, 2003, Adam Ereli, deputy spokesman for the U.S. Department of State, stated that the United States had issued "more than 20,000 immigrant visas to Cuban nationals so far in Fiscal Year 2003." He added:

> . . . Under the Migration Accords with Cuba, we are obligated to document 20,000 Cubans for travel to the United States for permanent residence each fiscal year. Like all our obligations, we treat this one seriously. We are committed to migration from Cuba that takes place only in a safe, legal, and orderly fashion. We remain absolutely committed to protecting our nation's borders through a sound migration policy, and to respecting the principles of international law.

The full text of Mr. Ereli's statement is available at *www.state.gov/r/pa/prs/ps/2003/24289.htm*.

On September 30, in response to a question from the press, the State Department called on Cuba "to allow freedom of movement and residence within its borders and to allow its citizens to leave and return to their country" consistent with the UN Universal Declaration of Human Rights. The question and the Department's answer are set forth below and are available at *www.state.gov/r/pa/prs/ps/2003/24788.htm*.

Question: *What does the United States think about a statement by Cuba's Foreign Minister, who said that Cubans living outside of the United States no longer need to have Cuban government permission in order to visit the island.*

Answer: We fully support the right of Cubans to travel freely to and from Cuba. Unfortunately, the Castro regime continues to deny Cubans this basic right. We call on Cuba to respect the principles enshrined in the United Nations Universal Declaration of Human Rights, to allow freedom of movement and residence

within its borders and to allow its citizens to leave and return to their country.

Based on the press reports we have seen concerning the Cuban Foreign Minister's statement, there are no practical changes in the Castro regime's restrictions on the rights of Cubans in America to travel to their homeland. All those born in Cuba and now living in the United States, who arrived after December 31, 1970, will be required to obtain Cuban passports in order to enter Cuba. These individuals will be treated solely as Cuban citizens and will be subject to a range of restrictions and obligations. Cuba does not recognize the right of the U.S. government to protect Cuban-born American citizens traveling to Cuba and consistently refuses to allow U.S. consular access to those arrested or detained in Cuba.

b. U.S. policy on travel restrictions and immigration

On October 10, 2003, President George W. Bush announced new initiatives concerning Cuba policy. Among other things, his remarks focused on tightening restrictions on travel to Cuba and, on immigration, "working to ensure that Cubans fleeing the dictatorship do not risk their lives at sea."

The full text of the President's remarks, excerpted below, is available at *www.whitehouse.gov/news/releases/2003/10/20031010-2.html. See also* fact sheet on initiatives to assist the Cuban people, available at *www.whitehouse.gov/news/releases/2003/10/20031010-7.html.*

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Last year in Miami, I offered Cuba's government a way forward—a way forward toward democracy and hope and better relations with the United States. I pledged to work with our Congress to ease bans on trade and travel between our two countries if—and only if—the Cuban government held free and fair elections, allowed the Cuban people to organize, assemble and to speak freely, and ease the stranglehold on private enterprise.

Since I made that offer, we have seen how the Castro regime answers diplomatic initiatives. The dictator has responded with

defiance and contempt and a new round of brutal oppression that outraged the world's conscience.

In April, 75 peaceful members of Cuban opposition were given harsh prison sentences, some as long as 20 years. Their crimes were to publish newspapers, to organize petition drives, to meet to discuss the future of their country. Cuba's political prisoners subjected to beatings and solitary confinement and the denial of medical treatment. Elections in Cuba are still a sham. Opposition groups still organize and meet at their own peril. Private economic activity is still strangled. Non-government trade unions are still oppressed and suppressed. Property rights are still ignored. And most goods and services produced in Cuba are still reserved for the political elites.

Clearly, the Castro regime will not change by its own choice. But Cuba must change. So today I'm announcing several new initiatives intended to hasten the arrival of a new, free, democratic Cuba.

First, we are strengthening re-enforcement of those travel restrictions to Cuba that are already in place. U.S. law forbids Americans to travel to Cuba for pleasure. That law is on the books and it must be enforced. We allow travel for limited reasons, including visit to a family, to bring humanitarian aid, or to conduct research. Those exceptions are too often used as cover for illegal business travel and tourism, or to skirt the restrictions on carrying cash into Cuba. We're cracking down on this deception. I've instructed the Department of Homeland Security to increase inspections of travelers and shipments to and from Cuba. We will enforce the law. We will also target those who travel to Cuba illegally through third countries, and those who sail to Cuba on private vessels in violation of the embargo. You see, our country must understand the consequences of illegal travel. All Americans need to know that foreign-owned resorts in Cuba must pay the wages . . . of their Cuban workers to the government. A good soul in America who wants to be a tourist goes to a foreign-owned resort, pays the hotel bill—that money goes to the government. The government, in turn, pays the workers a pittance in worthless pesos and keeps the hard currency to prop up the dictator and his cronies. Illegal tourism perpetuates the misery of the Cuban people.

And that is why I've charged the Department of Homeland Security to stop that kind of illegal trafficking of money.

By cracking down on the illegal travel, we will also serve another important goal. A rapidly growing part of Cuba's tourism industry is the illicit sex trade, a modern form of slavery which is encouraged by the Cuban government. This cruel exploitation of innocent women and children must be exposed and must be ended.

Second, we are working to ensure that Cubans fleeing the dictatorship do not risk their lives at sea. My administration is improving the method through which we identify refugees, and redoubling our efforts to process Cubans who seek to leave. We will better inform Cubans of the many routes to safe and legal entry into the United States through a public outreach campaign in southern Florida and inside Cuba itself. We will increase the number of new Cuban immigrants we welcome every year. We are free to do so, and we will, for the good of those who seek freedom. Our goal is to help more Cubans safely complete their journey to a free land.

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4. Haiti

a. Visa denials to certain Haitians

Section 616 of the Commerce, Justice, State Appropriations Act for Fiscal Year 1999, Pub. L. No. 105–277, 112 Stat. 2681, as extended and amended, prohibits the use of funds, either appropriated or otherwise made available, to issue visas to Haitians who have been implicated in certain politically motivated murders, acts of violence against the Haitian people by the Front for Advancement and Progress of Haiti ("FRAPH"), or the coup of September 1991. Section 616(a)(1), as amended, applies the prohibition to "any person who has been credibly alleged to have ordered, carried out, or materially assisted in the extrajudicial and political killings of" 25 named victims of presumed political murder. Section 616(b) provides an exemption to the 6161(a)(1) prohibition

if the Secretary of State finds that the entry of a person who would otherwise be excluded "is necessary for medical reasons or such person has cooperated fully with the investigation of these political murders."

In keeping with the requirements of subsection 616(c) of the act, Assistant Secretary of State Paul V. Kelly transmitted to Congress a list of persons credibly alleged to have ordered or carried out the political murders. The list included persons wanted in connection with the murder of eight of the named victims: Antoine Izmery, Guy Malary, Father Jean-Marie Vincent, Pastor Antoine Leroy and Jacque Fleurival, Mireille Durocher Bertin and Eugene Baillergeau, Michel Gonzalez, and Jean-Yvon Toussaint. Mr. Kelly also transmitted a statement that "none of the persons credibly alleged to have ordered or carried out the extra-judicial and political killings described in the statute applied for a visa in 2002."

b. Deterring illegal migration from Haiti

In testimony dealing with U.S. policy toward Haiti before the Senate Foreign Relations Committee on July 15, 2003, Under Secretary of State for Political Affairs Marc Grossman identified deterrence of illegal immigration as one of the key parts of the administration's Haiti policy.

Mr. Grossman's remarks, excerpted below, are available at *www.state.gov/p/22490.htm*. A fact sheet released by the Department of State on December 29, 2003, on deterring illegal migration from Haiti is available at *www.state.gov/r/pa/prs/ps/2003/27567.htm*.

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. . . [I]llegal migration is an important U.S. security concern. We want to deter illegal migration while treating migrants in a fair and humane fashion. And we support legal migration from Haiti: approximately 15,000 immigrant visas are issued to Haitians every year.

Illegal migration from Haiti is very sensitive to changes or perception of changes in U.S. policies regarding repatriation and parole into the community pending resolution of asylum claims.

For example, in November 1991, a month after the coup that removed President Aristide from power, Haitians took to the seas in an effort to reach the United States. U.S. policy at the time was not clearly established—most were taken to Guantanamo Bay for asylum processing but about one-third were paroled into the U.S. The result was a wave of Haitian migrants, nearly 38,000 from the end of 1991 to June 1992. After the first President Bush ordered the direct repatriation of boat migrants, almost all of whom were found to be intending economic migrants, not political refugees, the number dropped to 2,404.

We support Department of Homeland Security policies designed to deter illegal migration from Haiti by promptly repatriating migrants interdicted at sea who have no legitimate fear of persecution and by detaining those who are successful in reaching the U.S. while their claims are processed.

The Department of Homeland Security interviews all migrants, whether interdicted at sea or detained in the U.S., who establish a credible fear of persecution, to determine whether or not they have a well-founded fear of persecution. People detained in the U.S. who meet the well-founded fear threshold are granted asylum here; those who are interdicted at sea and are found to require protection are resettled in third countries.

These policies have been successful in deterring migrant flows, which have leveled off to approximately 1,300 to 1,400 per year over the past 3 years while providing protection to those who need it.

5. Lifting of visa restrictions on Belarus

On April 14, 2003, Deputy Spokesman Reeker announced that visa restrictions previously imposed in November 2002 on Belarus had been lifted. The basis for the changes and remaining concerns with the human rights record of Belarus are explained in the press statement set forth below.

The full text of the statement is available at *www.state.gov/r/pa/prs/ps/2003/19629.htm*.

The United States Government has decided in tandem with fourteen member countries of the European Union to rescind visa restrictions relating to Belarus.

The United States has taken this step in response to Belarus cooperation in establishing the Organization for Security and Cooperation in Europe (OSCE) Office in Minsk and allowing this office to carry out its mandate. We expect the Belarus authorities to continue this cooperation thereby ensuring the necessary conditions for an effective and unimpeded operation of the OSCE office.

The United States and the European Union remain seriously concerned at the continuing deterioration of democracy and respect for the rule of law in Belarus as well as its failure to fulfill international commitments. Serious violations of human rights and recurrent restrictions on fundamental freedoms imposed by the Government of Belarus are in clear contradiction of internationally accepted democratic standards.

The United States and the European Union consider the flawed conduct of local elections on March 2, 2003, and the arrest and imprisonment of several participants in the recent peaceful demonstrations in Minsk as further setbacks. We have repeatedly called on the Belarusian authorities to stop the harassment of opposition politicians, journalists and intellectuals as well as to improve the media situation in Belarus and to cooperate with international organizations in accordance with their international commitments.

The United States urges Belarus to undertake a policy of political liberalization including respect for human rights and religious and media freedom. Belarus must make fundamental reforms to strengthen democratic discourse and the participation of its citizens in the political process. The United States and the European Union will work closely with the OSCE and other international partners to contribute to the development of genuine democracy and respect for human rights in Belarus. We remain committed to providing support and assistance to Belarusian civil

society. Substantial progress in democratic reform and respect for fundamental freedoms and human rights will be considered by the United States and the European Union as a new starting point for discussions on the improvement of its relations with Belarus.

6. Termination of suspension of entry

a. Senior officials of National Union for the Total Independence of Angola

On November 28, 2003, pursuant to the authority of § 5 of Presidential Proclamation 7060 of December 12, 1997, 62 Fed. Reg. 65,987 (Dec. 16, 1997), Secretary of State Colin L. Powell determined that suspension of entry into the U.S. of senior officials of the National Union for the Total Independence of Angola ("UNITA") and certain adult dependents was no longer necessary. 68 Fed. Reg. 69,113 (Dec. 11, 2003). The suspension had been put in place by Presidential Proclamation 7060, issued pursuant to § 221(f) of the INA, 8 U.S.C. § 1182(f). The Office of the Spokesman, U.S. Department of State, indicated that the decision was made based on UNITA "having completed its successful transition into a political party and the peace process in Angola having been fully implemented." *See www.state.gov/r/pa/prs/ps/2003/27114.htm.*

b. Certain persons connected with policies impeding Burma's transition to democracy

On June 10, 2003, the Department of State expanded the categories of persons whose visa applications must be referred to the Department for review because they appear to be subject to Presidential Proclamation 6925 of October 3, 1996, 61 Fed. Reg. 52,233 (Oct. 7, 1996). The proclamation, issued pursuant to § 212(f) of the INA, 8 U.S.C. § 1182(f), suspended the entry into the United States as immigrants and nonimmigrants "persons who formulate, implement, or benefit from policies that impede Burma's transition to

democracy, and the immediate family members of such persons." A telegram of June 10, 2003, to all diplomatic and consular posts, stated that "individuals in the following categories appear to be subject to 212(f) procedures by virtue of their positions:

— Members of the State Peace and Development Council (SPDC) (Formerly the State Law and Order Restoration Council (SLORC)) and their immediate families;
— Government ministers and other senior Burmese government officials and their immediate families;
— Military above the rank of Colonel and their immediate families; and
— Civil servants above the rank of Director-General and their immediate families.
— Managers of state-owned enterprises and their families.

The full text of the telegram is available at *www.state.gov/s/l/c8183.htm.*

On September 17, 2003, the Department of State provided guidance on the definition of "immediate family member" for purposes of administering Presidential Proclamation 6925 with respect to Burmese visa applicants, as set forth below.

The telegram to all diplomatic and consular posts transmitting the guidance is available at *www.state.gov/s/l/c8183.htm.*

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For purposes of administering the 212(f) Proclamation for Burma, the Department has decided to consider someone to be within the scope of the language "immediate family member" if the person is (a) the spouse, son, daughter, brother, or sister of the principal alien, or (b) a relative by blood or marriage, regardless of the degree of relationship, who resides regularly in the same household with the principal alien or who is financially supported by the principal alien.

Immediate family members may include:

— spouses;
— children, whether by blood or adoption, minor or adult, married or unmarried;
— spouses of married children;
— parents;
— parents of spouses;
— siblings, their spouses, and their children.

7. Timely removal of aliens

On February 20, 2003, the Office of Legal Counsel, U.S. Department of Justice, provided guidance concerning the timing of removal of an alien subject to a final order of removal under section 241(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(a). Memorandum Opinion for the Deputy Attorney General, Re: Limitations on the Detention Authority of the Immigration and Naturalization Service. The opinion explained:

> These issues arose in the context of the case of a particular alien who received a final order of removal on October 1, 2002, and whose 90-day removal period thus expired on December 30, 2002. This alien has significant connections to a known al Qaida operative who was seized in Afghanistan and who is now held at the naval base at Guantanamo Bay, Cuba. It was deemed a substantial possibility that the alien himself was a sleeper agent for al Qaida. Insufficient information existed at first, however, to press criminal charges or to transfer the alien to military custody as an enemy combatant. When it became apparent that it would be logistically possible to remove the alien very early within the 90-day removal period to the country that had been specified at the removal hearing (*i.e.*, travel documents were obtained), the question arose whether his removal could be delayed to permit investigations concerning his al Qaida connections to continue.

The opinion concluded that such delay is allowed, but "only when the delay in removal beyond the 90-day period is related to effectuating the immigration laws and the nation's immigration policies." Excerpts below from the opinion set forth the analysis as it relates to foreign policy concerns. *See also Digest 2001* at 17–18 for further discussion of *Zadvydas v. Davis*, 533 U.S. 678 (2001), referred to in the opinion.

The full text of the opinion is available at *www.usdoj.gov/olc/2003opinions.htm*.

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Section 241(a) of the INA directs that the Attorney General "shall remove" aliens within 90 days of the date on which they are ordered removed. INA § 241(a)(1)(A). It also indicates, however, that section 241 elsewhere provides exceptions to that general rule. *Id.* (fn. omitted). Section 241(a)(6) on its face provides such an exception. It states that "[a]n alien ordered removed who is inadmissible under section 212 [1182], removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) [1227] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period."

The plain text of the provision expressly states, in language indicating a grant of authority, that listed classes of aliens "may be detained beyond the removal period." By its terms it thus grants the Attorney General the power to refrain from removing an alien—and instead to keep him in detention—after the removal period has expired. The statute does not provide any preconditions for the exercise of this authority, other than that the alien must belong to one of the listed categories. Thus, in the *Zadvydas* [*v. Davis*, 533 U.S. 678 (2001)] litigation the United States took the position that "by using the term 'may,' Congress committed to the discretion of the Attorney General the ultimate decision whether to continue to detain such an alien and, if so, in what circumstances and for how long." Brief of the United States in *Ashcroft v. Kim Ho Ma*, 2000 WL 1784982 at *22 (Nov. 24, 2000).

Nothing in the Supreme Court's decision in *Zadvydas* casts any doubt on the validity of the plain-text reading of section 241(a)(6) as an express authorization for the Attorney General to detain—and thus refrain from removing—the listed classes of aliens beyond the removal period. The *Zadvydas* Court held that it would raise serious constitutional questions for Congress to authorize the *indefinite* detention of aliens falling into the listed classes. It thus read into the statute an implicit limitation on the allowable *duration* of post-removal-period detention. 533 U.S. at 689 ("the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States"). The Court also implied that detention beyond the 90-day removal period must be in furtherance of removal-related purposes, as it stated that the reasonableness of a detention should be measured "primarily in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal." *Id.* at 699. . . .

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The question here is whether a[n] . . . exception may . . . be implied under the statute that would permit the Attorney General under certain conditions to *choose* to delay removal of an alien even where it would be possible to remove him by the deadline. It could be argued that impossibility of removal—a circumstance beyond the Attorney General's control—is the *only* circumstance that makes it permissible for the Attorney General to fail to accomplish removal by the 90-day mark. Such a limited exception to the 90-day rule, however, would not be consistent with the nature of the decisions that are entrusted to the Attorney General under the immigration laws. Rather, a similar exception to the 90-day deadline should be understood as implicit in the statute where the time deadline would conflict with the Attorney General's ability properly to enforce the immigration laws, taking into account the full range of considerations he is charged with weighing in accomplishing removal of an alien. The Attorney General is charged by different provisions of section 241, for example, with determining whether it would be "prejudicial to the United States"

to remove an alien to the country of his choosing, *see* INA § 241(b)(2)(C)(iv), and with determining whether it would be "inadvisable" to remove aliens to other countries designated by the statutory decision tree, *see* INA § 241(b)(1)(C)(iv); INA § 241(b)(2)(E)(vii); INA § 241(b)(2)(F). *Cf.* INA § 241(a)(7)(B) (noting circumstances in which Attorney General may make a finding that "removal of the alien is otherwise impracticable or contrary to the public interest"). As explained above, in making these and other similar determinations an essential part of the operation of the immigration laws, Congress has embedded considerations of foreign policy and national security in the decisions that the Attorney General must make in accomplishing the removal of aliens. *See Zadvydas*, 533 U.S. at 700–01. And even where a specific statutory determination is not required, in any situation involving removal of an alien with terrorist connections, weighty considerations of foreign policy and national security bear upon efforts to provide the fullest information possible to the receiving country to promote both its security and the security of the United States. At other times, the health and well-being of an alien, including human rights that are protected by the United States' treaty obligations, must be considered. *See, e.g.,* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Apr. 18, 1988, S. Treaty Doc. No. 100–20 (1988); INA § 241(b)(3)(A).

In entrusting the Attorney General with the responsibility to make determinations that could have such serious implications, Congress surely did not intend to require him to make determinations in undue haste and without taking the necessary time to conduct thorough investigations, seriously deliberate, confer with other executive agencies, and make an informed decision. If the 90-day deadline were considered an inexorable command, however, it might require precisely such uninformed decision-making. For example, under the decision tree provided by section 241(b), a country willing to accept a particular alien might not be found until late in the removal period, and the Attorney General might then be faced with deciding whether it would be "inadvisable" to remove the alien to that particular country in a matter of days. Where the Attorney General has such a role

to perform—and particularly where his decision may rest upon grave concerns for national security—there is no reason to understand the 90-day deadline as an overriding imperative in the statute that may force a premature decision based on incomplete information or lack of deliberation. Similarly, where the removal of an alien with terrorist connections is at stake and the United States is in the process of investigating information that, if passed along to a receiving country, could have a profound impact on the measures that country could take to ensure both its security and the national security of the United States, there is no reason for thinking that the 90-day deadline was meant to trump due deliberation on such proper considerations under the immigration laws.

In short, in our view, Congress did not intend a rigid time deadline to take precedence in situations where the proper administration of the immigration laws requires additional time. The statute gives no indication that Congress attributed any less importance to discretionary immigration-related determinations entrusted to the Attorney General and his designees than it did to non-discretionary functions such as securing travel documents and finding a country willing to accept an alien. Thus, in our view, the Attorney General is not rigidly bound by the 90-day requirement even in situations where it theoretically would be possible to remove an alien and a foreign country has already signaled its willingness to accept him.

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D. ASYLUM AND REFUGEE STATUS AND RELATED ISSUES

Temporary Protected Status Program

a. Extension of designation

During 2003 a number of designations under the Temporary Protected Status ("TPS") Program were extended for 12–18 months. TPS beneficiaries are granted a stay of removal and work authorization for the designated TPS period and

for any extensions of the designation. For example, on July 9, 2003, the Secretary of the Department of Homeland Security issued the Notice of Extension of Designation of El Salvador under TPS, extending the designation for eighteen months, from September 9, 2003, to March 9, 2005. 68 Fed. Reg. 42,071 (July 16, 2003). The Federal Register notice explained the legal basis for the extension as excerpted below (internal headings omitted).

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On March 1, 2003, the functions of the Immigration and naturalization Service (Service) transferred from the Department of Justice to the Department of Homeland Security (DHS) pursuant to the Homeland Security Act of 2002, Public Law 107–296. The responsibilities for administering the TPS program held by the Service were transferred to the Bureau of Citizenship and Immigration Services (BCIS) of the DHS.

Under section 244 of the Immigration and Nationality Act (Act), 8 U.S.C. 1254a, the Secretary of DHS, after consultation with appropriate agencies of the Government, is authorized to designate a foreign state or (part thereof) for TPS. The Secretary of DHS may then grant TPS to eligible nationals of that foreign state (or aliens having no nationality who last habitually resided in that state).

Section 244(b)(3)(A) of the Act requires the Secretary of DHS to review, at least 60 days before the end of the TPS designation or any extension thereof, the conditions in a foreign state designated under the TPS program to determine whether the conditions for a TPS designation continue to be met and, if so, the length of an extension of TPS. 8 U.S.C. 1254a(b)(3)(A). If the Secretary of DHS determines that the foreign state no longer meets the conditions for TPS designation, he shall terminate the designation, as provided in section 244(b)(3)(B) of the Act. 8 U.S.C. 1254a(b)(3)(B). Finally, if the Secretary of DHS does not determine that a foreign state (or part thereof) no longer meets the conditions for designation at least 60 days before the designation or extension is due to expire, section 244(b)(3)(C) of the Act provides for an

automatic extension of TPS for an additional period of 6 months (or, in the discretion of the Secretary of DHS, a period of 12 or 18 months). 8 U.S.C. 1254a(b)(3)(C).

On March 9, 2001, the Attorney General initially designated El Salvador under the TPS program for a period of 18 months based upon a series of severe earthquakes that caused numerous fatalities and injuries and left 1.6 million people (over one-quarter of the country's population) without adequate housing. 66 FR 14214. Following the initial designation, the Departments of Justice (DOJ) and State (DOS) kept a close watch over the progress of reconstruction in El Salvador. Given the amount of reconstruction necessary, the Attorney General extended the El Salvador TPS designation on July 11, 2002 (67 FR 46000).

After the extension of El Salvador's TPS designation on July 11, 2002, DHS and DOS have continued to monitor the conditions in that country. Prior to making his decision to extend the El Salvador TPS designation, the Secretary of DHS consulted with relevant government agencies to determine whether conditions warranting the TPS designation continue to exist in El Salvador.

Although El Salvador has made progress in its post-earthquake reconstruction effort, much work remains. (DOS Recommendation (April 13, 2003)). As of April 2003, only one-third of the 170,000 homes destroyed by the earthquakes had been replaced. Id. More than three-quarters of the damaged roads still need repair. Id. As of February 2003, some rural health clinics have been rebuilt, but construction had not begun on other major health facilities. (BCIS Resource Information Center (RIC) (May 7, 2003)). The RIC reports that, in February 2003, the majority of damaged or destroyed schools targeted for reconstruction by USAID were still in the design phase. Id.

The economy of El Salvador is not yet stable enough to absorb returnees from the United States should TPS not be extended. (DOS Recommendation). Returning Salvadorans would tax an already overburdened infrastructure that is currently incapable of providing for them at home. Id. A large number of returnees from the United States would not be able to find jobs or possibly housing, creating social unrest and exacerbating a critical crime situation and already dismal living conditions. Id. An extension will allow

the approximately 290,000 Salvadorans now with TPS to remain in the U.S. and continue sending home remittances, which have proven helpful in the recovery process. Id.

Based upon this review, the Secretary of DHS finds that the conditions that prompted designation of El Salvador under the TPS program continue to be met (8 U.S.C. 1254a(b)(3)(C)). There continues to be a substantial, but temporary, disruption of living conditions in El Salvador as a result of environmental disaster, and El Salvador continues to be unable, temporarily, to handle adequately the return of its nationals (8 U.S.C. 1254a(b)(1)(B)(i)–(ii)). On the basis of these findings, the Secretary of DHS concludes that the TPS designation for El Salvador should be extended for an additional 18-month period.

* * * *

Other extensions during 2003 were based on disruption from 1997 volcanic eruptions (Montserrat, 68 Fed. Reg. 39,106 (July 1); aftermath of severe flooding and mudslides caused by Hurricane Mitch in 1999 (Nicaragua, 68 Fed. Reg. 23,748 and Honduras, 68 Fed. Reg. 23,744 (both May 5)); and ongoing armed conflict that would pose a serious threat to the personal safety of returning nationals (or aliens having no nationality who last habitually resided in the country) (Somalia, 68 Fed. Reg. 43,147 (July 21); Liberia, 68 Fed. Reg. 46,648 (Aug. 6); Burundi, 68 Fed. Reg. 52,405 (Sept. 3) and Sudan, 68 Fed. Reg. 52,410 (Sept. 3)).

b. Termination of designation

On January 27, 2003, the Immigration and Naturalization Service announced the termination of the designation of Angola under the TPS program, based on a determination by Attorney General John Ashcroft that conditions in Angola no longer support a TPS designation. 68 Fed. Reg. 3,896 (Jan. 27, 2003). As explained in the Federal Register, after March 29, 2003, the effective date of the termination, "nationals of Angola (and aliens having no nationality who

last habitually resided in Angola) who have had TPS under the Angola program will no longer have such status." Excerpts below explain the basis for the determination; internal headings have been omitted.

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On March 29, 2000, the Attorney General published a notice in the Federal Register at 65 FR 16634 designating Angola for TPS for a period of one year, based upon conditions in Angola at that time. That TPS designation was extended twice and is scheduled to expire on March 29, 2003. See 66 FR 18111 (April 5, 2001 (extension and redesignation)); 67 FR 4997 (Feb. 1, 2002) (extension). Based upon a recent review of conditions within Angola by the Departments of Justice and State, the Attorney General finds that conditions in Angola no longer support a TPS designation.

* * * *

. . . [T]he Attorney General has determined that conditions warranting TPS designation no longer exist, and that the TPS designation for Angola must be terminated. Section 244(b)(3)(B) of the Act provides that the Attorney General "shall" terminate a designation if he determines that Angola "no longer continues to meet the conditions for designation * * *" A statutory condition common to designations under paragraphs (A) and (C) of section 244(b)(1) of the Act is a threat to the personal safety of potential returnees. Whether the precipitating condition is an "ongoing armed conflict," INA Sec. 244(b)(1)(A), or other "extraordinary and temporary conditions," INA Sec. 244(b)(1)(C), this shared condition—threat to returnees' safety—must "continue to be met" or the Attorney General "shall" terminate the designation. INA Sec. Sec. 244(b)(3)(A), (B). The disarmament, demobilization, and ongoing reintegration of ex-combatants, the formal end to war, and the discussions regarding planned elections are all positive developments and an indication that internal armed conflict no longer threatens returning Angolans. Furthermore, efforts by the United Nations and non-governmental organizations to resettle

Angolan citizens signify the improvement of humanitarian and socioeconomic conditions in Angola. For the foregoing reasons, the Attorney General determines that Angolan TPS beneficiaries may return safely to Angola at this time and, therefore, terminates the TPS designation for Angola.

This notice terminates the designation of Angola for TPS. There may be avenues of immigration relief and protection available to aliens who are nationals of Angola (and aliens having no nationality who last habitually resided in Angola) in the United States who believe that their particular circumstances make return to Angola unsafe. Such avenues may include, but are not limited to, asylum, withholding of removal, or protection under Article 3 of the Torture Convention.

After the designation of Angola for TPS is terminated on March 29, 2003, former TPS beneficiaries will maintain the same immigration status they held prior to TPS (unless that status has since expired or been terminated) or any other status they may have acquired while registered for TPS. Accordingly, if an alien held no lawful immigration status prior to receiving TPS benefits and did not obtain any other status during the TPS period, he or she will maintain that unlawful status upon the termination of the TPS designation.

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On September 3, 2003, the Department of Homeland Security announced that the designation of Sierra Leone under the TPS, scheduled to expire November 2, 2003, would be terminated May 3, 2004. 68 Fed. Reg. 52,407 (May 3, 2003).

Cross References

USCG law enforcement vessels in US-Canada border enforcement, **Chapter 5.B.5.**

Northern Marianna Islands citizenship issues, **Chapter 5.B.2.**

Detention of aliens, **Chapter 6.F.**

Executive branch constitutional authority in passport issues, **Chapter 9.B.**

Chapter 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. Consular Notification

a. Address to state attorneys general

On March 20, 2003, William H. Taft, IV, Legal Adviser of the U.S. Department of State, addressed the National Association of Attorneys General. Mr. Taft's remarks focused primarily on the issue of consular notification. He noted that

> this is the first time in a long time—and perhaps the first time ever—that the Legal Adviser of the Department of State has addressed this particular gathering. I think it is fair to say that my presence here today reflects one of the fundamental changes we are seeing in the American legal landscape. That is, of course, the fact that our legal work at every level of government is being influenced by international law and activities.

Excerpts below address issues of particular relevance to states of the United States.

The full text of Mr. Taft's remarks is available at *www.state.gov/s/l/c8183.htm.*

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. . . Some of you probably have encountered the issue of consular notification in your criminal litigation—specifically, in efforts to suppress evidence or to obtain new criminal trials or new sentencing hearings in cases in which the consular notification obligations have not been observed. Some of you may have also seen efforts to obtain remedies under the federal civil rights law for violations of consular notification requirements by state or local officials. Others of you may not yet have run into the consular notification issue, but I assure you that it is coming your way, because it is an issue that travels with almost every foreign national that enters the United States to every state they may be found in.

* * * *

I would like to make three brief observations about the Vienna Consular Convention before turning to the subject of remedies for violations of the obligations established by it.

First, because these treaty obligations are the law of the land, we need to comply with them. Compliance generally requires nothing more than making a phone call or putting a message on a fax machine or sending a letter. This is well worth the effort. These obligations were all entered into as part of a very aggressive effort of the United States Government to protect American citizens abroad. To get protection for Americans abroad in our treaties, it was necessary to provide reciprocal protections to foreign nationals in the United States. We obviously can't insist that other countries comply and then not comply ourselves. So it is both right and fair that we comply.

Second, we are very much aware that, in most cases, the actual job of complying with these obligations falls to state and local officials. While it is not difficult to comply with the requirement if you know about it, it is difficult to make sure that all of the relevant officials—police officers, sheriffs, prosecutors, prison wardens, police training officers, and the like—know of the obligations and know how to comply. After the State Department learned that foreign nationals on death row had not received consular notification, it began an intensive effort to remedy the fundamental problem, which was that our consular notification obligations had not been sufficiently well publicized. The

Department now runs an on-going program to improve understanding of these obligations, and compliance with them, at all levels of government, federal, state, and local. It is an enormous task now run by our Bureau of Consular Affairs. . . .

And the last observation I will offer is that we are not negotiating any more treaty obligations of this nature. We think that the current legal framework is adequate and appreciate that it can be at times daunting to ensure that these obligations are understood and observed by all concerned. We are not going to add to them or make them more complicated.

Let me turn now to the question of remedies where there is a failure of notification. We are required under international law to advise a foreign national who is arrested or detained, without delay, that he has a right to have his consular officials notified of his arrest or detention. What is the remedy under international law if we fail to do that?

This is a question of immediate importance to many of you as well as to my office. We are preparing now to defend the United States in the International Court of Justice . . . in a case called *Avena and Other Mexican Nationals*. . . .

This is the third case we have had in the World Court over remedies for violations of the Vienna Consular Convention's consular notification obligations in death penalty cases. Paraguay brought the first of the three cases, which involved a Paraguayan national named Angel Breard, who was sentenced to death by Virginia. Paraguay withdrew that case after Breard's execution, so the Court never decided it. The second case was brought by Germany and involved two German nationals, Karl and Walter LaGrand, who were sentenced to death and executed by Arizona. That case was not withdrawn and was decided by the World Court in June of 2001.

* * * *

. . . [T]he Court [in *LaGrand*] ruled that, if "severe penalties" are imposed in cases involving a failure to provide consular notification as required, the United States "by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation." While

the term "severe penalties" is ambiguous, it certainly includes death sentences.

We expect that in the long run consular notification issues will be raised and addressed by the courts prior to trial. This is already beginning to happen because individuals are more aware of the possibility of consular assistance; defense counsel are increasingly aware of consular notification claims; consular officers are working harder to establish contacts with arresting officials; and we are doing a better job of complying thanks to the work of our Consular Bureau and the help of state and local as well as federal officials throughout the country. As we continue to improve compliance and as cases involving older violations run their course, we should not have significant difficulty with the *LaGrand* decision. But we do still have some difficult cases in which a violation has already occurred and the claim was procedurally defaulted before consular officials became aware of the case.

In death penalty cases where the consular notification claims are procedurally defaulted from judicial review, we have taken the position that review and reconsideration of the conviction and sentence can occur in the clemency process—by which we mean any procedure that a state has to consider granting leniency in light of all relevant information. We have worked to provide this remedy in death penalty cases as they have been brought to our attention. We have been made aware of just two cases since *LaGrand*: the *Valdez* case in Oklahoma, and the *Suarez Medina* case in Texas. We worked closely with Governor Keating of Oklahoma and with the pardon board in Texas to ensure that review and reconsideration of the conviction and sentence occurred in each case. In the end, Governor Keating decided to deny clemency, but made very clear in a letter to the President of Mexico that he had in fact reviewed and reconsidered the conviction and sentence in light of the consular notification violation. He also granted a 30-day stay to permit Mr. Valdez to pursue other diplomatic and legal options. As it turned out, the Oklahoma courts then granted Mr. Valdez a new sentencing hearing for reasons clearly related to—although not directly premised on—the consular notification issue. The Texas parole board does not issue written decisions, but the Chairman of the board provided a

written description of the nature and extent of the board's review before it decided not to recommend clemency for Suarez Medina. Mr. Suarez was executed last August. We have made clear to the World Court that we consider both of these processes to have fully complied with its *LaGrand* decision, which did not impose an obligation of result, but rather one of process.

* * * *

b. Claims by Mexico against the United States in the International Court of Justice: The Avena and Other Mexican Nationals Case

The International Court of Justice ("ICJ") heard oral arguments in *The Avena and Other Mexican Nationals Case* (*Mexico v. the United States of America*) from December 15–19, 2003, at The Hague.

Mexico filed the case on January 9, 2003, alleging the failure of the United States to inform 54 Mexican nationals that they had the right to have Mexican consular authorities notified of their arrest and detention following their arrests on murder charges, as required by Article 36(1)(b) of the Vienna Convention on Consular Relations ("VCCR"). Each of the 54 Mexican nationals was convicted and sentenced to death under the law of one of ten states—Arizona, Arkansas, California, Florida, Illinois, Nevada, Ohio, Oklahoma, Oregon, and Texas. (Mexico later withdrew two of the cases, conceding that notification was given in one case and that the other was a dual U.S.-Mexican national and therefore not entitled to the protection of Article 36.)

When it filed its case, Mexico also requested an indication of provisional measures to ensure that no Mexican national would be executed and that no date of execution would be fixed for any Mexican national before the ICJ rendered a final judgment. On February 5, 2003, the ICJ issued an order of provisional measures stating that the United States "shall take all measures necessary to ensure that [the three Mexican

nationals for whom execution was most imminent] are not executed pending final judgment in these proceedings."

In its application, Mexico asked the ICJ to adjudge and declare that (1) the United States violated the rights of Mexico and of its 54 nationals under Articles 5 and 36(1)(b) of the Convention in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals; (2) Mexico was therefore entitled to *restitutio in integrum*; (3) the United States was under an international legal obligation not to apply 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) or any other doctrine of its municipal law to preclude the exercise of rights afforded by Article 36 of the Convention; (4) the United States was under an international legal obligation to carry out any future detention of or criminal proceedings against the 54 Mexican nationals on death row or any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial, or other "power" in conformity with "the foregoing international legal obligations;" and (5) that the right to consular notification under the Vienna Convention is a human right.

Mexico further asked the ICJ to adjudge and declare that the United States, "pursuant to the foregoing legal obligations," must (1) restore the *status quo ante*, the situation that existed before the detention of, proceedings against, and convictions and sentences of the 54 nationals; (2) ensure that provisions of its municipal law enable "full effect" to be given to the purposes for which the rights afforded by Article 36 of the Convention are intended; (3) establish a meaningful remedy at law for violations of the rights afforded to Mexico and its nationals by Article 36 of the Vienna Convention, including by barring the imposition of the procedural default rule; and (4) provide Mexico a "full" guarantee of non-repetition.

In its Counter-Memorial, filed with the ICJ on November 3, 2003, and in oral proceedings before the ICJ in December,

the United States took issue with Mexico's description of the facts in the individual cases and its characterization of the U.S. legal system; noted that foreign nationals are not always identified as such in the United States, a large and diverse country with independent law enforcement systems; pointed out that all of the Mexican nationals had been tried in the United States legal system, a system that guarantees due process to all defendants regardless of nationality; and asserted that the United States had consistently made good faith efforts to implement the VCCR. The United States argued that (1) the ICJ lacked jurisdiction to decide many of Mexico's claims; (2) the ICJ should find significant aspects of Mexico's application and submission inadmissible; (3) the ICJ's judgment in *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, set forth the principles applicable to the *Avena* case (*see Digest 2001* at 21–24); (4) the United States provides the "review and reconsideration" required under *LaGrand* in its criminal justice systems and through executive clemency proceedings; (5) the ICJ should not find violations in any of the 54 cases because Mexico had failed to meet its burden of proof regarding them; and (6) if the ICJ found a breach of Article 36(1) of the Convention, it should apply the review and reconsideration remedy it ordered in *LaGrand* and should not grant Mexico's request for *vacatur*, exclusion, orders of cessation and guarantees of non-repetition.

The excerpts below from the U.S. Counter-Memorial, submitted November 3, 2003, explain the U.S. interpretation of the obligations imposed by Article 36 of the Convention, the U.S. position that its legal system provides meaningful review and reconsideration for violations of Article 36, the U.S. rejection of Mexico's argument that consular notification is a human right or a fundamental due process right, and the U.S. views that the remedies sought by Mexico were inappropriate and that the *LaGrand* judgment laid down the appropriate remedy for violation of Article 36 obligations.

The United States elaborated on these arguments during its oral presentations to the ICJ at the December hearing.

Also below are excerpts from the presentations of William H. Taft, IV, Legal Adviser; Catherine W. Brown, Assistant Legal Adviser for Consular Affairs; D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs; James H. Thessin, Deputy Legal Adviser; Thomas Weigend, professor of law and director of the Institute of Foreign and International Criminal Law at the University of Cologne; and Elisabeth Zoller, professor of public law at the University of Paris II (Panthéon-Assas).

Footnotes have been omitted from the excerpts.

The full text of all oral and written pleadings in *Avena and Other Mexican Nationals* is available at *www:icj-cij.org*.

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Counter-Memorial submitted by The United States of America, 3 November 2003

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CHAPTER V

THE *LAGRAND* JUDGMENT SETS FORTH THE PRINCIPLES APPLICABLE TO THE DISPUTE PRESENTED TO THE COURT

5.1. In this case, the Court is asked to interpret and apply two specific provisions of the VCCR. First, Mexico places in issue Article 36(1)(b), which provides for any foreign national taken into custody by a State Party that:

1. With a view toward facilitating the exercise of consular functions relating to nationals of the sending State: . . .
   (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any

> other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

Mexico asserts that the concluding sentence in Article 36(1)(b) requires that a person be informed of the possibility of consular notification immediately and before he or she is questioned. According to Mexico, if the detained person so requests, the consular officer must then be notified immediately, again before the detainee is questioned. Finally, Mexico would require that the questioning not be initiated until after the consular officer has decided whether or not to render consular assistance. Mexico even appears to go so far as to suggest that, if the consular officer declines to respond, questioning may not occur. A failure to comply with Article 36(1)(b), Mexico claims, should be remedied by barring use of any statement taken from him or her that precedes these steps. The United States disagrees.

5.2. Second, Mexico asserts a dispute involving Article 36(2), which provides:

> 2. The rights referred to in paragraph 1 of this article 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.

Mexico contends that the proviso of this paragraph requires that the laws of the United States—and presumably of all States Parties to the VCCR—must provide that, in all cases in which consular information is not provided immediately and before any statement is taken, the foreign national is entitled to a new trial in which any statement he or she has provided before receiving consular information is excluded from evidence. The United States once again disagrees.

* * * *

B. Mexico has Misconstrued and Overstated the Object and Purpose of Article 36

6.4. The object and purpose of the VCCR is to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems". The Convention emerged from an effort to codify "consular intercourse and immunities" practiced at the time, and its drafters believed that it would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems. The Convention's seventy-nine articles address a wide range of issues associated with the everyday conduct of consular relations. The articles codify fundamental principles, such as the inviolability of consular premises and the establishment of consular posts, ensuring privileges and immunities, facilitating communications between the receiving State and consular officers, determining the applicability of local taxes, and the like.

6.5. With that context in mind, the United States agrees with Mexico that consular officers may serve important functions when foreign nationals are detained. The assistance that consular officers may offer detainees, at least in the United States, is wide-ranging. They may make contact and facilitate communications with family and friends; they may monitor the conditions of detention to ensure that adequate food, clothing and medical care are provided; they may monitor criminal proceedings to see that a fair trial is granted; they may arrange for legal representation of the detainee; they may assist the detainee's attorneys in hiring experts or gathering mitigating evidence. In some other States, however, the consular officer's role is considerably more circumscribed by receiving State law or tradition.

6.6. Consular officers may also, in some cases, serve as a "cultural bridge". Mexico in fact highlights this function, and undoubtedly a consul can provide important information to the detainee who is unfamiliar with the legal system of the receiving State. But this aspect of consular work should not be given the central importance that Mexico's Memorial attaches to it in the

course of its effort to paint a picture of Mexican nationals in the United States with no meaningful understanding of the legal system in which they find themselves. In fact, whether a consular officer serves as a "cultural bridge" will depend on how long the national has lived in the receiving State and what his or her experience there has been. It is difficult to see the relevance of the consular officer as a "cultural bridge", for example, in a case in which a detainee has lived in the receiving State for a lengthy period, or has had previous encounters with its criminal justice system, as is the case with at least forty-six of the fifty-four cases before the Court.

6.7. Further, it is important not to confuse the full extent of what a consular officer might choose or attempt to do with the limited functions of a consular officer under Article 36(1). Article 36(1) begins with a clear statement that its provisions are for "facilitating the exercise of consular functions." Subparagraph 1(a) states that a sending State has a general right of communication. This is the only relevant right when a national is free in the host country; the foreign national may communicate with his or her consular officer and seek assistance, and the consular officer may provide any assistance he or she wishes that is within the scope of the consular functions enumerated in Article 5 of the VCCR. Subparagraph 1(b) follows to address the special problem of communication when a foreign national is detained, and thus no longer free to seek out his or her consular officer at will. It gives to a detained foreign national an opportunity to communicate with his or her consular officers and to have the consular officers notified of the detention—thus preventing a secret detention.

6.8. This subparagraph has another purpose, not addressed by Mexico, which is to give the detainee the discretion to reject consular notification because he or she may prefer, for privacy or other reasons, that the sending State government not be aware of or involved in his or her affairs.

6.9. Paragraph 1(c) has as its purpose permitting but not requiring the consular officer to render appropriate assistance to the detainee. It allows the sending State to determine the types and amount of consular assistance it will provide, if any, within the limitations prescribed by Articles 5 and 36 of the VCCR. It

does not require that a consular officer visit or otherwise communicate with the detainee, (the officer may not be able to visit the detainee for some days, for example, or may decide not to visit or assist at all) but it permits him to do so. Likewise, it permits but does not require the consular officer to arrange for the detainee's legal representation. And it reiterates the overall control of the detainee, recognized in subparagraph 1(b), stating that the consular officer must refrain from taking action expressly opposed by the national.

6.10. It is not a purpose of Article 36, however, to create rights for nationals of the receiving State, including dual nationals. Nor is it a purpose of Article 36 to allow a consular officer to serve as a lawyer for the detainee, or to interfere with an investigation or to prevent the collection of evidence in accordance with the laws and regulations of the receiving State. It thus is not an object or purpose of Article 36 to prevent law enforcement officials from questioning a foreign national until that individual is informed of the possibility of consular assistance under the VCCR, until the individual actually requests consular notification, and until the consular officer arrives and renders assistance. Yet this is exactly how Mexico defines the object and purpose, in that Mexico asserts that: "[t]he presence of consular officials throughout interrogation provides an essential safeguard against . . . abuses . . . Thus, the foreign national's right to seek the guidance of consular officers is essential to an intelligent, voluntary, and informed decision whether to exercise his right to remain silent in the face of interrogation". This is not correct.

6.11. Nor is it an object and purpose of Article 36 to allow a consular officer to ensure that a foreign national understands his or her legal rights regarding the making of statements to the police before any statement is made. Article 36 merely contemplates that foreign nationals will be told that they may communicate with the consular officers, and be allowed to initiate such communications—if they so wish—after having been taken into custody. Article 36 does not even require that consular officers be given access to their nationals "without delay", and it has never been understood to require access before an interrogation. Whether a foreign national arrested for a criminal offense understands his legal rights before he or she makes a statement is not for a consular officer to

determine; it is a question specifically addressed by the person's lawyer, once obtained, and by the courts at a subsequent point in time.

6.12. These are only the most significant ways in which the Memorial overstates the role of the consular officer and misstates the purposes of Article 36. To justify the very particular and extraordinary remedy it seeks, Mexico then compounds the error by failing to distinguish among the three distinct obligations established in Article 36 and thus distorts Article 36. The first is the obligation in the concluding clause of subparagraph (1)(b) to inform the foreign national "without delay" of the "rights under this subparagraph". To prevent the confusion that Mexico has introduced, we refer to this undertaking as the obligation to provide "consular information". The second is the obligation, upon the detainee's request, to notify the consular post "without delay" of the detention, which we refer to as the obligation of "consular notification". Because this obligation arises *only* when consular notification is requested by the detained foreign national, a lack of consular notification at most raises a question whether the person detained received consular information; it does not necessarily indicate a breach of Article 36(1)(b). If the person detained is provided consular information and declines to request consular notification, then no breach of Article 36(1)(b) occurs. The third relevant obligation is the obligation to permit the consular officer to have access to and communicate with the detained foreign national. This obligation is not in subparagraph (1)(b), but rather in subparagraph (1)(c). More importantly, subparagraph (1)(c) does not provide that the consular officer shall have a right to visit, converse, or correspond with the detainee "without delay".

6.13. Mexico jumbles these obligations and, in doing so, makes three significant errors. First, it wrongly assumes that failure to notify consular officers of an arrest or detention necessarily implies that Article 36(1)(b) was breached. This is wrong as a matter of law and fact. In reality, the vast majority of foreign nationals, including Mexican nationals, decline consular notification when given consular information. Mexico's mistake leads it to make a claim of systematic breaches of Article 36 by the United States that is unfounded, and to claim remedies for breaches that it has not proven.

6.14. Second, Mexico fails to recognize that the provision of consular information is a means to an end—ensuring that the consular officer is aware of the detention. While the obligation to provide consular information is important, the significance of a failure to provide such information clearly varies depending on whether and when consular notification occurs in fact. It is not unusual for family or friends to notify a consular officer of an arrest immediately, and well before the competent authorities can do so, or for a detainee who is allowed to use the telephone to call the consulate directly. If the consular officer then contacts the detaining officials directly, and before they complete the process of providing consular notification, it would hardly be surprising if they concluded that the provision of notification was unnecessary. Any "breach" of Article 36(1)(b) in this context would be inconsequential. Thus, it is plainly inappropriate to equate the importance of consular information and consular notification. It is also inappropriate to assume that a failure to comply with one or the other is always significant as to whether the object and purpose of Article 36(1)(b) has been fulfilled.

6.15. Finally, Mexico conflates the requirements of subparagraph (1)(b), to inform and, if requested, to notify without delay, with the requirement of subparagraph (1)(c), to permit access. An example is when it states that: "Article 36 requires notification and access *without delay* to enable meaningful consular assistance". Through this sleight of hand, Mexico asserts the non-existent right of a consular officer to talk with a foreign national immediately upon his arrest or detention and before anything else happens, and thus to intervene immediately in a criminal investigation.

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C. Article 36(1)(b) Obligates States to Provide Foreign Nationals With Consular Information Under the VCCR and to Notify Consular Officers When Requested "Without Delay", Meaning in the Ordinary Course of Business and Without Procrastination or Deliberate Inaction

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6.18. In addressing the question "how quickly" the detainee needs to be informed, the United States Department of State has provided federal, state, and local law enforcement officials the following guidance:

> *There should be no deliberate delay, and notification should occur as soon as reasonably possible under the circumstances.* Once foreign nationality is known, advising the national of the right to consular notification should follow promptly.
>
> In the case of an arrest followed by a detention, the Department of State would ordinarily expect the foreign national to have been advised of the possibility of consular notification by the time the foreign national is booked for detention. The Department encourages judicial authorities to confirm during court appearances of foreign nationals that consular notification has occurred as required.

6.19. In addressing how quickly notification must be made to the consular officer if requested, the Department of State has provided this guidance:

> The Department of State also considers "without delay" here to mean that *there should be no deliberate delay, and notification should occur as soon as reasonably possible under the circumstances.* The Department of State would normally expect notification to consular officials to have been made within 24 hours, and certainly within 72 hours. On the other hand, the Department does not normally consider notification . . . to be required outside of a consulate's regular working hours. In some cases, however, it will be possible and convenient to leave a message on an answering machine at the consulate or to send a fax even though the consulate is closed.

In United States practice, it has never been the case that consular information must necessarily be provided before a detainee can be

questioned, or even that the information be given by a person involved in the interrogation process (as opposed, for example, by other competent authorities who have contact with the detained person, such as those responsible for booking). Mexico, however, contends that the Court should require the United States to change this practice. Acknowledging that the VCCR does not define the phrase "without delay", Mexico argues that "without delay" should be interpreted as meaning "immediately *and* prior to any interrogation. . . .

* * * *

1. The Ordinary Meaning in Context Supports the Definition Given To "Without Delay" by the United States

6.21. When the words "without delay" are considered in light of their ordinary meaning and in their context, it is clear that Mexico's proposed definition is unsustainable. First, conceptually, it is self-evident that how long it takes to carry out the obligations under Article 36 depends on the circumstances. An act may take a long time, and yet be done "without delay" if, for example, the act is complex (many people arrested as a group), or if time is required to determine a person's identity or nationality (if he presents false or inconsistent information or documents). Likewise, an act could be completed in a short time, and yet have been delayed if the actor could conveniently have completed it more quickly, but elected not to do so. The actor's intention and actions, and the circumstances in which he finds himself, are plainly relevant, indeed key, to assessing whether he acted "without delay". The phrase in context is not simply a function of time.

6.22. The second prong of Mexico's proposed definition—its insertion of a "before interrogation" requirement—likewise is flawed. Consular information and law enforcement interrogations are not necessarily linked, certainly not in the context of the VCCR, and there is no reason why questioning should be made contingent on a request for notification. In furtherance of ensuring that consular information is provided without delay, a State Party may provide that consular information will be given routinely when

the person is taken before a judicial authority—an event that in many States Parties occurs within a few days of an arrest. Or a State Party might provide that the information will be given by a prison official or by a social worker who will visit each detainee within the first day of detention. In either case the information would be given without delay, but in neither case would it relate to the conduct of other regular government functions such as the interrogation of the person or other aspects of the related law enforcement investigation, which may be proceeding on an entirely different schedule to solve a crime while the evidence is fresh and to protect public safety. Nothing requires that the consular information be provided by the arresting officer as opposed to the investigator, magistrate or social worker. The carrying out of a criminal investigation in particular has nothing to do with how quickly or slowly the information on consular notification is conveyed and properly proceeds on an independent schedule. Thus, "without delay" cannot mean "before interrogation".

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6.25. An examination of the entire text of Article 36(1) lends further support to the United States' interpretation and, likewise, reveals why Mexico's asserted definition is unsustainable. There is nothing in any part of subparagraph (1)(b) that links the provision of consular information to the criminal investigation. As noted, the phrase "without delay" appears three times in that subparagraph: first, in relation to notifying the consular post, upon request, of the detention; second, in relation to forwarding any communication from the detainee addressed to the consular post; and finally, in relation to informing the detainee that he may have his consular post notified and his communications forwarded. Each obligation must be performed "without delay". Mexico faces a heavy burden to show that the same phrase used repeatedly in the same clause is to be given different meanings but has failed to—and cannot—meet that burden. Yet giving each usage the same meaning proposed by Mexico demonstrates that Mexico's definition is untenable because it leads to absurd results. By contrast, the definition suggested by the United States works in all relevant contexts.

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6.29. Likewise instructive is the fact that the texts of other articles within the VCCR show that when they intended to describe obligations that must be performed simply in terms of time, the drafters utilized a variety of different phrases. For example, Article 14 requires the receiving State to "*immediately notify*" the competent authorities as soon as the head of a consular post is admitted even provisionally to the exercise of his or her functions. But if "without delay" means "immediately", as Mexico argues, then what meaning is to be given to "immediately notify", which must have been intended to indicate an even shorter time period? Why, moreover, would the drafters have used different language to represent what Mexico contends is essentially the same concept?

* * * *

2. State Practice Confirms "Without Delay" Has the Meaning Given To It by the United States

6.32. Mexico has also failed to show that the practice of States under the VCCR establishes an agreement of the States Parties to give the phrase "without delay" the special meaning it proposes. In fact, Mexico points to no State practice except that of the United States, which it completely misrepresents, and its own, which it also portrays inaccurately. State practice—including Mexico's own practice—simply does not support Mexico's position. Rather, State practice is consistent with the view of the United States. 6.33 The United States has compiled a wealth of information on how States Parties to the VCCR carry out their obligations under Article 36(1)(b), including through a comprehensive survey of State practice.

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6.35. Of special note, Mexican authorities routinely interrogate detained United States nationals before they are given consular information. In many cases, it is only during or even after the interrogation that the Mexican law enforcement authorities become aware that the detainee is a United States citizen. Importantly, in all of our consular districts except Nogales and Tijuana, Mexican

law enforcement officials do not break off interrogation if a United States citizen asks to speak to the consulate. Contact with the consular officer in most Mexican districts is permitted only after the interrogation is completed.

6.36. Article 128, Section IV of Mexico's Federal Code of Criminal Procedure requires that the detention of a foreign citizen be communicated immediately to the sending State's diplomatic or consular mission, regardless of whether the sending State is one in which notification is mandatory despite the wishes of the detainee. . . .

6.37. Even Article 128.IV's requirement of immediate notification of a foreign national's consulate does not guarantee that the consulate will be notified *prior to* interrogation. It certainly does not guarantee that the consular officer would be able to intervene before the foreign national provides his or her initial statement, or that the administration of prosecutorial or judicial process in Mexico would be halted prior to interrogation and/or an initial declaration while United States consular authorities were given an opportunity to consult with a United States citizen detainee. Moreover, Mexico's administration of consular notification is erratic and inconsistent, and appears nowhere to ensure suspended proceedings while an American detainee is permitted to speak to his or her consulate.

6.38. With very few exceptions, our posts surveyed worldwide (including those in host countries with which we have bilateral treaties) could not identify any law, regulation or judicial decision in any receiving State that precludes questioning of a suspect before he or she has been given consular information or that in any way links the right to remain silent to consular information.

6.39. When we look to practice regarding notification to the consular officer, and then access by the officer to the detainee, we also find no link to interrogation. The majority (fifty-seven) of the eighty-four States in which the provision of consular notification to the United States is governed by the VCCR and on which we have information routinely notify United States consular officers within seventy-two hours of the detainee's request for notification. In none of these fifty-seven countries, nor in any of the remaining twenty-seven that do not routinely provide consular notification,

is there any law, regulation or judicial precedent absolutely barring questioning of a detained foreign national until consular notification has been given.

6.40. With respect to access, in some States consular officers generally are not allowed to have access to detained foreign nationals during an initial period of detention and investigation. In the vast majority of VCCR countries, however, consular access to detainees—by telephone or in person—is readily granted when requested. Nevertheless, it usually occurs only after at least initial questioning of the detainee. The reasons for this vary: permission from judicial or other officials may be required; consular officers may not learn of the detention for several days (or longer); the detainee may be in a remote location; or the consular officer's workload may not permit an immediate call or visit.

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6.42. Finally, it is important to recognize that many States, including the United States, have entered into bilateral consular agreements that also address the obligations of consular notification. These agreements provide greater, not lesser, protections than the VCCR by ensuring that States are informed when their nationals are detained regardless whether the detainee wishes notification to occur. Under many of the bilateral agreements to which the United States is a party—with nearly sixty other States—notification to the consular officers must occur within a set period of time, in some cases up to four days. With only a few exceptions, the States Parties to these agreements are also parties to the VCCR. The bilateral agreements are intended to ensure that the notification of the consular officer actually occurs within a defined period of time; this demonstrates an understanding that completion of this process "without delay" pursuant to the VCCR could take more time than the bilateral agreements specify. Moreover, even when bilateral agreements require notification "immediately", parties to these agreements do not understand them to require notification before questioning. Nor are these agreements implemented in a way that suggests they bar questioning of a detained foreign national until consular notification has been given.

* * * *

3. States Have Not Accepted Mexico's Proposed Definition Because Resort to that Definition Leads to Absurd Results

6.44. Any serious consideration of Mexico's proposed definition quickly shows that—unlike the meaning given to "without delay" by the United States—it would lead to manifestly absurd results. For example, if we assume *arguendo* that "without delay" means "immediately *and* prior to any interrogation" and implement that definition "literally" as Mexico demands, making it a genuine automatic rule that admits of no exceptions or qualifications, we would quickly find, by reference to a few of the fifty-four cases, that the public would have been seriously endangered. Six of the fifty-four cases involve the disappearance and subsequent murder of adolescents or children. Under Mexico's rule, in some future case, the competent authorities might arrest a foreign national who would know the whereabouts of a possibly still-living child; they would provide consular information before any questioning occurred and, if the detainee requested consular notification, delay any interrogation until the relevant consulate was notified and a consular officer had visited the individual, arranged for assistance and could observe the interrogation. Perhaps Mexico would grant an exception to this hard rule where tender lives are at stake. But would interrogation be permitted in a case where the arrested individual might instead have information about the location of a large drug shipment expected to arrive that day and soon to be for sale on street corners? In the case of the arrest of a person who may have knowledge of the location in an urban center of a bomb that has not yet exploded? What about an individual involved in mislabeling prescription drugs currently in commercial circulation containing toxic substances?

6.45. Leaving aside the dangerous implications that Mexico's rule has for public safety, it is clear that the criminal justice systems in the United States (and most other States Parties to the VCCR) would be seriously impeded if Mexico's interpretation were adopted. There are currently over 17 million foreign nationals living in the United States. Of the 184 States that maintain consulates in the United States, thirty do not have a consulate outside of Washington D.C., and seventeen more do not have consulates other than on the eastern seaboard (typically in New

York and connected with their Mission to the United Nations). Even if only some appreciable minority of the thousands of foreign nationals arrested every day in the United States were to request consular notification, interrogations of these individuals would have to be postponed until the competent United States authorities were able to locate a consular officer and that officer decided whether to communicate with the individual being detained—perhaps as far away from Washington D.C. as Hawaii or Alaska.

6.46. The consular officer could well decide, after some consideration, not to communicate with or assist the detained national. For it is important to remember always that Article 36 does not require consular officers to assist their nationals in detention either "without delay" or at all. Accordingly, United States authorities would be forced to postpone the interrogation of a capital murder suspect indefinitely while waiting for a consular officer to decide whether or not to visit or otherwise communicate with the detainee. Neither the detainee nor the United States would have any legal basis for compelling the consular officer to assist the foreign national and, under Mexico's inflexible rule, proceeding with the interrogation in the absence of a requested consular officer would result in a voided conviction and a new trial.

6.47. Finally, Mexico's interpretation would have the effect of prolonging detentions or making the orderly performance of consular functions impossible. A person may be arrested, detained, charged, and released on bail or other conditions all within a span of twenty-four to forty-eight hours. If immediate notification were required and all processes to cease pending arrival of the consular officer, this might well prolong the detention of the person. Alternatively, if processes were not to cease pending arrival of the consular officer, then those officers would be inundated with notices regarding persons who ultimately are only briefly in custody.

4. The Travaux Préparatoires *Support the Definition Given To "Without Delay" by the United States*

6.48. Customary international law, as reflected in Article 32 of the VCLT, provides that recourse to the *travaux* is had only where interpretation under the principles outlined in Article 31

"leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable". The United States submits that the phrase "without delay" plainly has the meaning given it by the United States, not that given to it by Mexico. . . .

6.49. We address the *travaux*, however, because Mexico has put them at issue. Mexico's claim that "[t]he *travaux préparatoires* confirm that the intent of the phrase 'without delay' was to require unqualified immediacy" rests upon a highly selective reading of the *travaux* to conjure up a consensus that never existed. In fact, the *travaux* fail utterly to support Mexico's assertion that negotiators intended "without delay" to have the special meaning it proposes. Contrary to Mexico's hopeful assertion, the only conclusion that can be drawn "unqualified" from the *travaux* is that, as is so often the case in multilateral negotiations, there was a last minute agreement to use the words "without delay" in relation to the obligation to inform, but no clear consensus as to how this would be applied. Moreover, a full and fair examination also reveals why Mexico failed to provide any supporting citation to the *travaux* to bolster its proposition that "without delay" means "prior to interrogation". The *travaux* expressly contradict Mexico's position on the interrogation point. Indeed, it can be said with complete confidence that there is absolutely nothing in the record indicating that these two words were intended to be related to either the taking or the refraining from taking of specific acts by law enforcement authorities.

* * * *

D. The United States Gives Full Effect To Article 36(1) and Provides the "Review and Reconsideration" Required Under Article 36(2) in Its Criminal Justice Systems and Through Executive Clemency Proceedings

* * * *

***1. The Implications of Article 36(2) and* LaGrand *for the Laws* and Regulations of the Receiving State**

* * * *

6.55. Significantly, when it announced its remedy in the *dispositif* [in the *LaGrand* case], the Court did not say that review and reconsideration must be provided by the courts, even though the breach had arisen from judicial application of the procedural default rule. Rather, the Court held that, in the event of a breach of Article 36(1)(b), "the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention". This holding clearly confirmed what Article 36(2) expressly permits—that receiving States may establish laws and regulations of general applicability, without creating special laws and regulations for foreign nationals, so long as they ensure that the purposes of Article 36(1) are given full effect. As the first sentence of Article 36(2) requires, the precise contours of the process of review and reconsideration are left to the discretion of the receiving State.

6.56. Thus, as construed by the Court in *LaGrand*, Article 36(2) has two functions—basic function, and a remedial function. Its basic function is to make clear that the obligations established by Article 36(1) should be exercised in accordance with the laws and regulations of the receiving State—which laws can include those governing the criminal justice process, but such laws and regulations should "enable full effect to be given to the purposes" for which those obligations are undertaken. Second, in the event that a breach of Article 36(1)(b) has occurred and serious penalties have been imposed on a foreign national detainee, the receiving State should still give full effect to the purposes of Article 36(1)(b) by providing "review and reconsideration of the conviction and sentence" in light of the violation, by means of its own choosing. These are two distinct functions, both arising under Article 36(2), that may overlap in their execution.

* * * *

6.58. Mexico's focus on the remedial function of Article 36(2) ignores its more basic function, which is to emphasize the rights of the receiving State to conduct its own affairs in accordance with its own laws. The Court's holding in *LaGrand*, that procedural default rules of the receiving State are not automatically

inconsistent with the obligations imposed by Article 36(2), respected this basic function. But Mexico conflates these functions, which must be considered separately and in their proper sequence: first, the basic function; and then the remedial one. Mexico has instead started with the remedial function and then attempted to recast the basic function of Article 36(2), finding in it affirmative obligations on the receiving State that do not in fact exist—making the tail wag the dog.

* * * *

6.60. The proviso establishes no affirmative obligation to create laws or regulations; it instead provides a boundary on the discretion of the receiving State. Moreover, the proviso should be read and understood precisely—its requirement is that "full effect" must be given to the "purposes" of Article 36. It is not that laws and regulations must be adapted or changed in any particular way, or that they must give effect to purposes that are not intended by Article 36(1).

* * * *

2. The United States Criminal Justice Systems Give "Full Effect" to Article 36(1), and Provide Appropriate Remedies for Breaches, Through the Judicial Process

6.63. The first respect in which Mexico claims that the United States has breached Article 36(2) is by "foreclosing legal challenges to convictions and death sentences" through the application of procedural default rules. Mexico is unwilling to accept the fact the criminal justice systems of the United States address all errors in process through both judicial and executive clemency proceedings, relying upon the latter when rules of default have closed out the possibility of the former. That is, the "laws and regulations" of the United States provide for the correction of mistakes that may be relevant to a criminal defendant to occur through a combination of judicial review and clemency. These processes together, working with other competent authorities, give full effect to the purposes for which Article 36(1) is intended, in conformity with Article 36(2). And, insofar as a breach of Article

36(1) has occurred, these procedures satisfy the remedial function of Article 36(2) by allowing the United States to provide review and reconsideration of convictions and sentences consistent with *LaGrand*.

6.64. In the first instance, the judicial system can deal with any claim arising from Article 36(1) if it is timely raised. Indeed, the United States affirmatively encourages judicial authorities to ensure that consular notification requirements have been complied with, and some states have placed the obligation of providing or confirming consular information on their magistrates. If Article 36(1) is not fully complied with, trial courts can consider requests for extensions of time to permit consular notification or even assistance, if offered, or for other relief based on the breach. They will not automatically bar the use of a defendant's statements simply because the defendant was not provided with consular information on a timely basis, but they will bar the use of a statement if the foreign national gave it involuntarily or without understanding and waiving his "*Miranda*" rights. This approach cannot offend the remedial requirements of Article 36(2), given that the purposes of Article 36(1) do not include altering the normal course of law enforcement investigations or preventing the taking of statements.

6.65. In addition, the United States provides review and reconsideration through extensive appellate and collateral review of trials and sentencing hearings. In those cases where a VCCR breach is alleged at trial, appeal courts will review how the lower court handled that claim along with all others in the normal process of direct appeal and collateral review, in accordance with relevant municipal law. In this way, review and reconsideration takes place in the normal course of appellate review of all asserted errors at trial. In cases in which the defendant does not claim a VCCR breach during trial, however, procedural default rules will possibly preclude such claims on direct appeal or collateral review, unless the court finds there is cause for the default and prejudice as a result of the alleged breach. Procedural default rules, in and of themselves, do not breach Article 36(2). This Court so stated in *LaGrand*. Indeed, such rules, in various forms, are common worldwide. . . .

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3. The United States Criminal Justice Systems Also Give "Full Effect" To Article 36(1) Through Executive Clemency Proceedings

6.67. Mexico argues that the United States cannot fulfill the remedial aspects of Article 36(2) through the clemency process because executive clemency proceedings do not provide "uniform, fair or meaningful" review and reconsideration. Mexico is wrong. While the clemency procedures of the fifty states of the United States are not uniform (just as their judicial systems are not), these procedures are an integral part of the existing "laws and regulations" of the United States through which errors are addressed, and they provide an appropriate mechanism for review and reconsideration in cases where breaches of Article 36(1)(b) have occurred. Where judicial remedies have been exhausted and yet review and reconsideration has not taken place, the United States can nonetheless meet its obligations through the clemency process.

6.68. Clemency is defined as "[m]ercy or leniency . . . the power of the President or a governor to pardon a criminal or commute a criminal sentence". It is an executive prerogative with deep roots within the common law system, understood historically both as a vehicle for leniency or mercy, and as a means to ensure fair and correct legal outcomes. Clemency in the modern era has been viewed less as a means of grace and more as a part of the constitutional scheme for ensuring justice and fairness in the legal process. It recognizes that criminal justice systems require fail-safe mechanisms to deal with claims that were not, could not, or should not have been considered by the courts. As the United States Supreme Court indicated, clemency functions effectively as "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted". As one recent commentator noted, "clemency is uniquely positioned to correct legal error". It remains an important feature of common law systems worldwide, including both the federal government of the United States, as well as all states that permit capital sentences.

6.69. Mexico has suggested that, because clemency has sometimes been described as an act of grace, it is not a legal remedy. This ignores the fact that each of the fifty-four defendants has a legal right to petition for clemency. No issue, including a claim of breach of the VCCR, is *a priori* excluded from that process. It is the result of the process, not the availability of the process, that depends on the "grace"—or broad discretion—of the decision maker; the availability of the process is a right. Moreover, it is that broad discretion to grant clemency that allows the process to take account of any claim; for example, that broad discretion allowed Illinois Governor George Ryan to commute the sentences of three of the fifty-four Mexican nationals in this case based, at least in part, on their having allegedly not received consular information as required

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4. Article 36(2) Does Not Compel States Parties to Treat Article 36(1) as Creating Rights that are Fundamental to Due Process

6.79. Next, we address Mexico's complaint that the "refusal [of the United States courts] to recognize Article 36 rights as fundamental to due process for a foreign national . . . prevents the courts 'from attaching any legal significance' " to Article 36(1) breaches. Mexico devotes considerable effort to arguing that consular notification and assistance are due process rights, even human rights. Mexico does this in order to support its claim that Article 36(2) requires the United States courts to treat a breach of Article 36(1) as a fundamental due process violation, which in Mexico's view would necessitate the imposition of certain heightened remedies under both international law and United States law. This Court elided any consideration of these arguments when they were made by Germany in *LaGrand*. This Court should now reject them.

6.80. To take Mexico's human rights argument first, the VCCR is not (and, as will be explained below, was never intended to be) a human rights instrument. The VCCR is about consular relations between States, as clearly stated in its preamble. Indeed, one looks

in vain for the inclusion of consular notification in any international or regional human rights document, such as the European Convention on Human Right, and the United States was unable to find the VCCR included in any volume compiling human rights instruments. The protections it provides are conferred on the basis of reciprocity, nationality, and function, and they inure only to nationals of States Parties. They are not applicable *erga omnes*. They are not enjoyed by all human beings simply by virtue of their human existence—the standard definition of a human right. For these reasons, it cannot be said that informing a detained person that he or she may have a consular official notified of his or her arrest is a "human right." Mexico has provided no evidence to the contrary. Its position on this distorts the nature of the requirements of Article 36(1)(b) and trivializes the concept of a human right.

6.81. Mexico hinges its argument, though, on the fallacy that the requirements of Article 36(1)(b) are fundamental to due process, claiming that consular notification is "an essential requirement for fair criminal proceedings against foreign nationals". It implies that this Court, in interpreting the VCCR, has a mandate to determine what a State's criminal justice system must regard as "due process" rights or as "fundamental" rights, thereby taking on the role for the United States that the United States courts have long assumed in making these determinations under the "due process" clauses of the United States Constitution. Moreover, to lend credence to its argument, which persistently overstates the purposes and the importance of Article 36(1)(b), Mexico denigrates the United States criminal justice systems, making the reckless and inaccurate assertion that, in the United States, "foreign nationals —and Mexican nationals in particular—are frequently subject to discriminatory treatment as a consequence of their race and immigrant status . . . in the courtrooms, jails, and lawyers offices . . .". Mexico's not-so-subtle implication, here and throughout its argument, is that United States courts do not (and cannot be trusted to) provide fair trials in *any* case in which the defendant is a foreign national. This is a profoundly offensive argument. The United States Constitution guarantees all those who stand accused a fair trial, regardless of nationality. The

Constitution's substantive and procedural safeguards, and especially the legal assistance provided to indigents in the United States, exceed every international standard for fairness and justice. Thus, it simply does not follow, as Mexico would have it, that a breach of Article 36 leads ineluctably to an unfair trial in the United States.

6.82. Leaving aside Mexico's highly inappropriate request that the Court condemn the entire criminal justice system of the United States, or that it redefine the concept of "due process" in the criminal justice system of the United States, it is not the case that the requirements of Article 36(1)(b) are fundamental to the fairness of a criminal trial, whether as aspects of due process or otherwise. As Professor Weigend explains, Article 36(1) establishes procedural rights, not substantive rights, and the procedural rights it establishes are at best tangential to the criminal process. They do not necessarily attach to the criminal process at all: if a foreign national is charged and tried without being arrested or otherwise detained, there is no obligation to inform him of the possibility of consular notification. Accordingly, national criminal justice systems do not accord the obligations of providing consular information and notification the status Mexico claims they have. Thus it is wrong to suggest that the "laws and regulations" of the United States must give Article 36(1)(b) the status of a constitutional protection in order to comply with the proviso of Article 36(2). . . .

6.83. Mexico consistently confuses the requirements of consular information and notification, which are all that Article 36(1)(b) protects, with the right of the sending State to provide consular assistance under Article 36(1)(c). And it persistently ignores the fact that consular assistance, by the VCCR's own terms, is discretionary (both as to the State and its national). Consular officers have no international legal duty to respond to the request of the defendant, and the ability of all governments to provide assistance to their nationals abroad is limited by resource constraints, if nothing else. Further, to rely on consular assistance as essential to ensure due process for foreign nationals in criminal proceedings is contrary to, and would undermine, the clear obligation of all States to provide due process. Fair trial and due

process rights guarantees do not, cannot, and should not depend on the consular intervention of other States in order to be redeemed. Thus, it cannot be accepted, as Mexico would have it, that a foreign national under no circumstances can receive a fair trial in the absence of consular assistance.

6.84. With the exception of an advisory opinion of the Inter-American Court of Human Rights in an advisory proceeding initiated by Mexico—a decision which has attracted no support from any other national or international court—consular notification has never been understood by the international community to be an essential element of due process and fair trial protections.

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6.86. . . . Mexico has pointed to no State that considers Article 36(1)(b) as fundamental to due process and to no State that provides the remedies Mexico seeks. Moreover, it is not even the general practice of States to provide such remedies on an automatic basis with respect to rights that are more central to their criminal justice systems.

6.87. This is certainly true of the United States. As the Court is aware, United States courts do not require automatic exclusion of statements from use in evidence for a breach of Article 36(1)(b). Nor do United States courts require the *vacatur* of a conviction or sentence in those circumstances. This is because United States courts follow the general rule that such remedies are rarely granted, and then only for constitutional violations or when explicitly mandated by statute. They do not consider Article 36(1)(b) as fundamental to due process. Consistent with this practice, the United States does not insist upon such remedies for United States citizens abroad for the mere failure to follow the procedures set forth in Article 36.

6.88. This result is also true, however, of Mexico. The United States is aware of no instance in which Mexican courts have vacated a criminal verdict to remedy a breach of Article 36(1)(b), and Mexico has referred the Court to no such case. Indeed, in 1976, the United States and Mexico entered into a prisoner transfer

agreement with the conscious understanding that United States prisoners in Mexico, with respect to whom Article 36(1)(b) had not been honored and who were transferred to the United States, would have their Mexican sentence enforced by the United States, regardless of the breach. Mexico insisted on this understanding. If Mexico in the intervening years had truly believed that Article 36(1)(b) created fundamental rights, one might expect that Mexico would have established a domestic program enforcing its VCCR obligations by requiring the stringent application of the remedies it advocates in this case. Instead, it appears that, even as of today, Mexico has not implemented such a program.

6.89. Article 128, Section IV of Mexico's Federal Code of Criminal Procedure requires that the detention of a foreign national be communicated immediately to the sending State's diplomatic or consular mission. Mexican law, however, provides no judicial remedy for the failure by Mexican authorities to comply with Article 128.IV, or otherwise to provide notice to detained foreign nationals of VCCR requirements. . . .

6.90. When we look beyond the practice of the United States and Mexico, we see that the few reported national court decisions that deal with alleged failures to advise a foreign national of consular information are squarely at odds with Mexico's position. In no case has a court described or treated Article 36(1)(b) as fundamental to due process.

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CHAPTER VIII

IF THE COURT FINDS A BREACH OF ARTICLE 36(1), IT SHOULD APPLY THE SAME REMEDY HERE AS IT ORDERED IN *LAGRAND*—"REVIEW AND RECONSIDERATION"—AND SHOULD NOT GRANT MEXICO'S REQUESTS FOR *VACATUR*, EXCLUSION, ORDERS OF CESSATION AND GUARANTEES OF NON-REPETITION

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A. Mexico's Proposed Restitution Remedy Should be Rejected Because It Asserts a Form of Restitution Not Appropriate to the Circumstances of Individual Cases Involving Breaches of Article 36

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8.3. Mexico's proposed application of *restitutio in integrum* is unprecedented and far-reaching when viewed against the customary contours of what is in any event an exceptional legal remedy. Mexico would have the Court declare that the United States is under the extraordinary obligation to vacate the convictions and sentences of all fifty-four Mexican nationals, to exclude in any subsequent legal proceedings any statements or confessions obtained prior to consular notification and assistance, to prevent the application of any procedural penalty for a defendant's failure to raise a known VCCR claim on a timely basis, to prevent the application of any law that would bar a United States court from providing a remedy for a VCCR breach, and to prevent the application of any law that would require an individualized showing of prejudice as a prerequisite to relief.

8.4. The Court should reject Mexico's misplaced attempt to apply a theoretical form of *restitutio in integrum* in a context for which it is not suited. While there may be cases—such as the return of property to its rightful owner—in which it may be appropriate for the Court to order what might be regarded as a return to the *status quo ante*, such a concept is not appropriate in the circumstances of this case. . . .

1. Review and Reconsideration Satisfies the Purpose of Reparations and Strikes the Appropriate Balance of the Rights and Interests at Stake

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8.9. In the Commentaries to its Draft Articles on State Responsibility, the International Law Commission expressly addressed the application of restitution in the circumstances at issue in this case. The Commentary states:

> The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, *in cases of restitution not involving the return of persons, property or territory of the injured State*, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.

The Commentary then continues in a footnote:

> Thus in the *LaGrand* case, the Court indicated that a breach of the notification requirement in art. 36 of the Vienna Convention on Consular Relations . . . leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction "by taking account of the violation of the rights set forth in the Convention". . . . This would be a form of restitution which took into account the limited character of the rights in issue.

As the International Law Commission agreed, review and reconsideration is the appropriate remedy in VCCR cases given the respective natures of the rights and interests at issue: in this case, the interest of the United States in the fair, expeditious and orderly administration of justice; and the interest of Mexico in the performance of consular information and notification.

* * * *

2. Mexico's Proposed Remedy Is Inconsistent with the Requirement of a Causal Link Between any Breach Proven and the Harm Resulting

8.18. No relief would be appropriate in any case in which the same legal outcome actually reached would have resulted absent

the breach. In such cases, as the International Law Commission's Special Rapporteur on State Responsibility, Professor Crawford, has explained, "the notion of a *general* return to the earlier situation may be excluded". Indeed, he has aptly observed that, in the particular context of cases involving capital sentences where there was a breach of the VCCR:

> [T]he 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 the failure of notification had no effect on the conviction. . . . Only if a sufficient causal connection could be established between the United States' failure to notify and the outcome of the trial could the question of restitution arise at all.

8.19. As President Shi stated in his Separate Opinion in *LaGrand*, the review and reconsideration remedy allows measures to be taken only "to prevent injustice or an error in conviction or sentencing". The determination whether the breach warrants changing the conviction or sentence depends critically on the facts of each particular case, the application of relevant municipal law, and other factors.

3. Review and Reconsideration is Consistent with this Court's Conception of its Own Role and the Decisions of Other International Courts and Tribunals

8.20. A division of competences characterizes adjudication before the Court. It falls to the Court to resolve particular cases. In the event the Court determines that a party's act was unlawful and requires a remedy, it then falls to that party to implement the Court's decision in the context of its own system. In many cases, there will be multiple ways in which parties could appropriately give effect to the Court's decision. In such circumstances, the Court has consistently declined to require a particular means of compliance. As the Court held in the *Haya de la Torre* case, the

various choices regarding the means of implementing the Court's decision "are conditioned by facts and by possibilities which, to a very large extent, the Parties alone are in a position to appreciate. A choice amongst them could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice". . . .

8.21. For the same reasons, the Court has only rarely ordered states to take specific actions and has never made orders as broad as those Mexico requests here. In this regard, it bears recalling that the United States specifically sought, in its Application and in its Submission in the *Tehran Hostages* case, an order from this Court directing Iran to submit to its authorities for prosecution under municipal law or to extradite to the United States the persons responsible for the breach of the VCCR. Yet, this Court denied this request without comment, evidently because it did not consider its functions to include what would have amounted to dictating to a State and its courts whether and how to conduct criminal proceedings. Even in those few cases in which the Court did effectively direct a State to take a particular action, it did not specify the means by which the State was to implement the judgment.

* * * *

4. There is No Legal Basis for the Automatic and Categorical Exclusionary Rule Mexico Has Demanded

8.27. Just as it would be unprecedented for the Court to order the *vacatur* of the convictions and sentences at issue in this case, so too it would be unprecedented (and without legal foundation) for this Court to decide that United States municipal courts should exclude from evidence "in any subsequent criminal proceedings against the [Mexican] nationals, statements and confessions obtained prior to notification to the national of his right to consular assistance". Such an order would amount to judicial legislation, completely at odds with fundamental notions of State sovereignty and judicial independence. It would have no basis in customary

international law and no support whatsoever in the text of the VCCR.

8.28. Mexico asserts that the exclusionary rule is a general principle of law, since it "applies in both common law and civil law jurisdictions and requires the exclusion of evidence that is obtained in a manner that violates due process obligations". Mexico contends on this basis that the Court should order the exclusion of all statements and confessions made by the defendants to officials prior to being provided with consular information. Mexico has overstated the pervasiveness of the exclusionary rule in legal systems throughout the world, has not taken into account its varying forms, and ignores the fact that it has never been used to mandate exclusion of statements made by a defendant prior to receiving consular information, as Mexico demands.

8.29. While it is true that some legal systems have begun, in the last twenty-five years, to use exclusionary rules in different ways and for varying purposes, the practice is not by any means widespread or consistent enough to be considered a "general principle of law". As recently as the 1970s, the automatic exclusionary rule adopted by the United States Supreme Court was seen as a "peculiarity". Other forms of an exclusionary rule have since been adopted in other jurisdictions. But even considering the varying forms of exclusion collectively, exclusion certainly does not constitute the majority position. As Professor Weigend explains, "Exclusion of evidence as a sanction for employing illegal means in obtaining it has some appeal for legal systems adhering to the adversary mode of adjudicating cases". In legal systems using the "inquisitorial" mode for fact-finding, however, "it is the court's responsibility to find the truth regardless of the activity or passivity of the prosecution and defense". In such systems, depriving the court of relevant information by excluding evidence "makes little sense". The majority of legal systems "do not recognize a strict 'automatic' exclusionary rule". Rather, they "tend to generally admit relevant evidence even if it was obtained in violation of a legal rule, but exclude evidence which is either inherently unreliable . . . or undesirable".

8.30. Furthermore, the purposes of these rules differ. In the United States, the exclusionary principle is in large part viewed as

a prophylactic judicial remedy designed to deter Constitutional violations. Exclusionary rules will serve other purposes in other criminal courts. The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court, for example, exclude evidence "obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings". Statements made without consular information "would undoubtedly be admitted" under this standard.

8.31. Mexico has failed to point to even a single instance in which any national court or any national legislature has concluded that the automatic exclusion of all statements and confessions made by an accused to the authorities prior to receipt of consular information is an appropriate remedy for a breach of Article 36, whatever the purpose of their rule. Not one. In fact, the only area of consensus among the limited number of States that have adopted an exclusionary rule is in applying the rule as a remedy for involuntary confessions, which cannot be equated to a breach of Article 36. Clearly State practice does not indicate the emergence of new customary international law, contrary to Mexico's assertion.

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8.33. In particular, Mexico's emphasis on its own newly adopted exclusionary rule is highly misleading in this regard. Mexican courts have upheld the introduction of coerced or otherwise compromised confessions despite the advent of certain constitutional guarantees. Moreover, the significance of the rule as articulated by Mexico is grossly overblown since there are numerous instances in which exclusionary protections are utterly lacking in Mexico. In particular, one notes the total absence of reported cases that would automatically bar evidence obtained via arbitrary detention and, more relevant to this case, that would automatically exclude evidence obtained against a non-Mexican defendant where his or her consulate was not notified pursuant to law. The meager protection offered by Mexico's rule flatly undermines its effort to equate a general exclusionary principle with common State practice.

* * * *

B. Mexico is not Entitled to the Order of Cessation and Guarantees of Non-Repetition that it Demands

8.35. In *LaGrand*, the Court held that the commitment to improved compliance expressed by the United States, coupled with the "review and reconsideration" remedy, satisfied Germany's demands for guarantees of non-repetition.

8.36. Mexico submits that "the Court can no longer accept as adequate the assurances provided in *LaGrand*". Yet the United States has demonstrated that its efforts to improve the conveyance of information about consular notification are continuing unabated and are achieving tangible results. Mexico asserts that the remedy ordered in *LaGrand* has "proven ineffective to prevent the regular and continuing violation by its competent authorities of consular notification and assistance rights guaranteed by Article 36". However, Mexico's Memorial wholly fails to establish a "regular and continuing" pattern of breaches of Article 36 in the wake of *LaGrand*, nor could it, given the extraordinary lengths to which the United States has gone to implement this Court's directives. As the Court noted in *LaGrand*, "no State could give a guarantee [that there will never again be a failure to observe the obligation of notification under Article 36 of the VCCR]". Yet Mexico seizes upon isolated cases alleging such failure in its efforts to overturn the Court's judgment in *LaGrand*. Moreover, Mexico has failed utterly to prove its claim that the means that the United States has chosen to carry out the review and reconsideration remedy are inadequate. . . .

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MEXICO VS. UNITED STATES, VERBATIM RECORD, INTERNATIONAL COURT OF JUSTICE, 12 DECEMBER 2003

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Ms. Brown:

V. INTERPRETATION OF ARTICLE 36(1)

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Mexico's interpretation would lead to absurd results and be impracticable

5.22. Mr. President, Members of the Court, the fact that no State has understood Article 36(1) to require consular access before interrogation should come as no surprise, because it would lead to absurd results to do so. . . . We have already noted that the consular officer has no obligation to visit, to communicate with, or to assist his national. Holding an interrogation in abeyance pending a consular response could jeopardize an investigation or threaten public safety; but to hold it in abeyance when a consular officer has no obligation to respond, and may never do so, would effectively hold the receiving State's criminal investigation hostage to the resource limitations and consular priorities of the sending State. Mexico yesterday suggested that this fundamental problem could be addressed by the Court articulating an elaborate rule allowing a reasonable time for access depending on the severity of the crime and the proximity of the consular post. Leaving aside the obvious fact that this proposal would effectively have the Court rewrite the Convention, it would yield even more absurd results. Instead of a single rule for all States parties, authorities in each State would make subjective determinations about the seriousness of the crime and the relative availability of consular officers from 165 different countries to respond. The result would be hundreds of different rules delaying investigations for varying and unpredictable lengths of time.

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Mr. Mathias:

VI. Interpretation of Article 36, paragraph 2

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6.17. . . . Mexico has asserted that "the Court determined in *LaGrand* that clemency review alone did not constitute the required review and reconsideration. No basis for this statement is given, nor could it be, as the Court made no such determination. The clemency processes in respect of the LaGrand brothers were not

part of the Court's *dispositif* in *LaGrand*, nor did the Court expressly discuss clemency in its reasoning. Moreover, as the United States has conformed its conduct subsequently to *LaGrand*, the clemency process is now informed by the review and reconsideration requirement.

6.18. Mexico has also asserted that "it is clear that the Court's direction to the United States in *LaGrand* clearly contemplates that 'review and reconsideration' would be carried out by judicial procedures". No basis for this statement is provided either, and for the same reason. . . . The Court in *LaGrand* did note that Germany had argued for a result that "where it cannot be excluded that the judgment was impaired by the violation of the right to consular notification, appellate proceedings allow for a reversal of the judgment and for either a retrial or a re-sentencing". . . . Notably, there is no reference to appellate proceedings in the Court's discussion of its review and reconsideration remedy, and no such thing in the *dispositif*. In its place is the Court's express conclusion that the review and reconsideration "obligation can be carried out in various ways. The choice of means must be left to the United States." The Court pointedly *did not* approve Germany's requested remedy of appellate review.

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C. There is no basis for a case-by-case review of compliance with Article 36(2)

6.21. One additional point relates to the nature of the review to be carried out by the Court in this case. In the *LaGrand* case, as the Court is aware, it found that the breach of Article 36(2), "was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such". In that case, the record before the Court fully documented the proceedings related to the LaGrand brothers. There was an uncontested factual basis upon which the Court could rest its conclusion with respect to Article 36(2). Here, even as lately supplemented by Mexico, the evidence it has submitted is far from providing a basis on which the Court could assess the compliance of the United States with its

obligations under this provision with respect to the 52 named Mexican nationals.

6.22. In addition, with respect to the 52 individual cases, a final assessment of United States compliance could not in any case be undertaken by the Court because the cases remain ongoing. It is for this reason that none of these 52 cases is admissible, and Mexico's claims concerning them must be rejected. At most, therefore, in these proceedings, the appropriate assessment by the Court should be limited to the relevant laws and regulations as such, and the Court's judgment should not include 52 separate assessments addressing the compliance of the United States with the obligation set forth in Article 36(2) in respect of each of the named Mexican nationals.

6.23. There is an additional, independent reason why the Court should go no further in this case than to review the relevant laws and regulations of the United States as such. It would have the advantage of corresponding more closely to the nature of the obligation undertaken by the States parties in the proviso to Article 36(2). That obligation, after all, is stated generally: that the laws and regulations of a State party must enable full effect to be given to the purposes for which Article 36(1) was intended. It is an undertaking by a State as to the nature of its laws and regulations, it is not a guarantee with respect to the application of those laws and regulations in any particular case. Mexico's claims with respect to Article 36(2) in this case should be dismissed because the laws and regulations of the United States *are* structured so as to provide for the review and reconsideration required by the Court. . . .

Mr. Thessin:

VIII. THE UNITED STATES PROVIDES THE "REVIEW AND RECONSIDERATION" REQUIRED UNDER ARTICLE 36(2) IN ITS CRIMINAL JUSTICE SYSTEMS AND THROUGH EXECUTIVE CLEMENCY PROCEEDINGS

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Review and reconsideration in the judicial process

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8.10. Let us now examine more closely how the United States judicial systems provide remedies for violations of the fundamental concerns Mexico seeks to prevent. At the trial stage, every defendant has the opportunity to show how any breach of Article 36 known to him or his counsel affected his due process rights, whether or not the trial court labels this review as one invoking an "individual" or a "fundamental" Vienna Convention claim. On occasion, a defendant may decide for whatever reason, strategic or otherwise, not to raise a claim at trial even though he is aware of a breach. In fact, at least eight of the 52 Mexican nationals at issue in this case knew of a possible claim, but chose not to raise the issue at trial. . . .

8.11. If a defendant does choose to raise such a claim, trial courts have the power to decide whether the failure to provide consular information produced an error impairing a particular right of sufficient significance to warrant a remedy. Trial courts have the power to exclude statements if the foreign national gave them involuntarily or waived his rights without understanding them. For example, in the case of Carlos Alvarez and Ramiro Hernandez, both defendants moved to suppress their statements but were unable to show that their statements were involuntarily made. Trial courts can also order postponements and extensions of time to permit consular notification or even consular assistance, if offered. Trial courts have the broad power to fashion other appropriate relief, including further discovery of evidence or the replacement of unsatisfactory counsel. For example, in the case of Mendoza Garcia, although the court denied a motion to suppress statements he had made to the police, the court issued an order asking the Government of Mexico to assist in bringing defense witnesses to the United States to testify on his behalf.

8.12. Every foreign national has the opportunity during the appellate and collateral review processes to show how the failure of consular notification deprived him of his due process rights or in any way affected the fundamental fairness of his trial. In those cases where the defendant has alleged at trial that a failure of

consular information has resulted in harm to a particular right, an appeals court can review how the lower court handled the claim [of prejudice].

Mr. Taft:

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8.12. . . . If the foreign national did not raise his Article 36 claim at trial, he may face procedural constraints on raising that particular claim in direct or collateral judicial appeals. This is not surprising. Procedural default principles are common worldwide and, as the Court said in *LaGrand*, they do not breach Article 36(2). Absent a requirement to raise issues in a timely way, defendants would always postpone raising claims until they were found guilty and would then seek to start the trial over.

8.13. But the key is to understand what is and what is not defaulted. For example, Mexico claims that it provides competent interpreters. If the interpreter at the trial is not competent, the defendant can demand relief on appeal about the inadequate interpretation services. Whatever label he places on his claim, his right to competent interpretation must and will be vindicated if it is raised in some form at trial. In that way, even though a failure to label the complaint as a breach of the Vienna Convention may mean that he has technically speaking forfeited his right to raise this issue as a Vienna Convention claim, on appeal that failure would not bar him from independently asserting a claim that he was prejudiced because he lacked this critical protection needed for a fair trial.

8.14. Let us put this issue in perspective. By Mexico's own concession, in only eight out of the 52 cases has a court determined that Vienna Convention claims were procedurally defaulted due to the defendant's failure to raise the claim at trial. And in most of these eight cases, the courts evaluated consular-related harm to the foreign national either by reviewing the Convention claim for prejudice despite the default or by reviewing other, related claims on their merits. For example, Mr. Plata Estrada did not raise a Vienna Convention claim at trial, but he did do so on appeal. Although the appeals court noted that he was procedurally barred from bringing such a claim at that stage, it also noted that he did

not claim or show that he was discriminated against; or that his trial counsel was not experienced in the area of capital litigation; or that his trial counsel was otherwise deficient in the representation. Plata Estrada did, however, argue that his guilty plea was coerced and two different appellate courts reviewed this issue in considerable detail.

This careful review process occurred also in the case of *Valdez* v. *Oklahoma*. Although Valdez's claim under the Convention was procedurally defaulted, the Oklahoma court vacated the capital sentence and ordered a new sentencing procedure because Valdez's trial counsel was ineffective in failing to uncover significant mitigating evidence that was subsequently discovered through the intervention and assistance of the Mexican consulate.

8.15. The lesson from this is clear: Do not be misled by Mexico's assertion that US courts fail to provide review and reconsideration if they do not label a claim as a Vienna Convention claim. Even if a US court will not consider the failure of consular information as an issue in its own right, courts will consider properly preserved independent claims that the due process rights of a foreign national were unacceptably compromised in prior proceedings. And, certainly, the defendant may amplify this claim by explaining how the failure of consular notification contributed to this unacceptable result. And they have done so.

* * * *

Review and reconsideration in the clemency process

8.17. Mr. President, Members of the Court, the United States also gives "full effect" to the "purposes for which the rights accorded under [Article 36(1)] are intended" through executive clemency proceedings. The clemency process with its deep roots within the common law system is well suited to the task of providing review and reconsideration.

8.18. Clemency procedures supplement review in the judicial stages. They also function alone. . . .

* * * *

8.20. Every state where a Mexican faces capital punishment has careful procedures that give each individual a full opportunity

to have his clemency application fairly heard. Applications raising significant claims are thoroughly investigated. This includes: reviewing information received from interested parties; some states permit public hearings where both proponents and opponents of clemency can make their arguments; the clemency authority will then make a decision, with the Governor often receiving a written recommendation from the administrative board responsible for investigating and considering clemency applications.

8.21. Two points are particularly noteworthy. First, these clemency procedures allow for broad participation by advocates of clemency, including an inmate's attorney and the sending state's consular officer. Indeed, participation is not limited to the consular officer. The President of Mexico, in several instances, and even Pope John Paul II in the case of a non-Mexican in Missouri have personally made successful clemency pleas to state Governors on behalf of defendants convicted of capital crimes. Second, these clemency officials are not bound by principles of procedural default, finality, prejudice standards, or any other limitations on judicial review. They may consider any facts and circumstances that they deem appropriate and relevant, including specifically Vienna Convention claims.

8.22. Mexico attacks unfairly the integrity of the decision-makers in this process. The state legislatures that created these processes, and the Governors and clemency boards that implement them, are properly established institutions under the laws of the United States. They, and the processes they oversee, are entitled to the presumption that they operate in good faith and on a regular basis according to United States law. Mexico has provided no basis for this Court to find otherwise, even if this Court were accustomed to assess the merits of State legal systems, which it is not.

8.23. Nor, as Mexico claims, can clemency fairly be said to be a process that reviews only sentences, but not convictions. Even ignoring Mexico's concession that these 52 individuals in the cases before the Court "committed abominable crimes", clemency in fact results in pardons of convictions as well as commutations of sentences. Within the last year, for example, one Governor pardoned 38 individuals convicted of non-capital crimes, and this

occurred in Texas, a state whose process of clemency Mexico has disparaged.

* * * *

8.25. Although you would not know it from Mexico's presentation, clemency is a process that works carefully, fairly, and successfully to review and reconsider breaches of Article 36. Since this Court's decision in *LaGrand,* we are aware of seven foreign nationals sentenced to death whose Vienna Convention claims were reviewed and reconsidered in clemency. Of these seven, the sentences of five were commuted in clemency. In a sixth case, the Governor's concerns for the Vienna Convention claims set in motion a series of events that, as you heard yesterday, resulted in the imposition of a sentence of life imprisonment in lieu of the death penalty. And in one case, clemency was denied.

8.26. As I now describe these seven cases, ask yourself whether or not the clemency process, in Mexico's words, "rarely, if ever, includes a review and reconsideration of the effect of a violation of the Vienna Convention". Ask yourself also whether "violations of the Vienna Convention are given no weight in clemency review".

8.27. In January of 2003, the Governor of Illinois granted clemency in capital cases to five foreign nationals, including three Mexican nationals who are the subject of this case. In announcing his decision, the Illinois Governor made clear that he was influenced by what he understood to be violations of Article 36. As the Governor put it:

> "Another issue that came up in my individual, case-by-case review was the issue of international law. The Vienna Convention protects US citizens abroad and foreign nationals in the United States. It provides that if you are arrested, you should be afforded the opportunity to contact your consulate. There are five men on death row who were denied"—in the less precise language of the Governor—"that internationally recognized human right. Mexico's President Vicente Fox contacted me to express his deep concern for the Vienna Convention violations."

8.28. The Governor's decision followed an established process. The Illinois Prisoner Review Board thoroughly reviewed all claims and considered all materials collected in connection with the applications, including letters of support from the Mexican Government presenting its views on the *LaGrand* decision. The Board held extensive hearings in each case except one, where the defendant chose not to file a petition for clemency. After the hearings, the Board made non-binding and confidential recommendations to the Governor.

8.29. In a sixth case, in August of 2002, the Texas Board of Pardons and Paroles, recommended against clemency for Javier Suarez Medina. The Governor followed that recommendation as he was required to do by law. But before the Board made its recommendation, several actions ensured full review and reconsideration. When Mexico brought the case to the attention of the Department of State, we contacted the Governor and the Board, drawing attention to the failure to provide consular information and inviting consideration of that fact and of this Court's decision in *LaGrand* during the clemency proceedings. The Chairman of the Board met personally with Mexican officials to discuss the petition and Mexico's views regarding the failure to provide consular information. All Board members received Mexico's written synopsis of its presentation along with copies of all the materials that Mexico supplied. To allow adequate time to review and consider the materials submitted on the consular information issue, the Board extended the deadline for its consideration. . . .

8.30. Mexico quarrels with the outcome, but it provides no basis for the Court to conclude that the Board either failed to review and reconsider carefully the conviction and sentence or decided unreasonably that the Vienna Convention claim did not require setting them aside. In front of witnesses, Suarez Medina shot an undercover police officer eight times. He confessed to the killing, but clearly would have been convicted regardless of his confession. The sufficiency of the evidence of his guilt was never in doubt, and the fundamental fairness of his trial was examined at multiple stages of post-conviction review. He was not unreasonably or unfairly barred from raising his claim under the

Convention on appeal—in fact he and Mexico knew of the claim from June 1989, but between then and 2002, 13 years later, neither he nor Mexico raised the issue at all as a basis for challenging his conviction or sentence on direct appeal or in collateral challenges.

8.31. In the final case, the Governor of Oklahoma in July of 2001 denied clemency for Gerardo Valdez Maltos, after receiving a favourable recommendation for clemency from the Oklahoma Pardon and Parole Board. The Governor, however, then granted a stay of execution to allow for further judicial appeals on, among other issues, the consular notification claim and its effects. As these proceedings progressed, the sentence of Valdez Maltos was reduced to life imprisonment.

8.32. The Governor's decision followed full review and reconsideration of the case. The Department of State in early June 2001 wrote first to the Pardon and Parole Board and then to the Governor requesting that they give careful consideration to Valdez Maltos's pending clemency request. Indeed, the Mexican Government thanked the Department for its letters and acknowledged their value. The Board recommended commutation after reviewing extensive mitigation evidence bearing on the appropriate sentence that had been gathered with the assistance of the Mexican consular officers. After discussing the matter with the Mexican President, the Oklahoma Governor granted a 30-day stay of execution to allow himself time to consider the recommendation further.

8.33. In the interim, this Court decided the *LaGrand* case. And then the Department wrote again to the Governor. This second letter focused the Governor's attention particularly on the *LaGrand* decision and requested that he specifically consider the impact of any Vienna Convention violation on either the conviction or sentence in the case.

8.34. There can be no doubt that the Governor took the *LaGrand* decision into account, and independently reviewed and reconsidered Valdez Maltos's conviction and sentence. In addition to meeting with Valdez Maltos's defence attorneys and senior officials of the Mexican Government, including the Mexican Legal Adviser, the Governor spoke directly with President Fox about the case. The Governor and his advisers reviewed at length the

facts, the procedural and legal questions, and the particular issues related to the breach of Article 36.

8.35. Based on the review of all the evidence, including the failure to give consular information, the Governor ultimately concluded that clemency was not warranted. . . .

8.36. So what does this review of the clemency process that Mexico so disparages show us? There have been seven cases in which violations of the Vienna Convention's requirements have been raised. Seven times the claims of violation have been reviewed and reconsidered. The results of the review and reconsideration have varied, depending on the facts of each case. This process is not the charade Mexico has portrayed for the Court. It plainly provides an effective form of review and reconsideration that fully satisfies this Court's decision in *LaGrand*.

* * * *

8.38. Obviously, Mexico would prefer that judicial relief or clemency be granted in every case. That is why it demands an automatic nullification, even when no actual prejudice resulted, or where the claim has already been reviewed by a US court or where it was knowingly defaulted. But the obligation set out in *LaGrand* is a fair review and reconsideration, not an automatic reversal in every case. One would not expect that, at the end of a process where each defendant may have had the fundamental fairness of his trial and his claims of actual innocence reviewed by perhaps dozens of state and federal judges, miscarriages of justice would frequently remain that require clemency.

Professor Weigend:

IX. REMEDIES—CRIMINAL JUSTICE SYSTEMS

I. Introduction

* * * *

9.3. The purpose of my statement is to show that the remedies Mexico proposes for breaches of the Vienna Convention would

be in open conflict with the criminal procedure laws of most legal systems of the world. If the radical solutions suggested by Mexico were to be adopted, this would indeed create havoc with the well-balanced ways in which legal systems deal with deviations from the proper process. In light of this fact, I submit that the Court would be well advised to follow the path it has taken in *LaGrand*, that is, not to impose on States particularized procedural adjustments that may be alien to their procedural systems but instead to leave it to each State to provide for review and reconsideration of cases by means of its own choosing.

2. *Restitutio in integrum* in the context of the criminal process

9.4. . . . Mexico would now turn this proposition into an affirmative duty of the receiving State to re-establish the situation that existed before the wrongful act was committed. And Mexico further applies this concept of *restitutio in integrum* to the criminal process, demanding that the Court order the United States to introduce, in its domestic law, three distinct procedural remedies. . . . These are:

— first, that any judgment and sentence must be vacated whenever the requirements of Article 36 of the Vienna Convention were not followed;
— second, that a new trial must be granted in this case even when the judgment and sentence have become final under domestic law;
— third, that at the new trial any statement the defendant had made before being given information about consular access must be suppressed.

3. Article 36 VCCR and the criminal process

9.5. I submit that Mexico is mistaken in applying the concept of *restitutio in integrum* in this fashion. Before I take a closer look at each of Mexico's propositions, it may be useful to briefly consider the relationship between Article 36 requirements and the

criminal process. . . . Article 36 of the Vienna Convention does not relate only to criminal defendants but instead applies to all nationals of sending States detained by the receiving State for any reason. The obligations of receiving States under Article 36 have the purpose of enabling the consulate, if the detainee so wishes, to assist him in dealing with this situation, for example, by informing relatives or by organizing humanitarian or legal assistance—which is useful regardless of the reason for which the individual has been taken into custody. Criminal procedure law, on the other hand, provides every suspect, regardless of nationality, with certain basic rights that put him or her in a position of "equality of arms" with the prosecution, especially by providing him with an attorney, by ensuring that he knows of the charges against him and of his rights as a participant in the process, and by granting him access to exonerating evidence. If the suspect does not sufficiently understand or speak the language in which the investigation is being conducted, he must be provided with an interpreter. In the real world, the two circles of obligations concerning consular information and notification, on the one hand, and obligations based on criminal procedure law, on the other, sometimes overlap; but while consular involvement may sometimes have the *effect* of enhancing a suspect's procedural prospects, this effect certainly is not the *purpose* of Article 36. . . . [I]t is the purpose of *domestic* criminal process rights to guarantee fair proceedings and an equitable judgment; and that is true for suspects of all nationalities regardless of the possible intervention of consular officers. Having access to one's consulate is not by any means a legal prerequisite for obtaining a fair trial, nor does the availability of such access have any direct impact on the correctness of the judgment or sentence. Put simply, Article 36 of the Vienna Convention does not confer criminal process rights.

9.6. It is important to keep this rather distant relationship between consular notification procedures and criminal process rights in mind when one goes about defining remedies for breaches of Article 36. Because a failure to follow the requirements of Article 36 might, in individual cases, have a *factual* influence on a foreign defendant's conviction and sentence, the Court in *LaGrand* has stated that a legal system must not categorically preclude foreign

defendants from bringing a breach of Article 36 to the attention of the authorities of the receiving State before a severe sentence is carried out. Mexico, however, now requests this Court to go far beyond *LaGrand* by making the United States start the process from scratch whenever a breach of Article 36 has occurred.

4. Remedies

1. Turning back the clock?

9.7. . . . I think it is necessary that I point out, at the outset, that in the criminal process it is not possible to simply turn back the clock. . . . Legal systems do provide for the case that the criminal process has been affected by legal error. But even when a trial is found to have been unfair, all an appeals court can do is vacate the judgment and order a new trial. Even an appeals court cannot erase what has happened *before* trial. . . . When we look for a proper resolution of cases in which breaches of Article 36 have occurred, we should therefore dispel the naive notion of playing the film backward and starting again from zero. . . .

2. Automatic reversal

9.8. Beyond the back-to-zero solution, Mexico suggests that any judgment based on a process in which Article 36 procedures were not followed should be subject to reversal without any showing of prejudice. . . . [N]ational legal systems do in some circumstances provide for automatic reversal of a judgment upon proper appeal. But this radical solution is typically restricted to misapplications of substantive criminal law and to the absence of the most basic formal prerequisites of an orderly process. In most legal systems, criminal convictions will be reversed when they fail to comport with applicable *substantive* criminal law, for example, when the court of first instance has based the defendant's conviction on a misinterpretation of a criminal statute. Clearly, this is not the situation at issue here. Legal systems are much more restrictive in allowing the reversal of judgments on the basis of *procedural* faults.

There are only very few categories of procedural violations that are almost universally recognized as leading to automatic reversal, that is, without at a minimum making it necessary for the defendant to show prejudice to his case. Such absolutely "fatal" procedural faults are typically limited to an illegal composition of the court, the absence of persons from trial whose presence is prescribed by law—which includes defense counsel when his participation is required by law—and the illegal exclusion of the public from the trial. Breaches of the Vienna Convention hardly qualify as procedural error, because they do not directly interfere with a foreign national's criminal process rights. And even if one were to emphasize that *factual* impact breaches of Article 36 can have on a defendant's conviction or sentence, neglect of consular notification surely does not fit into the short list of fatal procedural errors leading to *automatic* reversal. One should bear in mind that even breaches of fundamental trial rights, such as the right to consult with an attorney or the privilege against self-incrimination, in the great majority of legal systems will lead to a new trial only if the appellant can show prejudice, that is, that the violation may have had an impact on the outcome of his case.

9.9. Mexico's position in this regard may be explained by the fact that Mexico's own law of criminal procedure deviates from the great majority of legal systems. Under Mexican law, an appeal is successful whenever the defendant can show that he was not informed of his right to legal counsel, that he was prevented from making contact with legal counsel, that no translator was appointed for him, or that the court declined to hear evidence properly offered by the defendant. . . . Mexico's rule is exceptionally liberal when compared with the actual state of the law in the great majority of legal systems. The remedy proposed by Mexico for breaches of Article 36 would consequently deviate from most countries' legal standards on appellate review. And it would deviate from Mexico's own standard as well: even Mexico's extensive list of procedural errors leading to automatic reversal does not include a lack of consular information and notification. . . .

9.10. Mexico's claim that judgments must be reversed whenever Article 36 was breached suffers from yet another flaw. Several legal systems, including both those of the United States and of

Mexico, limit the admissibility of appeals alleging procedural error. They impose strict requirements of early protest against defective procedural rulings or acts. . . . Exceptions from this strict rule of procedural default apply only if there was a manifest violation leaving the defendant without a defense, or if the lack of timely protest was due only to the turpitude or negligence of defendant's legal counsel. Procedural default thus significantly limits a defendant's ability to raise a violation of Article 36. . . .

9.11. In sum, Mexico's assertion that "a departure from the requirements of procedural fairness renders illegitimate any conviction or sentence resulting from the flawed proceedings" does not correctly describe the state of procedural law worldwide. . . .

3. Reopening the case

9.12. But Mexico goes even further and asks this Court to extend the rule of automatic reversal to cases in which the judgment and sentence have become *final* according to domestic law. This would lead to an even greater intrusion into universally recognized principles of criminal procedure. . . . This concept of finality is necessary in order to ensure the stability, reliability and effectiveness of the administration of criminal justice. Reopening cases years or decades after the original trial has ended would lead to mere shadow trials, with witnesses whose memories have faded, or with secondary evidence because the original evidence has long disappeared or become worthless. In many cases, it would be impossible to do justice on such shaky evidence.

9.13. Most legal systems have therefore wisely adopted the rule that judgments that have become final can be challenged in court only under highly exceptional circumstances. To overcome finality, it is not sufficient that some error on substantive or procedural law has occurred. The defendant may have his case reopened and a new trial granted only if, for a special reason recognized by law, it would be *intolerable* for a system of justice to continue to uphold and execute the original judgment. Categories of circumstances giving rise to an extraordinary appeal against a final judgment tend to be similar worldwide. They are generally

limited to two types of situations: criminal interference with the original process *(falsa)*, and the belated discovery of crucially relevant new evidence after finality has attached *(nova)*. Typical examples of the former category are cases in which a witness at the original trial has later been convicted of perjury, or a document tending to incriminate the defendant later turns out to have been forged. Examples of the "new evidence" category would be another person's credible confession to have committed the offence in question when there can be only one perpetrator, or the appearance, in good health, of the presumed murder victim. Mexican law closely follows this pattern, specifying that the convicted person bears the burden of showing that one of the extraordinary circumstances exists that can overcome finality.

9.14. The cases before this Court of course are a far cry from satisfying the rigorous test that I have just outlined. In the context of the criminal process, breaches of Article 36 are, at most, simple procedural errors, and such errors are not sufficient to overcome the rule of finality. When Mexico requests this Court to order the United States to reopen cases long after final adjudication, it invites the Court to invent a completely new rule that is alien to national procedural systems and would dislocate basic tenets of criminal procedure law that have been recognized around the world, Mexico itself included.

4. Excluding evidence

9.15. Mr. President, please permit me now to turn to the last of Mexico's demands that fall within my portion of the presentation. Mexico wishes this Court to declare that any statement a foreign national defendant makes in advance of receiving consular information or of having contact with his consular officer must be suppressed. This claim rests on two assumptions: first, that it is illegal for law enforcement personnel to take a statement from a defendant before he or she has been informed or has made contact with the proper consulate; and second, that exclusion of illegally obtained evidence—the so-called exclusionary rule—is a general principle of law under Article 38 (1) *(c)* of this Court's

Statute. I submit that both assumptions are incorrect and that the broad ruling Mexico asks the Court to make would therefore be without a legal basis.

(a) Right to consular assistance before interrogation?

9.16. First, I have not found any legal system that would provide in the context of the criminal process an unqualified right for a foreign national suspect to speak with a consular officer before he or she is being interrogated by the police; and in the great majority of States, suspects do not even have to be informed on consular notification prior to being interrogated. . . . In my research on this issue, I did not find any legal system that would have expressly transferred Article 36 obligations into its criminal procedure law. . . .

9.17. The absence of an explicit reference to the Vienna Convention of course does not mean that States parties to the Convention do not respect and apply the requirements of that document. But given the lack of express language, one cannot expect national law enforcement agencies to go beyond the clear requirements of the text of the Convention and to refrain from questioning suspects until they have been informed of the possibility of consular notification, until contact with the suspect's consulate has been established or until a consular officer has seen fit to talk with the suspect. Such procrastination would not only seriously impede the timely clarification of critical facts but would run counter to standard practice of a large number of legal systems. . . .

(b) Exclusion of illegally obtained evidence

9.18. In a similar fashion, Mexico has developed a rather extravagant legal theory claiming that the exclusion of evidence obtained illegally is a universally recognized principle in the sense of Article 38 (1) *(c)* of the Court's Statute. . . . It is true that a number of legal systems have adopted a general rule that illegally obtained evidence shall not be admitted at trial. . . . The great majority of legal systems, however, do not suppress evidence simply

because it was obtained in illegal ways. Rather, courts in most countries tend to perform an individualized analysis, weighing the nature and gravity of the violation, the inherent reliability of the evidence, the relevance of the evidence in question for finding the truth, and the seriousness of the accusation.

9.19. The way the international community has addressed the issue of excluding evidence may best be reflected by the formulations in Rule 95 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia as well as in Article 69, section 7, of the Statute of the International Criminal Court. According to both instruments, illegally obtained evidence is admissible in court unless the method by which it has been obtained casts substantial doubt on its reliability, or admission would be antithetical to *and* would seriously damage the integrity of the proceedings. If this were the test for excluding statements made without consular information or notification, such statements would undoubtedly have to be admitted: a suspect's ignorance of Article 36 requirements certainly has no impact on the reliability of his or her statement, and it cannot be said that admission would "seriously damage" the integrity of court proceedings. . . . In short, international law simply does not know of a rule even remotely similar to the sweeping exclusion of evidence as suggested by Mexico.

* * * *

Professor Zoller (English translation of French original):

X. REPARATION

* * * *

1. Mexico's claims for reparation have no legitimate basis in international law

10.5. The claims for reparation submitted by Mexico fall into three categories. Not one of them has any legal foundation.

A. The request for a declaratory judgment

10.6. First, Mexico asks the Court for a "declaratory judgment", which, as it explains in its Memorial, would state "clearly and precisely the international legal obligations of the United States under the Vienna Convention, as well as the consequences that arise from those obligations". Mexico is asking the Court for an interpretative declaration of the provisions of Article 36 of the Vienna Convention on Consular Relations.

10.7. This first request by Mexico raises wide-ranging practical problems. The Vienna Convention on Consular Relations is a multilateral treaty which extends to over 160 States parties. Article 36(2) of the Convention provides that the rights referred to in paragraph 1 of that Article "shall be exercised in conformity with the laws and regulations of the receiving State". Assuming for the moment that the Court gave effect to the Applicant's claims, its declaration on Article 36 of the Convention could hardly amount to anything other than a limited special régime within the broad general framework of the Convention, since Mexico's Application is meaningless except in relation to the law of the United States. Given the obvious discrimination that this limited "made-to-measure" régime for Article 36 would represent, relative to the rules applied to the other States parties to the Convention, it is not apparent how the Court could comply with Mexico's request without indirectly affecting the rights of third-party States.

10.8. Furthermore, if Mexico were to obtain a declaration from the Court granting it the favorable régime to which it claims to be entitled in its relations with the United States, on what grounds and for what reason would it be the only State to benefit? If the principle of sovereign equality of States were not to be flouted, the privileged régime secured by Mexico would have to be extended to all States parties to the Convention. Moreover, reciprocity demands that all those States would be justified in claiming what would very soon become known as the "Mexican privilege". It is apparent that, if the Court acceded to Mexico's request, it would not be confining itself to settling the dispute between the two States but would be legislating for all States

parties to the Vienna Convention on Consular Relations, including those which have not ratified the Optional Protocol.

* * * *

B. The request for *restitutio in integrum*

10.10. Secondly, Mexico asks the Court to grant *restitutio in integrum*, i.e., to require the United States to make a fresh start in all proceedings currently pending before American courts and to start "a new proceeding" for each national. . . .

* * * *

10.12. . . . Mr. Donovan told us yesterday that such a procedure was not "materially impossible". But the real issue is whether it is legally possible.

10.13. The better view among publicists has long been that States show a perfectly proper concern "to avoid certain constitutional obstacles that could be overcome only at the price of complications out of proportion to the advantage of restitution in kind". *[Translation by the Registry]*. This is always the case where the wrongful act to be redressed is a judicial one. In no country claiming to apply the rule of law is it possible to overturn a judgment—an act of the judiciary—in the same way that an act by the executive or the legislature can be abrogated. An executive order or an administrative decree may be relatively easy to annul, albeit subject to the rights of third parties; a statute is less easy to abrogate, but such difficulties as may exist depend essentially on political considerations. On the other hand, the constitutional bedrock of the principle of judicial independence in any State operating under the rule of law means that the quashing of a judicial act is possible only at the price of considerable complications. . . .

10.14. That is why international jurisprudence has never gone so far as to say that annulment is the normal form of reparation for a judicial decision presumed to be internationally wrongful. . . .

10.15. In international practice the only cases in which judgments have been annulled *en masse,* as Mexico would like the

Court to order in respect of the 52 convictions and sentences by American courts, were those that were the result of specific treaty provisions. Even in these exceptional cases there were exceptions. . . . Even European human rights law makes no provision for the type of reparation that Mexico is seeking. When a judicial act is incompatible with the European Convention or with one of its protocols, the Court does not annul it.

10.16. Mr. President, Members of the Court, Mexico has not explained why there is a need to abandon this international practice in the present case. In truth, it is not even aware of that practice, as witness its casual statement that: "The only 'burden' [the quotation marks are the Applicant's] that restitution would impose on the United States here would be the need to conduct new trials." Mr. President, they cannot be serious! Assuming that the Court were to grant Mexico what it asks, the federal government fails to see how, given the present state of federal constitutional law, it could implement its decision without causing upheavals of staggering scope. Worse, assuming that it were able to set in motion the necessary machinery, it could not even guarantee a successful outcome.

* * * *

C. The request for assurances of non-repetition for the future

10.18. Thirdly, the Applicant asks the Court to order the United States to cease its wrongful acts and to offer assurances of non-repetition.

10.19. Mexico would like the United States to be ordered to promise, as it were, "never to do it again". However, it is unclear what purpose such a request serves, because all this has long been settled. Specifically, the obligation on the competent authorities in the various States of the United States to inform the consular authorities of the imprisonment of any foreign national who requests such notification has been understood since ratification by the United States of the Vienna Convention on Consular Relations, and even before the decision in the *LaGrand* case the federal government was unstinting in its efforts to ensure that the

competent authorities in the States informed the consular authorities when foreigners were arrested and requested that their consul be notified.

* * * *

Mr. Mathias

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XI. REVIEW AND RECONSIDERATION IS THE APPROPRIATE REMEDY FOR A BREACH OF ARTICLE 36 OF THE CONVENTION

* * * *

A. The Court decided the appropriate remedy for a breach of Article 36 in *LaGrand*

11.2. Mexico apparently wants to persuade the Court, contrary to the record in the case and the judgment itself, that the Court in *LaGrand* did not already decide upon the appropriate remedy for prospective breaches of the Convention. . . .

11.3. Mexico's description of *LaGrand* is, at best, incomplete, in that it fails to mention that Germany specifically sought assurances in *LaGrand* with respect to "any future cases of detention or of criminal proceedings against German nationals". There is no suggestion that this referred only to future cases in which executions had taken place. On the contrary, it certainly included future cases involving persons still incarcerated. In other words, persons in the same position as the Mexican nationals in this case. And in response to Germany's request in *LaGrand*, this Court—as is well known—in the seventh paragraph of its *dispositif* found that

> "should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1*(b)*, of the Convention

having been respected, the United States of America, by means of its own choosing, shall allow . . . review and reconsideration . . .".

* * * *

B. Review and reconsideration is the appropriate remedy for a breach of Article 36

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11.9. As it was in *LaGrand*, the Court's task in this case is to balance the respective rights of the Parties taking into account the nature of the procedural obligation owed to Mexico and the related substantive rights of the United States.

11.10. With respect to the rights of the United States, the Members of the Court well understand the fundamental character of a State's criminal justice system. It is a touchstone of State sovereignty. Its smooth operation is essential to the maintenance of public order, one of a State's primary responsibilities to its citizens. In *LaGrand*, while the Court went far, the review and reconsideration remedy that it fashioned did not compromise the effectiveness of the domestic criminal justice system. On the contrary, the Court left it to the State to determine how best to implement a review and reconsideration mechanism in the overall context of its domestic legal system. By contrast, Mexico's proposed remedy would intrude deeply into the criminal justice system, because, even in the revised form previewed by counsel for Mexico yesterday, it would have the Court impose new rules on US courts with respect to issues such as the exclusion of evidence and procedural default.

11.11. In its Memorial, Mexico heedlessly suggested that its proposed remedy "would impose no burden here at all". As with its erroneous assertion that the remedy in *LaGrand* took into account only the LaGrand brothers and not future German nationals, Mexico here departs from the realm of legal argument and engages in legal fantasy. The intrusion into State sovereignty that Mexico invites this Court to undertake would be truly

unprecedented. The Members of the Court can no doubt imagine the implications for their own national criminal justice systems if final convictions and sentences in an entire category of cases were declared invalid and an international tribunal were to insert itself into ongoing criminal cases. Mexico may trivialize this, but the Court's action in *LaGrand* suggests that the Court will not.

* * * *

C. The review and reconsideration remedy is better in accord with the proper role of the Court

11.16. Review and reconsideration of a conviction and sentence, by means of a State's own choosing, is also an appropriate remedy because it is better in accord with the proper judicial role of the Court in resolving disputes like the one presently before it, for two independent reasons, one practical and one fundamental.

11.17. First, as a practical matter, because the Convention is so widely adhered to, and because of the varied manner in which States implement their obligations thereunder as well as the diverse ways that States have established and operate their criminal justice systems, the Court should interpret the Convention and prescribe remedies that are meaningful and applicable across the diverse legal systems of all the States parties. While this case is between Mexico and the United States, the instrument on the basis of which the Court is acting creates international legal obligations for States on every continent representing all the principal legal systems of the world, including common law States and civil law States, unitary States and federal States. Review and reconsideration, by means of a State's own choosing, is the only remedy capable of general application across legal systems and cultures. It provides a way forward for all State parties. And it avoids the complications that would ensue were the Court in this case to decide, as Mexico requests, for example, that application of the exclusionary rule, a rule of evidence that Professor Weigend has shown is unknown in many legal systems, is somehow required by the Convention.

11.18. The more fundamental advantage of the review and reconsideration remedy over the remedy proposed by Mexico is

that "review and reconsideration" does not involve the Court in fashioning an order for the prospective operation of a domestic criminal justice system, a function that is beyond the Court's proper role. The Court is mindful of its role in a case under a compromissory clause: here, to decide a dispute concerning the interpretation or application of the Convention. The Court's role is limited to its assessment of the international legal obligations of the parties and does not extend to a determination of the means by which the parties implement their obligations in their domestic legal systems. In an appropriate case, the Court may determine the remedy for a breach of an obligation, but its determination of that remedy, too, is limited to a statement of what international law requires. Here, it is not for the Court to determine prospectively how the review and reconsideration remedy is to be implemented by the United States, or by any other State.

c. Citizen of country without diplomatic relations

In December 2003 Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, Department of State, responded to a request from the Oklahoma attorney general's office, in a case concerning a national of Vietnam. Because the United States had no diplomatic or consular relations with Vietnam at the time the arrest was made in 1992, the letter explained, no obligation existed under the Vienna Convention on Consular Relations to notify the person arrested of his right to contact consular officials, which were not present in the United States at the time.

The letter, excerpted below, is available in full at *www.state.gov/s/l/c8183.htm.*

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* * * *

The United States of America and the Socialist Republic of Vietnam did not have consular relations or diplomatic relations in 1992. No provision had been made at that time for performance of consular functions by third countries under protecting power arrangements; nor was the Vietnamese representative to the United

Nations in New York authorized to perform consular functions on behalf of Vietnamese nationals in the United States. Accordingly, in 1992, there was no one in the United States authorized to provide consular assistance to Vietnamese nationals in the United States. The two countries established limited consular relations in 1994 and diplomatic relations were not normalized until July 1995.

The United States and Vietnam were both parties to the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, in November 1992. (The United States became a party to the Convention on November 24, 1969, and Vietnam became a party on September 8, 1992.) Nevertheless, the competent authorities in the United States were under no obligation to implement Article 36 at that time with respect to Vietnamese nationals arrested or detained in the United States. Given the lack of consular relations between the two countries, Vietnam was not a "sending State" and the United States was not a "receiving State" for purposes of the Convention at that time.

2. Temporary Refuge for American Citizens

U.S. diplomatic and consular posts overseas have at times granted temporary emergency protection to U.S. citizens in danger of suffering serious harm on a case-by-case basis. In recent years, particular concerns have arisen concerning American citizen women seeking to recover their abducted children or seeking to escape domestic violence, forced marriages, and related problems abroad, especially in Saudi Arabia. The Department of State issued written guidance in October 2003 to all overseas posts concerning when and how to grant requests by private American citizens for temporary emergency protection in U.S. diplomatic and consular premises. The guidance, excerpted below, will be incorporated into Chapters 2 and 7 of the Foreign Affairs Manual.

The full text of the telegram is available at *www.state.gov/s/l/8183.htm.*

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4. Conducting an Interview
A consular officer should conduct an initial interview of the person requesting temporary refuge with an emphasis on gathering information needed to verify the person's U.S. citizenship, to identify the citizen reliably, and to evaluate the nature and severity of the danger he or she fears. It is largely on the basis of this information that Department will make a determination about the U.S. citizen's eligibility for temporary refuge and need for other consular services.

* * * *

At the conclusion of the interview, consular officer should explain to the U.S. citizen that post must report to Department and seek instructions regarding the U.S. citizen's request for temporary refuge. In the meantime the U.S. citizen will be permitted to remain on embassy/consulate grounds or may leave freely if he or she wishes.

Unless the U.S. citizen or his/her presence within embassy/consulate facilities appears to pose an unacceptable safety or security risk, post should not compel a U.S. citizen who requests temporary refuge and communicates a belief that he or she is in danger of serious harm to leave the embassy/consulate grounds without first seeking instructions from the Department and post management, in accordance with the procedures described herein.

* * * *

6. Department Instruction to Grant/Deny Temporary Refuge
. . . . Chief among the Department's considerations in [deciding whether or not the circumstances warrant affording temporary refuge to the U.S. citizen] will be whether the requesting person will otherwise be in danger of serious harm. Department's evaluation of the request will take into account the presence or absence of alternative resources for assistance and protection, applicable host country laws, and the prevailing local conditions in which the requesting person's claimed fear of harm arises.

The Department will not approve requests for temporary refuge if the requesting U.S. citizen would not otherwise be in danger of

serious harm or if host-country resources exist that are able reliably to protect the person from harm. Except in the narrowest of circumstances, the Department also will not grant requests for temporary refuge apparently intended to prevent or avoid the execution of the laws of a host country, even when the application of those laws may appear adverse to the interests of the U.S. citizen.

* * * *

13. Terminating Refuge
Posts may afford U.S. citizens temporary refuge only until appropriate arrangements for their safety are in place. Department and post will confer throughout to determine if and when circumstances warrant termination of temporary refuge by Department, which determination Department will communicate in corresponding explicit instructions.

14. Guidance Limited to Individual Refuge Requests
This guidance applies to those circumstances in which U.S. citizens seek temporary refuge for emergency protection from a harm the fear of which is specific to the person seeking refuge and to her or his individual circumstances. The instructions contained in this cable and in corresponding FAM revisions do not/not supplant the guidance and procedures set forth in 12 FAH-1 H-1500 (relating to the emergency evacuation of large numbers of U.S. citizens and other persons for whom the U.S. Government may have a responsibility), 12 FAH-1 H-1600 (relating to safe haven when large numbers of U.S. citizens are expected to arrive at post as a result of a nearby crisis), or other related guidance, unless and except as expressly indicated.

3. Availability of Consular Assistance in Iraq

The availability of consular services in Iraq remained limited throughout 2003. A travel warning of February 8, 2003, alerted Americans to the lack of consular services at that time (and advised against travel to Iraq) as follows:

> This Travel Warning is being issued to reflect the temporary closure of the U.S Interests Section at the Embassy of the Republic of Poland in Baghdad. No consular services are available to U.S. citizens at this time in Iraq. The U.S. Government continues to urge all U.S. citizens to avoid travel to Iraq. U.S. citizens in Iraq should depart. This warning replaces the Travel Warning of October 31, 2002.
>
> The United States does not have diplomatic relations with Iraq, and there is no U.S. Embassy in Baghdad. While our interests in Iraq are represented by the Embassy of the Republic of Poland in Baghdad, due to the temporary closure of the U.S. Interests Section, there are no consular services available to U.S. citizens in Iraq. The United Nations and the United States continue to impose sanctions which restrict financial and economic activities with Iraq, including travel-related transactions.

Following military action and the establishment of the Coalition Provisional Authority ("CPA") to administer Iraq (see Chapter 18.A.I.C(3)), a U.S. consular officer was assigned to the CPA, making available limited emergency services as noted in a travel warning issued July 15, 2003:

> There is a U.S. consular officer in Baghdad who can provide limited emergency services to U.S. citizens in Iraq and is located at the Iraq Forum (Convention Center) across from the al-Rashid Hotel. The consular officer cannot provide visa services. American citizens who choose to visit or remain in Iraq despite the warning contained herein are urged to pay close attention to their personal security, should avoid rallies and demonstrations, and should inform the U.S. consular officer of their presence in Iraq.

The full text of the two travel warnings is available at *www.state.gov/s/l/c8183.htm.* Current travel warnings and consular information sheets are available at *http://travel.state.gov.*

B. CHILDREN

1. Adoption

a. Hague Adoption Convention

On September 15, 2003, the Department of State published proposed regulations to implement aspects of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Convention"), May 29, 1993, S. Treaty Doc. No. 105–51 (1998); 1870 U.N.T.S. 167, 32 I.L.M. 1134 (1993) and the Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901–14954. The proposed regulations focused on establishing a process to accredit domestic adoption agencies for purposes of conducting international adoptions pursuant to the Convention. "Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons; Preservation of Convention Records," 68 Fed. Reg. 54,063 and 54,119 (Sept. 15, 2003). Public comments were invited on the proposed regulations, to be submitted to the Department of State on or before November 14, 2003. On November 13, 2003, the comment period for the proposed rules was extended by thirty days. 68 Fed. Reg. 64,296 (Nov. 13, 2003). Excerpts from the September Federal Register describing the regulations are set forth below. For further background on the Convention and implementing legislation, *see Digest 2000* at 141–150.

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II. Introduction

Regulations to implement the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Convention) and the recently enacted Intercountry Adoption Act of 2000 (the IAA), Public Law 106–279, 42 U.S.C.

14901–14954 (herein referred to as the IAA or Public Law 106–279), are being proposed for the first time. These regulations will be added as part 96 of title 22 of the Code of Federal Regulations (CFR). The purpose of these regulations is to enable the United States to become a party to the Convention. The Convention governs intercountry adoptions between countries that are parties to the Convention ("Convention adoptions"). The IAA is the U.S. implementing legislation for the Convention. Once the Convention enters into force for the United States, all Convention adoptions must comply with the Convention, the IAA, and these regulations. These regulations address the accreditation of agencies (non-profit adoption service providers) and the approval of persons (for-profit and individual adoption service providers) to provide adoption services in Convention cases. The regulations also set forth the process for designating one or more accrediting entities to perform the accreditation and approval functions, the procedures for conferring and renewing accreditation and approval, the procedures for monitoring compliance with accreditation or approval standards, the rules for taking adverse action against accredited agencies and approved persons, and the standards for accreditation and approval. The regulations also address which agencies and persons are required to adhere to these standards, and what adoption-related activities are exempted from the accreditation and approval requirements. Finally, the regulations set forth the procedures and requirements for temporary accreditation under section 203(c) of the IAA. (Pub. L. 106–279, section 203(c)).

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The IAA designates the U.S. Department of State as the Central Authority for the United States. The Secretary of State is designated as the head of the Central Authority. . . . Certain Central Authority functions are delegable outside of the Department and the Federal government and will effectively be delegated either to the accrediting entities or to the accredited agencies, temporarily accredited agencies, or approved persons, as appropriate, pursuant to these regulations. The IAA specifically provides that the Department may "authorize public or private entities to perform appropriate central authority functions for which the [Department]

is responsible, pursuant to regulations or under agreements published in the Federal Register." (Pub. L. 106–279, section 102(f)(1)).

As Central Authority, the Department will be responsible for: Acting as liaison with other Central Authorities; assisting U.S. citizens seeking to adopt children from abroad and to residents of other Convention countries seeking to adopt children from the United States; exchanging information; overseeing the accreditation and approval of adoption service providers; monitoring and facilitating individual cases involving U.S. citizens; and, jointly with the Attorney General (presumably now the Secretary of Homeland Security), establishing a Case Registry with information on intercountry adoptions with Convention and non-Convention countries.

This Preamble is intended to facilitate understanding of the background and purpose underlying the regulations. The Preamble should not be considered a substitute for the text of the regulations themselves. . . .

III. The 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption

A. Development of the Hague Convention on Intercountry Adoption

A copy of the Convention is available on the Hague Conference Web site at *www.hcch.net*. The Convention is a multilateral treaty developed under the auspices of the intergovernmental organization known as the Hague Conference on Private International Law (Hague Conference). The Convention provides a framework of safeguards for protecting children and families involved in intercountry adoption, while still being acceptable to, and capable of being implemented by, diverse sending and receiving countries. This Convention is one of the most widely embraced and broadly accepted conventions developed by the Hague Conference.

The Convention is the first international instrument to recognize that intercountry adoption could "offer the advantage of a permanent home to a child for whom a suitable family cannot

be found in his or her state of origin.'' (S. Treaty Doc. 105–51, at 1). Some countries involved in the multilateral negotiations on the Convention sought to prohibit intercountry adoptions even for those children eligible for adoption for whom a permanent family placement in the child's country of origin could not be arranged. On the other hand, proponents of intercountry adoption at the Hague Conference believed that the best interests of a child would not be served by arbitrarily prohibiting a child in need of a permanent family placement from being matched with an adoptive family simply because the family resided in another country. The Convention reflects a consensus that an intercountry adoption may well be in an individual child's best interests.

If a country becomes a party to the Convention, intercountry adoptions—incoming and outgoing—with other party countries must comply with the requirements of the Convention. The objectives of the Convention are: First, to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for the child's fundamental rights as recognized in international law; second, to establish a system of cooperation among contracting states to ensure that those safeguards are respected and thereby prevent the abduction, sale of, or traffic in children; and third, to secure the recognition in contracting states of adoptions made in accordance with the Convention. The Convention also requires all parties to act expeditiously in the process of adoption. The Convention's norms and principles apply whether the party country is acting as a sending country or as a receiving country.

To accomplish its goals, the Convention makes a number of significant modifications to current intercountry adoption practice, including three particularly important changes. First, the Convention mandates close coordination between the governments of contracting countries through a Central Authority in each Convention country. In its role as a coordinating body, the Central Authority is responsible for sharing information about the laws of its own and other Convention countries and monitoring individual cases. Second, the Convention requires that each country involved make certain determinations before an adoption may proceed. The sending country must determine in advance that the child is

eligible to be adopted, that it is in the child's best interests to be adopted internationally, that the consent of birth parents, institutions, or authorities that are necessary under the law of the country of origin have been obtained freely and in writing, and that the consent of the child, if required, has been obtained. The sending country must also prepare a child background study that includes the medical history of the child as well as other background information.

Concurrently, the receiving country must determine in advance that the prospective adoptive parent(s) are eligible and suited to adopt, that they have received counseling, and that the child will be eligible to enter and reside permanently in the receiving country. The receiving country must also prepare a home study on the prospective adoptive parent(s). These advance determinations and studies are designed to ensure that the child is protected and that there are no obstacles to completing the adoption.

B. U.S. Ratification of the Convention

The United States signed the Convention on March 31, 1994, with the intent to ratify it in due course. On September 20, 2000, the Senate gave its advice and consent to ratification. The Senate's advice and consent to the Convention were subject to the following declaration: "The President shall not deposit the instrument of ratification for the Convention until such time as the Federal law implementing the Convention is enacted and the United States is able to carry out all the obligations of the Convention, as required by its implementing legislation." (146 Cong. Rec. S8866 (daily ed. Sept. 20, 2000)). Thus, the Convention will not actually come into force and govern intercountry adoptions between the United States and other party countries until the United States is able to carry out its obligations. These regulations are essential in enabling the United States to meet its Convention obligations.

The United States strongly supports the Convention's purposes and principles and believes that U.S. ratification will further the critical goal of protecting children and families involved in intercountry adoptions. The United States is a major participant in intercountry adoption, primarily as a receiving country but also

as a sending country. Many U.S. citizens adopt children eligible for adoption from another country, and in those cases the United States is acting as a receiving country. From October 1999 to September 2002, a total of 59,079 children were issued orphan visas to immigrate to the United States in connection with their adoption. As a sending country, the United States also places children abroad for adoption. There are no reliable statistics at the Federal level on the number of U.S. children adopted annually by persons resident in a foreign country.

Advocates for ratification of the Convention argued that many Convention countries would eventually refuse to permit intercountry adoptions by U.S. citizens unless the United States ratified the Convention (Hearing on the Convention and IAA Before the Senate Comm. on Foreign Relations, 106th Cong. (October 5, 1999)). The Department in fact has seen such developments. The Department wishes to complete preparations for implementation as rapidly as possible to ensure that U.S. families and the children they adopt have the advantage of the Convention's protections and that U.S. prospective adoptive parent(s) will be able to adopt children from Convention countries, particularly if those countries prohibit adoptions vis-á-vis countries that are not party to the Convention. The Department also wants to ensure that U.S. children who are adopted by parents from other countries are protected under the Convention and the IAA as well.

C. Use of Private, Accredited Adoption Service Providers

One particularly controversial issue that arose during Convention negotiations was whether private adoption service providers would be permitted to perform Central Authority functions. Some countries wanted all parties to rely exclusively on public or governmental authorities to perform Central Authority functions. Other countries, including the United States, advocated for parties to have the option of using private adoption service providers to complete Convention tasks. In the United States, private, non-profit adoption service providers currently handle the majority of U.S. intercountry adoption cases. In its final form, the Convention permits party countries to choose to use private,

Convention-accredited adoption service providers to perform Central Authority tasks. Specifically, Article 22 permits private, non-profit adoption service providers instead of Central Authorities to complete certain Central Authority functions required by the Convention. As discussed below, however, private, for-profit providers may perform such functions only as authorized under Article 22(2), which imposes limitations that do not apply to private, non-profit providers.

By including a provision allowing non-governmental bodies to provide adoption services, the Convention recognized the critical role private bodies play—and historically have played—in the intercountry adoption process. In the United States, for example, the number of intercountry adoptions from 1989 to 2001 totaled 147,021, and private, non-profit adoption service providers handled most of those adoptions. Recognizing, also, the role of private, for-profit adoption service providers in the United States, the Senate gave its advice and consent to the ratification of the Convention subject to a declaration, pursuant to Article 22(2) of the Convention, that U.S. Central Authority functions under Articles 15 to 21 of the Convention may be performed by approved private, for-profit adoption service providers. (146 Cong. Rec. S8866 (daily ed. Sept. 20, 2000)).

Consistent with Article 22 of the Convention and the declaration just discussed, the IAA establishes a system to accredit private non-profit, and to approve for-profit, adoption service providers and outlines specific standards the private providers must meet in order to become accredited agencies (in the case of non-profits) or approved persons (in the case of for-profits and private individuals). The proposed regulations focus exclusively on this essential process of accrediting agencies and approving persons that wish to offer or provide adoption services in Convention cases.[1] These regulations contain detailed and comprehensive

[1] The Convention uses the terms private accredited bodies and bodies or persons to refer to adoption service providers. The IAA uses the terms agency and person and accredited agency and approved person to encompass such providers. The IAA terms—agency or person and accredited agency or approved person—will be used from this point forward in the Preamble and are defined in subpart A of part 96.

standards intended to ensure that the United States complies with the Convention, which requires that accredited agencies and approved persons be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption, and be subject to supervision by competent authorities of the Convention country as to their composition, operation, and financial situation. Accredited agencies and approved persons must also comply with the requirements of Article 32 of the Convention, which provides that no one shall derive improper financial or other gain from activity related to an intercountry adoption; only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid; and the key personnel of the agencies and persons involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered. These proposed regulations reflect those Convention requirements.

D. Ability of U.S. Accredited Agencies and Approved Persons To Operate in Other Convention Countries

Once accredited or approved, an agency or person may offer or provide adoption services in the United States in Convention cases. However, under Article 12 of the Convention, a private body accredited in one Convention country may act in another Convention country only if the competent authorities of both countries have authorized it to do so. Thus, U.S. accredited agencies and approved persons are not automatically entitled to operate in other Convention countries. In practice, this means that even if a U.S. agency or person is accredited or approved in the United States, another Convention country may choose to work with only certain U.S. accredited agencies or approved persons. Currently some Convention (and non-Convention) countries require U.S. agencies and persons to be accredited under the laws and standards of that Convention country. This practice may well continue. The Department is hopeful that, to avoid duplicative accreditation processes, and as permitted by Article 12 of the Convention, other Convention countries will recognize the

accreditation or approval granted by the United States and permit U.S. accredited agencies and approved persons to act inside the other Convention country without requiring any further accreditation. The Department is mindful, however, that some U.S. agencies or persons, especially those that work in more than one Convention country, may well have to go through several costly accreditation processes. One of the rationales for drafting comprehensive, stringent standards for U.S. accreditation and approval is to encourage other Convention countries to accept U. S. accreditation or approval and not require further accreditation or approval.

* * * *

IV. The Intercountry Adoption Act of 2000 (IAA)

A. Passage of the IAA

The IAA implements the Convention in the United States. In 2000, Congress considered and passed the IAA during approximately the same time period that the Senate was considering the Convention. The President transmitted the Convention to the Senate for its advice and consent on June 11, 1998. (S. Treaty Doc. 105–51 at III (1998)). . . .

B. Overview of Substantive Provisions

The IAA's purposes reflect and complement those of the Convention. They are: To protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such an adoption is in a child's best interests; and to improve the ability of the Federal government to assist U.S. citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States. To accomplish these goals, the IAA provisions: (1) Set forth minimum standards and requirements for

accreditation and approval; (2) make substantive changes to the Immigration and Nationality Act (INA) with respect to Convention adoptions; (3) set requirements for completing individual adoptions; and (4) confer specific responsibilities on the Department and other government entities for carrying out the mandates of the Convention and the IAA.

* * * *

D. Federalism Issues

The Convention and the IAA for the first time require Federal regulation of agencies and persons for purposes of intercountry adoptions. Historically, State law alone regulated agencies and persons. The IAA contains a specific provision disfavoring preemption of State law unless State law provisions are inconsistent with the Convention or the IAA. (Pub. L. 106–279, section 503(a)). The Department throughout the regulations has been careful to defer to State law, especially in the case of U.S. emigrating children whose adoptions will continue to be covered mainly by State law, even when not explicitly required by the IAA. In particular, the regulations require agencies and persons to comply with any applicable licensing and other laws and regulations in the States in which they operate, and do not supplant existing State licensing and other laws and regulations. For example, when a State requirement exceeds a standard in subpart F of part 96, the agency or person must also comply with the State requirement as necessary to ensure that it maintains its State license. Similarly, when the IAA standard for accreditation or approval is more stringent than a State requirement, the agency or person must meet the IAA standard as well as the State standard. Also, the regulations utilize State law definitions whenever possible. For example, the regulations defer to State law to define "best interests of the child" instead of developing a Federal definition that would replace existing State law definitions. Finally, a number of the standards, such as those relating to internet use, expressly require observance of State as well as Federal law.

The impact of the Convention and the IAA is clearest in cases of U.S. children emigrating from the United States to a Convention country in connection with their adoption. Previously, State law alone governed cases of children emigrating for adoption, whereas there has been Federal involvement (through the immigration laws) in incoming cases. Now adoptions involving emigration to Convention countries must comply with the procedures and safeguards of the Convention (such as those of Convention Articles 4 and 17) and the IAA, which include requirements that may not currently exist in State law. Under these regulations, the burden of making the majority of the Convention and the IAA determinations for emigrating children is unavoidably placed on State courts. The Department assumes that these determinations generally will be made in the context of adoption or placement proceedings that would occur in any event, and that the States may charge fees to cover the costs of these services. Nevertheless, the Department is sensitive about imposing additional burdens on States; therefore, the regulations do not call for State court action other than as strictly required to permit an adoption under the Convention or the IAA. States that do not wish to undertake even those minimal requirements may refrain from permitting Convention adoptions or placements in their jurisdictions. Also, throughout the preliminary input phase, State agencies were asked to submit comments on the draft regulations and such input was used in the drafting of the proposed regulations. The Department welcomes comments from State and local agencies and tribal governments on the proposed regulations and in particular seeks comment on the standards covering cases in which a child is emigrating from the United States in Sec. Sec. 96.53, 96.54, and 96.55 of subpart F.

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b. Other adoption issues

(1) Denial of notarial service for parental consent to adoption

In August 2003 the U.S. Department of State responded to inquiries from the American embassy in Mexico City concerning an increasing number of requests for U.S. consular

officers to notarize a birth parent's final and irrevocable consent to adoption of a child already living in the United States with prospective adoptive parents. The factual circumstances of these requests were explained in a telegram dated August 4, 2003, from the Department of State as follows:

> [t]he birth parents, or the prospective adoptive parents, seeking the notarized consent to adoption typically indicate that the child in question entered the United States unlawfully. At the time of entry to the United States, the child did not qualify as an adopted child under Section 101(b)(1)(E) of the Immigration and Nationality Act (INA), nor as an orphan under Section 101(b)(1)(F) of the INA. No adoption has occurred in Mexico; and an adoption has yet to occur in the United States. The notarized consent documents are to be used in U.S. State court adoption proceedings. Typically, the age of the child varies and the length of time the child has been in the physical custody of the prospective adoptive parents ranges from up to 12 years to just a few months. The consent documents to be notarized may or may not include the consent of both birth parents.

As explained in the excerpts below, the Department concluded that the notarial request should be denied as not authorized by the laws or authorities of the host country.

The full text of the telegram is available at *www.state.gov/s/l/c8183.htm*.

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2. WHAT IS THE POLICY ON NOTARIAL REQUESTS? The policies applicable to notarial requests are stated in 7 FAM 821–827 and 22 CFR 92.1–92.17 Generally, a consular officer should refuse requests to perform notarials only after careful consideration. A consular officer may refuse to perform a notarial act if the officer has reasonable grounds to believe that it will be used for a purpose that is unlawful, improper, or inimical to the best interests of the United States. Also, under 7 FAM 824 and 22 CFR 92.9, a

consular officer may perform only those notarial services authorized by treaty between the United States and the host country or that are permitted by the authorities of the host country.

* * * *

4. COULD THE CHILD'S STATUS BE ADJUSTED? Technically, in some cases, once the adoption is granted in the United States, the child may be able to legalize status under Section 101(b)(1)(E) of the INA depending upon whether or not the child meets the Section 101(b)(1)(E) criteria. Under section 101(b)(1)(E), the adoptive parents must have two years legal custody and two years residence with the child before filing the immigrant visa petition; the two years legal custody and two years residence with the child may occur before or after the adoption, but if before the adoption, it must be based on a grant of legal custody; and the child must be adopted while under the age of 16 (except in applicable sibling circumstances). Thus, the fact that the adoption occurs in the United States and there was an unlawful entry of the child does not preclude the possibility that the child could adjust status. . . .

* * * *

6. WHY DO SO MANY OF THESE CASES INVOLVE ADOPTIONS BY RELATIVES? A review of email information and cables from Mexico and from other posts over the past two years reveals that in most cases the birth parents, who were seeking to relinquish parental rights and consent to the adoption of their child, were relatives of the prospective adoptive parents. Under current immigration law, it is not possible for birth parents to place for adoption a child directly with relatives in the United States. As noted, under Section 101(b)(1)(E)(adopted children), a designated, direct placement by the birth parents to other family members is possible; however, the prospective adoptive parents would have to move to the child's country of origin to meet the two-year legal custody/residence requirement. Under 101(b)(1)(F)(orphans), the birth parents may not directly place the child with designated family members. Instead, the child must meet the definition of orphan and be abandoned.

* * * *

7. WHAT IS PROVIDED FOR IN MEXICAN ADOPTION LAW? As reported by post, Mexican adoption law requires that U.S. citizens and other non-Mexican citizens who wish to adopt a Mexican child must adopt the child in Mexico in accordance with Mexican law. Mexican adoption procedure includes a six-month trial period during which the child lives with the prospective adoptive parents to assure mutual benefit. The adoption is not final until after this time, and the child cannot leave Mexico before it is complete. The six-month trial period may be waived at the judge's discretion. In the cases presented to post to date, no child has been adopted in accordance with the Mexican adoption procedures. Further, Mexico has ratified the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Hague Adoption Convention). The parties involved in moving the child across national lines without first adhering to the Hague Convention requirements for intercountry adoptions are circumventing the protections afforded the child, the birth parents, and the prospective adoptive parents by this treaty.

8. WHAT ARE THE RISKS TO CHILDREN IF SUCH NOTARIAL REQUESTS ARE GRANTED ON A REGULAR BASIS? There are unwarranted risks of substantial harm to a child who becomes involved in this convoluted process. There is no pre-placement evaluation or home study of the prospective adoptive parents prior to the physical custody of the child being transferred; there is no governmental entity (either Mexican or U.S.) approving or overseeing the placement in advance of the adoption or checking on the status of the child during the period the child is residing with the U.S. potential parents, which theoretically could extend for a lengthy period of time (that is, from the time the child enters the United States without inspection until the time the adopting parents and the birth parents decide to complete an adoption); there is no guarantee that the child will be placed with relatives and the unsupervised placement of an undocumented child with unknown persons who have not had a home study or been approved to be adoptive parents in a particular State is extremely risky to a child's safety and well being. . . .

9. HOW ARE BIRTH PARENT RIGHTS PROTECTED? In some instances, the birth parent requesting that his or her documents relinquishing parental rights and consenting to the adoption of the child in the United States has represented that the other birth parent's consent was not necessary or would not be included. Because Mexican adoption law has not been followed in these cases, it is difficult to ascertain if both birth parents consent is necessary and if so, whether or not it was properly obtained. . . .

10. MAY THE NOTARIAL REQUESTS BE DENIED AND, IF SO, WHAT ARE THE GROUNDS FOR REFUSING? In light of the factors discussed, post should deny/deny requests to notarize U.S. State court documents from Mexican birth parents in which the parent or parents seek to relinquish parental rights and consent to the adoption of their Mexican child who was moved to the United States without first complying with Mexican adoption law under 7 FAM 824 and 22 CFR 92.9 as not authorized by the laws or authorities of the host country.

(2) Advance determination of orphan status in connection with international adoption

In June 2003 the Department of Homeland Security, Bureau of Citizenship and Immigration Services ("DHS/BCIS") and the State Department Bureau of Consular Affairs agreed to offer participation in the Orphan First pilot program involving five countries to prospective adoptive parents. A telegram to posts dated June 26, 2003, described the program as excerpted below.

The full text of the telegram is available at *www.state.gov/s/l/c8183.htm.*

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2. . . . The goal of the Orphan First program is to make a determination on an orphan's eligibility under the INA prior to the prospective adoptive parents traveling to post or incurring legal responsibility for the orphan. We expect that early adjudication

of the orphan status elements of the I-604 investigation will mitigate potential issues to prospective parents, adoptive children, and consular and immigration officials in processing adoption cases. BCIS will begin offering some prospective parents the option of participating in the Orphans First Pilot Program as of July 1, 2003.

3. The pilot program involves five countries: Haiti, Honduras, the Philippines, Poland, and Sierra Leone. . . .

* * * *

2. International Child Abduction

a. European Court of Human Rights

On April 24, 2003, the European Court of Human Rights ("ECHR") issued a decision in *Sylvester v. Austria* (App nos 36812/97 and 40104/98). The two applicants in the case were an American father and a daughter born in the United States of his marriage with an Austrian citizen. As described in the ECHR opinion, "The family's last common residence was in Michigan. Under the law of the State of Michigan the parents had joint custody" over the child.

As set forth in greater detail in the ECHR opinion, the facts of the case are as follows. The Austrian mother left the United States with the one-year-old daughter in October 1995, without the consent of the father. The father immediately requested the Austrian courts to order his daughter's return, relying on the 1980 Hague Convention on the Civil Aspects of International Child Abduction done at The Hague, October 25, 1980, 134 U.N.T.S. 98 (1983) ("Hague Abduction Convention"). Within days the mother filed an application with the Graz District Civil Court in Austria for sole custody over the daughter. On December 20, 1995, the Graz court found that the daughter had been wrongfully removed within the meaning of Article 3 of the Hague Convention and ordered the daughter returned to the United States. Although this

decision was affirmed on appeal, an enforcement order was issued in May 1996, and the United States Department of State repeatedly requested information as to steps being taken to locate the child and enforce the order, the mother successfully avoided enforcement efforts.

In October 1996 the Supreme Court of Austria set aside the enforcement order and referred the case back to the Graz District Civil Court to consider whether the child would suffer grave psychological harm by being returned to her father, given the intervening year when she had been solely with her mother. The Graz District Civil Court dismissed the enforcement application, finding that in the year and four months since the abduction the father "had become a complete stranger" to the child and that maintaining her relationship with the mother, now the child's "main person of reference" was "indispensable for her well-being."

In bringing the case to the ECHR, the father alleged violations of Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Human Rights Convention"). As relevant to the decision, Article 8 provides:

> 1. Everyone has the right to respect for his private and family life, . . .
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The ECHR noted that "it is for each Contracting State to equip itself with adequate and effective means to ensure compliance with its positive obligations under art 8 of the Convention . . ." In the case before it, the Court found that Austria had violated Article 8, holding:

> 72. . . . the Court concludes that the Austrian authorities failed to take, without delay, all the measures that could reasonably be expected to enforce the return order, and thereby breached the applicants' right to respect for their family life, as guaranteed by art 8.

The ECHR found it unnecessary to rule on the allegations concerning Article 6 of the European Human Rights Convention. It awarded damages, costs and expenses to the father. In satisfaction of that award, the government of Austria paid Mr. Sylvester approximately $43,000.

On May 7, 2003, the U.S. Department of State sent a diplomatic note to the Embassy of Austria, stating in part:

> In view of the Court's unanimous decision, and numerous previous representations at the highest levels over a course of years by the United States Government, the United States Government requests a response as soon as possible from the Government of Austria on the steps it plans to take to improve Mr. Sylvester's access to his daughter, thereby upholding his and his daughter's right to their family life.

Department of State Archive No. WCS20030002676.

In accordance with Article 46 of the European Human Rights Convention, the Council of Europe's Committee of Ministers supervises the execution of the ECHR's judgments. At the end of 2003, the Committee of Minister's supervisory work with respect to the *Sylvester v. Austria* case was ongoing.

b. U.S. report on compliance with Hague Abduction Convention

In April 2003 the Department of State submitted the Report on Compliance with the Hague Abduction Convention, pursuant to § 2803 of Pub. L. No. 105–277, 112 Stat. 2681 (1998), as amended by § 202 of Pub. L. No. 106–113, 113 Stat. 1501 (1999). As required by the legislation, the report addresses compliance by states parties to the Hague Abduction Convention.

The full text of the report, excerpted below, is available at *http://travel.state.gov/2003haguereport.html. See also* June 2003 Report to Congress on International Child Abductions in Response to the Statement of Managers Accompanying FY-2003 Omnibus Appropriations Bill P.L. 108–7, available at *http://travel.state.gov/2003_Hague_Compliance_Report.html.*

This report reviews the status of implementation of the Convention by countries recognized by the United States (currently 51) as parties to the Convention. It specifically cites those countries where implementation of the Convention has proven problematic, for reasons specific to each country and to varying degrees. It also discusses unresolved applications filed through the U.S. Central Authority for the return of children to the United States. Under the Convention, return and access applications may also be filed either directly with the Central Authority of the state where the child is located or with a foreign court with jurisdiction to hear a return request. The left-behind parent may pursue return without involving the U.S. Central Authority. In these circumstances, the U.S. Central Authority may never know about such a request and its disposition. Thus this report cannot give a complete picture of the outcome of all Hague applications for the return of children to the United States.

* * * *

This report identifies specific countries and cases in which parties to the Convention have not met its goals or in which the Convention has not operated to achieve a satisfactory result for left-behind parents in the United States. . . . .

* * * *

RESPONSE TO SECTION 2803(a):

Section 2803(a)(1) requests "the number of applications for the return of children submitted by applicants in the United States to the Central Authority for the United States that remain unresolved more than 18 months after the date of filing."

Taking into account the above clarifications, as of September 30, 2002, there were 48 applications that remained unresolved 18 months after the date of filing with the relevant foreign Central Authority.

Section 2803(a)(2) requests "a list of the countries to which children in unresolved applications described in paragraph (1) are alleged to have been abducted, are being wrongfully retained in violation of the United States court orders, or which have failed to comply with any of their obligations under such Convention with respect to applications for the return of children, access to children, or both, submitted by applicants in the United States."

The 48 applications identified above that remain unresolved 18 months after the date of filing, as of September 30, 2002, involve fifteen countries: Australia, Belgium, Colombia, Ecuador, Germany, Honduras, Ireland, Israel, Mauritius, Mexico, Panama, Poland, South Africa, Spain and Zimbabwe. The extent to which these countries and others appear to present additional, systemic issues of compliance under the Convention is discussed further in Sections (a)(3), (a)(4) and (a)(6), below.

In considering the question of compliance and court orders, it should be noted that most Hague cases are premised on a parent's shared custody rights by operation of law, typically shared custody under state law by virtue of being husband and wife. A court order is not a requirement for filing a Hague application. Moreover, while the existence of rights of custody in the country of habitual residence at the time of an abduction is a requirement for filing under the Convention, the Convention itself does not address the question of enforcement of such custody rights in other countries. The Convention requires that foreign countries recognize U.S. custody rights to the extent that such rights provide the basis for application and the rationale for return. Adjudication of cases under the Convention by foreign courts should only take into consideration whether the child was wrongfully removed from the country of habitual residence or wrongfully retained abroad.

Section 2803(a)(3) requests "a list of countries that have demonstrated a pattern of noncompliance with the obligations of the Convention with respect to the applications for the return

of children, access to children, or both, submitted by applicants in the United States to the Central Authority of the United States."

There are many factors involved in implementing the provisions of the Convention, not least because the executive, legislative and judicial branches of each party country have important and varying roles. A country may thus perform well in some areas and poorly in others. The Department of State, building on recommendations of an inter-agency working group on international parental child abduction, has identified the elements involved in implementing the provisions of the Convention and has used these as factors for evaluating country performance. The elements are: the existence and effectiveness of implementing legislation; Central Authority performance; judicial performance; and enforcement of orders. "Implementing legislation" can be evaluated as to whether, after ratification of the Convention, it has the force of law enabling the executive and judicial branches to carry out their Convention responsibilities. "Central Authority performance" involves the speed of processing applications; procedures for assisting left-behind parents in obtaining knowledgeable, affordable legal assistance; judicial education or resource programs; responsiveness to the U.S. Central Authority and left-behind parent inquiries; and success in promptly locating abducted children. "Judicial performance" comprises the timeliness of first hearing and subsequent appeals and whether courts apply the Convention and its articles appropriately. "Enforcement of orders" involves the prompt enforcement of civil court orders under the Convention by civil or police authorities and the existence and effectiveness of sanctions compelling compliance with orders. Specific instances of failure to enforce orders are addressed in section (a)(6) below.

This report identifies those countries that the Department of State has found to have demonstrated a pattern of noncompliance or that, despite a small number of cases, have such systemic problems that the Department believes a larger volume of cases would demonstrate continued noncompliance constituting a pattern. In addition, the Department recognizes that countries may demonstrate varying levels of commitment to and effort in meeting their obligations under the Convention. The Department considers

that countries listed as noncompliant are not taking effective steps to address deficiencies.

As discussed [in subsequent pages of the report], the Department of State considers Austria, Honduras, Mauritius, Mexico and Panama to be noncompliant using this standard, and Switzerland to be not fully compliant. The Department of State has also identified several countries of concern that have inadequately addressed some aspects of their obligations under the Hague Convention. These countries are The Bahamas, Colombia, Germany, Poland, and Spain.

A word about Sweden: Sweden was listed in our first compliance report in 1999 as a non-compliant country. In the 2001 report, we placed Sweden in the category of countries of concern with regard to implementation of the Convention. The last report reflected, in our view, the extent to which Sweden had been responsive to the concerns raised in the initial report. Sweden's implementation of the Convention over the last year, including the court-ordered and enforced return of a child to the United States, indicated continued progress toward full compliance with the Convention. We therefore have not listed Sweden in any of the categories of non-compliance in this report. While we hope this progress indicates a firm commitment to the Convention's principles, we will monitor closely Sweden's actions in each new case, and will continue to seek resolution of long-standing cases of concern.

* * * *

3. Parental Access to Children

On October 22, 2003, the United States and Egypt signed a memorandum of understanding ("MOU") "setting forth guidelines for future discussions on cooperation in consular cases concerning parental access to children according to the applicable laws of each country." The MOU states that the two countries "encourage their citizens to reach voluntary custody and access arrangements providing both parents with rights of access to their children" and that in

circumstances where a parent in one country has been unable to gain access to a child in the other country, "the consular officials and other relevant authorities of [the two countries] intend to cooperate to facilitate access by parents to their children and contact between them, consistent with applicable law." Furthermore, authorities of the two countries "plan to work with parents and with each other as needed to assist in the facilitation of visits by parents with their children, consistent with applicable law;" and the two countries "intend to exchange information about the laws and practices in their respective countries relevant to child custody, parental access to children, and related matters and expect to take steps to inform parents and other citizens of the laws and practices of the other country." The Scope, Purpose and Basis section of the MOU is set forth below.

The full text of the MOU is available at *www.state.gov/s/l/c8183.htm*.

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The Arab Republic of Egypt and the United States of America intend to seek an arrangement to enhance consular and other cooperation toward resolving and managing the difficulties involving parents residing in one country whose children reside in the other country. The Arab Republic of Egypt and the United States of America are committed to working together to encourage the maintenance of the bond between parents and their children.

The purpose of such an arrangement would be to assist a parent residing in one country to obtain meaningful access to his or her children residing in the other country. Such access could be sought in conjunction with a parent's efforts to obtain the return of a child, or as the parent's primary goal in the context of shared custody or a custody dispute.

The basis for such an arrangement would be the Vienna Convention on Consular Relations, done at Vienna on 24 April 1963, to which the Arab Republic of Egypt and the United States of America are both parties, and in particular the provisions of articles 5(e) and (h), according to which consular functions include

assisting nationals of the sending state and safeguarding the interests of children who are nationals of the sending state.

Nothing in such an arrangement would serve as the basis for failure to return children, nor would such an arrangement or any of its terms prevent parents from attempting simultaneously to establish or enforce rights of custody and access through the legal systems of either country. Access by parents to their children is not a substitute for the return of children.

* * * *

C. PRISONER ISSUES

The Treaty on the Execution of Penal Sentences, signed between the United States of America and the United Mexican States in 1976 ("U.S.-Mexico prisoner transfer agreement"), provides that "[s]entences imposed in [one of the treaty partners] on nationals of the [other treaty partner] may be served in penal institutions or subject to the supervision of the authorities of the [treaty partner of nationality] in accordance with the provisions of this Treaty." Article II provides that the treaty shall apply only if certain conditions are met, including "[t]hat the offense for which the offender *was convicted and sentenced* is one which would also be generally punishable as a crime in the Receiving State. . . ." (Emphasis added). This general rule requiring a conviction and sentence is subject to a limited exception, however: Article VIII(2) of the treaty provides that "[b]y special agreement between the Parties, persons *accused of an offense but determined to be of unsound mental condition* may be transferred for care in institutions in the country of nationality." (Emphasis added).

In an exchange of notes dated June 30, 2003, and September 5, 2003, respectively, the United States of America and the United Mexican States entered into such a special agreement to transfer an American found by Mexico to be of unsound mental condition to the United States for commitment. A transfer pursuant to Article VIII(2) of the

treaty was originally proposed by Mexico by diplomatic note of November 4, 2002.

A summary of the U.S. diplomatic note of June 30, 2003, setting forth the terms of the special agreement, was provided to counsel for the individual in question and is excerpted below.

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In accordance with the Treaty on the Execution of Penal Sentences signed between the United States of America and the United Mexican States in 1976, [the U.S. citizen in question] will complete the remainder of the sentence (order of commitment) imposed upon him by the Third Judge of the Penal Court of the Bravos District, Chihuahua, Mexico. [The U.S. citizen in question] was found to have committed the acts of injury, kidnapping and robbery, as summarized by the Court's December 3, 1999, judgment and commitment order.

* * * *

1. A Mexican Court found [the U.S. citizen in question] was incompetent or incapable of exercising judgment under Art. 52 of the Penal Procedures Code of the State of Chihuahua;
2. The conclusions of the Mexican Court will be considered as definitive under Section 4243 of Title 18 of the United States Code, that [the U.S. citizen in question] committed the offenses charged but that he was not guilty by reason of insanity;
3. The remainder of the order of commitment against [the U.S. citizen in question] will be administered by a Court of the United States as if he had been ordered committed by a Court of the United States pursuant to Title 18, United States Code, Section 4243;
4. The penal Court of the Bravos District, Chihuahua retains exclusive jurisdiction as provided in Article VI of the Treaty; and

5. The United States will have the authority to administer the commitment order entered against [the U.S. citizen in question] in accordance with Article V(2) of the Treaty.*

Cross References

International child maintenance convention, **Chapter 15.B.**
Judicial assistance, **Chapter 15.C., D.2.,3.**

* [Editors' note: Article V(2) provides that the "completion of a transferred offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise. The Transferring State shall, however, retain the power to pardon or grant amnesty. . . ."]

Chapter 3

International Criminal Law

A. EXTRADITION, MUTUAL LEGAL ASSISTANCE, AND RELATED ISSUES

1. Agreements on Extradition and Mutual Legal Assistance between the United States of America and the European Union

On June 25, 2003, U.S. Attorney General Ashcroft and Greek Minister of Justice Petsalnikos signed agreements between the United States and the European Union ("EU") on extradition and mutual legal assistance in criminal matters. A memorandum prepared by the Office of Law Enforcement and Intelligence, Office of the Legal Adviser, U.S. Department of State, summarized the main features of the agreements as set forth below. *See* 43 I.L.M. 747 (2004), which also includes copies of the agreements. *See also* Chapter 4.A. for a discussion of the European Union as treaty partner and provision for bilateral instruments confirming changes effected by the U.S.-EU agreements in existing bilateral extradition and mutual legal assistance treaties.

. . . The agreements will modernize the United States' extradition and mutual assistance relationships with EU member states, and also create an institutional framework for U.S. law enforcement relations with the European Union itself, which gradually is developing greater responsibilities in this area.

The impetus for the agreements was the September 11, 2001 terrorist attacks on the United States. On September 20, 2001, the European Council of Ministers proposed that the Union negotiate an agreement with the United States on law enforcement cooperation against terrorism. The concept subsequently was broadened to encompass two separate agreements addressing extradition and mutual legal assistance in criminal matters more generally. Negotiations took place during 2002–03, under the leadership of the EU Presidencies of Denmark and Greece, with assistance from the Council and Commission secretariats.

Historically, the United States has conducted its extradition and mutual legal assistance practice almost exclusively on the basis of bilateral treaties. It has existing extradition treaties with all EU members, and mutual legal assistance treaties (MLATs) with eighteen of the now twenty-five EU member states. Neither EU agreement contains the full panoply of provisions ordinarily included in U.S. extradition and mutual legal assistance treaties. Instead, they supplement and selectively amend these treaties. With respect to those countries with which the United States lacks an underlying MLAT, the EU Agreement will serve to create a limited mutual legal assistance treaty relationship.

Main Features of the Agreements

The Extradition Agreement contains several provisions that will significantly improve the scope and operation of existing bilateral extradition treaties between the United States and EU member states. One provision (Article 4) replaces lists of extraditable offenses in several older bilateral treaties which do not presently cover such modern offenses as money-laundering. Henceforth, any offense punishable by more than one year's imprisonment under both states' legal systems would be extraditable. Another important provision (Article 10) ensures that a U.S. extradition request is not disfavored by an EU member state which simultaneously receives a competing request for the person from another member state pursuant to the newly-created European Arrest Warrant. Further, the Extradition Agreement (Articles 5–8) simplifies procedural requirements for preparing and transmitting extradition documents, easing and speeding current procedures.

At the EU's request, the Extradition Agreement also includes a provision on capital punishment (Article 13), which permits the requested state to deny extradition if it does not have capital punishment for the same offense; most but not all U.S. bilateral extradition treaties with EU member states already had a similar provision. A further echo of contentious topics in the current U.S.-EU dialogue can be found in an entry to the Explanatory Note to the Agreement, stating that the above-mentioned provision on competing requests (Article 10) is without effect on obligations that EU member states may have under the Rome Statute of the International Criminal Court or on the rights of the United States as a non-Party with regard to the ICC.

The Mutual Legal Assistance Agreement contains several innovative provisions that should prove of value to U.S. prosecutors and investigators. It creates a specialized mechanism for obtaining bank account information from an EU member state (Article 4), enabling the U.S. to tap into a recently-created EU network of national registries for such data. U.S. MLATs historically have not contained a specialized procedure for querying bank account information on a national basis, because of a lack of domestic legal authority for such a request network, but Congress, in enacting Section 314 of the USA Patriot Act in 2001, authorized the Department of Treasury to create such a mechanism.

The Mutual Legal Assistance agreement also elaborates legal frameworks for the use of new techniques such as joint investigative teams (Article 5), which have proven valuable in the counter-terrorism area, and for the use of video-conferencing technology to take testimony from foreign-located witnesses (Article 6). Further, U.S. administrative agencies which investigate conduct with a view to future criminal prosecution henceforth will have the opportunity to request assistance from all EU member states (Article 8), whereas currently they have this possibility only in some of them. In addition, the Mutual Legal Assistance Agreement includes an article setting out parameters for the use of personal data (Article 9), a subject that has been a major EU and member state concern in recent years. While satisfying the requirements of the EU directive on this subject, the provision ensures U.S. investigators and prosecutors the necessary flexibility to use

information obtained from a member state not only for a particular case but also in other proceedings.

2. Testimony Concerning Fugitives Avoiding Extradition

On October 1, 2003, Samuel M.Witten, Deputy Legal Adviser, U.S. Department of State, appeared before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, Committee on Government Reform, U.S. House of Representatives. His testimony, "Strengthening the Long Arm of the Law: How are Fugitives Avoiding Extradition, and How Can We Bring Them to Justice?", is excerpted below.

The full text of the testimony is available at *http://reform.house.gov/UploadedFiles/Witten.pdf.*

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. . . [T]he United States has extradition treaty relationships with over 100 countries throughout the world. Pursuant to this network of extradition treaties, our extradition requests in recent years have resulted in the return for trial and punishment of persons charged with or convicted of the widest variety of crimes, including murder, white-collar crimes, narcotics traffickers and terrorists. Some of our recent extraditions have included the extradition from France of James Kopp, who murdered abortion doctor Bernard Slepian in Buffalo, New York, and was convicted of second degree murder this year in New York, and of Ira Einhorn, who murdered his girlfriend in Philadelphia and was a fugitive from justice for over 20 years before he was convicted of murder in 2002. Earlier this year we obtained the extradition from Guatemala of Milton Napolean Marin Castillo, who committed a double murder in Ann Arbor, Michigan.

Areas of Concern

While there have been many successes, the existence of an extradition treaty, even a modern one, does not ensure that all will always go well in our extradition requests to our partners.

Because of the differences in legal systems around the world, the extradition process is neither simple nor without frequent delays. I will highlight for you today three major areas of continuing concern for the Administration with respect to our international extradition relationships.

Nationality

One concern has been our ability to obtain the extradition of nationals of the Requested State. As a matter of longstanding policy, the U.S. Government extradites U.S. nationals. Most of the treaties we have sent recently to the Senate similarly freely allow for the extradition of nationals. Some countries, however, are prohibited by their constitutions or other legal authority from extraditing their nationals. The U.S. Government has made it a high priority to convince states to agree to extradite their nationals, notwithstanding laws or traditions to the contrary. This is, however, a very sensitive and deep-seated issue, and we have not succeeded in obtaining unqualified approval in all circumstances. A number of our major treaty partners, such as France, Germany, and many countries of Central and South America, still cannot extradite nationals. We continue, however, to work to convince these and all other countries to remove constitutional and other legal restrictions on the extradition of nationals.

In this connection, we have achieved notable successes recently in the Western Hemisphere with respect to the issue of extradition of nationals. Our recent treaties with Argentina, Bolivia, Paraguay, and Peru all provide for extradition of nationals. They represent a watershed in our efforts to convince civil law countries in the Western Hemisphere to obligate themselves to extradite their nationals to the United States. In practical terms, these treaties should help the United States to bring to justice violent criminals and narcotics traffickers, regardless of nationality, who reside or may be found in these countries.

We also are able to make gains in the area of extradition of nationals in some cases by working directly with our treaty partners on modifications of their extradition policies, where their law permits extradition of nationals. For example, 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. After many years of discussion, Mexico and Colombia have been extraditing nationals to the United States in recent years, Mexico under the U.S.-Mexico bilateral extradition treaty and Colombia under the authority of its domestic extradition law.

Death Penalty and Life Assurances

Another continuing problem is many countries' concern about the penalties that may be imposed in the requesting state, such as the death penalty or even sentences of life imprisonment. Our modern treaties typically 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 carried out. These treaties do not require the parties to the treaty to deny extradition absent death penalty assurances but permit them to do so in appropriate cases. In many cases, the United States is in a position to provide such assurances when requested to do so. Prosecuting authorities generally can take measures that rule out the death penalty, and often are prepared to forego the death penalty rather than allow the fugitive to escape U.S. justice. There have been cases, however, where U.S. federal or state prosecutors have not been in a position to provide assurances that they would not seek the death penalty for a particular fugitive, for example, where the crime is such that they would prefer not to give the assurance and instead take the chance that the fugitive might be returned from a different jurisdiction or otherwise come into the United States.

Beyond death penalty assurances, one troubling development with respect to sentencing is that some of our extradition treaty partners have requested assurances regarding life imprisonment as a prerequisite to extraditing fugitives to the United States, despite an absence of treaty provisions for such assurances. The degree to which U.S. federal and state prosecuting officials can or are willing to comply with such requests varies.

This matter of assurances relating to life imprisonment has become a particular concern in the last two years with respect to Mexico, which I understand is of particular concern to the Committee. In October 2001, the Mexican Supreme Court held that life sentences were unconstitutional under the Mexican Constitution and that, in addition to such sentences being barred in Mexico, no fugitive in Mexico could be extradited to another country if that fugitive faces a life sentence in the State requesting his extradition. Following this judicial ruling, Mexico was obligated to seek assurances from the United States that fugitives who face extradition from Mexico will not be sentenced to life imprisonment if returned, tried, and convicted in the United States.

During the nearly two-year period that this ruling has been in effect, officials in the executive branches of both countries have worked to try to design assurances that will satisfy the Mexican judicial requirement but also will be acceptable, or at least workable, to U.S. prosecutors. At the same time, however, we continue to strongly believe, and have communicated firmly to the Mexican Government, that the Mexican Supreme Court opinion should be revisited so that our extradition relationship is not subject to this additional burden. Both the State Department and the Justice Department, including the Attorney General and Secretary Powell, have engaged the Mexican Government on this issue. We have pressed, and will continue to press, for the Government of Mexico to seek the reversal of this decision, and at a minimum reduce its adverse impact for as long as it is in effect.

Dual Criminality

. . . The older U.S. treaties negotiated before the late 1970s include a list of covered offenses. For countries with which the United States still has such "list" treaties, a request for extradition for a crime not included in the list would be rejected. In newer treaties concluded in the last 30–35 years, however, 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 law of both states by imprisonment for more than a year, or a more severe penalty. . . . The recently-signed extradition agreement with the European

Union will make dual criminality the standard for all twenty-five countries that as of next year will be EU members.

Apart from updating the extraditable offenses in individual bilateral extradition treaties, the United States has been a leader in the recent successful series of multilateral negotiations on international narcotics trafficking, organized crime, corruption, and terrorism. Each of these multilateral conventions, such as the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 2000 UN Convention Against Transnational Organized Crime and its Protocols on Trafficking and Smuggling of Persons, the 1997 UN Convention for the Suppression of Terrorist Bombings, and the 1999 UN Convention for the Suppression of Financing of Terrorism, include extradition provisions that have the specific effect of updating extradition list treaties between parties to the convention to add the offenses named in the convention. . . . In this respect, I should note that in the framework of the Council of Europe the United States has recently negotiated and signed an international convention on computer crime that will add major computer crime offenses to the list of crimes in our extradition treaties for which extradition is possible.

Additional Impediments to Extradition

There are other reasons why fugitives sometimes are not returned expeditiously for trial, even where an extradition treaty is in place and a fugitive from one nation can be located and arrested in another nation. Sometimes, in the courts of the United States and the courts of our treaty partners, there are lengthy judicial proceedings at which fugitives exercise their rights to challenge extradition in trial court and through appeals or other proceedings. In the United States judicial system, fugitives have the right to seek a writ of habeas corpus that reviews a judicial finding of extraditability. Many countries of Latin America have the *amparo* process, which permits challenges to orders of extradition. In some cases, fugitives in Europe have sought relief from the European Court of Human Rights after judicial proceedings are concluded in the country of extradition.

In addition to these procedural rights, evidentiary requirements for extradition differ among legal systems and the process of

extradition can become quite complex. Although an extradition hearing is not a full-fledged trial on the merits, the evidentiary requirements vary from legal system to legal system and do not necessarily mirror the requirements of our own "probable cause" standard. Procedural differences can lead to frustrating delays in proceedings. We address these and similar problems through direct consultations with our treaty partners, by amending treaties in some cases, and by increasing our knowledge of relevant aspects of foreign legal systems and thereby enhancing our ability to work more effectively with our law enforcement partners.

The Return of Fugitives Other Than Pursuant to a Bilateral Treaty

Outside of the process of extradition pursuant to bilateral treaties, our law enforcement partners have frequently invoked other means available under their domestic law to assist the United States in obtaining the return of fugitives to our country for trial or punishment. In recent years, Colombia has been extremely helpful in returning dozens of fugitives to the United States, particularly in narcotics related matters, pursuant to extradition procedures incorporated under its domestic laws. We have also obtained custody of many fugitives from other countries, including Canada and Mexico, through those countries' deportation or expulsion processes. Thus while extradition pursuant to treaty continues to be the most common means of returning fugitives, there are other possibilities that we have pursued and will continue to pursue.

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3. Mutual Legal Assistance

a. Mutual legal assistance treaty with Japan

On November 24, 2003, President George W. Bush transmitted to the Senate for advice and consent to ratification the Treaty Between the United States of America and Japan on Mutual Legal Assistance in Criminal Matters. S. Treaty Doc. No. 108–12 (2003). Excerpts below from the report of

Secretary of State Colin L. Powell submitting the treaty to the President briefly describe its terms and the arrangement for central authorities to implement the treaty. This is the first mutual legal assistance treaty to be entered into by Japan with any country.

LETTER OF SUBMITTAL

Department of State,
Washington, October 27, 2003.

The President,
The White House.

The President: I have the honor to submit to you the Treaty Between the United States of America and Japan on Mutual Legal Assistance in Criminal Matters ("the Treaty"), and a related exchange of notes, both signed at Washington on August 5, 2003. I recommend that the Treaty be transmitted to the Senate for its advice and consent to ratification, and the exchange of notes be submitted for the information of the Senate.

* * * *

The scope of the Treaty includes not only assistance provided in connection with the investigation, prosecution, and prevention of criminal offenses, but also in certain related proceedings. Significantly, Article 1(3) permits assistance in connection with an administrative investigation of suspected criminal conduct (e.g., an investigation by the Securities and Exchange Commission of suspected securities fraud), in such cases and upon such conditions as the requested Party deems appropriate. The Central Authority of the requesting Party would be required to certify that the authority conducting the investigation has statutory or regulatory authority to conduct the investigation of facts that could constitute criminal offenses, and that the testimony, statements or items to be obtained will be used in the requesting Party in an investigation, prosecution or other proceeding in criminal matters, including a decision whether to prosecute.

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Article 2 provides for the designation of Central Authorities and defines Central Authorities for purposes of the Treaty. For the United States, the Central Authority is the Attorney General or a person designated by the Attorney General. For Japan, the Central Authority is the minister of Justice or the National Public Safety Commission or their designees. The authorization for Japan to designate two agencies is necessary because of the respective jurisdictions of the two agencies concerned. The article provides that the Central Authorities are to communicate directly with one another for the purposes of the Treaty.

This Treaty is accompanied by an exchange of diplomatic notes that further sets forth the specific kinds of requests that will be handled by each agency on the Japanese side. The notes also provide for consultations between the United States and Japan before the implementation of any changes in such designations.

In the exchange of notes Japan has designated the Minister of Justice as the Central Authority with respect to requests made by the United States. With respect to requests made by Japan, the Minister of Justice will also serve as the Central Authority for requests submitted by public prosecutors or judicial police officials, or if a request requires examination of a witness in a U.S. court. The Central Authority in connection with requests made by police officials or imperial guard officers will be the National Public Safety Commission or its designee. The Minister of Justice and the National Public Safety Commission will establish a mechanism to avoid unnecessary duplication of requests and to facilitate efficient and speedy provision of assistance.

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b. Litigation concerning implementation of mutual legal assistance treaty with Canada

On March 31, 2003, the U.S. Court of Appeals for the Eleventh Circuit reversed a district court decision quashing subpoenas issued pursuant to a request for assistance by Canada in connection with an ongoing investigation pursuant to the U.S.-Canada Treaty on Mutual Legal Assistance in Criminal

Matters ("MLAT") (*reprinted at* 24 I.L.M. 1092 (1985)). *In re Commissioner's Subpoenas*, 325 F.3d 1287 (11th Cir. 2003). The MLAT obligates the United States and Canada to provide "mutual legal assistance in all matters relating to the investigation, prosecution and suppression of offences."

In response to Canada's request in this case, acting pursuant to the MLAT and 28 U.S.C. § 1782, the United States filed a petition in the U.S. District Court for the Southern District of Florida seeking an order appointing an assistant U.S. attorney as a "commissioner" to assist the Canadian government in obtaining the requested evidence. Section 1782 authorizes federal district courts to order persons to provide testimony or other assistance "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation" in response to requests known as "letters rogatory" sent from the court of another country or, in certain circumstances, by "interested persons."

The court of appeals explained the lower court's decision to grant the motion to quash as follows:

> Reading Article VII, P 2 of the MLAT [providing that "[a] request shall be executed in accordance with the law of the Requested State. . . ."] to incorporate by reference the entire substantive law of the Requested State, the magistrate judge concluded that the treaty request was subject to this circuit's interpretation of 28 U.S.C. § 1782 requiring foreign discoverability as a condition precedent to granting requests made by foreign governments through letters of request and letters rogatory. Since the parties agreed that there was no authority under Canadian law to compel this type of testimony from witnesses in a domestic criminal investigation where no charges had yet been filed, the magistrate judge held that 28 U.S.C. § 1782 and its foreign discoverability requirement precluded the assistance in this case.

In reversing, the court of appeals concluded:

> This case presents an issue of first impression for the federal appellate courts. We must ascertain whether this mutual legal assistance treaty between the two countries obligates the United States, at the request of Canada, to issue subpoenas to compel the testimony of witnesses in a criminal investigation prior to the filing of formal charges. Because we construe this Treaty to obligate both countries to execute requests for the issuance of subpoenas for purposes of compelling testimony in criminal investigations and to arrange for the taking of such testimony even prior to the actual initiation of formal charges, we hold that the Canadian request for assistance should have been granted and the subpoenas should not have been quashed by the district court.

Excerpts below from the court's opinion provide its analysis on these issues.

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. . . We conclude that the most logical construction of the phrase "law of the Requested State" in the MLAT is that the Treaty partners intended to utilize the established procedures set forth in the existing laws of the Requested State to execute the treaty requests, rather than to subject each and every treaty request to any and all limitations of existing law of the Requested State. That is, the Treaty utilizes § 1782 as a procedure for executing requests, but not as a means for deciding whether or not to grant or deny a request so made. This construction is more plausible primarily because of Article V, which delineates only narrowly confined circumstances in which the Requested State "may deny assistance." Article V is entitled "Limitations on Compliance" and provides, in relevant part:

1. The Requested State may deny assistance to the extent that
   a) the request is not made in conformity with the provisions of this Treaty; or
   b) execution of the request is contrary to its public interest, as determined by its Central Authority.

Moreover, "public interest" is itself narrowly defined in Article I of the Treaty to mean "any substantial interest related to national security or other essential public policy." If a request could be denied based on any limitation provided by the substantive law of the Requested State, as appellees urge, Article V's specific limitation where the request would be contrary to the public interest of the Requested State would be rendered superfluous.

The treaty negotiations and ratification history, fundamental canons of treaty construction, and analogous cases construing similar language in the text of other treaties also point strongly to our ultimate construction.

* * * *

Interpreting the MLAT to subject each and every request to the existing substantive law of the requested state runs contrary to another fundamental principle of treaty interpretation. "Treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between national legal systems." Restatement (Third) of Foreign Relations § 325 cmt. d; United States v. Lombera-Camorlinga, 206 F.3d 882, 888 (9th Cir. 2000). Obviously, the United States and Canada have their own domestic substantive law. Consequently, under the appellees' construction of the MLAT, the viability of requests under the Treaty would often turn on which country is entertaining the request, even if the information requested is identical.

* * * *

If there were any doubt about our conclusion that the parties did not intend to subject Canadian treaty requests to a foreign discoverability requirement, the Technical Analysis provides significant clarity. And, as the executive branch's official construction of the Treaty, this analysis is entitled to significant deference by this Court. "Although not conclusive, the meaning attributed to treaty provision by the Government agencies charged with their negotiation and enforcement is entitled to great

weight." Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184, 102 S. Ct. 2374, 2379, 72 L. Ed. 2d 765 (1982). The "Introduction" section of the Technical Analysis discusses the reasons for the creation of the Treaty and notes the fact that, in the past, the Canadian courts would refuse many requests for assistance by law enforcement officials from the United States because the information sought was for investigative purposes prior to the initiation of formal criminal charges. In so noting, the negotiators recognized that this created "unequal treatment since the United States provided assistance [to Canada] without regard to whether the case was pre- or post-indictment." Technical Analysis at 1. In an endnote, the negotiators elaborated that "[a]ssistance is available for a foreign country under 28 U.S.C. 1782 without regard to whether the action has already been filed." Id. at 26 n.2. Here, the negotiating team specifically discussed requests by Canada under section 1782 and understood section 1782 to allow for assistance without regard to lack of discoverability in Canada of compelled testimony prior to the actual filing of criminal charges. These statements in the Technical Analysis, constituting formal executive branch interpretations, all but foreclose any argument that the parties intended to subject the Attorney General's petitions, made honoring a Treaty request, to a foreign discoverability requirement for letters rogatory and letters of request.

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. . . . Similarly, "[t]he practice of 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, 109 S. Ct. 1183, 1192–93, 103 L. Ed. 2d 388 (1989). Based on its actions in this particular case, the government of Canada understands the Treaty to allow the assistance that it has requested in this case. The United States Department of Justice obviously agrees. Such deference is a significant factor leading to our conclusion, a conclusion however which is also indicated by the entirety of the text of the Treaty, analogous cases, and application of the canons of treaty interpretation. . . .

B. INTERNATIONAL CRIMES

1. Terrorism

a. Overview

On September 18, 2003, William H. Taft, IV, Legal Adviser for the U.S. Department of State, delivered an address to the International Bar Association regarding the U.S. and global response to the threat of international terrorism. Excerpts below focus on establishing and maintaining international norms and use of sanctions.

The full text of the address is available at *www.state.gov/s/l/c8183.htm.*

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. . . [I]n order to eliminate the terrorist threat, the United States and our allies are working together to identify the terrorists; cut off their money and inhibit their movements; find them, apprehend them, and bring them to justice. We're also working to press for reforms in States that harbor terrorists, and to limit access to weapons of mass destruction, because these steps are important elements of the effort to cut off terrorists' support and reduce, if not eliminate, the amount of harm they can do us. And we are working, both bilaterally and through multilateral institutions like the UN, the IMF, and the multilateral development banks, to build capacity in countries to deal with the terrorist threat. This last effort involves working with governments that have not had legal authority to implement UN sanctions on terrorists, or the institutions and skills to monitor and regulate domestic financial flows funding terrorists and terrorism.

Key legal initiatives to advance these overall goals include our efforts (1) to establish international norms for dealing with terrorism, through United Nations Security Council resolutions, international conventions, and other means; (2) to identify and publicly designate terrorist groups and individuals involved with

them; (3) to define and implement legal mechanisms for effectively cutting off financing to individuals or organizations determined to be involved in acts of terrorism, (4) to exclude and remove from the United States individuals associated with terrorist organizations, and (5) to work on seizing terrorists and bringing them to justice. Our lawyers are also busy working to implement sanctions and nonproliferation measures, but because these are more longstanding measures, and have not altered as significantly in the last two years, I will not dwell on them here.

The initiatives I have listed are major efforts, but there will be no quick fix. We have made considerable progress, and there is still much to do. As we go forward, one guiding principle for our efforts is the desire to work with other States to create a comprehensive worldwide approach, in order to leave no refuge anywhere for the terrorists and those who sponsor them. Another key guiding principle is the need to respect and protect universal human rights, including those of the terrorists themselves. And of course, a central principle is that we must act pursuant to the rule of law. From the initial closing of the airports to the military actions and continuing reconstruction in Afghanistan and Iraq, our actions have been carefully undertaken, and surrounded with procedural safeguards, to ensure that U.S. actions are consistent with all applicable laws, allow the greatest flexibility to military forces, provide the highest possible level of protection of civilians, and give the maximum respect for the civil and political rights of individual citizens. Naturally these objectives often intersect.

Efforts to establish and strengthen international norms

In this regard, the United States for many years has supported an effort to establish a clear set of international norms for combating terrorism. The creation and use of such norms can give all countries a blueprint for proceeding. As an additional benefit, this effort assists the ongoing U.S. efforts to promote international law generally and foster broader international cooperation.

We have been pleased to participate in several important developments in the area of international norms in the last two years.

UNSCR adoption and implementation

To begin with, as I'm sure you know, the U.S. supported the UN Security Council's adoption of two resolutions requiring Member States to take various actions to counter worldwide terrorism in general. Security Council Resolution 1373, adopted September 28, 2001, requires States to refrain from providing support for terrorism, and to freeze "without delay" the funds, other financial assets or economic resources of those who commit or attempt terrorist acts, or those who help such persons. The resolution also requires States to prevent the movement of terrorists through border controls and the issuance of identity papers and travel documents to them, and also to adopt measures to prevent counterfeiting, forgery or fraudulent use of such papers and documents.

The second Security Council resolution, Resolution 1390, requires States to freeze the assets of Usama bin Laden, members of the al Qa'ida organization, and the Taliban, and their associates, prohibit the sale or supply of arms and related materiel to them, an to prevent their entry into or transit through their territories. This resolution is a follow-on from two previous resolutions targeted at Usama bin Laden and the Taliban and the use of the area of Afghanistan under its control for sheltering and training terrorists (resolutions 1267 and 1333). Two subsequent resolutions also deal with Usama bin Laden, members of al Qa'ida and the Taliban, and persons associated with them: Resolution 1455, which continues and expands 1390, and Resolution 1452, which provides certain limited exceptions to the asset freeze requirements of resolutions 1390 and 1267.

These resolutions are binding on all UN Member States under Chapter VII of the UN Charter, so in theory they should be very powerful tools. In practice they may not always be quite as powerful as we'd like, but they are a very important foundation for coordinating and legitimizing individual States' efforts in this regard.

UN Conventions

Conventions are binding only upon those parties who agree to be bound, so they are in one sense more limited than Security

Council Resolutions, which are enacted under Chapter VII. But they can be considerably more detailed, and they generally have been actively negotiated by the very parties who will then be bound by them, which can make them a more effective and practical blueprint for action. The United States has become a party to all 12 UN conventions and protocols relating to terrorism, and has successfully encouraged other States to do the same. Before September 11, only two countries had become parties to all 12 UN terrorism conventions and protocols. Today no less than 37 countries, including the United States, have responded by becoming parties to all 12 conventions and protocols.

The two newest, and potentially most useful, of these instruments are the International Convention for the Suppression of the Financing of Terrorism and the International Convention for the Suppression of Terrorist Bombings, both of which have entered into force in the last two years, and are already widely supported. The United States became a party to both on June 26, 2002. Ninety-one states are parties to the Terrorist Financing Convention, which obligates parties to criminalize conduct relating to the raising of financial assets to support terrorist activities. One hundred and one states are parties to the Terrorist Bombings Convention, which requires parties to criminalize terrorist attacks that use explosives or other lethal devices on targets such as public facilities and government buildings. It also requires parties to cooperate on investigations, extraditions, and prosecutions of offenders. The United States has already enacted legislation to give domestic effect to these two conventions, including criminal liability under title 18 [of the U.S. Code].

Regional Efforts: OAS, Asia, Europe, Near East

The United States has also participated in regional and multilateral counter-terrorism efforts. Along with 29 other countries, we signed the Inter-American Convention Against Terrorism on the same day it was adopted, last year, by the General Assembly of the Organization of American States. (Two others have signed since.) This convention requires signatories to establish a legal and regulatory regime to combat terrorist financing, including financial intelligence units and more stringent controls

at banks. It also seeks to improve regional cooperation against terrorism through exchanges of information, experience and training, technical cooperation, and mutual legal assistance.

We are working with the Asia-Pacific Economic Cooperation group and other entities in that region to establish regulatory regimes consistent with the obligations of Asian and Pacific countries to implement the Security Council's resolutions in this area. We are working with the OSCE (Organization for Security and Cooperation in Europe), with the EU and with countries in the Near East to coordinate in putting these resolutions, and other agreements, into effect.

We have also broadened the mandate of the Financial Action Task Force, the world's leading organization aimed at combating money laundering, so that it now is also aimed against terrorism and is exercising leadership in setting standards in this area.

II. Designation of Terrorist Individuals and Organizations

Resolutions and conventions and norms are good, but actions and implementation are vital. This is why we are working closely in the Counter-Terrorism Committee established by UN Security Council Resolution 1373. The CTC experts are reviewing the measures taken by States under this resolution, identifying areas in which states could benefit from technical assistance and assisting in the coordination of such assistance to help States meet their obligations under the resolution. We're also working in the UN 1267 Sanctions Committee, which maintains a consolidated list of individuals and entities associated with Usama bin Laden, the al-Qa'ida organization or the Taliban, which entities and individuals thus becomes subject to assets freezing requirements and other mandatory sanctions. The 1267 Committee is a very useful mechanism for ensuring the effective internationalization of asset freezes, because all UN member states are required to freeze the assets of any individual or entity included on this Committee's consolidated list.

In addition to determining and publicizing who the terrorists are, these international efforts are acting to cut off the ability of terrorists and their supporters to operate, particularly by disrupting the financial support networks for terrorists and terrorist

organizations. Foreign terrorists often depend upon widespread financial support networks. Asset freezes are an important tool in targeting these networks. By disrupting them we make it much more difficult for terrorists to pursue their activities.

We are also working regionally and domestically on these issues. One major portion of our domestic effort is the designation of individuals or organizations that are involved in acts of terrorism. There are now powerful domestic authorities to designate and freeze the assets of terrorists and their supporters and to impose other measures against them.

AEDPA/USA PATRIOT Act/Section 219

A major authority is section 219 of the Immigration and Nationality Act, which was added by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and later amended by the USA PATRIOT Act, and other provisions [8 U.S.C. § 1189]. This provision gives the Secretary of State the authority to designate a foreign group as a foreign terrorist organization (FTO) if he determines that the group engages in terrorist activity or terrorism that threatens the security of U.S. nationals or the national security, foreign relations, or economic interests of the United States. There are currently 36 designated FTOs.

Designation as an FTO has several consequences within the United States. First, it allows our government to require U.S. financial institutions, should they become aware of having possession of or control over assets of an FTO, to block transactions in the assets and to report them to the Treasury [18 U.S.C. § 2339B(a)(2)]. In addition, once a group has been designated, it becomes a federal criminal offense for anyone to knowingly provide material support or resources to the FTO [18 U.S.C. § 2339B(a)(1)]. This consequence brings in the resources of our law enforcement personnel to help in the effort to control and apprehend terrorists and their benefactors. There are also certain immigration consequences that I'll get to later.

Since designation has serious consequences, there are procedures in place to minimize the risk of mistaken designations—and correct them, if necessary. No designation can be made until an administrative record has been prepared setting forth the basis

for the proposed designation. Although classified information may be included in the record, courts have the ability to review the record, including any classified materials, *ex parte* and *in camera* [8 U.S.C. § 1189(a)(3)(B)]. Designations expire after two years, unless there is a specific redesignation upon a finding that the relevant circumstances "still exist" [8 U.S.C. § 1189(a)(4)].

Although the United States can and will act alone under domestic authority in designating (and taking other actions) against terrorists, we know we are more effective when other States act in coordination with us. We are pleased that the European Union, for example, has worked with us to ensure that nearly every terrorist individual and entity we have designated has also been designated by the E.U. We have also worked closely with other States including Italy, China, Russia, Germany, Algeria and Saudi Arabia to submit names to the U.N. for designation, so that the assets of these designees will be frozen worldwide. The international designation process also has certain safeguards. For example, the UN 1267 Sanctions Committee has incorporated into its guidelines a non-exclusive process for seeking review of its designations.

U.S. Authorities: Executive Order 13224 and Executive Order 12947

The broadest and most flexible authority is the most recent: Executive Order 13224—signed by President Bush on September 23, 2001—which blocks the assets of terrorists and their supporters designated by the President in the Annex to the Order. It also provides authority for the Secretary of State or the Secretary of the Treasury, in consultation with each other and the Attorney General and the Secretary of Homeland Security, to make additional designations of individuals and entities meeting the Order's criteria. The Order is targeted on foreign individuals and entities that commit, or pose a significant risk of committing, acts of terrorism; those who give them material support or provide them with financial or other services; and their subsidiaries, front organizations, and agents. We have avoided use of the mere "associated with" basis for designation. This Order allows us to target a broader spectrum than simply those who have been specifically designated as FTOs, and indeed, more than 250

individuals and organizations are currently designated under the Order. There is an additional, more targeted authority: a previous Executive Order, that allows the Secretary to designate organizations that pose a significant risk of disrupting the Middle East peace process.

There are several legal consequences of designation pursuant to Executive Order 13224. For example, with limited exceptions set forth in the Order, or as authorized by the Treasury Department's Office of Foreign Assets Control (OFAC), designations result in the blocking of the designated individual's or entity's assets within the U.S. or in the possession or control of U.S. persons worldwide. The Order also prohibits U.S. persons from engaging in any transaction or dealings in such blocked assets.

As with FTO designations, there are regulations that provide specific procedures for seeking administrative reconsideration of a designation. In addition, OFAC will consider, on a case-by-case basis, exceptions to a freeze so that a designee can pay for certain living expenses or legal services in a manner consistent with Resolution 1452 (which allows for such exceptions).

International Cooperation on Terrorist Finance

We are pleased that, working with us, all member countries of the Gulf Cooperation Council have increased oversight of their banking systems, and several countries—including Bahrain, Egypt, Qatar and the UAE—have passed domestic legislation specifically designed to counter money laundering. The United States plays a leading role within the Financial Action Task Force, and worked with the other members to adopt the Eight Special Recommendations on Terrorist Financing and the guidance for their implementation. Following the adoption of these recommendations, a number of jurisdictions, including key Middle Eastern countries have acted to strengthen their legal and regulatory regimes to avert the abuse of charitable and other nongovernmental organizations.

Terrorists are still taking advantage of vulnerabilities in other countries. Often these countries have the will to assist but lack either the expertise or the means, including the legal authority, to do so. For this reason, U.S.-financed training and technical

assistance programs include training and assistance in developing and implementing laws as well as in other areas.

Efforts for the future will focus on certain areas of vulnerability. For example, as the international banking system becomes a system that the terrorists can no longer safely use, we are helping develop new norms to limit abuse of alternative, informal value transfer systems, such as the traditional "hawalas" and wage remittance systems, which are still being used to transfer resources among terrorists. Yet it is important that these norms do not cut off legitimate commerce, such as the wage remittance systems that enable immigrant or temporary workers to send funds to their families back home.

We are also targeting the misuse of charities, especially where there is willing complicity on the part of the charities' leaders. However, we are very sensitive to the plight of those people that legitimate charities, including Islamic charities, assist. And we are proud that Americans provide the most generous support of charities in the world. Our aim is thus to put in place effective oversight on how such funds are used, while still enabling organizations to raise funds effectively for charitable purposes both here and abroad.

[III.] Exclusion of Terrorists from U.S.

The Patriot Act also gives the Secretary of State new authority to designate terrorist organizations for immigration purposes, in consultation with or upon the request of the Attorney General. The list of organizations designated under this authority is commonly known as the Terrorist Exclusion List (TEL). Specifically, an organization can be placed on the TEL if the Secretary of State finds that the organization commits or incites to commit a terrorist activity, prepares or plans a terrorist activity, gathers information on potential targets for terrorist activity, or provides material support to further terrorist activity.[1] We

[1] The organization must commit or incite to commit a terrorist activity "under circumstances indicating an intention to cause death or serious bodily injury."

have already designated 48 such organizations, and we continually monitor the activities of organizations in order to determine whether designation may be appropriate. Individual aliens who solicit funds, recruit members, or provide material support for a TEL organization are inadmissible to the U.S. and may be prevented from entering. If they are already in U.S. territory, they may (in certain circumstances) be deported.

The USA PATRIOT Act also expanded the Secretary of State's authority to exclude from the U.S. aliens who engage in terrorist activities or are linked to terrorism. For example, an alien who has used his position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization are inadmissible if the Secretary determines that these acts were done in a way that "undermines" U.S. efforts to reduce or eliminate terrorist activities.

The Act also gave the State Department access to the National Crime Information Center, and in the time since the Act's passage we have incorporated nearly 8 million criminal records into our visa lookout database so that these records can also be considered by consular officials as they determine whether to grant a visa.

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b. Patterns of Global Terrorism

On April 30, 2003, the Department of State released its annual report *Patterns of Global Terrorism: 2002*, subsequently revised. The report is submitted in compliance with Title 22 of the United States Code, § 2656f(a), which requires the Department to provide Congress a full and complete annual report on terrorism for those countries and groups meeting the criteria of subsections (1) and (2) of that section.

The full text of the report is available at *www.state.gov/s/ct/rls/pgtrpt/2002/html.*

c. Libyan involvement in terrorist bombings

On December 21, 1988, Pan Am Flight 103 exploded over the town of Lockerbie, Scotland, killing 270 people. In 1991 both the United States and the United Kingdom indicted two Libyans, Abdel Basset al-Megrahi and Al-amin Khalifa Fahima, on charges relating to placement of a bomb on the aircraft. At the same time, the United States and the United Kingdom demanded a number of steps of Libya relating to the incident, including: surrendering the accused for trial, accepting responsibility for the actions of its officials, cooperating in the investigation, and paying appropriate compensation. In 1992 the UN Security Council in Resolution 731 called upon Libya to "provide a full and effective response to those requests so as to contribute to the elimination of international terrorism." In the same year Libya instituted cases against the United States and the United Kingdom at the International Court of Justice ("ICJ"), maintaining that the two countries had breached their legal obligations under the Montreal Convention of September 23, 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation by, among other things, demanding that Libya surrender the alleged offenders for trial either in Scotland or in the United States. *Aerial Incident at Lockerbie (Libyan Arab Jahahiriya v. United Kingdom)* and *(Libyan Arab Jamahiriya v. United States of America)*. In 1992 and 1993 the UN Security Council adopted Resolutions 748 and 883 imposing sanctions on Libya for its failure to respond to the demands of the United States and United Kingdom.

In 2001 a Scottish Court sitting in the Netherlands, established by agreement expressly to try the two Libyans, found Abdel Basset al-Megrahi guilty of murder and concluded that there was insufficient evidence to find Al-amin Khalifa Fahima guilty. That decision was upheld by the Scottish High Court of Justiciary, also sitting in the Netherlands. *Megrahi v. Her Majesty's Advocate*, 2002 S.C.C. 509. Pursuant to Security Council Resolution 1192, the UN sanctions imposed in Resolutions 748 and 883 were

suspended, but not lifted, when Libya transferred the two suspects to the Scottish court for trial. *See Digest 2001* at 98–99, *Digest 2002* at 111.

During 2003 Libya took additional steps, leading to the lifting of UN sanctions and termination of the ICJ cases, as discussed below.

(1) Lifting of UN sanctions

On September 12, 2003, the Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1506, UN Doc. S/RES/1506 (2003), lifting "the measures set forth in paragraphs 4, 5 and 6 of its resolution 748 (1992) and paragraphs 3, 4, 5, 6 and 7 of its resolution 883 (1993)." The referenced measures were the sanctions imposed on Libya relating both to the destruction of Pan Am flight 103 over Lockerbie, Scotland, and the destruction of the French Union de transports aeriens ("UTA") flight 772 over Niger. Resolution 1506 also stated that the Security Council:

> has concluded its consideration of the item entitled "Letters dated 20 and 23 December 1991 from France, the United Kingdom of Great Britain and Northern Ireland and the United States of America" and hereby *removes* this item from the list of matters of which the Council is seized.

The preamble to the resolution welcomed a letter of August 15, 2003, from the Libyan representative to the President of the Council, described as:

> recounting steps the Libyan Government has taken to comply with resolutions [731, 748, 883, and 1192], particularly concerning acceptance of responsibility for the actions of Libyan officials, payment of appropriate compensation, renunciation of terrorism, and a commitment to cooperating with any further requests for information in connection with the investigation (S/2003/818).

> In its letter Libya stated that it "is committed to be cooperative in the international fight against terrorism [and] . . . to cooperate with efforts to bring to justice those who are suspects." The Libyan letter outlined steps already taken as set forth below.

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In [the] context [of the Lockerbie incident] and out of respect for international law and pursuant to the Security Council resolutions, Libya as a sovereign State:

- Has facilitated the bringing to justice of the two suspects charged with the bombing of Pan Am 103 and accepts responsibility for the actions of its officials.
- Has cooperated with the Scottish investigating authorities before and during the trial and pledges to cooperate in good faith with any further requests for information in connection with the Pan Am 103 investigation. Such cooperation would be extended in good faith through the usual channels.
- Has arranged for the payment of appropriate compensation. To that end, a special fund has been established and instructions have already been issued to transmit the necessary sums to an agreed escrow account within a matter of days.

* * * *

. . . [T]he Libyan Arab Jamahiriya affirms that it will have fulfilled all Security Council requirements relevant to the Lockerbie incident upon transfer of the necessary sums to the agreed escrow account. It trusts that the Council will agree. Therefore, in accordance with paragraph 16 of Council resolution 883 (1993) and paragraph 8 of resolution 1192 (1998), the Libyan Arab Jamahiriya requests that in that event the council immediately lift the measures set forth in its resolutions 748 (1992) and 883 (1993).

The preamble to Resolution 1506 also welcomed an August 15, 2003, letter from the representatives of the United Kingdom and the United States of America, S/2003/819, set forth below.

In view of the letter dated 15 August 2003 addressed to you by the Libyan Arab Jamahiriya related to the bombing of Pan Am 103 (S/2003/818) and in the light of the actions and commitments that form the background to the letter, the Governments of the United Kingdom and the United States of America are prepared to allow the lifting of the measures set forth by the Council in its resolutions 748 (1992) and 883 (1993) once the necessary sums referred to in the Libyan letter have been transferred to the agreed escrow account.

In its letter, the Libyan Arab Jamahiriya has pledged before the Council to cooperate in the international fight against terrorism and to cooperate with any further requests for information in connection with the Pan Am 103 investigation. We expect Libya to adhere scrupulously to those commitments.

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In a press briefing of August 25, 2003, Philip T. Reeker, Deputy Spokesman, U.S. Department of State, stated that "we were notified by the lawyers for the families of the Pan Am 103 victims, that Libya had completed transfer of the $2.7 billion, and that money is now in an escrow account at the Bank for International Settlements in Basel." *See www.state.gov/r/pa/prs/dpb/2003/c8043.htm.* Press reports at the time indicated that, under the agreement, each victim's family was to receive up to $10 million, to be paid in increments when UN sanctions were terminated, U.S. commercial sanctions were lifted, and Libya was removed from the U.S. list of state sponsors of terrorism, discussed in B.1.d. below.

Ambassador James B. Cunningham, U.S. Deputy Permanent Representative to the United Nations, provided

an explanation of the U.S. decision to abstain on the vote adopting Resolution 1506, excerpted below.

The full text of Ambassador Cunningham's statement is available at *www.un.int/usa/03_133.htm.*

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Mr. President, Members of the Council, on December 21, 1988, the lives of 270 innocent men, women and children representing over 20 different nationalities were tragically cut short when Pan Am 103 exploded over Lockerbie, Scotland. In 1992, after proof of Libya's responsibility for the bombing had been uncovered, the United Nations imposed sanctions on Libya. Since that time the United States Government has worked with the Government of the United Kingdom, the families of the Pan Am 103 victims, and other members of the international community to ensure that Libya fulfilled a number of demands, including surrender of the two suspects for trial, acceptance of responsibility for the actions of its officials and payment of appropriate compensation.

United Nations sanctions were suspended in 1999 after Libya fulfilled one demand by transferring the two Libyan suspects for trial before a Scottish court sitting in the Netherlands. One defendant, Abdel-Basset al-Megrahi, was convicted by the court of murder in 2001, and a Scottish appellate court upheld the conviction in 2002. Megrahi is currently serving a life sentence in a Scottish prison.

Libya has now addressed the remaining UN requirements related to the Pan Am 103 bombing. Among other steps, it has formally stated that it accepts responsibility for the actions of its officials and made arrangements to pay compensation to the families of the victims in accordance with an agreement worked out directly between them. Although nothing can bring back their loved ones, the hundreds of family members who have suffered for the past 15 years can take some measure of solace from these long-awaited steps.

In recognition of these steps, and to allow the families' settlement to go forward, the United States has not opposed the formal lifting of the United Nations sanctions on Libya. As stated

in the joint letter from the United States and United Kingdom to the President of the Council on August 15, we expect Libya to adhere scrupulously to the commitments it has now made to the Council to cooperate in the international fight against terrorism and to cooperate with any further requests for information in connection with the Pan Am 103 investigation.

Our decision, however, must not be misconstrued by Libya or by the world community as tacit U.S. acceptance that the Government of Libya has rehabilitated itself. The United States continues to have serious concerns about other aspects of Libyan behavior, including its poor human rights record, its rejection of democratic norms and standards, its irresponsible behavior in Africa, its history of involvement in terrorism, and—most important—its pursuit of weapons of mass destruction and their means of delivery. Libya is actively pursuing a broad range of WMD, and is seeking ballistic missiles. In those efforts, it is receiving foreign assistance—including from countries that sponsor terrorism. Libya's continued nuclear infrastructure upgrades raise concerns. Tripoli is actively developing biological and chemical weapons. The United States will intensify its efforts to end Libya's threatening actions. This includes keeping U.S. bilateral sanctions on Libya in full force.

In its compensation settlement with the Pan Am 103 families, Libya has tied the payment of some of the available funds to changes in U.S. bilateral measures [related] to Libya, something clearly outside the scope of UN requirements. Furthermore, Libya has imposed an eight-month time limit during which these steps must be taken, unless it agrees otherwise. We hope that by doing this, Libya is signaling that it intends to move quickly to address the concerns that underlie the U.S. measures. We also urge that Libya do so in order for the families to receive the balance of the available funds. Nonetheless, the U.S. cannot guarantee that Libya will take the required steps and we would not want our vote on the resolution lifting sanctions to be misconstrued as a decision now to modify U.S. bilateral measures regardless of future Libyan behavior. After all, it has taken Libya almost 15 years to address Pan Am 103. For this reason, and because of the concerns I have stated, the United States has abstained on this resolution.

(2) Termination of ICJ cases by Libya against the United States and the United Kingdom

On September 10, 2003, the International Court of Justice issued orders removing from the court's list the cases brought by Libya in 1992 against the United States and the United Kingdom. As to the case against the United States, the order referred to "a letter dated 9 September 2003, filed in the Registry on the same day, [in which] the Agent of Libya and the Co-Agent of the United States jointly notified the Court that "the Libyan Arab Jamahiriya and the United States of America have agreed to discontinue with prejudice the proceedings initiated by the Libyan Application filed on 3 March 1992." Order of September 10, 2003, *Case Concerning Questions Of Interpretation And Application Of The 1971 Montreal Convention Arising From (Libyan Arab Jamahiriya v. United States Of America)*.

(3) Remaining Issues

As noted in the statement of Ambassador Cunningham at the time the UN Security Council adopted Resolution 1506 lifting sanctions against Libya, *supra,* one of the remaining issues between the United States and Libya concerned its weapons of mass destruction. On December 19, 2003, President Bush welcomed a declaration that day by Colonel Moammar al Ghadafi

> publicly confirm[ing] his commitment to disclose and dismantle all weapons of mass destruction programs in his country. He has agreed immediately and unconditionally to allow inspectors from international organizations to enter Libya. These inspectors will render an accounting of all nuclear, chemical and biological weapons programs and will help oversee their elimination. Colonel Ghadafi's commitment, once it is fulfilled, will make our country more safe and the world more peaceful.

* * * *

> As the Libyan government takes these essential steps and demonstrates its seriousness, its good faith will be returned. Libya can regain a secure and respected place among the nations, and over time, achieve far better relations with the United States. . . .

The full text of President Bush's statement is available at *www. whitehouse.gov/news/releases/2003/12/20031219-9.html. See* discussion in Chapter 18.B.3.

d. Determination of countries not cooperating fully with U.S. antiterrorism efforts

Section 40A of the Arms Export Control Act, as amended, 22 U.S.C. § 2781, provides that "[n]o defense article or defense service may be sold or licensed for export under this Act in a fiscal year to a foreign country that the President determines and certifies to Congress . . . is not cooperating fully with United States antiterrorism efforts," unless the President determines that the transaction is important to the national interests of the United States. On May 15, 2003, Deputy Secretary of State Richard L. Armitage, acting by delegation, determined and certified that Cuba, Iran, Libya, North Korea, Sudan, and Syria are not cooperating fully. 68 Fed. Reg. 28,041 (May 22, 2003).

Section 620A of the Foreign Assistance Act of 1961, as amended, Pub.L. No. 90–629, 82 Stat. 1320, 22 U.S.C. § 2371, prohibits most assistance, absent a waiver, to "any country if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism." Similarly, section 6(j) of the Export Administration Act, Pub. L. No. 96–72, 93 Stat. 503, 50 U.S.C. app. § 2405(j), requires a validated license for the export of goods or technology to a country if the Secretary of State has determined

> (A) The government of such country has repeatedly provided support for acts of international terrorism.

(B) The export of such goods or technology could make a significant contribution to the military potential of such country, including its military logistics capability, or could enhance the ability of such country to support acts of international terrorism.

Countries currently so designated are Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. 58 Fed. Reg. 52,523 (Aug. 12, 1993). The effect of the designation as to Iraq was made inapplicable by Presidential Determination No. 2003–23, May 7, 2003, 68 Fed. Reg. 26,459 (May 16, 2003), discussed in Chapter 16.A.2.b.

e. Terrorist financing

(1) UN Security Council Resolution 1455

On January 17, 2003, the UN Security Council adopted Resolution 1455, acting under Chapter VII of the UN Charter. UN Doc. No. S/RES/1455 (2003). The preamble of the resolution reiterated the Security Council's "condemnation of the Al-Qaida network and other associated terrorist groups" and of "all forms of terrorism and terrorist acts" as noted in prior resolutions. It also reaffirmed that "acts of international terrorism constitute a threat to international peace and security." In paragraph 1 the Security Council decided "to improve the implementation of the measures imposed by paragraph 4(b) of resolution 1267 (1999), paragraph 8(c) of resolution 1333 (2000) and paragraphs 1 and 2 of resolution 1390 (2002)." Together these provisions required all states to freeze funds, other financial assets or economic resources owned or controlled directly or indirectly by those persons associated with Usama bin Laden, or with members of the Taliban or the al Qaida organization, and included on the list maintained by the Security Council Committee established pursuant to Resolution 1267 ("1267 Committee"). In addition to asset freezing, these provisions required all states to prevent entry into or transit through their territory of listed

individuals, and to prevent the supply of arms or other military assistance to them.

Among other things, paragraph 5 of Resolution 1455 called upon all states "to continue to take urgent steps to enforce and strengthen through legislative enactments or administrative measures, where appropriate, the measures imposed under domestic laws or regulations . . . to prevent and punish violations of the measures referred to in paragraph 1. . . ." Paragraph 6 called upon all states to submit updated reports to the 1267 Committee "on all steps taken to implement the measures referred to in paragraph 1" and related investigations and enforcement actions, "unless to do so would compromise investigations or enforcement actions."

On January 20, Secretary of State Colin Powell addressed a ministerial session on terrorism at the UN Security Council. His remarks, excerpted below, stressed the need for continued enforcement of these and other sanctions against terrorism.

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The United Nations has long worked to marshal the international community against terrorism. For example, as we have noted here this morning, there are 12 counter-terrorism conventions and protocols negotiated under the auspices of the United Nations and its affiliated agencies. It is vital that all states become parties to all of these conventions and protocols, and fully implement them as soon as possible.

With the passage of Security Council Resolution 1373 in September 2001, the United Nations fundamentally changed the way the international community responds to terrorism. Resolution 1373 created an obligation for all member states to work together to deny terrorists the ability to solicit and move funds, to find safe haven, acquire weapons, or cross international borders.

* * * *

We are particularly pleased that, just last Friday, the Security Council unanimously adopted Resolution 1455. This important

new resolution is aimed at improving member state implementation of these sanctions that are targeted at terrorists and without time limits. The international community could not have sent a stronger message of its determination to stamp out terrorism.

* * * *

On April 17, 2003, the United States filed its report with the 1267 Committee, "on all steps taken to implement the measures referred to in paragraph 1" of Resolution 1455, as called for under paragraph 6 of that resolution. UN Doc. No. S/AC.37/2003/(1455)/26.

On July 29, 2003, Ambassador John D. Negroponte addressed the Security Council on the Report of the 1267 Committee on Al-Qaida/Taliban Sanctions, excerpted below.

The full text of his statement is available at *www.un.int/usa/03_117.htm.*

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Freezing terrorist assets remains a top United States Government priority. Approximately $135 million dollars in terrorist assets have been frozen worldwide since the tragic events of September 11, 2001. While this is a sizable figure, we recognize that more can be done to find, follow and freeze terrorist funds. Continued success in tracking terrorist financing will require international vigilance. We note, however, that 39 Member States have not yet introduced domestic legislation enabling terrorist-linked assets to be frozen. The United States urges these States to enact appropriate laws in line with Council expectations. Regulation of informal money transfer systems, such as hawala, also warrant closer Council attention.

The reports called for under resolution 1455 constitute a crucially important part of the Committee's work. We are disappointed that more States have not taken the opportunity to convey information that is essential to make improvements to the sanctions regime. Given the magnitude of the Al-Qaida threat, a 30 percent response rate is inadequate and hampers the Committee's ability to do its work. We encourage the Committee

to seek additional information from States as necessary. Member State successes and challenges need to be addressed through closer examination of these reports. Where there are gaps in capacity, we must find better ways to address them.

The work of the 1267 Committee in the remainder of 2003 will result in a concrete assessment of Member State implementation of this key sanctions regime; this should not be a pro forma exercise. We anticipate this December 2003 written assessment be a robust analysis containing an array of recommendations for Council consideration, including on issues such as hawala and charities important themes identified by the Monitoring Group. Ambassador Munoz's intended travel in October will usefully frame the Committee's remaining work and end-of-the-year assessment to the Council, as well as send an important political signal in key capitals. He, as Committee Chairman, and we, as a Council, should not shy away from asking difficult questions. The United States believes that counter-terrorism expectations for Member States should remain high. We all can, and should, strengthen efforts to meet the ongoing challenge that Al-Qaida poses.

* * * *

We also emphasize that States unwilling to implement their obligations, whatever the reason must be encouraged and, if necessary, pressured to do more. The international community cannot allow intransigence by some to be the weak link that undermines our shared counter-terrorism efforts.

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(2) Regulations implementing terrorism sanctions in the United States

(i) Global Terrorism Sanctions Regulations

On June 6, 2003, the Office of Foreign Assets Control, Department of the Treasury ("OFAC"), issued an interim final rule adding new part 594 to chapter V of 31 CFR "to carry out the purposes of Executive Order 13224 of September

23, 2001." 68 Fed. Reg. 34,196 (June 6, 2003). Excerpts below explain the background of the rule. The emergency declared in E.O. 13224 was continued by President Bush on September 18, 2003. 68 Fed. Reg. 55,187 (Sept. 22, 2003).

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On September 23, 2001, the President, invoking the authority, inter alia, of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) ("IEEPA") and the United Nations Participation Act (22 U.S.C. 287c), issued Executive Order 13224 (66 FR 49079, September 25, 2001), effective at 12:01 a.m. eastern daylight time on September 24, 2001. In the order, the President found that "grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001 * * * and the continuing and immediate threat of further attacks on United States nationals or the United States" constituted an unusual and extraordinary threat to the national security, foreign policy and economy of the United States, and declared a national emergency with respect to that threat. The order was amended by Executive Order 13268 (67 FR 44751, July 3, 2001) and Executive Order 13284 (68 FR 4075, January 28, 2003) [adding requirement of consultation with the newly created Secretary of Homeland Security].

These regulations are promulgated to implement Executive Order 13224. They are in addition to and do not take the place of other parts of 31 CFR chapter V relating to terrorism, including, but not limited to, the Terrorism Sanctions Regulations (part 595), implementing Executive Order 12947, "Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process" (60 FR 5079, January 25, 1995); the Terrorism List Government Sanctions Regulations (part 596), implementing section 321 of the Antiterrorism and Effective Death Penalty Act of 1996 (18 U.S.C. 2332d); and the Foreign Terrorist Organizations Sanctions Regulations (part 597), implementing sections 302 and 303 of the Antiterrorism and Effective Death Penalty Act of 1996 (8 U.S.C. 1189, 18 U.S.C. 2339B). (Detailed information

regarding each of those other parts is available on OFAC's Web site (*http://www.treas.gov/ofac*).) Certain persons designated pursuant to the regulations now being promulgated may also be designated pursuant to those other parts, and transactions related to those persons are subject to the requirements of those parts and other sanctions under U.S. law. These new regulations also do not in any way modify the criminal prohibition, set forth at 18 U.S.C. 2339B, against providing material support or resources to foreign terrorist organizations designated pursuant to section 219 of the Immigration and Nationality Act, as amended.

Specifically, these regulations are promulgated in furtherance of the sanctions set forth in Executive Order 13224. Section 1 of the order blocks, with certain exceptions, all property and interests in property of foreign persons listed in an Annex to the order and persons designated by the Secretary of State or the Secretary of the Treasury pursuant to criteria set forth in the order. Section 2 of the order prohibits any transaction or dealing by a United States person or within the United States in property or interests in property blocked pursuant to the order, including but not limited to the making or receiving of any contribution of funds, goods, or services to or for the benefit of a person designated in or pursuant to the order. Section 2 of the order also prohibits any transaction by a United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in the order, as well as any conspiracy formed to violate such prohibitions. Section 7 of the order authorizes the Secretary of the Treasury, in consultation with the Secretary of State, the Secretary of Homeland Security and the Attorney General, to take such actions, including the promulgation of rules and regulations, as may be necessary to carry out the purposes of the order. Acting under authority delegated by the Secretary of the Treasury, the Department of the Treasury's Office of Foreign Assets Control ("OFAC") is promulgating these Global Terrorism Sanctions Regulations, 31 CFR part 594 (the "Regulations").

* * * *

On August 9, 2003, Secretary of State Colin L. Powell amended the October 31, 2001, designation pursuant to Executive Order 13224 of the Mujahedin-e Khalq ("MEK" and other aliases) to add two new aliases: National Council of Resistance ("NCR") and National Council of Resistance of Iran ("NCRI"), including their U.S representative offices and all other offices worldwide. 68 Fed. Reg. 48,984 (Aug. 15, 2003). Secretary Powell also "clarif[ied] that the October 31, 2001 designation of the People's Mujahedin Organization of Iran, a.k.a. PMOI, as aliases of the MEK includes its U.S. representative office and other offices worldwide." The Federal Register notice stated further:

> Consistent with the determination in section 10 of Executive Order 13224 that "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously," I determine that no prior notice need be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

Parallel changes to the aliases of MEK were made in the Secretary of State's biennial redesignation of this group as a foreign terrorist organization pursuant to 8 U.S.C. § 1189. 68 Fed. Reg. 46,861 (Oct. 2, 2003).

(ii) Amendments to Export Administration Regulations

The Bureau of Industry and Security, Department of Commerce, issued an interim final rule, effective June 6, 2003, amending the Export Administration Regulations ("EAR"). 68 Fed. Reg. 34,192 (June 6, 2003). As explained in the Federal Register notice, the action taken was "consistent with E.O. 13224 and UNSC Resolutions 1267, 1390, 1452 (December 20,

2002), and 1455, as well as 1373, by imposing a license requirement on all exports and reexports to persons designated in or pursuant to E.O. 13224." Persons designated under E.O. 13224 are referred to as Specially Designated Global Terrorists ("SDGTs"). In addition, the rule amended the EAR by expanding reexport controls on Specially Designated Terrorists ("SDTs") and Foreign Terrorist organizations ("FTOs") "by requiring a license for the export from abroad or re-export to a designated SDT or FTO by a non-U.S. person of any item subject to the EAR, whether such item is on the Commerce Control List or is classified as EAR99."

(3) Litigation in U.S. courts

(i) Foreign terrorist organizations

Litigation instituted in U.S. courts by certain organizations challenging their designation as foreign terrorist organizations and by individuals and organizations wanting to provide assistance to certain organizations so designated continued in 2003. *See* discussion in *Digest 2002* at 91–94.

Humanitarian Law Project v. United States Department of Justice

In *Humanitarian Law Project v. United States DOJ*, 352 F.3d 382 (9th Cir. 2003), the U.S. Court of Appeals for the Ninth Circuit held that 18 U.S.C. § 2339B, which provides criminal penalties for "knowingly providing material support or resources" to a designated organization must be construed to require proof that a person charged with violating the statute had knowledge of the organization's designation or knowledge of the unlawful activities that caused it to be so designated. The court of appeals also reaffirmed its prior decision that the prohibition on providing "training" and "personnel" in § 2339B is impermissibly overbroad, and thus void for vagueness under the First and Fifth Amendments.

People's Mojahedin Organization of Iran v. Department of State

On May 9, 2003, the U.S. Court of Appeals for the District of Columbia denied a petition for review of a foreign terrorist organization's designation by the Secretary of State. *People's Mojahedin Organization of Iran ("PMOI") v. Department of State,* 327 F.3d 1238 (D.C. Cir. 2003). The court of appeals reviewed the history of the case, including its decision in *Nat'l Council of Resistance of Iran ("NCOR") v. Dept of State*, 251 F.3d 192 (D.C. Cir. 2001). In *NCOR*, the court found that NCOR and PMOI "were one and the same," and that NCOR had "presence or property" in the United States and was therefore entitled to assert a claim of due process rights under the U.S. Constitution. The court concluded in *NCOR* that the statute, as applied by the Secretary, did not provide "the fundamental requirement of due process," that is, "the opportunity to be heard at a meaningful time and in a meaningful manner." It therefore remanded to the Secretary of State.

In its 2003 *PMOI* decision, the court noted that:

> [a]fter the remand, the Secretary provided the PMOI with an opportunity to respond to the unclassified evidence, considered all material submitted by the PMOI along with both the unclassified and classified material in [the] file, and reentered the 1999 designation on September 24, 2001, followed by a new two-year designation on October 5, 2001, based on material in the 1997 and 1999 administrative records, together with a new record compiled in 2001.

On this subsequent petition, the court rejected PMOI's contention that its redesignation as a terrorist organization was still unconstitutional because the statute permitted the Secretary to rely upon "secret evidence—the classified information that respondents refused to disclose and against which PMOI could therefore not effectively defend." The court concluded on this issue:

> We already decided in *NCOR* that due process required the disclosure of only the unclassified portions of the administrative record. . . . We made that determination informed by the historically recognized proposition that under the separation of powers created by the United States Constitution, the Executive Branch has control and responsibility over access to classified information and has [a] " 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business." . . . We have already established in *NCOR* the process which is due under the circumstances of this sensitive matter of classified intelligence in the effort to combat foreign terrorism. The Secretary has complied with the standard we set forth therein, and nothing further is due.

United States v. Sattar

On July 22, 2003, the U.S. District Court for the Southern District of New York granted in part and denied in part motions to dismiss indictments against defendants Ahmed Abdel Sattar, Yassir Al-Sirri, Lynne Stewart, and Mohammed Yousry. The Indictments charged, among other things, that they conspired to provide, and provided, and attempted to provide material support and resources to a foreign terrorist organization—Islamic Group ("IG")—in violation of 18 U.S.C. § 2339B. *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003). Excerpts below describe the background of the case as relevant here, and rulings of the court that the circumstances of the case did not support indictment on charges of providing either personnel or communications equipment, but rejecting defendants' argument that the case should be dismissed on grounds that the designation of the foreign terrorist organization here was obtained in violation of due process. (Internal cross-references have been omitted.)

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* * * *

Defendant Stewart was Sheikh Abdel Rahman's counsel during his 1995 criminal trial and has continued to represent him since his conviction. The Indictment alleges that over the past several years, Stewart has facilitated and concealed messages between her client and IG [Islamic Group] leaders around the world in violation of the SAMs [Special Administrative Measures], limiting Sheik Abdel Rahman's communications from prison. During a May 2000 visit to Sheikh Abdel Rahman in prison, Stewart allegedly allowed defendant Yousry, who acted as the Arabic interpreter between Sheikh Abdel Rahman and his attorneys, to read letters from defendant Sattar and others regarding IG matters and to discuss with her client whether IG should continue to comply with a cease-fire that had been supported by factions within IG since in or about 1998. According to the Indictment, Yousry provided material support and resources to IG by covertly passing messages between IG representatives and Sheik Abdel Rahman regarding IG's activities. . . .

* * * *

First, with regard to the "provision" of "communications equipment," Sattar and Stewart argue that the Indictment charges them with merely talking and that the acts alleged in the Indictment constitute nothing more than using communications equipment rather than providing such equipment to IG. For example, the Indictment charges Sattar with participating in and arranging numerous telephone calls between IG leaders in which IG business was discussed, including the need for "a second Luxor." The Indictment describes numerous other telephone calls in which Sattar participated. Stewart is charged with, among other things, providing communications equipment to IG by announcing Sheikh Abdel Rahman's withdrawal of support for the cease-fire in Egypt and thereby making the statements of the otherwise isolated leader available to the media.

* * * *

. . . [B]y criminalizing the mere use of phones and other means of communication the statute provides neither notice nor standards for its application such that it is unconstitutionally vague as applied. . . .

* * * *

It is not clear from § 2339B what behavior constitutes an impermissible provision of personnel to an FTO. . . . The Government accuses Stewart of providing personnel, including herself, to IG. In so doing, however, the Government fails to explain how a lawyer, acting as an agent of her client, an alleged leader of an FTO, could avoid being subject to criminal prosecution as a "quasi-employee" allegedly covered by the statute.

* * * *

The defendants urge the Court to follow United States v. Rahmani,* 209 F. Supp. 2d 1045 (C.D.Ca. 2002), and dismiss Counts One and Two on the ground that the Indictment relies on a designation obtained in violation of due process. . . .

* * * *

The inability to raise as a defense in this case the correctness of the Secretary's determination that IG is an FTO is not itself a violation of the defendants' rights to due process. The element of the offense is the designation of IG as an FTO, not the correctness of that determination, and the Government would be required to prove at trial that IG was in fact designated as an FTO.

* * * *

(ii) Specially Designated Terrorists and Specially Designated Global Terrorists

Designations of the Holy Land Foundation for Relief and Development as a Specially Designated Terrorist and a Specially Designated Global Terrorist under Executive Orders 13224 and 12947 and the resulting blocking of its assets were upheld in 2002 by the U.S. District Court for the District

* [Editors' note: *U.S. v. Rahmani*, discussed in Digest 2002 at 93–94, was still pending on appeal in the Ninth Cirucuit at the end of 2003.]

of Columbia. *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002). The district court granted summary judgment to the U.S. government except for Holy Land's claim based on a Fourth Amendment violation. *See Digest 2002* at 98–101. Holy Land appealed. On appeal, the District of Columbia Circuit affirmed. 333 F.3d 156 (D.C. Cir. 2003).

(iii) Delisted entities

As discussed in *Digest 2002* at 101 and 886–887, certain persons that had been designated under Executive Order 13224 were "delisted" because additional information established that they had no prior knowledge of the relevant group's involvement in terrorism and had taken remedial actions to sever any ties with entities providing funds to support terrorism. Consolidated suits brought by two such previously designated entities, Aaran Money Wire Service, Inc. and Global Services International, Inc., and the owners of each, were dismissed as moot by the U.S. District Court for the District of Minnesota in 2003. *Aaran Money Wire Service, Inc. v. United States*, 2003 U.S. Dist. LEXIS 16190 (D. Minn. 2003).

2. Genocide, War Crimes, and Crimes Against Humanity

See C. INTERNATIONAL CRIMINAL TRIBUNALS AND RELATED ISSUES, below.

3. Narcotrafficking

a. U.S. narcotics certification

On March 1, 2003, the Department of State submitted the annual International Narcotics Control Strategy Report for 2002 to Congress, available at *www.state.gov/g/inl/rls/nrcrpt/*

2002/. On September 15, 2003, as provided in section 706(1) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107–228 (2002), President George W. Bush identified 23 countries as major drug-transit or major illicit-drug producing countries. 68 Fed. Reg. 54,973 (Sept. 19, 2003). Under the 2002 legislation, he further determined that two of the countries, Burma and Haiti, had "failed demonstrably" to meet their international counternarcotics commitments. As to Haiti, however, President Bush determined that provision of assistance that would otherwise be cut off by this determination was necessary to the national interest of the United States.

For a discussion of current U.S. law on these issues, including statutory modifications in 2002, *see Digest 2002* at 122–125. A fact sheet on the 2003 narcotics certification process, issued January 31, 2003, is available at *www.state.gov/g/inl/rls/fs/17010.htm*.

Excerpted below is the President's memorandum for the Secretary of State making the determinations, which the Secretary transmitted to Congress. The full text of the memorandum and statements of explanation on Burma and Haiti are available in the Federal Register publication.

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* * * *

Consistent with section 706(1) of the Foreign Relations Authorization Act, Fiscal Year 2003 (Public Law 107–228) (the "FRAA"), I hereby identify the following countries as major drug-transit or major illicit drug producing countries: Afghanistan, The Bahamas, Bolivia, Brazil, Burma, China, Colombia, Dominican Republic, Ecuador, Guatemala, Haiti, India, Jamaica, Laos, Mexico, Nigeria, Pakistan, Panama, Paraguay, Peru, Thailand, Venezuela, and Vietnam.

The Majors List applies by its terms to "countries." The United States Government interprets the term broadly to include entities that exercise autonomy over actions or omissions that could lead to a decision to place them on the list and, subsequently, to determine their eligibility for certification. A country's presence

on the Majors List is not necessarily an adverse reflection of its government's counternarcotics efforts or level of cooperation with the United States. Consistent with the statutory definition of a major drug-transit or drug-producing country set forth in section 481(e)(5) of the Foreign Assistance Act of 1961, as amended (the "FAA"), one of the reasons that major drug-transit or drug producing countries are placed on the list is the combination of geographical, commercial, and economic factors that allow drugs to transit or be produced despite the concerned governments most assiduous enforcement measures.

Consistent with section 706(2)(A) of the FRAA, I hereby designate Burma and Haiti as countries that have failed demonstrably during the previous 12 months to adhere to their obligations under international counternarcotics agreements and take the measures set forth in section 489(a)(1) of the FAA. Attached to this report are justifications (statements of explanation) for each of the countries so designated, as required by section 706(2)(B).

I have also determined, in accordance with provisions of section 706(3)(A) of the FRAA, that provision of U.S. assistance to Haiti in FY 2004 is vital to the national interests of the United States.

Combating the threat of synthetic drugs remains a priority, particularly the threat from club drugs, including MDMA (Ecstasy). Since January, we have redoubled our efforts with The Netherlands, from which the majority of U.S. MDMA seizures originate. I commend the Government of The Netherlands for its efforts to address this scourge, including increased enforcement, improved risk assessment and targeting capabilities of passenger aircraft and cargo, and international cooperation to control precursor chemicals. I urge the Government of The Netherlands to focus its efforts on dismantling the significant criminal organizations responsible for this illicit trade, using all tools available to law enforcement. Continued progress in implementing our joint action plan, developed in March, should have a significant impact on the production and transit of MDMA from The Netherlands to the United States. Although we have seen a stabilization of MDMA use rates domestically, there is an increase in the number of countries in which MDMA is produced and trafficked. We will continue to monitor the threat from synthetic drugs and the emerging trends.

The United States and Canada are both targeted by international trafficking organizations. We continue to work closely with the Government of Canada to stem the flow of illicit drugs to our countries and across our common borders. The United States remains concerned about the diversion of large quantities of precursor chemicals from Canada into the United States for use in producing methamphetamines. We hope that Canada's newly implemented control regulations will disrupt that flow. The United States is also concerned about widespread Canadian cultivation of high-potency marijuana, significant amounts of which are smuggled into the United States from Canada. We will work with the Government of Canada in the coming year to combat these shared threats to the security and health of our citizens.

In the 8 months since my January determination that Guatemala had failed demonstrably in regard to its counternarcotics responsibilities,* the Government of Guatemala has made efforts to improve its institutional capabilities, adhere to its obligations under international counternarcotics agreements, and take measures set forth in U.S. law. These initial steps show Guatemala's willingness to better its counternarcotics practices, but the permanence of these improvements has yet to be demonstrated. I expect Guatemala to continue its efforts and to demonstrate further progress in the coming year.

We are deeply concerned about heroin and methamphetamine linked to North Korea being trafficked to East Asian countries, and are increasingly convinced that state agents and enterprises in the DPRK are involved in the narcotics trade. While we suspect opium poppy is cultivated in the DPRK, reliable information confirming the extent of opium production is currently lacking. There are also clear indications that North Koreans traffic in,

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* [Editors' note: President Bush made a determination on January 30, 2003, that identified the same countries as major drug transit or major illicit drug producing countries. 68 Fed. Reg. 5,787 (Feb. 5, 2003). At that time, the President designated Burma, Guatemala and Haiti as countries that had failed demonstrably to adhere to their obligations and also determined that provision of U.S. assistance to Guatemala and Haiti in FY 2003 was vital to the national interests of the United States.]

and probably manufacture, methamphetamine. In recent years, authorities in the region have routinely seized shipments of methamphetamine and/or heroin that had been transferred to traffickers ships from North Korean vessels. The April 2003 seizure of 125 kilograms of heroin smuggled to Australia aboard the North Korean-owned vessel "Pong Su" is the latest and largest seizure of heroin pointing to North Korean complicity in the drug trade. Although there is no evidence that narcotics originating in or transiting North Korea reach the United States, the United States is intensifying its efforts to stop North Korean involvement in illicit narcotics production and trafficking and to enhance law-enforcement cooperation with affected countries in the region to achieve that objective.

b. Litigation concerning obligations under 1971 UN Convention on Psychotropic Substances

On September 4, 2003, the U.S. Court of Appeals for the Tenth Circuit affirmed a district court decision preliminarily to enjoin the federal government from prohibiting or penalizing the sacramental use of hoasca by O Centro Espirita Beneficiente Uniao do Vegetal ("UDV"), a small religious organization. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170 (10th Cir. 2003). Hoasca contains dimethyltryptamine ("DMT"), a drug listed in Section I of the Controlled Substances Act (21 U.S.C. §§ 801–904, ("CSA"), which implements U.S. obligations under the UN Convention on Psychotropic Substances, 1019 U.N.T.S. 175 (1971), 10 I.L.M. 261 (1971). *See* discussion of the case in *Digest 2001* at 128–143.

The court of appeals agreed with the district court that the United States had not shown a compelling interest in prohibiting hoasca that would justify its taking this action in violation of the Religious Freedom Restoration Act ("RFRA"), which provides that the Government shall not "substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1. The preliminary injunction was issued by the U.S. District

Court of New Mexico in an unpublished opinion dated August 12, 2002.

On October 16, 2003, the United States filed a petition for rehearing en banc, which was granted in an unpublished order on January 7, 2004. Among other things, the petition argued that the panel majority erred in affirming an injunction that requires the United States to violate the 1971 UN Convention on Psychotropic Substances. That section of the petition is set forth below.

The full text of the petition is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

The 1971 Convention requires signatory nations to "prohibit all use" of Schedule I substances (including DMT), except for limited scientific and medical purposes. Convention, Art. 7(a); App. 155. As the dissent recognized (at 10–13), the district court plainly erred in concluding that hoasca was not covered by the terms of the Convention. *See also O Centro I*, 314 F.2d at 466. The panel majority declined to address the district court's incorrect legal holding that the treaty does not apply to hoasca, but nevertheless concluded that the treaty does not provide a basis for prohibiting the UDV's ceremonial use of hoasca. That holding is incorrect.

First, to the extent the panel majority held that RFRA prevails in a "conflict" with the 1971 Convention, it was error to do so. Nothing in RFRA's text or legislative history suggests that the interests served by a treaty or another statute cannot be "compelling." *See, e.g.*, *Adams* v. *Commissioner of Internal Revenue*, 170 F.3d 173, 179 (3d Cir. 1999) (compelling interest in applying tax laws).

Second, the panel majority's holding that the Government failed to show that compliance with the treaty is the least restrictive means of advancing its interest failed to take into account the fact that no one has suggested a less restrictive means by which the United States could further its compelling interest in complying with the Convention and nevertheless permit the UDV to import, distribute, possess and use hoasca. The unrebutted evidence

demonstrated that a "reservation" is not possible, and that seeking an amendment would damage the Government's ability to oppose amendments that undermine the war against international drug trafficking.

The only "less restrictive" alternative is simply to violate the treaty. That, however, is not an option, given the fact that such a violation would weaken the United States' efforts to bring other countries into compliance with their obligations under the Convention. The panel majority's decision places an impossible standard upon the Government—requiring it to provide specific evidence negating less restrictive means that no one has identified.

Finally, as the dissent pointed out, the panel majority incorrectly limited the relevance of the treaty to the likelihood of success, ignoring its relevance to the third and fourth factors governing preliminary injunctions—the balance of harms and the public interest. An order requiring the Government to violate a treaty causes substantial harm to the United States, particularly where, as here, compliance with that treaty is essential to the United States' efforts to combat international drug trafficking. In light of the foreign policy implications and the traditional role of the Executive in administering the Nation's agreements with foreign powers, a judicial edict requiring the United States to violate an important international treaty is truly extraordinary. The panel majority's failure even to consider the harm to the Government and to the public interest in these circumstances is an error that requires correction by the full Court.

* * * *

c. Designation of significant foreign narcotics traffickers

On July 1, 2003, in a letter to the Chairmen of the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence, President George W. Bush reported on the status of sanctions imposed upon significant foreign narcotics traffickers designated in 2003. Among other things, the letter designated seven foreign persons and entities as appropriate for sanctions, pursuant to the Foreign

Narcotics Kingpin Designation Act, 21 U.S.C. 1903. As a result of the designation, the letter explained,

> United States persons are prohibited from engaging in financial transactions and conducting business with these individuals. In addition, any assets within the United States or within the possession or control of United States persons that are owned or controlled by significant foreign narcotics traffickers are blocked. Finally, significant foreign narcotics traffickers and immediate family members who have knowingly benefited from their illicit activity will be denied visas for entry into the United States.

The full text of President Bush's letter is available at *www.whitehouse.gov/news/releases/2003/07/20030702.html*.

d. Resumption of U.S. drug interdiction assistance to Colombia

On April 20, 2001, a Peruvian Air Force A-37 interceptor aircraft participating in a Peru-U.S. counternarcotics airbridge denial program fired on a civilian floatplane carrying five U.S. citizens after mistaking the floatplane's behavior for that of a narcotics trafficking aircraft. *See* discussion in *Digest 2001* at 121–128. Following the incident, U.S. intelligence support for the airbridge intercept program with both Peru and Colombia was immediately suspended. In Presidential Determination 2003–32, issued August 18, 2003 and entitled "Resumption of U.S. Drug Interdiction Assistance to the Government of Colombia," President George W. Bush certified that:

> (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) that country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which shall at a minimum include effective

means to identify and warn an aircraft before the use of force is directed against the aircraft.

68 Fed. Reg.50,963(Aug. 25, 2003). The certification satisfied the requirements of 22 U.S.C. § 2291–4 for resumption of U.S. Government assistance to Colombia. Assistance had not been resumed for Peru at the end of 2003.

4. Trafficking in Persons

Beginning in 2003, section 110(c) of the Trafficking Victims Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464, 22 U.S.C. § 7107 (2000), required the President to submit a notification of one of four specified determinations with respect to "each foreign country whose government, according to [the annual June 1 report to Congress mandated by § 110(b)(1)]—(A) does not comply with the minimum standards for the elimination of trafficking; and (B) is not making significant efforts to bring itself into compliance. . . ." The four determination options are set forth in § 110(d)(1)–(4).

Pursuant to this provision, on September 9, 2003, President George W. Bush issued Presidential Determination No. 2003–35 concerning the fifteen countries named in the third annual Trafficking in Persons Report, June 1, 2003 (68 Fed. Reg. 53,871 (Sept. 15, 2003). The President imposed sanctions on Burma, Cuba, Liberia, North Korea, and Sudan, in each case for failure to meet minimum standards or make significant efforts to bring itself into compliance, as provided in § 110(d)(1). Consistent with the act's waiver authority in § 110(d)(4), the President also determined that certain multilateral assistance to Sudan (as necessary to implement a peace accord) and to Liberia would promote the purposes of the act or is otherwise in the national interest of the United States. The remaining ten governments were determined to have improved sufficiently since the release of the annual report of June 2003 to avoid sanctions, as provided in subsection 110(d)(3). Secretary of State Colin L.

Powell also provided certification required by section 110(e) that specified assistance was not "intended to be received or used by any agency or any official from any country identified in the [President's Determination] who has participated in, facilitated, or condoned a severe form of trafficking in persons." The June 2003 report is available at *www.state.gov/g/tip/rls/tiprpt/2003/*.

The President's determination, the Secretary's certification, and a memorandum of justification for the President's determination, with a brief country-by-country analysis, are available at w*ww.state.gov/g/tip/rls/rpt/25017.htm*.

Other U.S. efforts to end human trafficking

A fact sheet released February 5, 2003, outlined other actions taken by the United States in the effort to eliminate trafficking in persons.

The fact sheet, excerpted below, is available at *www.state.gov/g/tip/rls/fs/28548pf.htm*.

Human trafficking denies hundreds of thousands of people their basic human rights, poses a serious public health risk, and fuels organized crime around the world. It is a dark and uncomfortable subject, but one that must be illuminated.

The United States has taken significant action to combat trafficking in persons, including trafficking for commercial sexual exploitation.

- In April 2003, the PROTECT Act [Pub. L. No. 108–21] was signed into law by President Bush. This bill serves as a historic milestone for protecting children while severely punishing those who victimize young people. The PROTECT Act allows law enforcement officers to prosecute Americans who travel abroad to abuse minors, without having to prove prior intent to commit illicit crimes. This bill also makes clear there is no statute of

limitations for crimes involving the abduction or physical or sexual abuse of a child—in virtually all cases. The bill also strengthens laws punishing offenders who travel abroad to prey on children ("sex tourism"). These U.S. "tourists" are now subject to domestic child abuse/child exploitation laws even if their crimes are committed abroad, and they face up to 30 years imprisonment, from a previous maximum of 15 years.

- In December 2003, President Bush reauthorized the Trafficking Victims Protection Act [Pub. L. No. 108–193], which accelerates our global work against modern-day slavery in a number of ways:
  - Provides new tools for addressing destination countries that may be turning a blind eye to trafficking, especially the abuse of foreign women.
  - Makes convictions and sentencing of traffickers as important as arrests in evaluating country progress.
  - Requires better statistical monitoring, giving us access to critical law enforcement data related to trafficking.
  - Creates a *Watch List* of countries weakening their commitment to prosecute traffickers, prevent abuse, and protect victims.
- President Bush has made the fight against slavery an American priority. In a September 2003 speech he made to the United Nations, President Bush called slavery, "A special evil in the abuse and exploitation of the most innocent . . ." He declared: "Those who patronize this industry debase themselves and deepen the misery of others. Governments that tolerate this trade are tolerating a form of slavery." The president committed $50 million to support the global fight against human trafficking.
- The U.S. is actively partnering with other nations to combat this transnational crime, providing assistance to trafficking victims and striving to highlight the dangers of sex tourism and trafficking. Nearly $93.5 million in U.S. government funding was devoted to anti-trafficking activities worldwide in FY 2003.

* * * *

5. Cybercrime

On November 17, 2003, President George W. Bush transmitted the Council of Europe Convention on Cybercrime to the Senate for advice and consent to ratification. Excerpts below from the report of the Secretary of State submitting the treaty to the President for transmittal provide the views of the United States on certain key aspects of the Convention, with particular focus on substantive criminal law and jurisdictional issues. S. Treaty Doc. No. 108–11. *See also* discussion of Federalism clause in *Digest 2001* at 156–159.

LETTER OF SUBMITTAL

Department of State,
Washington, September 11, 2003.

The President,
The White House.

The President: I have the honor to submit to you, with a view to its transmittal to the Senate for advice and consent to ratification, the Council of Europe ("COE") Convention on Cybercrime ("the Cybercrime Convention" or "the Convention"), which was adopted by the COE's Committee of Ministers on November 8, 2001. On November 23, 2001, the United States, which actively participated in the negotiations in its capacity as an observer state at the COE, signed the Convention at Budapest. I recommend that the Convention be transmitted to the Senate for its advice and consent to ratification.

Accompanying the Convention is its official Explanatory Report, which was also adopted by the COE's Committee of Ministers on November 8, 2001. The Explanatory Report, which was drafted by the Secretariat of the COE and the delegations participating in the negotiations, provides a thorough analysis of the Convention. It is customary for the COE to prepare such reports in connection with its conventions. Under established COE practice, such reports reflect the understanding of the Parties

in drafting convention provisions and, as such, are accepted as fundamental bases for interpretation of COE conventions. The Explanatory Report would be provided to the Senate for its information.

The Cybercrime Convention is the first multilateral treaty to address specifically the problem of computer-related crime and electronic evidence gathering. . . .

* * * *

By requiring Parties to establish certain substantive offenses, the Convention will help deny "safe havens" to criminals, including terrorists, who can cause damage to U.S. interests from abroad using computer systems. Similarly, by requiring Parties to have certain procedural authorities, the Convention will enhance the ability of foreign law enforcement authorities to investigate crimes effectively and expeditiously, including those committed by local criminals against U.S. individuals, institutions and interests. Since cybercrimes are often committed via transmissions routed through foreign Internet Service Providers ("ISPs") and criminals increasingly seek to hide evidence of their crimes abroad, the Convention would also provide mechanisms for U.S. law enforcement authorities to work cooperatively with their foreign counterparts to trace the source of a computer attack and to obtain electronic evidence stored outside the United States. Thus, the Convention's obligations on Parties to establish domestic law enforcement frameworks and create a regime of international cooperation would enhance the United States' ability to receive, as well as render, international cooperation in preventing, investigating and prosecuting computer-related crime.

The Convention would not require implementing legislation for the United States. As discussed below, existing U.S. federal law, coupled with six reservations and four declarations, would be adequate to satisfy the Convention's requirements for legislation. All of these reservations and declarations are envisaged by the Convention itself. Since other provisions contained in the Convention are self-executing (e.g., articles relating to extradition and mutual assistance), they would not require implementing legislation either.

* * * *

CHAPTER II—MEASURES TO BE TAKEN AT THE NATIONAL LEVEL (ARTICLES 2–22)

Chapter II consists of three parts, covering substantive criminal offenses that Parties are to establish; procedural mechanisms that Parties must have under their respective laws; and provisions requiring Parties to establish jurisdiction over the offences to be established. As discussed further in connection with Article 41 ("Federal clause"), a federal state may reserve the right to assume obligations under Chapter II "consistent with its fundamental principles governing the relationship between its central government and constituent States or other similar territorial entities." In explaining this provision, the Explanatory Report (paragraph 317) makes clear that the United States could therefore implement its obligations under Chapter II through its federal criminal law, which "generally regulates conduct based on its effects on interstate or foreign commerce, while matters of minimal or purely local concern are traditionally regulated by constituent States." Thus, provided it invokes the Federal clause reservation provided for in Article 41, the United States would be able to rely on its existing federal laws, which, because of the architecture of the Internet and computer networks, provide for broad coverage of the obligations contained in Chapter II. The United States would not be obligated to criminalize activity that otherwise would not merit an exercise of federal jurisdiction. Similarly, whether or not constituent State laws conform to the Convention would not be an issue since the United States, having invoked the federal clause reservation, would not be required to implement the Convention's obligations at that level.

Substantive criminal law (Articles 2–13):

Articles 2–10 of the Convention require Parties to criminalize domestically, if they have not already done so, certain conduct that is committed through, against or related to computer systems. Included in these substantive crimes are the following offenses

against the "confidentiality, integrity and availability" of computer data and systems: "Illegal access" (Article 2), "Illegal interception" (Article 3), "Data interference" (Article 4), "System interference" (Article 5), and "Misuse of devices" (Article 6). Also included are offenses involving the use of computer systems to engage in conduct that is presently criminalized outside the cyber-realm, i.e., "Computerrelated forgery" (Article 7), "Computer-related fraud" (Article 8), "Offences related to child pornography" (Article 9), and "Offences related to infringements of copyright and related rights" (Article 10).

For criminal liability to attach under the offenses to be established pursuant to Articles 2–10, the conduct in question must be committed intentionally. As the Explanatory Report (paragraph 113) notes, "wilfully" was used in lieu of "intentionally" in the context of Article 10 infringements so as to conform with Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), which employs the term "wilful." In addition, the Report (paragraph 39) explains that determinations of what constitutes the necessary criminal intent are left to each Party's interpretation under its laws.

The obligation to establish offenses under the Convention extends only to acts committed "without right." This concept recognizes that in certain instances conduct may be legal or justified by established legal defenses, such as consent, or by other principles or interests that preclude criminal liability. Thus, as explained in the Explanatory Report (paragraph 38), the Convention does not require the criminalization of actions undertaken pursuant to lawful government authority (e.g., steps taken by a Party's government to investigate criminal offenses or to protect national security). Additional guidance regarding the contours of "without right" is provided in the Explanatory Report (e.g., paragraphs 43, 47, 48, 58, 62, 68, 76, 77, 89, 103) in the context of the various offenses to be established. Such guidance makes it clear that authorized transmissions, legitimate and common activities inherent in the design of computer networks, and legitimate and common operating or commercial practices should not be criminalized.

The condition that conduct be committed "without right" is explicitly stated in all but one of the enumerated offenses. The

one exception is Article 10 ("Offences related to infringement of copyright and related rights"), where it was determined that the term "infringement" already captured the concept of "without right" (Explanatory Report, paragraph 115).

The requisite elements for the various offenses are set forth in Articles 2–10. Except for Article 5 ("System interference") and Article 8 ("Computer-related fraud"), these articles also provide that a Party may require certain additional criminalization elements or may otherwise limit application of a criminalization obligation, provided a permitted declaration or reservation is made in accordance with Articles 40 and 42. This approach seeks to promote uniform application of the Convention while recognizing that permitting Parties to maintain established concepts in their domestic law will broaden acceptance of the Convention. As discussed below, in order to implement the Convention's substantive criminal law obligations under existing federal criminal law, the United States would avail itself of declarations and reservations provided for in Articles 2, 4, 6, 7, 9, 10, and 41.

In terms of the specific offenses against the confidentiality, integrity and availability of computer data and systems, Article 2 ("Illegal access") requires a Party to criminalize unauthorized intrusions into computer systems (often referred to as "hacking," "cracking" or "computer trespass"). Such intrusions can result in damage to computer systems and data, and compromise the confidentiality of data. Under Article 2, a Party may require certain additional elements for there to be criminal liability, including that the offense must be committed with an intent to obtain computer data. In order to correspond with the requirement contained in existing U.S. computer crime law, 18 U.S.C. Sec. 1030(a)(2) & (b), I recommend that the following declaration be included in the U.S. instrument of ratification:

> The Government of the United States of America declares, pursuant to Articles 2 and 40, that under United States law, the offense set forth in Article 2 ("Illegal access") includes an additional requirement of intent to obtain computer data.

Article 3 ("Illegal interception") seeks to protect the privacy of non-public computer data transmissions from activities such as monitoring and recording through technical means (Explanatory Report, paragraph 54). Article 4 ("Data interference") requires a Party to criminalize "the damaging, deletion, deterioration, alteration or suppression of computer data," which the Explanatory Report (paragraphs 60 and 61) makes clear would include the inputting of malicious codes, such as viruses, that can threaten the integrity, functioning or use of computer data and programs. Under Article 4(2), a Party may reserve the right to require that such conduct result in serious harm. In order to maintain federal jurisdictional damage thresholds, e.g., 18 U.S.C. Sec. 1030(a)(5)(B), I recommend that the following reservation be included in the U.S. instrument of ratification:

> The Government of the United States of America, pursuant to Articles 4 and 42, reserves the right to require that the conduct result in serious harm, which shall be determined in accordance with applicable United States federal law.

Article 5 ("System interference") requires a Party to criminalize acts with respect to data which seriously hinder the functioning of a computer system. Examples of such acts are provided by the Explanatory Report (paragraph 67) and include using programs to generate denial of service attacks and transmitting malicious code, such as viruses, to stop or slow the functioning of a computer system.

The offenses to be established under Articles 2–5 are frequently committed using computer programs or access tools, such as stolen passwords or access codes. To deter their use for the purpose of committing Article 2–5 offenses, Article 6 ("Misuse of devices") requires a Party to criminalize the possession, production, sale, procurement for use, import, distribution, or making available of such items. As recognized in the Explanatory Report (paragraph 73), however, devices such as computer programs can be used for either criminal or non-criminal purposes (so-called "dual use" devices). To avoid criminalizing activities related to devices intended

for legitimate purposes, the Article provides that devices must be "designed or adapted primarily for the purpose of committing" an Article 2–5 offense. Moreover, Article 6 provides that activities in relation to devices, passwords or access codes, including their production and distribution, must be done with the intent that such devices, passwords or access codes be used for the purpose of committing an Article 2–5 offense. The Article also makes clear that it "shall not be interpreted" to impose criminal liability on the authorized testing or protection of a computer system.

With respect to the possession offense, Article 6(1)(b) provides that a Party may require that a number of items be possessed before criminal liability attaches. United States law, 18 U.S.C. Sec. 1029(a)(3), requires that a person possess fifteen or more access devices in order for there to be federal jurisdiction. I therefore recommend that the following declaration be included in the U.S. instrument of ratification:

> The Government of the United States of America declares, pursuant to Articles 6 and 40, that under United States law, the offense set forth in paragraph (1)(b) of Article 6 ("Misuse of devices") includes a requirement that a minimum number of items be possessed. The minimum number shall be the same as that provided for by applicable United States federal law.

Article 6(3) provides that a Party may reserve the right not to apply the criminalization requirement for the misuse of items, so long as the reservation does not concern the sale, distribution or making available of passwords, access codes or similar data with the intent that they be used for committing an Article 2–5 offense. United States law does not directly criminalize the possession or distribution of data interference and system interference devices. Therefore, I recommend that the United States limit its obligations accordingly by including the following reservation in its instrument of ratification:

> The Government of the United States of America, pursuant to Articles 6 and 42, reserves the right not to apply

> paragraph (1)(a)(i) and (1)(b) of Article 6 ("Misuse of devices") with respect to devices designed or adapted primarily for the purpose of committing the offenses established in Article 4 ("Data interference") and Article 5 ("System interference").

With respect to the substantive crimes to be established which involve the use of computer systems to commit acts that would normally be considered criminal if committed outside the cyber-realm, Article 7 ("Computer-related forgery") seeks to protect the security and reliability of data by creating an offense akin to the forgery of tangible documents. The Article requires a Party to criminalize the input, alteration, deletion, or suppression of computer data, resulting in inauthentic data with the intent that it be considered or acted upon for legal purposes as if it were authentic, regardless of whether the data is directly readable and intelligible. It also allows a Party to require intent to defraud, or similar dishonest intent, before criminal liability attaches. In order to enable the offense to be covered under applicable U.S. fraud statutes, I recommend that the following declaration be included in the U.S. instrument of ratification:

> The Government of the United States of America declares, pursuant to Articles 7 and 40, that under United States law, the offense set forth in Article 7 ("Computer-related forgery") includes a requirement of intent to defraud.

Article 8 ("Computer-related fraud") requires a Party to criminalize manipulations of data that are done with fraudulent intent and to procure an unlawful economic benefit. As indicated in the Explanatory Report (paragraph 86), an example of an activity that would be encompassed by the Article 8 offense is the serious problem of on-line credit card fraud.

Articles 9 and 10 deal with content-related offenses. Article 9. ("Offences related to child pornography") requires a Party to criminalize various aspects of the production, possession, procurement, and distribution of child pornography through computer systems. The Explanatory Report (paragraph 93) notes that it was

believed important to include Article 9 because of the increasing use of the Internet to distribute materials created through sexual exploitation of children. In addition to covering visual depictions of an actual minor engaged in sexually explicit conduct, the Article covers images of a person appearing to be a minor engaged in such conduct as well as realistic images representing a minor engaged in such conduct (so-called "virtual" child pornography). Article 9(4), however, provides that a Party may reserve the right not to criminalize cases of a person appearing to be a minor or realistic images representing a minor engaged in such conduct. These categories were covered under U.S. law by 18 U.S.C. Sec. 2256(8)(B), (C) & (D), and to the extent that such images are obscene, certain conduct relating to such obscene images is also covered by federal obscenity law. In light of the U.S. Supreme Court's decision in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), ruling Sec. 2256(8)(B) & (D) unconstitutional, I recommend that the following reservation be included in the U.S. instrument of ratification:

> The Government of the United States of America, pursuant to Articles 9 and 42, reserves the right to apply paragraphs (2)(b) and (c) of Article 9 only to the extent consistent with the Constitution of the United States as interpreted by the United States and as provided for under its federal law, which includes, for example, crimes of distribution of material considered to be obscene under applicable United States standards.

Article 10 ("Offences related to infringement of copyright and related rights") is directed at infringements of intellectual property rights, i.e., copyright and related rights, by means of a computer system and on a commercial scale. Its approach differs from the other articles requiring the establishment of offenses in that it defines the offenses by reference to other international agreements, which are set forth in the Article. Specifically, a Party is required under Article 10 to establish as criminal offenses acts that are committed "wilfully, on a commercial scale and by means of a computer system" and that are defined as infringements of

copyright or related rights, under its domestic law, pursuant to obligations it has undertaken in the referenced agreements. As indicated in the Explanatory Report (paragraphs 110 and 111), a Party's obligations under this Article are framed only by those agreements that have entered into force and to which it is party. Moreover, a Party's obligations under Article 10 may be limited by reservations or declarations it has made with respect to the referenced agreements. For the purpose of determining the United States' obligations under Article 10, the relevant referenced agreements are the four to which the United States is party, i.e., the Paris Act of 24 July 1971 of the Bern Convention for the Protection of Literary and Artistic Works, the Agreement on the Trade-Related Aspects of Intellectual Property Rights, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. Of these, the latter two entered into force after the Cybercrime Convention was opened for signature.

Because, among the referenced agreements, only TRIPS requires criminal sanctions, Article 10 permits a Party to reserve the right not to impose criminal liability in limited circumstances provided other "effective remedies" are available and the reservation does not derogate from its minimum obligations under applicable international instruments, which the Explanatory Report (paragraph 116) makes clear refers to TRIPS. Because U.S. law provides for other effective remedies but not criminal liability for infringements of certain rental rights, I recommend that the following reservation be included in the U.S. instrument of ratification:

> The Government of the United States of America, pursuant to Articles 10 and 42, reserves the right to impose other effective remedies in lieu of criminal liability under paragraphs 1 and 2 of Article 10 ("Offenses related to infringement of copyright and related rights") with respect to infringements of certain rental rights to the extent the criminalization of such infringements is not required pursuant to the obligations the United States has undertaken under the agreements referenced in paragraphs 1 and 2.

Article 11 ("Attempt and aiding or abetting") provides that aiding or abetting the commission of any of the offenses set forth in Articles 2–10 shall also be made criminal. Similarly, a Party is required to criminalize an attempt to commit certain of these offenses, to the extent specified in paragraph 2 of the Article. As with the Article 2–10 offenses, aiding or abetting or an attempt must be committed intentionally. Thus, as indicated in the Explanatory Report (paragraph 119), the fact that an ISP is a mere conduit for criminal activity, such as the transmission of child pornography or a computer virus, does not give rise to criminal liability for the ISP, because it would not share the criminal intent required for aiding and abetting liability. Further, the Explanatory Report (paragraph 119) makes clear the Parties' understanding that "there is no duty on a service provider to actively monitor content to avoid criminal liability under this provision."

Article 12 ("Corporate liability") requires the adoption of criminal, civil or administrative measures to ensure that a corporation or similar legal person can be held liable for the offenses to be established in accordance with the Convention, where such offenses are committed for its benefit by a natural person who has a leading position in the corporation or legal person. The Article also provides for liability where a lack of supervision or control by a leading person makes possible the commission of one of the criminal offenses for the benefit of the legal person by a natural person acting under its authority. Per the Explanatory Report (paragraph 125), a "natural person acting under its authority" is understood to be an employee or agent acting within the scope of their authority. Further, the Explanatory Report (paragraph 125) notes that a "failure to supervise should be interpreted to include the failure to take appropriate and reasonable measures to prevent employees or agents from committing criminal activities on behalf of the legal person." The Explanatory Report (paragraph 125) also makes clear, however, that such appropriate and reasonable measures "should not be interpreted as requiring a general surveillance regime over employee communica-t-ions." The concepts set forth in Article 12 are already reflected in U.S. law.

Under Article 13 ("Sanctions and measures"), each Party is to ensure that Articles 2–11 offenses committed by natural persons are subject to "effective, proportionate and dissuasive sanctions, which include deprivation of liberty." As elucidated in the Explanatory Report (paragraph 130), the Article leaves open the possibility of other sanctions or measures, such as forfeiture, for these offenses. Consistent with the approach set forth in Article 12 ("Corporate liability"), sanctions to be imposed against legal persons may be criminal, civil or administrative in nature.

Procedural law (Articles 14–21):

As recognized by the Explanatory Report (paragraph 133), evidence in electronic form can be difficult to secure, as it may be flowing swiftly in the process of communication and can be quickly altered, moved or deleted. In an effort to ensure that Parties are able to investigate effectively the offenses established under the Convention and other criminal offenses committed by means of a computer system, as well as to collect evidence in electronic form of a criminal offense, the Convention requires each Party to ensure that its competent authorities have certain powers and procedures for use in specific criminal investigations or proceedings. These powers and procedures are set forth in articles on: "Expedited preservation of stored computer data" (Article 16), "Expedited preservation and partial disclosure of traffic data" (Article 17), "Production order" (Article 18), "Search and seizure of stored computer data" (Article 19), "Real-time collection of traffic data" (Article 20), and "Interception of content data" (Article 21). All of these powers and procedures are already provided for under U.S. law.

* * * *

Jurisdiction (Article 22):

Article 22 requires a Party to establish jurisdiction over the offenses specified in the Convention where committed in the Party's territory, on board a ship flying its flag, on board an aircraft registered under its laws, or, in certain circumstances, by one of its nationals. Except with respect to offenses committed in its

territory, Article 22(2) permits a Party to enter a reservation as to these jurisdictional bases. Because U.S. criminal law does not provide for plenary criminal jurisdiction over offenses involving its nationals and selectively provides for maritime or aircraft jurisdiction, I recommend that the following reservation be included in the U.S. instrument of ratification:

> The Government of the United States of America, pursuant to Articles 22 and 42, reserves the right not to apply in part paragraphs (1)(b), (c) and (d) of Article 22 ("Jurisdiction"). The United States does not provide for plenary jurisdiction over offenses that are committed outside its territory by its citizens or on board ships flying its flag or aircraft registered under its laws. However, United States law does provide for jurisdiction over a number of offenses to be established under the Convention that are committed abroad by United States nationals in circumstances implicating particular federal interests, as well as over a number of such offenses committed on board United States-flagged ships or aircraft registered under United States law. Accordingly, the United States shall implement paragraphs 1(b), (c) and (d) to the extent provided for under its federal law.

Under Article 22(3), a Party is also required to establish jurisdiction over the criminal offenses established in accordance with Articles 2–11 of the Convention in the event it does not extradite an alleged offender solely on the basis of nationality. As explained in the Explanatory Report (paragraph 237), establishing such jurisdiction is necessary to ensure that such a Party has the ability to undertake investigations and proceedings against the alleged offender domestically. United States law permits extradition of nationals; accordingly, this paragraph does not give rise to a need for implementing legislation.

As indicated in the Explanatory Report (paragraph 239), offenses committed through the use of the Internet may target victims in many states, giving rise to instances in which more than one Party has jurisdiction. Accordingly, Article 22(5) provides that

when more than one Party claims jurisdiction over an alleged offense established in accordance with the Convention, they shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

CHAPTER III—INTERNATIONAL CO-OPERATION (ARTICLES 23–35)

* * * *

Article 24 . . . provides that a Party that conditions extradition on the existence of a treaty may use the Convention itself as a treaty basis, although it is not obligated to do so. For situations in which there is no separate extradition treaty in existence, Article 24(7) provides that a Party is to notify the COE of the name and address of its authority for receiving requests for extradition or provisional arrest under the Convention. The United States would not invoke Article 24 as a separate basis for extradition, but, instead, would continue to conduct extradition pursuant to applicable bilateral treaties, supplemented where appropriate by relevant international law enforcement conventions. Thus, the principal legal effect of Article 24 for the United States would be to incorporate by reference the offenses provided for in the Convention as extraditable offenses under U.S. bilateral extradition treaties. Further, because the United States would continue to rely on bilateral extradition treaties, it would notify the COE that it is not designating an authority under Article 24(7) and that the authority responsible for making or receiving extradition requests on behalf of the United States is set forth in the applicable bilateral extradition treaties.

* * * *

Article 32 ("Trans-border access to stored computer data with consent or where publicly available") is not a mutual assistance provision per se. Rather, as discussed in the Explanatory Report (paragraphs 293 and 294), it reflects the general agreement that an accessing Party need not seek the prior authorization of another Party to access data stored in that other Party's territory where the data is publicly available or obtained through a computer

system located in the accessing Party's territory with the lawful and voluntary consent of a person who has lawful authority to disclose that data through that system.

* * * *

Chapter IV—Final provisions (Articles 36–48):

As indicated in the Explanatory Report (paragraph 303), the provisions contained in Chapter IV ("Final provisions") are generally based on standard model clauses used by the COE. . . .

* * * *

Article 41 ("Federal clause") permits a federal state to enter a reservation allowing for minor variations in coverage of its Chapter II obligations ("Measures to be taken at the national level"). As stated in the Explanatory Report (paragraph 316), this reservation takes into account that variations in coverage may occur due to "well-established domestic law and practice" of a federal state based on the federal state's "Constitution or other fundamental principles concerning the division of powers in criminal justice matters" between its central government and its constituent entities. The reservation was inserted to make clear that the United States could meet its Convention obligations through application of existing federal law and would not be obligated to criminalize activity that does not implicate a foreign, interstate or other federal interest meriting the exercise of federal jurisdiction. In the absence of the reservation, there would be a narrow category of conduct regulated by U.S. State, but not federal, law that the United States would be obligated to criminalize under the Convention (e.g., an attack on a stand-alone personal computer that does not take place through the Internet). Article 41 makes clear that this reservation is available only where the federal state is still able to meet its international cooperation obligations and where application of the reservation would not be so broad as to exclude entirely or substantially diminish its obligations to criminalize conduct and provide for procedural measures. Such a restriction is not an obstacle for the United States because the Convention's

international cooperation provisions are implemented at the federal level and because federal substantive criminal law provides for broad overall coverage of the illegal conduct addressed by the Convention. In invoking the reservation, the U.S. Government would be obliged to bring the Convention's provisions to the attention of its constituent States and entities, with a "favourable opinion" encouraging them to take appropriate action to give effect to such provisions, even though, as a result of the reservation, there would be no obligation for them to do so. This step would be accomplished through an outreach effort on the part of the federal government. Accordingly, I recommend that the following reservation be included in the U.S. instrument of ratification:

> The Government of the United States of America, pursuant to Articles 41 and 42, reserves the right to assume obligations under Chapter II of the Convention in a manner consistent with its fundamental principles of federalism.

Furthermore, in connection with this reservation, I recommend that the Senate include the following understanding in its resolution of advice and consent:

> The United States understands that, in view of its reservation pursuant to Article 41, Chapter II of the Convention does not warrant the enactment of any legislative or other measures; instead, the United States will rely on existing federal law to meet its obligations under Chapter II of the Convention.

Article 42 ("Reservations") enumerates those provisions by which a Party can exclude or modify its obligations with respect to specified articles at the time it consents to be bound by the Convention. Consistent with COE treaty practice, the Article provides that no other reservations may be made. Article 43 ("Status and withdrawal of reservations") provides a mechanism for Parties to withdraw their reservations as soon as circumstances permit. As set forth above, to meet its obligations without the need for additional implementing legislation, the United States

would make permitted reservations under Articles 4(2), 6(3), 9(4), 10(3), 22(2), and 41.

6. Corruption: UN Corruption Convention

On December 9, 2003, the United States signed the UN Convention Against Corruption, in Merida, Mexico. A press statement released December 10 by the Department of State summarized key elements of the convention and is available at *www.state.gov/r/pa/prs/ps/2003/27056.htm.*

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The United States, represented by Attorney General John Ashcroft, signed the United Nations Convention Against Corruption yesterday in Merida, Mexico. The Convention represents a major advance in the international fight against corruption. We worked hard for this result.

Over 100 additional nations are expected to sign the Convention during a High Level Signing Conference being hosted by President Fox and the Government of Mexico from December 9 through 11. The United States has been an active participant during the entire two-year negotiation process, and has been committed to working with participating governments to produce a convention that can have truly global acceptance and application.

The Convention contains a wide range of provisions that will strengthen international efforts to fight corruption—in which the United States Government is already a leader—and complement ongoing existing international initiatives in the G-8, OECD, OAS, and other multilateral fora. It contributes to a number of general areas relating to a government's anticorruption efforts; including:

Criminalization: requires governments to criminalize the bribing of their own and foreign public officials and other corruption-related crimes such as embezzlement and money laundering.

Prevention: requires governments to take a number of measures to prevent corruption, including those that

promote integrity among their public officials and increase the participation of civil society in the fight against corruption.

International cooperation, including with respect to asset recovery: provides a practical channel for governments to work together to extradite persons and exchange evidence regarding corruption offenses, and recover assets illicitly acquired by corrupt public officials.

Cooperation in implementation: creates a vehicle for governments to monitor implementation of the Convention and to share expertise and provide technical assistance relating to their anticorruption efforts.

7. Money Laundering

On December 20, 2002, Nauru and Ukraine were designated primary money-laundering concerns pursuant to § 311 of the USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272, 31 U.S.C. § 5318A (2002). That statute authorizes the Secretary of the Treasury to designate a foreign jurisdiction, financial institution operating outside the United States, class of transactions, or type of account as being of "primary money laundering concern" and to impose one or more of five "special measures" with respect to such jurisdiction, institution, class of transactions, or type of account, in consultation with, among others, the Secretary of State and the Attorney General. 67 Fed. Reg. 78,859 (Dec. 26, 2002); *see* discussion in *Digest 2002* at 126–131. Further action on the two countries was announced in April 2003, as described below.

a. Imposition of special measures on Nauru

On April 10, 2003, the Department of the Treasury, Financial Crimes Enforcement Network ("FinCEN"), issued a notice of proposed rulemaking to impose special measures against the country of Nauru. 68 Fed. Reg. 18,917 (April 17, 2003).

As described in the Federal Register notice, the special measure to be imposed is

> designed to deny Nauru financial institutions access to the U.S. financial system through correspondent accounts. The proposed rule would prohibit certain U.S. financial institutions from maintaining correspondent accounts for, or on behalf of, a Nauru financial institution. Furthermore, if a U.S. financial institution covered by this proposed rule learns that a correspondent account that it maintains for a foreign bank is being used to provide services indirectly to a Nauru financial institution, the U.S. financial institution must terminate the correspondent account of the foreign bank.

Excerpts below from the Federal Register notice describe the concerns with Nauru that led to the imposition of special measures. (Footnotes omitted.)

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B. Offshore Shell Banks in Nauru

In an effort to raise funds, the island has resorted to the selling of passports (or "economic citizenships") to non-resident foreigners, and, of greater concern, the selling of offshore banking licenses. Nauru is notorious for permitting the establishment of offshore shell banks with no physical presence in Nauru or in any other country. The evidence indicates that the entities that obtain these offshore banking licenses are subject to cursory and wholly inadequate review by the country's officials, lack any credible on-going supervision, and maintain no banking records that Nauru or any other jurisdiction can review. In addition, one of the common requirements imposed by Nauru on these offshore banks is that they not engage in economic transactions involving either the currency of Nauru (currently the Australian dollar) or its citizens or residents. Consequently, these offshore shell banks have no apparent legitimate connection

with the economy or business activity of Nauru. Indeed, only one bank appears to be physically located in Nauru, the "Bank of Nauru." It is a local community bank that also serves as the Central Bank.

In 2000, FinCEN reported that 400 offshore banks had been granted licenses by Nauru. It has been verified by on-site reports that a 1,000 square foot wooden structure is "home" to these banks that have no physical or legal residence anywhere in the world. The United States Government has been able to verify the names of 161 of the institutions licensed by Nauru. These are institutions for which the limited information available indicates that there is a strong likelihood that they are shell banks that are not subject to effective banking supervision.

C. FATF Designation

As a consequence of the current practices of Nauru, the Financial Action Task Force on Money Laundering (FATF) placed Nauru on the "Non-Cooperative Countries and Territories" (NCCT) list in June 2000 for maintaining an inadequate anti-money laundering regime. . . .

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On July 22, 2002, FATF wrote Nauruan officials to express FATF's concern about the practice in Nauru of issuing licenses to offshore shell banks and asked Nauru to cease licensing such entities. Nauru, however, has not ceased this activity.

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On September 26, 2002, Treasury published in the Federal Register a final rule implementing sections 313 and 319(b) of the Act (the Section 313/319 Rule).[67 Fed. Reg. 60,562 (Sept. 26, 2002)]. That rule, among other things, prohibits certain financial institutions from providing correspondent accounts to foreign shell banks, and requires such financial institutions to take reasonable steps to ensure that correspondent accounts provided to foreign banks are not being used to provide banking services indirectly to

foreign shell banks. There will be significant overlap between the Section 313/319 Rule and this proposed rule for those financial institutions covered by the Section 313/319 Rule, although they are quite distinct. . . .

b. Revocation of designation of Ukraine

On April 10, 2003, the Department of the Treasury, FinCEN, also announced that it was revoking the designation of Ukraine as a primary money-laundering concern, effective April 17, 2003. 68 Fed. Reg. 19,071 (April 17, 2003). Excerpts below explain the decision to revoke the designation, while flagging continuing concerns.

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Since Treasury's designation of Ukraine under section 5318A, Ukraine has taken steps to address the deficiencies [on which designation was based]. First, Ukraine amended its anti-money laundering law clearly to allow the Ukrainian financial intelligence unit to share information with law enforcement and to lower the suspicious transaction reporting thresholds. Second, the Ukrainian criminal code was amended to criminalize money laundering, the failure to file suspicious transaction reports, and tipping off the subjects of such reports. Finally, the Ukrainian banking and financial services laws were amended to require the full disclosure of beneficial ownership at account opening for all legal entities and natural persons. These new provisions are scheduled to come into force as of June 7, 2003.

As a result of these further legislative enhancements, along with the pledge of aggressive implementation, on February 14, 2003, the FATF rescinded its call for counter-measures against Ukraine.

In light of the further legislative enhancements, the commitment of Ukraine to further efforts to implement its anti-money laundering legislation, and the FATF's decision to rescind the call for counter-measures, Treasury has decided to revoke the designation of Ukraine as a primary money laundering concern under section 5318A.

Significantly, Treasury's revocation of the primary money laundering concern designation should not be construed as an indication that financial transactions involving Ukraine do not continue to present a heightened risk of money laundering. To the contrary, Ukraine's recent legislative enactments are not yet in force and much work remains.

8. Support for Law Enforcement Institutions

On October 9, 2003, Ambassador Sichan Siv, U.S. Representative to the Economic and Social Council of the United Nations, addressed the Third Committee on crime prevention and criminal justice and international drug control. Excerpts below from his statement provide the views of the United States on the importance of support for law enforcement internationally.

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The illegal drug trade and other forms of transnational crime are among the most widespread challenges facing the international community. Drugs and crime threaten all countries, irrespective of economic and demographic conditions. These criminal organizations generally target weak states and jurisdictions. They can dominate, threaten, and corrupt local authorities with impunity.

For this reason, support for law enforcement institutions must be mainstreamed into overall efforts to achieve sustainable development. In many cases, as in Afghanistan and elsewhere, these institutions need to be created from scratch. Building institutional capacities in such environments is a difficult, long-term process, particularly when the regions are in the midst of civil conflicts. It requires sustained funding and commitment from both host governments and the donor community. The United States is optimistic that there is growing international appreciation for the link between development and law enforcement. Corruption and lack of law enforcement hinder socio-economic development. We are therefore committed to treating law enforcement assistance as development assistance.

Another dangerous global trend is the increased involvement of organized crime with trafficking in persons. Like other forms of transnational organized crime, trafficking in persons has critical implications for regional and national stability. Human trafficking contributes to societal corrosion and threatens the rule of law, democracy, and economic prosperity.

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Within the past few days, we have witnessed two landmark achievements in our efforts to develop a global infrastructure against crime and corruption—the forces of "uncivil society" that the Secretary-General has warned against. On October 1, 2003, after two years of negotiations involving some 130 countries, we successfully concluded the United Nations Convention against Corruption. The Convention requires countries to criminalize corrupt behavior, implement preventive measures, and facilitate international cooperation.

On September 29, 2003, the Transnational Organized Crime Convention entered into force, ratified by over 50 countries. The Convention's supplemental Protocols to Prevent, Suppress and Punish Trafficking in Persons and the Protocol against Smuggling in Migrants will also soon enter into force. The speed with which this Convention has become effective testifies to broad international consensus. The United States is reviewing the Convention to ensure that its provisions are consistent with our law. Once this process is completed, we hope to ratify and accede to the Convention promptly. Until then, we will remain strongly supportive of its goals and urge the Convention's world-wide implementation. The United Nations Office on Drugs and Crime has done an admirable job of promoting ratification of these instruments.

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C. INTERNATIONAL CRIMINAL TRIBUNALS AND RELATED ISSUES

1. *Ad hoc* Criminal Tribunals

a. International Criminal Tribunal for the Former Yugoslavia: Request for production of information by the United States

On November 13, 2002, defense counsel representing the accused in *Prosecutor v. Ojdanic*, Case No. IT-99-37-PT, International Criminal Tribunal for the Former Yugoslavia ("ICTY"), filed an Application for Orders to NATO and States for Production of Information ("Application") with the ICTY. On February 28, 2003, the United States filed its response to the application in *Ojdanic.* As explained in excerpts set forth below, the United States requested that the ICTY reject the application as directed against the United States "because the Defense has not satisfied any of the basic requirements of Rule 54 *bis* of the Tribunal's Rules of Procedure and Evidence." (Internal cross-references and footnotes have been deleted.)

The full text of the U.S. response is available at *www.state.gov/s/l/c8183.htm.*

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The Defense Has Not Taken Reasonable Steps To Obtain the Requested Information

Rule 54 *bis* (A)(iii) requires an applicant to "explain the steps that have been taken by the applicant to secure the State's assistance." Implicit in this requirement is not only that the applicant take *some* steps, but also that those steps be *reasonable*. Indeed, Rule 54 *bis* (B)(ii) expressly permits the rejection of an application in limine if it appears that reasonable steps have not been taken.

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This record does not represent "reasonable steps" to secure the assistance of the United States. To the contrary, the Defense has rejected that assistance, and the United States respectfully submits that the Tribunal should therefore reject the Application.

The Request for Information is Overbroad

The Defense has also failed to satisfy the threshold requirement of Rule 54 *bis* (A)(i) that the requesting party "shall . . . identify as far as possible the documents or information to which the application relates." The Appeals Chamber, in the *Blaskic* Subpoena Decision [Prosecutor v. Tihomir Blaskic, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial chamber II of 18 July 1997 (29 October 1997)], underscored that a requestor must "identify specific documents and not broad categories," while recognizing that specific details may be omitted if the requestor explains why he is unable to provide them. The Defense request does just the opposite. Its demands are framed in the broadest possible terms, with no explanation for its lack of specificity. Yet this request, as finally explicated by the Application, primarily seeks statements made by or to General Ojdanic. Clearly, General Ojdanic would know what those statements were, which are of interest to the Defense, who uttered them, where and when. Thus, the Defense's insistence on framing its request in the broadest and vaguest of terms is indefensible.

The original Defense request demanded "all recordings, summaries, notes, or text of any and all intercepted communications" in which General Ojdanic was either a party, or was mentioned or referred to. Also demanded was all other information "in any form from any source relating to statements made by or about General Ojdanic." Even limited to the specified six-month period, this was grossly overbroad and unnecessarily intrusive—there was no indication of what content or subject-matters were specifically being sought, or what the Defense hoped to prove with them. Yet that was precisely what was required to enable the United States to focus its search and disclosure on genuinely relevant material.

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The Defense Has Made No Showing of Necessity

Rule 54 *bis* (A)(ii) requires the Defense to demonstrate that its request for information is "necessary for a fair determination" of the issues being tried. "Necessity" in this context is twofold: the content of the information should be shown to be potentially critical to the adjudication of guilt or innocence; and it should be shown that the State is the best, or only, source of that information.

Here, the Defense has made no showing of necessity, in any form. As noted above, the Defense request primarily seeks statements made by or to General Ojdanic. The Tribunal cannot judge the importance of any such statements, without knowing what they are alleged to contain. Yet the Defense, which is in the best position to know what statements were made by or to the accused, what orders he gave, and how any of these were transmitted or memorialized, has put none of this before the Tribunal.

Similarly, the Defense has made no showing that the United States, or any other State or organization, is the best or only source of such statements. Whatever the statements may have been, the Defense is in fact their best source.

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The United States Has Responded Fully to the Defense Request, Reasonably Construed

From the outset, the United States made clear to the Defense that the United States was prepared to cooperate, but that requests would have to be reasonable and focused, that responses would be limited to unclassified material (including redacted and declassified material from classified sources), and that the existence of intercepts would be neither confirmed nor denied. At the same time, the United States undertook to search *all* sources for responsive information and, if specifically exculpatory information was located, to seek a means of providing it to the Defense.

Despite the Defense's refusal to reasonably narrow or explain its request, the United States did conduct a search of all sources. It identified responsive information, redacted and declassified it, and offered it to the Defense. The United States did not find any exculpatory information, and it so informed the Defense. Taking

the Defense request together with the explanation of the request offered in paragraph 15 of the Application—that the Defense seeks generalized exculpatory information—we submit that the United States response is a full and complete response to that request.

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Legitimate National Security Concerns Justify the United States Refusal To Make Further Disclosure

The United States has a compelling national security interest in protecting information about intercepted communications, including whether or not it possesses them. Disclosure of such information may reveal not only the content of particular information, but the extent and nature of United States capabilities, and where and how they might be directed. Such information is among the most highly protected national security assets of the United States, and its compromise would cause grave damage to United States national security.

It is for this reason that the United States refuses to confirm or deny the existence of intercepts. This policy applies equally to the Defense and the Prosecutor. Throughout the course of its information-sharing relationship with the Prosecutor, the United States has consistently declined to confirm or deny the existence of intercepts, instead taking the same approach as was taken in this case with the Defense. This approach enables the United States to search in all sources, and to disclose relevant information in a manner that does not compromise any intelligence sources and methods.

This Tribunal recognizes the validity of such concerns. Rule 54 *bis* specifically contemplates that States may object to disclosure of information on national security grounds. The *Blaskic* Subpoena Decision, which Rule 54 *bis* largely reflects, strongly suggested that such concerns should not be lightly dismissed. Although the Appeals Chamber in that case held that Article 29 of the Tribunal's Statute "derogates from international law" by overriding the national-security "privilege" in customary law, it grounded its interpretation of Article 29 on the damage that would be done to the Tribunal's mission if it were denied information it characterized as "of decisive importance" or "crucial." Thus, the threshold

showing of necessity required by Rule 54 *bis* is even higher when the national security interests of a State are implicated. It should not be presumed that the United Nations Security Council, in approving Article 29, intended to invade States' sovereign prerogative to protect national security information on any lesser justification.

Yet, as noted above, the Defense has made *no* showing of necessity. Against this failure, the United States asks the Tribunal to consider the substantial cooperation the United States has already offered to the Defense, its compelling reasons for protecting highly sensitive intelligence sources and methods, and its representation that it is withholding no exculpatory information.

The United States further asks that the Tribunal, in assessing these matters, consider the demonstrated bona fides of the United States. In the *Blaskic* Subpoena Decision, the Appeals Chamber observed:

> "[A]ccount must be taken of whether the State concerned has acted and is acting bona fide. . . . The degree of bona fide cooperation and assistance lent by the relevant State to the International Tribunal, as well as the general attitude of the State *vis-a-vis* the International Tribunal (whether it is opposed to the fulfilment of its functions or instead consistently supports and assists the International Tribunal) are no doubt factors the International Tribunal may wish to take into account. . . ."

The Appeals Chamber was speaking of the weight to be attached to the representations of a State when the Tribunal reviews documents which are alleged to raise national-security concerns. However, these considerations are no less applicable here, where the United States argues that the Defense has not even made a showing sufficient to justify such a review.

Since the creation of the Tribunal, the United States has been among its strongest supporters. The United States has been unstinting in the provision of information to the Prosecutor, and has cooperated with defense counsel as well. The United States has few rivals in the quantity, quality and variety of information

provided to the Tribunal. In considering the representations of the United States made above, we respectfully ask that the Tribunal give this longstanding cooperation and support due weight.

b. Completion of work of the ICTY and the International Criminal Tribunal for Rwanda

On August 28, 2003, the UN Security Council adopted Resolution 1503, recalling and reaffirming the President of the Security Council's endorsement of the ICTY Completion Strategy:

> completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 . . . (S/PRST/2002/21), by concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions.

Among other things, Resolution 1503 urged the International Criminal Tribunal for Rwanda ("ICTR") to formalize a detailed strategy modeled on the ICTY Completion Strategy "to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda, in order to allow the ICTR to achieve its objective" of completing its work on the same schedule as the ICTY.

Acting under Chapter VII, the resolution (1) called on the international community to assist national jurisdictions to improve their capacity to prosecute transferred cases; (2) called on all states, particularly named states in the relevant regions, "to intensify cooperation with and render all necessary assistance" to the ICTY and the ICTR, particularly to bring Radovan Karadzic and Ratko Mladic, as well as Ante Gotovina and all other indictees to the ICTY, and to further investigations of the Rwandan Patriotic Army and bring

Felicien Kabuga and all other indictees to the ICTR; and (3) called upon indictees to surrender. In addition, it called on the donor community to support the work of the High Representative to Bosnia and Herzegovina in creating a special chamber, within the State Court of Bosnia and Herzegovina, to adjudicate allegations of serious violations of international humanitarian law ("War Crimes Chamber"); called on both the ICTY and the ICTR to "take all possible measures" to meet the schedule leading to completion of all work by 2010; and amended the Statute of the International Tribunal for Rwanda to create a prosecutor separate from the ICTY prosecutor. Carla del Ponte remained Chief Prosecutor for the ICTY.

In remarks to the Security Council on October 8, 2003, James B. Cunningham, Deputy United States Permanent Representative to the United Nations, provided the views of the United States welcoming these developments.

The capture and prosecution of persons indicted for war crimes has long been a priority for the United States and the Security Council. The emergence of a stable and prosperous Bosnia and Herzegovina will not be possible until indicted war criminals are brought to justice, especially Radovan Karadzic and Ratko Mladic.

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The parties made a solemn commitment at Dayton eight years ago to cooperate with the ICTY and turn over indictees. The International Community has kept its Dayton commitments, including the creation of the Republika Srpska. The time has come for the Republika Srpska to do its part and comply with all the requirements of Dayton and its greater obligation as a part of the Euro-Atlantic community.

While it is the ICTY that will try Karadzic, Mladic, and other senior officials most responsible for crimes within the ICTY's jurisdiction, it is important that justice for other cases be transferred to a competent national jurisdiction in Bosnia and Herzegovina.

We commend the efforts of the Office of the High Representative, the international community, and the government of Bosnia and Herzegovina to create domestic capacity by establishing a War Crimes Chamber within the Court of Bosnia and Herzegovina. The project, part of a regional effort, is essential to the strengthening of the rule of law and will also support the ICTY's completion strategy.

We strongly urge the Office of the High Representative, the ICTY, and the local authorities to refine and finalize the plan for and begin operation of a War Crimes Chamber without delay. Resolution 1503 encourages member states to support the establishment of this War Crimes Chamber. For its part, the United States is prepared to lend its support by providing expert assistance and up to one-third of the cost.

We encourage other donors and the Bosnia and Herzegovina authorities to also help shoulder the financial and technical burdens.

We applaud High Representative Ashdown's efforts to target those who provide financial and logistical support to persons indicted for war crimes (PIFWCs). The United States has instituted its own mechanisms to ban the travel, freeze the assets, and prohibit financial activities of those who help persons indicted for war crimes to evade justice. Steps such as the EU travel ban are also effective at putting pressure on these individuals, and the United States enthusiastically welcomes them.

In keeping with the recently passed UNSCR 1503, we strongly urge all states to impose similar measures to freeze the assets and restrict the travel of fugitive indictees as well as those individuals or groups that help them evade justice.

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c. Khmer Rouge trials

In remarks to the Third Committee of the General Assembly on May 2, 2003, Nicholas Rostow, Counsel to the U.S. Mission to the United Nations in New York, commented on efforts to establish a Khmer Rouge Tribunal, as set forth below, available at *www.un.int/usa/03_061-2.htm.*

The United States remains committed to the establishment of a credible tribunal and supports the substance of the current resolution, but will dissociate itself due to concerns about the timing. The United States believes it would have been better to delay consideration of this resolution until after the Cambodian National Assembly elections in July.

At the same time, the United States acknowledges the efforts of the Secretary-General and the Government of Cambodia to reach agreement on the establishment of an Extraordinary Chamber with international assistance to bring to justice senior leaders of the Khmer Rouge and others who bear the greatest responsibility for atrocities committed. We take note of the commitment shown by a number of nations to establish a credible Khmer Rouge tribunal, especially the original co-sponsors of UN General Assembly Resolution 57/228, Japan and France, as well as Australia, in leading the Friends [of Cambodia group].

2. International Criminal Court

a. Overview

On May 13, 2003, William H. Taft, IV, Legal Adviser of the U.S. State Department, speaking to the Judicial Conference of the U.S. Court of Appeals for the Armed Forces, addressed the current views of the United States on the International Criminal Court, established by the Rome Statute, UN Doc. No. A/CONF.183/9, 37 I.L.M. 1002 (1998). Mr. Taft also discussed steps being taken by the United States to preserve its position and alternative mechanisms for ensuring international accountability for perpetrators of war crimes, crimes against humanity and genocide.

The full text of prepared points for Mr. Taft's speech, excerpted below, is available at *www.state.gov/s/l/c8183.htm.*

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Why Are We Concerned About the ICC?

- By now, U.S. concern about the ICC is well known. In May of 2002, the Department of State notified the United Nations, as depository of the Rome Statute, that the United States does not intend to become a party. This had the effect of removing any doubts about legal or political commitments that might be associated with the previous Administration's signature of the Statute.
- What has motivated the United States' concerns?
- Let me make one thing clear: Our disagreement is not with the principle of accountability. The United States remains a leader in its dedication to ensuring that such perpetrators are brought to justice, and we are committed to investigating and, if appropriate, prosecuting those who are alleged to have committed these most serious crimes.
- Our disagreement is with the way that the Rome Statute purports to achieve accountability. It is marred by serious flaws:
  - The ICC is an institution of unchecked power. The Court's authority is not constrained by adequate checks or balances. For example, the treaty creates a self-initiating prosecutor, answerable to no state or institution other than two judges on a three-judge panel of the Court itself. Final judgments are exempt from any clemency review by a political authority.
  - The ICC seeks to supplant the appropriate role of the UN Security Council in determining threats to international peace and security, by including within its jurisdiction (and planning to define) the crime of "aggression". This is a serious departure from the framework set out in the UN Charter, which allocates the power to decide when a state has committed an act of aggression to the Security Council. Judicialization reflects a mistrust of the deliberative process of the United Nations.
  - The treaty purports to create a new and objectionable form of jurisdiction over the nationals of non-Party

states, even where their democratically elected representatives have not agreed to become bound by the treaty. The United States has never recognized the right of an international court to try its citizens absent its consent or a UN Security Council mandate. But the ICC has been given the authority by the parties to the Rome statute to do so today.

What Have We Been Doing About It?

- The United States has responded to the flaws in the Rome Statute through a coordinated international effort to work with other countries to avoid any disruptions that the Rome Statute might cause. There are two initiatives that I thought would be particularly useful to describe:
  - So-called "article 98 agreements," which guard against the risk that U.S. persons will be surrendered to the ICC.
  - And actions within the Security Council to ensure that the ICC's claims of jurisdiction do not undermine support for and involvement in multilateral operations. We have done this by working to ensure that peacekeeping and other UN-mandated operations are established with appropriate safeguards for U.S. military and civilian personnel who may participate in them.

Article 98 Agreements

- Article 98 agreements derive their name from Article 98(2) of the Rome Statute, which states, in part, that "the Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the court."
- There has been a great deal of debate over the meaning of this provision, but let me clear up a few misconceptions about the Article 98 agreements we have now signed with a number of countries.

- First, as a technical matter, these agreements are not designed to "deny" the ICC jurisdiction over crimes. The agreements speak to the physical transfer of a person, and are silent on the ICC's jurisdiction or lack thereof.
- Second, these agreements do not grant "immunity" to U.S. persons. They simply contain a promise by the countries involved not to send persons to the ICC. They do not in any way affect the status quo with regard to the ability of either party to the agreement to prosecute individuals in accordance with domestic law.
- Third, the United States continues to be committed to investigating and prosecuting crimes of the type listed in the Rome Statute, in accordance with our pre-existing legal obligations. We are a party to the 1948 Genocide Convention, the 1984 Torture Convention, the 1949 Geneva Conventions, the 1907 Hague Conventions, and numerous other human rights instruments. These agreements helped form the basis for the crimes listed in the Rome Statute. We are already obligated under these treaties to prosecute offenses under these conventions, and we are committed to doing so.
- Fourth, these agreements are not intended to "undermine" the ICC. We respect the rights of countries that wish to join the ICC, we only ask that they respect our right not to join and not to be subject to the authority of an international organization we have not joined. An Article 98 agreement allows countries to participate without causing U.S. personnel to be subjected to the court.
- There has been considerable discussion over whether our Article 98 agreements are consistent with the Rome Statute. Specifically, there are some who object to the scope of persons covered in our agreements: All U.S. nationals, in addition to all present and former government officials, employees, contractors and military servicemembers. They feel the scope should be restricted to those who are only present in a country that receives a surrender request from the ICC because they have been sent there by our government.

- Countries that have signed Article 98 agreements with us, [include] parties or signatories to the Rome Statute, so there are those who have concluded, as we have, that there is no inconsistency. But rather than try to settle this debate, let me explain to you why the scope of coverage we are seeking is so important to us.
- Our primary concern about the ICC is that U.S. citizens could be subjected to politically motivated prosecutions for doing their jobs. Because the Rome Statute has no statute of limitations, moreover, our personnel continue to be at risk of prosecution even after they complete their government service, for the rest of their lives.
- We don't want to see our citizens forced to live in fear of ever traveling outside the United States, lest they be made the subject of an ICC proceeding based, for example, on their past service to our country.
- Let me also briefly describe the American Servicemembers' Protection Act, or ASPA, and how ASPA fits in with our Article 98 negotiating strategy. There has been a lot of discussion in the media about ASPA and the connection the U.S. Government is making between Article 98 agreements and military assistance.
  - The granting of U.S. military assistance to a foreign government is and always has been an instrument and facet of foreign policy. We grant military assistance to express support for particular governments, and we withhold it to express disapproval of particular types of conduct or particular governments. Sometimes, Congress provides us with additional foreign policy guidance in the form of legislation. In that respect, ASPA is no different from the wide variety of laws that already govern U.S. military assistance.
  - Section 2007 of ASPA provides that, after July 1, certain forms of grant-based military assistance will no longer be provided to any country that is a party to the ICC, and is not either a member of NATO or a Major Non-NATO Ally, unless the President waives this restriction.

— There are two grounds on which the President can waive this restriction: Either because the country has entered into an Article 98 agreement with us, or because it is otherwise in the national interest for us to continue furnishing military assistance.
— Thus, ASPA does not affect our major alliances, and it also does not punish countries for joining the ICC. It only withholds certain forms of military assistance for those countries that refuse to take measures to protect our personnel from the court.

UNSC Peacekeeping Resolutions

- With respect to UN peacekeeping and other operations, the USG undertook an intense diplomatic effort last year, prior to the entry into force of the Rome Statute, to protect U.S. troops and other personnel involved in such operations from exposure to the ICC.
- The United States has been a major contributor to operations that maintain peace and security around the globe. We contribute approximately 6,000 troops and civilian police to UN-established or UN-authorized peacekeeping operations, in addition to the 37,000 troops we have deployed in the Republic of Korea with UN authorization.
- Contributing U.S. personnel to these efforts demonstrates a commitment to international peace and security. It can also involve significant danger to those personnel. Having accepted those risks in the service of promoting peace and stability, the United States is unwilling to accept the additional risk of exposing them to politicized prosecutions before a court whose jurisdiction we have not accepted.
- For that reason, when it became clear that the Rome Statute would enter into force last year, we pushed hard for a Security Council resolution that would protect U.S. personnel from jeopardy before the ICC as a result of their participation in peacekeeping missions. Those negotiations were contentious, even though we took great care to respect

the obligations of those states that had ratified the Rome Statute. In June of 2002, following unsatisfactory treatment of this important issue, the United States reluctantly vetoed a resolution to renew the mandate of the UN peacekeeping mission in Bosnia.

- In the end, however, we secured last July a Security Council resolution under Chapter VII that triggers a mechanism under article 16 of the Rome Statute providing for a renewable one-year deferral of ICC investigations or prosecutions with respect to relevant nationals of non-Parties to the Rome Statute.
- UNSC Resolution 1422 invokes that mechanism and asks the ICC not to proceed "if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts and omissions relating to a United Nations established or authorized operation." The Security Council further decided that Member States shall take no action inconsistent with that request to the ICC.
- As I said, the article 16 mechanism in the Rome Statute contemplates a maximum deferral period of one year, which can be renewed. Resolution 1422 covers only the one-year period starting July 1, 2002. But the resolution also expresses the Security Council's intention to renew the request annually for as long as may be necessary. It is clear that future renewals of this deferral mechanism are necessary, and we fully expect the Security Council to renew its request to the ICC this summer.
- While I'm on the subject of the Security Council, it is worth noting that the American Servicemember Protection Act also speaks to the participation of U.S. military personnel in peacekeeping operations authorized by the Security Council:
  - ASPA provides that U.S. military personnel may not participate in newly created peacekeeping operations unless the President submits a certification to Congress that either (1) the Security Council has permanently exempted U.S. military personnel from ICC jurisdiction for actions in connection with the peacekeeping

operation; or (2) the host country of the peacekeeping mission has entered into an Article 98 agreement with us; or (3) the national interests of the United States justify U.S. participation.

Looking Ahead Now:

- The USG will of course continue its efforts to avoid disruptions that might be caused by the Rome Statute.
- At the same time, however, we will continue to pursue our leadership role as an advocate for accountability for perpetrators of war crimes, genocide and crimes against humanity. We believe that there are suitable alternatives to the ICC. These include:
  - At the most fundamental level, the pursuit of justice through credible national judicial systems.
  - Where domestic institutions are lacking but domestic will exists, the international community must be prepared to assist through political, financial, legal and logistical support.
  - Where domestic will is non-existent, the international community can intervene through the UN Security Council. This includes ad hoc mechanisms such as those for the former Yugoslavia and Rwanda. Or hybrid courts can be authorized, with a mixture of international and affected state participation, as in the case of the Special Court for Sierra Leone. The United States has played a key role in these initiatives.
  - We were instrumental in establishing these courts and tribunals, and we remain the largest financial contributor to the UN Tribunals, having provided over $300 million to the Rwanda and Yugoslav Tribunals to date.
- In this context, it is only natural that our attention turns to Iraq as we learn more every day about the atrocities committed by the former regime in Iraq. The United States has been a leader in pursing justice for serious violations of the laws of war and other atrocities, from Nuremberg through the international tribunals I have just mentioned.

Iraq will be no different. There must be accountability in Iraq. The question is what forums are available for accountability.

— Neither the United States nor Iraq is a party to the Rome Statute, and it's our view that war crimes cases should be handled by the United States or other states whose citizens were the victims of the crimes, or by the Iraqi people with international support.
— We are cataloging and documenting the reports of war crimes and other atrocities, both past and present. Our troops have been given the additional mission to help secure and preserve evidence of war crimes and atrocities.
— For crimes committed against U.S. personnel, we will investigate and prosecute. We will also seek and prosecute those who committed or ordered war crimes against U.S. personnel during the Gulf War of 1991.
— For the regime's crimes committed against other countries' nationals, both in the present and in the past, the governments of those nationals may also have a sovereign interest in seeking justice.
— For the regimes' crimes committed against Iraqis, we believe that those responsible should be brought before an Iraqi-led process, possibly ranging from tribunals to truth and reconciliation commissions. The United States, together with others in the international community, intends to help ensure that a strong and credible process is created to bring the perpetrators to justice. This process will be part of the Iraqi movement toward democracy, the rule of law and legitimate international judicial institutions. This approach is consistent with the U.S. view that international practice should support sovereign states seeking justice domestically when it is feasible and would be credible. Because justice and the administration of justice are a cornerstone of any democracy, pursuing accountability while respecting the rule of law by a sovereign state must be encouraged at all times.

b. UN Security Council resolutions

(1) Resolution 1487

On June 12, 2003, the UN Security Council adopted Resolution 1487, concerning jurisdiction of the International Criminal Court. In the resolution, acting under Chapter VII of the UN Charter, the Security Council:

> 1. *Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a 12-month period starting 1 July 2003 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;
> 2. *Expresses* the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;
> 3. *Decides* that Member States shall take no action inconsistent with paragraph 1 and with their international obligations;
> 4. *Decides* to remain seized of the matter.

See also Digest 2002 at 157–165 on adoption of its predecessor, Security Council Resolution 1422, referred to in 2.a. *supra*.

Ambassador James B. Cunningham, Deputy U.S. Representative to the United Nations, welcomed the adoption of the resolution, addressing U.S. concerns with the International Criminal Court and its role in peacekeeping missions. His remarks, excerpted below, are available at *www.un.int/usa/03_085.htm*.

Mr. President, we welcome the Security Council's renewal for another year of the compromise on the International Criminal Court so painstakingly put together in Resolution 1422. Like any

compromise, the resolution [1487] does not address all of our concerns about the Court. It does balance divergent positions and help ensure against any undermining of UN peace operations.

Like Resolution 1422, this resolution exempts states that are not parties to the Rome Statute but participate in UN operations from the ICC's jurisdiction in a manner consistent with the UN Charter and with the 1998 Rome Statute. The resolution is consistent with the fundamental principle of international law, the need for a state to consent if it is to be bound, is respected by exempting from ICC jurisdiction personnel and forces of states that are not parties to the Rome Statute. It is worth noting that the resolution does not in any way affect parties to the Court, nor the Rome Statute itself. Nor does it, as some today suggested, elevate an entire category of people above the law. The ICC is not "the law."

The provisions of this resolution are as relevant and necessary today as Resolution 1422 was a year ago. We all know that UN operations are important if the Council is to discharge its primary responsibility for maintaining or restoring international peace and security. We also all know that it is not always easy to recruit contributors and that it often takes courage on the part of political leaders to join military operations established or authorized by this Council. It is important that Member States not add concern about ICC jurisdiction to the difficulty of participating.

We have heard the arguments that this resolution is not necessary, and we do not agree. I would suggest that even one instance of the ICC attempting to exercise jurisdiction over those involved in a UN operation would have a seriously damaging impact on future UN operations. . . .

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The ICC is not a UN institution and, some would even say, challenges and weakens the UN Charter system and the Council's place in it. The ICC is vulnerable at each stage of any proceeding to politicization. The Rome Statute provides no adequate check. . . .

Our primary concern, of course, is for American personnel that may find themselves subject to ICC jurisdiction even though the United States is not a party to the Rome Statute. As Ambassador

Negroponte explained last year, "the power to deprive a citizen of his or her freedom is an awesome thing, which the American people have entrusted to their government under the rules of our democracy . . . [T]he International Criminal Court does not operate in the same democratic and constitutional context, and therefore does not have the right to deprive Americans of their freedom."

The United States, therefore, has a fundamental objection to the ICC. In our view, it is a fatally flawed institution. Many others, including some of our closest friends, do not share that view. . . . This resolution represents a compromise that respects the strongly held views of those who support the ICC and the equally strongly held views of those that do not. Such respect is important to maintain. This compromise, therefore, is important to maintain.

(2) Resolution 1497

On August 1, 2003, the Security Council, acting under Chapter VII, adopted Resolution 1497 authorizing the establishment of a multinational force in Liberia to support the implementation of the June 17, 2003, ceasefire agreement. *See* discussion in Chapter 17.C.1. In Operative Paragraph 7 of the resolution, the Security Council

> [d]ecide[d] that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State.

Permanent Representative John D. Negroponte responded to questions from the press on this provision, stating:

> . . . With respect to the question of exclusive jurisdiction, we thought that that was important. If you note, and

> I would emphasize the point, that it applies only to countries that are sending forces that are not parties to the Rome Statute. We think that's an important distinction, and it is a distinction that was added at the request of one of the parties to the Rome Statute that is on the Council. . . .

The full text of Ambassador Negroponte's exchange with reporters is available at *www.un.int/usa/03_121.htm*.

On October 20, 2003, President George W. Bush certified, consistent with section 2005 of the American Servicemembers' Protection Act of 2002, Pub. L. No. 107–206, 116 Stat. 820; 22 U.S.C. § 7421 et seq., that

> members of the U.S. Armed Forces participating in the United Nations Mission in Liberia (UNMIL) are without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court because, in authorizing the operation, the United Nations Security Council (in Resolutions 1497 (2003) and 1509 (2003)) has provided for the exclusive jurisdiction of the contributing State for all acts or omissions arising out of or related to UNMIL, unless such exclusive jurisdiction is expressly waived.

68 Fed. Reg. 63,973 (Nov. 10, 2003). *See Digest 2002* at 168–174.

c. Article 98 agreements

During 2003 the United States continued to negotiate bilateral agreements under Article 98 of the Rome Statute. Article 98 provides that:

> [t]he Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State

> to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

See also Digest 2002 at 165–168.

On September 12, 2003, Lincoln Bloomfield, Assistant Secretary of State for Politico-Military Affairs, addressed the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, at the United Nations. Mr. Bloomfield set forth the views of the United States on the International Criminal Court and explained the importance of Article 98 agreements. Excerpts below from his remarks address the scope of the Article 98 agreements being negotiated, applicable to all U.S. persons rather than limited to those serving in their governmental capacities or as military personnel as proposed in non-binding guidelines issued by the European Union in September 2002. *See Digest 2002* at 166.

Mr. Bloomfield's remarks, excerpted below, are available at *www.state.gov/t/pm/rls/rm/24137.htm. See also* remarks by the Legal Adviser, William H. Taft, IV, 2.a. *supra.*

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The State Department's Legal Adviser's Office has painstakingly reviewed the arguments made against the U.S. scope position. Without delving into details beyond my professional competence, we are confident in our view that the text of the Rome Statute neither mandates the EU interpretation nor undermines the U.S. position. Indeed, our legal experts find support in the usage found in other conventions such as the Vienna Convention on Consular Relations, whose use of the term "sending state" refers to all persons who are nationals of the sending state.

Our legal experts, moreover, have reviewed again the preparatory work of the Rome Statute, to consult what the Vienna Convention on the Law of Treaties refers to as "supplementary means of interpretation." Some may be surprised to learn that

the records contain no official *travaux preparatoires* that would either confirm or determine the meaning of Article 98(2) as relates to scope of coverage. In sum, the U.S. position on scope is legally supported by the text, the negotiating record, and precedent.

Why should the U.S. non-surrender agreements apply to all American citizens? Here, a practical perspective is appropriate, to explain why elected leaders—and not only American leaders—would find this approach entirely appropriate in the 21st Century.

The United States is a nation of immigrants; we have familial ties to localities all over the world. Our national interests know no bounds: we have diplomatic representation almost everywhere, and our private businesses and educational institutions are similarly represented far and wide.

The United States military is unique in its global presence and operations. Our personnel were found in over 100 countries over the past year. At one point in 2003, more than 400,000 U.S. military personnel were serving outside American territory. By next year, the U.S. will have over 50 treaty alliance commitments to defend the security of countries all over the world. One does not have to hold a view of American exceptionalism to acknowledge the profile and symbolic resonance of the American identity in the world.

But let us look further, at other citizens whose presence and involvement could readily be perceived by partisans as influential, even decisive, on one side or another of the violent conflicts that sometimes give rise to war crimes, genocide and crimes against humanity.

In Iraq this year, 600 media reporters, mostly American, deployed along with the coalition military forces, embedded in their operations. Non-governmental organizations numbering in the hundreds are, by the nature of their humanitarian mission, on the scene wherever societies are at risk from conflict. American corporations and their executives are posted in resource extraction areas where separatist or competing territorial claims remain unsettled.

The point, of course, is that American citizens, many of them educated and well-connected to influential actors abroad, are no

less a target for potential resentment by the parties to a violent conflict than officials of the U.S. Government. You will note that Americans taken hostage in Lebanon, Colombia or the Philippines in recent years were evidently singled out not as much for their profession as for their nationality. The potential for accusations giving rise to politically motivated prosecutions cannot neatly be parsed among Americans.

Nor do we believe that European political leaders would necessarily view their equities differently. We have noted that some have required very broad, if ambiguous, immunity from exposure to any tribunal of persons related in any way to their peacekeeping deployments to Afghanistan, for example. It is also telling that Article 124 of the Rome Treaty contains a scope provision of its own, providing a party to the Statute with a period in which it can decide not to accept the jurisdiction of the Court with respect to war crimes alleged to have been committed "by its nationals." At least one EU member state has availed itself of this immunity provision on behalf of its citizens.

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d. Suspension of military assistance

Pursuant to § 2007 of the American Servicemembers' Protection Act of 2002, as of July 1, 2003, no U.S. military assistance may be provided to the government of a country that is a party to the Rome Statute, with certain exceptions. The section specifically exempts the governments of NATO members, major non-NATO allies, and Taiwan. It also provides for a Presidential waiver on a determination that such waiver is important to the U.S. national interest or that the country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the ICC from proceeding against U.S. personnel present in the country. *See also Digest 2002* at 168–174.

On June 30, 2003, President George W. Bush issued Presidential Determination No. 2003–27 waiving the prohibition on military assistance to six countries with whom

agreements with the United States pursuant to Article 98 of the Rome Statute had entered into force, and sixteen countries for whom waiver was important to the national interest of the United States because each had concluded such an agreement with the United States. Of the sixteen, waiver as to seven of the countries was effective until November 1, 2003, and for the remaining nine until January 1, 2004. 68 Fed. Reg. 41,219 (July 11, 2003).
The determination is set forth below.

Consistent with the authority vested in me by section 2007 of the American Servicemembers' Protection Act of 2002, title II of Public Law 107–206 (22 U.S.C. 7421 et seq.), I hereby determine that:

(1) Gabon, the Gambia, Mongolia, Senegal, Sierra Leone, and Tajikistan have each entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against U.S. personnel present in such countries and waive the prohibition of section 2007(a) of the American Servicemembers' Protection Act with respect to these countries for as long as such agreement remains in force;

(2) it is important to the national interest of the United States to waive, until November 1, 2003, the prohibition of section 2007(a) with respect to Afghanistan, Djibouti, Democratic Republic of Congo, East Timor, Ghana, Honduras, and Romania, and waive that prohibition with respect to these countries until that date; and

(3) it is important to the national interest of the United States to waive, until January 1, 2004, the prohibition of section 2007(a) with respect to Albania, Bolivia, Bosnia-Herzegovina, Botswana, Former Yugoslav Republic of Macedonia, Mauritius, Nigeria, Panama, and Uganda, and waive that prohibition with respect to these countries until that date.

In a press briefing on July 1, 2003, the White House press spokesman commented as set forth below on the action taken.

The full briefing is available at *www.whitehouse.gov/news/releases/2003/07/20030701-6.html#7.*

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Q Ari, the United States just declared about 50 countries, including Colombia and six prospective NATO members, ineligible for military aid because they won't exempt Americans from the International Criminal Court. My question is, why is this priority more important than fighting the drug wars, integrating Eastern Europe? And is there any chance that they would be declared eligible for this aid anytime soon?

MR. FLEISCHER: Well, number one, because the President is following the law. This is a law that Congress passed that the President signed, dealing with what's called Article 98 actions that would make certain that American military personnel and other personnel who are stationed abroad would not be subject to a court who has international sovereignty that's in dispute, that would be able to reach out to these countries and take Americans and put them on trial before an entity that the United States does not recognize.

So it's important to protect American servicemen and women and others in government. There should be no misunderstanding, that the issue of protecting U.S. persons from the International Criminal Court will be a significant and pressing matter in our relations with every state.

Additional determinations waiving the prohibition on assistance were issued by President Bush on July 29, 68 Fed. Reg. 47,441 (Aug. 11, 2003) (Albania, Bosnia and Herzegovina, Djibouti, Mauritius, and Zambia based on Article 98 agreements in force); on September 24, 68 Fed. Reg. 57, 319 (Oct. 3, 2003)(Afghanistan, Democratic Republic of the Congo, Georgia, and Honduras based on Article 98 agreements in force and Guinea, based on national interest waiver due to a concluded Article 98 agreement); on October 6, 68 Fed.

Reg. 59,857 (Oct. 20, 2003) (Colombia based on Article 98 agreement in force); on November 1, 68 Fed. Reg. 63,981 (Nov. 10, 2003) (Antigua and Barbuda, Botswana, East Timor, Ghana, Malawi, Nigeria, and Uganda based on Article 98 agreements in force, and Romania, based on national interest waiver due to a concluded Article 98 agreement); on November 21, 68 Fed. Reg. 66,693 (Nov. 28, 2003) (Bulgaria, Estonia, Latvia, Lithuania, Slovakia, and Slovenia, "with respect to military assistance for only certain specific projects that I have decided are needed to support the process of integration of these countries into NATO, or to support Operation ENDURING FREEDOM or Operation IRAQI FREEDOM" based on a determination that waiver was important to the national interest of the United States); and on December 30, 2003, 69 Fed. Reg. 2,055 (Jan. 14, 2004) (Belize, Former Yugoslav Republic of Macedonia, Panama, and Fiji, based on Article 98 agreements in force). In addition, on December 30, 2003, Thailand was named a major non-NATO ally. 69 Fed. Reg. 2,053 (Jan. 14, 2004).

Cross References:

Prisoner transfer from Mexico, **Chapter 2.C.**
EU as party to law enforcement treaties, **Chapter 4.A.**
Reservation to Terrorist Bombing Convention, **Chapter 4.B.1.b.**
Succession by Bosnia and Herzogovina to U.S.-Serbia extradition treaty, **Chapter 4.B.2.**
US Coast Guard law enforcement vessels in U.S.-Canada border enforcement, **Chapter 5.B.5**
ICC and other judicial procedure and related issues, **Chapter 6.G.**
Human rights and terrorism, **Chapter 6.J.**
Use of extradition treaty not waiver of sovereign immunity, **Chapter 10.A.4.a.(3).**
Dismissal of RICO charges under revenue rule, **Chapter 15.A.6.**
UN Security Council Resolution 1497 concerning Liberia and ICC, **Chapter 17.C.1.**
Arms embargo implementing UN Security Council Resolutions 1390 and 1455, **Chapter 18.B.7.b.**

Chapter 4

Treaty Affairs

A. CAPACITY TO MAKE

European Union as Party to Mutual Legal Assistance and Extradition Agreements

On June 25, 2003, the United States signed international agreements on extradition and mutual legal assistance with the European Union. This is the first time the United States has signed an international agreement with the European Union, as opposed to the European Community. A memorandum prepared by the Office of Law Enforcement and Intelligence, Office of the Legal Adviser, Department of State, explained the relationships and obligations created as excerpted below. *See* discussion of the substance of the agreements in Chapter 3.A.1. *See also* 43 I.L.M. 747 (2004), which includes the text of the agreements.

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The European Union was created by the 1992 Treaty of Maastricht, which divided the Union's responsibilities into three "pillars", the third of which is criminal judicial and police cooperation—an area historically primarily within the authority of member states. The subsequent Amsterdam and Nice Treaties expanded the possibilities for Union action in the so-called Third Pillar. In particular, Articles 24 and 38 of these latter instruments granted the European Council the power to authorize the Presidency, as

the agent for the Union, to negotiate and sign international agreements with third states with respect to Third Pillar matters. These Agreements with the United States constitute the Union's first exercise of the Article 24/38 power in the area of criminal judicial and police cooperation. It previously had been utilized only in the area of common foreign and security policy (the Second Pillar), for example in a 2001 agreement concluded with the Former Yugoslav Republic of Macedonia on the activities of an EU Monitoring Mission.

The EU, as the party to the Agreements with the United States, assumes its obligations as a matter of international law, and thereby becomes responsible internationally for implementation by its member states. At the same time, the effect of Articles 24 and 38, as a matter of internal EU law, is to bind the member states to the international obligations in the Agreements, except where a member state has indicated that it first "has to comply with the requirements of its own constitutional procedure". A number of member states, including the United Kingdom, France, Germany, the Netherlands, and Denmark, submitted the agreements to their parliaments for review prior to the Council decision to authorize signature, and received endorsement. Most also will submit the signed agreements for domestic ratification or a lesser form of parliamentary review.

The United States determined as well to secure directly from each member state confirmation of the changes effected by the US-EU Agreements in existing bilateral extradition and mutual legal assistance treaties. Accordingly, Article 3(2) of each Agreement obliges the Union to "ensure that each member State acknowledges, in a written instrument between such Member State and the United States of America" the resulting application of the bilateral treaty, as amended. In addition, the Agreements may enter into force only after completion of the bilateral instruments.

Following signature of the US-EU Agreements in June 2003, the United States began direct discussions with member states on the necessary bilateral instruments. Since the bilateral instruments will serve to modify existing treaties, they, like the US-EU Agreements themselves, will be submitted to the U.S. Senate for advice and consent to ratification. In addition, bilateral instruments,

or comprehensive new treaties incorporating their provisions, will be concluded with the ten states that acceded to the EU in the spring of 2004, and with each new Member State acceding to the EU thereafter.

B. CONCLUSION, ENTRY INTO FORCE, RESERVATION, APPLICATION, AND TERMINATION

1. Reservations Practice and Related Issues

a. Objection to reservation

On May 27, 2003, the U.S. Department of State circulated a diplomatic note to chiefs of mission concerned with the International Convention for the Regulation of Whaling, setting forth its objections to a reservation by Iceland to the Convention. Iceland withdrew from the International Whaling Commission ("IWC") in 1982, the year a moratorium on commercial whaling was adopted by the parties to the convention. It rejoined on October 14, 2002, with a reservation to the moratorium. At the time of the U.S. note, fifteen IWC member countries had deposited objections to Iceland's reservation. Of these, twelve countries object to Iceland's reservation but recognize Iceland as a party. The United States shares this view, as reflected in its note, below. Three countries object to the reservation and do not recognize Iceland as a party to the convention. *See* discussion of U.S. views on the reservation in *Digest 2002* at 206–212.

The Secretary of State presents his compliments to Their Excellencies and Messieurs and Mesdames the Chiefs of Mission of the Governments concerned with the International Convention for the Regulation of Whaling, done at Washington December 2, 1946 ("the Convention") and refers to his circular note, dated October 18, 2002, regarding the deposit of an instrument of adherence by Iceland to the Convention and the Protocol to the Convention with a reservation.

The Secretary of State wishes to inform the Chiefs of Mission that the United States of America, in its capacity as a party to the Convention, objects to the reservation contained in the instrument of adherence by Iceland. This objection shall not preclude the entry into force of the Convention as between the United States of America and Iceland.

The Secretary of State would be grateful if the Chiefs of Mission would forward this information to their respective governments.

b. Declaration as reservation contrary to object and purpose

On June 5, 2003, the U.S. Mission to the United Nations presented a diplomatic note setting forth the U.S. objection to a declaration made by Pakistan upon accession to the International Convention for the Suppression of Terrorist Bombings to the UN Treaty Office in its capacity as depositary for the convention.

The declaration provided:

> The Government of the Islamic Republic of Pakistan declares that nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right to self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law. This interpretation is consistent with Article 53 of the Vienna Convention on the Law of Treaties 1969 which provides that an agreement or treaty concluded in conflict with an existing *jus cogen* [sic] or preemptory norm of international law is void and, the right of self-determination is universally recognized as a *jus cogen* [sic].

As recorded in the U.S. note, set forth below, the United States considers the declaration to be a reservation and objects to it as contrary to the object and purpose of the Convention, among other things. At the time the United States filed its objection, Austria, Denmark, France, India, Israel, Italy, The Netherlands, Spain, Sweden, and the United Kingdom had filed similar objections.

[The United States] refers to the declaration made by the Government of the Islamic Republic of Pakistan upon accession to the International Convention for the Suppression of Terrorist Bombings (1997) on August 13, 2002.

The Government of the United States of America, after careful review, considers the declaration made by Pakistan to be a reservation that seeks to limit the scope of the Convention on a unilateral basis. The declaration is contrary to the object and purpose of the Convention, namely, the suppression of terrorist bombings, irrespective of where they take place and who carries them out.

The Government of the United States also considers the declaration to be contrary to the terms of Article 5 of the Convention, which provides: "Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention . . . are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature."

The Government of the United States notes that, under established principles of international treaty law, as reflected in Article 19(c) of the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of the treaty shall not be permitted.

The Government of the United States therefore objects to the declaration made by the Government of Pakistan upon accession to the International Convention for the Suppression of Terrorist Bombings. This objection does not, however, preclude the entry into force of the Convention between the United States and Pakistan.

2. Succession of Parties

During 2002 and 2003 Bosnia-Herzegovina made several extradition requests for persons located in the United States.

On December 19, 2003, Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs, executed an affidavit, filed in an extradition proceeding in the U.S. District Court for the Southern District of New York, concluding that the 1901 U.S.-Servia extradition treaty remains in force between the United States and Bosnia-Herzegovina. *In the Matter of the Extradition of Muhamed Sacirbegovic*, 280 F. Supp. 2d 81 (S.D.N.Y. 2003).

Mr. Dalton's affidavit, excerpted below, is available in full at *www.state.gov/s/l/c8183.htm*.

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3. The Extradition Treaty between the United States of America and the Kingdom of Servia ("Servia") ("the Extradition Treaty") was signed at Belgrade on October 25, 1901. The U.S. Senate gave advice and consent to ratification on January 27, 1902, and the President of the United States ratified the Treaty on March 7, 1902. Servia ratified the Treaty on. March 17, 1902, and the Parties exchanged their instruments of ratification on May 13, 1902. The Treaty entered into force on June 12, 1902, thirty days after the Parties exchanged instruments of ratification.

4. Servia became part of the Kingdom of Serbs, Croats and Slovenes in 1918, and the Treaty became applicable to that Kingdom by virtue of succession. In 1929, the Kingdom of Serbs, Croats and Slovenes was renamed Yugoslavia, which in 1946 was subsequently renamed the Federal Peoples' Republic of Yugoslavia.

5. In 1954, Rafo Ivancevic, Consul General of the Federal Peoples' Republic of Yugoslavia, filed an appeal from a decision of the U.S. District Court for the Southern District of California denying a request under the 1901 Treaty for the extradition of Andrija Artukovic on the ground that the treaty was no longer effective. The Court of Appeals for the Ninth Circuit reversed the District Court and found that the Treaty remained in force and that it was "a present, valid and effective treaty between the United States and the Federal Peoples' Republic of Yugoslavia, and ha[d] been a valid and effective treaty continuously since its execution between the United States and Servia and through the changes in

official title of the latter state to its present title of the Federal Republic of Yugoslavia." *Ivancevic v. Artukovic*, 211 F. 2d 565, 575 (1954).

6. In 1963, Yugoslavia was renamed the Socialist Federal Republic of Yugoslavia ("SFRY"), The SFRY consisted of six constituent republics: Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Montenegro, and Macedonia. Following the dissolution of the SFRY in 1991–1992, Bosnia-Herzegovina became an independent State. As a successor State, Bosnia-Herzegovina had the right under customary international law to accept, either expressly or by implication, the international agreements of its predecessor State.

7. In 1992, the United States recognized Bosnia-Herzegovina as an independent state and the two countries established diplomatic relations. In a letter of April 19, 1992 that related to the recognition, President Izetbegovic of Bosnia-Herzegovina informed the Secretary of State that "Bosnia is ready to fulfill the treaty and other obligations of the former SFRY." Since that time the United States has considered that treaties such as the extradition treaty continue in force between the two countries.

8. All States existing on the territory of the former Yugoslavia have accepted the fact that they are successor States to the Socialist Federal Republic of Yugoslavia. (A successor State is defined in the Vienna Convention on Succession of States in Respect of Treaties, 1946 United Nations Treaty Series, 4, 6, as a "State which has replaced another State on the occurrence of a succession of States.") Those States have also generally accepted *ipso facto* succession to treaties of the former SFRY. (See State Practice Regarding State Succession and Issues of Recognition: The Pilot Project of the Council of Europe, Kluwer Law International 106 (1999) "In particular Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, as well as Slovenia, have either enacted national legislation or made declarations which indicate that they are willing to abide by the rules of customary law which in their view seem to be largely enshrined in the Vienna Convention on Succession of States in Respect of Treaties and in particular its Art. 34."

9. Although the Vienna Convention on the Succession of States to Treaties is in force for Bosnia and Heregovina and the other

states mentioned in the preceding paragraph, it is not in force for the United States. However, the United States has accepted the applicability of the customary international law rule in Article 34 of that Convention to cases of separation of parts of a State for more than a decade. Paragraph 1(a) provides: "When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist: (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each State so formed. . . ." See statement "A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia" by Edwin J. Williamson, 1992 Proc. Am. Soc'y Int'l L. 10–15, 15 (1992). At the time of the statement Mr. Williamson was the Legal Adviser of the Department of State.

10. On March 26, 2002, Bosnia-Herzegovina requested the extradition from the United States of Muhamed Sacirbegovic pursuant to the Extradition Treaty. Bosnia-Herzegovina also has made other extradition requests to the United States. On February 6, 2003, the United States District Court for the Northern District of Texas, found Slobodan Galusic extraditable to Bosnia on the basis of the Extradition Treaty. Another extradition request from Bosnia-Herzegovina, for Ahmet Grahovic, currently is pending in U.S. court. In all these cases, Bosnia-Herzegovina and the United States have continued to apply the Extradition Treaty.

11. On the basis of my review of the record and the foregoing analysis, I conclude that the Extradition Treaty remains in force between the United States and Bosnia-Herzegovina.

* * * *

3. Notice of Acceptance

On August 19, 2003, Mr. Dalton responded to a request from a party to the North Atlantic Treaty of 1949 for further information concerning the legal requirements for expressions of consent to be bound by a treaty in connection with efforts by that party to accept the protocols on the Accession of

> Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia to the North Atlantic Treaty. The protocols were opened for signature at Brussels on March 26, 2003, and signed on that date on behalf of all the parties to the North Atlantic Treaty.

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The second sentence of Article II of each Protocol reads as follows:

> The present Protocol shall enter into force when each of the Parties to the North Atlantic Treaty has notified the Government of the United States of its acceptance thereof

The Vienna Convention on the Law of Treaties, which is generally recognized as a codification of treaty law . . . , provides in Article 2(1)(b) that "ratification' [and] 'acceptance' . . . mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty". Paragraph 2 provides that the provisions of paragraph 1 regarding the use of terms in the Convention are "without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State."

* * * *

The establishment and application of "acceptance" as a means of expressing the consent of a State to be bound by a treaty is discussed in § 610 of I *Oppenheim's International Law, 9th Ed. (1992)*. The section concludes: "Where acceptance . . . follows signature, [its] function is closely analogous to that of ratification, and [it]may express a state's consent to be bound by a treaty under conditions similar to those which apply to ratification."

The second sentence of the cited section of *Oppenheim* states that practice since the Second World War, in a number of treaties, has established acceptance as a procedure whereby a State's consent to be bound can be expressed. A footnote to that proposition recounts an earlier example, the acceptance of membership in the ILO, following upon a joint resolution of Congress authorizing the President to accept an invitation extended to the United States

to become a member of the organization. (Documentation relating to that action appears at CLVIII L.N.T.S. 46–48. While the Note from the United States refers to authority conferred on the President by the Congress of the United States to accept the invitation, the consent of the United States to be bound is expressed in the acceptance by the President of the invitation from the ILO.)

International practice of states recognizes that there is a difference between action by a domestic legal body ratifying or authorizing ratification or acceptance of a treaty and the international act whereby a State expresses its consent to be bound. This difference is illustrated by a number of instruments of ratification and analogous documents contained in *National Treaty Law and Practice, Studies in Transnational Legal Policy*, Nos. 27 and 30, published by the American Society of International Law in 1995 and 1999, respectively. Each of the volumes contains chapters by experts in treaty law and practice in six countries. Instruments that refer to action taken under domestic law and express the consent of a State to be bound appear in the studies for the following countries at the study and page indicated: Austria (27, p.25); Chile (30, p.56); Colombia (30, p.99); Germany (27, p.70); USA (30, p.225). Similar instruments from other countries are included in the depositary archives of the United States. . . .

* * * *

The most recent treatise that discusses this issue is Anthony Aust's *Modern Treaty Law and Practice* (Cambridge University Press, 2000). His discussion confirms the positions set out above. He notes at pp. 85–86 that the form and content of an instrument of ratification is not laid down by the Vienna Convention on the Law of Treaties. In his view, however, since "Article 2(l)(b) defines ratification as 'the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty', the instrument must give clear and unambiguous expression to that intention". Noting that under Article 14(2) of the Vienna Convention consent to be bound can be expressed by 'acceptance' under conditions similar to those which apply to ratification, he states at p.87: "The rules applicable to ratification apply equally to acceptance. . . ."

* * * *

4. Claim of Invalidity

On December 22, 2003, the Department of State delivered a diplomatic note to the Ministry of Foreign Affairs of the Republic of Peru contesting Peru's assertion that its consent to be bound by the Multilateral Agreement on the Liberalization of International Air Transportation ("Agreement") was invalid. In its note of September 23, 2003, Peru had indicated that Article 56 of its political constitution requires approval by its Congress before ratification by the President of treaties "cover[ing] the following subjects: 1. Human Rights; 2. State sovereignty, domain or integrity; 3. National Defense; 4. State financial obligations." The agreement at issue "should have followed the compulsory procedure foreseen by the Constitution." The Peruvian note concludes that "in light of [Article 46 of the Vienna Convention on the Law of Treaties], it is clear that my country's consent to be bound by this Agreement is invalidated due to the fact that it is in direct violation of one of the main regulations of its national law concerning the jurisdictional competence to conclude treaties. Consequently, this incompliance invalidates the consent of the Peruvian State to be bound by this agreement, which, in turn, causes Peru not to be bound. . . ."

Article 46 provides:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

The U.S. response, excerpted below, is available at *www.state.gov/s/l/c8183.htm.*

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* * * *

The Government of the United States has carefully considered the position taken in the referenced note that Article 46 of the Vienna Convention allows Peru, pursuant to Article 65, paragraph 1 of the Vienna Convention, to declare null its consent to be bound by the Agreement. The Government of the United States is unable to accept that the facts recited in the note provide a basis under Article 46 of the Vienna Convention for the Government of Peru to declare that its consent to be bound by the Agreement is null. Accordingly, the United States objects to the measure which Peru has proposed.

The Government of the United States is concerned that if other countries were to take a position similar to that taken by Peru in this case, the stability of treaties, which rests upon the *pacta sunt servanda* principle, could be seriously undermined.

* * * *

On January 14, 2004, the Peruvian embassy in Wellington informed the Government of New Zealand, in its capacity as depositary of the Agreement that after considering responses the Government of Peru had received concerning its notification of invalidity of the Agreement, Peru was withdrawing its notification of invalidity and was withdrawing from the Agreement in accordance with its terms.

5. Interpretation: Need for Consultation

In the aftermath of the War of 1812, U.S. Secretary of State Richard Rush and British Minister to the United States Charles Bagot agreed to limit their navies to one warship each on Lakes Ontario and Champlain and two each on the other lakes of the Great Lakes. The agreement was done by an exchange of notes at Washington on April 28 and 29, 1817, and entered into force on April 29, 1817 ("Rush-Bagot Agreement"). All other armed vessels on these lakes were to

be dismantled, and no other vessels of war were to be built or armed there. The size of weaponry permitted on warships was also limited.

In 2003 the U.S. Coast Guard ("USCG") requested concurrence from the Department of State that the Rush-Bagot Agreement did not prohibit the USCG from deploying automatic weapons (M-60 and/or .50 caliber machine guns) aboard USCG vessels operating in U.S. waters on the Great Lakes. The vessels would be engaged in law enforcement efforts to prevent terrorists and others engaged in criminal activities from crossing the U.S.-Canadian boundary by water. In a letter from James Derham, Acting Assistant Secretary, Bureau of Western Hemisphere Affairs, to Admiral David S. Belz, Assistant Commandant for Operations, U.S. Coast Guard, the Department of State agreed that prior U.S. statements on the scope of the Rush-Bagot Agreement support the position that the USCG would not be prohibited from deploying such weapons, but noted that it was not clear that Canada had ever agreed with that interpretation. Because the two countries had a "long-standing practice of prior notifications and consultations," the letter concluded that the Department of State "would not agree that the USCG may deploy these weapons unilaterally without additional notification to or consultation with the Government of Canada." The letter explained:

> We understand the exigencies of the situation and the considerations that underlie the USCG proposal to deploy such weapons aboard USCG vessels, and we fully support USCG efforts to ensure maritime security on our northern border. However, while we do not find that the concurrence of the Canadian side is required by the terms of the Treaty, it is our position that, based on (a) the record of prior notifications and consultations under the Rush-Bagot Agreement, (b) the need to preserve and promote an atmosphere of voluntary transparency and consultation with Canada, and (c) the overwhelming foreign policy interests of preserving both the spirit of the Rush-Bagot

> Agreement and the current positive U.S.-Canadian relationship, the United States should not arm USCG "revenue cutters" operating in U.S. waters on the Great Lakes without prior notification through official channels and consultation.

A *pro memoria* note of April 22, 2003, recorded the outcome of consultations between the two governments on March 17, 2003, in Ottawa. The note, set forth below, confirms the understanding shared by the two countries that the USCG could install light weapons on USCG vessels operating in U.S. waters of the Great Lakes, consistent with the Rush-Bagot Agreement.

The full text of the letter and note are available at *www.state.gov/s/l/c8183.htm*.

The Government of the United States refers to consultations between representatives of the Government of the United States of America and representatives of the Government of Canada held at Ottawa on March 17, 2003, regarding the Rush-Bagot Agreement of 1817 and the intention of the United States Government to install light weapons on United States Coast Guard vessels operating in U.S. waters of the Great Lakes.

In the wake of the events of September 11, 2001, the United States Coast Guard, which is the principal Federal law enforcement agency responsible for maritime safety and security, has increased its vigilance, readiness, and patrols to enforce U.S. laws along the United States' 95,000 miles of coastline, including the Great Lakes and inland waterways. In view of the potential for a tragic outcome in the event the security and integrity of the U.S.-Canadian border is compromised, the Government of the United States deems it prudent that the U.S. Coast Guard be prepared and equipped to take whatever law enforcement measures may be necessary and authorized to prevent terrorists or others engaged in criminal activities from crossing the U.S.-Canadian boundary by water. This increased effort includes the arming of Coast Guard patrols with M-60, .50 caliber machine guns or like automatic weapons,

in waters of the Great Lakes that are subject to the jurisdiction of the United States in order to protect ports, the flow of commerce, and the marine transportation system from terrorism. As such, the United States Government assures the Government of Canada that these vessels so armed will not engage in law enforcement activities in Canadian waters. Furthermore, those U.S. Coast Guard vessels engaged in fisheries enforcement will not have arms installed (or stowed) on them when they operate in Canadian waters in accordance with our existing understanding. Finally, all U.S. Coast Guard vessels located in the Great Lakes will have any such armament dismantled and safely stowed when they are in Canadian waters or ports.

The purpose of the Rush-Bagot Agreement of 1817 was to limit the naval forces and armaments on the Great Lakes in order to reduce tensions inflamed by the War of 1812 and gave birth to a spirit of cross-border cooperation that has continued to be the hallmark of U.S./Canadian defense, security and law enforcement relations. Both Governments have at appropriate junctures acknowledged that the technical scheme and definitions of the Agreement are not altogether applicable to present-day conditions; nevertheless, both Governments value the purpose of the Agreement, appreciate the spirit of cooperation and mutual respect embodied in it, and affirm that these will continue to guide them in matters relating to naval forces on the Great Lakes for some time to come.

The Coast Guard vessels to be armed are law enforcement vessels operating domestically under the Department of Homeland Security, and are not naval forces under the Department of Defense. Both Governments are of the view that the Rush-Bagot Agreement was not intended to cover law enforcement vessels with the light armaments herein described, nor are the actions described herein contrary to the object and purpose of the Agreement.

However, both Governments value the history of transparency and consultation that has always characterized our collaborative efforts to ensure and enhance mutual security. To this end, and in light of the extensive record of prior notifications and consultations under the Rush-Bagot Agreement, the United States Government has consulted with the Government of Canada concerning the

details of the arming of the U.S. Coast Guard vessels operating in U.S. waters on the Great Lakes.

Accordingly, this Note formally places on record the results of consultations between representatives of the Government of the United States of America and the Government of Canada held at Ottawa on March 17, 2003, on the issue of the arming of United States Coast Guard vessels operating in U.S. waters on the great Lakes as well as our mutual understanding of the interpretation of the Rush-Bagot Agreement in this context.

6. International Agreement for Construction of Embassy

On November 17, 2003, the United States and the People's Republic of China signed an international agreement to provide for construction of new embassies in their respective capitals. Agreement Between the Government of the United States of America and the Government of the People's Republic of China on the Conditions of Construction of New Embassy Complexes in Washington and Beijing. Provisions excerpted below relate to diplomatic status of sites and archives; treatment of personnel, including privileges and immunities; and shipments, including a special bilateral arrangement.

The full text of the agreement is available at *www.state.gov/s/l/c8183.htm*.

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9. Diplomatic Status of Sites and Archives
   9.1 The Liang Ma He Site and the ICC Site shall be considered part of the premises of the Construction Party's diplomatic mission under the VCDR from the date of delivery of possession.
   9.2 All of the Construction Party's adjunct sites (including but not limited to temporary sites) shall be considered part of the premises of the Construction Party's diplomatic mission under the VCDR from the time each such site is approved

by the Host Country and acquired by the Construction Party.

9.3 All sites referred to in Articles 9.1 and 9.2 of this Agreement shall be inviolable and under the total control of the Construction Party.

9.4 The records and papers of an organization from the same country as the Construction Party relating to design or construction work performed in connection with such new construction (including but not limited to tender and contract documents, architectural and engineering plans, and specifications) shall be considered a constituent part of the archives of the diplomatic mission of the Construction Party and shall be inviolable under the VCDR.

* * * *

10.6 Construction Party personnel who are of Construction Party nationality, and whose stay in the Host Country is more than 30 calendar days, shall be attached to the Construction Party diplomatic mission as administrative and technical staff of the mission for the duration of their functions. These personnel shall enjoy the privileges and immunities afforded to administrative and technical staff as specified in the VCDR; but this does not apply to any obligation to compensate Host Country nationals for their personal injuries arising from acts performed outside the course of official duties.

11. Shipments

11.1 The Construction Party shall have the right to import and export all project-related materials and equipment (including but not limited to vehicles) and shall be exempt from all customs duties, taxes, and related charges other than charges for storage, cartage, and similar services, in accordance with Article 36 of the VCDR.

* * * *

11.6 As a special bilateral arrangement, the Host Country customs shall release, without inspection, construction materials and equipment shipped as special dedicated

> project materials for the Construction Party's embassy, and shall finish procedures for release within 48 hours of the landing of the articles and submission of written declaration to the customs authorities pursuant to Host Country customs procedures. The Construction Party shall submit advance written notice in accordance with Host Country requirements no later than 24 hours before the arrival of the shipments. The Construction Party shall comply with related Host Country laws and regulations and shall attach visible marks to the shipments and make customs declarations in writing to Host Country customs authorities.

* * * *

C. ROLE IN LITIGATION

On September 29, 2003, the United States filed a Statement of Interest in *McKesson HBOC, Inc. v. the Islamic Republic of Iran*, Civil Action No. 1:82-cv-00220 (RJL)(D.D.C.). The Statement of Interest addressed issues relating to the Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran, June 16, 1957, U.S.-Iran, 8 U.S.T. 899 ("Treaty of Amity" or "Treaty"). Excerpts from the brief set forth below explain the views of the United States on the distinction between whether a treaty is self-executing and whether it creates a private right of action. In this case, the result is that

> . . . the Treaty of Amity imposes a legal obligation on Iran and the United States not to expropriate property of each other's nationals without just compensation. Iranians with property in this country may pursue an exprpriation claim against the United States government through the Fifth Amendment, which both prohibits uncompensated takings and (as McKesson notes) permits property owners to sue for just compensation. The Treaty likewise obligates Iran with respect to United

> States nationals holding property in Iran. Absent enforcement in Iran, however, a claim by a United States citizen of a Treaty violation is expected to be resolved through traditional diplomatic espousal; if diplomacy fails, the United States can submit the dispute to the International Court of Justice or to an alternative forum agreed upon by both Iran and the United States. The Treaty, however, does not create a mechanism for private parties to sue at home for enforcement.

References to other pleadings in the case have been omitted.

The history of the litigation and a brief filed by the Overseas Private Investment Corporation in the Supreme Court opposing a grant of certiorari in interlocutory appeal in the case are discussed in *Digest 2002* at 219–226, 519–522.

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1. The Question Whether A Treaty Is Self-Executing Is Different From The Question Whether A Treaty Creates A Private Right Of Action

This Court's conclusion that the Treaty of Amity provides a cause of action because it is self-executing conflates two separate inquiries. " 'Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies.' " Seguros, 115 F. Supp.2d at 1378 (quoting Restatement § 111, cmt. h). That courts sometimes discuss both concepts together "does not detract from their distinctiveness." Li, 206 F.3d at 67–68 (Selya, J., and Boudin, J., concurring) (citation omitted). Even McKesson concedes the two inquiries are distinct. (fn. omitted). A treaty is self-executing "whenever it operates of itself without the aid of any legislative provision." Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829), overruled in part, United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833). But that means only that the treaty is "regarded in courts of justice as equivalent to an act of the legislature." Id.; see also Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("[i]f the treaty contains stipulations which are

self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment"). Thus, a "self-executing" treaty preempts inconsistent state law, can be interpreted by federal courts, and may be relied upon as a defense to a state or federal claim. See Ford v. United States, 273 U.S. 593, 602, 611 (1927) (while treaty "creates no offense against the law of the United States" it may still provide a defense to prosecution).

Like an Act of Congress, however, a treaty may establish legal standards or rules of decision in litigation without itself creating a private right of action. Indeed, there is a general presumption that treaty rights are *not* privately enforceable. See Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir.) ("[i]nternational treaties are not presumed to create rights that are privately enforceable."), cert. denied, 506 U.S. 955 (1992); see also Li, 206 F.3d at 60 ("treaties do not generally create rights that are privately enforceable in the federal courts"); United States v. Jimenez-Nava, 243 F.3d 192, 197, 198 (5th Cir.) (noting the "presumption against implying private rights" in treaties), cert. denied, 533 U.S. 962 (2001).[11] As the Supreme Court said well over 100 years ago in the Head Money Cases:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.

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[11] Accord Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) (treaties "do not generally create rights that are privately enforceable in courts"), cert. denied, 470 U.S. 1003 (1985). While this Court previously recognized a presumption that treaties are self-executing, see McKesson, 1997 WL 361177 at *14, "neither the Restatement nor any judicial precedent recognizes a similar presumption with respect to whether a treaty creates a private right of action." Seguros, 115 F. Supp. 2d at 1378. "On the contrary, there is generally the opposite presumption." Id.; see also id. ("'[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts. . . .'") (quoting Restatement § 907 cmt. a).

112 U.S. 580, 598 (1884); see also id. ("infraction becomes the subject of international negotiations and reclamations"). (fn. omitted)

In line with these governing principles, courts have interpreted various treaties as not providing private rights of action even though they are self-executing. See, e.g., Seguros, 115 F. Supp.2d at 1380–81 (convention between the United States and Mexico, while self-executing, did not create a private right of action). Most relevant here, in Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989), the Supreme Court ruled that a foreign corporation could not sue Argentina for certain alleged wrongs, explaining that the treaties on which the respondents relied "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." Id. at 442 (citing, in support, Head Money Cases, 112 U.S. at 598–99, and Foster, 27 U.S. (2 Pet.) at 314) (footnote omitted). Thus, while the treaties established "substantive rules of conduct," they did not confer private rights of action, and the Court held they therefore did not constitute an express waiver of sovereign immunity for purposes of the Foreign Sovereign Immunities Act. See 488 U.S. at 442 (discussing 28 U.S.C. § 1604).

2. The Treaty Of Amity, While Self-Executing, Does Not Create A Private Right Of Action For United States Nationals In United States Courts

The United States agrees with this Court's determination that the Treaty of Amity's prohibition against uncompensated expropriation is "self-executing," in the sense that it is intended to establish a substantive legal standard without the need for implementing legislation. The prohibition is effective of its own force, and imposes a legal obligation on the governments of Iran and the United States. See Walker, United States Practice, at 230 (FCN treaty protections "establish or confirm in the potential host country a governmental policy of equity and hospitality to the foreign investor"); Asakura v. Seattle, 265 U.S. 332, 341 (provision of FCN treaty with Japan

"operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts"), amended by, 44 S.Ct. 634 (1924).

The United States has an obligation under the Treaty not to take property of Iranian nationals in the United States without payment of just compensation. To satisfy that obligation, the United States relies on the availability of the constitutional prohibition against uncompensated takings (contained in the Fifth Amendment's Takings Clause), enforceable through a direct action under the Fifth Amendment. See Proposed Treaty of Friendship, Commerce, and Navigation Between the United States and the Italian Republic: Hearing Before a Subcomm. of the Senate Comm. on Foreign Relations, 80th Cong., 2d Sess. 11 (Apr. 30, 1948) ("Italian FCN Hearing") (testimony of Willard Thorp, Assistant Secretary of State for Economic Affairs) (in discussing compensation for nationalization in the United States and Italy in the context of a similar FCN treaty with Italy, noting that, in the United States, eminent domain "is something that is done rarely, and then only on fair and full compensation adjudicated by the Court"); id. at 26 ("[i]f we nationalize property [in the United States], the owner is entitled to court protection and a determination, if necessary, by going to the courts, of what he will be paid in connection with the expropriation quite regardless of his nationality"); see also Treaty of Amity Hearing at 21 (State Department response to Committee question discussing rights of eminent domain in the United States and Nicaragua in the context of similar FCN treaty with Nicaragua). The Treaty requires Iran to satisfy the same obligation with regard to United States-owned property in Iran in a similarly effective manner.[13]

The Treaty of Amity does not, however, create a private right of action for United States citizens to sue Iran for uncompensated

[13] Cf. Treaty of Amity Hearing at 21 ("In both the United States and Nicaragua, the right of eminent domain extends to any property the taking of which the constitutional authorities find to be necessary in the public interest. The significant part of the provision in question is, of course, that part which prescribes that property may not be taken, whatever the purpose, without prompt and just compensation.")

expropriations in United States courts.[14] By its terms, the Treaty says nothing about private rights of action to enforce its substantive provisions. See, e.g., Goldstar (Panama) S.A., 967 F.2d at 968 ("[t]he Hague Convention does not explicitly provide for a privately enforceable cause of action"); cf. Haven v. Polska, 215 F.3d 727, 733 (7th Cir.) (in analyzing whether treaty waives sovereign immunity, noting that "[i]t does not even mention the availability of a cause of action in the United States courts"), cert. denied, 531 U.S. 1014 (2000). This Court, in fact, already has recognized that the Treaty is silent on this point. See McKesson Corp., 1997 WL 361177 at *14.

Nor does the Treaty create such a cause of action by implication. Given the presumption that treaties do not create privately enforceable rights, the standard for creating such a right by *implication* surely is high. Even in the context of statutes (where no similar presumption applies), courts exercise great circumspection in recognizing implied private rights of action. See, e.g., Alexander v. Sandoval, 532 U.S. 275, 285–287 (2001); Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 67 n.3 (2001). The critical question must be whether the United States clearly intended the Treaty to create a cause of action that would allow United States citizens to sue Iran for an uncompensated expropriation in United States courts. Cf. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979) (in statutory context, "[t]he dispositive question remains whether Congress intended to create any such remedy").

Nothing in the Treaty's text suggests it was intended to create a cause of action for United States citizens to sue Iran in the courts of this country. The Treaty establishes legal standards and obligations that are designed to protect the nationals (including corporations) of one state party in the territory of the other. E.g., Treaty of Amity, art. IV, para. 2 (prohibiting the uncompensated taking of "[p]roperty of nationals and companies of either High

[14] This is separate and apart from any question whether the Treaty should be read to create an implied private right of action for Iranian nationals or companies to sue for expropriations in this country in violation of the Treaty, an issue this case does not present.

Contracting Party . . . within the territories of the other High Contracting Party").

Furthermore, the Treaty plainly contemplates that disputes will be handled by the host country.[15] For example, the Treaty guarantees "access to the courts of justice and administrative agencies" by "[n]ationals and companies of either High Contracting Party . . . within the territories of the other High Contracting Party" (Treaty of Amity, art. III, para. 2); it does not confer an analogous right of access for nationals and companies of one party to that party's *own* courts (whether to bring an action against the other party or for any other purpose). Similarly, the Treaty provides that, in the event of a taking, the host country "shall promptly make reasonable provision for the withdrawal, in foreign exchange in the currency of the other [state party], of" the required compensation. Id., art. VII, para. 2(a). Again, this provision anticipates that disputes will be resolved in the alleged expropriating country; in the national's country, there would be no question that compensation would be paid in the national's own currency.

In fact, the only mechanism for enforcement the Treaty provides is through the compromissory clause, which gives the United States government the right to submit disputes "as to the interpretation or application" of the Treaty to the International Court of Justice.[16] See Treaty of Amity, art. XXI, para. 2. This mechanism, written expressly into the Treaty, strongly suggests the Treaty was not also intended to create—by implication—a

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[15] We acknowledge the D.C. Circuit's observation that "Iran's post-revolutionary courts cannot provide adequate remedies for U.S. claims." 271 F.3d at 1108. But the Treaty was negotiated and signed in the 1950s, and the adequacy of Iran's post-revolutionary courts is not relevant to whether the United States intended to create a cause of action for Treaty violations by Iran in United States courts.

[16] As McKesson notes, the United States previously has stated that, because the compromissory clause does not apply to private parties, it would not preclude a United States citizen from asserting an otherwise viable cause of action for expropriation in United States courts, such as, for example, a cause of action based on Iranian law. Our argument here is only to show that the Treaty itself does not create a private right of action for United States citizens to sue Iran in United States courts.

mechanism for private enforcement by United States citizens in United States courts. See Seguros, 115 F.Supp.2d at 1381 (in rejecting claim that international convention creates a private right of action, noting the convention "explicitly states that '[d]isputes arising as to the application of this Convention shall be settled through diplomatic channels'").[17]

There also is nothing in "the circumstances surrounding [the Treaty of Amity's] execution" (Diggs, 555 F.2d at 851) to suggest it was intended to create a cause of action for United States citizens to sue Iran for expropriation in United States courts. To the contrary, during an advice and consent hearing on the Treaty, a State Department representative testified it was his expectation that disputes would be resolved in the host country (and then, if necessary, through diplomatic means). See Treaty of Amity Hearing at 11 (testimony of Thorsten V. Kalijarvi, Deputy Assistant Secretary of State for Economic Affairs, Department of State) . . . (fn. omitted)

Indeed, one reason the United States, in the 1980s, adopted the "BIT" (bilateral investment treaty) as its model investment treaty—replacing the FCN form—was to provide a mechanism for individual investors to take investment disputes with state

[17] In support of its argument that the Treaty creates a cause of action (an argument we discuss in detail in Part 3 below), McKesson cites cases holding that the Warsaw Convention creates rights of action against air carriers for lost baggage and wrongful death. See McKesson Opp. at 11. The Warsaw Convention, however, is different from the Treaty of Amity on a number of fronts, including because: (i) it incorporates a two-year statute of limitations for filing damages actions; (ii) the statute of limitations refers (in the original French text) to "the action for liability" (emphasis added), which some courts have interpreted as evidence that the Convention itself creates a cause of action and does not merely provide standards to be employed in whatever actions may—or may not—be available under other domestic law; and (iii) it expressly states that a passenger whose baggage is lost where more than one carrier is involved "shall have a right of action" against each involved carrier, leading some courts to reason that that the Convention must operate the same way if only one carrier is involved, and, further, that it must also operate the same way if the damage is inflicted on passengers, not baggage. See In re Mexico City Aircrash of October 31, 1979, 708 F.2d 400, 411–13 (9th Cir. 1983).

parties directly to binding arbitration (without having to rely on the local courts of the host government or on direct involvement by the United States government). See Department of State, Letter of Submittal, May 9, 1986, U.S.-Bangl. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, reprinted in S. Treaty Doc. No. 99–23, at vi (1986) (the BIT "adopts FCN language and concepts," but "[p]erhaps most significantly, the BIT goes beyond the traditional FCN to provide investor-host country arbitration in instances where an investment dispute arises") (fn. omitted).

* * * *

4. Finding That The Treaty Of Amity Creates Such A Cause Of Action Would Be Detrimental To The United States' Foreign Policy Interests

As the Solicitor General explained in the government's Supreme Court brief, finding the Treaty of Amity to create a private right of action in an investor's own courts would be detrimental to the broader foreign relations interests of the United States. See Gov't Opp. Cert. at 14. The United States is a party to numerous FCN treaties. Most (if not all) of the postwar FCN treaties contain similar terms, including provisions which provide for "prompt, just, and effective" compensation, "just" compensation, or similar language regarding compensation for expropriated property. See Walker, United States Practice, at 235 & n.19.

If United States courts conclude that FCN treaties generally should be understood to confer private rights of action on United States nationals to sue the Nation's treaty partners in United States federal courts, then the courts of the Nation's treaty partners could well reach a similar conclusion, potentially subjecting the United States government to a variety of new suits in foreign courts (including Iranian courts) by foreign nationals. Such a result would adversely affect the United States' foreign policy interests.

In its prior decision, this Court deemed it "hardly likely" that the United States would be subject to suit in foreign courts. McKesson Corp., 1997 WL 361177 at *14 n.24. We respectfully disagree with the Court's assessment (fn. omitted). The Court

apparently assumed that foreign courts would necessarily apply a doctrine of personal jurisdiction similar to that under United States law and that the only types of claims that would be brought against the United States would involve expropriation. There is no basis for either of these assumptions.

McKesson makes a similar argument, contending there is "no reason" to expect the Nation's treaty partners will "alter their approach to how the United States is treated in their courts based on how this Court interprets U.S. law in this case." See McKesson Opp. at 29. But the "U.S. law" in this case *is* the Treaty of Amity, and there is every reason to think our treaty partners will take notice if United States courts hold they may be sued directly under an FCN treaty for allegations of breach.

Finally, McKesson argues that the government's foreign policy concern is a "generalized apprehension," not "based on an interpretation of the language or negotiating history of the Treaty of Amity itself." This misunderstands our position. The government's foreign policy concern is that it not be subject to unwanted and unbargained-for suits in foreign courts. This flows directly from the government's view that the Treaty does not create a private right of enforcement in a national's own courts (fn. omitted). This Court, accordingly, should not infer the creation of reciprocal rights by which United States nationals may sue Iran in United States courts.

Cross References

Treaties in cases before ICJ, **Chapter 2.A.1. and Chapter 18.A.5.**
Federalism issues in implementation of Hague Adoption Convention, **Chapter 2.B.1.a.**
Federalism issues in COE cybercrime convention, **Chapter 3.B.5.**
Relationship between U.S. treaty obligations and statues, **Chapter 3.A.3.b. and B.3.b.; Chapter 8.B.3.**
References to ratification of treaties in UNGA resolutions, **Chapter 6.A.3, B.2.c., G.1. and 3.**
Relationship between treaty and common law revenue rule, **Chapter 15.A.6.**

CHAPTER 5

Foreign Relations

A. FOREIGN RELATIONS LAW OF THE UNITED STATES

On several occasions in 2003, President George W. Bush issued statements at the time of signing legislation into law that indicated areas in the legislation that would be read consistent with the President's authority under the Constitution to conduct foreign affairs and as commander in chief. Examples are provided below.

1. Syria Accountability and Lebanese Sovereignty Restoration Act of 2003

On December 12, 2003, President George W. Bush signed into law the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, Pub. L. No. 108–175, 117 Stat. 2428, discussed in Chapter 18.B.7.c. The statement, excerpted below, is available at *www.whitehouse.gov/news/releases/2003/12/print/20031212-3.html*.

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Section 5 of the Act purports to impose upon the President requirements to take certain actions against Syria unless the President either determines and certifies to the Congress that the Government of Syria has taken specific actions, or determines that it is in the national security interest of the United States to waive

such requirements and reports the reasons for that determination to the Congress. A law cannot burden or infringe the President's exercise of a core constitutional power by attaching conditions precedent to the use of that power. The executive branch shall construe and implement section 5 in a manner consistent with the President's constitutional authority to conduct the Nation's foreign affairs and as Commander in Chief, in particular with respect to the conduct of foreign diplomats in the United States, the conduct of United States diplomats abroad, and the exportation of items and provision of services necessary to the performance of official functions by United States Government personnel abroad.

Section 6 of the Act requires an officer in the executive branch to furnish information to the Congress on various subjects involving Syria and terrorism. The executive branch shall construe section 6 in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.

My approval of the Act does not constitute my adoption of the various statements of policy in the Act as U.S. foreign policy. Given the Constitution's commitment to the Presidency of the authority to conduct the Nation's foreign affairs, the executive branch shall construe such policy statements as advisory, giving them the due weight that comity between the legislative and executive branches should require, to the extent consistent with U.S. foreign policy.

2. Defense Production Reathorization Act of 2003

On December 19, 2003, President Bush signed into law the Defense Production Reathorization Act of 2003, Pub. L. No. 108–195, 117 Stat. 2892. In so doing, he made the following comments, available at *www.whitehouse.gov/news/releases/2003/12/20031219-13.html.*

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Section 123(c) of the Defense Production Act Amendments of 1992, as enacted by section 7(c) of the Act, purports to require the executive branch to undertake consultations with foreign nations on specific matters and to report thereon to the Congress. The executive branch shall construe section 123(c) in a manner consistent with the constitutional authorities of the President to conduct the Nation's foreign relations and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.

B. CONSTITUENT ENTITIES

1. Compact of Free Association with the Republic of the Marshall Islands and Federated States of Micronesia

Section 231 of the original Compact of Free Association between the Government of the United States of America and the Government of the Republic of the Marshall Islands ("RMI") and the Compact of Free Association between the Government of the United States of America and the Federated States of Micronesia ("FSM"), set forth in Title II of Pub. L. No. 99–239, 99 Stat. 1770 (1986), required that the parties commence negotiations in 1999 regarding certain provisions that would expire in 2003. The negotiations regarding the expiring and other provisions resulted in the signing of the Compact of Free Association, as amended between the United States and the RMI on April 30, 2003, and as amended between the United States and the FSM on May 14, 2003.

On June 27, 2003, the Department of State transmitted draft legislation to approve the amended Compacts of Free Association, and otherwise to amend Pub. L. No. 99–239, and to appropriate funds for fiscal years ending on or before September 30, 2023, and for other purposes. In his letter transmitting the legislation to the President of the Senate, Secretary of State Colin Powell explained key aspects of the revisions as excerpted below.

President Bush signed into law the Compact of Free Association Amendments Act of 2003 on December 17, 2003, Pub. L. No.108–188, 117 Stat 2719. Section 101 of the Act authorized the President to agree to an effective date for and thereafter to implement each of the newly amended compacts. The act sets forth the full texts of the amended compacts in section 201.

The full text of the transmittal letter is available at *www.state.gov/s/l/c8183.htm*.

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In addition to the revisions to the financial assistance provisions discussed in the next paragraph, revisions to Title One of the Compact address issues that arose during the first 16 years of the Compact relationship. Thus, the amendments would improve the provisions regarding non-immigrant migration to the United States under the Compact, including by requiring a passport. Amendments to Title Three of the Compact and subsidiary agreements would extend the defense relationship with the FSM and RMI indefinitely, and secure United States access to the important Ronald Reagan Ballistic Missile Defense Test Site at Kwajalein Atoll, a key component of our space and ballistic missile defense programs, potentially through 2086. In addition to approving the amendments to the Compact, the draft bill would provide compensation for the impact on several United States jurisdictions that have welcomed migrants from the freely associated states.

For fiscal years 2004 through 2023, the newly negotiated compact amendments would provide $92.7 million a year for the FSM in sector grants and contributions to a trust fund, plus partial adjustment for inflation, and from $57.7 to $62.7 million a year for the RMI in sector grants, payments related to U.S. use of Kwajalein, and contributions to a trust fund, plus partial adjustment for inflation. The income from the trust funds would be used for sector grants in the same sectors after 2023 when U.S. annual financial assistance is terminated. The draft bill funds grants in the six areas of greatest need, with priority given to the education

and health sectors. Funding for the financial assistance provided by the negotiated agreements is in the President's fiscal year 2004 budget for the Department of Interior. The Compact, as amended, features accountability provisions that are substantially strengthened over those of the existing Compact. In sum, approval of the amended Compact and of the rest of the draft bill would protect United States interests and promote the continued mutual well-being of our three countries.

* * * *

2. Citizenship of Certain Persons Born in the Northern Mariana Islands

On July 10, 2003, the U.S. District Court for the Northern Mariana Islands dismissed an action seeking declaratory and injunctive relief that all persons born in the Northern Mariana Islands between January 9, 1978, and November 4, 1986, are U.S. citizens by birth. *Sabangan v. Powell*, Civil Action No. 02–0039 (D.N.M.I. 2003), 2003 WL 22997247. Excerpts below from the court's unpublished opinion provide its analysis of the relevant documents in concluding that U.S. citizenship was not so bestowed. (Footnotes omitted.) At the end of 2003 an appeal was pending in the Ninth Circuit.

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The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America became effective in three stages: (1) upon enactment on March 24, 1976; (2) upon establishment of the CNMI government at 11:00 a.m. on January 9, 1978; and (3) upon the termination of the Trust Territory of the Pacific Islands (hereinafter "TTPI" or "Trusteeship Agreement") at 12:01 a.m. on November 4, 1986. COVENANT § 1003 provides the effective dates for the various sections of the COVENANT. Section 503, among others, became effective on March 24, 1976, while §§ 304 (privileges and immunities enjoyed by N.M.I. citizens) and 501, among others,

became effective on January 9, 1978. Sections 101 (N.M.I. sovereignty), 301, 302, 303, and 506 became effective on November 4, 1986.

Section 501(a) of the COVENANT makes Section 1 of the Fourteenth Amendment applicable to the N.M.I. "as if the Northern Mariana Islands were one of the several States." However, it does not follow that § 501(a) thereby confers U.S. citizenship on the plaintiffs, for the following reasons. First, the plain wording of § 501(a) states that Section 1 of the Fourteenth Amendment applies as if the N.M.I. were "one of the several States," not as if the N.M.I. were "in the United States." The Citizenship Clause requires that, to acquire citizenship by birth, a person must be both born or naturalized "in the United States" and be subject to its jurisdiction. When § 501 was made effective on January 9, 1978, it did not deem the N.M.I. to be "in the United States" for purposes of the Citizenship Clause. Furthermore, § 503 of the COVENANT, which became effective on March 24, 1976, confirms that Congress did not consider the N.M.I. to be "part of the United States" as defined in the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(38), prior to the termination of the TTPI. Section 503 provides that the laws of the United States,

> . . . presently inapplicable to the Trust Territory of the Pacific Islands, will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement: (a) except as otherwise provided in Section 506, the immigration and naturalization laws of the United States; . . . .

COVENANT § 503. Because the U.S. immigration and naturalization laws do not apply in the N.M.I., except for specified purposes, it then follows that its provision, 8 U.S.C. § 1401(a), which defines nationals and citizens of the United States at birth, does not apply to persons born in the N.M.I.

Next, when read together with all other relevant COVENANT provisions (i.e. §§ 301, 302, 303 of Article III and §§ 503 and 506

of Article V), plaintiffs interpretation of § 501 would render § 303 meaningless. . . . The defendants argued, and the court agrees, that it is unlikely that Congress would have intended such a result. When Congress previously dealt with conferring U.S. citizenship to certain inhabitants of various U.S. territories, it adopted various straightforward statutory provisions to do so. *See, e.g.*, Organic Act of Puerto Rico, ch. 145, § 5, 39 Stat. 951, 953 (1917) (conferring U.S. citizenship on some Puerto Rican citizens); Nationality Act of 1940, ch. 876, § 202, 54 Stat. 1137, 1139 (1940) (conferring U.S. citizenship on all those born in Puerto Rico after 1899); and Organic Act of Guam, ch. 512, § 4(a), 64 Stat. 384 (1950) (conferring U.S. citizenship on persons in Guam). Congress did the same with the N.M.I. and its inhabitants. Congress set forth a comprehensive scheme in the COVENANT at §§ 301, 302, and 303 of Article III and §§ 503 and 506 of Article V that clearly defines who are entitled to U.S. citizenship upon termination of the Trusteeship Agreement.

Finally, it is important to note that COVENANT § 501 deals with the application of the United States Constitution to the Northern Mariana Islands, not with the granting of U.S. citizenship. . . . [T]he structure and legislative history of the COVENANT show that Congress intended §§ 301, 302, 303, and 506 of the Covenant to be the scheme for granting U.S. citizenship and nationality to N.M.I. residents upon the termination of the Trusteeship Agreement.

3. Commonwealth of the Northern Mariana Islands: Control of "Submerged Lands"

On August 7, 2003, the U.S. District Court for the Northern Marianas Islands dismissed a complaint by the Commonwealth of the Northern Marianas Islands against the United States concerning submerged lands seaward of the low-water mark and granted the U.S. counterclaim for declaratory judgment. *Commonwealth of the Northern Marianas Islands v. United States of America*, Case No. 99–0028–55. The court held:

> FOR THE FOREGOING REASONS, which show that there is no genuine issue as to any material fact which would preclude entry of summary judgment, the Commonwealth's complaint to quiet title in waters seaward of the low-water mark is dismissed with prejudice, and the United States' counterclaim for a declaratory judgment decreeing: 1) that the United States possesses "paramount rights in and powers over the waters extending seaward of the ordinary low water mark on the Commonwealth coast and the lands, minerals, and other things of value underlying such waters;" and 2) that the CNMI "Marine Sovereignty Act" [2 N.Mar.1. § Code 1101 *et seq.*] and "Submerged Lands Act" [2 N.Mar.1. Code § 120 1 *et seq.*] are preempted by federal law, is granted.

The decision is published on the court's website at *www.nmid.uscourts.gov*. The judgment of August 8 is reported as 99–0028–56; errata as 99–0028–57. The case has been appealed to the Ninth Circuit, and the parties have stipulated to a partial stay of judgment, reported as 99–0028–65. For further discussion, *see Digest 2002* at 246–259.

Cross References

Relationship between U.S. treaty obligations and statues, **Chapter 3.A.3.b. and B.3.b.; Chapter 8.B.3.**

ILC Diplomatic Protection: development of customary international law, **Chapter 8.A.1.**

Preemption of state authority in foreign affairs, **Chapter 8.B.1.a.(1)(i).**

Executive Branch constitutional authority in foreign state recognition and passport issuance, **Chapter 9.B.**

Clean Diamonds Act and constitutional constraints, **Chapter 11.E.4.8.**

Chapter 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On March 31, 2003, the Department of State released the 2002 Human Rights Reports. The report, entitled "Country Reports on Human Rights Practices," is submitted to Congress by the Department of State in compliance with §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961 ("FAA"), as amended, and § 504 of the Trade Act of 1974, as amended. These reports are often cited as a source for U.S. views on various aspects of human rights practice in other countries. The report is available at *www.state.gov/g/drl/rls/hrrpt/2002/index.htm*.

2. Inter-American Commission on Human Rights: Precautionary Measures

By letter of September 22, 2003, the Inter-American Commission on Human Rights ("IACHR") notified the United States of a hearing scheduled for October 20, 2003, to "address issues of precautionary measures" relating to detainees in Guantánamo Bay, Cuba. At the hearing, Andre Surena, as member of the U.S. delegation, restated the position of the United States on three main points:

> First—that the Commission lacked the jurisdictional competence to apply international humanitarian law, including the 1949 Geneva Convention on prisoners of war, as well as customary international humanitarian law;
>
> Second—that, even if the Commission did possess the requisite jurisdictional competence, precautionary measures in this case were neither necessary nor appropriate; and
>
> Third—that the Commission did not have authority over non-States Parties to the American Convention on Human Rights to request precautionary measures, as it has done in this case.

See discussion of IACHR competence to issue preliminary measures in *Digest 2002* at 261–269 and 1008–1017. After further comments on the Commission's lack of jurisdiction over matters relating to the laws and customs of war, Mr. Surena concluded that the delegation "reiterates the foregoing points and submits that the Commission should dismiss the petition underlying its request for precautionary measures." Subsequent to its October 20 statement, the United States submitted to the IACHR a lengthy memorandum describing the conditions of detention of enemy combatants at Guantánamo and amplifying the legal basis for the detention. *See* Chapter 18.A.3.b for public statements on detention at Guantánamo.

The full text of Mr. Surena's statement is available at *www.state.gov/s/l/c8183.htm*.

3. References to Human Rights Treaties and Other Instruments in UN General Assembly Resolutions

As in prior years, the United States continued in 2003 to object to formulations in UN General Assembly resolutions that would go beyond urging or inviting consideration of ratification of treaties or would suggest that states are bound by treaties to which they are not party.

For instance, the United States submitted an amendment to revise operative paragraph ("OP") 3 of Resolution 165, "International Covenants on Human Rights," A/RES/58/165. With the amendment, which was defeated, OP 3 would have "strongly appeal[ed] to all States that have not yet done so to *consider becoming* parties to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights," (emphasis added) rather than appealing to states "to become parties." The United States explained its amendment as follows:

> . . . The United States firmly maintains its belief in the sovereign authority of States to make any and all decisions about treaty ratifications. We believe, therefore, that it is outside the mandate of this Committee to adopt a resolution that attempts to pressure all States to become parties to any convention.

The United States subsequently joined consensus on the resolution.

Similarly, the United States had requested an amendment to OP 1 of Resolution 156, "The girl child," A/RES/58/156. As adopted, that paragraph "stresses the need for full and urgent implementation of the rights of the girl child as guaranteed to her under all human rights instruments . . . as well as the need for universal ratification of those instruments." The U.S. amendment would have inserted the word "applicable" before "human rights instruments" and would have substituted "invites states to consider ratification of those instruments as well as their optional protocols" for the last phrase. The United States explained that

> . . . the insertion of the word "applicable" . . . would make it clear that states only are implementing the legal obligations they have assumed under treaties that they have ratified, not all treaties, irrespective of whether they have ratified or not. The substitution of an invitation by this body for states to "consider" ratifying these treaties, in lieu of a reference to universal ratification, would make

> it clear that states have the sovereign right to "consider" ratifying treaties—this is standard language when making reference to treaty ratification at the [UN] Commission on Human Rights, ECOSOC, and in [the Third] Committee.

The United States joined consensus on adoption of the resolution.

The United States also joined consensus on Resolution 183, "Human rights in the administration of justice," adopted December 22, A/RES/58/183. In doing so, the United States made observations provided below. *See also* B.2.c.(2), G.1., and G.3. below for comments relating to other treaties.

On OPs 1 and 2 [calling for "implementation of all United Nations standards on human rights in the administration of justice"] we understand the standards referred to in OP 1 and 2 to be those set forth in binding legal instruments and applicable only to those member States who are States Parties to those instruments, not to any provisions in the numerous non-binding instruments emanating from both the UN human rights and UN crime programs that are essentially UNGA resolutions, or recommendations to Member States.

Regarding OP 15, [referring to a "proposal of the Sub-commission on the Promotion and Protection of Human Rights"] we believe that sub-commission "decisions" have no status or effect until accepted or endorsed by the Commission on Human Rights. The sub-commission "decision" is in fact nothing more than a proposal in its report pending before the 2004 session of the CHR, and the amended language of OP 15 makes that clear.

4. UN Commission on Human Rights

On March 21, 2003, Ambassador Kevin E. Moley, U.S. Permanent Representative to the United Nations in Geneva, commented on the Report of the High Commissioner for Human Rights. Ambassador Moley added the following points on key contributions by the UN Commission on

Human Rights ("UNCHR") and addressed consideration of needed improvements to the Commission's operations, including the "simple proposition that only real democracies" deserve to be members.

The full text of Ambassador Moley's remarks is available at *www.humanrights-usa.net/2003/statements/0321Moley%20Item%204.html. See also* discussion of Cuba's continued participation in the UNCHR, I.1. below.

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* * * *

The Commission on Human Rights is the only institution that we created to focus exclusively on political and civil rights—whose realization are key to helping all of these other United Nations bodies achieve their fundamental aims.

Nations whose citizens enjoy political and civil liberties do not threaten the peace and security of other countries, near or far. They do not seek poison gases, deadly viruses or nuclear weapons in a deluded desire to conquer neighbors or destroy the innocent. Nor do they tend to drive refugees from their homes or spawn terrorists.

Nations whose citizens enjoy political and civil liberties, instead, contribute to international peace and security. They create the conditions for entrepreneurship and long-lasting, broad-based economic growth. They generate the means and medical advances necessary to staunch the global pandemic of HIV/AIDS. And they lead efforts to combat trafficking in persons and other forms of degradation.

The Commission on Human Rights can contribute to these goals primarily by helping ordinary men and women enjoy the political and civil liberties that their governments have undertaken to secure in ratified agreements. While the Commission cannot solve many of the broadest problems besetting human kind, it can help put in place the stepping stones—those indispensable political and civil rights—that can enable democratic governments, individually and collectively, to make progress.

We therefore agree with the High Commissioner that it is critical for the Commission on Human Rights to concentrate

on stopping and, better yet, preventing, violations of human rights. Such pervasive and consistent patterns of abuse leave entire populations in squalor, preventing the advent—let alone the advancement—of democracy and good governance.

Tyrants aside, there are leaders of countries that have democratized in recent years and want to continue moving forward. But they are unsure how best to do so. The High Commissioner's idea of encouraging such governments to report on what he calls their "national protection systems" for human rights is worth pursuing. We can encourage support, for instance, to a country struggling with voter fraud by suggesting practical measures to hold free and fair elections; or suggesting specific steps to ensure that women fully participate in the political process.

We want to find ways to ensure that governments elected to the Commission share a true commitment to its basic purpose to promote and protect human rights. Nations of conscience cannot allow the Commission of Human Rights to become a protected sanctuary for malefactors. We cannot allow human rights abusers to undermine this organization from within. If we were to enact a code of conduct for members, it would have no effect for lawless governments, by their very nature, follow neither the dictates of law nor morality. We should, instead, consider the simple proposition that only real democracies, democracies with regularly scheduled multi-party elections, independent judiciaries, and constitutional guarantees of human rights, deserve membership on the Commission for Human Rights.

Nor should we allow human rights offenders and their allies of convenience to fashion new justifications for their negative behavior masquerading as "human rights" standards. Oppressed men and women across the world do not suffer from any shortage of standards, but, rather, from an absence of action. The United States urges the High Commissioner to concentrate on getting nations to implement the treaties and conventions that they have ratified.

Another concern of ours relates to a recent proliferation of special rapporteurs who dissipate the Commission's limited resources, and whose mandates stray from the Commission's core mission. The future effectiveness of the Commission of

Human Rights requires prioritization: in other words, a return to the time-honored basics such as freedom of speech, thought, assembly, worship, and the press; the equal protection of the law; and of governments limited in power, subject to the will of the people expressed through competitive, regularly-held elections.

The United States pledges to work with the High Commissioner to help the Commission on Human Rights reform and fulfill its unique mission in the United Nations system so that one day every member of the human family will enjoy liberty's manifold blessings.

The United States called for a vote and voted no on Libya's becoming president of the UNCHR. In a speech entitled "The U.S. Role in the United Nations," October 31, 2003, Kim R. Holmes, Assistant Secretary for International Organization Affairs, U.S. Department of State, described the issue as follows:

> . . . [W]e want the UN to live up to the vision of its founders, whether it is getting countries to help us end the scourge of terrorism, stop civil wars, uphold their obligations under UN Security Council resolutions, or help stop global crises like HIV/AIDS and SARS [severe acute respiratory syndrome].
>
> It is why we took the unprecedented step of calling for a vote in the Human Rights Commission when it looked like Libya would win the chair's seat by secret ballot. We lost that battle; Libya was elected chair of the Commission. But standing on principle there was worth it. Since then, many people and influential NGOs [nongovernmental organizations] began taking a serious look at the procedures that allowed this flaunting of principle to occur, and many are calling for reforms of the CHR. One day, we hope it can once again become the foremost international body contributing to the protection of human rights.

The full text of the speech is available at *www.state.gov/p/io/rls/rm/2003/26040.htm*.

5. Certification of Colombian Government and Armed Forces

Section 564(a) of the FY 2003 Foreign Operations, Export Financing and Related Programs Appropriations Act conditions the obligation of 25 percent of the funds appropriated by that act "that are available for assistance for the Colombian Armed Forces" on two certifications to Congress by the Secretary of State with respect to certain human rights-related issues. Division E of the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108–7, 117 Stat. 205. On July 7, 2003, the Secretary of State made the first required determination and certification, on terms set forth in § 564(a)(2), allowing up to half of the funds at issue to be obligated. The second determination, enabling the obligation of the remaining foreign assistance funds for Colombia at issue, was pending at the end of December 2003.

The full text of a July 8 press release announcing the first determination, excerpted below, is available at *www.state.gov/r/pa/prs/ps/2003/22284.htm*.

On July 7, 2003, Secretary of State Colin L. Powell determined and certified to Congress that the Colombian Government and Armed Forces are meeting the statutory criteria related to human rights and severing ties to paramilitary groups. These conditions are that the Colombian Armed Forces are suspending military officers credibly alleged to have committed gross violations of human rights or to have aided or abetted paramilitary organizations; cooperating with civilian prosecutors and judicial authorities in prosecuting and punishing such members; severing links with paramilitary organizations; and executing outstanding orders for the capture of paramilitary leaders; and that the Colombian Government is prosecuting and punishing those members of the Armed Forces credibly alleged to have committed gross violations of human rights or to have aided or abetted paramilitary organizations.

* * * *

B. DISCRIMINATION

1. Race

a. Muslim and Arab people in the United States

On March 21, 2003, in a letter to the Secretariat of the Commission on Human Rights ("UNCHR"), the Permanent Mission of the United States to the UN Office at Geneva provided an observation on the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance. E/CN.4/2003/G/48. The report, entitled "Situation of Muslim and Arab peoples in various parts of the world in the aftermath of the events of 11 September 2001," E/CN.4/2003/23, included an examination of the situation of Muslim and Arab people in the United States.

The full text of the letter, excerpted below, is available at *www.unhchr.ch/huridocda/huridoca.nsf/Documents?OpenFrameset* under 59th Session, Correspondence from Governments to UN bodies. *See also* announcement of guidelines to implement U.S. ban on racial profiling, *www.usdoj.gov/opa/pr/2003/June/03_crt_355.htm.*

The Government of the United States welcomes the opportunity to respond to the above-mentioned report which examines the situation of Muslim and Arab peoples in various parts of the world, including the United States, in the aftermath of the events of September 2001. Since 11 September 200l, the United States has mobilized unprecedented resources to prevent further attacks against the United States, while at the same time ensuring respect for civil liberties. In our fight against terrorism, the United States recognizes that all ethnic, national and religious groups are entitled to equal treatment under the law. We recognize that the overwhelming majority of Muslims and Arabs in our country are law abiding residents and citizens, and we do not tolerate bias motivated attacks against them.

Within our government, the U.S. Department of Justice ("Justice Department") has led our nation's fight against terrorism in America. The Justice Department has taken every step, used every tool at its disposal, and employed every authority under the law to prevent further acts of terrorism and to protect innocent American lives, while preserving the constitutional liberties that all Americans cherish.

Toward this end, the Justice Department has used the full weight of the federal justice system, including its criminal penalties to neutralize potential terrorist threats by prosecuting those who violate the law and thereby pose a national security risk. In some cases, the Justice Department has prosecuted individuals for crimes not directly related to terrorism, just as prosecutors from earlier generations used income tax violations and similar offenses to convict dangerous, organized crime figures. The Justice Department does not hesitate to use any available charge or tool to remove dangerous individuals from the streets and protect American lives.

When the September 11 investigation has led us to those who have violated our immigration laws, we have enforced those laws and invoked our statutory authority to detain those individuals. In many cases, the United States determined the best course of action to protect Americans was to remove potentially dangerous individuals from the country and ensure that they could not return.

The September 11 investigation has generated hundreds of leads implicating aliens in the United States, leads ranging from possible involvement in the attacks to possible possession of material information concerning those attacks. In identifying the individuals of interest to the investigation, the Justice Department focused on individuals who came from countries in which Al Qaeda and other terrorist groups operate, as well as individuals believed to have knowledge of reliable and useful information about Al Qaeda, the September 11 terrorist attacks, or the September 11 hijackers. The Justice Department did not target these individuals simply because of their nationality, race, religion, ethnicity, or cultural identity, as the report alleges, but rather because they were of a special investigative interest to law enforcement.

U.S. commitment to non-discrimination

It is the law and policy of the United States to provide equal treatment of all national, ethnic and religious groups. Since 11 September 2001, the Attorney General and other Justice Department office have met with leaders of various groups, including the Arab, Muslim and Sikh communities to exchange information and concerns about the September 11 investigation. The Attorney General and other United States Government officials have also made numerous public statements urging Americans to practice unity and tolerance.

On 25 September 2001, the Attorney General recorded a public service announcement to promote tolerance and to discourage ethnically and religiously motivated harassment and crimes against the Arab, Sikh and Muslim communities. . . .

The Director of the Federal Bureau of Investigation has also been active in his outreach efforts, and has sent a clear message to the Federal Bureau of Investigation regarding its commitment to vigorously investigate and prosecute hate crimes. On 17 September 2001, the Director of the Federal Bureau of Investigation publicly announced its commitment to vigorously investigate and prosecute cases against those who committed acts of violence against the Arab, Muslim and Sikh communities.

Justice Department officials, including from the Federal Bureau of Investigation and the Civil Rights Division, have also met regularly with leaders of the Arab, Muslim and Sikh communities to hear their concerns and ensure that the Justice Department and the Federal Bureau of Investigation work cooperatively with those communities. As the Assistant Attorney General for the Civil Rights Division stated on 13 September 2001, "[a]ny threats of violence or discrimination against Arab or Muslim Americans or Americans of South Asian descent are not just wrong and un-American, but also are unlawful and will be treated as such."

Combating bias-motivated attacks against Muslims and Arabs

The Justice Department reports that, after the September 11 terrorist attacks, there was an increase in hate crimes against

Arabs, Muslims, and Sikhs (mistaken for Muslims) residing in the United States. The rate of those offenses then dropped precipitously within a few weeks until, as of mid-January, 2002, the rate had nearly returned to the low rate prevailing before 11 September 2001.

The United States has made clear that any act of violence or discrimination against a person based on the perceived race, religion or national origin of that person is contrary to our fundamental principles and the laws of the United States. Any threats of violence against Arab or Muslim Americans or Americans of South Asian descent are unlawful and will be treated as such. Such misguided acts of hatred violate federal law and, more particularly, run counter to the very principles of equality and freedom upon which our nation is founded.

The Justice Department and the Federal Bureau of Investigation are committed to investigating and prosecuting aggressively violations of the federal hate crime laws. The Criminal Section of the Civil Rights Division of the Justice Department has been monitoring carefully the rate of hate crimes against Arabs and others since the terrorist attacks. At that time, the Civil Rights Division formed a Hate Crimes Working Group, including prosecutors from the Civil Rights Division and agents from the Federal Bureau of Investigation's civil rights unit, to monitor, investigate and, if credible evidence were discovered, prosecute those accused of committing hate crimes in response to the September 11 attacks.

When investigations indicate unlawful conduct has occurred, including assaults with dangerous weapons and assaults resulting in serious injury and death; telephone, Internet, mail, and face-to-face threats; and vandalism, arson, shootings, and bombings directed at homes, businesses, and places of worship, then prosecution can occur. The FBI has opened over 400 investigations since 11 September 2001, approximately 40% of which are still under investigation or review. The Justice Department has initiated 12 federal prosecutions of 17 defendants, and state and local prosecutors have initiated more than 80 prosecutions.

It should also be noted that the Justice Department has a contingency plan in place to address any resurgence of backlash

incidents that may occur following an invasion of Iraq. In this regard, the Justice Department has designated a handful of prosecutors to focus solely on backlash matters should it be needed. They would also target those attempting attacks on synagogues, should that occur. That effort would occur simultaneously with a renewed outreach effort by senior Justice Department personnel.

Preventing racial discrimination by airlines

The terrorist attacks of September 11 have also raised concerns about airline discrimination directed at individuals who are, or are perceived to be, of Arab, Middle Eastern, or South Asian descent and/or Muslim or Sikh. The U.S. Department of Transportation ("Department of Transportation") is committed to ensuring that all persons are provided equal protection of the laws and that no person is subject to unlawful dissemination when traveling in the United States. It is the policy of the United States government that persons and their property may not be denied boarding or removed from an aircraft solely because they appear to be Arab, Middle Eastern, Asian, and/or Muslim or Sikh; or solely because they speak with an accent that may lead another person to believe they are Arab, Middle Eastern, Asian and/or Muslim or Sikh. Individuals who may appear to be of Arab, Middle Eastern or South Asian descent and/or Muslim or Sikh have the right to be treated with the same respect as persons of other ethnicities and religions.

Various federal statutes prohibit unlawful discrimination against air travelers because of their race, color, religion, ethnicity, or national origin. On 21 September 2001, the Department of Transportation sent a notice to U.S. carriers, either directly or through their associations, of the need to conduct their operations in a nondiscriminatory manner. The notice reminded carriers that it is not only wrong but also illegal to discriminate against people based on race, ethnicity, or religion. The carriers have been cooperative and have relayed to their employees the Department of Transportation notice that they not target or otherwise discriminate against passengers.

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b. UN Commission on Human Rights and General Assembly resolutions

The United States continued its practice of calling for a vote and voting no on resolutions on racism at the UNCHR and the General Assembly when the resolutions contain extensive emphasis on follow-up to the World Conference Against Racism, held August 28 through September 8, 2001, in Durban, South Africa (*see Digest 2001* at 267–268).

During 2003 such resolutions included, in the UNCHR, "World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action," E/CN.4/RES/2003/30 and, in the General Assembly, "Global efforts for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action," A/RES/58/160.

2. Gender

a. Commission on Status of Women

The United States joined consensus on the agreed conclusions of the forty-eighth session of the Commission on the Status of Women, December 3, 2004. *See www.un.org/News/Pres/docs/2004/wom1447.doc.htm.*

b. Statement to UN Commission on Human Rights

On April 10, 2003, Ambassador Ellen Sauerbrey, U.S. Delegation to the 59th Session of the UNCHR, provided a statement on the human rights of women, excerpted below.

The full text of the statement is available at *www.humanrights-usa.net/2003/statements/0410zRightsofWomen.htm.*

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. . . Women make up over half the population in countries around the world. But in too many places, they remain oppressed, subject to violence, and denied the education and economic opportunities necessary to improve their lives. The United States is committed to the principle that women and girls must have equality of opportunity for success.

Strong communities, strong economies and progress towards true democracy depend on the full participation of women. Families are better served and children better nourished and educated when women's equal rights and fundamental freedoms are secure.

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Trafficking in women, domestic abuse, harmful traditional practices such as female genital mutilation, so-called "honor crimes," rape, forced abortion and sterilization, and other horrific acts threaten the health and lives of women and girls. Such violence often goes unchecked due to indifference of state officials and failure to investigate and prosecute cases seriously.

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Women who are beaten in their homes or attacked on the streets, raped, trafficked, or subjected to other forms of violence cannot participate effectively in the political process, the economy, or the social life of a country. Trafficking in particular violates human rights and denigrates the dignity of women by treating them as commodities. Recognizing the magnitude of the global problem, the U.S. is committed to working with other countries to eliminate trafficking.

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UN Security Council Resolution 1325 highlights the plight of women suffering in conflict situations and the beneficial role they can have in decision-making processes. Participation of women is necessary in all activities, from design and implementation of

programs in conflict and post-conflict situations to making sure they are beneficiaries of those programs.

A major obstacle to development that affects all, but particularly affects women is HIV/AIDS. Violence against women especially contributes to their vulnerability to the infection. Women who are trafficked, raped by, or have intimate partners who are infected are at high-risk for contracting HIV.

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Expanding women's political participation around the globe is also an important goal. Promoting women's rights through political participation improves not only the lives of women, but also those of their families, communities and societies throughout the world. A country cannot become a true democracy if over half its population are purposefully silenced. To build well-organized civil societies, women's collective voice must be heard in the political process.

The United States supports initiatives in many countries that expand women's political skills and their ability to run for and serve in public office. Women who do not know how to vote and run for office need to be given the necessary tools. . . .

United Nations Security Council Resolution 1325 highlights the importance of involving women in helping their societies recover and rebuild after devastating civil strife. But it is unlikely to happen unless they have already learned the basic elements of participatory democracy and understand the beneficial role that they can have in the decision making process.

Women and their children have the best chance to thrive in societies where fundamental freedoms, human rights, property rights, equality, and freedom from violence are ensured. As a delegate to the UN Commission on Human Rights and as the U.S. Representative to the UN Commission on the Status of Women, my mission is to strive to ensure that women—who in many countries are horrendously oppressed—have full access to economic, social and political rights. These rights, which we take for granted in free societies, allow all individuals to go as far and as fast as their energies and talents will take them.

c. UN General Assembly resolutions

(1) Women and political participation

The United States introduced a resolution entitled "Women and political participation," adopted by the UN General Assembly by consensus on December 22, 2003. A/RES/58/142. The resolution sets forth actions designed to facilitate increased participation by women in political processes domestically and internationally. The resolution urges and invites actions by states, the private sector, non-governmental organizations and other actors of civil society, and the United Nations itself.

(2) Convention on Elimination of All Forms of Discrimination Against Women

The United States joined consensus on UN General Assembly Resolution 147, A/RES/58/147, "Elimination of Domestic Violence Against Women." In explaining the U.S. position on the resolution, Ann Corkery, Public Delegate, reiterated U.S. policy on the convention.

Ms. Corkery's remarks, delivered November 24, 2003, are available at *www.un.int/usa/03_244.htm*.

. . . The resolution and its adoption by consensus make a strong statement against a problem that has no place in civilized society.

Paragraph 7(o) of the resolution calls upon states "to consider, as a matter of priority, becoming party to the Convention on the Elimination of All Forms of Discrimination against Women."

The United States supports CEDAW's general goal of eradicating discrimination against women and are committed to promoting the human rights and fundamental freedoms of women worldwide. We believe countries should consider, as a matter of policy, how the Convention's principles and Committee recommendations would affect the economic, social, and political opportunities of

women in their societies. The issue of CEDAW ratification is under review by the United States to address a number of concerns raised regarding the text of the Convention and the record of the CEDAW committee. Thus, we wish to clarify that our joining consensus should not be seen as a change in U.S. policy regarding CEDAW.

On October 30, 2003, in the UN General Assembly Third Committee, the United States disassociated itself from consensus on the resolution entitled "Advancement of Women—the Convention on the Elimination of All Forms of Discrimination Against Women." The resolution had "urge[d] all States that have not yet ratified or acceded to the Convention to do so" rather than to "consider" ratifying. An explanation of the U.S. position by Ambassador Sichan Siv, U.S. Representative to the UN Economic and Social Council, at that time affirmed the U.S. commitment to women's rights:

> The United States is committed to ensuring that the promotion of human rights and fundamental freedoms of women is fully integrated into American foreign policy. In that context, we support the Convention on the Elimination of All Forms of Discrimination Against Women's (CEDAW's) general goal of eradicating discrimination against women across the globe.

Ambassador Siv's remarks, excerpted below, are available at *www.un.int/usa/03_210.htm*.

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3. Religion

a. Countries of particular concern

On March 6, 2003, Secretary of State Colin Powell announced the designation of six countries as "countries of particular concern" for particularly severe violations of religious freedom under the International Religious Freedom Act.

A press statement announcing the designations is set forth below and is available at *www.state.gov/r/pa/prs/ps/2003/18302.htm*.

Secretary of State Colin L. Powell has designated six countries as "countries of particular concern" for particularly severe violations of religious freedom under the International Religious Freedom Act. Those countries are Burma, China, Iran, Iraq, North Korea, and Sudan. Last year, these six countries were also designated. Regrettably, the status of religious freedom has not significantly improved in any of these countries since that time.

The designation of "countries of particular concern" is just one of many tools the U.S. Government uses to address religious persecution and bring pressure on those governments which are responsible. The Secretary can make or remove a designation at any time, depending on changing conditions in a particular country as well as on how responsive its government is in addressing problems.

Advancing religious freedom remains a high priority of U.S. foreign policy, both as a universal human right and as a cornerstone of stable and free societies. The State Department also continues to promote religious freedom through the production of the annual International Religious Freedom Report, the annual Human Rights Report, the development of a broad range of strategies to address both systemic issues and specific incidents of persecution, and regular negotiations with many governments that repress the freedom of religious belief and practice.

b. Report on religious freedom

The fifth annual International Religious Freedom Report, covering June 2002 through June 2003, referred to above, was released on December 18, 2003. The report is submitted in compliance with § 102(b) of the International Religious Freedom Act ("IRFA") of 1998, which requires the Secretary of State to transmit to Congress each year "an Annual Report on International Religious Freedom supplementing the most

recent Human Rights Reports by providing additional detailed information with respect to matters involving international religious freedom." The annual report includes individual country chapters on the status of religious freedom.

In a press conference on December 18, Deputy Secretary of State Richard L. Armitage explained, "[e]ven though religious freedom is a universal right, recognized by international law and religious traditions the world over, millions of people in scores of countries do not enjoy this right, and this report tells their story." John Hanford, Ambassador at Large for International Religious Freedom, summarized the conclusions of the report as set forth below.

The full text of the press conference is available at *www.state.gov/s/d/rm/27404.htm.* The report is available at *www.state.gov/drl/rls/irf/2003.*

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This, the fifth annual edition of the International Religious Freedom Report, attempts to establish a baseline of fact about the status of religious freedom worldwide. It also seeks to describe positive trends and highlight improvements. Sadly, however, too many religious believers around the world do not enjoy such freedoms, and there are a number of factors driving this grim reality.

Let me identify briefly five categories of religious freedom abuses: First, attempts by totalitarian or authoritarian regimes to control religious belief or practice are manifest in countries such as North Korea, China, Vietnam and Burma.

Second, I would point to states that favor a dominant religion and are hostile toward minority or non-approved religions, and examples here would include Saudi Arabia, Iran, Sudan and Turkmenistan.

In this latter case, new, draconian legislation has effectively criminalized the religious activities of many Muslims, Christians and other faiths, and I'm speaking here of Turkmenistan.

Third, there is the problem of state neglect, discrimination or persecution toward minority or non-approved religions, and we find this in nations such as Egypt, Georgia, Indonesia and Nigeria.

Fourth, there are states that have discriminatory legislation or policies disadvantaging certain religions. And this category includes Belarus, Russia and Eritrea. In the case of Eritrea, for example, over 300 Evangelical and Pentecostal Christians currently suffer imprisonment only because their churches are not sanctioned by the state.

Fifth, certain states stigmatize particular religions by wrongfully associating them with dangerous cults or sects. As you can see, the problems that one century ago stirred President Roosevelt to action, continue today to afflict too many countries and too many religious believers.

The United States remains steadfast in its resolve to stand with the persecuted and to speak out on behalf of those whose governments would silence them. Their plight inspires our determination and our vigilance. We do this for them.

And in seeking to stop persecution, the first, and often the most vital step, is to ensure that the stories are told and the abuses revealed. And we worked very hard to make this report we are releasing today do just that.

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c. Anti-Semitism

(1) OSCE anti-Semitism conference

On July 3, 2003, Secretary of State Colin L. Powell held a press conference with the Honorable Rudoph Giuliani, former Mayor of New York City, Abe Foxman of the Anti-Defamation League, and U.S. Representative Christopher Smith, on their return from the Organization for Security and Cooperation in Europe ("OSCE") anti-Semitism Conference, held June 19–20 in Vienna. Excerpts below provide the views of Mr. Giuliani, head of delegation to the conference.

The full text of the press conference is available at *www.state.gov/secretary/rm/2003/22211.htm.*

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The good news is that the efforts of the United States and the hard work that's been done over the last 4, 5, 6 months, led to a great deal of support to institutionalizing an analysis of anti-Semitism within the OSCE. And to that end, Germany offered to hold a follow-up conference next year to discuss in Berlin the progress that's been made in setting up statistics, passing hate crimes legislation, and looking at where there have been successes and where there have been failures in reducing and eliminating anti-Semitism in Europe.

And that was supported by Russia, was supported by France and other countries. And now, of course, it has to be done officially, but that would be, in and of itself, really a great step. A first conference in Vienna and a second conference a year later in Berlin—you can't miss the significance of discussing the progress being made in eliminating anti-Semitism in Berlin.

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(2) UN General Assembly resolutions

The United States co-sponsored Resolution 159, "The incompatibility between democracy and racism," A/RES/58/159, adopted by the General Assembly on December 22, 2003. The resolution recognizes "with deep concern the increase in anti-Semitism and Islamophobia in various parts of the world, as well as the emergence of racial and violent movements based on racism and discriminatory ideas against Arab, Jewish and Muslim communities, as well as communities of people of African descent, communities of people of Asian descent and other communities."

Although the United States supported inclusion of language referring to anti-Semitism in Resolution 160, "Global efforts for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action," A/RES/58/160, the United States voted against the resolution for other reasons.

(3) UN Commission on Human Rights resolution

The United States voted against adoption of a resolution entitled "World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action," E/CN.4/RES/2003/30, after it unsuccessfully attempted to re-insert language concerning anti-Semitism and Islamophobia.

In a resolution entitled "Elimination of all forms of religious intolerance," E/CN.4/RES/2003/54, the United States succeeded in having a compromise amendment adopted to add a new preambular paragraph 13, stating:

> Recognizing with deep concern the overall rise in the instances of intolerance directed against members of many religious communities in various parts of the world, including cases motivated by Islamophobia and anti-Semitism.

Following adoption of the amendment, the United States re-joined as a co-sponsor of the resolution, and the resolution was adopted by vote.

4. Persons with Disabilities

On June 18, 2003, Ralph Boyd, Assistant Attorney General for Civil Rights, U.S. Department of Justice, provided the opening statement for the United States to the UN General Assembly Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. As excerpted below, the statement emphasizes the steps taken by the United States in addressing disability issues under domestic law. Given the domestic regime in place, the United States indicated that it does not anticipate becoming a party to a convention on this issue.

The full text of Mr. Boyd's statement and an accompanying enumeration of disability rights law measures in the United States, are available at *www.un.int/usa/03_089.htm*.

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We recognize that UN General Assembly resolution 56/168, much like our efforts over the last several decades here in the United States, is intended to further the goals of human equality and dignity for those with disabilities, in keeping with the aspirations memorialized in the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. Adopted by consensus, the resolution called for the creation of this Ad Hoc Committee "to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities."

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Because of these and similar [discriminatory] circumstances faced by individuals the world over, the United States intends to join constructively in the work of the Committee, and we hope that our national laws will offer a useful model for some aspects of this Committee's work. The United States long ago chose to undertake the task of promoting the rights of persons with disabilities—to go beyond mere words and implement a comprehensive set of regulations and enforcement mechanisms ensuring real, observable improvement in the lives of persons with disabilities. . . .

So we may have experience and expertise other countries will find useful. Our history, however, shows that while the cause of ensuring and promoting disability rights—indeed, the very integration of persons with disabilities into our society—requires firm commitment, it also requires careful thought. It is the position of the United States today that, given the complex set of regulations needed to canvass this broad area, and the enforcement mechanisms necessary to ensure equal opportunity for those with disabilities, the most constructive way to proceed is for each Member State, through action and leadership *at home*, to pursue within its borders

the mission of ensuring that real change and real improvement is brought to their citizens with disabilities.

Thus we hope to participate in order to share our experiences —and to offer technical assistance if desired on key principles and elements—but given our comprehensive domestic laws protecting those with disabilities, not with the expectation that we will become party to any resulting legal instrument. This may be true also of other delegations representing States with well-developed legal protections.

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The United States delegation followed up its opening statement with a second intervention during the ad hoc committee's discussion of possible elements for a convention. The intervention by the United States focused on disability measures under U.S. law, as set forth below in full.

The United States is pleased to participate in the discussion of the elements of a proposed convention on the rights of persons with disabilities. In doing so, we draw from our experiences under the Americans with Disabilities Act and other disability rights law in the United States.

The following general principles underpin the federal disability rights legislation in the United States.

*Integration of persons with disabilities into the mainstream of society is a fundamental concept. Integration is essential to breaking down attitudinal barriers and unfair stereotypes about persons with disabilities.

*By providing persons with disabilities the same opportunities and advantages open to all other citizens, we can enable their independence and promote their dignity.

*Inclusion of persons with disabilities as active participants in decision-making about the development of disability rights laws and in their implementation is essential to the efficacy and success of legislation.

In furtherance of these general principles, there are specific core measures that are common in our nation's disability rights laws. The following measures could be useful to members of the Committee in considering elements of a proposed disabilities convention.

1. Air and land transport. Measures to ensure that public transportation is accessible to people with disabilities, for example, the requirement that all new buses be lift-equipped.
2. Employment. Measures that ensure that persons with disabilities have equal opportunity to gainful employment and that employers, both public and private, make reasonable accommodations in the workplace. Such accommodations could include making job sites accessible, providing special computer equipment, and restructuring jobs through, for instance, flexible work hours and shifting non-essential job tasks.
3. Education. Measures that ensure that all persons with disabilities receive an education appropriate to their needs and based on an individualized determination of need.
4. Government services. Measures that make all the programs, services and activities of public governments accessible, including, for example, curb ramps on city sidewalks, sign language interpreters in the courts and police, and providing documents in Braille, on disk or in large print for legislative sessions.
5. Voting. Measures to ensure exercise of the right to vote in an accessible location independently and privately.
6. Physical access. Measures that ensure that all new and altered buildings are constructed so that they are accessible to all persons.
7. Telecommunications. Measures that ensure that telecommunications systems are usable by people who have impaired hearing or speaking ability.
8. Web-site access. Measures that ensure that services that are provided by websites are accessible to people who are blind or have low vision.

9. Housing. Measures that ensure that the housing stock includes accessible features.
10. Healthcare. Measures that ensure equal access to healthcare for people with the full range of disabilities, including those with psychiatric disabilities.

These concrete elements are intended to ensure that people with disabilities have the freedom to live independently and with dignity, integrated in their communities and without fear of unnecessary institutionalization. Each of these measures is predicated on the core principles of non-discrimination and equality of treatment and embody the precepts of autonomy and inclusion.

We would be pleased to make available summaries of disability rights laws in the United States for delegations that may find such summaries useful in the Ad Hoc Committee's ongoing discussions of elements for a proposed convention.

C. CHILDREN

1. Rights of the Child

On April 25, 2003, Kate Gorove of the U.S. delegation to the 59th Session, United Nations Commission on Human Rights ("UNCHR"), provided an explanation of the position of the United States in disassociating itself from consensus on Resolution 2003/86, "Rights of the Child." *See also* G.2. below.

Ms. Gorove's comments are provided below and are available at *www.humanrights-usa.net/2003/statements/0425Child.html.*

The United States welcomes the interest of the United Nations in general and this Commission in particular with regard to issues relating to children. My government is constructively and generously engaged in a wide variety of multilateral and bilateral activities that benefit children around the world. The United States respects and appreciates the interests and contributions

of other nations and organizations to promoting and protecting the rights of children, and to enhancing the quality of their lives in direct ways.

But my government will not accept an assertion that any country or group of countries does more for the sake of children than the United States, or is in a morally or legally superior position to make pronouncements on the rights of children. And that brings us to the draft resolution on the rights of the child set forth in Document E/CN.4/2003/L.105 of 22 April 2003.

While my delegation believes that there are improvements in this text over its predecessors and we appreciate the receptiveness of many co-sponsors to some of our requests, we must insist that the process of dealing with this resolution change in the future, starting with the next UN General Assembly. In particular, there was no text distributed until Friday of the fourth week of this session, which was also the first day of consultations on the text. With the two holidays that followed and voting on all resolutions only commencing at the start of the fifth week, there has been extremely limited time to work on this resolution. My government will prepare extensive proposals for future resolutions on this subject and pursue them vigorously.

My government will not join consensus on this draft resolution. The United States is committed to ensuring that the protection of the rights of children is fully integrated into American foreign policy. It is for this reason that the United States supports many of the principles underlying this resolution. For example, the United States has ratified two Optional Protocols to the Convention on the Rights of the Child relating to the involvement of children in armed conflict and the sale of children, child pornography, and prostitution.

Included among our many specific difficulties with this resolution are the following:

> Preambular paragraph 1: My government regrets that the United States amendment for this paragraph was rejected by the co-sponsors. The United States has repeatedly made clear that the Convention on the Rights of the Child raises a number of concerns. In particular, the Convention

conflicts with the rights of parents, U.S. sovereignty, and state and local law in the United States. Many of the activities covered by the Convention in areas such as education, health, and criminal justice are primarily the responsibility of state and local governments in the United States. Under the U.S. Constitution, the federal government does not have the power to supersede state authority in many such cases. In addition, the Convention, in some cases—such as the degree to which children should participate in decisions affecting themselves, or have the right to choose actions independent of parental control—sets up a tension between the rights of children and the rights of parents. United States law generally places greater emphasis on the duties of parents to protect and care for children, and apportions rights between adults and children in a manner different from the Convention.

While the language now in L.l05 does acknowledge that there are "other relevant human rights instruments," we cannot accept the overemphasis given to the Convention on the Rights of the Child and the assertion that primarily the Convention is "the standard in the promotion and protection of the rights of the child." While the Convention may touch upon most issues confronting children, other international instruments address particular problems in a far more comprehensive and effective manner. Thus, my delegation cannot accept the refusal by the co-sponsors to list ILO conventions that address child labor matters, the Hague Convention on international child abduction, the leading refugee instruments, and the International Covenant on Civil and Political Rights.

Preambular paragraph 5: My delegation cannot accept the reaffirmation of past resolutions on this subject that we regard as seriously flawed, both for what they say and fail to say, including the resolution from the 2002 UN General Assembly on which my government voted No.

Operative paragraph 10: My government has made clear in many forums our disagreement with a rights-based approach.

Operative paragraph 22: To the extent this paragraph includes capital punishment, my government finds it unacceptable.

Operative paragraph 35(a): My government completely rejects the call for the abolition of the juvenile death penalty.

2. Children and Armed Conflict

On January 14, 2003, Ambassador Richard S. Williamson, U.S. Alternate Representative to the United Nations, addressed the UN Security Council on children and armed conflict. In particular, he commented on the Secretary-General's report on the issue, including a listing of governments and armed groups violating their international obligations. S/2002/1299.

Ambassador Williamson's remarks, excerpted below, are available at *www.un.int/usa/03_004.htm*.

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The use of children as combatants is one of the worst aspects of contemporary warfare. Young girls and boys are especially vulnerable to exploitation during warfare and its aftermath. They are unable to protect themselves, and they are stripped of their opportunity for better lives. Over 300,000 children are used in government or rebel forces in over 30 armed conflicts around the world. These children serve as soldiers, runners, guards, sex slaves and spies.

Our children are our future. Allowing their exploitation in armed conflicts does irrevocable harm to them and it diminishes the future for all, robbing a people of the future leaders they will need to reconstruct their society when the conflict ends, scarring the next generation that a society needs to reconcile and find justice when the killing stops, distorting the next generation's perspectives, diminishing the contribution they can make to rebuild the economy and social structures and often irreparably harming the child's opportunity for a healthy, productive, normal life. Therefore, we have a special responsibility to make extra efforts

to protect the children caught in the destructive cauldron of armed conflicts.

On December 23, 2002, the United States formally ratified the two Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict. The United States has been and wants to continue to support the important efforts to end the use of child soldiers contrary to international law. We want to support efforts to end the exploitation of girls and boys in armed conflict.

In his report, the Secretary-General touches upon a number of areas in which children today tragically suffer as a consequence of their exploitation in armed conflicts. As noted in the Secretary-General's report, when war displaces families and communities, children often spend their entire childhood in camps where they are at risk of exploitation and forcible recruitment by armed groups. In armed conflicts, girls and young women are present in many of today's fighting forces. These child soldiers, boys and girls, are a cynical exploitation that exacerbates the violence and great suffering endemic in any conflict. We must do better to protect the human rights of children caught in armed conflict. We must do better to protect our future.

The United States strongly supports setting 18 as the minimum age for compulsory recruitment by state actors and for recruitment or use in hostilities by non-state actors. We also support having states take all feasible measures to ensure that members of their armed forces below 18 years of age do not take a direct part in hostilities. And we support the Special Representative of the Secretary-General for Children and Armed Conflict as he works to obtain commitments for the protection and well being of children in conflict and post-conflict situations.

The United States supports the principle that child protection should be an explicit feature in peacekeeping mandates and, where appropriate, that child protection advisors be part of United Nations peace operations.

The United States supports the working group on child protection training for peace personnel in developing training materials that can be adapted to the mandate of peace operations and employed to train military, police and civilian personnel.

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Now I turn to one of the most important aspects of the Secretary-General's report. For the first time, in response to a Security Council request (Resolution 1379 (2001)), this report from the Secretary-General explicitly names governments and armed groups that recruit or use child soldiers in violation of their international obligations. Such public exposure can be a powerful tool to expose violators, hold them to account, and, hopefully, better protect children in armed conflicts. The list names twenty-three armed parties to conflicts in five countries: Afghanistan, Burundi, Democratic Republic of the Congo, Liberia, and Somalia.

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The Secretary-General's report is a good start. It responds to the Security Council's request for a list drawn from countries currently on the Security Council's active agenda. However, some of the worst violations of children on armed conflict are not included on the list, even though they are mentioned in the report.

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Other countries of concern to the United States, include Burma, Uganda, Colombia. Clearly the abuse of children in armed conflict goes beyond the scope of the Secretary's current report. And clearly we have a moral responsibility, a moral imperative to leave no child behind. We cannot ignore the damage to children in armed conflicts wherever that devastation occurs.

Therefore, the United States would like to see the Secretary-General submit a list to the Security Council next year of the worst abusers of children in armed conflict not limited to countries currently on the Security Council's agenda. And, the United States would like to see active monitoring of those that have already been named.

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3. The Girl Child

On December 22, 2003, the United States joined consensus on UN General Assembly Resolution 58/156, "The girl child." *See* discussion in A.3., *supra.*

D. ECONOMIC, SOCIAL, AND CULTURAL ISSUES

1. General

On April 7, 2003, Richard Wall, U.S. public delegate on the U.S. delegation to the 59th Session of the United Nations Commission on Human Rights ("UNCHR"), provided the views of the United States on Item 10, "Economic, Social and Cultural Rights." His remarks, excerpted below, emphasize the aspirational nature of these human rights.

The full text of his remarks is available at *www.humanrights-usa.net/2003/statements/0407Item10.htm.*

"A standard of living adequate for the health and well-being of himself and his family." This aspiration rings no less true today than it did in 1948 with the adoption of the Universal Declaration of Human Rights. The global community continues its seemingly never-ending struggle to determine how best to provide for its least fortunate citizens. While there may be disagreement on the strategy, we share a common goal—who here would argue that the people of this troubled planet should not have access to food, to water, to housing, to health care, to the basic necessities of life?

Let there be no misconception about the position of the United States on this issue. As a nation, we are committed to providing the conditions for individuals to achieve economic, social and cultural well-being, both at home and abroad. . . .

At the international level, the United States government is the world's largest contributor of funding to alleviate poverty and despair. We recognize the importance of economic, social and cultural issues to overall development strategies, and therefore,

a large percentage of our foreign assistance is targeted in this direction. For the fiscal year beginning this October, the President has requested over $2 billion for new assistance programs. Last year, the President announced the Millennium Challenge Account, which pledges to raise our total development assistance by $5 billion over three years for those countries that achieve the criteria of good governance, investment in the health and welfare of their citizens, and follow sound economic policies which promote growth set forth by the President. And our current budget request for the next fiscal year includes $450 million to provide international assistance to combat the scourge of HIV/AIDS, and President Bush has pledged $10 billion dollars over the next five years to add to these funds. The international outreach of American charities is massive, and dwarfs our official development assistance.

But how—as governments, as the international community—do we best achieve the "progressive realization" of economic, social and cultural rights? Although my government is not a party to the Covenant on Economic, Social and Cultural Rights, I use these words because they add meaning to the phrase from the Universal Declaration with which I began this statement. These two words draw a clear distinction between economic, social and cultural rights and civil and political rights. The former are aspirational; the latter inalienable and immediately enforceable.

This question of justiciability of economic, social and cultural rights has plagued the Commission for some time now. Some in this room argue in favor of making these rights justiciable. But do we really understand what this means? By agreeing with this approach, you—as governments—agree to provide housing for the millions who claim their present housing is not "adequate." You agree to provide food for each and every one of your citizens. And, even where not possible, you agree to provide the best available medical care for each and every citizen. If you fail to provide these "rights," you agree to provide monetary compensation. This is what it means for rights to be justiciable. A claim that these "rights" are justiciable is a false promise because it cannot be fulfilled.

The communist system promised to fulfill economic, social and cultural objectives, but it failed to deliver them. Proponents of that system further argued that these economic and social and

cultural rights were superior to civil and political rights. But experience has shown that societies that respect civil and political rights, practice democracy, and respect the rule of law, can do a better job achieving economic, social and cultural goals.

Indeed, free market democracies are less vulnerable to famine. Countries where criminals are held accountable and corruption is punished attract increased investment. Nations that internalize principles of good governance, transparency and develop strong democratic institutions perform consistently better on the indices of economic and social well being. It is no surprise that politicians who are accountable to their people are more responsive to their needs and aspirations.

Regrettably, the opposite principle is even more apparent. Governments that lack democratic institutions, accountability and the rule of law cause widespread suffering amongst their citizens. Indeed, the same delegations that most vehemently assert these rights in this forum often represent governments who consistently prevent their citizens from achieving them. In some nations, food has become a tool of oppression. Cultural diversity is treated as subversive and is stifled. Education is denied as a means to ensuring totalitarian control. Resources are diverted into foreign bank accounts, extravagant palaces and fancy cars.

Not surprisingly, these same governments want nothing more than to draw attention away from their own failings and shift the blame to others. . . .

Governments must take responsibility for their actions. The progressive realization of economic, social and cultural rights will not be achieved through justiciability or blame-shifting. It will be accomplished when governments look inward and diagnose the effects of their policies and practices. Government policy must empower the individual to achieve an adequate standard of living. The United States, along with the rest of the international community, stands ready to assist these governments in this endeavor where we can. But the true responsibility lies within.

See also U.S. statement on joining consensus on UNGA Resolution 165, "International Covenants on Human Rights,"A/RES/58/165, available at *www.state.gov/s/l/c8183.*

htm. Prior to adoption, the United States had called for a vote and voted no on operative paragraphs 3 (discussed in A.4., *supra*) and 25, which addressed justiciability of the rights set forth in the International Covenant on Economic, Social, and Cultural rights:

> In our view, economic, social and cultural rights are intended to be progressively realized. As a result, they are not rights which create immediate, actionable entitlements of a citizen vis-à-vis his or her own government. For these reasons, in our view, any further consideration of this issue [of justiciability] is neither relevant nor helpful to the work of this body. Furthermore, the United States does not recognize the need for further efforts towards developing indicators and benchmarks in order to strengthen progressively the enjoyment of these rights.

2. Development

a. World Summit on the Information Society

The first phase of the World Summit on the Information Society ("WSIS") took place in Geneva, December 10–12, 2003. At its conclusion, the United States joined consensus on adoption of the WSIS Declaration of Principles and Plan of Action, WSIS-03/GENEVA/DOC/0004 and WSIS-03/GENEVA/DOC/0005, respectively. The two documents and other relevant materials are available at *www.itu.int/wsis/geneva/index.html*. In joining consensus, the U.S. delegation provided an interpretative statement of the declaration, set forth below.

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1. The United States is pleased to join consensus on the Declaration of Principles and Plan of Action, which represent an important milestone in the international community's efforts toward development of the Information Society. The United States requests that this interpretative statement be included in the written

proceedings of this Summit; in part, our consensus is based on the understandings set forth herein.

2. The United States wishes to draw attention to the fact that a number of institutions, organizations and others have been requested to implement the Declaration of Principles and Plan of Action. Nonetheless, governments alone adopt the Declaration of Principles and Plan of Action.

3. The United States stresses that the right to freedom of opinion and expression, including the freedom to seek, receive and impart information, as outlined in Article 19 of the Universal Declaration of Human Rights, is an essential foundation of the Information Society.

4. The United States construes paragraph 27, D2(b) of the Plan of Action as reaffirming, and not redefining, paragraph 42 of the Monterrey Consensus of the International Conference on Financing for Development, which encouraged developing countries to pursue policies to ensure that official development assistance (ODA) is used effectively to help achieve development goals. The United States believes that such policies are vital to development and that without them ODA is not useful. The United States reiterates that it has not accepted an "agreed target" for ODA or made commitments to fulfill any such target.

5. The United States construes paragraph 27, D2(c) of the Plan of Action as reaffirming, and not redefining, the conclusions set forth in Chapter II.E of the Monterrey Consensus of the International Conference on Financing for Development, which emphasized that debtors and creditors must share responsibility for preventing and resolving unsustainable debt situations. In addition to noting the need for creditor initiatives to reduce outstanding indebtedness, the Monterrey Consensus highlighted the need for debtor countries to pursue sound macroeconomic policies and public resource management, as well as other public policy measures, in order to become eligible for debt relief. The United States believes that the inclusion in the WSIS documents of language from the Monterrey Consensus reaffirms this mutuality of responsibility.

6. The United States understands and accepts that the reference to a "right to development" in Paragraph 3 of the Declaration of

Principles to mean a right inherent in the individual that is an integral part of all human rights and fundamental freedoms. The lack of development cannot be invoked to justify abridgement of human rights.

7. The United States notes the several references in both the Declaration of Principles and Plan of Action on the importance of good governance to the Information Society. The United States interprets the references to "good governance" in the Declaration of Principles and Plan of Action to mean sound economic policies (including pro-competitive policies), solid democratic institutions responsive to the needs of the people and transparent to them, and, respect for human rights and for the rule of law.

8. The United States understands that the references to transfer of technology upon mutually agreed terms in the Declaration of Principles and Plan of Action mean that, in the case of technologies and know-how subject to intellectual property rights, any transfers must be on a freely negotiated, mutually-agreed basis. This is true regardless of whether transferor and transferee are governments, private entities, or others.

9. The United States construes the phrase "all relevant international norms" used in Paragraph 19(a) of the Plan of Action concerning E-Employment as including internationally recognized core labor standards.

10. The United States notes that the use of the phrase "indigenous peoples" in paragraph 15 of the Declaration of Principles or in Paragraphs 8(f), 11(i), 23(k) and 23(l) of the Plan of Action cannot be construed as having any implications as to the rights that might attach to such phrase under international law.

b. Development

On December 22, 2003, the UN General Assembly adopted Resolution 172, "The right to development," A/RES/58/172. The United States provided an explanation of its call for a vote and its vote against adoption of the resolution, as excerpted below.

The full text of the U.S. statement on Resolution 172 is available at *www.state.gov/s/l/c8183.htm*.

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The United States opposes this resolution, and therefore has called for a vote. Our opposition to this measure stems from the key fact that it continues to present the concept that lack of development justifies the denial of internationally recognized human rights. This concept stands the whole issue of development on its head. The key factor affecting whether or not nations develop is the extent to which they enjoy good governance which permits individuals to develop their talents and their intellects to the maximum extent, which allows them to speak and associate freely with one another, and which allows them to regularly choose their representatives in government—in short, whether governments afford their people basic human rights and fundamental freedoms.

Moreover, we oppose the call in this resolution for extensive studies and resources so that the Sub-commission on the Promotion and Protection of Human Rights can prepare a concept document on a legally binding instrument on the Right to Development. The devotion of scarce resources for such an effort is unwarranted in view of the fact that any such legally binding instrument is unlikely to ever garner significant support.

The United States cannot support the call to make progress on realizing the Right to Development. There is no internationally-accepted definition of such a right. Making such a call is premature and irrelevant.

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At the UN Commission on Human Rights, on April 25, 2003, the United States called for a vote and voted against paragraph 2 of document L. 14 entitled "The right to development." An explanation of the U.S. vote follows. The resolution was adopted.

As we made clear to the sponsors and co-sponsors during negotiations, the United States remains very concerned that operational paragraph 2 contains the statement, I quote, "to prepare a concept document establishing options for the implementation of the right to development and the feasibility, inter alia, of an international legal standard of a binding nature."

The United States maintained at the time, and repeats now, that this subject was never discussed during the two-week Working Group session, the purpose of which was to reach consensus on such momentous and far-reaching proposals. . . . [W]e ask those delegations who agree with us that this concept requires greater deliberation within the Working Group to join us and vote for the deletion of this paragraph.

The United States subsequently voted no on the resolution, E/CN.4/2003/L.14/Rev.1 *See www.humanrights-usa.net/2003/statements/0425RtoD.htm.*

c. Food

On December 22, 2003, the UN General Assembly adopted by vote Resolution 186, "The right to food," A/RES/58/186. The United States explained its negative vote on the resolution as worded, excerpted below. The United States also called for a vote and voted against the resolution on the right to food adopted by the UNCHR in April 2003. E/CN.4/RES/2003/25.

The text of the U.S. explanation of its vote in the UNGA is available at *www.state.gov/s/l/c8183.htm.*

Although the United States government agrees with much that is stated in this resolution and, by its actions, has proven its profound commitment to promoting food security around the world, it cannot support this resolution as drafted.

As delegations are aware, the United States has consistently taken the position that the attainment of any "right to adequate food" or "right to be free from hunger" is a goal or aspiration to

be realized progressively that does not give rise to any international obligations or diminish the responsibilities of national governments to their citizens.

In light of this long-standing view, the current resolution contains numerous objectionable provisions, including inaccurate textual descriptions of the underlying right, and unduly positive references both to General Comment 12, released in May 1999 by the Committee on Economic, Social, and Cultural Rights, and to certain actions by the Special Rapporteur.

We hope in future years that the sponsors of the resolution will accommodate our proposed suggestions so that we can join in the adoption of a resolution on this tremendously important subject.

d. Housing

The United States joined consensus on a UNCHR resolution entitled "Women's equal ownership of, access to, and control over land and the equal rights to own property and to adequate housing." E/CN.4/RES/2003/22. Prior to doing so, the United States proposed an amendment to delete the words "right to" before "adequate housing" in operative paragraph 4 of the resolution. The paragraph affirmed "Commission on the Status of Women resolution 42/1, which, inter alia, urges States to design and revise laws to ensure that women are accorded . . . the right to adequate housing, including through the right to inheritance . . . ." The amendment was not adopted.

The United States joined consensus on a resolution entitled "Adequate housing as a component of the right to an adequate standard of living." E/CN.4/RES/2003/27.

e. Health issues

(1) Physical and mental health

On December 22, 2003, the UN General Assembly adopted Resolution 173, "The right of everyone to the enjoyment of

the highest attainable standard of physical and mental health," A/RES/58/173. The United States called for a vote and voted against adoption of the resolution. The United States voted against a resolution of the same title at the UNCHR. E/CN.4/RES/2003/28. *See also* discussion of language in resolutions on access to medication below.

The full text of the U.S. explanation of its action in the General Assembly, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

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The United States is committed to the betterment of public health globally and to addressing the global health emergency that is HIV/AIDS. Our actions speak to that commitment in real terms. As examples—the President's Emergency Plan on HIV/AIDS, global disease surveillance efforts, research on the range of diseases including through public-private partnerships, and actions to address non-communicable diseases increasingly afflicting the developing world, and our financial commitment to all these issues—these are all part of that U.S. commitment.

We believe that setting goals and targets and bringing all nations up to higher standards is necessary, but health policies and actions need to be made based on sound scientific evidence and data, and not by a rights and entitlement-based approach. We therefore particularly object to PP 2, which implies an entitlement approach, as opposed to an enablement approach. During negotiations we have proposed substituting previously agreed upon language throughout the resolution, including formulations from the preamble of the WHO Constitution and the Declaration of the Madrid Ageing Conference, but these alternatives were not accepted.

The United States did not support the creation of a Special Rapporteur for the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. We will, of course, seek to be constructive with the Special Rapporteur, but we believe the interim report should have been noted in neutral terms only.

As to OP 13, the assertion that there is a "failure of market forces" in developing new drugs, vaccines, and diagnostic tools is often used to justify very restrictive regulatory tools that often further restrict the operation of markets. The language highlights failure rather than opening the door for acknowledging solutions. There is in fact a growing number of creative public-private partnerships currently underway to obtain more research dollars for vaccines, drugs, and diagnostic tools focused on diseases mainly afflicting the developing world.

For these reasons, the United States will vote no on this resolution.

(2) Access to medications

Also on December 22, the UN General Assembly adopted Resolution 179, "Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria," A/RES/58/179. The United States called for a vote on the resolution and voted no.

The explanation of the U.S. vote, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

The United States regrets that this resolution will not be adopted by consensus. Throughout the negotiating process, we made numerous attempts to find mutually agreeable language. We are particularly concerned that we were unable to reach consensus on this resolution because of the importance we attach to its subject.

The United States is taking concrete steps to rapidly increase global access to antiretroviral medications, including but not limited to the $15 billion Emergency Plan for AIDS Relief. Yesterday, President Bush and Prime Minister Blair of the United Kingdom made a joint statement on HIV/AIDS. They said, "We will pursue a comprehensive approach to expanding the delivery of HIV/AIDS prevention, care and treatment, including greater access to safe and effective medicines, better health system delivery, and building a skilled force of health workers. We share a commitment to rapidly increasing the availability of HIV treatment in the most affected

countries, to reducing HIV infection rates, and to developing programs to provide care and support for those infected with, and affected by, HIV/AIDS, including orphans and vulnerable children."

The United States regrets that we could not reach agreement on preambular paragraph 13 ["*Fully aware* that the failure to deliver antiretroviral treatment for HIV/AIDS to the millions of people who need it is a global health emergency"]. Despite constructive proposals by a number of delegations, the sponsors insisted on an unbalanced and unhelpful formulation. Let us be clear. The global health emergency is HIV/AIDS, and that emergency requires a comprehensive approach, as we agreed in the Declaration of Commitment two years ago.

The United States also cannot accept the formulation of preambular paragraph 2, for the reasons we expressed in our explanation of vote on [Resolution 173, *supra*.] We do not support an entitlement approach; we do not believe that this right should be interpreted as a legally enforceable entitlement, requiring the establishment of judicial or administrative remedies at the national or international levels to adjudicate such presumed rights.

With respect to preambular paragraph 1, the United States is not a party to the International Covenant on Economic, Social and Cultural Rights. Therefore, we cannot reaffirm the Covenant and cannot accept the paragraph as written.

It is unfortunate that the main sponsors were unwilling to make use of language agreed elsewhere that would have resolved our concerns.

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In the UNCHR, the United States called for a vote and voted no on preambular paragraphs (PPs) 1 and 2 in a resolution of the same title, E/CN.4/RES/2003/29. PP 1 reaffirmed the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, and PP 2 "reaffirm[ed] . . . that the right of everyone to the enjoyment of the highest attainable standard of physical and mental health is a human right." The paragraphs were retained, and the United States joined consensus on the resolution.

(3) Abortion and involuntary sterilization

On April 8, 2003, John D. Negroponte, the U.S. Permanent Representative to the United Nations, transmitted to the Secretary-General an explanation of the U.S. position on the draft resolution "Population, education and development," E/CN.9/2003/L.5, adopted by the UN Commission on Population and Development on April 4, 2003. The letter, E/CN.9/2003/9, noted that the United States had requested that the explanation "be circulated as a document of the thirty-sixth session of the Commission and included in its report." The attached explanation of position by Ambassador Sichan Siv, U.S. Representative to the Economic and Social Council, is set forth below.

The United States will join consensus on the draft resolution on the Population, Education, and Development. While there is much in the resolution that we support, there are other elements on which we have very strong reservations.

The United States understands that the word "reaffirming" in the first, second and third preambular paragraphs as it relates to the "Programme of Action of the International Conference on Population and Development, key actions for the further implementation of the Programme of Action of the International Conference on Population and Development, the Beijing Platform for Action and further actions and initiatives to implement the Beijing Declaration and the Platform for Action;" does not constitute a reaffirmation of any language in those documents that can he interpreted as promoting the legalization or expansion of abortion services.

The United States fully supports the principle of voluntary choice in family planning. We strongly reiterate that in no case should abortion be promoted as a method of family planning, and that women who have recourse to abortion should in all cases have humane treatment and counseling provided for them.

The United States emphasizes its commitment to programs that address greater male involvement in pregnancy prevention

and voluntary family planning efforts, and the need to stress the practices of delaying sexual initiation, abstinence, monogamy, fidelity, partner reduction and condom use in order to, among other reasons, prevent HIV infection.

We are pleased that the resolution notes the importance of education, especially of young people, with particular regard to women and girls. The United States attaches great importance to universal access to primary and secondary education, particularly for girls, as an essential and integral part of women's sustainable socio-economic development.

The United States stresses the need to further address the importance of family stability, the role of fathers and parent-child communication on abstinence, delaying sexual initiation, and responsible behavior. In this regard, the United States emphasizes the importance it attaches to the involvement of parents in decisions affecting children and adolescents in all aspects of sexual and reproductive health.

Finally, the United States notes that, like other UN resolutions, the documents adopted at this *Session* contain important political goals and coordinated plans of action, but are not intended to and do not create legally binding obligations on States under international law.

f. Education

The United States joined consensus on a resolution entitled "Right to education" in the UNCHR. E/CN.4/RES/2003/19.

E. TORTURE

On April 2, 2003, William J. Haynes, II, General Counsel of the Department of Defense, responded to inquiries from Human Rights Watch regarding detention and questioning of enemy combatants. His letter is set forth below in full.

This is in response to your December 26, 2002, letter to the President and other letters to senior administration officials

regarding detention and questioning of enemy combatants captured in the war against terrorism of global reach after the terrorist attacks on the United States of September 11, 2001.

The United States questions enemy combatants to elicit information they may possess that could help the coalition win the win' and forestall further terrorist attacks upon the citizens of the United States and other countries. As the President reaffirmed recently to the United Nations High Commissioner for Human Rights, United States policy condemns and prohibits torture. When questioning enemy combatants, U.S. personnel are required to follow this policy and applicable laws prohibiting torture.

If the war on terrorists of global reach requires transfer of detained enemy combatants to other countries for continued detention on our behalf, U.S. Government instructions are to seek and obtain appropriate assurances that such enemy combatants are not tortured.

U.S. Government personnel are instructed to report allegations of mistreatment of or injuries to detained enemy combatants, and to investigate any such reports. Consistent with these instructions, U.S. Government officials investigate any known reports of mistreatment or injuries to detainees.

The United States does not condone torture. We are committed to protecting human rights as well as protecting the people of the United States and other countries against terrorists of global reach.

In a June 2, 2003, letter to National Security Adviser Condoleezza Rice, Senator Patrick Leahy noted Mr. Haynes' letter to Human Rights Watch as part of the Administration's response to date, and posed additional questions concerning interrogations of detainees held by the United States. Mr. Haynes responded as set forth below in a letter dated June 25, 2003.

The full text of the correspondence between Senator Leahy and Mr. Haynes and related material is available at 150 CONG. REC. S781 (Feb. 10, 2004).

Dear Senator Leahy: I am writing in response to your June 2, 2003, letter to Dr. Rice raising a number of legal questions regarding the treatment of detainees held by the United States in the wake of the September 11, 2001, attacks on the United States and in this Nation's war on terrorists of global reach. We appreciate and fully share your concern for ensuring that in the conduct of this war against a ruthless and unprincipled foe, the United States does not compromise its commitment to human rights in accordance with the law.

In response to your specific inquiries, we can assure you that it is the policy of the United States to comply with all of its legal obligations in its treatment of detainees, and in particular with legal obligations prohibiting torture. Its obligations include conducting interrogations in a manner that is consistent with the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT") as ratified by the United States in 1994. And it includes compliance with the Federal anti-torture statute, 18 U.S.C. Sec. Sec. 2340–2340A, which Congress enacted to fulfill U.S. obligations under the CAT. The United States does not permit, tolerate or condone any such torture by its employees under any circumstances.

Under Article 16 of the CAT, the United States also has an obligation to "undertake . . . to prevent other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture." As you noted, because the terms in Article 16 are not defined, the United States ratified the CAT with a reservation to this provision. This reservation supplies an important definition for the term "cruel, inhuman, or degrading treatment or punishment." Specifically, this reservation provides that "the United States considers itself bound by the obligation under article 16 to prevent, 'cruel, inhuman or degrading treatment or punishment' only in so far as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." United States policy is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with this commitment.

As your letter stated, it would not be appropriate to catalogue the interrogation techniques used by U.S. personnel in fighting international terrorism, and thus we cannot comment on specific cases or practices. We can assure you, however, that credible allegations of illegal conduct by U.S. personnel will be investigated and, as appropriate, reported to proper authorities. In this connection, the Department of Defense investigation into the deaths at Bagram, Afghanistan, is still in progress. Should any investigation indicate that illegal conduct has occurred, the appropriate authorities would have a duty to take action to ensure that any individuals responsible are held accountable in accordance with the law.

With respect to Article 3 of the CAT, the United States does not "expel, return ('refouler') or extradite" individuals to other countries where the U.S. believes it is "more likely than not" that they will be tortured. Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country. We can assure you that the United States would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honored.

In closing, I want to express my appreciation for your thoughtful questions. We are committed to protecting the people of this Nation as well as to upholding its fundamental values under the law.

On June 26, 2003, UN International Day in Support of Victims of Torture, President George W. Bush issued a statement reiterating the U.S. commitment to the elimination of torture, as excerpted below.

The full text of President Bush's statement is available at *www.whitehouse.gov/news/releases/2003/06/20030626-3.html.*

. . . Torture anywhere is an affront to human dignity everywhere. We are committed to building a world where human rights are respected and protected by the rule of law.

Freedom from torture is an inalienable human right. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, ratified by the United States and more than 130 other countries since 1984, forbids governments from deliberately inflicting severe physical or mental pain or suffering on those within their custody or control. Yet torture continues to be practiced around the world by rogue regimes whose cruel methods match their determination to crush the human spirit. Beating, burning, rape, and electric shock are some of the grisly tools such regimes use to terrorize their own citizens. These despicable crimes cannot be tolerated by a world committed to justice.

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The United States is committed to the world-wide elimination of torture and we are leading this fight by example. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment. I call on all nations to speak out against torture in all its forms and to make ending torture an essential part of their diplomacy. I further urge governments to join America and others in supporting torture victims' treatment centers, contributing to the UN Fund for the Victims of Torture, and supporting the efforts of non-governmental organizations to end torture and assist its victims.

Also in 2003 the United States co-sponsored resolutions on torture in the UN Commission on Human Rights, E/CN.4/RES/2003/32, and in the UN General Assembly, A/RES/58/165.

F. DETENTIONS AND MISSING PERSONS

1. Detention of Aliens in U.S. Custody

a. Detention by the former Immigration and Naturalization Service

By letter of April 2, 2003, from the Permanent Mission of the United States to the United Nations Office at Geneva, the United States responded to a letter of September 18, 2002, from the special rapporteurs on the human rights of migrants, on the independence of judges and lawyers, and on torture; and the reports of these special rapporteurs to the UN Commission on Human Rights ("UNCHR") that contain allegations regarding the detention of non-U.S. nationals in custody of the Immigration and Naturalization Service ("INS") since September 11, 2001. E/CN.4/2003/G/74.

The full text of the U.S. response, set forth below, is available at *www.unhchr.ch/huridocda/huridoca.nsf/Documents?OpenFrameset* under 59th Session, Correspondence from Governments to UN bodies.

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The Government of the United States welcomes the opportunity to respond to the above-mentioned letter and reports, which contain allegations regarding the detention of non-U.S. nationals in custody of the former U.S. Immigration and Naturalization Service ("INS").[1] These allegations include a broad range of assertions, including that individuals in INS custody have been detained without any charges having been brought against them, that they have been deprived of procedural protections, and that

[1] On March 1, 2003 the Immigration and Naturalization Service (INS) was merged with the Department of Homeland Security. For the purpose of this response, we will refer to the INS when discussing actions taken before March 1, 2003.

the United States has failed to disclose information relating to the detainees. In addition, the letter and reports expressed concern about the detentions of a number of named individuals who were subject to detention in INS custody.

Since 11 September 2001, the United States has mobilized unprecedented resources to prevent further attacks against the United States, while at the same time ensuring respect for civil liberties. The United States has taken every step, used every tool at its disposal, and employed every authority under the law to prevent further acts of terrorism and to protect innocent American lives, while preserving the constitutional liberties that all Americans cherish. Toward this end, the U.S. Department of Justice ("Justice Department") has used the full weight of the federal justice system as a method of neutralizing potential terrorist threats by prosecuting those who violate the law and thereby pose a national security risk. In some cases, the Justice Department has prosecuted individuals for crimes not directly related to terrorism, including enforcement of its immigration laws, just as prosecutors from earlier generations used income tax violations and similar offenses to convict dangerous, organized crime figures. In this regard, the September 11 investigation has led to the arrest and detention of many aliens found in the United States in violation of the Immigration and Nationality Act (INA). Their treatment while in INS custody is consistent with the protections afforded aliens under U.S. law.

The United States will respond to the underlying concerns raised in the summary of allegations contained in the letter and the reports, but will refrain from disclosing any information the release of which might jeopardize the conduct of ongoing investigations, the safety and privacy of the aliens, and the public safety and interest. Accordingly, we will not comment on the individual cases raised in the letter and the reports. This position is consistent with the arguments the United States has made in ongoing domestic litigation.

Concerns have been raised that the United States has not disclosed a list of the identities of individuals who have been detained on immigration law violations or were deemed by the government to have associations or information relating to the

September 11 investigation and related terrorist investigations. This policy is based on the professional judgment of senior law enforcement officials, including those from the Criminal Division of the Justice Department and the Federal Bureau of Investigation with leading roles in the September 11 investigation. In their view, disclosure of the identities of the detainees would endanger the ongoing investigation and the detainees themselves. The disclosure of such information (and the information that would be disclosed in the removal hearings for the detainees) may reveal sources and methods of the investigation to terrorist organizations. It may reveal the locations and whereabouts of the detainees, particularly those cooperating with the United States Government in the investigation. This in turn could allow terrorists to evade detection and lead them to alter their future plans, thereby creating greater danger to public safety.

The United States therefore deemed several actions essential to the nation's continued security and the integrity of the September 11 investigation, including withholding public disclosures of some information regarding the detainees and closing their immigration court hearings to the public for as long as these aliens remained of interest to the investigation. Making public this information could give our enemies the roadmap of our investigations and could allow terrorist organizations to alter future attack plans, intimidate witnesses, and fabricate evidence. Thus, protecting such information is one of the actions deemed essential to our ongoing efforts to investigate the September 11 attacks and to prevent future attacks.

Nevertheless, in the interest of responding to concerns about the resulting detentions of non-U.S. nationals, the United States is in a position to provide some details regarding the numbers of individuals who have been detained in INS custody as a result of the September 11 investigation. As of March 28, 2003, the NS has detained 766 aliens on immigration violations at some time since the attacks of September 11, 2001, in connection with the investigation into the terrorist attacks. Of these 766 individuals, 505 have been deported or have left the country voluntarily. Only one of these aliens remains in custody as part of our active September 11 investigation.

The debate about our non-disclosure policy should not cast doubts on the commitment of the United States to respect the civil liberties of individuals held in U.S. custody. Individuals held on immigration charges in custody of the Department of Homeland Security ("DHS") are entitled to due process protections, in accordance with United States law. All detainees have been notified of the removal charges against them and are given the right to contest those charges in some type of an immigration proceeding. They are given lists of pro bono counsel and advised of their right to retain a lawyer at no expense to the government. They are also given the opportunity to seek release on bond, continuances to prepare their cases, an opportunity to examine the evidence against them, the opportunity to apply for discretionary relief from removal, a right of appeal to the Board of Immigration Appeals, and typically judicial review in the federal courts. Additionally, the United States adheres to its obligations pursuant to the Vienna Convention on Consular Relations to notify aliens of their rights to consular notification, communication and access.

Once an alien receives a final order of removal, that order is effected as soon as circumstances permit. There are some aliens with final orders of removal who are awaiting removal. The DHS is making every effort to remove them from the United States as soon as practicable.

While detained in DHS custody, aliens are provided treatment and care. Detainees may be placed in administrative segregation[2] when their continued presence in the general population poses a threat to life, property, staff or other detainees. Furthermore, all DHS detention centers and contract facilities are required by DHS detention standards to provide medical care and appropriate treatment to DHS detainees. The U.S. Public Health Service (USPHS) or a local provider provides the treatment.

For the foregoing reasons, the United States respectfully submits that the allegations contained in the letter and reports of the Special

[2] Administrative segregation is understood as detention in which restricted conditions of confinement are required to ensure the safety of detainees or others, the protection of property, or the security or orderly operation of the facility.

Rapporteurs do not accurately reflect the conditions of detention of aliens who have been detained as a result of the September 11th investigation, and the rights which they are afforded under the U.S. Constitution.

b. Two named detainees

By letter of April 2, 2003, the United States provided its response to a communication from the chairman-rapporteur of the Working Group on Arbitrary Detention, UNCHR, dated January 6, 2003, regarding Opinion No. 21/2002, adopted by the Working Group on December 3, 2002. E/CN.4/2003/G/72. The opinion related to the detention in the United States of two aliens who pled guilty to criminal charges, and who were sentenced and ultimately deported. The U.S. response disputed the opinion's conclusion that the two individuals had been subject to arbitrary detention and provided a summary of substantive and procedural rights given to every person who is a respondent in an immigration proceeding, a defendant in a criminal proceeding, or a material witness in a grand jury proceeding.

The U.S. letter is available at *www.unhchr.ch/huridocda/huridoca.nsf/Documents?OpenFrameset* under 59th Session, Correspondence from Governments to UN bodies.

The Government of the United States takes the opportunity to respond to the above-mentioned opinion relating to the detention of Ayub Mi Khan (alias Syed Gul Mohammed Shah) and Azmath Jaweed (alias Mohammed Azmath). The opinion concludes that Messrs. Khan and Jaweed were "detained for more than 14 months, apparently in solitary confinement, without having been officially informed of any charge, without being able to communicate with their families and without a court being asked to rule on the lawfulness of their detention."

The Government of the United States respectfully submits that these two individuals have not been subject to arbitrary detention. Messrs. Khan and Jaweed were lawfully detained on immigration

violations on September 12, 2001 in Texas after law enforcement officials found box cutters, hair dye, a knife and several thousand dollars among their belongings. They were detained on charges of overstaying their immigration visas, were charged with conspiracy to commit credit card fraud on December 13, 2001, and were indicted on January 14, 2002. Represented by counsel, both Messrs. Khan and Jaweed pled guilty to these charges in June 2002 before a United States district court judge.

On August 15, 2002, the district court, in accordance with federal statutes and sentencing guidelines, sentenced Mr. Khan to serve one year and one day of incarceration, and ordered him to pay restitution in the amount of $414,639, the amount of the loss resulting from the conspiracy. Upon completing his criminal sentence on October 25, 2002, Mr. Khan was transferred to immigration custody and was subsequently removed from the United States.

On September 18, 2002, the district court, in accordance with federal statutes and sentencing guidelines, sentenced Mr. Jaweed to time served and ordered him to pay restitution in the amount of $76,785, the amount of the loss resulting from the conspiracy. Upon completing his criminal sentence on September 19, 2002, Mr. Jaweed was transferred to immigration custody and was subsequently removed from the United States.

The above facts support the United States Government's position that Messrs. Khan and Jaweed, like other individuals in custody, have been given due process consistent with the United States Constitution and laws. The United States respectfully takes issue with the findings of the Working Group, which are not supported by any concrete facts and appear to have rested entirely on information provided by an undisclosed source. Indeed, there is no factual support for the Working Group's finding that Messrs. Khan and Jaweed were subjected to arbitrary confinement in violation of international law. There is no factual support for the Working Group's assertion that Messrs. Khan and Jaweed were deprived of a fair trial. There is no factual support for the Working Group's assertion that Messrs. Khan and Jaweed were detained without being officially informed of the charges that were pending against them. There is no factual support for the Working

Groups assertion that Messrs. Khan and Jaweed were denied access to a court to challenge the lawfulness of their detention and to contest the charges that had been lodged against them. Furthermore, with regard to the Working Group's finding that Messrs. Khan and Jaweed were unable to communicate with their families, we note that the criminal indictments filed against Messrs. Khan and Jaweed were part of the public record and that they were represented by counsel during the length of their criminal proceedings. Therefore, it would be logical to conclude that their families were in the position to ascertain Messrs. Khan and Jaweed's whereabouts and to communicate with them through counsel.

For the foregoing reasons, the Government of the United States respectfully submits that Messrs. Khan and Jaweed have not been subject to arbitrary detention.

To the extent that the Working Group's findings represent a general expression of concern for the treatment of detainees in our custody, we take this opportunity to reiterate the full panoply of substantive and procedural rights that are given to every person who is a respondent in an immigration proceeding, a defendant in a criminal proceeding, or a material witness in a grand jury proceeding. These due process rights were discussed in our initial submission to the Working Group. A summary of these rights follows.

Individuals undergoing a removal proceeding are notified of the charges of removal and are given the right to contest those charges in a removal hearing before an immigration judge. They are given a list of pro bono counsel and advised of their right to retain a lawyer of their own at no expense to the government. If they are detained, they may request to be released on bond or on their own recognizance. They are also given the opportunity to request continuances to prepare their cases, to examine the evidence against them, to present evidence on their own behalf, to apply for discretionary relief from removal. Additionally, they have a right of appeal to the Board of Immigration Appeals and typically judicial review in the federal courts.

Individuals undergoing criminal proceedings are notified of the charges pending against them and are given a fair trial. They have a right to be represented by court-appointed counsel if they

cannot afford their own lawyer. They also have the right to request continuances to prepare their defense, to examine the evidence against them, to present evidence on their own behalf, and to appeal any adverse decisions. Detention during the pendency of a criminal proceeding may only occur on the basis of an authorized arrest warrant and subsequent order justifying continued detention. The detainee is entitled to a judicial hearing to determine the lawfulness of such detention.

The laws of the United States permit use of the material witness statute to secure the attendance of witnesses before the grand jury. All persons held as material witnesses are informed of their right to counsel and are provided with counsel at the government's expense if they could not afford their own counsel, for the duration of their detention. Their detention is reviewed by federal judges in the districts in which they are held. By law, the United States Government is prohibited from disclosing to the public information regarding individuals detained on material witness warrants because such information concerns matters occurring before federal grand juries. See Federal Rule of Criminal Procedure 6(e).

For the aforementioned reasons, the Government of the United States respectfully submits that the findings of the Working Group are based on unsubstantiated and false facts, and a fundamental misunderstanding of our laws. These are laws that guarantee fundamental due process rights to all individuals detained on criminal and immigration charges and which require the United States Government to protect the privacy and security of persons in its custody, even while the Government pursues their conviction, removal, or testimony in grand jury proceedings.

c. Military detainees

See A. 2 *supra* and Chapter 18.A.3.

2. International Committee of the Red Cross Conference on the Missing

On February 21, 2003, T. Michael Peay, Legal Adviser, U.S. Mission to the United Nations in Geneva, delivered the

U.S. final statement at the conclusion of the International Committee of the Red Cross conference on persons missing as a result of armed conflict or internal violence, held February 19–21 in Geneva.

His remarks, excerpted below, are available at *www.us-mission.ch/press2003/0221ICRCmissing.html.*

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— The United States is concerned about the range of complex issues relating to "the missing." We take this matter seriously, and we welcome the ICRC's initiative to focus attention on it.

— Americans know from our own experience that families are torn apart by sudden loss of loved ones and by not knowing what has happened to them. For instance.

— There are still American service personnel missing from previous actions dating all the way back to the Korean conflict, World War II, and even earlier; accounting for these missing Americans is of the highest priority to our government. The seriousness with which the United States regards the issue of "the missing" is demonstrated by the significant funding and diplomatic support we have consistently given to the work of the ICRC and the IFRC.

— This Conference represents the culmination of a year's discussion among technical experts from around the world. The "observations and recommendations" emanating from the conference provide a sound basis for reflection and further discussion and dissemination within our respective organizations—and for implementation, where appropriate.

— As the Conference Chairman has noted, the final conference document is not to be considered as legally binding. Accordingly, the Conference did not establish new norms, standards, or obligations regarding international humanitarian and human rights law.

— The Conference, however, did achieve success in raising and broadening awareness about the issue of the "missing".

At the plenary session and, even more so, in the comments made by the technical experts during various panel discussions, a significant number of suggestions were voiced, some of which were aspirational but all of which, of course, will be given due consideration. The discussions over the past three days have clearly enriched our collective understanding and appreciation of the complexity and the human dimension of these problems.

— The final document gives all of us much to consider. Yet, we hasten to emphasize that one of the most important contributions governments can make with respect to the phenomenon of the missing is to fully adhere to their respective obligations under existing international law.

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G. JUDICIAL PROCEDURE, PENALTIES, AND RELATED ISSUES

1. Issues Related to the International Criminal Court in Resolutions of the UN General Assembly, UN Commission on Human Rights, and Organization of American States

For further discussion of U.S. concerns with the International Criminal Court ("ICC"), *see* Chapter 3.C.2.

a. UN General Assembly

UN General Assembly Resolution 196, "Situation of human rights in the Democratic Republic of the Congo," was adopted by vote on December 22, 2003. The United States voted in favor of the resolution, but made a statement recording its views on references to the death penalty and the International Criminal Court in operative paragraph 6. In that paragraph the General Assembly "called upon the Government of National Unity and Transition," among other things,

> (*e*) To reinstate the moratorium on capital punishment and adhere to its commitment to progressively abolish the death penalty;
>
> * * * *
>
> (*g*) To cooperate with the International Criminal Court and to continue to cooperate with the International Tribunal for Rwanda;
>
> The United States had called unsuccessfully for an amendment to paragraph (g) that would have substituted "To comply with its treaty obligations" in place of "To cooperate with the International Criminal Court." The U.S. comments are set forth below.

The U.S. delegation has voted in favor of this resolution as a whole as a demonstration of our continued concerns about the situation of human rights in the democratic republic of Congo, and our wish to see the situation in that conflict-torn nation resolved as soon as possible.

The U.S. has long-standing concerns about the ICC, and our support for this resolution as a whole in no way indicates a change in the U.S. position on the ICC. As proposed in our amendment, we would urge the DROC to simply adhere to its treaty obligations without specific reference to the ICC.

With respect to the death penalty, the U.S. underscores that under the International Covenant on Civil and Political Rights, to which the DROC and the U.S. and many other states are parties, the death penalty may be imposed "only for the most serious crimes" and in accordance with due process guarantees.

b. UN Commission on Human Rights ("UNCHR")

On April 25, 2003, the United States called for a vote and voted no on three paragraphs of a UNCHR resolution, "Impunity," E.CN.4/RES/2003/72. The three paragraphs recognized the establishment of the ICC "as an important

contribution to ending impunity" (PP8), acknowledged "the historic significance of the entry into force of the Rome Statute," (OP 3) and stressed the "importance of the implementation by States parties of their obligations under the Statute" (OP 4). As explained by T. Michael Peay, legal adviser to the U.S. Mission to the United Nations in Geneva:

> . . . as is well known, my government has a number of fundamental concerns with the Rome Statute of the International Criminal Court that prevent the United States from subscribing to the Rome Statute as it is currently drafted. We therefore cannot in good conscience subscribe to certain ICC references found in L. 101, in particular, PP8, OP3, and OP4.

See www.humanrights-usa.net/2003/statements/0425EOVL101.htm.

c. Organization of American States ("OAS")

On June 10, 2003, the General Assembly of the OAS adopted Resolution 1929, "Promotion of the International Criminal Court," AG/RES. 1929 (XXXIII-O-03) and Resolution 1944, "Promotion of and Respect for International Humanitarian Law," AG/RES. 1944 (XXXIII-O/03). The United States requested that its reservations to Resolution 1929 and to two operative paragraphs of Resolution 1944—2.b. (urging member states to consider becoming parties to the Rome Statute) and 9 (inviting states parties to the Rome statute to enact new criminal legislation and "adopt all measures necessary to cooperate effectively" with the ICC)—be placed on the record.

The statement by the delegation of the United States regarding Resolution 1929 is excerpted below. The U.S. statements are available as annexes to Resolutions 1929 and 1944 at *www.oas.org* under "Documents and Reports."

The United States has long been concerned about the persistent violations of international humanitarian law and international human rights law throughout the world. We stand for justice and the promotion of the rule of law. The United States will continue to be a forceful advocate for the principle of accountability for war crimes, genocide and crimes against humanity, but we cannot support the seriously flawed International Criminal Court. Our position is that states are primarily responsible for ensuring justice in the international system. We believe that the best way to combat these serious offenses is to build and strengthen domestic judicial systems and political will and, in appropriate circumstances, work through the United Nations Security Council to establish ad hoc tribunals as in Yugoslavia and Rwanda. Our position is that international practice should promote domestic accountability. The United States has concluded that the International Criminal Court does not advance these principles.

The United States has not ratified the Rome Treaty and has no intention of doing so. . . .

The United States notes that in past decades several member states have reached national consensus for addressing historic conflicts and controversies as part of their successful and peaceful transition from authoritarian rule to representative democracy. Indeed, some of those sovereign governments, in light of new events, evolved public opinion, or stronger democratic institutions, have decided on their own and at a time of their choosing to reopen past controversies. These experiences provide compelling support for the argument that member states–particularly those with functioning democratic institutions and independent functioning judicial systems–should retain the sovereign discretion to decide as a result of democratic and legal processes whether to prosecute or to seek national reconciliation by other peaceful and effective means. The United States is concerned that the International Criminal Court has the potential to undermine the legitimate efforts of member states to achieve national reconciliation and domestic accountability by democratic means.

Our policy on the ICC is consistent with the history of our policies on human rights, the rule of law and the validity of democratic institutions. For example, we have been a major

proponent of the Special Court in Sierra Leone because it is grounded in sovereign consent, combines domestic and international participation in a manner that will generate a lasting benefit to the rule of law within Sierra Leone, and interfaces with the Truth and Reconciliation Commission to address accountability.

The United States has a unique role and responsibility to help preserve international peace and security. At any given time, U.S. forces are located in close to 100 nations around the world, for example, conducting peacekeeping and humanitarian operations and fighting inhumanity. We must ensure that our soldiers and government officials are not exposed to the prospect of politicized prosecutions and investigations. Our country is committed to a robust engagement in the world to defend freedom and defeat terror; we cannot permit the ICC to disrupt that vital mission.

In light of this position, the United States cannot in good faith join in the consensus on an OAS resolution that promotes the Court.

2. Capital Punishment

On October 9, 2003, Francis Gaffney, of the U.S. delegation to the Human Dimension Implementation Meeting, Organization of Security and Cooperation in Europe, exercised the U.S. right of reply on the death penalty.

Mr. Gaffney's statement is set forth below in full and is available at *http://osce.usmission.gov/warsaw/Death_Penalty.pdf.*

We take note of the statements by the EU and a number of other speakers concerning the death penalty in the United States. Dr. Wedgwood spoke on behalf of the United States in some detail at this morning's session regarding the extensive due process protections in place in the event of the use of military commissions at Guantanamo, so I will not revisit that issue here.

As we have frequently noted in OSCE fora, the use of the death penalty in the United States is a decision left to democratically

elected governments at the federal and individual state levels. As speakers here have recognized, while international law requires limiting capital punishment to the most serious crimes and requires certain safeguards, most notably due process, it does not prohibit capital punishment. Within these bounds, 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 expressed and appropriately implemented. In the United States, the Supreme Court has strictly limited the application of the death penalty in a manner that conforms to the international obligations we have accepted.

I want to move on here to address the specific issues speakers have raised today about the imposition of the death penalty in the United States. With respect to the mentally retarded, the U.S. Supreme Court in June 2002 banned the execution of mentally retarded criminals as constituting "cruel and unusual" punishment prohibited by the 8th Amendment to the U.S. Constitution. On the mentally ill, in 1986 the U.S. Supreme Court prohibited the execution of the mentally insane and required an adversarial process for determining mental competency. This is an area of continuing debate, however, as legal definitions and concepts of insanity and competency do not always coincide with medical opinion.

Regarding crimes committed by juveniles: U.S. laws on the execution of juveniles are consistent with international obligations of the United States. When the United States ratified the United Nations International Covenant on Civil and Political Rights (ICCPR), it expressly reserved the right to continue to impose the death penalty for crimes committed by those under the age of 18. The U.S. Supreme Court has drawn a line at age 16, holding that the imposition of the death penalty on offenders beneath that age violates the 8th Amendment of the U.S. Constitution. I would note here that no international consensus has emerged to a sufficient point where application of this standard would be considered a violation of customary international law.

However, I must emphasize here that, as on the world stage, U.S. law on the imposition of the death penalty is in constant ferment. The EU noted today the example of the decision by the Governor of the State of Illinois to commute the death sentences

of all prisoners on death row. I have already mentioned last year's U.S. Supreme Court decision prohibiting the execution of mentally retarded criminals. In August of this year, the Supreme Court of the State of Missouri, citing the U.S. Supreme Court's reasoning in that case, concluded that execution of persons for crimes committed when they were under 18 years of age violates "evolving standards of decency" and is prohibited by the 8th Amendment of the U.S. Constitution. Since the U.S. Supreme Court is the ultimate arbiter on this issue, I imagine this will not be the last word.

But all of the foregoing serves to reinforce something that Ambassador Smith, the head of our delegation, noted in her statement to the opening plenary: Issues such as the imposition of the death penalty continue to be the subject of vigorous and open discussion among the American public. This is the genius of democracy. And, Mr. Moderator, as that debate proceeds, the United States will continue to be mindful of its obligations under international law.

In the UNCHR, the United States called for a vote on paragraph 35(a) of the resolution entitled "Rights of the Child," E/CN.4/RES/2003/86. Paragraph 35(a), among other things, calls upon states "to abolish by law as soon as possible the death penalty for those aged under 18 at the time of the commission of the offence." The paragraph was retained and the United States disassociated itself from consensus. The United States also called for a vote and voted no on the resolution entitled "The question of the death penalty," E/CN.4/RES/2003/67. The resolution was adopted.

3. Strengthening the UN Crime Prevention and Criminal Justice Programs

UN General Assembly Resolution 140, "Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in particular its technical cooperation capacity," A/RES/58/140, was adopted by consensus December 22,

2003. The United States joined consensus, offering the following explanation of its position.

The United States is pleased with the recent and successful completion of the first globally-negotiated anti-corruption treaty. We are also pleased with the recent entry into force of the Convention on Transnational Organized Crime. Fighting corruption and organized crime requires significant international cooperation; these conventions reflect and encourage that cooperation.

However, two operative paragraphs of this resolution urge states to ratify the Conventions on Transnational Organized Crime and Corruption. The United States believes that the General Assembly should limit itself to urging states to "consider" the ratification of conventions. We believe that it is the sovereign right of states to decide whether and when to sign and ratify international conventions.

4. Integrity of the Judicial System

On April 23, 2003, T. Michael Peay, the legal adviser to the U.S. Mission to the United Nations in Geneva, explained the U.S. decision to call for a vote and to vote no on Resolution 2003/39 of the UNCHR, "Integrity of the judicial system." The explanation stressed the role of the international law of armed conflict and that such law is not within the competence of the UNCHR.

The full text of the statement is available at *www.humanrights-usa.net/2003/statements/0423EOVJudicialSystem.htm*.

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The United States supports those provisions of this draft resolution that reflect civil and political rights and obligations owed by the government to the governed in a civil society. However, the resolution addresses matters concerning the international law of armed conflict that are beyond the CHR's competence.

In asserting the right of "everyone" to be tried by ordinary courts or tribunals, and in calling for military courts to be an "integral part of the general judicial system", the draft resolution ignores the Third Geneva Convention of 1949 and Article 75 of Additional Protocol I of 1977 to the Geneva Conventions. (The United States is not a party to Protocol I). Article 84 of the Third Geneva Convention of 1949 expressly creates a presumption that prisoners of war shall be tried only by a military court, unless express conditions for permitting civil court trials are satisfied.

Trial by military courts in times of armed conflict is a common and well-established practice under international law. Thus, calling on States to ensure that their military courts are an integral part of the general judicial system is simply contrary to the international law of armed conflict.

To be sure, there are fundamental procedural safeguards to be followed under the international law of armed conflict in prosecuting enemy combatants in military tribunals.

5. Extrajudicial Killing

A letter from the Permanent Mission of the United States to the UN Office at Geneva to the Secretariat of the UNCHR, dated April 14, 2003, provided the U.S. response to a letter from the special rapporteur on extrajudicial, summary, or arbitrary executions, dated November 15, 2002. E/CN.4/2003/G/80. The April letter provided the view of the United States that the UNCHR and the special rapporteur lack competence to address issues, such as those raised in the November letter, arising under the law of armed conflict, concluding:

> International humanitarian law is the applicable law in armed conflict and governs the use of force against legitimate military targets. Accordingly, the law to be applied in the context of an armed conflict to determine whether an individual was arbitrarily deprived of his or her life is the law and customs of war.

The U.S. letter, set forth below, is available at *www.unhchr.ch/huridocda/huridoca.nsf/Documents?*

OpenFrameset under 59th Session, Correspondence from Governments to UN bodies.

The Government of the United States welcomes the opportunity to respond to the above-mentioned letter inquiring into an incident in the Republic of Yemen on 3 November 2002 and to the Special Rapporteur's findings related to this incident which are found in her report to the fifty-ninth session of the Commission on Human Rights. The letter alleges that a U.S.-controlled Predator drone aircraft killed six men travelling in a car, including at least one individual who was a suspected senior figure of the Al Qaida organization. The letter refers to the protections of the right to life and security of the person and the protection of this right from arbitrary deprivation, as provided by the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights (ICCPR). In her report to the Commission, the Special Rapporteur "acknowledges that Governments have a responsibility to protect their citizens against the excesses of non-State actors or other authorities, but these actions must be taken in accordance with international human rights and humanitarian law. In the opinion of the Special Rapporteur, the attack in Yemen constitutes a clear case of extrajudicial killing."

The Government of the United States has no comment on the specific allegations and findings concerning a November 2002 incident in Yemen, or the accuracy thereof. The Government of the United States respectfully submits that inquiries related to allegations stemming from any military operations conducted during the course of an armed conflict with Al Qaida do not fall within the mandate of the Special Rapporteur.

The United States also disagrees with the premise of the letter and the conclusions contained in the report that military operations against enemy combatants could be regarded as "extrajudicial executions by consent of Governments." The conduct of a government in legitimate military operations, whether against Al Qaida operatives or any other legitimate military target, would be governed by the international law of armed conflict.

It is recalled that immediately following the attacks of September 11, 2001, most of the world, including the United Nations Security Council in resolution 1368 and NATO, condemned these attacks as a "threat to international peace and security," recognized the inherent right of individual and collective self-defense, and expressed determination to combat by all means threats to international peace and security caused by terrorist acts. NATO's North Atlantic Council determined on October 2, 2001, that the September 11th attack was directed from abroad by the world-wide terrorist network of Al Qaida and "shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies of Europe or North America shall be considered an attack against them all." Foreign Ministers of the States Parties to the 1947 Inter-American Treaty of Reciprocal Assistance ("the Rio Treaty"), likewise resolved on September 21, 2001, that "these attacks against the United States are attacks against all American states and that in accordance with all the relevant provisions of the . . . [Rio Treaty] . . . and the principle of continental solidarity, all States Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent."

Consistent with this widely held international view, President Bush stated in Military Order No. 1 of November 13, 2001, that "international terrorists, including members of Al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces."

* * * *

Despite coalition successes in Afghanistan and around the world, the war is far from over. The Al Qaida network today is a multinational enterprise with operations in more than 60 countries. Some Al Qaida operatives have escaped to plan and mount further terrorist attacks against the United States and coalition partners. The continuing military operations undertaken against the United

States and its nationals by the Al Qaida organization both before and after September 11 necessitate a military response by the armed forces of the United States. To conclude otherwise is to permit an armed group to wage war unlawfully against a sovereign state while precluding that state from defending itself.

International humanitarian law is the applicable law in armed conflict and governs the use of force against legitimate military targets. Accordingly, the law to be applied in the context of an armed conflict to determine whether an individual was arbitrarily deprived of his or her life is the law and customs of war. Under that body of law, enemy combatants may be attacked unless they have surrendered or are otherwise rendered hors de combat. Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attack in appropriate circumstances.

For the foregoing reasons, the Commission and Special Rapporteur lacks competence to address issues of this nature arising under the law of armed conflict.

6. Remedies

On August 15, 2003, in Geneva, the United States delivered general comments at the UNCHR consultative session on the proposed "Basic Principles and Guidelines on the Right to a Remedy for Victims of Violations of International Human Rights and Humanitarian Law."

The full text of the general comments, excerpted below, is available at *http://www.us-mission.ch/press2003/1508 Statement%20on%20International%20Humantiarian%20Law.html.*

. . . In an effort to advance the development of the concepts in this document, and with a view to the desirability of consensus adoption and widespread implementation of an instrument whose provisions would be relevant to widely differing domestic legal systems, the United States provides the following general comments and observations.

General Comments

As a preliminary matter, the Principles and Guidelines identified in the document should be properly characterized as aspirational—a non-binding standard of achievement—not as a statement of existing law. The new preambular paragraph 8 is helpful in clarifying this intent and the scope of the Principles, which were just affirmed by Prof. van Boven. However, certain provisions of the document, as drafted, continue to take a categorical approach to the "right to a remedy" as if there is general consensus that these "Guidelines and Principles" constitute customary international law or are an authoritative statement of existing legal obligations. Like other Governments, the United States does not believe this approach is warranted by the general state of international law. Many of these concepts have no basis in custom or in treaty law; indeed, state practice is at times in direct conflict with these Principles.

The title of this document properly identifies its content as including "Principles and Guidelines" on the right to a remedy. At its essence, the document is designed to set benchmarks that are desirable and realistic for States to achieve in implementation of existing human rights obligations and in accordance with their own constitutional and domestic legal framework. As is widely recognized here today, the Principles and Guidelines do not and cannot create legal obligations and, therefore, they should not be drafted or interpreted as if they do. As an example, Principle 5 would need to be revised to reflect its applicability only where States have voluntarily undertaken legal obligations (customarily by treaty) to (1) assert universal or quasi-universal jurisdiction over a specified crime; (2) facilitate extradition or surrender of offenders; or (3) provide other forms of cooperation in the pursuit of international justice. We believe that support for this point with respect to Principles 4 and 5 was voiced in the Conclusions of the Chairperson-Special Rapporteur in his Report on the 2002 Consultative Meeting.

To ensure that the phrasing of the Principles is consistent with their intent and objective, they should not contain words of binding legal obligation (such as "shall"), which are beyond the mandate

of the exercise and create confusion and potential discord with respect to their intended meaning. Consistent use of the word "should" would be a more accurate reflection of their status. Lack of clarity on this issue would only serve to diminish the prospect for widespread acceptance of the instrument.

Second, the United States Government reiterates its firm belief, expressed at earlier stages of review and discussion, that the Principles should not address International Humanitarian Law. By attempting to address both human rights and international humanitarian law ("IHL"), the Principles create conflict in a well-developed area of law conceptually distinct from international human fights law. It is true that many of the principles of humane treatment found in the law of armed conflict find similar expression in human rights law. The well-renowned scholar Jean Pictet, in a treatise on international humanitarian law (cited below, at page 15), stated that: "Indeed, the law of conflicts and human rights have the same origin: they stem from the need to protect the individual against those who would crush him."

Nevertheless, the two systems are quite distinct. Professor Theodor Meron, currently the President of the International Criminal Tribunal for the Former Yugoslavia in The Hague, has written:

> Not surprisingly, it has become common in some quarters to conflate human rights and the law of war/ international humanitarian law. Nevertheless, despite the growing convergence of various protective trends, significant differences remain. Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage. It also permits certain deprivations of personal freedom without convictions in a court of law.

Theodore Meron, The Humanization of Humanitarian Law, 94 A.J.I.L. 239, 240 (2002).

Further as Jean Pictet similarly observed,

> Some writers on human rights thought I was trying to merge human rights and the law of armed conflicts. It would have been absurd to do so. . . . What is important is to recognize that the two fields are interrelated and, conversely, that they are distinct and should remain so. . . . [T]he two legal systems are fundamentally different, for humanitarian law is valid only in the case of an armed conflict while human rights are essentially applicable in peacetime and contain derogation clauses in case of conflict. Moreover, human rights governs relations between the State and its own nationals, the law of war those between the State and enemy nationals.
>
> There are also profound differences in the degree of maturity of the instruments and in the procedures for their implementation. The Geneva Conventions are universal and of a mandatory nature. This is certainly not the case with human rights instruments. The systems of supervision and sanctions are also different. Thus the two systems are complementary, and indeed they complement one another admirably, but they must remain distinct, if only for the sake of expediency.

J. Pictet, Humanitarian Law and the Protection of War Victims pages 14–15 (1975) (emphasis in original).

As a further example of the distinction between the two bodies of law, through international conventions (notably the Geneva Conventions of 1949) and customary international law, international humanitarian law already recognizes various remedies for transgressions, particularly in the context of international armed conflict and regarding state responsibility. Indeed IHL imposes binding legal obligations on States with respect to criminal sanctions, the duty to search for offenders of certain violations, and compensation, which was recognized as an obligation as early as the Fourth Hague Convention of 1907. We are concerned that these non-binding Principles being developed in this forum would be confusing when placed alongside binding international obligations that States Parties to IHL conventions have already undertaken for international armed conflict. (The story differs,

of course, for non-international armed conflict, an important point not adequately addressed in the current document). For example each of the four 1949 Conventions has four articles on sanctions. States Parties undertake therein to take legislative measures "to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches . . . defined in the following article." States Parties have also undertaken the legal obligation to search for the guilty parties and to bring such parties before their own courts or to extradite them.

Additionally, remedies required for a grave breach of the Geneva Conventions are markedly different than those required by a minor breach. These differences of degree have important remedial consequences under IHL, an issue not expressly addressed in the Principles. Accordingly, to avoid creating conflict and ambiguity in an already well-developed area of law, we again recommend that the Principles address human rights law, but not IHL.

Additionally and more fundamentally, the mandate of the Human Rights Commission does not extend to the laws of war and interpretation and implementation of international humanitarian law instruments such as the Geneva Conventions of 1949. The United States strongly opposes the adoption of an instrument, even if non-binding, that would address issues largely outside the jurisdiction and competence of the Commission.

At a minimum, references to humanitarian law principles and norms in the document should be set aside for possible consideration by States at a later date. Such a staged approach would allow States to focus their views on the human rights principles that are at the core of the instrument. This focus would in all likelihood increase the prospects for early consensus on the subject. A staged approach would also permit needed study of the appropriateness of adoption of an instrument containing international humanitarian law principles under the auspices of the Human Rights Commission or another venue such as the ICRC.

Third, the United States Government believes that the Principles would be more effective if they focused on remedies such as access to justice rather than reparations and restitution. While it is appropriate and constructive to discuss or even recommend the potential forms and modalities of reparation, restitution, apology,

tribute, and satisfaction, such forms and modalities are peculiarly shaped by the structure and provisions of domestic law. They may also implicate such sovereign decisions as the modalities and processes of truth and reconciliation commissions. It is therefore recommended that a conceptual distinction be maintained between providing reparations and access to a remedy, with emphasis placed on the latter.

Fourth, the Principles speak in terms of States "obligations" with regard to, inter alia, enforcing international human rights law norms (Principle 1), ensuring consistency between their international legal obligations and domestic law (Principle 2) and providing alleged victims of violations with a remedy such as reparation (e.g. Principles 16 and 21). This language neglects to indicate, that, to the extent a State has undertaken legal obligations, it is generally with regard to human rights violations occurring within its territory and subject to its jurisdiction. International law does not obligate a State to provide, e.g., access to a remedy for a human rights violation that occurred outside the jurisdiction of the State. Nor does it obligate a State to provide access to a remedy for human rights violations committed by other States. A State may choose to provide such access, but it does not have a legal obligation to do so. This should be made clear in the document.

Fifth, we are concerned that the Principles do not make clear they are not intended to affect principles of state responsibility and diplomatic protection. All efforts should be made to preserve the distinction between these two areas of law and human rights law.

The United States Government holds additional general views that are formed by the desire to allow consensus adoption and widespread implementation of an instrument whose provisions would be relevant in widely differing domestic-legal systems. These views include, sixth, support for the Guidelines to cover gross or grave violations of human rights, as suggested in the authorizing resolutions of the Commission on Human Rights on the right to a remedy (e.g. 2003/34, 2002/44, 2000/41, 1999/33, 1998/43). Explanatory Comment 2 to the Principles is very helpful in adopting this approach, but we strongly recommend that this distinction

be expressed in the operative text of the Principles and not just in the comment at the end of the document. Indeed, the Chairperson-Special Rapportuer's Report of the 2002 Consultative Meeting indicated that both the Chair and Professor van Boven suggested that the title of the document include the word "Gross Violations."

Seventh, the United States supports recognition that the Guidelines should cover State actors and not be expanded to cover injury by private individuals who do not act with the authorization, acquiescence or ratification of the State.

* * * *

On April 23, 2003, Steve Solomon of the U.S. delegation to the UNCHR provided the following explanation of the U.S. vote on a resolution entitled "The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms." E/CN.4/RES/2003/34.

The full text of Mr. Solomon's statement is available at *www.humanrights-usa.net/2003/statements/0425EOV.htm*.

The U.S. is prepared to join in the consensus adoption of the resolution . . .

* * * *

— There are, however, some continuing concerns we have regarding the consultative process underlying the resolution.
— In particular, we believe that the process to elaborate a text on this subject has relied too heavily to date on academic experts at the expense of governmental experts. Academic experts can provide valuable advice but the primary work of drafting texts such as the one proposed should be done by governments.
— With this in mind, we wish to stress that the U.S. does not view any one text as the sole basis for discussion at the next consultative meeting.
— Finally, the U.S. understands that although the principles being discussed in the consultative process may in some

cases constitute principles of international law, the process is not intended to elaborate a legally-binding document or new standards. Rather, the text we are working on is intended to be a compilation of existing law.

7. Alien Tort Statute and Torture Victims Protection Act

The Alien Tort Statute ("ATS"), also often referred to as the Alien Tort Claims Act ("ATCA"), was enacted in 1789 and is now codified at 28 U.S.C. § 1350. It currently provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." Over the past several decades, the statute has been interpreted by the federal courts in various human rights cases, beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). It has been used as the basis for suits alleging violations of "specific, universal and obligatory human rights standards which confer fundamental rights upon all people vis-à-vis their own governments." *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied sub. nom. Estate of Marcos v. Hilao*, 513 U.S. 1126 (1995). Courts have upheld jurisdiction under the statute in certain circumstances against a non-state defendant, *e.g., Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996), *cert. denied*, 518 U.S. 1005 (1996). By its terms this statutory basis for suit is available only to aliens.

The Torture Victims Protection Act ("TVPA") was enacted in 1992 and is codified at 28 U.S.C. § 1350 *note*. It provides a cause of action in federal courts for individuals (regardless of nationality, including U.S. nationals) who are victims of official torture or extrajudicial killing against "[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation." The TVPA contains a ten-year statute of limitations.

Litigation is frequently initiated under both statutes and hence judicial opinions often discuss the two together.

a. Scope

(1) Doe v. Unocal

In the fall of 1996, villagers from the Tenasserim region of Myanmar (Burma) sued the Myanmar government, its government-owned oil company, the French company Total S.A., and Unocal (a U.S. company) under the Alien Tort Statute and the Racketeer Influenced and Corrupt Organizations Act ("RICO") alleging liability for international human rights violations (forced labor, murder, rape, and torture) perpetrated by the Myanmar military in furtherance of the construction of an oil pipeline in the Yadana Field. Following dismissal of the actions against the foreign government and the French company, a federal district court granted Unocal's motion for summary judgment, holding that it could not be held liable for the Myanmar government's use of forced labor and that there was insufficient evidence that the company knew that forced or slave labor was in fact being used. *Doe 1 v. Unocal Corp.,* 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

In September 2002 the Court of Appeals for the Ninth Circuit reversed that decision in part and remanded the case to the district court for further proceedings. *Doe 1 v. Unocal*, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002). In February 2003 the Ninth Circuit vacated the appellate decision and granted a motion for rehearing *en banc. Doe 1 v. Unocal*, 2003 U.S. App. LEXIS 2716 (9th Cir. 2003). Accordingly, the previous opinion of the Ninth Circuit panel may not be cited as precedent within the Ninth Circuit (except as it may subsequently be adopted following rehearing). *See Digest 2002* at 343–344. The United States filed a brief *amicus curiae* in support of Unocal in the en banc proceeding, arguing, *inter alia*, that the Ninth Circuit should revisit its ATS case law and hold that the ATS does not create a private right of action, but instead is merely jurisdictional. That case was argued before the court of appeals in June and remained pending at the end of 2003.

Excerpts from the government's amicus brief before the Ninth Circuit follow (footnotes omitted). The full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

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Especially in light of the numerous cases that have recently been litigated in United States courts based on the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), the United States has a substantial interest in the ATS' proper application. The ATS was enacted in 1789, as a jurisdictional provision. It ensures that federal courts may entertain causes of action that are otherwise properly cognizable under the "law of nations" insofar as that law is made part of U.S. law (Art. I, Sec. 8, Cl. 10), or under "a treaty of the United States." It was an obscure provision, which was almost never invoked and which became even less relevant after the enactment of general federal question jurisdiction and the elimination of the amount in controversy requirement.

In recent years, however, the ATS has been commandeered and transformed into a font of causes of action permitting aliens to bring human rights claims in United States courts, even when the disputes are wholly between foreign nationals and when the alleged injuries were incurred in a foreign country, often with no connection whatsoever with the United States.

In recent decisions, panels of this Court have made several fundamental analytical errors regarding the ATS. The Court has construed a statute that on its face merely confers subject matter jurisdiction as also affording an implied private right of action. Recent Supreme Court precedent, however, prohibits finding an implied private right of action in this jurisdictional grant. Moreover, it is clearly error to infer a right of action to enforce unratified or non-self-executing treaties, and non-binding United Nations General Assembly resolutions. Finally, contrary to the long-established presumption against extraterritorial application of a statute, this Court has extended the causes of action recognized under the ATS to conduct occurring wholly within the boundaries of other nations, involving only foreign sovereigns or nationals, and causing no direct or substantial impact in the United States.

Under this new view of the ATS, it has become the role of the federal courts to discern, and enforce through money damage actions, norms of international law from unratified or non-self-executing treaties, non-binding United Nations General Assembly resolutions, and purely political statements. Although often asserted against rogues and terrorists, these claims are without bounds, and can easily be asserted against allies of our Nation. For example, such claims have already been asserted against foreign nationals who have assisted our Government in the seizure of criminals abroad. *See Alvarez-Machain* v. *United States*, 266 F.3d 1045, 1051 (9th Cir. 2001), *vacated and rhg en banc granted*, 284 F.3d 1039 (9th Cir. 2002). This Court's approach to the ATS bears serious implications for our current war against terrorism, and permits ATS claims to be easily asserted against our allies in that war. Indeed, such claims have already been brought against the United States itself in connection with its efforts to combat terrorism. *See Al Odah* v. *United States*, 321 F.3d 1134, 1144–1145 (D.C. Cir. 2003) (ATS claims asserted by aliens detained at the U.S. Naval Base at Guantanamo Bay).

Wide-ranging claims the courts have entertained regarding the acts of aliens in foreign countries necessarily call upon our courts to render judgments over matters that implicate our Nation's foreign affairs. In the view of the United States, the assumption of this role by the courts under the ATS not only has no historical basis, but, more important, raises significant potential for serious interference with the important foreign policy interests of the United States, and is contrary to our constitutional framework and democratic principles.

While the United States unequivocally deplores and strongly condemns the anti-democratic policies and blatant human rights abuses of the Burmese (Myanmar) military government, it is the function of the political Branches, not the courts, to respond (as the U.S. Government actively is) to bring about change in such situations. Although it may be tempting to open our courts to right every wrong all over the world, that function has not been assigned to the federal courts. When Congress wants the courts to play such a role, it enacts specific and carefully crafted rules, such as in the Torture Victim Protection Act of 1991 ("TVPA"),

28 U.S.C. § 1350 note. The ATS, which is a simple grant of jurisdiction, cannot properly be construed as a broad grant of authority for the courts to decipher and enforce their own concepts of international law. Thus, respectfully, the Government asks the Court to reconsider its approach to the ATS.

* * * *

ARGUMENT

I. THE ATS DOES NOT PROVIDE A CAUSE OF ACTION AND DOES NOT PERMIT A COURT TO INFER A CAUSE OF ACTION TO ENFORCE INTERNATIONAL LAW NORMS DISCERNED BY THE COURTS FROM DOCUMENTS SUCH AS UNRATIFIED AND NON-SELF-EXECUTING TREATIES, AND NON-BINDING RESOLUTIONS.

A. The ATS Is Merely A Jurisdictional Provision.

1. It is a fundamental mistake to read the ATS as anything but a jurisdictional provision. *See* Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 479–480 (1986) ("any suggestion that the statute creates a federal cause of action is simply frivolous"). Congress passed this statute as part of the Judiciary Act of 1789. As slightly revised today, the ATS provides:

> [T]he 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.

28 U.S.C. § 1350. "The debates that led to the [Judiciary] Act's passage contain no reference to the Alien Tort Statute, and there is no direct evidence of what the First Congress intended it to accomplish." *Trajano* v. *Marcos*, 978 F.2d 493, 498 (9th Cir. 1992).

* * * *

In *Trajano*, however, this Court held that a court in an ATS action could define and enforce the law of nations as part of its common law powers. *See Trajano*, 978 F.2d at 499–502. Three years later in, *Hilao* v. *Estate of Marcos*, 25 F.3d 1467, 1474–76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995), the Court expressly held for the first time that the ATS itself created a cause of action to enforce the "law of nations." The Court misread *Filartiga* as having so held and simply followed *Filartiga* without independently examining the question.

* * * *

2. By its terms, the ATS vests federal courts with "original jurisdiction" over a particular type of action; it does not purport to *create* any private cause of action. An examination of the Judiciary Act of 1789 strongly supports that view. . . .

Although there is no direct legislative history regarding the ATS, many scholars agree that Congress passed this jurisdictional provision, in part, in response to two high profile incidents of the time concerning assaults upon foreign ambassadors on domestic soil (*Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (1784); *Report of Secretary for Foreign Affairs on Complaint of Minister of United Netherlands*, 34 J.Cont. Cong. 109, 111 (1788)). *See*, *e.g.*, Casto, 18 Conn. L. Rev. at 488–498. These two cases raised serious questions of whether the then-new federal institutions would be adequate to avoid international incidents that could arise if such matters were left to the state courts. *Id.* at 490–494.

At the time, "denial of justice" to one's own citizens abroad was a justification for a country to launch a war of reprisal. E. De Vattel, THE LAW OF NATIONS, bk. II, ch. XVIII, § 350, at 230–231 (Carnegie ed. trans. Fenwick 1916) (1758 ed.). For example, Edmund Randolph commented that, without an adequate federal forum, "[i]f the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender." Letter from Edmund Randolph, Governor, Virginia, to the Honorable Speaker of the House of Delegates (Oct. 10, 1787). James Madison also feared the country's inability to "prevent those

violations of the law of nations & of treaties which if not prevented must involve us in the calamities of foreign wars." 1 M. Farrand, RECORDS OF THE FEDERAL CONVENTION, 316 (1911). Notably, the protection of ambassadors is one of the three classic protections afforded by the law of nations, as given effect in domestic law. William Blackstone explained that "[t]he principal offences against the law of nations as animadverted upon by the municipal laws of England are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy." 4. W. Blackstone, COMMENTARIES, 67–68 (1783).

. . . Thus, the origins of the ATS are consistent with an understanding that it grants the federal courts subject matter jurisdiction over only those claims brought to enforce the "law of nations" insofar as that law has been affirmatively incorporated into the laws of the United States.

Under this understanding of the ATS (and Supreme Court jurisprudence regarding the recognition of causes of actions under federal law), *Congress* must enact a cause of action (or provide a basis for inferring a cause of action). Such causes of action would also fall within the present-day federal question jurisdiction (28 U.S.C. § 1331). While this interpretation may appear to render the ATS superfluous today, it would not have been so in 1789. General federal question jurisdiction was not enacted until nearly 100 years later, in 1875, and until 1980, that jurisdictional grant contained a minimum amount-in-controversy requirement. The courts have recognized that the elimination of the amount-in-controversy requirement in 1980, rendered numerous jurisdictional provisions superfluous.

Accordingly, although the ATS is somewhat of a historical relic today, that is no basis for transforming it into an untethered grant of authority to the courts to establish and enforce (through money damage actions) precepts of international law regarding disputes arising in foreign countries. Moreover, as we discuss next, this Court has erred to the extent that it has permitted ATS actions to proceed based on asserted international norms stemming from documents such as unratified and non-self-executing treaties, and non-binding United Nations General Assembly resolutions.

B. Neither The ATS Itself, Nor International Law Norms, Based On Documents Such As Unratified And Non-Self-Executing Treaties, And Non-Binding UN Resolutions, Provide Any Basis For Inferring A Cause Of Action.

1. International law does not generally provide causes of action enforceable in federal court. *See Tel-Oren*, 726 F.2d at 779 ("the law of nations consciously leaves the provision of rights of action up to the states") (Edwards, J., concurring); *id* at 810 (Bork, J., concurring). *See also* Christenson, *Federal Courts and World Civil Society*, 6 J. Transnat'l L & Policy 405, 511–512 (1997) ("U.S. courts will not incorporate a cause of action from customary international law"). This Court, however, has read the ATS statute as itself providing an implied cause of action to enforce international law norms. Reading the ATS' grant of jurisdiction as a broad implied right of action cannot today be reconciled with the Supreme Court's repeated refusal in recent decisions to recognize implied private causes of action. *See*, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). As the Court emphasized in *Sandoval*, it has "sworn off the habit of venturing beyond Congress's intent" when it comes to recognizing implied private rights. *Sandoval*, 532 U.S. at 287. And the renunciation of that "habit" of inferring private causes of action applies equally to older statutes, such as the ATS. *Ibid*.

Under controlling Supreme Court precedent, a court must focus on whether the statute at issue has "'rights-creating' language." *Sandoval*, 532 U.S. at 288. The ATS is demonstrably a *jurisdiction*-vesting statute. Although it refers to a particular type of claim (*i.e.*, a "civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"), it does not purport to create any particular statutory *rights*, much less rights that in turn could be interpreted to confer a private right of action for money damages. Thus, under the governing analysis established by the Supreme Court, it is plainly erroneous to construe the ATS itself as conferring a private cause of action.

2. Moreover, it is clearly improper to infer a cause of action when the documents relied upon by this Court to discern norms of international law were not themselves intended by that the

Executive or Congress to create rights capable of domestic enforcement through legal actions by private parties.

Although this Court has said that violations of international law "must be of a norm that is specific, universal, and obligatory" to be actionable under the ATS, *Hilao*, 25 F.3d at 1475, the Court has not actually applied those standards. Instead, it has found an implied right of action to enforce rights based upon international agreements that the United States has refused to join, *non*binding agreements, and agreements that are not self-executing, as well as political resolutions of UN bodies and other non-binding statements. *See*, *e.g.*, *Siderman de Blake* v. *Republic of Argentina,* 965 F.2d 699, 714–716 (9th Cir. 1991); *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998); *Alvarez-Machain*, 266 F.3d at 1051. None of these documents is "obligatory" in the sense that is critical for present purposes, because none in itself creates duties or rights enforceable by private parties in court. The Court has erroneously transformed these non-binding, non-self-executing documents—none of which remotely creates a private cause of action—into sources of binding obligatory rights actionable in private suits for damages in federal court.

If the United States refuses to ratify a treaty, or regards a U.N. resolution as non-binding, or declares a treaty not to be self-executing, there obviously is no basis for a court to infer a cause of action to enforce the norms embodied in those materials. *See Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring) (to enforce such agreements "is anti-democratic and at odds with principles of separation of powers"). As to treaties or conventions not ratified by the United States, it is clearly inappropriate for the courts to adopt and enforce principles contained in instruments that the President and/or the Senate have declined to embrace as binding on the United States, or enforceable as a matter of U.S. law through judicially-created causes of action. And, where a treaty is ratified but is not self-executing (as modern human rights treaties have been declared by the President and the Senate not to be), such a treaty neither creates a cause of action nor provides rules that a court may properly enforce in a legal action brought by a private party. As the Supreme Court has held, a non-self-executing treaty "addresses itself to the political, not the judicial department;

and the legislature must execute the [treaty] before it can become a rule for the Court." *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (1987) (emphasis added). Despite this established principle, this Court has, for example, based ATS claims on the International Covenant on Civil and Political Rights ("ICCPR"). *Martinez*, 141 F.3d at 1384; *Alvarez-Machain*, 266 F.3d at 1051–1052. That treaty is non-self-executing, *see*, *e.g.*, *Buell* v. *Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001), and therefore clearly does not itself provide a private cause of action and cannot furnish a basis for a court to infer one.

Furthermore, the labeling of an international law norm, derived from unratified agreements, etc., as "*jus cogens*" violations, *see Siderman de Blake*, 965 F.2d at 714, does not grant any greater legitimacy to judicial enforcement of such norms. Like the other types of perceived international law norms mistakenly enforced by this Court under the ATS, "the content of the *jus cogens* doctrine" * * * emanates from academic commentary and multilateral treaties, even when unsigned by the United States." *Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145, 1155 (7th Cir. 2001). Such sources do not authorize a court to infer a federal cause of action when the political Branches have elected not to use their powers to create one. *See* Christenson, *supra*, 6 J. Transnat'l L & Policy at 485 ("courts in the United States have uniformly rejected application of an asserted *jus cogens* norm as the sole basis for a cause of action."). *Cf. Blankenship* v. *McDonald*, 176 F.3d 1192, 1195 (9th Cir. 1999) (a *Bivens* cause of action should not be recognized where "congressional action has not been inadvertent in providing certain remedies and denying others to judicial employees").

This Court's approach of looking to unratified agreements to discern the "law of nations" under the ATS cannot be squared with the text of the ATS, which refers to both "treaties of the United States" and the "law of nations." The obvious import of the reference to treaties is that an international agreement must be a *ratified* treaty of the United States, receiving the advice and consent of the Senate, *before* it could be subject to enforcement in a private suit resting on the jurisdiction of the ATS (assum-

ing further that the treaty confers a private right of action, *see* pp. 15–16 n.7, *supra*). This Court, however, has erroneously construed the ATS to imply a cause of action to enforce such norms even where the Executive and Congress have declined to embody the norms in a binding or domestically enforceable law or treaty.

For example, in *Alvarez-Machain*, *supra*, a panel of this Court allowed a claim for a transborder arrest authorized by the U.S. Government even though "no international human rights instruments [even] refers to transborder abduction specifically." 266 F.3d at 1051. The panel erroneously relied upon, *inter alia*, general provisions of the Universal Declaration of Human Rights (a non-binding resolution of the General Assembly of the United Nations), the American Convention on Human Rights (which the Senate *refused* to ratify), and the ICCPR (a non-self-executing treaty). *Id.* at 1051–1052. These documents plainly do not create domestically enforceable *rights*. A court cannot properly find enforceable rights in the American Convention on Human Rights, where the Senate has refused to ratify that convention. And even as to the ICCPR, which is a treaty, when ratified by the United States, the Senate and the Executive Branch (as it has with other modern human rights treaties) expressly agreed that it would *not* be self-executing and may *not* be relied upon by individuals in domestic court proceedings. *See* S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070–71 (Apr. 2, 1992). It is flatly inconsistent with that decision of the political Branches for a court to infer a cause of action to enforce the terms of the agreement.

In certain areas, of course, a court, in connection with a matter already properly pending before it, may properly look to norms of international law to furnish a rule of decision, *e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900). That is very different from a court's inferring a cause of action as an initial matter based on international law. But even where a court may properly look to international law norms, it does so only *in the absence* of a "controlling executive or legislative act * * *." *The Paquete Habana*, 175 U.S. at 700. A ratified treaty accompanied by an express declaration that it is not self-executing is plainly such a

controlling act. Similarly, the existence of a treaty or convention that has been ratified by some nations and even signed by the United States (but not yet ratified) falls in the same category, because the political Branches have taken the matter fully in hand, but not yet taken the necessary steps to make the treaty binding on the United States; the treaty therefore cannot properly be relied upon in our courts as a source of the law of nations. And United Nations General Assembly resolutions are (with narrow exceptions) not binding on the member nations, and require further action by the member states before they can create any enforceable rights. *See* G. Schwarzenberger & E.D. Brown, A Manual of International Law 237 (1976). The actions or inactions of the political Branches with respect to those instruments must be deemed dispositive with respect to what effect they have on the law of nations to be applied within the United States. Thus, it is plainly wrong to infer a cause of action to enforce such documents in a suit for damages when the political Branches have elected not to do so.

3. Even beyond the general prohibition against judicial inferring of a cause of action, there are additional compelling reasons against inferring a cause of action (or creating common law causes of action to enforce international law norms) when the political Branches have not done so. In other contexts, courts refuse to infer causes of action where they implicate matters that by their nature should be left to the political Branches. *See FDIC* v. *Meyer*, 510 U.S. 471, 486 (1994). Matters that implicate international affairs are the quintessential example of a context where a court may not infer a cause of action. Permitting such implied causes of action under the ATS infringes upon the right of the political Branches to exercise their judgment in setting appropriate limits upon the enforceability or scope of treaties and other documents.

The Supreme Court has long recognized that the Constitution commits "the entire control of international relations" to the political Branches. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705 (1893). *See Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918) ("[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments."). It is the "plenary and exclusive

power of the President as the sole organ of the federal government in the field of international relations" to decide the "important complicated, delicate and manifold problems" of foreign relations. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936). Because the Constitution has so committed the power over foreign affairs, the Supreme Court has strongly cautioned the courts against intruding upon the President's exercise of that authority. *See ibid.* Indeed, the Supreme Court has recognized that foreign policy are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chicago & So. Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948).

Despite this instruction from the Supreme Court, the types of claims that are being asserted today under the ATS are fraught with foreign policy implications. They often involve our courts in deciding suits between foreigners regarding events that occurred within the borders of other nations, and in the exercise of foreign governmental authority. The ATS has been wrongly interpreted to permit suits requiring the courts to pass factual, moral, and legal judgment on these foreign acts. And, under this Court's approach, ATS actions are not limited to rogues and outlaws. As mentioned above, such claims can easily be asserted against this Nation's friends, including our allies in our fight against terrorism. A plaintiff merely needs to accuse a defendant of, for example, arbitrary detention to support such a claim. Indeed, that approach has already permitted an alien to sue foreign nationals who assisted the United States in its conduct of international law enforcement efforts. *See Alvarez-Machain*, 266 F.3d at 1051. As noted above, this Court's approach to the ATS therefore bears serious implications for our current war against terrorism, and permits ATS claims to be asserted against our allies in that war. Notably, such claims have already been brought against the United States itself in connection with its efforts to combat terrorism. *See Al Odah* v. *United States*, *supra*.

As interpreted by this Court in previous decisions, the ATS thus places the courts in the wholly inappropriate role of arbiters of foreign conduct, including international law enforcement. Where Congress wishes to permit such suits (*e.g.*, through the TVPA), it has done so with carefully prescribed rules and procedures.

The ATS contains no such limits and cannot reasonably be read as granting the courts such unbridled authority.

4. Moreover, while Congress can and has created specific offenses, such as piracy, in reference to the "Law of Nations," *see Ex Parte Quirin*, 317 U.S. 1, 30 (1942), it is error to read the ATS' reference to the "law of nations" as granting the judiciary the wholesale power, without direction from the legislature, to define and enforce customary international law through civil damage actions. There is no basis for holding that, by referencing the "law of nations" in the ATS, Congress must have intended to permit the Judicial Branch to engage in a free-wheeling exercise to develop its own views of "customary international law," based on sources that are neither law nor customary, such as unratified treaties and other non-binding documents.

In some instances a court can, as we have noted, look to international law where "questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. at 700. That principle does not, however, lead to the conclusion that international law provides a private cause of action to be pursued under the ATS. Even where international law norms are considered part of federal common law (*e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964)), they do not supply a private right of action. *See Tel Oren*, 726 F.2d at 811 (Bork, J. concurring) ("[t]o say that international law is part of federal common law * * * is not to say that, like the common law of contract and tort, for example, by itself it affords individuals the right to ask for judicial relief").

Those supporting an expansive view of the ATS might nevertheless argue that a federal court can enforce international law under the ATS just as it enforces admiralty law under its common law powers. It has been long understood, however, that "the body of admiralty law referred to in Article III did not depend on any express or implied legislative action. Its existence, rather, preceded the adoption of the Constitution." *R.M.S. Titanic, Inc.* v. *Haver*, 171 F.3d 943, 960 (4th Cir. 2000). *See also The American Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 544–545 (1828). The Framers drafted Article III with this full body of maritime law "clearly in view." *R.M.S. Titanic*, 171 F.3d at 960.

Thus, the reference in Article III to "all Cases of admiralty and maritime Jurisdiction" has been read as authorizing "the federal courts to draw upon and to continue the development of the substantive, common law of admiralty when exercising admiralty jurisdiction." *Id.* at 961. *See also United States* v. *Flores*, 289 U.S. 137, 148 (1933) (Section 2 of Article III "has been consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies").

Admiralty law is thus manifestly unique and does not support reading the ATS as granting the courts common law authority to create implied causes of action enforcing vague concepts of international law through an ATS claim. Notably, there is no similar express grant in Article III for the general enforcement of the Law of Nations, as there is for admiralty law. Rather, the power to define and legislate causes of actions regarding Law of Nations offenses is assigned to Congress under Article I. *See* Art. I, Sec. 8, Cl. 10. Nor, unlike the admiralty law situation, was there a pre-constitutional history of more than 1,000 years of specialized courts enforcing international law norms relating to human rights.

C. The TVPA Also Does Not Support Inferring A Cause Of Action Under The ATS.

In embracing an expansive view of the ATS, some courts have asserted that Congress ratified *Filartiga* and its progeny when it enacted the Torture Victim Protection Act. *See* Goodman & Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463, 514 (1997). The TVPA expressly provides a cause of action for damages to persons who suffered torture at the hands of any individual acting under the law of any foreign nation. *See* 28 U.S.C. § 1350 note.

In reporting on the TVPA, the Senate Committee did observe that the TVPA would provide "an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 * * * which permits Federal district courts to

hear claims by aliens for torts committed in violation of the law of nations." S. Rep. 102–249 at 4 (1991). The report noted that the "*Filartiga* case has met with general approval," but also recognized that at "least one Federal judge, however, has questioned whether section 1350 can be used * * * absent an explicit grant of a cause of action by Congress." *Id*. 4–5. The report stated that the TVPA was not intended to displace Section 1350, and concluded that the latter "should remain intact." *Id* at 5. *See also* H.R. Rep. No. 102–367 at 4 (1991).

Based on these *1991* legislative statements regarding a statute enacted in *1789*, some have argued that, regardless of the best reading of the ATS or of the original validity of *Filartiga*, the TVPA evidences Congressional approval of reading the ATS to provide a cause of action. A Congressional committee statement in 1991 about the meaning of the ATS, however, is obviously of no value in discerning the intent of Congress in *1789*. In a similar context, the Supreme Court recently refused to look to legislative history from 1986 setting forth "a Senate Committee's (erroneous) understanding of the meaning of the statutory term enacted some 123 years earlier." *Vermont Agency of Natural Resources* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000). As Judge Randolph explained, "the wish expressed in the committee's statement [about the TVPA] is reflected in no language Congress enacted; it does not purport to rest on an interpretation of § 1350; and the statement itself is legislative dictum." *Al Odah*, 321 F.3d at 1146 (Randolph, J., concurring).

II. NO CAUSE OF ACTION MAY BE IMPLIED BY THE ATS FOR CONDUCT OCCURRING IN OTHER NATIONS.

This Court has further compounded the significance of its erroneous application of the ATS by inferring causes of actions for acts occurring within other nations. Even if the ATS could be read to imply (or permit the implication) of a cause of action, it cannot be construed to have that effect in the territory of other nations. Unless expression to the contrary is found within a federal

statute, that statute is presumed to apply only within the territory of the United States, or, in limited circumstances, on the high seas. *See Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284–285 (1949). This presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991). It dates back to the time the ATS was enacted. Its earliest express application by the Supreme Court is found in *United States* v. *Palmer*, 16 U.S. 610 (1818), where the Court held that a federal piracy statute should not be read to apply to foreign nationals on a foreign ship. *Id.* at 630–31.

Nothing in the ATS or in its contemporaneous history suggests an intent on the part of Congress that it would furnish a foundation for suits based on conduct occurring within other nations. Notably, the only reported cases where courts mentioned the ATS after its recent enactment both involved *domestic* incidents—the capture of a foreign ship in U.S. territorial waters and seizure of slaves on a ship at a U.S. port. *See Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793); *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795). Moreover, Attorney General Bradford, while noting the availability of ATS jurisdiction for offenses on the high seas in 1795, also explained that insofar "as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts." *See* 1 Op. Att'y Gen. 57, 58 (1795).

As discussed above, many commentators believe that Congress passed the ATS in part to respond to two high profile incidents concerning assaults upon foreign ambassadors *on domestic soil*. *See* pp. 9–10, *supra*. Congress enacted the ATS because it wanted to ensure a federal forum so that traditional international law offenses (assaults against ambassadors and interference with the right of safe conduct) committed in this country were subject to proper redress. The point of the ATS was to *avoid* conflict with other countries.

That logic does not support expanding the ATS to encompass claims arising in other nations. Other nations did not in 1789 (and certainly do not today) expect our courts to provide civil remedies for disputes between their own citizens (or involving

third-country nationals) that occur on their own soil. *See* THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, Fitzpatrick, ed., Letter of George Washington to James Monroe, August 25, 1796 ("no Nation had a right to intermeddle in the internal concerns of another") (available at *http://memory.loc.gov/ammem/gwhtml/gwhome.html)*; *United States* v. *La Juene Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822) (Story, J.) ("No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns"). To the contrary, litigating such disputes in this country can itself lead to objections from the foreign nations where the alleged injury occurred. "[T]hose who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations * * *. A broad reading of section 1350 runs directly contrary to that desire." *Tel-Oren*, 726 F.2d at 812 (Bork, J.).

* * * *

(2) Flores v. Southern Peru Copper Corporation

Residents of Peru brought personal injury claims in the Southern District of New York against a copper mining company (a U.S. company indirectly owned by a Mexican corporation) alleging that the defendant's mining, refining and smelting operations in Peru produced noxious emissions into the air and water that were responsible for serious respiratory illnesses. Defendant Southern Peru Copper Company sought to dismiss the complaint for lack of subject matter jurisdiction, arguing that plaintiffs had failed to allege a violation of customary international law, and on the grounds of *forum non conveniens*. In July 2002 the district court agreed that plaintiffs had not pleaded a violation of any cognizable principle of customary international law. *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510 (S.D.N.Y. 2002); *see Digest 2002* at 344–345. This decision was upheld by the

Second Circuit Court of Appeals in August 2003 on the grounds that the rights to life and health are "insufficiently definite" as to form binding rules of customary international law capable of adjudication under the statute. *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

Tracing the history of litigation under the Alien Tort Statute since its decision in *Filartiga*, the court of appeals noted the continuing debate over the meaning and scope of that law, and in particular whether it creates a cause of action or is merely jurisdictional. In the Second Circuit, it concluded, the answer is clear: the ATS "permits an alien to assert a cause of action in tort for violations of a treaty of the United States and for violations of 'the law of nations,' which, as used in this statute, refers to the body of law known as customary international law." The difficult question is to determine which specific offenses violate customary international law. The court explained the analysis as follows:

> First, in order for a principle to become part of customary international law, States must universally abide by it. . . . Of course, States need not be universally successful in implementing the principle in order for a rule of customary international law to arise. If that were the case, there would be no need for customary international law. But the principle must be more than merely professed or aspirational.
>
> Furthermore, a principle is only incorporated into customary international law if States accede to it out of a sense of legal obligation. . . . Practices adopted for moral or political reasons, but not out of a sense of legal obligation, do not give rise to rules of customary international law. . . .
>
> Finally, customary international law addresses only those "wrong[s]" that are "of *mutual*, and not merely *several*, concern" to States. . . . Matters of "mutual" concern between States are those involving States' actions "performed . . . towards or with regard to the other," . . . Matters of "several" concern among States

> are matters in which States are separately and independently interested. Even if certain conduct is universally proscribed by States in their domestic law, that fact is not necessarily significant or relevant for purposes of customary international law.

After reviewing the sources and evidences of customary international law, the court rejected plaintiffs' argument that claims of "shockingly egregious" tortious behavior were sufficient to meet the statutory standard.

With respect to plaintiffs' specific allegations, the court concluded that the rights to life and health, as reflected in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Rio Declaration on Environment and Development, are "insufficiently definite to constitute rules of customary international law." The court's analysis is excerpted below.

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* * * *

These principles are boundless and indeterminate. They express virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them. But in the words of a sister circuit, they "state abstract rights and liberties devoid of articulable or discernable standards and regulations." *Beanal,* 197 F.3d at 167. The precept that "[h]uman beings are . . . entitled to a healthy and productive life in harmony with nature," Rio Declaration, Principle 1, 31 I.L.M. 874, for example, utterly fails to specify what conduct would fall within or outside of the law. Similarly, the exhortation that all people are entitled to the "highest attainable standard of physical and mental health," International Covenant on Economic, Social, and Cultural Rights, Art. 12, 993 U.N.T.S. 3, proclaims only nebulous notions that are infinitely malleable.

In support of plaintiffs' argument that the statements and instruments discussed above are part of customary international law, plaintiffs attempt to underscore the universality of the

principles asserted by pointing out that they "contain *no limitations as to how or by whom these rights may be violated.*" Pls.' Br. at 10 (emphasis added). However, this assertion proves too much; because of the conceded absence of any "limitations" on these "rights," they do not meet the requirement of our law that rules of customary international law be clear, definite, and unambiguous.

For the foregoing reasons, plaintiffs have failed to establish the existence of a customary international law "right to life" or "right to health."

* * * *

In addition, the court concluded, plaintiffs failed to submit sufficient evidence to establish that customary international law prohibits "*intra*national" pollution. None of the "voluminous documents" or affidavits of international law scholars referring variously to treaties, General Assembly resolutions, other "multinational declarations of principle" and decisions of multinational tribunals, convinced the court of the existence of any such norm of customary international law:

> Plaintiffs argue that all of the items of evidence they have submitted, when taken together, prove that local environmental pollution violates customary international law. However, because each of the instruments and affidavits plaintiffs rely on provides *no* evidence that intranational pollution violates customary international law, plaintiffs' claims fail whether these instruments and affidavits are considered individually or cumulatively. . . . Because plaintiffs have failed to submit evidence sufficient to establish that intranational pollution violates customary international law, the district court properly granted defendant's motion to dismiss.

(3) Estate of Valmore Lacarno Rodriguez v. Drummond

The District Court for the Northern District of Alabama has held that denial of the internationally recognized rights to associate and organize may constitute an actionable tort

under the ATS. *Estate of Valmore Lacarno Rodriguez v. Drummond*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003). In that case, relatives and heirs of several murdered Colombian trade union leaders, as well as the labor union of which they were members, alleged that an American company which conducted mining operations in Colombia was complicit in the actions of paramilitary groups that killed the organizers on their way home from the defendants' mine. The court rejected defendants' motion to dismiss the union's claims for extra-judicial killing and for denial of the fundamental rights to associate and organize.

Specifically, plaintiffs asserted claims of extra-judicial killing, denial of fundamental rights to associate and organize, wrongful death, and aiding and abetting. They claimed that defendants were jointly and severally liable for the murder of the three organizers by paramilitaries of the United Self-Defense Forces of Colombia ("AUC") because those paramilitaries were acting as defendants' agents. Defendants were said to have allowed AUC paramilitaries to enter their mining facilities in Colombia because the paramilitaries are "in a cooperative and symbiotic relationship with the regular [Colombian] military that are stationed on Drummond's property." In addition, plaintiffs alleged that the paramilitaries that actually killed two of the victims stated that "they were there to settle a dispute that [the two victims] had with Drummond." At the time of their death, the victims were in the midst of contract negotiations on behalf of Drummond employees with Drummond, Ltd.

Responding to the defendants' contention that the rights to associate and organize are not "well-established, universally recognized" norms of international law, the district court explained its preliminary conclusion that those rights are part of customary international law, as set forth below. For a decision reaching the opposite conclusion, *see* a.(6)(vi) below.

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In *Aquamar S.A., v. Del Monte Fresh Produce, N.A.,* 179 F.3d 1279, 1295 (11th Cir.1999), the Eleventh Circuit described the process of ascertaining customary international law as follows:

> We look to a number of sources to ascertain principles of international law, including international conventions, international customs, treatises, and judicial decisions rendered in this and other countries. *See* Malcolm N. Shaw, International Law 59 (1991) (citing article 38(1) of the Statute of the International Court of Justice); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) ("In ascertaining and administering customary international law, courts should resort to 'the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators.' ") (quoting *The Paquete Habana,* 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900)).

"Courts label a rule as customary international law, only if the rule is both (a) accepted by a 'generality' of states and (b) accepted by them as law (i.e., a 'sense of legal obligation')." *Estate of Winston Cabello,* 157 F.Supp.2d at 1359 (citing Hiram E. Chodosh, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 Tex. Int'l L.J. 87, 89 (1991) (citing Restatement (Third) of the Foreign Relations Law of the United States, § 102(2) (1987)) (defining customary law as "a general and consistent practice of states followed by them from a sense of legal obligation")); *see also Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 796 (D.C.Cir. 1984) (defining "law of nations" as "the principles and rules that states feel themselves bound to observe, and do commonly observe") (internal citation omitted).

Although this court recognizes that the United States has not ratified ILO Conventions 87 and 98, the ratification of these conventions is not necessary to make the rights to associate and organize norms of customary international law. As stated above, norms of international law are established by general state practice and the understanding that the practice is required by law. Restatement (Third) of the Foreign Relations Law of the United

States, § 102 (1987). In addition, treaties and judicial decisions by international tribunals can embody customary international law. *See Ford v. Jose Guiillermo Garcia*, 289 F.3d 1283, 1293 (11th Cir.2002) (using International Claims Tribunal for the Former Yugoslavia and recent decision by International Claims Tribunal for Former Yugoslavia as "the most recent indicia of customary international law"); *Estate of Winston Cabello*, 157 F. Supp. 2d at 1359 (finding that treaties can constitute customary international law).

Article 22 of the ICCPR clearly states that the rights to associate and organize are fundamental rights. The United States and Colombia have ratified the ICCPR. Many international laws, such as the ICCPR, are not self-executing, *United States v. Duarte-Acero,* 208 F.3d 1282, 1284 n. 8 (11th Cir. 2000) (citing 138 Cong. Rec. S4781, S4783 (daily ed. Apr. 2, 1992)), and thus require implementing legislation, such as the ATCA, for federal courts to enforce these laws and the rights within them. *Estate of Winston Cabello*, 157 F.Supp.2d at 1359 (citing *Duarte-Acero*, 208 F.3d at 1284 n. 8) (internal citations omitted). The rights to associate and organize are reflected in the ICCPR, the Universal Declaration of Human Rights, and Conventions 87 and 98 of the ILO.

This court is cognizant that no federal court has specifically found that the rights to associate and organize are norms of international law for purposes of formulating a cause of action under the ATCA. However, this court must evaluate the status of international law at the time this lawsuit was brought under the ATCA. *Filartiga*, 630 F.2d at 881. After analyzing "international conventions, international customs, treatises, and judicial decisions rendered in this and other countries" to ascertain whether the rights to associate and organize are part of customary international law, this court finds, *at this preliminary stage in the proceedings*, that the rights to associate and organize are generally recognized as principles of international law sufficient to defeat defendants' motion to dismiss. *Aquamar S.A., v. Del Monte Fresh Produce, N.A.*, 179 F.3d 1279, 1295 (11th Cir. 1999). Having reluctantly found that the fundamental rights to associate and organize support actionable torts under the ATCA, the court

next addresses whether the union sufficiently pled state action to create subject matter jurisdiction under the ATCA for the union's claim in Count Three.

* * * *

The district court in *Lacarno Rodriguez* also found that, in asserting that some of the paramilitaries who murdered the union leaders had been dressed in Colombian military uniforms and were in fact members of the Colombian military, and more generally that the paramilitaries had acted "within the course and scope of a business relationship with Defendants with the advance knowledge, acquiescence, or subsequent ratification of Defendants," the plaintiffs had in fact adequately alleged the necessary element of "state action" as set forth *inter alia* in *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000) ("'Color of law' jurisprudence of 42 U.S.C. 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act.").

In addition, the court rejected defendants' contention that the TVPA applies only to individuals, not to corporations. Acknowledging that one court had so concluded (*see Beanal v. Freeport-McMoRan, Inc.,* 969 F. Supp. 362, 382 (E.D.La. 1997)), the court noted that another court had more recently reached the opposite result (*see Sinaltrainal v. The Coca Cola Co.* in (4) below).

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The *SINALTRAINAL* court gave three primary reasons for its conclusion that Congress did not intend to exclude corporations from the TVPA. First, the court noted that "[t]he Senate Judiciary Report explains that the purpose of the TVPA is to permit suits 'against persons who ordered, abetted, or assisted in torture.'" Slip Op. at 17 (quoting S.Rep. No. 249, 102d Cong., 1st Sess. (1991) (1991 WL 258662, *9–10)). Second, the court noted that the Senate Judiciary Report does not mention any exemptions for

corporations and that courts have held corporations liable for violations of international law under the ATCA. Slip Op. at 17. Third, the court found persuasive the Supreme Court's holding in *Clinton v. New York*, 524 U.S. 417, 428, n. 13 (1998), that the term "individual" is synonymous with the term "person," and that the term "person" often has a broader meaning in the law than in ordinary usage. Slip Op. at 17. Because "a corporation is generally viewed the same as a person in other areas of law," the *SINTRAINAL* court concluded that if Congress intended to exclude corporations from the TVPA, Congress would have explicitly done so. Slip Op. at 17. Thus, because Congress failed to explicitly exclude corporations from the TVPA and because corporations can be sued under the ATCA, the *SINTRAINAL* court found that TVPA claims could be brought against private corporations. Slip Op. at 17.

This court follows the reasoning set forth in *SINTRAINAL* and finds that the plaintiff union can assert a TVPA [claim] against the corporate defendants. The court concludes that because corporations can be sued under the ATCA and Congress did not explicitly exclude corporations from liability under the TVPA, private corporations are subject to liability under the TVPA. Thus, because Drummond Co., Inc. and Drummond Ltd. are "individuals" under the TVPA, the union can assert TVPA claims against these entities.

* * * *

Finally, the court determined that under the TVPA, plaintiffs need not plead the exhaustion of local remedies. Noting that Section 2(b) of the TVPA states that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred," the court determined that defendants bear the burden of demonstrating that the union has not exhausted adequate and available remedies under Colombian law, citing *Wiwa v. Royal Dutch Petroelum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002) and *Sinaltrainal.*

(4) Sinaltrainal v. Coca-Cola

In *Sinaltrainal v. Coca-Cola Company*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003), discussed in (3) *supra*, the district court dismissed, for lack of jurisdiction under the ATS, a complaint seeking to hold the defendant liable for the murder of a local labor union leader by paramilitary forces in Colombia. The complaint alleged that in December 1996 members of a paramilitary unit shot the decedent, a leader in the Sinaltrainal union, because he had been attempting to organize employees at a Coca-Cola U.S.A. bottling plant in Carepa, Colombia. While the paramilitaries were said to have been acting in their "private" capacities, and as "hired guns" or agents of the defendant company's local subsidiary, it was also alleged that they acted under color of Colombian law, with significant assistance from the Colombian military and police. Such allegations were insufficient, the court said, to establish that the act in question was a "war crime," and since there was no evidence that Coca-Cola had acted in furtherance of a joint action or conspiracy with the paramilitaries, plaintiffs could not prove that they had violated international law by participating in the murder. The Alien Tort Statute claims against the Coca-Cola defendants were therefore dismissed.

The court also held that the TVPA, while creating a private cause of action for torture and extrajudicial killing perpetrated by individuals acting under the color of law of any foreign state, does not itself confer jurisdiction. Rather, the court said, claims under the TVPA could be entertained "only if they fall within the jurisdiction conferred by the ATCA." For that reason, claims under the TVPA against the Coca-Cola defendants in this case were also dismissed.

(5) Alvarez-Machain v. United States

As discussed in *Digest 2001* at 326–334, in 1993 Dr. Alvarez-Machain sued the U.S. Drug Enforcement Administration, certain U.S. government officials, and Mexican citizens for

claims arising from his detention in Mexico in 1990 and transportation to the United States for trial on charges connected with his alleged involvement in the murder of DEA Special Agent Enrique Camarena-Salazar in Guadalajara, Mexico in 1985. In 2001 the Ninth Circuit held that Dr. Alvarez-Machain could sue the United States for false arrest under the Federal Tort Claims Act (reversing dismissal of those claims by the lower court), and affirmed summary judgment for Alvarez-Machain on his ATS claims against Jose Francisco Sosa, a Mexican national. *Alvarez-Machain v. United States of America*, 266 F.3d 1045 (9th Cir. 2001). In 2002 the U.S. Court of Appeals for the Ninth Circuit granted rehearing *en banc*. *See Alvarez-Machain v. United States*, 284 F.3d 1039 (9th Cir. 2002).

In a decision filed June 3, 2003, the court of appeals, sitting *en banc*, withdrew the initial panel decision and issued a decision reaching the same result as the initial panel, affirming "the judgment with respect to [petitioner] Sosa's liability under the [ATS]" and "revers[ing] and remand[ing] the FTCA claims against the United States." *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003). Subsequently, the U.S. Supreme Court granted writs of *certioriari* to the Ninth Circuit filed by both Sosa and the United States. *Sosa v. Alvarez-Machain*, 124 S.Ct. 807 (2003); *United States v. Alvarez-Machain*, 124 S.Ct. 821 (2003).

In its *en banc* decision in June 2003, the Ninth Circuit addressed only the question whether Dr. Alvarez-Machain was entitled to a remedy at law under the Alien Tort Statute (and under the Federal Tort Claims Act) for a violation of the "law of nations." The court answered in the affirmative, finding that the DEA had no authority to effect Alvarez's arrest and detention in Mexico.

At the outset, the appellate court rejected the argument that only violations of *jus cogens* norms, as distinguished from violations of customary international law, are sufficiently "universal" and "obligatory" to be actionable as violations of "the law of nations" under the ATS ("to restrict actionable violations of international law to only those claims that fall

within the categorical universe known as *jus cogens* would deviate from both the history and text of the ATCA.") Nonetheless, it said, Dr. Alvarez-Machain lacked standing to obtain redress for claims based on an alleged violation of Mexico's sovereignty. "To allow state-on-state injuries like the one Alvarez alleges here to be vindicated by a third party not only would read too much into the ATCA, but would lead to the judiciary's intrusion into matters that are appropriately reserved for the Executive branch." Moreover, the court found that because a human rights norm recognizing an individual's right to be free from transborder abductions has not reached a status of international accord sufficient to render it "obligatory" or "universal," it cannot qualify as an actionable norm under the ATCA.

Unlike transborder arrests, the court stated, "a clear and universally recognized norm prohibiting arbitrary arrest and detention" does exist, and under that norm, the arrest and detention of Alvarez were arbitrary and in violation of the law of nations. As a matter of statutory interpretation, the court held that U.S. law enforcement agents lacked authority under the relevant U.S. domestic statutes to effect his extraterritorial arrest and detention in Mexico ("a federal arrest warrant, without more, hardly serves as a license to effectuate arrests worldwide"). Lacking a basis in domestic law, the court concluded, Alvarez's arrest and hence his detention were arbitrary because they were not "pursuant to law" so that Alvarez had established a tort committed in violation of the law of nations for purposes of jurisdiction under the ATS.

In September 2003 the United States filed a brief in support of Sosa's petition for a writ of certiorari from the Supreme Court to the Ninth Circuit in this case. *Sosa v. Alvarez-Machain*, No. 03-339. The full text of that brief is available at *www.usdoj.gov/osg/briefs/2003/oresponses/2003-0339.resp.html*. The government contended, as in *Doe v. Unocal*, *supra*, that, properly interpreted, the ATS is a jurisdiction-granting provision that does not establish private rights of action. In any event, the United States argued, the

challenged arrest in this case was not actionable under the ATS. Noting that the Supreme Court has never addressed the scope of the ATS, and considering the sharp disagreement among the lower courts over the issue, which presents "profound separation-of-powers implications and serious consequences for both the development and expression of the Nation's foreign policy," the government urged the Court to grant the petition and resolve the questions concerning the proper scope and application of the ATS.

The government further urged the Court to address the Ninth Circuit's holding with regard to the authority of domestic law enforcement authorities to conduct arrests abroad, which it said "threatens the government's ability to conduct necessary law enforcement operations abroad in its efforts to combat terrorism, international crime, and the flow of illegal drugs into the United States." This issue was addressed in the separate government petition for certiorari seeking review of the Ninth Circuit's judgment in this case, under docket No. 03-485, *United States v. Alvarez-Machain*, filed in October 2003, available at *www.usdoj.gov/osg/briefs/2003/2pet/7pet/2003-0485.pet.aa.html*.*

(6) Other cases

(i) In *Presbyterian Church of Sudan v. Talisman Energy*, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003), current and former residents of Sudan brought a class action under the ATS alleging that Talisman, a Canadian energy company, had collaborated with the Government of the Republic of Sudan in an alleged policy of ethnic cleansing of non-Muslim civilian populations in areas surrounding the company's concessions in southern Sudan in order to protect and facilitate oil exploration and exploitation. Among the alleged human

* As this volume was going to press, the Supreme Court issued a decision reversing the Ninth Circuit, *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004), which will be addressed in *Digest 2004*.

rights violations were extrajudicial killing, forced displacement, military attacks on civilian targets, confiscation and destruction of property, kidnapping, rape, and enslavement. Defendant moved to dismiss *inter alia* on grounds of lack of jurisdiction, *forum non conveniens*, act of state, politicial question, and comity. In a lengthy opinion supporting its decision to deny that motion, the district court stated that corporations may be held liable for violations of international law, at least for gross human rights violations; that aiding and abetting are actionable under the statute; and that plaintiffs had adequately pled a substantial degree of cooperation between the defendant corporation and the Sudanese government so that the former could be treated as a "state actor" for purposes of the ATS.

(ii) In 1996 a number of Algerian citizens and a non-governmental organization of Algerian women brought an action for damages under the ATS against the Islamic Salvation Front ("FIS") and an individual alleged to have been a member of that group, alleging the commission of war crimes, crimes against humanity, and other violations of domestic and international law during the domestic conflict in Algeria that followed the aborted 1992 parliamentary elections. Only the individual defendant was served. In granting his motion for summary judgment, the district court ruled *inter alia* that the statute gave it no jurisdiction over allegations that the defendant had been complicit in murder and threats by armed Islamic groups against civilians or non-combatants where those actions did not constitute a war crime, crime against humanity, slave trading, aircraft hijacking, piracy, or crime committed in pursuit of genocide for which international law attributes individual liability without requiring state action. The court also found plaintiffs' evidence linking the defendant to the alleged acts of the armed groups "too tenuous to support a finding of liability." *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115 (D.D.C. 2003).

(iii) Aliens who had been captured abroad and were being held in U.S. military custody at Guantánamo Bay Naval

Base in Cuba contested the legality and conditions of their confinement. *Al Odah v. United States of America*, 321 F.3d 1134 (D.C.Cir. 2003). *See* discussion in Chapter 18.A.3.c.(1).

In a separate concurring opinion, Circuit Judge Randolph reviewed the various decisions concerning the scope of the ATS from *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980) forward. He concluded that to hold, as the detainees contended, that the Alien Tort Statute creates a cause of action for treaty violations would be to grant aliens greater rights in the nation's courts than American citizens enjoy. He questioned *Filartiga*'s theory that federal common law incorporates customary international law, *inter alia* because permitting courts rather than the Congress to determine federal law "among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers. . . . Nothing in the Constitution expressly authorizes such free-wheeling judicial power." Id. at 1148.

(iv) In *Barrueto v. Larios*, 291 F. Supp. 2d 1360 (S.D. Fla. 2003), the family members of a deceased economist under the Allende government of Chile alleged that the defendant participated in the decedent's torture and extrajudicial killing as part of the so-called "Caravan of Death" that took place following the *coup d'etat* headed by General Agusto Pinochet. Defendant sought dismissal of the complaint *inter alia* on grounds that plaintiffs had not exhausted all adequate and available remedies in Chile. The court denied the motion, finding that under the TVPA the exhaustion requirement is not jurisdictional.

(v) In one case arising from the events of September 11, 2001, various family members and representatives of victims brought an action to hold accountable the persons and entities that funded and supported the al Qaeda organization. In a memorandum opinion upholding jurisdiction *inter alia* over claims based on the Alien Tort Statute, the U.S. District Court for the District of Columbia ruled that (a) the

ATS does create a federal cause of action, (b) claims based on aircraft hijacking allege a violation of international law "of the type that gives rise to individual liability," and (c) proof that the defendants were accomplices, aiders and abetters, or co-consipirators in such a violation, even if not direct perpetrators, would support a finding of liability under the statute. *Burnett v. Al Baraka Investment and Development Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2003). *See also* Chapter 10.A.1.b.(1) and 4.c.

(vi) The right to associate and organize was held not to be actionable under the ATS in *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003). In this case, six Guatemalan citizens (all living in the United States at the time the suit was filed) brought an action against Del Monte, and two of its subsidiaries for a number of human rights violations (including kidnapping, torture, and unlawful detention) alleged to have taken place on the defendants' banana plantations in Guatemala. According to the complaint, in October 1999 the labor union representing the workers on the Bobos plantation was about to call a strike when armed groups kidnapped and detained plaintiff union leaders in order to gain a bargaining advantage. In granting defendants' motion to dismiss, the court rejected claims of torture, arbitrary detention and war crimes as factually insufficient, held that plaintiffs had failed to establish the existence of a customary international law right to associate and organize, and found that plaintiffs' conclusory allegation of "state action" and "joint action under color of law" were unsupported. *But see* a.(3), *supra*.

b. Forum non conveniens

In *Abdullahi v. Pfizer, Inc.*, 77 Fed. Appx. 48, (2d Cir. 2003), a suit by Nigerians alleging that defendant drug manufacturer had violated international law by using an experimental ("new, untested and unproven") antibiotic to treat victims of a meningitis epidemic, the U.S. District Court for the Southern

District of New York had dismissed the complaint on the ground of *forum non conveniens*. *See* 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y. 2002); *Digest 2002* at 345–346. Plaintiffs appealed. In October 2003 the Court of Appeals for the Second Circuit vacated that decision and remanded the proceeding to the district court to determine whether dismissal of a parallel lawsuit in Nigeria (involving different plaintiffs but the same course of conduct by Pfizer) should preclude application of *forum non conveniens*. The court noted that under settled law a *forum non conveniens* motion may not be granted unless an adequate alternative forum exists, and that in general an alternative forum is ordinarily adequate if the defendants are amenable to service of process there and the forum permits litigation of the subject matter of the dispute.

c. Effect on U.S. foreign policy interests

(1) Apartheid litigation

On October 30, 2003, the United States filed a statement of interest in multidistrict litigation pending before the U.S. District Court for the Southern District of New York. *In re South African Apartheid Litigation (MDL No. 1499)*. This litigation effectively consolidated some ten separate lawsuits seeking damages from a number of U.S. and foreign corporations for their alleged complicity in the apartheid regime in South Africa. On the previous August 7, Judge John E. Sprizzo had written to the Legal Adviser of the Department of State, William H. Taft, IV, asking "whether the Department of State has an opinion as to whether adjudication of these cases would have an adverse impact on the interests of the United States and, if so, the nature and significance of any such impact."

In his letter, Judge Sprizzo noted that the Government of South Africa had already communicated, by means of a declaration by its Minister of Justice and Constitutional

Justice, its official position that the proceedings impermissibly interfere with South Africa's efforts to address political matters in which it, as a foreign sovereign, has a predominant interest. (In a subsequent letter to Judge Sprizzo, made part of the formal record of the case, Minister Penuell M. Maduna stated: "I wish to confirm that the South African Government is of the view that the litigation should be halted. It is of this view because it believes that the issues of reparations is an issue which affects South Africans and should be dealt with by South Africans, if necessary, in South African courts. . . . We do not believe that the goodwill which exists in South Africa and the partnerships which have developed to deal with the past should be jeopardized by the litigation in New York.")

The statement of interest filed by the United States conveyed the Legal Adviser's reply to the court, dated October 27, 2003, and sent to Shannon Coffin, Deputy Assistant Attorney General for the Civil Division of the Department of Justice for filing in the court. The full text of Mr. Taft's reply follows.

I am writing in response to Judge John E. Sprizzo's letter of August 7, which is attached hereto, and request that the Department of Justice submit this response to the Court. Judge Sprizzo inquired whether the Department of State believes that adjudication of the above-captioned litigation would have an adverse impact on the interest of the United States and, if so, the nature and significance of that impact. The Department's views are set out below.

At the outset, I reiterate the long-standing opposition of the United States Government to, and its abhorrence of, the institution and practices of apartheid and our commitment to helping the people of South Africa overcome their tragic past.

With respect to litigation in U.S. courts by alleged victims of apartheid, an initial concern relates to the Alien Tort Statute, 28 U.S.C. § 1350, which we understand is a central basis for the current apartheid cases. The statute has been addressed by a

number of courts over the past two decades, including the Second Circuit in *Filartiga v. Pena-Irala* [630 F.2d 876 (2d Cir. 1980)] and *Flores v. Southern Peru Copper Corporation* [343 F.3d 140 (2d Cir. 2003)]. The United States Government has a substantial interest in the proper interpretation and application of this statute because it implicates profound separation of powers concerns and serious consequences for both the development and expression of the nation's foreign policy. The United States has recently taken the position in various pending cases that the Alien Tort Statute is a jurisdictional provision only and does not itself create any private causes of action. For the Court's convenience, I have attached a copy of the brief recently submitted to the U.S. Supreme Court by the United States in support of a petition for certiorari in *Sosa v. Alvarez-Machain* (No. 03-339).

More specifically with respect to the subject matter of the litigation, it is our view that continued adjudication of the above-referenced matters risks potentially serious adverse consequences for significant interests of the United States. The Government of South Africa has, on several occasions and at the highest levels, made clear its view that these cases do not belong in U.S. courts and that they threaten to disrupt and contradict its own laws, policies and processes aimed at dealing with the aftermath of apartheid as an institution. As Minister of Justice Maduna explained in his letter to the Court of July 11, 2003, the current Government of South Africa has taken extensive steps to promote reconciliation and redress for apartheid-era injustices. We note that the government pursuing these policies is broadly representative of the victims of the apartheid regime and believe that this government is uniquely charged with a popular mandate to deal with the legacy of apartheid.

Support for the South African government's efforts in this area is a cornerstone of U.S. policy towards that country. For that reason, we are sensitive to the views of the South African government that adjudication of the cases will interfere with its policy goals, especially in the areas of reparations and foreign investment, and we can reasonably anticipate that adjudication of these cases will be an irritant in U.S.-South African relations. To the extent that adjudication impedes South Africa's on-going

efforts at reconciliation and equitable economic growth, this litigation will also be detrimental to U.S. foreign policy interests in promoting sustained economic growth in South Africa.

Various other foreign governments, including those of the United Kingdom and Canada, have also approached us via diplomatic channels to express their profound concern that their banks, corporations and other entities have been named as defendants. In light of their strong belief that the issues raised in the litigation are most appropriately handled through South Africa's domestic processes, we can anticipate possible, continuing tensions in our relations with these countries over the litigation.

We are also concerned that adjudication of the apartheid cases may deter foreign investment where it is most needed. The United States relies, in significant part, on economic ties and investment to encourage and promote positive change in the domestic policies of developing countries on issues relevant to U.S. interests, such as respect for human rights and reduction of poverty. However, the prospect of costly litigation and potential liability in U.S. courts for operating in a country whose government implements oppressive policies will discourage U.S. (and other foreign) corporations from investing in many areas of the developing world, where investment is most needed and can have the most forceful and positive impact on both economic and political conditions. To the extent that the apartheid litigation in U.S. courts deters such investment, it will compromise a valuable foreign policy tool and adversely affect U.S. economic interests as well as economic development in poor countries. We would be pleased to provide any additional information the Court may require.

(2) Overview

On September 9, 2003, the Legal Adviser of the Department of State, William H. Taft, IV, addressed the Asia Society in New York, regarding the Alien Tort Statute. His prepared remarks are set forth below in full.

I am very pleased to have this opportunity to share with you some thoughts regarding the Alien Tort Statute (ATS)—an ancient and, until very recently, obscure law that has lately become, in the words of *The Washington Post*, "the somewhat improbable subject of a fierce political debate."

As the Legal Adviser of the Department of State, I have become involved (somewhat improbably) over the past few years in a number of lawsuits under the ATS, partly by virtue of the fact that my office has been asked by federal judges in a number of such cases to provide the views of the Department of State on whether and how the pendency of these suits affects the foreign policy interests of our nation. More recently, as many of you are aware, the DOJ filed a significant brief in one of these cases—the Unocal litigation in the 9th Circuit—setting out the Administration's views on several important legal issues under the ATS, in particular whether the statute is merely jurisdictional or also provides a federal cause of action.

My intent this evening is to say a few words about both aspects—the legal issues as well as the impact of the litigation on foreign policy interests of the United States. I must begin, however, with a word of caution, because some of these cases are still pending, and a number of people here this evening, indeed here on this panel, are involved in these cases. So I'll do what we ask our staff attorneys to do when they give talks in public, and make the disclaimer that my remarks this evening are personal and do not necessarily reflect the formal views of the USG or the Administration, especially in regard to pending litigation.

Text and Background

The text of the ATS is short and simple: "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." The statute was enacted in 1789, as part of the first Judiciary Act, and so far as I am aware, to this day no one really knows why. There are different theories about what specific problems the Congress intended to settle; we may hear some pretty strong opinions on that question from other panelists or members

of the audience. There is little question, however, about the legal problem it created for us today—the statute does not define exactly what Congress meant by "a tort only, committed in violation of the law of nations." The ATS clearly grants jurisdiction; over what is far less clear.

For many years, this didn't much matter, because the ATS was effectively dormant. In 1980, however, it received an expansive construction when the Second Circuit, in the landmark case of *Filartiga v. Pena-Irala*, held that the ATS gave Paraguyan nationals a federal cause of action against a former Paraguyan official who was allegedly responsible for the torture and death of their son in Paraguay. The cause of action question in that case was whether torture could properly be considered a tort under the law of nations. The court said it could.

This decision opened the door for human rights activists worldwide to bring into U.S. courts claims relating to alleged human rights violations committed in foreign countries by foreign governments or others acting under color of governmental authority against non-U.S. citizens. I'm sure you are all familiar with these Filartiga-type cases, in which foreign victims sue foreign governmental officials for abuses which took place abroad, having nothing to do with the United States except that plaintiffs are able to take advantage of our open courts. The range of cognizable abuses has grown markedly over the years. A current example here in New York is the pending suit against Mr. Mugabe, brought by Zimbabwean citizens who allege various human rights abuses in connection with the recent elections in that country.

Such cases often raise service of process issues, and not infrequently issues of immunity. And while plaintiffs typically seek money damages, they rarely succeed in recovering any, since individual defendants tend to default, leaving no assets in the US against which judgments can be executed, and those judgments are effectively unenforceable abroad. To greater or lesser extents, the proceedings may give the plaintiffs a measure of publicity and a "day in court." But observers can and do differ about whether that is a sufficient justification for allowing such cases in our domestic judicial system, and whether any demonstrable benefit comes from what are often only declaratory judgments.

More recently, litigation under the ATS has taken a different tack, targeting U.S. and foreign corporations for committing or being complicit in the commission of human rights abuses in other countries in the pursuit of their corporate activities. I am certain you have all heard of the pending *Unocal* case in the 9th Circuit, in which a U.S. corporate defendant is alleged to have "aided and abetted" the commission of serious human rights abuses in connection with the construction of a natural gas pipeline in Burma. Other such cases involve those against Rio Tinto Zinc for its activities in Papua New Guinea and Exxon-Mobil for its activities in Indonesia, and more recently the groups of a dozen or so suits against US and foreign corporations and banks for their activities in South Africa during the time of apartheid.

These "vicarious liability" cases present a number of interesting legal issues, including jurisdiction and standards of liability, but since they remain in active litigation, I do not think it appropriate to go into details.[2] What I can say, and surely you are all aware of this, is that many observers, inside and outside the government, have been increasingly concerned about two particular aspects of these cases as they have been considered by the courts.

First is the issue whether the ATS provides a clear federal cause of action (in addition to jurisdiction). Courts have been increasingly liberal in interpreting the statutory requirement of "a tort only in violation of the law of nations" to include additional causes of action beyond torture—forced labor, arbitrary detention, etc.—and doing so on the basis of a very expansive reading of customary international law without any specific congressional endorsement, sometimes relying on treaties the US has not ratified, resolutions of the UN General Assembly and other UN bodies we have not accepted, and the writings of professors. The second concerns whether foreign policy implications are relevant to the continued pendency of such cases. We may all have a general presumption that when it comes to private litigation, foreign

[2] *Doe v. Unocal* (9th Circuit) [Burma]; *Sarei v. Rio Tinto Zinc* (9th Circuit) [Papua, New Guinea]; *Doe v. ExxonMobil* (D.D.C.) [Aceh Province, Indonesia]; *Ntzebesa v. Citigroup* (S.D.N.Y.) [South Africa].

policy issues have no relevance, and should never be exercised to deprive victims of serious abuses of their right to a remedy. But the principle of separation of powers is a time-honored doctrine in our governmental system, and our courts long ago developed various doctrines to give it effect. By the same token, the executive branch has long recognized the right of judges to ask about the government's foreign policy concerns about pending litigation. So when, in the Legal Adviser's Office, we're asked by a judge for our views, we will respond out of respect for the court.

We are also continuing to see more ATS cases that involve human rights-based charges against foreign states or their high-level officials (officials are often targeted if the plaintiffs are unable, under existing rules of foreign sovereign immunity, to sue the foreign governments directly). Of particular interest to this audience may be the recent cases dealing with Japan and the People's Republic of China, including one that involves Jiang Zemin, China's former head of state.[3] The Japanese cases arise from allegations of sexual slavery committed against the so-called Korean Comfort Women during World War II by Japan and the Imperial Japanese Army. The Chinese cases focus on current Chinese government repression of the Falun Gong movement in China and elsewhere.

The one of course, is largely a matter of history, the other involves events of more recent vintage. In both cases, however, the underlying challenge is to policies and practices pursued by foreign governments, and whether those governments and/or their officials can be held liable in U.S. courts for acting in accordance with those policies.

Legal Issues

Let me turn, briefly, to the main legal issues posed by these various ATS cases.

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[3] Japan (*Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003)), the People's Republic of China (*Plaintiff A, et al. v. Jiang Zemin* (N.D. Ill.); *Doe v. Liu* (N.D. Ca.); *Jin v. Ministry of State Security* (D.D.C.).

ATS provides no private right of action

Perhaps the more important question from the point of view of the executive branch is whether the ATS itself provides, or was intended to provide, a private right of action or whether it requires separate congressional enactment of a specific statute specifically authorizing defined causes of action.

As expressed in the Unocal brief, the United States position is that the ATS, "which is a simple grant of jurisdiction, cannot properly be construed as a broad grant of authority for the courts to decipher and enforce their own concepts of international law."[4] It's not often that we take positions protective of the role and authority of the Congress, but here it is entirely appropriate, given the lack of clarity in the statute itself and the clear inclination of judges to accept the assertions of plaintiffs' counsel about the content and meaning of customary international law for purposes of the jurisdiction and reach of federal courts. It would not be difficult for the Congress to specify exactly which "torts under the law of nations" it proposed to make actionable and under what conditions; indeed it has already done so in the Torture Victims Protection Act.

The DOJ brief also addressed the issue of foreign policy implications. As the government stated in May:

> the "[w]ide-ranging claims the courts have entertained regarding the acts of aliens in foreign countries necessarily call upon our courts to render judgments over matters that implicate our nation's foreign affairs. In the view of the United States, the assumption of this role by the courts under the [ATS] not only has no historical basis, but, more important, raises significant potential for serious interference with important foreign policy interests of the United States, and is contrary to our constitutional framework and democratic principles."

[4] May 8, 2003 *amicus curiae* brief of the United States in *Doe v. Unocal*, Nos. 00-56603, 00-56628 (9th Cir.).

There has been some pointed opposition to this position from human rights activists, who have reacted with what *The Washington Post* called "a tizzy". For example, Human Rights Watch called the government's stance "a craven attempt to protect human rights abusers at the expense of victims," and the Lawyers Committee for Human Rights described it as an attempt "to run a stake through the heart of a law which has proven to be a valuable tool in pursuing justice for human rights abuses."

The *Post* itself concluded in an editorial, however, that these charges are "quite unjust," and that the government's position is, indeed, both reasonable and prudent. The *Post* was correct, in my view.

One can understand why the plaintiffs are eager to exploit the ATS for an ever broader range of abuses. The acts of which they complain are shameful and reprehensible—for example, Japan's barbaric and inhumane treatment of the so-called Comfort Women during World War II (*Joo*); the forced labor and mistreatment of Burmese natives near the Yadana gas pipeline (*Unocal*); the repression of the Falun Gong spiritual movement in China (*Jiang*); the environmental and other depredations against the Bougainville islanders in Papua New Guinea (*RTZ*); and the atrocities visited on the people of Aceh, Indonesia by the Indonesian security forces in their efforts to crush the rebellion in Aceh Banda (*ExxonMobil*).

We may all be able to agree that victims of such abuses deserve a forum in which to seek appropriate remedies, and that those responsible should be held to account. Yet it is an entirely separate issue whether the *U.S.* courts are the most appropriate forum for determining the extent to which such actions were violations of local or international law, and resolving responsibility for them. Even if the local courts in these countries are not able or willing to examine such claims, that failure does not mean the U.S. can or should pick up the task. Congress has certainly not given our federal judiciary universal civil jurisdiction over abuses taking place anywhere in the world, having no connection to this country, its citizens or its government. Yet that is the use to which they are being put under the expansive interpretation of the statute.

Given the many courts that have already indulged in reviewing allegations of these types, this debate seems likely to continue until the Supreme Court rules on the matter.

Cases against governments and/or their officials are not truly adversarial

In most of the cases against foreign officials or their governments, the defendants either will not or cannot (as a practical matter) present a defense. The courts then render default judgments based on the plaintiffs' allegations, with no rebuttal. But generally no monetary recovery is or can be obtained.

Take the Falun Gong lawsuits as an example. These cases are against high-level Chinese government officials (including former President Jiang Zemin and other Chinese diplomatic and consular officers) or Chinese government agencies. It will not, I suspect, surprise you to know that the PRC, which still adheres to the doctrine of absolute sovereign immunity (which the U.S. abandoned in 1952 with the Tate Letter, and more thoroughly in 1976 with enactment of the FSIA), refuses to appear in foreign courts to defend against private foreign challenges to its national policies. And it objects strenuously to the assertion of U.S. juridiction over acts and policies within its own territory, with no subjective or objective connection to this country.

The United States similarly objects to subjecting its high-level officials to intrusive discovery at the hands of foreign private litigants in foreign court proceedings in connection with the performance of their official duties. Here, I have in mind, for example, Belgium's recent attempt to assert universal jurisdiction over alleged human rights violators—including, inter alia, Secretary of Defense Rumsfeld and General Tommy Franks. Why should we tell China it must do that which we don't want to do ourselves? How would we feel if Chinese courts entertained litigation between U.S. litigants about religious discrimination, or freedom of opinion and belief, or the treatment of Muslim prisoners in the United States?

Case resolution requires information unavailable to the courts

Even where ATS defendants do appear in court, as in the cases against major corporations (which can't allow a suit against them

to go undefended), in many instances a just resolution of the case requires information unavailable to the courts. Even when the claims against companies don't directly challenge the actions of foreign governments/officials—and therefore arguably don't offend foreign governments and don't need access to internal foreign government material—they are almost all premised upon the company's knowledge of, involvement in or reaction to the actions of foreign governments, and thus their resolution depends upon a prior decision about the nature of the foreign government's activities.

The 9th Circuit, for example, has adopted a novel standard of liability in which a corporate defendant can be liable under ATS if it has "aided and abetted" in alleged atrocities. Yet when the atrocities are alleged to have been committed by a foreign government, corporate defendants lack access to foreign government officials and sensitive internal foreign state documents, and so cannot provide this information in their defense. How can ExxonMobil, for example, defend itself against allegations that it aided and abetted the alleged atrocities committed by Indonesian security forces in Aceh Banda, without the ability to summon Indonesian government officials or to gain access to internal Indonesian government documents and records? How can U.S. courts make informed judgments about the security situation in foreign venues such as Indonesia without access to critical witnesses and documents whose availability is outside the control of the parties or the court?

Cases cause foreign policy frictions

In addition to these problems, which raises serious questions about whether the processing of these cases is worth the burden on the limited judicial and executive resources of the U.S., there is a greater problem: such lawsuits can, and sometimes do, generate serious friction between the United States and other governments. These frictions can damage broader United States government efforts to modify foreign government behavior in areas that are both related and unrelated to the subject matter of the individual lawsuits.

For example, the United States undertakes a variety of serious diplomatic efforts to discourage the Chinese government's

mistreatment of the Falun Gong adherents, and tries to improve the situation of the Falun Gong in China. But these efforts may be hindered because the Chinese government takes strong umbrage at what it considers to be unjustified findings and pronouncements by U.S. judges concerning Chinese government officials, policies, and actions in these areas.

Other potentially adverse foreign policy implications may also arise when litigants file lawsuits against high-level foreign government visitors who are invited guests of our government. For example, Chinese concerns about possible service of process on visiting Chinese government officials caused the Chinese government to refrain from sending representatives to the U.S. to participate in an important anti-narcotics training course. Chinese government officials have also refused to accept from State Department officers official USG communications because of stated concerns that these officers might have been designated as process servers by U.S. courts acting in response to *ex parte* applications for orders authorizing alternate service. Such reluctance by foreign leaders and officials to come to the United States to engage in diplomacy is disruptive to the government's ability to conduct foreign relations.

In some instances, foreign governments complain that the issues submitted to our courts have already been resolved by their own internal processes. In the pending apartheid cases, for example, the Government of South Africa has objected, pointing out that it has pursued other mechanisms for resolving issues arising from apartheid, in particular through the Truth and Reconciliation Commission and that it does not seek nor desire financial compensation from foreign companies for their involvement. Other governments have similarly protested the filing of charges against their corporations and banks for their dealings in South Africa during the apartheid era.

Cases involve political rather than legal questions

In some instances—certainly not all, but surely in more than a few—pendency and pursuit of these cases can be also disruptive to the executive's ability to conduct foreign relations—a sensitive and nuanced exercise that requires specialized expertise and a

weighing of many factors, including those of which the courts know little. The courts have recognized this problem in other areas, and have created the "act of state" and "political question" doctrines, which allow the courts to decline to rule on cases the resolution of which requires too detailed an examination of these sensitive political subjects. As the Supreme Court held in *Baker v. Carr* more than forty years ago:

> "Several formulations . . . may describe a political question, although each has one or more elements which identify it as essentially a function of separation of powers. 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 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."[5]

Current ATS lawsuits such as *Jiang*, *RTZ*, *Unocal*, and *ExxonMobil* seem to fall squarely within the bounds of many of these *Baker* criteria. The Constitution commits the conduct of foreign relations solely to the Executive Branch, and it is not appropriate for the courts to, for example make sweeping ex parte findings about how the PRC and its highest officials administer certain policies—particularly when that may interfere with, for example, State Department efforts to encourage the PRC to bring North Korea to the negotiating table. There are few manageable

[5] 369 U.S. 186, 217 (1962).

standards for how far our courts may or should go in second-guessing the official, governmental acts of foreign states taken within their own jurisdictions.

Cases could harm the interests the plaintiffs are trying to protect
On top of all this, adjudication of such matters by US courts can potentially have unintended consequences at odds with the interests of those whom the plaintiffs seek to protect. This is not, of course, to say that human rights abuses are not justiciable or are within the exclusive domestic purview (or "sovereignty") of the abusing country. We have long since passed that point of contention. But it still true that when U.S. courts issue judgments holding foreign states and their highest officials liable for having pursued officially sanctioned government policies, those states and officials are generally less likely to cooperate with USG diplomatic efforts to address similar allegations on a more systemic basis. And if a case is against a "deep pocket" U.S. company, this could dissuade other U.S. companies from doing business in certain foreign states, which could allow entrepreneurs from other, possibly less enlightened, countries to move in to fill the entrepreneurial vacuum. This is true even if the case is ultimately dismissed, since the burden of having to defend against the case, perhaps for years, prior to a dismissal—particularly if the case reaches the discovery phase—as well as the attendant bad publicity while the case is ongoing, is probably as or more damaging to a company than any ultimate judgment.

Cases are decided by differing standards in each jurisdiction, creating more uncertainty
The above problems with the ATS are compounded because our courts are not bound by any common understanding of the causes of action, the limits of ATS accountability, or the legal standards to be applied in reviewing any given case. In the absence of more specific congressional guidance, and because the Supreme Court has not ruled on the scope of the ATS, every federal court remains free to intrude itself into the foreign policy realm to the extent deemed appropriate in its own Circuit. Currently, there is a cacophonous diversity of judicial opinion on

this subject, and standards are in flux. This climate of judicial unpredictability heightens the foreign policy risks and commercial uncertainty that the broad interpretation of ATS jurisdiction already creates.

Conclusion

Before I close my remarks, let me emphasize that the "fierce political debate" to which *The Washington Post* editorial refers is not in any way a debate about ends. This Administration is a world leader in its quest for improved international human rights, including particularly international religious freedom and labor standards. We produce annual written reports such as the Human Rights Report and the Trafficking in Persons report. We push for human rights in formal diplomatic venues such as the UN Human Rights Commission, and our formal Human Rights Dialogue with China—where we get extremely detailed with China about actions that may violate human rights standards. We also take other diplomatic actions that I can't go into here.

The ATS debate ought to be understood as simply a debate about means (rather than ends). I believe that the quest for improved international human rights is generally not well served by using the ATS, for the various reasons I have detailed, and that the other efforts I have described work better in both the short and long term. Therefore, the sooner the Supreme Court puts the ATS back in its proper historical position the better for all concerned.

H. INDIGENOUS PEOPLE

The United States participated in the first formal round of negotiations at the Organization of American States ("OAS") on the Draft Declaration on the Rights of Indigenous Peoples, entitled "Quest for Points of Consensus," November 10–12, 2003. A verbatim record is available at OEA/Ser.K/XVI, GT/DADIN/doc.154/03 rev.1, December 18, 2003, at *www.oas.org*. Speeches from a special session held in February 2003 are also available at *www.oas.org*.

At the United Nations, the United States participated in negotiations on the draft UN Declaration on Rights of Indigenous Populations, September 15–26, 2003.

I. RULE OF LAW AND DEMOCRACY PROMOTION

1. Cuba

On March 19, 2003, the State Department issued a press statement condemning the arrest of dozens of opposition members in Cuba:

> This is an appalling act of intimidation against those who seek freedom and democratic change in Cuba. These people have been arrested for simply speaking out, one of the most basic internationally recognized human rights. We call on the Cuban government to release them immediately and for the international community to join us in demanding their release.
>
> . . . We also note that these events coincide with the opening of the UN Commission on Human Rights in Geneva, of which Cuba is a member. The United States calls on the commission to condemn this action in the strongest terms. Cuba has again demonstrated that it is not fit to sit on this commission.

The full text of the press statement is available at *www.state.gov/r/pa/prs/ps/2003/18834.htm. See also* press statement of April 3, 2003, condemning the initiation of trials by "kangaroo courts" against those arrested, available at *www.state.gov/r/pa/prs/ps/2003/19318.htm.*

a. UN Commission on Human Rights

Ambassador Jeane Kirkpatrick, head of the U.S. delegation to the 59th Session of the UN Commission on Human Rights ("UNCHR"), gave an address before the Commission on April 14, 2003, entitled "Defenders of Democracy." Her

remarks, set forth below, are available at *www.humanrights-usa.net/2003/statements/0414Item17.htm.*

The United States delegation believes that human rights depend on democratic institutions. Promoting democracy, encouraging its spread is the centerpiece of our foreign policy. The United States government supports programs to build civil societies and democratic institutions, to promote transparency and increase civil engagement.

We think we should be clear about who it is we refer to as human rights defenders: They are, especially, persons who take serious risks to expand the domain of liberty, often risking their freedom or even their lives in the process. It is an unwelcome coincidence that the very same time this Commission was spending six weeks discussing the promotion of human rights, the government of Cuba imposed long sentences on 75 persons—doctors, librarians, academics, journalists.

The Cuban regime would have us believe that all these individuals were organized by the U.S. government to subvert it. But an examination of their activities gives the lie to such a claim. Many of the seventy-five were involved in the Varela project to peacefully petition the Cuban government to permit an alternative to its one-party un-elected legislature. Others were merely trying to disseminate literature and news prepared by independent organizations.

The sentences of the seventy-five dissidents handed down April 3–7 range between 12 to 26 years at trials lasting less than a day for each. The names of these authentic human rights defenders are appended to our statement.

A second testimony to the quality of Cuban justice could be seen last week at the summary trial and execution of three Cubans charged with attempted hijacking of a passenger ferry to Florida. No one was hurt in the attempted hijacking except the three executed. Yes, they committed a crime, but they, like everyone, deserved due process and a reasonable sentence.

Once again the representative of Cuba spoke today of a U.S. effort to lure Cubans to the United States. He should ask himself

instead why so many Cubans are so eager to leave their homes for a strange country with a strange language.

Once again, for the fifth, sixth, seventh time, the Cuban delegate referred to a U.S. blockade of Cuba. But the Cuban delegate surely knows that the U.S. government has only once, in 1962, established a blockade of Cuba at the time of a crisis in the U.S.-Soviet relations growing out of the Soviet move to deploy nuclear missiles in Cuba. It was removed once the crisis was past.

On April 30 the United States protested Cuba's re-election to the UNCHR. White House Spokesman Ari Fleischer stated:

> The Human Rights Commission undermines its own credibility at the United Nations when they allowed Cuba to get reelected. The Human Rights Commission not only hurts the people of Cuba, but they hurt the very cause in which nations should sign up to serve on the Human Rights Commission. The Human Rights Commission wanted to send investigators into Cuba, and Cuba said, no. And yet today, Cuba gets reelected to the Human Rights Commission. It raises troubling issues, and that's why the United States is speaking out about it. We hope others will speak out.

The full exchange with reporters on May 1, from which this statement is excerpted, is available at *www.whitehouse.gov/news/releases/2003/04/20030429-3.html.*

b. Organization of American States

On May 19, 2003, Ambassador Roger F. Noriega, then U.S. Permanent Representative to the Organization of American States ("OAS"), delivered remarks to the Permanent Council of the OAS on Agenda Item #2, Human Rights in Cuba, as excerpted below.

The full text of Ambassador Noriega's remarks is available at *www.state.gov/p/wha/rls/rm/20746.htm.*

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* * * *

"Los pueblos de America tienen derecho a la democracia y sus gobiernos la obligacion de promoverla y defenderla."

Those words, of course, are familiar to all of us. They constitute the first sentence of the first article of the Inter-American Democratic Charter. Indeed, the first right enumerated under Article 3 as an "essential element" of democracy is "respect for human rights . . ."

When the member states drafted and approved the Democratic Charter, it was our firm conviction that the right to democracy so clearly and boldly stated in Article One applied to all people in the Americas, with no exclusions. These same rights are enshrined in the OAS Charter and in subsequent OAS declarations. They underscore our firm belief that democracy is the only legitimate form of government in our hemisphere and that all of our citizens should enjoy the freedoms and basic rights that democracy brings.

A statement considering the deteriorating human rights situation in Cuba has been presented by the delegations of Canada, Chile and Uruguay. It is based on an excellent resolution on the same subject presented by Nicaragua and Costa Rica. The United States is proud to support these statements.

The declaration presented by Canada is a clear and strong statement of principles. It reminds us of our collective commitments to democracy in this Hemisphere. It calls attention to the sweeping repression of non-violent political dissent in Cuba unleashed in past months by the Government of Cuba and expresses our solidarity with the Cuban people's legitimate right to enjoy all the rights enshrined in the Inter-American Democratic Charter. It requests the Inter-American Commission on Human Rights to monitor the human rights situation in Cuba and report to the Permanent Council its findings. Finally, the statement expresses this body's willingness to promote "a broad and constructive dialogue in relation to Cuba which could contribute to the integration of all nations in a democratic hemisphere."

. . . [W]e, the member states of the Organization of American States, OAS, do not share consensus on all matters. We disagree—sometimes vigorously—on some issues. But on this most basic tenet—that democracy is a fundamental right of the peoples of

the Americas and the protection of human rights is the solemn obligation of their government—we are of one mind.

* * * *

. . . It is time for the OAS, the organization most firmly committed to the defense of democracy in the Western Hemisphere, to make itself heard.

Mr. Chairman, on April 28, U.S. Secretary of State Colin Powell stated, "We look to our friends in the OAS to live up to the ideals we share and take a principled stand for freedom, democracy and human rights in Cuba. We look to them to join us in developing a common hemispheric approach to supporting Cubans dedicated to building a democratic and free Cuba."

The declaration that like-minded governments offer today meets that challenge. The final paragraph of this declaration is particularly important and relevant because it signals the beginning of a constructive, forward-looking dialogue among neighbors about how we can prepare for and promote a democratic transition in Cuba.

* * * *

The people of Cuba aspire to and deserve the same opportunities. And, they should be able to count on our solidarity—so that the essential elements of democracy, outlined in the Inter-American Democratic Charter, will soon be respected in Cuba.

See also fact sheet released by the White House on U.S.-Cuba policy, announcing three initiatives "intended to assist the Cuban people in their struggle for freedom and to prepare the U.S. government for the emergence of a free and democratic Cuba," available at *www.state.gov/p/wha/rls/fs/25155.htm.*

2. Cambodia

On July 31, 2003, Richard Boucher, spokesman for the U.S. Department of State, commented on standards for elections

in Cambodia, provided below and available at *www.state.gov/r/pa/prs/ps/2003/22942.htm*.

The United States supports a free and fair election process in Cambodia that meets international standards. This process includes the still uncompleted vote counting phase. The National Election Committee has the duty to give an accurate vote tally and to properly review complaints of election irregularities from political parties, take corrective action, and punish any transgressors in accordance with the Electoral Law.

The U.S. urges all parties to act responsibly during this sensitive period in advance of the preliminary announcement of election results on August 8. The National Election Committee should be given time to complete its work in a thorough and deliberate manner. It is premature to endorse the results as forecast and published by political parties. The transition to power and the validation of the new government should follow the requirements laid out in the Cambodian Constitution.

The U.S. urges the Government of Cambodia to respect the right of the people to assemble peacefully and express their views and grievances and this right to peaceful expression of views extends to political parties as well. The U.S. is deeply concerned by rhetoric that is threatening and provocative in nature. Any intimations about the potential use of force should be avoided.

The U.S. also notes that the formation of a coalition government is a matter for the political parties to determine among themselves in a free and open manner.

3. Independence of Colonial Countries and Peoples

On December 9, 2003, the United States voted against UN General Assembly Resolution 111 on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. UN Doc. No. A/RES/58/111. Representative Benjamin A. Gilman, U.S. Public Delegate, provided the explanation of the U.S. vote as set forth below.

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Unfortunately, the United States cannot support the draft resolution on the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. By adopting a narrow definition of decolonization, the draft resolution fails to take into account the complex reality of Non-Self-Governing Territories. For the United States, the very term "non-self-governing" seems inappropriate for those who can establish their own constitution, elect their own public officers, have representation in Washington, and choose their own economic path.

The United States fully supports countries that choose independence, and we are proud to welcome them as equal and sovereign partners. Not all Territories choose independence however, and we equally support their right to a full measure of self-government, including the rights to integration and free association. The world encompasses a variety of people, places and political circumstances. This richness does not allow for just one path. The United States believes that a single standard should be applied to every Territory, and we call upon Member States to respect the choices made by residents of Non-Self-Governing Territories.

In conclusion, Mr. Chairman, we look forward in 2004 to a healthy dialogue with the Committee of 24 and it is our hope that all parties will cooperate so that a reduction in the number of Non-Self-Governing Territories is achieved.

J. TERRORISM

1. Inter-American Committee on Human Rights

On January 23, 2003, the United States presented comments on a report entitled "Terrorism and Human Rights," produced by the Inter-American Committee on Human Rights, October 22, 2002, available at *www.cidh.oas.org/Terrorism/Eng/toc.htm*. The U.S. statement, presented at the Third Regular Session of the Inter-American Committee against Terrorism ("CICTE"),

in San Salvador, El Salvador, set forth below in full, welcomed many of the report's recommendations while also reiterating the U.S. position that the CICTE lacks jurisdiction to interpret and apply the law of armed conflict, including international humanitarian law.

- The United States welcomes the report on Terrorism and Human Rights produced by the Inter-American Commission on Human Rights.
- We firmly believe that respect for human rights and the fight against terrorism are not contradictory but compatible.
- For this reason we believe that this report will serve as an important reference document for member states as they draft legislation and implement other counter-terrorism measures that affect human rights law.
- This report will be particularly useful in each country's development of law enforcement measures to prevent terrorist acts and to investigate, prosecute and punish those who commit such acts.
- The report will also serve as a reminder to countries to carefully analyze their obligations under international law in crafting their response to combating terrorism—that such a response must be carried out in accordance with their international legal obligations. *
- This report contains a number of recommendations that each member state may decide to implement according to its national situation, depending upon such factors as whether that state is a party to the American Convention on Human Rights, whether that state's legal system is based on common law or civil law, and which applicable body of law is controlling.
- We would like to respectfully note, however, that we continue to take issue with the Commission's belief that it has a mandate to apply and interpret international humanitarian law. Although we appreciate the Commission's careful analysis of situations controlled by human

rights law and situations controlled by international humanitarian law, we do not believe that the Commission's founding documents vest it with jurisdiction to interpret and apply the law of armed conflict, including international humanitarian law.

- To be clear on this point, to say that both human rights law and the law of armed conflict draw on similar principles of treatment does not mean that bodies with jurisdiction over the one have jurisdiction over the other.
- Having said this, we welcome the Commission's report as a reaffirmation of the importance of human rights protection within OAS member states. Indeed, no country can be more proud than the United States of its contribution to the cause of human rights on the global stage. Our review of the report is ongoing and we will continue to share with you our observations and positions.

2. UN Human Rights Commission

On August 23, 2003, Jeffrey DeLaurentis, of the U.S. delegation, provided the following explanation of the U.S. vote on Resolution L-51, "Human Rights and Terrorism," E/CN.4/RES/2003/37. His statement is available at *www.humanrights-usa.net/2003/statements/0423EOVTerrorism.html.*

The United States knows all too well the pain and suffering that terrorists inflict. Our citizens have been targeted and killed in many countries, including inside the United States. Everyone in this room remembers the horror that terrorists brought to the world on the morning of September 11, when they killed over 3,000 innocent men, women and children. Most of the victims were Americans that day, but there were also people from 80 other countries in the World Trade Center and on those jets of death.

The United States has a strong commitment to combating the evil of terrorism. Our commitment includes cooperating with the appropriate mechanisms established by the international community.

We regret, therefore, that we are obliged to vote no on this resolution. Our reason is that its sponsors have included language noting a document that contains language objectionable to many countries in this room.

The resolution also continues to include language that grants terrorists and terrorist organizations a measure of legitimacy by equating their conduct with that of states.

The basic function of the Commission is to set human rights standards that are binding upon states and then to review states' compliance with those standards.

Terrorists are not state actors. Terrorists are criminals who bear individual responsibility for their actions.

For these reasons, we will call for a vote and vote no on the adoption of this resolution.

Cross References

Visa restriction and suspension of entry, **Chapter 1.C.3-6.**
Asylum and refugee issues, **Chapter 1.D.**
European Court of Human Rights child abduction case, **Chapter 2.B.2.a.**
Support for law enforcement institutions, **Chapter 3.B.8.**
Implementation of Trafficking Victims Protection Act, **Chapter 3.B.4.**
International criminal tribunals and related issues, **Chapter 3.C.**
Democracy and international organizations, **Chapter 7.A.**
Claims for human rights abuses, **Chapter 8.B.2.a.; Chapter 10.A.1.a.(1), 2., 3.b., 3.d. and B.**
Genetic data, **Chapter 13.C.**
Imposition of human rights-related sanctions, **16.A.2.**
Role of OAS in regional stability, **Chapter 17.A.1.**
Enemy combatants held by the United States, **Chapter 18.A.3.**
Distinctions between humanitarian and human rights law, **Chapter 18.A.3.b.(2).**

CHAPTER 7

International Organizations

A. DEMOCRACY AND INTERNATIONAL ORGANIZATIONS

On December 5, 2003, Kim R. Holmes, Assistant Secretary of State for International Organization Affairs, addressed the World Federalist Association and Oxfam in Washington, D.C., on the role of democracy in international organizations. Excerpts below address principles of true democracy, transparency and accountability in international organizations, and making decisions by international organizations more democratic. Footnotes have been omitted.

The full text of Mr. Holmes' remarks is available at *www.state.gov/p/io/rls/rm/2003/26949.htm*.

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We are, today, witnessing the advance of freedom, in East Timor, in Afghanistan, in Iraq, and elsewhere. People who just a few years ago had no voice are now writing their own constitutions, electing their own leaders, and creating real democratic institutions. They are not doing this alone. Countries, non-governmental organizations, and international organizations like the United Nations are offering resources, security, and expertise. And international organizations are welcoming these new governments into their folds.

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Today, our challenge is to understand how international organizations could better aid this global advance of democracy. We are asked to consider how their decisions could better represent the will of the people of the world—who all seek freedom, peace, human rights, and the opportunity to prosper. Let me begin with a few principles.

First, true democracy rests in popular sovereignty—the voice and will of the people expressed through elections, and reflected in the maintenance of democratic institutions. The closer government is to the people, then, the more democratic it will be and the more legitimate. The further the centers of power are from the people—and the less accountable those centers are to the people—the less democratic they will be.

Second, liberty and human rights may be universal values, but you need democratic self-government—a social contract between people and their government—to protect them. If the power of government is expanded too much, human rights will inevitably be in danger. Democratic self-governance, then, cannot be separated from human rights. It is the main instrument by which human rights are preserved and advanced.

Third, international organizations are most effective in advancing human rights and development when they focus on advancing democratic self-governance. Advancing democracy, therefore, should be the goal of every international organization. But by this, I mean democratic self-governance—the democratization of society—the building of democratic institutions and civil society as the foundations of true democracy.

Of course, it is very difficult to convince the leaders of non-democratic countries to change peacefully. It requires them giving power to the people. That is why so many people look to international organizations like the United Nations to take the lead. It is why so much hope is placed in its work. And it is why there is great disappointment when it does not succeed.

We may not all agree here on how to make the United Nations and other international organizations more effective to advance democratic self-governance. But a good place to start is to consider how the organizations themselves adhere to three dynamics of democracy—representation, transparency, and accountability.

The Question of Representation

Nation states seek representation in international organizations to pursue their own interests in the global arena. Of course, not all countries participate in every international organization or affiliated body. Not all countries want to participate in all of them, either.

Still, some say that, for their decisions to be truly democratic, international organizations must have universal membership, just like the United Nations General Assembly. They believe that expanding participation in bodies like the Security Council would vastly enhance the legitimacy of their decisions.

Now, representation *is* a key element of democracy. But decisions do not become more democratic simply by having more member states involved in making them. What makes a decision more democratic is whether those involved represent the voice and will of their people. The legitimacy of their decisions will be questioned, for good reason, if this is not the case. Governments that do not respect the rule of law at home find it very easy to ignore the rule of law internationally. Witness North Korea.

That is why we believe that, if international bodies are based on democratic principles, those principles should infuse every deliberation and decision. Giving equal status to democratic countries and to non-democratic countries—whose decisions rarely reflect consent from those they govern—creates an inherent tension in these bodies that can make implementing decisions quite challenging.

We see this played out most dramatically in the Commission on Human Rights (CHR). This year, members of the Commission included Cuba, Congo, China, Libya, Syria, and Zimbabwe—widely recognized human rights abusers who care less about improving human rights than about preventing themselves from being sanctioned.

Needless to say, it is extremely difficult to discuss with such countries a "democracy deficit" in the CHR. They have invested too much in the status quo. We should not expect them to want to change the dynamics of decision-making if it will heap more criticism on them.

If we want the Commission's decisions to be more democratic—more important, if we want its decisions to mean something for the suffering people who look to it for help—then the democratic members of the UN must take the lead. Countries that uphold the purposes and principles of the CHR should see that more democratic countries get elected to serve on it.

Similarly, the General Assembly's decisions would carry more moral weight if more of its 191 members upheld the principles of human rights and democracy enshrined in the UN Charter and the Universal Declaration of Human Rights. That is, after all, what the founders of the United Nations envisioned, and what the members of the UN each pledged to uphold.

The Charter gives all nations an equal voice in the General Assembly, regardless of the size of their population or territory, the magnitude of their resources, and their human rights record. Not all members of the General Assembly share the same democratic values or vision. Not all are like-minded about good governance and the rule of law.

So while this "one-nation, one-vote" principle sounds entirely democratic, in practice, we find countries voting with regional blocs, often quite differently than if they were voting on their own domestic practices. All too often, the end goal is simply consensus.

The General Assembly has been, unfortunately, ineffective. Many of the same resolutions are debated every year. Too many are politically motivated, against Israel, for example, a democratic state that came about after the General Assembly itself called for its establishment.

When the decisions of an international body are out of step with its original purpose, when its members ignore the principles on which it was founded, then the desire for consensus can become the tyranny of consensus. One of two things can happen. The body becomes mired in meaningless activity, or it expands its reach to new areas unrelated to its original purpose.

We applaud General Assembly president Julian Hunte for his determination to make that body more effective. Streamlining its agenda will be a good first step. But increasing the democratic quotient among its members, and focusing efforts on promoting

democracy and the rule of law, would have greater long-term benefits for the globalization of democracy.

The Security Council deserves mention here as well. Among its members are non-democratic states like Syria.

Now, many believe the Council's structure needs to change because of its inability to come together over a "second resolution" on Iraq last spring. Certainly, many of us would have preferred a different outcome to that debate; but what happened last spring was not surprising. It has always been the case that when the Permanent Five members do not agree on a course of action, the Council does not work well. This was true during the Cold War; it is true today.

In fact, the P-5 members have disagreed for years over how to proceed in Iraq. Particularly acute were disagreements over UN sanctions on Iraq. These disagreements reflect larger political realities. The Council was merely the forum in which these disagreements were played out. It is impossible to say whether the outcome would have been different—and more democratic—had more countries been members of the Security Council.

The Council may well need to be modernized to reflect new realities. But it is important to stress that the Council did not become obsolete because of its inability to find consensus on that second resolution. Three times after that, in Resolutions 1483, 1500, and 1511, its members came together to lift sanctions on Iraq, to authorize the coalition forces, and to lay the groundwork for international cooperation and a multinational force. These were all adopted, in unanimous decisions, to help the Iraqi people. The will and voice of the international community was clear. It did not need additional members to make it clearer.

The Issue of Transparency

The legitimacy of international organizations, and their decisions, suffers when they are not transparent. That's true for the United Nations, for international financial institutions, and for international organizations like the World Trade Organization. We believe that the UN's budget processes are transparent, for example, even as we are striving to improve budget discipline.

However, this does not mean that every aspect of the UN's work should be made public. In deliberations, there must be an opportunity for private discussions between member states before their positions are made public. If not, compromises become hard to achieve; too much sunshine can freeze positions and reduce flexibility.

Moreover, the more sensitive deliberations of governments in the Security Council *should* be held in private. When it comes to discussions about peace and security, weapons of mass destruction, and peacekeeping, governments need to work in private, without pressure from special interests as positions are worked out. Governments can be more candid behind closed doors, assured that what they say in private will not be front-page news the next day. I do believe that the Council's formal negotiations and final decisions must be transparent and that members of the Council should justify their votes to the world.

In the General Assembly, measures can be adopted by acclamation, which means there is no recorded vote, and no one to be held accountable for voting contrary to expectations. But this is standard practice in many democratic fora. Recording every vote in the United Nations system would not be feasible.

In many subsidiary bodies like the CHR, countries are elected to leadership positions by secret ballot. They are put forth as candidates based on regional rotations, not because they are the very best standard-bearers for that particular body. We took a public and principled stand against this practice last January, when it appeared Libya would get the silent nod to chair the CHR. Our calling for a vote was unprecedented. And, frankly, it made some of our colleagues uncomfortable. We lost that vote, but we did shine a light on a commission that has allowed a country still under the cloud of UN sanctions and still facing criticism as a human rights abuser to chair its most important human rights body.

The Importance of Accountability

Another factor that is essential to democratic governance is accountability. International organizations are criticized when the

decision-makers bear little accountability for their decisions. Here too we agree.

The Security Council was designed specifically with accountability in mind. Those who would be responsible for carrying out its decisions in matters of war were given the authority to make those decisions. Because they would deal in crisis interventions, they would have to come together quickly to authorize expensive, and possibly deadly, force. The stakes were high; the veto was seen as the glue that would keep the great powers in the bargain.

Democracy and accountability suffer when we accept as members of the Security Council countries that threaten their neighbors, oppress their people, and break international laws and treaties. I believe the Council's decisions would have more moral authority if every member elected to it governs justly and abides by the rule of law.

Accountability is at risk in regional institutions as well, such as the European Union. This troubling potential for a "democracy deficit" in Europe was pointed out some 12 years ago by Harvard professor Shirley Williams, a founder of the British Social Democratic Party. She wrote, "if the European Community is to be what it claims to be, the hub of Europe and the democratic model for Europeans, then its decisionmaking institutions must become truly accountable, not to Europe's governments or its bureaucrats, but to its people." We agree.

Making Decisions More Democratic

As I have tried to explain, the decisions of international organizations become more democratic—more representative of the people affected, more transparent, and more accountable—when more democracies are involved. Those democracies should strive to make sure their work is bolstering democracy among member states. The UN does good work in monitoring elections and helping countries like East Timor craft democratic constitutions. But to sustain a peaceful democracy, the Timorese will need help to strengthen the democratic foundations of their institutions.

In fact, much of our effort in the UN system focuses on building the democratic underpinnings of civil society. We are pleased that the outcome of deliberations in 2002, in Monterrey, Mexico, and Johannesburg, South Africa, mean that more of the UN's development work will focus on good governance and the rule of law—necessary conditions for economic growth. We look forward to working in UNESCO, the United Nations Educational, Scientific, and Cultural Organization, to help bring a "democratic dominant" focus to its activities, such as in civics education, literacy, and the promotion of press freedom.

Helping to build or reinforce democratic institutions should be a goal of every UN development program. It should be a touchstone for reform aimed at reducing corruption, protecting political and civil rights, increasing investor confidence, and generating financing for development.

Finally, another way to improve the democratic deficit is to increase cooperation among the real democracies at the UN. It is a stark reality that those who subvert the rule of law at home will seek to undermine the rule of law globally. We have only to look at North Korea and Saddam Hussein's legacy for deeply troubling examples. Such regimes fear nothing more than democratic nations coming together to stand up for the principles enshrined in the UN Charter—principles they abuse at home everyday.

The idea of a democracy caucus is not new. The World Federalist Association publicized this idea in a newsletter last year. A cross-regional group of democracies should join their vision, their values, and their vitality to change the culture of the United Nations and other international organizations. Such a caucus would make it easier for many countries, such as India, South Africa, Brazil, and many small nations, to offer leadership at the UN.

In fact, democratic countries are already combining their energies to advance freedom. Chile hosted a meeting of foreign ministers of the Community of Democracies (CD) Convening Group at the start of this year's General Assembly. In Geneva, our ambassador has joined meetings with members of this group and other countries who are on the Commission on Human Rights, to discuss our shared concerns. Here in Washington, we are hosting

a series of lunches with large and small, new and not-so-new democracies to hear their ideas and concerns.

We are also listening to the concerns of civil society. Non-governmental organizations frequent my bureau to discuss the UN's difficulties in protecting and promoting human rights and fundamental freedoms. Everyone has a stake in helping the UN and international organizations work better in these areas.

But it is ultimately up to the member states of international organizations, and especially the United Nations, to exert more self-discipline in their decision-making. This is true whether they are involved in establishing program and budget priorities, electing countries to leadership positions and commissions, voting for sanctions, or passing resolutions. Democratic principles should underpin all that they do. Because what they decide will reflect on the credibility of the entire institution, which so many people hope can be a source of moral authority in the world.

The United States remains firmly committed to the global expansion of democracy and, as President Bush puts it, "the hope and progress it brings as the alternative to instability and hatred and terror." "Lasting peace is gained," he added, "as justice and democracy advance."

We carry this strategy into all our work in international organizations. One of our resolutions aimed at strengthening UN technical assistance for elections was adopted by the UN Third Committee by a vote of 156-0-7. Interestingly, the seven who abstained were Brunei, Burma, China, Cuba, Libya, Syria, and Vietnam. We also put forth another successful resolution aimed at expanding women's participation in the political process. It was adopted by the Third Committee with 110 cosponsors.

* * * *

B. UNITED NATIONS ORGANIZATIONS

1. UNESCO

On September 29, 2003, First Lady Laura Bush addressed the General Conference of the United Nations Education,

Science and Cultural Organization ("UNESCO") on the occasion of the return of the United States to the organization, stating:

> . . . As of October 1st, the United States government will once again be a full, active and enthusiastic participant in UNESCO's important mission to promote peace and freedom. And the people of my country will work with our UNESCO colleagues throughout the world to advance education, science, culture and understanding.

The full text of First Lady Bush's address is available at *www.whitehouse.gov/news/releases/2003/09/20030929-6.html*.

A fact sheet released by the Department of State on September 22 explained the U.S. decision to rejoin UNESCO. The full text is available at *www.state.gov/p/io/rls/fs/2003/24189.htm*.

The UN Educational, Scientific and Cultural Organization (UNESCO) was established in 1946 to promote peace and security through educational, scientific, and cultural initiatives worldwide. It focused on five major thematic areas: education, natural sciences, social and human sciences, communication and information, and culture. In 1984, the United States, a founding member of UNESCO, withdrew from the organization. Since that time, however, the United States continuously maintained an Observer Mission to UNESCO and participated in programs of mutual benefit, particularly the World Heritage Committee and the International Oceanographic Commission. UNESCO has recently made a concerted effort to institute financial and management reform and resumed efforts to reinforce founding principles, including an emphasis on international press freedom.

Why the United States is Rejoining UNESCO

- UNESCO's mission and programming reflect and advance a wide range of U.S. interests. For example, UNESCO manages the "Education for All" program, which promotes universal basic education and literacy. This initiative

advances U.S. educational goals worldwide and closely parallels the U.S. "No Child Left Behind" program.

- UNESCO advocates education that promotes tolerance and civic responsibility. This is a key to building democracy and combating terrorism.
- UNESCO helps countries protect their natural and cultural heritage. It promotes adoption of sound scientific standards. These efforts are important in maintaining a healthy balance between continuity and imperatives for change.
- UNESCO promotes press freedom and independent media, essential foundations of democracy.
- UNESCO brings countries together to address issues that have significant implications for the future, such as bioethics and cultural diversity. The United States intends to be a full and active participant in these deliberations.

2. Funding Issues

On December 11, 2003, Madelyn Spirnak, Deputy United States Representative to the Economic and Social Council, provided the following explanation of the U.S. position on Operative Paragraph 5 of UN General Assembly Resolution L.14/Rev.1*: Protection of Global Climate for Present and Future Generations of Mankind, in the Second Committee.

The statement is available at *www.un.int/usa/03_258.htm.* Also on December 11, Ms. Spirnak expressed the same U.S. position concerning the UN Convention to Combat Desertification, available at *www.un.int/usa/03_257.htm.*

The United States is disappointed by the continued diversion of resources from the UN regular budget to subsidize independent and self-sustaining treaty bodies such as the UN Framework Convention on Climate Change. As a matter of principle, treaty bodies can and should collect the necessary funds from their membership to finance their activities. We are not opposed to the UNFCCC. We strongly support the objectives of the UNFCCC,

and will continue to do so through our voluntary contributions to the organization.

C. NORTH ATLANTIC TREATY ORGANIZATION

On May 8, 2003, the U.S. Senate gave advice and consent to ratification of the Protocols to the North Atlantic Treaty of 1949 on Accession of Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovak Republic, and Slovenia. 149 CONG.REC. S5885 (May 8, 2003).

President George W. Bush transmitted the Protocols to the Senate on April 10, 2003. S. Treaty Doc. No. 108–4 (2003). Excerpts below from the accompanying letter from Secretary of State Colin L. Powell, submitting the Protocols to the President for transmittal provide the views of the United States on the importance of the undertakings.

* * * *

LETTER OF SUBMITTAL

The Secretary of State,
Washington, April 5, 2003.

The President,
The White House.

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, Protocols to the North Atlantic Treaty of 1949 on the accession of Bulgaria, Estonia, Latvia, Lithuania, Romania, the Slovak Republic, and the Republic of Slovenia. These protocols were opened for signature at Brussels on March 26, 2003, and were signed on that day on behalf of the United States of America and the other parties to the North Atlantic Treaty.

The Protocols propose adding these countries to NATO as full members, with all the privileges and responsibilities that apply to current allies. The core commitment to these seven states will be embodied in the existing text of the North Atlantic Treaty of 1949, including the central collective defense provision in Article 5. I believe these countries merit this commitment on our part and

that they share our common commitment to democratic values and are prepared to act as responsible allies. The U.S. decision to pursue the enlargement of NATO has had bipartisan support across several administrations. I am confident that the Senate will grant its advice and consent to ratification of these protocols, after due deliberation, without hesitation. After Poland, Hungary, and the Czech Republic formally joined the NATO Alliance in 1999, NATO's leaders created the Membership Action Plan, or "MAP," to assist future aspirants. These seven countries' successful performance in the MAP process and the impressive record of their political, economic, and defense reforms have created a compelling justification for their invitation to join NATO. At the Prague Summit, in November 2202, you and the other NATO heads of state agreed that Bulgaria, Estonia, Latvia, Lithuania, Romania, the Slovak Republic and the Republic of Slovenia had demonstrated their adherence to the core values of NATO and their readiness to contribute to NATO's collective security. As you stated at the Summit, the seven invitees will bring a fresh spirit to the Alliance.

NATO has been the most successful military alliance in history. However, the threats to our collective security have changed dramatically since the end of the Cold War. The nexus of weapons of mass destruction and terrorism is the greatest threat to our security and to that of our Allies. NATO can play an important role in helping the civilized world meet this threat. However, NATO must change to do so. Its enlargement to encompass these countries is an important step in that direction.

These seven nations, so recently freed from totalitarian rule, understand that freedom and security require vigilance and sacrifice. Over the past few months, they had stood with the United States as we pursued the disarmament of Iraq. They also stood with the United States in the War on Terrorism, in Afghanistan, and in the Balkans. They are prepared to shoulder their fair share of the burdens of our collective security. They have all committed to spend a minimum of two percent of their GDP on defense, higher than that of many current allies. They have also taken seriously NATO's efforts to update and improve its capabilities, developing the specialized skills that the Alliance will need in the years ahead.

The Protocols to the Treaty of 1949 for each of the seven states are identical in structure and composed of three Articles. Article I provides that, once the Protocol has entered into force, the Secretary General of NATO shall extend an invitation to the named state to accede to the North Atlantic Treaty, and that, in accordance with Article X of the Treaty, the state shall become a party to the Treaty on the date it deposits its instrument of accession with the Government of the United States of America. Article II provides that the Protocol shall enter into force when each of the parties to the North Atlantic Treaty has notified the Government of the United States of America of its acceptance of the Protocol. Article III provides for the equal authenticity of the English and French texts, and for deposit of the Protocol in the archives of the Government of the United States of America, the depositary state for North Atlantic Treaty purpose.

These seven countries have a deep appreciation for U.S. efforts to free them from communism. They have made the hard choices to reform their countries and become vibrant democracies with vigorous market economies. Their accession to the Alliance will be a major step toward realizing your vision of a Europe whole, free, and at peace.

Respectfully submitted,
COLIN L. POWELL

D. INTERNATIONAL TELECOMMUNICATION UNION

On April 30, 2003, President George W. Bush transmitted to the Senate for advice and consent to ratification amendments to the Constitution and Convention of the International Telecommunication Union as contained in the Final Acts of the Plenipotentiary Conference held in Minneapolis, Minnesota, in 1998. S. Treaty Doc. No. 108–5 (2003). Excerpts below from the President's letter of transmittal and the accompanying report of Secretary of State Colin Powell provide the views of the United States on certain aspects of the amendments.

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LETTER OF TRANSMITTAL

The White House, April 30, 2003.

To the Senate of the United States:

I transmit herewith for Senate advice and consent to ratification, the amendments to the Constitution and Convention of the International Telecommunication Union (ITU) (Geneva 1992), as amended by the Plenipotentiary Conference (Kyoto 1994), together with declarations and reservations by the United States as contained in the Final Acts of the Plenipotentiary Conference (Minneapolis 1998). I transmit also, for the information of the Senate, the report of the Department of State concerning these amendments.

* * * *

The pace at which the telecommunication market continues to evolve has not eased. States participating in the 1998 ITU Plenipotentiary Conference held in Minneapolis submitted numerous proposals to amend the Constitution and Convention. As discussed in the attached report of the Department of State concerning the amendments, key proposals included the following: amendments to clarify the rights and obligations of Member States and Sector Members; amendments to increase private sector participation in the ITU with the understanding that the ITU is to remain an intergovernmental organization; amendments to strengthen the finances of the ITU; and amendments to provide for alternative procedures for the adoption and approval of questions and recommendations.

* * * *

Subject to the U.S. declarations and reservations mentioned above, I believe the United States should ratify the 1998 amendments to the ITU Constitution and Convention. They will contribute to the ITU's ability to adapt to a rapidly changing telecommunication environment and, in doing so, will serve the needs of the United States Government and U.S. industry.

I recommend that the Senate give early and favorable consideration to these amendments and that the Senate give its advice and consent to ratification.

George W. Bush.

LETTER OF SUBMITTAL

Department of State,
Washington, DC, March 1, 2002.

The President,
The White House.

The President: . . .

The International Telecommunication Union (ITU), with over 180 Member States, is the United Nations specialized agency with responsibility for certain international telecommunication matters. It provides a forum for global telecommunication standardization activities; for the international allocation, management, and use of radio spectrum; and, in the case of developing countries, for the promotion and provision of technical assistance in the area of telecommunications. These activities take place under the auspices of three "Sectors"—the Telecommunication Standardization Bureau, the Radiocommunication Bureau, and the Development Bureau.

* * * *

- [As to] [a]mendments to enhance private sector participation in the ITU. . . . I note that the United States for domestic policy reasons . . . will require that U.S. private sector entities seeking to become Sector Members apply for such membership through current procedures, which require the direct involvement of the U.S. government.

* * * *

ITU practice provides for declarations and reservations to be submitted by governments prior to signature of the instruments to be adopted at a particular conference. In 1998, the United States submitted six declarations and reservations that are included in the 1998 Final Acts. These declarations and reservations, with the exception of statements No. 91 and 92, which do not concern amendments to the Constitution and Convention, require Senate advice and consent to ratification. . . .

Consistent with longstanding U.S. practice at ITU treaty-making conferences, the first (Number 90) incorporates by reference reservations and declarations from previous conferences and reserves the right to make additional specific reservations at the time of deposit of the U.S. instrument of ratification to the amendments to the ITU Constitution and Convention. It also reiterates the longstanding U.S. position that the United States can only be considered bound by instruments adopted at an ITU Conference once it officially notifies the ITU of its consent to be bound. . . .

The second (Number 101) preserves for the United States the freedom to respond to other Member State reservations. It reads as follows:

> The United States of America refers to declarations made by various Members reserving their right to take such action as they may consider necessary to safeguard their interests with respect to application of provisions of the Constitution and the Convention of the International Telecommunication Union (Geneva, 1992), and any amendments thereto. The United States of America reserves the right to take whatever measures it deems necessary to safeguard U.S. interests in response to such actions.

The third (Number 102) was in response to a statement by Cuba reserving its right to take any steps that it may deem necessary against U.S. radio and television broadcasting to Cuba and denouncing U.S. use of radio frequencies at Guantanamo, Cuba. The U.S. response, which is similar to responses entered by the United States at previous ITU Conferences, reads as follows:

> The United States of America, noting Statement 81 entered by the delegation of Cuba, recalls its right to broadcast to Cuba on appropriate frequencies free of jamming or other wrongful interference and reserves its rights with respect to existing interference and any future interference by Cuba with U.S. broadcasting. Furthermore, the United States of America notes that its presence in Guantanamo is by virtue

> of an international agreement presently in force and that the United States of America reserves the right to meet its radiocommunication requirements there as it has in the past.

The fourth (Number 111), in which the United States joined 24 other countries, in responding to a statement by Colombia concerning the use of the geostationary satellite orbit, reads as follows:

> The delegations of the above-mentioned States, referring to the declaration made by the Republic of Colombia (No. 50), in as much as this and any similar statement refers to the Bogota Declaration of 3 December 1976 by equatorial countries and to the claims of those countries to exercise sovereign rights over segments of the geostationary-satellite orbit, consider that the claims in question cannot be recognized by this conference.
>
> Further, the above-mentioned delegations wish to affirm or reaffirm the declaration made by a number of delegations (No. 92) at the Plenipotentiary Conference (Kyoto, 1994) and declarations at conferences referred to therein as if these declarations were here repeated in full.
>
> The above-mentioned delegations also wish to state that the reference in Article 44 of the Constitution to the "geographical situation of particular countries" does not imply a recognition of claim to any preferential rights to the geostationary-satellite orbit.

* * * *

The Department of State and the other agencies involved recommend that these declarations and reservations . . . be confirmed in the U.S. instrument of ratification of the amendments. The Department of State and the other interested agencies are of the view that no additional reservations are required.

Ratifying the amendments will enable the United States to continue to play a significant leadership role in the affairs of the ITU.

These amendments will not require implementing legislation on the part of the United States.

* * * *

Cross References

Structure and objectives of UNCHR, **Chapter 6.A.4., I.1.a.**
Immunities, **Chapter 10.C.1. and D.**
Membership and other issues related to UNCITRAL and UNIDROIT, **Chapter 15.A.1.**
Role of OAS in regional cooperation, **Chapter 17.D.1.**
Effectiveness of Conference on Disarmament, **Chapter 18.B.4.**

Chapter 8

International Claims and State Responsibility

A. GOVERNMENT-TO-GOVERNMENT CLAIMS

1. Diplomatic Protection and Responsibility of International Organizations

In the report on its fifty-fourth session, the International Law Commission welcomed comments by states on certain questions concerning, among other things, diplomatic protection and responsibility of international organizations. A/57/10. Comments of the United States on diplomatic protection, dated May 16, 2003, are excerpted below. The U.S. submission provided its view of customary international law in the areas of protection of ships' crew members and shareholders, and on the treatment of continuous nationality in claims espousal. It also urged the Commission to restrict its work to codification of customary international law.

The full text of the U.S. comments, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

The Government of the United States of America welcomes the opportunity to provide comments in response to the questions posed by the Commission in Paragraphs 27, 28, and 31 of the Report on its fifty-fourth session, A/57/10. In addition, the United States takes this opportunity to comment on one issue raised in both Article 4 of the draft articles on diplomatic protection adopted

by the Commission on first reading and the Article 20 proposed in the Special Rapporteur's Fourth Report on Diplomatic Protection.

I. Diplomatic Protection

Protection of Crew Members

Since the late eighteenth century, the United States has often advocated the position, and on multiple occasions espoused claims based on the theory, that the State of nationality of the ship can provide non-exclusive diplomatic protection to crew members who hold the nationality of a third State. *See* A.D. Watts, *The Protection of Alien Seamen*, 7 International and Comparative Law Quarterly 691, 693–98 (1958). This policy stemmed from U.S. opposition to British impressment of seamen on U.S.-flag merchant vessels sailing on the high seas, especially during the Napoleonic Wars. *See* James Fulton Zimmerman, *Impressment of American Seaman* (1925). While the United States did not, in theory, object to Britain's impressment of its own nationals, the United States did protest British searches of U.S. vessels and the removal of crew members. Since Britain and the United States could not agree upon a mechanism for determining the nationality of seamen serving aboard their merchant vessels on the high seas, despite many years of diplomacy, the United States adopted the rule, first proposed by Thomas Jefferson in 1792, that "the vessel being American shall be evidence that the seamen on board are such." *See* Secretary of State Thomas Jefferson to Thomas Pinckney, June 11, 1792, in 3 *American Slate Papers: Foreign Relations* 574 (1832); *see also* Secretary of State Daniel Webster to Lord Ashburton, Aug. 8, 1842, in l *The Papers of Daniel Webster: Diplomatic Papers* 679 (Kenneth E. Shewmaker ed., 1983) ("In every regularly documented American merchant vessel the crew who navigate it will find their protection in the flag which is over them.").

This presumption regarding the nationality of crew members serving aboard U.S. ships led to the extension of diplomatic protection beyond the area of impressment. Thus, in *McCready v. Mexico* (Convention of July 4, 1868), the United States argued that it could espouse the claim of a non-national seaman, and the Commission agreed. Umpire Sir Edward Thornton concluded that

"seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve." 3 John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* 2537 (1898). A similar conclusion would have been reached by the Commission in *Hilson v. Germany* (Special Agreement of Aug. 10, 1922), according to Umpire Edwin Parker, absent the treaty provision to the contrary. See 7 R.I.A.A. 176, 183 (1925). U.S. courts and domestic claims commissions have also recognized the rule, see In re Ross, 140 U.S. 453, 472 (1891); *Cruz v. Zapata Ocean Resources, Inc.*, 695 F.2d 428, 433–34 (9th Cir. 1982); Moore, *supra*, 2350, and the United States has espoused the claims of third State crew members diplomatically as well, *see* 3 Green Haywood Hack-worth, *Digest of International Law* 418 (1942). Other States, in some reported instances, have apparently also adopted this view. *See* Watts, *supra*, 697.

Yet, the United States has not consistently applied this approach. Some U.S. statutes have required that a foreign seaman, as a precondition to his protection, declare his intent to become a U.S. citizen. *See* Act of June 7, 1872, § 29, 17 Statutes at Large 262, 268; cf. Detention of August Piepenbrink, 9 *American Journal of International Law* 353–60 (Spec. Supp. 1915). And in the *S.S. "I'm Alone" Case (Can. v. U.S.)* (Special Agreement, Convention of Jan. 23, 1924). the United States argued that "the Commissioners should not in this proceeding recognize or give effect to a claim submitted on behalf of a claimant [the French spouse of a drowned French crew member] who is not a Canadian citizen." "Statement with Regard to the Claims for Compensation Made by His Majesty's Government in Canada," in *Claim in Respect of the Ship I'm Alone": Statements Submitted by the Agent for the United States Pursuant to the Directions Given by the Commissioners, Dated the 30th of June. 1933*, at 12 (1934).[1] Indeed, little more than twenty years ago, the United States argued

[1] Without discussion, the Commissioners awarded compensation to the French claimant. *See* 3 R.I.A.A. 1610, 1618 (1935).

in U.S. court that "under international law the United States could not claim from the offending foreign nation losses sustained by seamen who were not nationals of the United States." *Cruz*, 695 F.2d at 432.

Given this varied practice, it is no wonder that there is some uncertainty as to whether customary international law allows the State of nationality of a ship to protect third State crew members. *Compare. e.g.,* Ian Brownlie, *Principles of Public International Law* 482 (5th ed. 1998) (noting that the nationality exception for alien crew members is "generally accepted"), *with* 1 Georg Schwarzenberger, *International Law* 593–94 (3d ed. 1957) (doubting the existence of the exception). When the International Court of Justice, in the *Reparation Case*, recognized that there are "important exceptions" to the rule that diplomatic protection is only exercised by the State of nationality, it did not specify the protection of crew members as one of those exceptions. *See* Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 181 (Apr. 1 1). *But see id.* at 202 (Hackworth, dissenting) (suggesting that one of the exceptions referred to was for third State crew members); *id.* at 206 n.1 (Pasha, dissenting) (same).

The United States is of the view that the Commission should restrict its work to the codification of customary international law. Accordingly, the issue of the diplomatic protection of crew members of third States should be omitted from the scope of the topic. This approach is especially reasonable given the proliferation of flags of convenience and the decision of the International Tribunal for the Law of the Sea in the *M/V "Saiaa" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, which applies, by virtue of the United Nations Convention on the Law of the Sea, to over 140 States. For these and other reasons, the topic's scope should also not include the recognition of a right to the diplomatic protection of third State crew members by the State of nationality of aircraft and spacecraft.

Protection of Shareholders

As the United States noted in its statement to the Sixth Committee, a State may exercise diplomatic protection on behalf

of shareholders that have its nationality for unrecovered losses to their ownership interests in a corporation registered/incorporated in another State that is expropriated or liquidated by the State of registration/incorporation or for other unrecovered direct losses.

The United States notes that the Special Rapporteur, in his Fourth Report, cites the U.S. statement as providing support for an exception to the general rule that the State of nationality of the shareholders *in a* corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation. *See* John Dugard, Fourth Report on Diplomatic protection, U.N. Doc. A/CN.4/530 (Mar. 13, 2003), paras. 27 n.80, 84 n.224. To be clear, the position of the United States is that the State of the shareholders may exercise diplomatic protection when they have been directly injured by internationally wrongful acts of another State. A classic example of a direct injury is when the State of incorporation/registration interferes with the shareholders' ownership rights by expropriating or liquidating the shareholders' corporation under circumstances that make such an act internationally wrongful, such as discrimination or failure to pay compensation.

On the subject of exceptions to the general rule, we would urge the Commission to proceed with caution. We are not convinced that the sources cited by the Special Rapporteur establish that either of the exceptions he proposes in his Article 18 has been accepted as customary international law. We also note that the proposed exception for corporations with the nationality of the respondent State would create a regime where shareholders in such corporations would receive *greater* international protection than shareholders in corporations of other nationalities operating in that same State. It is not apparent to us that such a result is justified. At the very least, this area requires further study.

Continuous Nationality

Article 4 of the draft articles, as adopted by the Commission on first reading, fixes the "date of official presentation of the claim" as the end-date for the period of continuous nationality (i.e., the *dies ad quem*). The Commentary states that "the date of presentation of the claim is that on which the first official or informal

demand is made by the State exercising diplomatic protection."[2] Article 20, as recently proposed by the Special Rapporteur, similarly uses that date as the *dies ad quern*. See Dugard, Fourth Report, para. 93.

The United States believes that the *dies ad quem* stated in these articles does not accurately reflect customary international law. Under customary international law, nationality must be maintained continuously from the date of the event giving rise to the claim through, not only the date of presentation, but also the date of the claim's resolution. This conclusion is supported by all relevant instances of State practice.

The United States is aware of eight specific instances in the context of arbitral decisions and claims presented through diplomatic channels in which the effect of a change in nationality between the presentation and the resolution of the claim was raised and addressed. In each of these instances, the nationality of the claimant or the person on whose behalf the claim was presented changed *after* the date the claim was officially presented to the respondent State but before the claim's final resolution.[3] In each of these cases, the international claim was dismissed or withdrawn when it became known that the claim was now being asserted on behalf of a national of the respondent State.[4]

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[2] As the United States noted in its comments to the Sixth Committee, the "date of presentation" has frequently been understood in State practice to refer to the entire period in which the international claim is pressed. [*See, e.g., Biens Britanniques au Maroc Espagno*]—Benchiton (Gr. Brit. v. Spain), 2 R.I.A.A. 615, 706 (1924). For the sake of clarity, in its comments on the Commission's proposal the United States uses the term "date of presentation" in the sense used by the Commission in its draft commentary: the date "on which the first official or informal demand is made."

[3] There are, of course, numerous reported cases in which a change in nationality *before* presentation of the claim resulted in dismissal. These cases, however, shed no light on the issue under discussion here: whether customary international law supports the view, suggested in Articles 4 and 20, that a change in nationality *after* presentation but before resolution does not equally compel dismissal.

[4] *See* 5 Green Haywood Hackworth, *Digest of International Law* 805 (1943) (where American claimant Ebenezer Barstow died after his claim was presented to the Japanese government, the United States declined to continue

These cases evidence a clear customary international law rule. In each of these cases, the dismissal or withdrawal of the claims reflected a sense of legal obligation. In each case decided by an arbitral tribunal, the issue was governed by customary international law rather than the specific terms of a treaty. In each case where

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to espouse the claim because the decedent's wife, who was the new owner of the claim, was Japanese); *Eschauzier*, 5 R.I.A.A. 207 (Gr. Brit-Mex. CI. Comm'n of 1931) (dismissing claim by a former British national who became a U.S. citizen by marriage after filing the claim); *Guadalupe* (unpublished) (Fr.-Mex. Reorganized Cl. Comm'n 1931), *discussed in* A.H. Feller, *The Mexican Claims Commissions*, 1923–1934 97 (1935) (tribunal denied claim where French nationality was lost "not only subsequent to the filing but also after the *specific* claim had been listed as receivable in the Supplementary French-Mexican Convention of 1930"); *Biens Britanniques an Maroc Espagnol—Benchiton (Gr. Brit. v. Spain)*, 2 R.I.A.A. 615, 706 (1924) (claim denied where claimant lost protected status after first British demarche to Spain concerning claim: "the claim must remain national up to the time of judgment, or at least up to the time of the termination of the argument relating thereto") (translation from 1923–1924 I.L.R. 189); *Exors. of F. Lederer v. German Government*, 3 *Recueil des Decisions des Tribunaux Arbitraux Mixtes* 762, 765, 770 (Gr. Brit.-Germ. Mixed Arbitral Tribunal 1923) (where after notification of claim British claimant died leaving German beneficiaries. claim refused: to allow such relief would "be inconsistent with the meaning of the Treaty, for it would lead in effect to payments . . . —by Germany to German nationals"); Fred K. Nielsen, *American and British Claims Arbitration* 30 (1926) (in the *Hawaiian Claims* case before the American and British Claims Tribunal, the British Government voluntarily withdrew three claims, "the claimants having acquired American nationality" during the fourteen years between the date the claims were first filed and the date the memorial was submitted); *Chopin*, 60 *French and American Claims Commission, 1880–1884, Records of Claims* (undated) (claim formally presented by France through diplomatic [typsetter: the line break above should not exist] channels on Aug. 30, 1864, withdrawn by May 24, 1883 motion to dismiss claim as to one beneficiary who had since become a U.S. national by marriage); *Report of Robert S. Hale, Esq.*, [1873, Part II, Vol. III] *U.S. Foreign Relations* 14 (1874) (report of agent before British and American Claims Commission that the commission was unanimous that the claimant in the *Gribble* case lacked standing as a British subject because he "had filed his declaration of intention [to seek U.S. citizenship] . . . before the presentation of his memorial, had subsequently, and pending his claim before the commission, completed his naturalization, and was at the time of the submission of his cause a citizen of the United States.").

the claim was withdrawn, it was withdrawn against the interest of the claimant State in receiving compensation from the respondent State for an act it alleged to be internationally wrongful. These cases, in short, reflect consistent State practice.[5]

* * * *

In addition, the United States notes that States have long asserted views supporting the date of resolution of the claim, rather than the date of its presentation, as the *dies ad quern*. Based on a survey conducted in preparation for the Hague Codification Conference, the League of Nations Preparatory Committee concluded: "According to the opinion of the majority, and to international jurisprudence, the claim requires to have the national character at the moment when the damage was suffered, and to retain that character *down to the moment at which it is decided*. . . ." Bases of Discussion for the Conference Drawn up by the Preparatory Committee League of Nations Doc. C.75.M.69.1929.V (1929), reprinted in 2 League of Nations Conference for the Codification of International Law 119301 423, 562–67 (Shabtai Rosenne ed., 1975) (emphasis added). More recently, States similarly expressed "strong support . . . for the retention of the customary rule, i.e. that diplomatic protection could only be exercised on behalf of a national of the plaintiff State, and that the link of nationality must exist from the first *to the last* moment of the international claim." Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During Its Fifty-Sixth Session, U.N. Doc. A/CN.4/521, ¶ 74 at 11 (Jan. 21, 2002) (emphasis added).

It is clear that the *diese ad quem* stated in Articles 4 and 20 does not represent customary international law. The United States believes the Commission should amend its draft to reflect the

[5] The Commentary to Draft Article 4 claims that there is "some disagreement in judicial opinion over the date until which the continuous nationality of the claim is required." Report of the International Law Commission on the Work of Its Fifty-fourth Session, United Nations GAOR, 57th sess., Supp. 10, U.N. Doc. *A/57/10* (2002) at 179 (footnote omitted). No citations are provided, and no reference is made to the clear State practice cited here.

customary rule. The United States reserves its views on other aspects of Draft Article 4, as well as the other draft articles adopted on first reading.

2. United States-Iran Claims Tribunal

On November 4, 1979, Iranian militants seized the U.S. Embassy in Tehran, holding diplomatic and consular personnel and other persons hostages. *See Case Concerning United States Diplomatic and Consular Staff in Tehran*, 1980 I.C.J. 3, 12. On January 19, 1981, the United States and Iran entered into an international executive agreement embodied in two declarations of the Government of Algeria, known as the Algiers Accords. Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the United States ("General Declaration") and Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration"). 20 I.L.M. 223 (1981). The Accords brought about the release of the American hostages and established the Iran-U.S. Claims Tribunal ("Tribunal") at The Hague, the Netherlands, to resolve existing disputes between the two countries and their nationals. *See also Digest 2001* at 381–382. During 2003 the United States was involved in several ongoing intergovernmental cases before the Tribunal, including filings and hearings in five such cases and a decision in one discussed in this section.

a. Case B/61

On September 1, 2003, the United States filed its Rebuttal in Case B/61, consisting of a three-volume "Brief and Evidence on Issues Common to Multiple Claims," and some 52 individual briefs and evidence regarding claims relating to private U.S. companies. Iran filed Case B/61 originally in

1982,* claiming that the United States violated its obligations under Paragraph 9 of the General Declaration by precluding the export of certain properties to Iran. Iran therefore claimed that the United States was obligated to compensate Iran for its alleged losses.

Iran's claims against the United States in Case B/61 relate to commercial contracts between Iran and private U.S. companies, mainly involving the sale of military equipment. Prior to November 14, 1979, the sale of most military equipment was (and remains today) subject to U.S. export control regulations that reflect national security interests. On November 14, 1979, shortly after the November 4 seizure of the U.S. Embassy in Tehran, President Jimmy Carter issued Executive Order 12170. This order temporarily blocked all "property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which . . . come within the possession or control of persons subject to the jurisdiction of the United States." 44 Fed. Reg. 65,729 (Nov. 15, 1979).

Paragraph 9 of the General Declaration,—at issue here —covered U.S. obligations with respect to tangible properties:

> Commencing with the adherence by Iran and the United States to this Declaration and the attached Claims Settlement Agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad

* Statement of Claim, Case No. B/61, Jan. 19, 1982. The United States filed a Statement of Defense in October of 1982. In the following years, many additional filings, pleadings and evidence were submitted by the Parties, culminating in the United States' filing of this Rebuttal to Iran's Reply (Brief and Evidence in Answer to the United States' Consolidated Response to the Questions of Liability (Part I) And Compensation (Part II): Volumes I–XXXIII, Case No. B/61, July 2, 1999 .

and which are not within the scope of the preceding paragraphs.

The following is excerpted from the U.S. "Summary of the Argument," contained in its Rebuttal to Iran's Reply Brief and Evidence, entitled "Brief Of The United States On Issues Common To Multiple Claims," Volume I of III (Brief).

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The United States respectfully requests the Tribunal not to apply its ruling that, despite the fact that the United States acted consistently with its obligations under the Accords in refusing to license the export of sensitive equipment, it must nonetheless compensate Iran for losses resulting from the license denials because of an implied obligation.** The United States would have never agreed to such a compensation obligation, for it would have put Iran in a far better position than it was in as of the date of the freeze of Iranian assets. Furthermore, such a compensation obligation would have been tantamount to paying ransom for the unlawful seizure and holding of American hostages, which the United States consistently and unequivocally refused to do. Nothing in the Algiers Accords requires the United States to pay compensation for the lawful exercise of its export control authority, and the decision that there is such an obligation constitutes an unauthorized rewriting of the Algiers Accords contrary to well-settled principles of treaty interpretation.

** [Editors' note: In a related case (Case A/15), the Tribunal determined legal issues with implications for Case B/61. In Partial Award 529, the Tribunal decided, *inter alia*, that the United States was in compliance with the Algiers Accords when it excluded export-controlled property from regulations directing the transfer of Iranian property to Iran. *See* Partial Award 529-A15-FT at ¶ 59, 28 Iran-U.S. C.T.R. at 133–34. Nevertheless, the Tribunal concluded that the United States had an implied obligation to compensate Iran for losses resulting from the U.S. decision to preclude the transfer of those properties. *See id.* at ¶ 65. The text of the excerpt relates to the United States' request in Case B/61 that the Tribunal *not* apply its ruling in Partial Award 529.]

* * * *

If the Tribunal reaches the issue of liability, Iran must prove that it is entitled to compensation for each item of property in accordance with Paragraph 9. Thus, Iran bears the burden of proving that the claimed property was in existence on January 19, 1981; that the claimed property was in the United States or otherwise subject to U.S. jurisdiction as of January 19, 1981; that the entity that owned the property was "Iran" as of January 19, 1981; and that Iran owned the property as of January 19, 1981.*** Iran's various attempts to reinvent the law of ownership should be rejected. Where Iran has failed to prove U.S. liability, its claims must be dismissed.

Under the Tribunal's precedents, because the United States acted lawfully when it refused to license the export of sensitive material, Iran is not entitled to any lost profits or other consequential damages for the decision not to license the export of the property, but at most only to compensation not exceeding the fair market value of the property at the valuation date. In addition, Iran's loss calculation must take into account losses Iran could have avoided through reasonable mitigation, including selling the property to a third party, as well as the circumstances relating to the underlying transaction, such as amounts Iran saved by not receiving the property. The Tribunal should also take into account the risk run by Iran, prior to November 14, 1979, that it would not have received the property due to the lawful application of U.S. export control laws. Iran is not entitled to specific performance.

In contrast to the objective value calculation required by the Tribunal and detailed in its precedents, Iran has submitted a subjective methodology, which it misleadingly calls "replacement value," that is unique in the annals of international law. Iran's "replacement value" methodology has no basis in Tribunal law

*** [Editor's note: Also in Partial Award 529, the Tribunal ruled that the United States properly excluded from the transfer regulations property in which Iran's interest was only partial or contingent. *See id.* at ¶ 43. Thus, the United States argues that Iran is obligated to prove it owned, *i.e.*, held title to, the properties for which it claims compensation.]

or practice. The Tribunal awards replacement value only when a claimant proves that the market valued a used item as new as of the valuation date. Iran's novel justifications for awarding "replacement value," as it defines the term, have no merit. Iran's unique, subjective theory fails to value the specific property at issue as of the valuation date, as required. But even taken on its own terms, Iran's "replacement value" proposal is fundamentally flawed because, as a result of Iran's own actions, the claimed properties did not have a heightened subjective value to Iran. Further, even assuming, *arguendo*, the appropriateness of Iran's "replacement value" theory, its application is faulty in numerous ways. For all these reasons, Iran's compensation request should be dismissed.

b. Case A/30

In January 2003 the United States filed its rejoinder brief in Case No. A/30. 18–1 Mealey's Intl. Arb. Rep. 5 (2003). Originally filed by Iran in 1996, this case involves allegations that two pieces of legislation enacted by the U.S. Congress—the Intelligence Authorization Act FY 96 and the Iran-Libya Sanctions Act ("ILSA")—violate provisions of the Algiers Accords relating to Paragraph 1 of the General Declaration in which the United States pledged that "it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs."

The United States argued in its brief that Iran lacks standing to raise such claims because Iran comes before the Tribunal with unclean hands. Iran has itself intervened in the internal affairs of numerous other countries, and engaged in the direct support of documented terrorist activities against foreign governments and Iranian dissidents and foreign nationals abroad.

Additionally, the United States argued that Iran failed to substantiate its charge that U.S. legislative action breached obligations under the Accords. As an initial matter, the United

States articulated why the provision in the Accords concerning "non-intervention"—a non-binding statement of policy—does not impose an enforceable obligation.

Were the Tribunal to find that such an enforceable obligation exists, however, the United States maintains that the Tribunal must still reject Iran's claims for failure to establish a *prima facie* case. Principally, Iran failed to show that the United States authorized, appropriated money for, or engaged in covert activities related to Iran. With respect to ILSA, Iran could not overcome the broad consensus that economic sanctions do not violate customary international law, or the fact that non-intervention relating to economic measures is not expressly covered by the Accords. Finally, the U.S. commitment under the Accords to revoke trade sanctions promulgated during the hostage crisis had no bearing on sanctions imposed for Iran's post-Accords activities.

The Tribunal granted Iran the opportunity to respond to the United States' most recent submission. Iran has received Tribunal approval for several three-month extensions, the latest of which extended the deadline for Iran's response until February 20, 2004.

c. Case A/15 (IV)

In April 2003 the United States filed its "Brief and Evidence on All Remaining Issues" in Cases A/15(IV) and A/24 before the Iran-U.S. Claims Tribunal. In these two consolidated cases, Iran seeks compensation for attorneys' fees and costs incurred in U.S. court cases that were officially suspended under executive orders and Treasury Department regulations consistent with General Principal B of the General Declaration.

In the first stage of the proceedings, the Tribunal held that Iran may not recover for any litigation expense unless it could demonstrate that the expense was "reasonably compelled in the prudent defense of its interests." In order to make such a showing, the Tribunal required Iran to show

"what expenses it incurred with regard to each specific case and what was the particular justification for the specific sums it spent." *Iran v. United States*, Partial Award 590-A15(IV)/A24FT (Dec. 28, 1998) at ¶214(A)(a)(3)-(4).

In its brief, the United States argued that Iran had neither provided the required specific justification nor demonstrated the necessity of the expenses for which it seeks recovery. The U.S. executive orders issued pursuant to the Algiers Accords stripped the suspended cases of any legal effect. Therefore, Iran could not have suffered any injury as a result of continuing litigation in the suspended cases. Because Iran never had to take action in the suspended cases to avoid injury, the United States argued that the Tribunal could not find any of Iran's expenses to be necessary and that the case had to be dismissed. The following excerpt from the U.S. brief summarizes this argument.

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When the United States suspended the cases against Iran in fulfillment of U.S. obligations under General Principle B [of the General Declaration] it rendered those cases to be of "no legal effect." As a result, it was wholly unnecessary for Iran to take any action whatsoever in its own defense. In the hundreds of suspended cases in which Iran did not file documents, make an appearance, or even monitor the case, Iran never had to satisfy a single judgment. Because Iran's interests were fully secured by U.S. actions, any expenses it chose to incur were entirely superfluous.

Moreover, Iran's only support for its claim is a mass of incoherent and poorly explained evidence, all of which fails to justify compensation under the terms of the Tribunal's specific pronouncements in the Partial Award. Far from presenting evidence of appearances and filings made in the prudent defense of its interests, Iran boldly attempts to claim damages for a wide range of alleged expenses that clearly fall outside the parameters of the Partial Award. It seeks compensation for charges associated with tax advice, immigration matters, and substitutions of counsel. Iran even seeks reimbursement for the costs of running its Bureau of

International Legal Services office in The Hague. The Tribunal has already ruled that Iran may not receive compensation for these kinds of alleged expenses and many others like them.

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d. Case B/1: U.S. Counterclaim

On September 22–24, 2003, the United States participated in a hearing before the Iran-U.S. Claims Tribunal on the issues of whether the Tribunal has jurisdiction over the U.S. counterclaim in Case B/1 and, if so, whether the relief that it may grant should be limited to an offset against any amount that might be awarded to Iran in Case B/1.

On March 13, 1982, the United States filed its counterclaim in Case B/1 along with its Statement of Defense. Statement of Defense and Counterclaim of the United States, Case B/1, Mar. 31, 1982. The U.S. counterclaim alleged that, beginning in 1979, Iran violated the security conditions of its Foreign Military Sales ("FMS") contracts by failing to maintain the security of major classified weapon systems sold to Iran under its FMS program. The United States demanded compensation for expenses of over $800 million that it incurred to remediate those breaches. In April 1982, after a round of briefings on the merits of the counterclaim, Iran challenged the Tribunal's jurisdiction over any counterclaims in government-to-government claims. Subsequent pleadings between 1989 and 1992 addressed the issue of whether the Tribunal's jurisdiction over the counterclaim should be considered as a preliminary matter or along with the merits. The Tribunal took no further action on the counterclaim until November 2001, when it announced its intention to expedite consideration of the counterclaim in order to determine whether the counterclaim would continue to be relevant to Iran's obligation to maintain the Security Account (described in 2.e. below). The Tribunal then ordered the parties to submit hearing memorials on the questions of "whether the Tribunal has jurisdiction over the counterclaim in this Case,

and if it has, whether such jurisdiction is limited to an offset against any amount that might be awarded to Iran in this Case." The United States filed its hearing memorial on July 29, 2002.

At the September hearing, Iran opposed the Tribunal's exercise of jurisdiction over the U.S. counterclaim on the grounds that Article II(2) of the Claims Settlement Declaration does not permit counterclaims in government-to-government cases, and that the U.S. counterclaim was not filed in time to be accepted as an independent claim. Iran also challenged the admissibility of the U.S. counterclaim, objecting that the counterclaim does not arise from the contracts that form the basis of its claim in Case B/1, that the counterclaim was not outstanding on January 19, 1981, as assertedly required by the Claims Settlement Declaration, and that it does not provide a sufficiently specific and detailed statement of the claim to meet the Tribunal's minimum standard of pleading. Iran argued further that, because of the alleged deficiencies in the pleading of the counterclaim, should the Tribunal determine that it has jurisdiction over the U.S. counterclaim, it should limit the U.S. recovery to an offset against any amount that Iran might be awarded against the United States in Case B/1.

In response to Iran's challenges, the United States asserted that the Tribunal derives its jurisdiction over the U.S. counterclaim from the UNCITRAL Rules, which permit respondents to bring counterclaims, and which were incorporated explicitly into the Tribunal's Rules. Further, the United States argued that the well-documented practice of the parties in submitting numerous counterclaims in government-to-government cases demonstrates conclusively that, in drafting the Claims Settlement Declaration, the parties intended for the Tribunal to exercise jurisdiction over official counterclaims. On issues pertaining to the admissibility of the counterclaim, the United States asserted, first, that it had fully complied with the filing deadline requirement of the Tribunal rules by submitting the counterclaim with its statement of defense; and, second, that the counterclaim is

based upon precisely those contracts that form the basis of Iran's claim in Case B/1. The United States reviewed the text of the counterclaim to demonstrate that in the formal aspects of its pleading and in the specificity of its allegations, the U.S. counterclaim complied fully with the requirements of the Tribunal rules for pleading, as the Tribunal has interpreted those rules in numerous cases. Finally, on the issue of whether any recovery for the United States upon the counterclaim should be limited to an offset, the United States maintained that the Tribunal's jurisprudence on offsets does not justify restricting recovery on the counterclaim to an offset, and argued that such a restriction would severely prejudice the U.S. right to the fair adjudication of its counterclaim.

The United States anticipates that the Tribunal will rule on the question of its jurisdiction over the counterclaim by summer 2004.

e. Case A/33

On September 29 and 30, 2003, the United States and Iran participated in a hearing on the merits of Case A/33, before the Tribunal. This case was filed by the United States on October 15, 2001, claiming that Iran is in violation of an obligation under Paragraph 7 of the Algiers Accords. The Tribunal has the case under consideration and is expected to issue a ruling in 2004.

The U.S. claim in A/33 concerns Iran's obligation to replenish and maintain a minimum balance of $500 million in the Security Account established by Paragraph 7 of the General Declaration. Paragraph 7 required the creation of the Security Account to hold Iranian funds "to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement." It also requires Iran to maintain a minimum balance of $500 million in the Security Account until the president of the Tribunal certifies that all arbitral awards against Iran have been satisfied.

In a decision issued on December 19, 2000, in Case A/28, No. DEC 130-A28FT (Dec. 19, 2000), 15–12 Mealey's Intl. Arb. Rep. 4 (2000), a case also brought by the United States, the Tribunal found that Paragraph 7 did obligate Iran to replenish the Security Account in order to maintain a $500 million minimum balance, and further found Iran had been in violation of this fundamental obligation for eight years. The Tribunal also stated that it expected Iran would comply with the obligation in the future. *Id.* at ¶ 95B.

The United States filed Case A/33 on October 15, 2001, alleging that despite this clear delineation of Iran's obligation in Case A/28, since the December 2000 decision, Iran had failed to replenish and maintain the Security Account at or above the $500 million level required by Paragraph 7. Iran filed its Statement of Defense in Case A/33 on August 30, 2002. A hearing before the full Iran-U.S. Claims Tribunal was scheduled for September 29–30, 2003.

At the September hearing, the U.S. presentation focused on establishing that Iran's failure to replenish and maintain the Security Account was a continuous violation of its Paragraph 7 obligation, interpreted definitively by the Tribunal in Case A/28. The United States' presentation also addressed jurisdictional objections and the Tribunal's authority to adjudicate Case A/33 as a dispute arising from the interpretation or performance of the Algiers Accords under Paragraph 17 of the General Declaration and Article II(3) of the Claims Settlement Declaration. Finally, the United States' presentation addressed the question of appropriate remedies for Iran's alleged breach of its obligation.

The Tribunal is expected to issue a ruling in 2004.

f. Award in Sheibani v. U.S.

On June 11, 2003, Chamber One of the Tribunal dismissed a claim brought against the United States by members of

Iran's parliament, the Majlis, for damages arising from alleged U.S. involvement in the *coup d'état* of August 19, 1953, in Iran. *Sheibani v. U.S.,* Case No. 946. DEC 131-946-1, 2003 WL 21663253. In its decision, excerpted below, the tribunal found that the claim failed to meet the requirements for either claims of nationals or government-to-government claims over which the tribunal has jurisdiction under the Algiers Accords.

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11. Article II of the Claims Settlement Declaration gives the Tribunal jurisdiction over two kinds of claims: private and official. With respect to private claims, Article II, paragraph 1, of the Declaration gives the Tribunal the power to decide "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States . . . [that] arise out of debts, contracts . . . expropriations or other measures affecting property rights. . . ."

12. Article VII, paragraph 2, of the Claims Settlement Declaration further provides in relevant part: "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state. . . .

13. Therefore, in order for nationals of Iran or the United States to be deemed proper claimants by the Tribunal under the Claims Settlement Declaration, they must claim before this Tribunal as the owners of the claims and must show that their claims were "owned" by nationals of Iran or the United States, as the case may be, continuously from the time they arose until the time that the Algiers Accords entered into force on 19 January 1981. This requirement is further established by Tribunal precedent.[2] Here, however, the Claimants do not even purport to "own"

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[2] See, e.g., Tchacosh Company, Inc. et al. and The Government of the Islamic Republic of Iran, et al., Award No. 540-192-1, paras. 22–23

the instant Claim; they profess to have brought it on behalf of others. Such a "group action," as the Respondent has styled this Claim, is not permitted by the Claims Settlement Declaration or Tribunal Precedent. (Fn. omitted.)

14. In addition, the Claimants have not claimed that they personally (as distinct from the Iranian population as a whole) suffered any injury as a result of the Respondent's alleged actions or that they have properly acquired such claims of other Iranian nationals prior to the Tribunal's jurisdictional cutoff date. On the contrary, in their Reply of 28 January 1993, the Claimants clearly contend that "they represent a large number of people who have personally incurred injuries." Because ownership of a claim is a sine qua non of a party's standing in a private claim, and because the Claimants have not pleaded such injury or ownership, the Tribunal finds that they have no standing to bring this Claim.

15. The Claimants, moreover, have not stated an "official claim [] . . . arising out of contractual arrangements . . . for the purchase and sale of goods and services," as required by Article II, Paragraph 2, of the Claims Settlement Declaration, and in any event lack standing to bring any such claim. A claim for damages alleged to result from the cited event does not implicate any of the "contractual arrangements" that alone can form the subject matter of an official claim and hence falls outside the Tribunal's jurisdiction. In addition, since "official claims" must be "of the United States and Iran against each other," as also required by Article II, Paragraph 2, the Claimants here have no standing to advance such a claim, as they themselves recognize that "[t]his claim . . . is

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(9 Dec. 1992), reprinted in 28 Iran-U.S. C.T.R. 371, 380–381; Harrington and Associates, Inc. (a claim of less than US$250,000) and The Islamic Republic of Iran, Award No. 321-10712-3, paras. 14–20 (27 Oct. 1987), reprinted in 16 Iran-U.S. C.T.R. 297, 301–302; Richard D. Harza, et al. and The Islamic Republic of Iran, et al., Award No. 232-97-2, paras. 21–22 (2 May 1986), reprinted in 11 Iran-U.S. C.T.R. 76, 84–85; and McCollough & Company, Inc. and The Ministry of Post, Telegraph and Telephone, et al., Award No. 225-89-3, paras. 12–14 (22 Apr. 1986), reprinted in 11 Iran-U.S. C.T.R. 3, 7.

not brought by the Government of Iran, its agencies, instrumentalities or controlled entities" against the United States and "cannot, therefore, be characterized as an official claim within the meaning of the Claims Settlement Declaration. . . ."

16. Having established that the Claimants in this Case lack proper standing to bring a private claim and do not purport to bring an official claim, the Tribunal need not consider whether the instant Claim otherwise satisfies the jurisdictional requirements set forth in Article II, Paragraph 1, of the Claims Settlement Declaration.

3. Claims Against Iraq: United Nations Claim Commission

After the liberation of Kuwait following Iraq's invasion, in 1991 the United Nations Security Council adopted Resolution 692, establishing the United Nations Compensation Commission ("UNCC") in Geneva, as provided in section E of Security Council Resolution 687. The purpose of the UNCC is to resolve claims against Iraq by foreign nationals, companies, and governments that arose as a direct result of the invasion and occupation of Kuwait. The UNCC has received approximately 2.6 million claims from claimants worldwide, with an asserted value in excess of $300 billion.

The United States submitted to the UNCC over 3,000 individual claims for losses arising from the Iraqi invasion and occupation of Kuwait. These losses include personal property, bank accounts and securities, income, salary or support, real property, and individual business losses, as well as claims for losses resulting from departure from Iraq and Kuwait, and serious personal injury or death. The United States also submitted 155 claims from U.S. corporations and over a dozen claims from U.S. Government agencies for losses attributable to Iraq's invasion of Kuwait.

Funds to pay successful claimants come from Iraqi oil sales. Awards are paid as funds become available in the Compensation Fund. On May 22, 2003, UN Security Council Resolution 1483, discussed in Chapter 16.A.2.c.(1), reduced

contributions to the UNCC from 25 percent to 5 percent of Iraqi oil export proceeds. As of December 2003, the 5 percent share was being deposited into the UN Compensation Fund to permit the UNCC to make payments on claims and to fund the UNCC's ongoing operations. Fewer than 150 American claims against Iraq remain to be reviewed and awarded by the UNCC. As of December 2002, successful American claimants had received approximately $250 million toward UNCC awards totaling almost $700 million.

In a letter of July 18, 2003, Secretary of State Colin Powell responded to an inquiry from a U.S. claimant concerning payment of an existing award in light of these developments, as excerpted below.

The full text of the letter is available at *www.state.gov/s/l/c8183.htm*.

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After the recent hostilities in Iraq, the United States was instrumental in ensuring the preservation of the UNCC program in UN Security Council Resolution 1483. Although the percentage of Iraq's oil export revenues that will be devoted to the UNCC's Compensation Fund was reduced to five percent to ensure the availability of funding necessary for Iraq's pressing reconstruction needs, this resolution provides assurance that there will continue to be funds available to pay awards. We recognize that this means full payment of awards such as yours will require more time.

Additionally at the June 24–26 UNCC Governing Council Working Group meeting, we were successful in winning approval of a statement "recognizing that the reduced funding of the Compensation Fund that may occur during the next year would further delay the fully payment of awards . . . that have unpaid balances," and concluding that "once the level of income into the Compensation Fund permits, consideration will be given to means by which payments on such awards may be resumed."

The United States worked hard to establish the UNCC, and we continue to believe that appropriate compensation should be paid to the victims of Iraq's invasion of Kuwait. Thus far,

the UNCC process has worked well and represents a major achievement.

* * * *

B. CLAIMS OF INDIVIDUALS

1. Compensation of Terrorism Victims

On July 17, 2003, William H. Taft, IV, Legal Adviser of the Department of State, testified before the Senate Committee on Foreign Relations in support of proposed legislation entitled "Benefits for Victims of International Terrorism Act," S.1275. Mr. Taft's testimony, provided below in full, sets forth the history of Congressional efforts to provide compensation for victims of terrorism, an analysis of the shortcomings of those efforts, and the administration's proposal for the Benefits for Victims of International Terrorism Program, as embodied in S. 1275. *See also Digest 2002* at 408–410. At the end of 2003 no legislation had been enacted on this issue.

Let me begin by expressing the Administration's and my own personal sympathy to victims of international terrorism. Over the last 25 years, we have all seen how Americans and our embassies and facilities abroad have become the targets for the most dreadful attacks. We all remember the sight of our embassy personnel being paraded before the cameras during their captivity in Iran for 444 days and can not begin to imagine their suffering. Additional Americans were taken hostage in Lebanon, and held for years in the most deplorable conditions. Others were killed, while yet others have died in attacks by suicide bombers, in acts of airline sabotage, and in attacks on our embassies abroad. All of these victims and their families have suffered unspeakable injuries and pain.

Congress has passed numerous pieces of legislation to make clear its intent that victims of international terrorism receive compensation.

First, in 1996, Congress provided that civil suits against the terrorist parties, including state sponsors of terrorism, would hold them responsible. It passed an amendment to well-established rules of sovereign immunity embodied in the Foreign Sovereign Immunities Act that removed immunity from suit for states designated as sponsors of international terrorism.

This legislation opened the courts to suits against the state sponsors of terrorism, and judgments were rendered against those states; it was, however, difficult for plaintiffs to collect on their judgments. In most cases, in fact, the defendant states have not even appeared in the suits. Nor do these states typically have many assets in the United States against which a judgment may be executed. What property is here is frequently blocked and often subject to competing claims of ownership.

To address this situation, in 2000, Congress passed additional legislation. This act made blocked assets of Cuba available to pay certain outstanding judgments against that country. It also provided that certain plaintiffs with judgments against Iran could be paid out of funds from the U.S. Treasury supplemented by a small portion of blocked Iranian funds. In all, approximately $377.7 million was paid by the Treasury to 13 victims or their families. Other plaintiffs with judgments against Iran, as well as plaintiffs with judgments against other state sponsors of terrorism, however, received no payments as a result of the new legislation. Subsequently, Congress added two more plaintiffs to the list of those eligible for payments. As a result, one additional judgment holder against Iran received compensation; the other additional plaintiff is still awaiting a judgment. This brought the total of payments from the Treasury for 14 victims to $386 million.

Following the tragic events of 9/11, Congress acted swiftly to address the immediate needs of the victims and families of those most horrific acts of terrorism by passing title IV of the Air Transportation Safety and System Stabilization Act. It established a Special Master within the Justice Department, who determines the appropriate amount to be paid in each individual case. The payments come from the Treasury. As we all know, while many have welcomed and benefited from this program, there has also been significant criticism.

Last year, Congress addressed this subject yet again and passed the Terrorism Risk Insurance Act. This statute made additional judgment holders eligible for payments. It also made some of the blocked assets of terrorist parties, including those of state sponsors of terrorism and their agencies and instrumentalities, available to satisfy some judgments. Congress had previously passed similar provisions in 1998. However, these also permitted the President to waive the attachment provisions. President Clinton issued a waiver upon signing the amendment into law.

With passage of the Terrorism Risk Insurance Act, judgment holders began to attach blocked assets of terrorist list states, but with uneven results. Some who had received judgments against Iraq were able to satisfy their judgments from some $100 million in blocked Iraqi assets. All other Iraqi assets, however, have been vested by the President in the United States, and are not available to compensate judgment holders.

Plaintiffs with judgments against Iran are also attempting to attach Iranian blocked assets. But Iran has few blocked assets in the United States—about $23 million, according to Treasury's most recent report to Congress, and the largest amount of these are diplomatic and consular properties subject to obligations pursuant to the Vienna Conventions on Diplomatic and Consular Relations, and thus not subject to attachment under the new statute. So there is very little money or property available to satisfy these judgments.

Thus, while it was Congress' intent to address the suffering of victims of international terrorism, the legislation it passed, piecemeal over the years, has proven unsatisfactory in several respects. The current litigation-based system of compensation is inequitable, unpredictable, occasionally costly to the U.S. taxpayer and damaging to the foreign policy and national security goals of this country.

First, let me address the inequitable and unpredictable nature of the current system. While some U.S. victims have been successful in obtaining large default judgments, others, who may not be able to prove who was responsible for the terrorist act, are not able to obtain court judgments. Yet others are barred by international agreement from even bringing suit.

Some judgment holders have been able to satisfy judgments against the particular state sponsor of terrorism, because at the time their judgments were rendered, there happened to be sufficient blocked assets they could attach. Others have not, because the defendant state in their cases has few blocked assets in the United States. In addition, plaintiffs have had to compete against each other for satisfaction, hoping that their writs were served before the others for attachment of the very same assets.

Yet others have been eligible to receive payments directly from the U.S. Treasury. But many have received and can expect to receive nothing under the current system. And those victims or families who have received payments have received drastically varying amounts for similar injuries.

Second, the current system has been costly to the U.S. taxpayer and will continue to be so, whether or not the funds come directly from the U.S. Treasury. Under the Victims of Trafficking Act, payments totaling $386 million were made from the U.S. Treasury for 14 victims [*see* 68 Fed. Reg. 8,077 (Feb. 19, 2003)]. Continued payments in this fashion, based upon compensatory damages awarded by a court, would amount to a significant drain on the U.S. Treasury. And while some blocked assets have been made available for attachment, in theory to make the terrorist party pay, in fact the U.S. taxpayer is most likely to end up footing this bill.

Virtually all of the Iranian blocked property that has been the subject of attachments involves property that is the subject of claims against the U.S. government before the Iran-United States Claims Tribunal in The Hague, where we will have to account for it. And when the time comes for the United States to demand from Iran or other states reimbursement for the amounts it has paid on their behalf, there will be offsetting claims to cover judgments against the United States rendered in foreign courts. Recently an Iranian court entered a default judgment against the United States for $500 million.

Third, the current system has frequently conflicted with foreign policy and national security interests. The U.S. government blocks assets in the interests of the nation as a whole. This is a powerful

foreign policy tool. It is not intended to expropriate those assets, but to use them to promote important foreign policy goals. Using those assets to pay court judgments undermines the President's ability to use this tool in the broader interest of the nation. For example, blocked Iraqi assets were needed this year for the people of Iraq and to support reconstruction efforts, just as blocked Afghan assets were needed for similar purposes in 2002, and as blocked Iranian assets were held as critical leverage in 1981 to secure the release of the hostages.

Using blocked assets to pay claims and judgments will not deter terrorism. Terrorist states already know that they will never see the blocked assets unless they change their behavior. The only governments that will be hurt by the use of blocked assets for paying judgments will be the governments that end their country's support for terrorism.

Congress evidently recognized that the current ad hoc, piecemeal approach to compensation had significant downsides and therefore looked to the Administration to help develop an alternative program. In passing the Commerce, Justice and State Appropriations Act for FY 2002, Congress made clear its interest in a comprehensive program to ensure fair, equitable, and prompt compensation for all U.S. victims of international terrorism (or their family members) that occurred or occurs on or after November 1, 1979.

In June 2002, Deputy Secretary Armitage in a letter to many Senators and Congressmen set out four major principles for a proposal that would do this:

(1) the program should provide the same benefits to those with low incomes as to those with greater means;
(2) victims should receive benefits as quickly as possible, without the need for litigation or a drawn-out adjudication process;
(3) the amount to be paid should be on par with that provided to families of public safety officers killed or injured in the line of duty—a catastrophe for which Congress has previously determined taxpayers would wish to provide compensation; and

(4) compensation would not come from blocked assets, thereby assuring that the practice of using blocked assets as leverage in the conduct of foreign policy can continue.

Last month, we forwarded draft legislative language to Chairman Lugar. We believe that the program we have proposed is the fairest and most equitable approach to providing benefits to victims or their families. It provides all victims and their families with predictability, so that they know up front what benefit the federal government will provide them, without ever having to go to court or needing an attorney or ad hoc legislation from Congress for their particular situations. Importantly, for persons who have already filed lawsuits against terrorist states seeking compensation for injuries suffered in terrorist incidents—whether they have obtained judgments yet or not—the bill will not affect their ability to attach blocked assets; they are essentially grandfathered in this respect, losing no rights they currently have.

Let me highlight some of the major provisions of the program that would be established under S. 1275. When an act of international terrorism occurs, the victim, or victim's family would receive a quick, uniform payment, without having to prove who was responsible for the act of terrorism and without having to bring a lawsuit and obtain a judgment.

The families of those killed would receive the same amount that is paid to families of police officers and fire fighters who are killed in the line of duty under legislation enacted previously. That amount is currently $262,000, and is subject to an automatic escalator clause. Those injured or held hostage would receive up to that amount according to a schedule to be established in regulations.

The program would be administered by the State Department and paid for out of funds separately authorized and appropriated to the Department for this purpose. The U.S. Government would be subrogated, to the extent of payments made, to any recovery in litigation or settlement.

Those who decided not to participate in this program could still sue to the extent permitted by current law, but they would not be able to satisfy judgments out of blocked assets, unless their

suits have already been filed. The possibility that assets of terrorist states, whether blocked or otherwise, may be available to satisfy judgments in the past has, with few exceptions, led only to either of two results. Either there turn out to be no available assets and no payments are made or Congress has paid the judgments from the Treasury. Under our bill the route to the Treasury will be short and reliable, and no one will be under the illusion that there are terrorist state assets available to compensate them in the largest number of cases where there really aren't.

We believe this program would be fair to all victims and their families. There would no longer be a need to try to find a defendant, and to race to the courthouse to try to obtain a default judgment, and then to see whether any blocked assets are still available for that particular country or ad hoc legislation could be enacted to provide a Treasury payment. While providing a generous benefit to victims, it would be less costly to the U.S. Treasury and fairer than paying massive default judgments to a small number of victims and leaving many others out. I hope you will consider this proposal favorably.

2. Claims by Victims of the Nazi Era

a. Claims under California state law

(1) Claims in federal courts

(i) State authority in foreign affairs

On June 23, 2003, the U.S. Supreme Court ruled that California's Holocaust Victim Insurance Relief Act of 1999 ("HVIRA") interfered with the federal government's conduct of foreign relations and was therefore preempted. *American Insurance Association v. Garamendi*, 539 U.S. 396, *rehearing denied*, 124 S. Ct. 35 (2003). The Supreme Court decision reversed *Gerling Gobal Reinsurance Corp. v. Low*, 296 F.3d 832 (9th Cir. 2002). The U.S. brief as *amicus curiae* supporting the petition for a writ of certiorari in the case is excerpted in

Digest 2002 at 415–429; the U.S. *amicus* brief on the merits, filed February 24, 2003, is available at *www.usdoj.gov/osg/briefs/2002/3mer/1ami/toc3index.html.*

As described by the Court, California's HVIRA "requires any insurer doing business in that state to disclose information about all policies sold in Europe between 1920 and 1945 by the company itself or anyone 'related' to it." The Court explained that

> [t]he Nazi Government of Germany engaged not only in genocide and enslavement but theft of Jewish assets, including the value of insurance policies, and in particular policies of life insurance, a form of savings held by many Jews in Europe before the Second World War. . . . HVIRA was meant to enhance enforcement of both the unfair business practice provision and the provision for suit on the policies in question by 'ensuring that any involvement [that licensed California insurers] or their related companies may have had with insurance policies of Holocaust victims are [sic] disclosed to the state. . . . While the legislature acknowledged that "the international Jewish community is in active negotiations with responsible insurance companies through the [International Commission on Holocaust Era Insurance Claims (ICHEIC)] to resolve all outstanding insurance claims issues," it still thought the Act "necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary."

The United States Government, however, had entered into an executive agreement with Germany regarding a Foundation, "Remembrance, Responsibility, and the Future" ("the Foundation"). 39 I.L.M. 1298 (2000). The German government agreed to ensure that insurance claims against German companies would be processed under ICHEIC procedures and any supplemental procedures agreed by ICHEIC and the German insurers. The Foundation also set aside money to

pay such insurance claims. (For discussion of an agreement on additional procedures, Agreement Concerning Holocaust Era insurance Claims, *see Digest 2002* at 430–434.) Similar agreements were reached with Austria and France.

Excerpts below from *American Insurance Association* provide the Court's analysis of the preemption of the state law at issue in the case. Footnotes and internal citations have been omitted.

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. . . [P]etitioners here, several American and European insurance companies and the American Insurance Association . . . filed suit for injunctive relief against respondent insurance commissioner of California, challenging the constitutionality of HVIRA. . . .

* * * *

The principal argument for preemption made by petitioners and the United States as *amicus curiae* is that HVIRA interferes with foreign policy of the Executive Branch, as expressed principally in the executive agreements with Germany, Austria, and France. . . .

* * * *

Generally. . . valid executive agreements are fit to preempt state law, just as treaties are, and if the agreements here had expressly preempted laws like HVIRA, the issue would be straightforward. But petitioners and the United States as *amicus curiae* both have to acknowledge that the agreements include no preemption clause, and so leave their claim of preemption to rest on asserted interference with the foreign policy those agreements embody. Reliance is placed on our decision in *Zschernig* v. *Miller*, 389 U.S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968).

* * * *

To begin with, resolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs. Since claims remaining in the aftermath of hostilities may be "sources of friction" acting

as an "impediment to resumption of friendly relations" between the countries involved, *Pink*, *supra*, at 225, 86 L Ed 796, 62 S Ct 552, there is a "longstanding practice" of the national Executive to settle them in discharging its responsibility to maintain the Nation's relationships with other countries, *Dames & Moore*, 453 U.S., at 679, 69 L Ed 2d 918, 101 S Ct 2972. The issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century, and although resolution of private claims was postponed by the Cold War, securing private interests is an express object of diplomacy today, just as it was addressed in agreements soon after the Second World War. Vindicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed.

The exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two. The . . . account of negotiations toward the three settlement agreements is enough to illustrate that the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions. As for insurance claims in particular, the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of policy information. See German Foundation Agreement, 39 Int'l Legal Materials, at 1299, 1303 (declaring the German Foundation to be the "exclusive forum" for demands against German companies and agreeing to have insurance claims resolved under procedures developed through negotiation with the ICHEIC); Agreement Relating to the Agreement of October 24, 2000, Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Jan. 23, 2001, 2001 WL 935261, Annex A, § 2(n) (same for Austria). This position, of which the agreements are exemplars, has also been consistently supported in the high levels

of the Executive Branch . . . . The approach taken serves to resolve the several competing matters of national concern apparent in the German Foundation Agreement: the national interest in maintaining amicable relationships with current European allies; survivors' interests in a "fair and prompt" but nonadversarial resolution of their claims so as to "bring some measure of justice . . . in their lifetimes"; and the companies' interest in securing "legal peace" when they settle claims in this fashion. As a way for dealing with insurance claims, moreover, the voluntary scheme protects the companies' ability to abide by their own countries' domestic privacy laws limiting disclosure of policy information.

California has taken a different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail. The situation created by the California legislation calls to mind the impact of the Massachusetts Burma law on the effective exercise of the President's power, as recounted in the statutory preemption case, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 147 L. Ed. 2d 352, 120 S. Ct. 2288 (2000). HVIRA's economic compulsion to make public disclosure, of far more information about far more policies than ICHEIC rules require, employs "a different, state system of economic pressure," and in doing so undercuts the President's diplomatic discretion and the choice he has made exercising it. Whereas the President's authority to provide for settling claims in winding up international hostilities requires flexibility in wielding "the coercive power of the national economy" as a tool of diplomacy, *id.*, at 377, 147 L Ed 2d 352, 120 S Ct 2288, HVIRA denies this, by making exclusion from a large sector of the American insurance market the automatic sanction for noncompliance with the State's own policies on disclosure. "Quite simply, if the [California] law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence." *Ibid.* (citing *Dames & Moore*, 453 U.S., at 673, 69 L Ed 2d 918, 101 S Ct 2972). The law thus "compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments" to resolve claims against European companies arising out of World War II. 530 US, at 381, 147 L Ed 2d 352, 120 S Ct 2288.

Crosby's facts are replicated again in the way HVIRA threatens to frustrate the operation of the particular mechanism the President has chosen. The letters from Deputy Secretary Eizenstat to California officials show well enough how the portent of further litigation and sanctions has in fact placed the Government at a disadvantage in obtaining practical results from persuading "foreign governments and foreign companies to participate voluntarily in organizations such as ICHEIC." In addition to thwarting the Government's policy of repose for companies that pay through the ICHEIC, California's indiscriminate disclosure provisions place a handicap on the ICHEIC's effectiveness (and raise a further irritant to the European allies) by undercutting European privacy protections. It is true, of course, as it is probably true of all elements of HVIRA, that the disclosure requirement's object of obtaining compensation for Holocaust victims is a goal espoused by the National Government as well. But "the fact of a common end hardly neutralizes conflicting means," *Crosby*, *supra*, at 379, 147 L Ed 2d 352, 120 S Ct 2288, and here HVIRA is an obstacle to the success of the National Government's chosen "calibration of force" in dealing with the Europeans using a voluntary approach, 530 US, at 380, 147 L Ed 2d 352, 120 S Ct 2288.

B

The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield. If any doubt about the clarity of the conflict remained, however, it would have to be resolved in the National Government's favor, given the weakness of the State's interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA.

* * * *

V

The State's remaining submission is that even if HVIRA does interfere with Executive Branch foreign policy, Congress authorized state law of this sort in the McCarran-Ferguson Act, 59 Stat 33, ch 20, 15 U.S.C. §§ 1011–1015, [15 USCS §§ 1011–1015] and

the more recent U. S. Holocaust Assets Commission Act of 1998 (Holocaust Commission Act), 112 Stat 611, note following 22 USC § 1621 [22 USCS § 1621]. There is, however, no need to consider the possible significance for preemption doctrine of tension between an Act of Congress and Presidential foreign policy, for neither statute does the job the commissioner ascribes to it.

* * * *

Indeed, it is worth noting that Congress has done nothing to express disapproval of the President's policy. Legislation along the lines of HVIRA has been introduced in Congress repeatedly, but none of the bills has come close to making it into law. See H. R. 1210, 108th Cong., 1st Sess. (2003); S. 972, 108th Cong., 1st Sess. (2003); H. R. 2693, 107th Cong., 1st Sess. (2001); H. R. 126, 106th Cong., 1st Sess. (1999).

In sum, Congress has not acted on the matter addressed here. Given the President's independent authority "in the areas of foreign policy and national security, . . . congressional silence is not to be equated with congressional disapproval." *Haig* v. *Agee*, 453 U.S. 280, 291, 69 L. Ed. 2d 640, 101 S. Ct. 2766 (1981).

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(ii) Claims for forced labor: Deutsch v. Turner

On January 21, 2003, the U.S. Court of Appeals for the Ninth Circuit affirmed dismissal of all cases in U.S. federal courts brought under § 354.6 of the California Code of Civil Procedure, providing for claims by "prisoner[s]-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945." *Deutsch v. Turner*, 324 F.3d 692 (9th Cir. 2003), as amended, March 6, 2003, *cert den. sub nom. Suk Yoon Kim v. Ishikawajima Harima Heavy Industries, Ltd*, 124 S. Ct. 105 (2003). The cases thus dismissed include *Deutsch v. Turner*, No. CV 00–4405 (C.D.Cal. Aug. 25, 2000), and those consolidated by the courts below as *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939

(N.D. Cal. 2000) (American claimants); 164 F. Supp. 2d 1153 (N.D.Cal. 2001) (Filipino claimants), and 164 F. Supp. 2d 1160 (N.D. Cal. 2001) (Korean and Chinese claimants). *See Digest 2000* at 505–40; *Digest 2001* at 539–450, n. 1. The court noted that although it is "plainly Holocaust survivors who are the intended beneficiaries" of § 354.6, the *Deutsch* case was "the only action before [it] concerning wrongs committed by German rather than Japanese corporations and the only action that was not consolidated with other cases by the district court."

At the time of the *Deutsch* decision, the Ninth Circuit decision upholding HVIRA as not violating the federal foreign affairs power, *Gerling Global Reinsurance Corp of America v. Low*, 296 F.3d 832 (9th Cir. 2002), had not yet been overturned by the Supreme Court. *See* discussion of *American Insurance Association, supra*. The *Deutsch* court distinguished the operation of § 354.6 from that of HVIRA, finding that the challenge to § 354.6 required it "to consider the importance to foreign affairs analysis of a [different] subset of foreign affairs powers: the power of the federal government to make and to resolve war, including the power to establish the procedure for resolving war claims." Excerpts below explain its conclusion that § 354.6 was "impermissible because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims." (Footnotes omitted.) Discussion of the foreign affairs authority generally has been omitted here; *see* discussion in *American Insurance Association, supra*.

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While neither the Constitution nor the courts have defined the precise scope of the foreign relations power that is denied to the states, it is clear that matters concerning war are part of the inner core of this power. Of the eleven clauses of the Constitution granting foreign affairs powers to the President and Congress, *see supra*, seven concern preparing for war, declaring war, waging war, or settling war. Most of the Constitution's express limitations

on states' foreign affairs powers also concern war. Even those foreign affairs powers in the Constitution that do not expressly concern war and its resolution may be understood, in part, as a design to *prevent* war. . . . Matters related to war are for the federal government alone to address.

* * * *

The war with Japan ended with the Treaty of Peace, signed in San Francisco, on September 8, 1951, by the representatives of the United States and 47 other Allied powers and Japan, and ratified by the United States Senate on April 28, 1952. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. No. 2490. Although the parties dispute whether that treaty by its own terms precludes the claims brought by any of the Appellants, that is the only dispute regarding the treaty. No party asserts that the treaty either creates—explicitly or implicitly—a private right of action against Japan or its nationals, or authorizes states of the United States to create such a right. Once again, without such authorization, states lack the power to alter the federal government's resolution of disputes relating to the war.

* * * *

California was dissatisfied with how the federal government chose to address the various wartime injuries suffered by victims of the Nazis and their allies after the United States brought the Second World War to a close. The California legislature found that, under the treaties and compensatory programs that the federal government had established, "victims of Nazi persecution have been deprived of their entitlement to compensation for their labor and for injuries sustained while performing that labor as forced or slave laborers prior to and during the Second World War." 1999 Cal. Stat. 216, § 1(b) (codified in notes to Cal. Code Civ. Proc. § 354.6). The state legislature therefore enacted section 354.6 to remedy these 54-year-old injuries in a manner favored by California but not provided for by the federal government. Appellants assert that no international agreement or other federal action prohibits California from doing so. However, as we have stated, because the issue is the lack of state power, it is immaterial

whether the federal government enacted a prohibition. The federal government, acting under its foreign affairs authority, provided its own resolution to the war; California has no power to modify that resolution.

* * * *

(2) California state courts: claims for forced labor

(i) Mitsubishi Materials Corp. v. Superior Court (Dillman, real party in interest)

On November 5, 2003, the Court of Appeal of California, Fourth Appellate District, Division Three, dismissed claims against Mitsubishi and other Japanese companies, holding that claims brought under § 354.6 were preempted by the 1951 Treaty of Peace with Japan. *Mitsubishi Materials Corp. v. Superior Court of Orange County* (*Dillman, real party in interest*), 113 Cal. App. 4th 55 (Cal. App. 4th Dist. 2003). The claims were brought by former members of the U.S. military held as prisoners of war by Japan during World War II or their heirs seeking compensation for alleged forced labor without pay for various Japanese companies. *See Digest 2002* at 435–440, excerpting the U.S. *amicus* brief filed with the California appellate court. At the end of 2003 appeal to the California Supreme Court was pending.

The court noted the recent decisions in *American Insurance Association* and *Deutsch*, discussed *supra*, both of which held aspects of California law unconstitutional, and indicated that it was vacating its prior decision and issuing its new decision "in light of both of these two federal court decisions, plus the additional briefing submitted by both sides." The court did not rule on the constitutional aspect of the law, concluding instead:

> The United States Constitution directly binds state court judges where treaties are concerned. The 1951 treaty is express in not allowing the claims of the plaintiffs. That

> does not in any way diminish the heroism of these plaintiffs. It does mean though, that we cannot provide any satisfaction of their claims in California state courts.
>
> We are therefore required to let a peremptory writ issue commanding the Superior Court to vacate its orders overruling the demurrers and denying the motions for judgment on the pleadings in these cases, and enter a new and different order dismissing the cases.

(ii) Taiheiyo Cement Corp. v. Superior Court (Jae Won Jeong, real party in interest)

On January 15, 2003, the Court of Appeal of California, Second Appellate District, Division Eight, upheld the validity of § 354.6 of the California Code of Civil Procedure in *Taiheiyo Cement Corp. v. Superior Court (Jae Won Jeong, Real Party in Interest)*.That decision was superseded by a grant of review by the California Supreme Court on April 30, 2003,* and on

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* The United States had filed a letter brief on March 5, 2003, in support of the petition of review. Case No. S113759, Supreme Court of the State of California. Arguing that the Court of Appeal "wholly failed to give effect to the foreign policy of the United States as reflected in the [1951 Peace] Treaty," the letter brief, among other things, drew the court's attention to the views of the Government of Japan:

> Immediate review by this Court is urgently required, as the Court of Appeal's decision threatens to have an adverse impact on foreign relations with and among the nations of East Asia. The Government of Japan has already protested to the United States in particularly strong language that the Court of Appeal's decision could have grave consequences. See The Views of the Government of Japan on section 354.6 of Code of Civil Procedure of the State of California (submitted, together with a request for judicial notice, herewith) (lawsuits under section 354.6 "would jeopardize the peace and stability in Asia and Pacific region that has been sustained by [the] settlement [of claims in the 1951 Treaty and subsequent bilateral treaties] for more than half a century"). The Japanese government has expressed the view that litigation of such claims in the face of the policies expressed in the Treaty of Peace "undermine[s] the credibility of the United States" in its dealings with foreign nations. Moreover, Japan regards the California statute and litigation under it as

September 24, 2003, the California Supreme Court transferred review back to the appellate court "with directions to vacate its decision and to reconsider the case" in light of *American Insurance Association.*

Taiheiyo Cement Corp. v. Superior Court of the State of California, for the County of Los Angeles (Jae Won Jeong, Real Party in Interest), 77P. 3d 2(2003). The case was pending at the end of 2003.

In a supplemental *amicus* brief filed October 24, 2003, with the Second Appellate District, the United States summarized its argument for dismissal as follows:

> The Supreme Court's opinion in [*American Insurance Association v.*] *Garamendi* compels the conclusion that California's World War II forced labor statute is invalid as an impermissible interference in matters of foreign policy. Most specifically, *Garamendi* contradicts two premises of this Court's January 15 decision. First, a state law that conflicts with federal foreign policy is preempted even in the absence of a clear indication of such intent. Second, *Garamendi* makes clear that in assessing the relevant state interest in a law that implicates foreign relations, a

"reopening the war claims settlements attained by the Peace Treaty" and warns that "such a decision would have negative repercussions that would result in the reopening or the revisiting of various war-related issues by" other nations, including Japan. By reopening so sensitive an issue as the wrongs of World War II, both real and perceived, California threatens to disrupt relations in East Asia at a time when they are particularly sensitive. As the United States informed the Court of Appeal, the availability of California courts to litigate wartime claims could reasonably be expected to impair discussion between Japan and North Korea regarding the normalization of relations, talks that had grown to encompass North Korea's nuclear weapons program. The diplomatic note from Japan reinforces this concern. The communiqué specifically states that the Government of Japan "is gravely concerned that section 354.6 would prejudice the ongoing talks with North Korea."

The full text of the March 5 letter brief is available at *www.state.gov/s/l/c8183.htm*.

> state law directed specifically at war-related claims does not fall within the realm of traditional state regulation. Under the principles articulated in *Garamendi*, California's World War II forced labor statute must be held invalid as an improper intrusion by the State into the realm of foreign affairs and impermissible interference with federal foreign policy as established in the 1951 Treaty of Peace.

The U.S. supplemental brief is available at *www.state.gov/sl/c8183.htm. See also Digest 2002* at 440–456.

b. Other claims

(1) Ungaro-Benares v. Dresdner Bank

On February 14, 2003, the U.S. District Court for the Southern District of Florida dismissed a claim for compensation from Dresdner Bank AG and Deutsche Bank AG for their alleged participation in taking a manufacturing company belonging to the claimant's grandfather "solely on the basis that he and his family were Jewish." *Ungaro-Benages v. Dresdner Bank AG*, Case No. 01-2547-CIV (S.D.Fl., filed June 18, 2001). The court granted summary judgment for defendants on grounds of political question, international comity, act of state doctrine, statute of limitations, failure to state a claim, and lack of capacity to sue.

The court also addressed, and denied, plaintiff's motion to strike the U.S. Statement of Interest filed pursuant to the U.S.-German executive agreement regarding the Foundation "Remembrance, Responsibility, and the Future." 39 I.L.M. 1298 (2000). Plaintiff had argued that the executive agreement was an unconstitutional taking of plaintiff's claim and contrary to prior U.S. treaty obligations, and that the court should ignore the U.S. Statement of Interest. The court rejected all these arguments. It said, in part:

> . . . there is nothing in the Executive Agreement that takes or extinguishes the Plaintiff's asserted claims in any way. The Executive Agreement is not a government-

> to-government claims settlement agreement, and the Government has not expressed any position on the merits of the Plaintiff's claims. Indeed, the Government expressly disavows any such purpose and suggests only that dismissal of the action would serve the foreign policy interests of the United States if there is any basis in law that would otherwise justify a dismissal. In effect, the Statement of Interest is nothing more than a formal—and appropriate—means of communication from the executive branch to the judicial branch giving notice that the litigation adversely impacts upon the foreign policy interests of the United States so that the Court may take that circumstance into account if it becomes relevant to any legal arguments advanced by the Defendants in seeking a dismissal. . . .

(2) Claims against the United States

(i) Achenbach v. United States

On June 19, 2003, the U.S. Court of Federal Claims dismissed a claim brought by U.S. citizens seeking to recover for injuries at the hands of Japanese forces on the Philippines, Guam, Wake, and Midway Islands during World War II. *Achenbach v. United States*, 56 Fed. Cl. 776 (2003). In that case, claimants alleged that the harm they suffered on these islands is attributable to the United States because the U.S. Government "'deliberately left them in harm's way by preventing them from securing passage back to the United States despite the overwhelming probability if not the virtual certainty of Japanese attack.'" The Court of Federal Claims dismissed because the six-year statute of limitations on suits against the United States "has been found to be a 'condition' upon the sovereign's consent to suit." The court rejected plaintiffs' claims that the statute of limitations "cannot have run here because defendant concealed information that shows it was responsible for the injuries inflicted by the Japanese during the war." In doing so, it relied in part on testimony by

internees during Congressional hearings in 1946 and 1947, in which one internee testified that "in effect we were expendables" in being left in the Philippines. Plaintiffs also acknowledged receipt of payments from the U.S. government as compensation for their time spent in internment camps.

(ii) Hair v. U.S.

On November 26, 2003, the U.S. Court of Appeals for the Federal Circuit affirmed dismissal by the Court of Federal Claims of an action alleging that the settlement of claims in the 1951 Treaty of Peace between the United States and Japan constituted a wrongful taking of U.S. citizens' property under the U.S. Constitution. *Hair v. United States*, 350 F.3d 1253 (Fed. Cir. 2003). *See Digest 2002* at 460–461. The appeals court affirmed on the basis of the six-year statute of limitation for claims against the United States.

3. Congressional Attempt to Allow Certain Claims Barred by Algiers Accords

On July 1, 2003, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a judgment of the district court dismissing a suit brought by former hostages held in Tehran from 1979 to 1981. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003). Rehearing and rehearing en banc were denied in unpublished opinions on November 7, 2003. 2003 U.S. App. LEXIS 22946 and 22947. The district court opinion is discussed in *Digest 2002* at 523–527.

As explained by the court of appeals, the "principal issue" on appeal was the question of whether this legislation "abrogated the Algiers Accords," which barred such claims. (*See* A.2. *supra* for a description of the Accords.) The court held that it did not, stating:

> . . . Executive agreements are essentially contracts between nations, and like contracts between individuals, executive agreements are expected to be honored by the

> parties. Congress (or the President acting alone) may abrogate an executive agreement, but legislation must be clear to ensure that Congress—and the President have considered the consequences. The "requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft, 501 U.S. 452, 461, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)*. The kind of legislative history offered here cannot repeal an executive agreement when the legislation itself is silent. . . .

Excerpts from the D.C. Circuit opinion concerning the relationship between the legislation and the Algiers Accords follow. The court's analysis of the legislation's relationship to the FSIA is discussed in Chapter 10.A.4.d(2).

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. . . The Accords required the United States to "bar and preclude the prosecution against Iran of any pending or future claim of . . . a United States national arising out of the events . . . related to (A) the seizure of the 52 United States nationals on November 4, 1979, [and] (B) their subsequent detention . . ." 20 I.L.M. at 227. . . . The amendments do not, on their face, say anything about the Accords. They speak only to the antecedent question of Iran's immunity from suit in United States courts. Plaintiffs therefore urge us to consider statements in the "Conference Report" on the second appropriations act, which made [a] technical correction. These statements, plaintiffs say, show that Congress expressly recognized a conflict between their lawsuit and the Accords and passed the amendments to resolve the conflict in plaintiffs' favor.

Some words about conference reports are in order. After the House and the Senate pass different versions of legislation, each body appoints conferees to resolve disagreements between the House and Senate bills. If a majority of the conferees from each body agree, they submit two documents to their respective houses: a conference report presenting the formal legislative language and a joint explanatory statement that explains

the legislative language and how the differences between the bills were resolved. Each body must vote on approving the conference report in its entirety and may not approve it only in part or offer any amendments. *See generally* STANLEY BACH & CHRISTOPHER M. DAVIS, CONGRESSIONAL RESEARCH SERVICE, CONFERENCE REPORTS AND JOINT EXPLANATORY STATEMENTS (2003).

. . . But it is not the conference report—which consists of the text of the legislation—on which plaintiffs rely. The statements they think important are in the joint explanatory statement, which is in the form of a committee report. While both the conference report and the joint explanatory statement are printed in the same document, Congress votes only on the conference report. . . . The point is that contrary to what plaintiffs suggest, the explanatory remarks in the "conference report" do not have the force of law.

The joint explanatory statement relating to [the second amendment], . . . explains the meaning of § 626(c)[the first amendment]: "The provision . . . acknowledges that, *notwithstanding any other authority*, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under the Antiterrorism Act of 1996 and the provision specifically allows the judgment to stand. . . ." H.R. CONF. REP. NO. 107–350, at 422–23 (2001) (emphasis added). This statement, and the italicized language in particular, is the type of language that might abrogate an executive agreement—if the statement had been enacted. But Congress did not vote on the statement and the President did not sign a bill embodying it. There is thus no clear expression in anything Congress enacted abrogating the Algiers Accords. . . .

* * * *

4. Nemariam v. Ethiopia

On January 24, 2003, the U.S. Court of Appeals for the District of Columbia Circuit reversed the decision of the district court that had dismissed the claims of Hiwot Nemariam

and others against Ethiopia and the Commercial Bank of Ethiopia. *Nemariam v. The Federal Democratic Republic Of Ethiopia and The Commercial Bank Of Ethiopia*, 315 F.3d 390 (D.C. Cir. 2003), *cert. denied, Ethiopia. v. Nemariam*, 124 S.Ct. 278 (2003). Nemariam claimed that she was expelled by the government of Ethiopia in 1998 during a period of armed conflict in the long-standing border dispute between Ethiopia and Eritrea because she was of Eritrean descent. Further, the Commercial Bank of Ethiopia ("CBE"), an agency or instrumentality of the government of Ethiopia, effectively expropriated her bank account because Ethiopian banking regulations permit withdrawal of funds only when an account holder presents a passbook in person at the bank. Nemariam filed suit against Ethiopia and the CBE in June 2000, asserting that Ethiopia's actions amounted to a taking of her property in violation of international law, invoking jurisdiction under section 1605(a)(3) of the Foreign Sovereign Immunities Act.

In December 2000 Ethiopia and Eritrea signed a peace agreement, which formally ended the conflict and, among other things, created the Ethiopia/Eritrea Claims Commission ("Commission"). Ethiopia and Eritrea are the only two parties permitted to appear before the Commission, but they may bring claims on behalf of their nationals. The Commission has exclusive jurisdiction over all claims arising from the conflict except for claims filed in another forum prior to the effective date of the agreement.

The district court dismissed on the ground of *forum non conveniens,* holding that the Claims Commission provided an adequate alternative forum. In reversing the district court, the D.C. Circuit concluded as set forth below.

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* * * *

We conclude that the Commission's inability to make an award directly to Nemariam, and Eritrea's ability to set off Nemariam's claim, or an award to Eritrea based upon her claim, against claims made by or an award in favor of Ethiopia, render the Commission

an inadequate forum; the "remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper [Aircraft Co. v. Reyno]*, 454 U.S. at 254. In so saying, we recognize that the decision is a close one, particularly in the light of our limited standard of review and the district court's observation, with which we agree, that there is nothing in the record to suggest the plaintiffs' awards will be set off against debts owed by Eritrea to Ethiopia. Neither, however, is there any legal barrier to such a set off.

5. Expropriation Claims Against Costa Rica

During 2003 a number of U.S. citizens raised concerns with the U.S. Government regarding the freezing of assets of a business in Costa Rica in which they had substantial investments, urging that action be taken pursuant to 22 U.S.C. § 2370a and related legislation. That provision, often referred to as the "Helms amendment," prohibits the provision of most assistance to a government of a country that has, as relevant here, "nationalized or expropriated the property of a United States person" and has not, within "3 years after the date on which a claim was filed" either

> (A) returned the property,
> (B) provided adequate and effective compensation for such property . . . equivalent to the full value thereof, as required by international law,
> (C) offered a domestic procedure providing prompt, adequate and effective compensation in accordance with international law, or
> (D) submitted the dispute to arbitration. . . .

It also requires the President to instruct the U.S. executive directors of each multilateral development bank and international financial institution to vote against any "loan or other utilization of . . . funds" for such country except for assistance directed specifically to programs "which serve the basic human needs of the citizens of that country."

In a letter dated January 2, 2004, William E. Schuerch, Deputy Assistant Secretary of the Department of the Treasury for Multilateral Development Banks and Specialized Development Institutions, responded to a July 2003 petition from a number of claimants to President George W. Bush, requesting that he take action pursuant to 22 U.S.C. § 283r in response to the freezing of the assets of Mr. Villalobos' business. Mr. Schuerch's response is excerpted below.

The full text of the letter is available at *www.state.gov/s/l/c8183.htm.*

This is in response to your petition of July 7 addressed to President George W. Bush in the case of Luis Enrique Villalobos Camacho in Costa Rica. The Treasury Department has been informed of the concerns of United States citizens regarding the Costa Rican government's freezing of the assets of Mr. Villalobos' business in which many U.S. investors had invested significant funds. Our understanding is that these actions relate to an ongoing criminal investigation by the Government of Costa Rica into the business practices of Luis Enrique Villalobos.

You have requested that President George W. Bush take action pursuant to 22 U.S.C. § 283r, one of the "Gonzalez Amendments" to the Inter-American Development Bank Act of 1972. This statute states that the President shall instruct the U.S. Executive Director of multinational lending institutions to vote against any loan or other utilization of funds of the Bank for a country under certain circumstances. As the federal courts have explained, the Gonzalez Amendments and the prior "Hickenlooper Amendment" were effectively repealed in 1994 when Congress passed the Helms Amendment.[3]

In order to promote the settlement of claims with foreign governments, however, the Helms Amendment does not call for sanctions to be applied unless, among other things, three years have passed since a claim has been filed in response to the alleged

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[3] *See Betteroads Asphalt v. United States*, 106 F. Supp. 2d 262, 266 (D.P.R. 2000); *Talenti v. Clinton*, 102 F.3d 573, 575 (D.C. Cir. 1996).

expropriation or seizure of ownership or control of the property of U.S. nationals. The Helms Amendment also contains a waiver provision at subsection (g), should the President determine that a waiver is in the national interest, and an exception for assistance "directed specifically to programs which serve the basic human needs of the citizens of [the offending] country."

Because the relevant actions by the Costa Rican government took place in July of 2002, the applicable statutory three-year period will not have passed until at least July 2005. Moreover, even if this period had passed, the U.S. government would need to consider more fully before imposing any sanctions whether the alleged actions of the Costa Rican government were expropriatory or otherwise actionable under the Helms Amendment. At present, our government has not seen evidence that would lead to the conclusion that the actions of the government of Costa Rica would be actionable under that Amendment. However, the Treasury and State Departments will continue to monitor the situation and could make a definitive determination on the Amendment's applicability if, after the three year statutory period, the issue has not been resolved.

To date, the State Department informs us that it has taken a number of steps to assist U.S. investors in this dispute with the Costa Rican government. The U.S. Embassy in San Jose has been in contact several times with the prosecutor involved with the case, most recently within the last few weeks, informing him of the adverse effects the freeze is having on U.S. investors, obtaining information on the status of the case and requesting him to expedite the criminal investigation so that any funds to which U.S. investors may be legally entitled can be released.

Several State Department officials have also met and spoken with U.S. investors, to hear their position and inform them of these steps being taken by the Department to assist them in pressing their case. The State Department assures us that it will continue to follow developments in the case actively, and to request that the investigation and any criminal charges be prosecuted in an expeditious manner.

The Treasury Department will also continue to follow developments in the case actively.

* * * *

Cross References

Settlement of claims against Libya for Pan Am 103, **Chapter 3.B.1.c.**

Expropriation claims against Iran, **4.C.**

Claims under Alien Tort Statute and Torture Victims Protection Act, **Chapter 6.G.7.**

Proposed remedies for human rights abuses, **Chapter 6.D.1. and G.6.**

Claims affected by immunities and act of state doctrine, **Chapter 10.**

Claims under NAFTA and WTO, **Chapter 11. B., C.**

Chapter 9

Diplomatic Relations, Succession and Continuity of States

A. GENERAL

In 2003 the United States did not have diplomatic relations with Iraq, Iran, or North Korea. *See* fact sheet at *www.state.gov/s/inr/rls/4250.htm*. *See* Chapter 2.A.3. concerning limited availability of consular services in Iraq.

A fact sheet entitled "Dependencies and Areas of Special Sovereignty" was released January 23, 2003, by the Bureau of Intelligence and Research, U.S. Department of State, available at *www.state.gov/s/inr/rls/10543.htm*. Among such sites, fourteen are listed as under the sovereignty of the United States: American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Northern Mariana Islands, Palmyra Atoll, Puerto Rico, U.S. Virgin Islands, and Wake Island.

B. EXECUTIVE BRANCH CONSTITUTIONAL AUTHORITY OVER FOREIGN STATE RECOGNITION AND PASSPORTS

On December 22, 2003, the U.S. Department of Justice filed a motion to dismiss and a memorandum in support of that motion in *Zivotofsky v. Secretary of State*, Civ. No. 03CV01921(GK) (D.D.C. 2003). Plaintiff, an infant child represented by his parents as guardians, was born of U.S.

citizen parents in Jerusalem in October 2002. Zivotovsky sought mandamus to order the Secretary of State to issue him a passport and a consular report of birth showing his birthplace as Jerusalem, Israel, rather than simply as Jerusalem. As explained in the U.S. memorandum, the plaintiff had been issued both a consular report of birth and a valid, unrestricted passport; each showed his birthplace only as Jerusalem. Thus, plaintiff was "[i]n effect . . . ask[ing] this Court to order the Secretary of State to formally recognize, for passport purposes, Jerusalem as an entirely Israeli city—an extremely sensitive foreign policy issue that has long been the source of international dispute and a matter for the careful attention of the Executive Branch."

The U.S. memorandum argued that the case should be dismissed because the plaintiff could not demonstrate any claim of injury as a basis for jurisdiction; that the complaint presented a non-justiciable political question; and that the claim failed on its merits because the statutory provision on which plaintiff relied, discussed in excerpts below, could not constitutionally require the President to list Israel on the passport documents. Finally, the memorandum argued that the case should be dismissed because the requested legal remedy of mandamus is not available in light of the permissive construction required of the statute at issue. Excerpts below provide the U.S. view that issues of recognition and passport issuance are political questions not judicially reviewable and that the statute in question could not, consistent with the U.S. constitution, mandate the issuance of a passport inconsistent with U.S. foreign policy. Internal cross-references have been omitted. At the end of 2003 this case and a nearly identical case, *Odenheimer v. U.S. Dep't of State*, Civ. No. 03CV02048, were both pending in the District Court of the District of Columbia.

The full text of the U.S. memorandum is available at *www.state.gov/s/l/c8183.htm*.

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II. BACKGROUND

A. The 2003 Foreign Relations Authorization Act

The statutory provision that Plaintiff relies upon is found in the lengthy Foreign Relations Authorization Act, Fiscal Year 2003 (the "Act"). See H.R. 1646, Pub. L. 107–228, 116 Stat. 1350. . . .

Section 214 of the Act is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." The specific subsection that Plaintiff relies on is 214(d), which provides:

> Record of Place of Birth as Israel for Passport Purposes—For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

The remainder of this section "urges the President . . . to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem," § 214(a)[2], purports to limit funding for a U.S. consulate in Jerusalem unless the facility is supervised by the U.S. Ambassador to Israel, § 214(b)[3], and purports to limit funding under the Act for publishing any "official government document which lists countries and their capital cities

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[2] In 1995, Congress passed the Jerusalem Embassy Act, Pub. L. 104–45, which purports to limit the obligation of other overseas building expenses until the U.S. Embassy in Jerusalem is officially opened. But, consistent with the President's ultimate responsibility for and control over foreign policy, Section 7 of the Act gives the President the ability to suspend the limitation by certifying U.S. national security interests. The President has repeatedly invoked this waiver since enactment, most recently in December 2003.

[3] At present, the U.S. Consulate General in Jerusalem, established in 1928, is an independent U.S. mission whose members are not accredited to a foreign government. They do not report to the U.S. Ambassador to Israel.

unless the publication identifies Jerusalem as the capital of Israel," § 214(c).[4]

B. The President's September 30, 2002 Signing Statement

The President signed the Act on September 30, 2002. But because of Section 214 regarding Jerusalem, and certain other troubling provisions, consistent with Executive practice the President issued a Signing Statement setting forth his construction of Section 214. See 38 Weekly Compilation of Presidential Documents 1658–60 (September 30, 2002). After recognizing the Act's "[m]any provisions . . . [that] will strengthen our ability to advance American interests around the globe, including nonproliferation of weapons of mass destruction, and to meet our international commitments," the President discussed the "number of provisions that impermissibly interfere with the constitutional functions of the presidency in foreign affairs, including provisions that purport to establish foreign policy that are of significant concern."

The President stated:

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct

[4] On February 20, 2003, the President signed the "Consolidated Appropriations Resolution, 2003," Pub. L. 108–7. Division B, Title IV, Section 404 provides: "For the purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon request of the citizen, record the place of birth as Israel." Upon signing the bill, the President issued a statement that certain provisions were "inconsistent with the constitutional authority of the President to conduct foreign affairs . . . [and so the Executive Branch would thus] construe [those sections] as advisory." See Weekly Comp. of Presidential Documents, Vol. 39, No. 8 at 225–27. Plaintiff's Complaint does not mention Section 404, but the language is nearly identical to Section 214(d) of the Act, and for the reasons outlined in this Memorandum of Law, Section 404 also is unconstitutional if construed as mandatory.

> the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed (Id. at 1659.)

The President concluded his statement with:

> My approval of the Act does not constitute my adoption of the various statements of policy in the Act as U.S. foreign policy. Given the Constitution's commitment to the presidency of the authority to conduct the Nation's foreign affairs, the executive branch shall construe such policy statements as advisory, giving them the due weight that comity between the legislative and executive branches should require, to the extent consistent with U.S. foreign policy. at 1660.)

C. United States Policy Regarding Jerusalem

For more than half a century, the United States has played an important mediating role in promoting a negotiated settlement to the Middle East Arab-Israeli conflict. The city of Jerusalem—recognized worldwide as having significant historic, religious, spiritual and cultural meaning for Judaism, Christianity, and Islam—lies at the heart of this conflict. As a result, United States policy, consistent with many other countries, is that Jerusalem's final status has not yet been determined but will be settled by Permanent Status Negotiations between the parties to the Middle East conflict. Israel and the Palestinians likewise have agreed that the question of Jerusalem is a matter to be addressed in Permanent Status Negotiations. The United States consistently follows this policy, which is consonant with U.N. Security Council resolutions and agreements between the parties concerning the Middle East conflict.

The practice of identifying only Jerusalem on passport documents for U.S. citizens born there stems from this policy.

* * * *

D. United States Policy For Issuing Passports To U.S. Citizens Born In Jerusalem

The Department of State has adopted special instructions for its consular officers overseas to govern passport documents for U.S. citizens born in the Jerusalem city limits. These instructions, necessary to implement U.S. foreign policy toward the Middle East, are found, along with other instructions pertaining to the preparation of and issuance of passports for persons born abroad, in the Foreign Affairs Manual. The general policy for U.S. citizens born abroad is to print on passport documents the country of birth.[5] (7 FAM 1383.) There are exceptions to this general policy, however, as when "there is a question as to what country has present sovereignty over the actual area of birth," (FAM 1383.4), or where a person is born in a country "not recognized by the U.S.," (7 FAM 1383.5–1).

There is an exception specifically applicable to Jerusalem, which reflects longstanding U.S. policy in a sensitive foreign affairs matter concerning the appropriate recognition given to a foreign state.

This exception provides that the birthplace on a passport document for an applicant born before May 14, 1948 in an area that was within the municipal borders of Jerusalem be identified as "Jerusalem." (7 FAM 1383.5–6.) Passport documents of persons born before May 14, 1948 in a location outside Jerusalem's municipal limits and later was annexed by the city are to be identified as either "Palestine" or the name of the location (area/city) as known before annexation. (Id.) For persons born after May 14, 1948 outside Jerusalem's municipal limits in an area later annexed by the city, it is acceptable to enter the name of

[5] Issuance of the C.R.B.A. is covered in a separate part of the FAM; the city and country of birth are generally listed on the certificate, but the same exception for Jerusalem applicable to passports applies to the C.R.B.A.

the location (area/city) as known before annexation. (Id.). For all other persons, Jerusalem is shown as the place of birth. Part II of the instructions lists the precise names of countries and territories to be used in U.S. passport documents. Next to "JERUSALEM" it reads "[Do not write Israel or Jordan. *See* sections 7 FAM 1383.5–5, 7 FAM 1383.5–6.]." (7 FAM 1383 Exhibit 1383.1, Part II.) These provisions, together, set forth the United States policy to not identify Israel, Jordan or any other country as the birthplace for U.S. citizens born there.

III. ARGUMENT

A. Plaintiff Lacks Standing

* * * *

Plaintiff, an infant child acting through his parents, has failed to allege any sort of injury, let along a judicially cognizable one. . . .

Plaintiff's claim is in reality an objection to the Executive Branch's foreign policy toward the Middle East, as evidenced by the unwillingness to issue passports inconsistent with the longstanding policy toward Permanent Status Negotiations. Such a general, non-individuated assertion of harm wholly fails to satisfy Article III's rigid requirements. . . .

* * * *

B. Plaintiffs Claim Presents A Non-justiciable Political Question

Plaintiff's claim would require this Court to make determinations that are committed to the Executive Branch. As such, adjudication of the claim is barred by the political question doctrine. . . .

The Supreme Court has set forth the following formulation for determining whether an issue constitutes a political question:

> 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.

Baker v. Carr, 369 U.S. 186, 217 (1962).

American diplomatic and foreign affairs—of which foreign state recognition is at the center—are invariably deemed to be political questions because the Supreme Court has often found a "textually demonstrable constitutional commitment" of United States diplomacy and foreign policy to the political branches. *Baker*, 369 U.S. at 217; *see, e.g., Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters related to foreign policy and national security are rarely proper subjects for judicial intervention."); *Chicago & Southern Air Lines*, 333 U.S. at 111 ("the very nature of executive decisions as to foreign policy is political, not judicial"); *United States v. Pink*, 315 U.S. 203, 229 (1942) ("'What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government. . . . Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not the courts.") (citations omitted); *United States v. Curtiss-Wright Export Corp.*, 299 U:S. 304, 320 (1936) (discussing the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (matters relating "to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"); *see also*

Worthy v. Herter, 270 F.2d 905, 911 (D.C. Cir. 1959) ("It is settled that in respect to foreign affairs the President has the power of action and the courts will not attempt to review the merits of what he does. The President is the nation's organ in and for foreign affairs.")[7] (citation omitted); United States ex rel. *Keefe v. Dulles*, 22 F.2d 390, 394 (D.C. Cir. 1954) (refusing to order Executive to take steps to free serviceman held by French civilian jailer—"the commencement of diplomatic negotiations with a foreign power is completely in the discretion of the President and the head of the Department of State, who is his political agent. The Executive is not subject to judicial control or discretion in such matters.") (citations omitted), cert. denied, 348 U.S. 952 (1955).

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[7] *Worthy* was used by the D.C. Circuit to dispose of a similar case, *Frank v. Herter*, 269 F.2d 245 (D.C. Cir. 1959), in a few sentences. See 269 F.2d at 246. But Chief Justice (then Circuit Judge) Warren Burger added a substantive concurring opinion in *Frank* expanding on the political question issue as related to foreign affairs, which is worth noting:

> In the implementation of our foreign policy and especially in relation to Communist China, the State Department recently concluded that a limited number, approximately 40, news representatives would be permitted to go to the Chinese mainland, on an experimental and temporary basis, provided the forces in control of that area would receive them. This threshold decision is political in the highest sense and is not reviewable on any basis in any circumstance by any court. Obviously, judges have neither the information essential to evaluate such a decision nor the competence and experience to appraise the information even if by chance it should be made available to them. Courts have no more occasion or power to inquire into such decisions than the State Department would have to inquire into the time allotted for oral argument or the length of printed briefs on appeals in this court.

269 F.2d at 247 (Burger, J., concurring).

> *Legal challenges to the establishment of diplomatic relations require the review of one of the rare governmental decisions that the Constitution commits exclusively to the Executive Branch*. Thus, even assuming that some plaintiff could satisfy the standing required to go forward with this action, a federal court could not grant the plaintiffs the relief they seek.

Id. at 202 (emphasis added).

The Third Circuit's decision in *Americans United for Separation of Church and State v. Reagan* is instructive. 786 F.2d 194. A group of twenty religious organizations, twelve religious officials, and seventy-one members of the clergy filed suit challenging United States diplomatic relations with the Vatican. The district court dismissed the Complaint for lack of standing and because it presented a non justiciable political question. 786 F.2d at 198. The Third Circuit, discussing the justiciability issue, found two issues presented: "(1) Is the Vatican a territorial sovereignty sufficiently independent of other such sovereign entities as to be entitled to recognition?, and (2) Is the regime claiming to be its government entitled to recognition as such?" 786 F.2d at 201.

The court refused to address either issue, holding that "[i]t has long been settled that the President's resolution of such questions constitutes a judicially unreviewable political decision." Id. (citations omitted). Discussing the *Baker* factors, the Third Circuit held:

> There is such a textually demonstrable commitment with respect to recognition of foreign states. Only the President has the power to "receive Ambassadors and other public Ministers." U.S. Const., art. II, § 3. Only the President has the power to appoint ambassadors, other public ministers, and consuls, although those appointments require the advice and consent of the Senate. Id., art. II, § 2, cl. 2.

* * * *

Plaintiff seeks to raise issues of territorial sovereignty and state recognition similar to those facing the Third Circuit in *Americans United*, but even more pronounced and politically sensitive. Adjudicating Plaintiff's claim seeking to order the Secretary of State to recognize Jerusalem as an entirely Israeli city would thrust this Court into ongoing political and foreign policy efforts directed toward the highly sensitive Middle East conflict. The Court would be required to second-guess the Executive's policy regarding the recognition of Jerusalem, made pursuant to an express and exclusive "textually demonstrable constitutional commitment." *Baker*, 369 U.S. at 217. In so doing, the Court also would have to

undermine the President's (and prior Presidents') diplomatic efforts and decision-making over several decades as to the Middle East conflict, by necessity "expressing lack of the respect due coordinate branches of government." Id. The same problems arise in considering the effect of changing the passport policy on ongoing diplomatic efforts. Any ultimate decision to set aside U.S. foreign policy with respect to Jerusalem would directly undercut the Quartet's Roadmap for Peace in the Middle East. Such a decision would be "impossib[le] . . . without an initial policy determination of a kind clearly for nonjudicial discretion." Id.

The status of Jerusalem also presents one of those circumstances where there is "an unusual need for unquestioning adherence to a political decision already made." Id. That decision by the Executive Branch, taking into account the longstanding policy of the United States, U.N. Security Council resolutions, and the agreements between the parties to the conflict, and confirmed recently in the Roadmap for Peace, is that the status of Jerusalem is to be determined through Permanent Status Negotiations. The President and Secretary of State are actively fulfilling the Executive Branch's constitutional role through their involvement in the Middle East peace process. Were the Court to undermine that role and restate U.S. foreign policy to Plaintiff's liking, the "potentiality of embarrassment from multifarious pronouncements by various departments" on the status of Jerusalem would be a certainty. Id.

Indeed, *Baker* itself specifically cited the recognition of foreign governments as a quintessential political question. As the Supreme Court explained, the "recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing,' and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory recognition." Id. at 212.

The Court should not usurp the Executive's efforts to address the Middle East conflict through the political process.[8] To do so

[8] That Congress has attempted to legislate in this area does not change the analysis, for even if the political branches could be said to disagree

would be to overrule the President's carefully balanced and historically grounded judgment regarding U.S. passport documents for U.S. citizens born in Jerusalem. These types of judgments are:

> political judgments, "decisions of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

People's Mojahedin, 182 F.3d at 23 (*quoting Chicago & Southern Air Lines*, 333 U.S. at 111). The Court should dismiss Plaintiff's claim as a non justiciable political question.

C. The President Properly Interpreted Section 214(d) As Advisory in Nature

Because Plaintiff's case raises a classic political question, and Plaintiff lacks standing, the Court should dismiss this action as non justiciable. But if the Court were to reach the merits, Plaintiffs case fails because, read in light of relevant canons of construction, Section 214(d) represents Congress's non-binding request to the President regarding the conduct of foreign relations as it relates to passports issued to individuals born in Jerusalem. The President's interpretation of this provision as precatory is supported by several familiar canons of statutory construction. First, given the

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over the importance of handling Jerusalem through the Permanent Status Negotiations, they do not appear to disagree over the President's constitutional authority in the area of foreign affairs. Indeed, in Section 214(a) of the Act, "Congressional Statement of Policy," Congress does not demand but merely "urges the President . . . to begin the process of relocating the United States Embassy in Israel to Jerusalem," in recognition of his authority over foreign affairs. (Emphasis added); see also note 2, supra. This Congressional recognition of Executive authority over foreign affairs, and specifically, passport policy, was discussed at length by the Supreme Court in *Agee*, where the Court wrote: "[f]rom the outset, Congress endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports." 453 U.S. at 293–94 (citations omitted).

President's broad constitutional authority in this realm of foreign affairs, his interpretation of a congressional enactment relating to the recognition of foreign states and the issuance of passports is entitled to substantial deference by this Court. Moreover, because Section 214(d) is part of a provision relating to U.S. foreign policy respecting Israel, it must be read in that broader context, and one related subsection of the provision supports the reading of Section 214(d) as advisory. Finally, if read as a mandate to the Secretary to revise Plaintiffs passport documents upon his parents' request, the statute would unconstitutionally burden the President's authority over the Nation's foreign affairs. Thus, the familiar doctrine of constitutional avoidance supports the President's alternative reading off the provision at issue.

1. The Constitutional Bases for Executive Branch Authority Over Foreign Affairs

Section 214(d) represents an attempt by Congress to legislate in a core area of foreign affairs constitutionally committed to the President. The President is vested with exclusive authority over the Nation's foreign affairs, a power that derives in large part from his authority as Executive and Commander in Chief. *See American Ins. Assn v. Garamendi*, 123 S. Ct. 2374, 2386 (2003) ("the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations' ") (citation omitted). Other, specific constitutional provisions provide further guidance on the President's authority. . . .

This dispute touches directly on one of the President's core, express Executive functions. Article II, Section 3 gives the President the power to "receive Ambassadors and other public Ministers." At the heart of this authority is the power to recognize foreign governments.[9] *Keefe*, 22 F.2d 390 at 394 ("commencement of

[9] As discussed earlier, *Baker* specifically acknowledges that the "recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing.' " *Baker*, 369 U.S. at 212.

diplomatic negotiations with a foreign power is completely in the discretion of the President and the head of the Department of State"). The issuance and regulation of U.S. passport documents fall squarely within this authority, and longstanding Congressional enactments reflect this understanding. In 22 U.S.C. § 211 a, Congress recognizes the broad discretion of the Executive, acting through the Secretary of State, to issue passports. 22 U.S.C. § 211a (recognizing authority of Secretary of State to grant, issue and verify passports and expressly noting that, except as authorized by the Secretary, "no other person shall grant, issue, or verify such passports") (emphasis added). Similarly, 22 U.S.C. § 2656, directs the Secretary to perform the duties entrusted to him by the President related to foreign affairs (fn. omitted). See *Agee*, 453 U.S. at 293–294 (1981); *Zemel,* 318 U.S. at 8 n.5. The D.C. Circuit has noted the reason for the constitutional commitment of authority to the President in this particular area. In upholding the State Department's denial of a passport to a media member who failed to agree to then-existing restrictions (fn. omitted) on U.S. travel abroad, the Court wrote: "Judgment on what course of action will best promote our foreign relations has been entrusted to the President, not to the courts, journalists, scholars, or even 'public opinion.' He makes his decision with the aid of the Department of State, a large organization with stations throughout the world, as well as on the basis of information received from all other parts of the Executive branch." *Worthy*, 270 F.2d at 913.

2. Viewed in the Proper Context, Section 214(d) is Permissive, not Mandatory.

In light of these constitutional principles and historical understandings, the language in Section 214(d) cannot be read to confer the absolute right that Plaintiff asserts. When signing the Act, the President noted the grave constitutional difficulties that would flow from such a mandatory reading of the statute . . .

Given the nature of this legislation—directly affecting, as it does, the conduct of U.S. foreign policy and, more specifically, passport policy—the President, as the sole organ of U.S. foreign policy, is entitled to substantial deference in his interpretation of

Section 214(d). See, e.g., *Regan v. Wald*, 468 U.S. 222, 243 (1984) (noting "the traditional deference to executive judgment '[i]n this vast external realm'" of foreign affairs) (citations omitted); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982) (regarding the meaning attributed to treaty between United States and Japan, "the meaning attributed . . . by the Government . . . is entitled to great weight") (citation omitted). The reasonableness of the President's interpretation in this case is supported by the statutory context in which the provision arises and by several canons of statutory interpretation.

* * * *

3. A Mandatory Reading of Section 214(d) Would Impermissibly Encroach on the President's Constitutional Authority Over Foreign Affairs.

If Section 214(d) is read as a command to comply with a Jerusalem-born U.S. citizen's request to designate his birthplace as Israel, then it unconstitutionally directs the Executive in his conduct of U.S. foreign policy, including his power to recognize foreign states and the broader power to speak for the United States in foreign affairs. That policy currently is that the final status of Jerusalem is to be resolved in Permanent Status Negotiations between the parties. A recognition of Jerusalem as a definitive part of Israel for purpose of passport processing would be inconsistent with that policy; thus, forcing the Executive Branch to revise its passport policy would substantially interfere with foreign policy matters firmly committed to the President.

This underlying policy is currently implemented by identifying only Jerusalem (without attributing Jerusalem to any particular state) on the passports of U.S. citizens born there. More than simply a form of individual identification needed for travel abroad, passports are, in fact, communications between governments.[14]

[14] The passports that the United States issues to its citizens allow the citizen to present to the foreign government the following communication of the United States Government, which appears in the passports of all U.S.

Agee, 453 U.S. at 306 (passport is a "letter of introduction" issued by the sovereign). As noted above, the President is the "sole organ of the federal government" responsible for these communications. *Curtis-Wright*, 299 U.S. at 319–20. To read the statute as mandatory would be to order the President to communicate with foreign countries a certain way regarding the U.S. policy on Jerusalem. Such a Congressional mandate would be a substantial intrusion upon the President's "power to speak . . . as a representative of the nation." Id at 319. Consequently, should this Court read Section 214(d) as mandatory, it must be stricken as unconstitutional for the many reasons discussed above. . . . The President cannot, on the one hand, be required to communicate by his Secretary of State to foreign governments that the United States recognizes Jerusalem as part of Israel (as Plaintiffs request for judicial relief ordering amendment of his passport would require), while at the same time adhering to his consistent foreign policy position that the status of Jerusalem must be resolved in negotiations between Israel and the Palestinians. Such a reading would frustrate the Constitution's design that the Government speak with one voice in the conduct of foreign affairs. See *Garamendi,* 123 S. Ct. at 2386 (noting the Constitution's "concern for uniformity in this country's dealings with foreign nations"). And given the sensitivity of the particular subject matter, Congress's frustration of the President's foreign policy here could have dramatic repercussions, not simply with respect to this country's relations with Israel and the

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Palestinians and their peace negotiations, but with respect to its relationships with other countries. This Court should not countenance such a substantial interference with delicate foreign policy objectives outlined by the President and reflected in the

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citizens: "The Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection."

Roadmap for Peace. It can and should read the statute to avoid this serious constitutional difficulty. But if it cannot do so, Section 214(d) must be invalidated as impermissibly infringing the President's plenary constitutional authority over the conduct of foreign affairs (fn. omitted).

Cross References

Succession of parties to extradition treaty, **Chapter 4.B.2.**

Chapter 10

Immunities and Related Issues

A. SOVEREIGN IMMUNITY

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602–1611, provides that, subject to international agreements to which the United States was a party at the time of enactment in 1976, a foreign state is immune from the jurisdiction of courts in the United States unless one of the specified exemptions in the statute applies. A foreign state is defined to include its agencies and instrumentalities. The FSIA provides the sole basis for obtaining jurisdiction over a foreign sovereign in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). For a number of years before enactment of the FSIA, courts abided by "suggestions of immunity" from the State Department. When foreign nations failed to request such a suggestion from the Department of State, however, the courts made the determination. The FSIA was enacted "in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to '[assure] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process,' H. R. Rep. No. 94–1487, at p. 7 (1976)." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

In the FSIA's exception for "commercial activities," Congress codified the "restrictive" theory of sovereign immunity, under which a state is entitled to immunity with respect to

its sovereign or public acts, but not those that are private or commercial in character. (The United States had previously adopted the "restrictive theory" in the so-called "Tate Letter" of 1952. *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711–715 (1976).) Generally speaking, a state engages in commercial activity when it exercises "only those powers that can also be exercised by private citizens" as distinct from "powers peculiar to sovereigns." *Alfred Dunhill*, 425 U.S. 682 at 704. The test for making this distinction is the nature of the transaction in question (the nature of the conduct which the foreign state performs or agrees to perform) as opposed to the intent behind it (the reason why the foreign state engages in the activity). *See Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992) ("the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose' ").

As enacted and in subsequent amendments the FSIA has provided several exceptions to immunity, such as by waiver or agreement to arbitrate, or for non-commercial torts within U.S. territory. In 1996 Congress enacted the "terrorism" exception. The various statutory exceptions set forth at §§ 1605(a)(1) to (7) have been subject to significant judicial interpretation.

Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. Government is not a party and does not participate. The following items represent only a selection of the relevant decisional material during the current year.

1. Scope of Application

a. Personal jurisdiction and default judgments

The FSIA provides that personal jurisdiction over a foreign-state defendant exists once the plaintiff establishes an exception to immunity pursuant to 28 U.S.C. § 1605 and accomplishes service of process pursuant to 28 U.S.C. § 1608. See, e.g., *Foremost-McKesson, Inc. v. Islamic Republic of*

Iran, 905 F.2d 438, 442 (D.C.Cir. 1990) ("Personal jurisdiction under FSIA exists so long as subject-matter jurisdiction exists and service has been properly made pursuant to 28 U.S.C. § 1608") (citing 28 U.S.C. § 1330(b)).

(1) In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2003 U.S. Dist. LEXIS 3981 (S.D.N.Y. 2003), the court made clear that the onus remains on the state in question to assert its immunity, and that failure to do so may result in a default judgment. In that case, a suit had been brought *inter alia* against the Republic of Sudan, which advised the court (in a communication from its chargé d'affaires) that "it does not intend to appear to participate in the lawsuit in any manner inasmuch as the Court does not have personal jurisdiction over the Government, which enjoys sovereign immunity from such a lawsuit." In response, the court noted that neither side had briefed the question of whether Sudan is entitled to immunity under the FSIA or whether an exception applies, and it therefore reserved decision on the matter. It stressed, however, that it is for the court, and not the state named as a defendant, to decide the question. "The Court notes . . . that it, and not Sudan, is the arbiter of whether Sudan enjoys immunity under the FSIA. In order to avoid the risk of suffering a default, Sudan must enter an appearance and formally move to dismiss for lack of jurisdiction." (In a related decision, rejecting the defendant corporation's motion to dismiss, the court held that Sudan was not a necessary and indispensable party to an action under the Alien Tort Statute. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F. Supp. 2d 289 (S.D.N.Y. 2003), discussed in Chapter 6.G.7.a.(6)(i)).

(2) Some defendants have raised "due process" challenges to the assertion of jurisdiction over foreign states in U.S. courts. For example, *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54 (D.D.C. 2003) arose from the bombing of UTA Flight 772 over southeastern Niger in September 1989, killing 170 passengers. Survivors of the American passengers killed in the incident, and the American corporation that owned the aircraft, brought an action under

the FSIA and the Flatow Amendment (*see* 4.d. below) against Libya, its intelligence service, and seven individuals, including the Libyan leader Muammar Qadhafi, for money damages for extrajudicial killings, aircraft sabotage, and personal injuries. In refusing defendants' motion to dismiss, the district court held in part that foreign states are not "persons" protected by the Fifth Amendment to the U.S. Constitution, and thus could not invoke the protections of that Amendment's "minimum contacts" test in challenging the court's jurisdiction, under the precedent of *Price v. Socialist People's Libyan Jamahirya*, 294 F.3d 82 (D.C.Cir. 2002). As to the individual defendants, however, the district court concluded that, "[u]nlike foreign states, alien individuals, even suspected terrorists—at least those who have a 'presence' in the United States—are still entitled . . . to the protections of the Due Process Clause of the United States Constitution," citing *Nat'l Council of Resistance of Iran v. Dep't of State,* 251 F.3d 192 (D.C.Cir. 2001).

(3) FSIA § 1608(e) prohibits entry of default judgment against a foreign state unless the claimant establishes his claim by "evidence satisfactory to the court" (a standard identical to the requirement for entry of defaults against the United States under Fed. R. Civ. P. 55(e)). In *Smith v. The Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003), a district court held that § 1608(e) requires legally sufficient evidentiary basis for a reasonable jury to find in favor of the plaintiff. In doing so, the court rejected arguments that a less rigorous rule should apply, such as a "clear and convincing" standard as adopted, for example, in *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91 (D.D.C. 2002) or *Alameda v. Secretary of Health, Ed. and Welfare*, 622 F.2d 1044 (1st Cir. 1980). *See also Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C.Cir. 2003) ("The Foreign Sovereign Immunities Act—FSIA—does not automatically entitle a plaintiff to judgment when a foreign state defaults. The court still has an obligation to satisfy itself that plaintiffs have established a right to relief").

b. Definition of foreign state

Section 1603(a) and (b) of the FSIA defines "foreign state" as follows:

> (a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
> (b) An "agency or instrumentality of a foreign state" means any entity—
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

(1) Government officials

(i) In *Global Index, Inc. v. Mkapa*, 290 F. Supp. 2d 108 (D.D.C. 2003), the holder of certain promissory notes issued by the Government of Zanzibar brought an action against the president of Tanzania and the president and finance minister of Zanzibar, in their official capacities, to recover some $400 million in unpaid principal and interest. On defendants' motion to dismiss, the district court held *inter alia* that defendants constituted a "foreign state" for purposes of the FSIA. It also held that even though the payee on the notes was a United States entity and payment had to be in U.S. dollars, the nonpayment of the promissory notes did not have the requisite "direct effect" in the United States, and thus action to collect on the notes did not fall within the commercial activity exception to the FSIA.

In equating the individual defendants to foreign sovereigns, the court stated as follows.

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. . . [I]t is well-settled that individuals who act in their official capacities on behalf of a foreign sovereign "are considered agencies or instrumentalities of a foreign state." *Jungquist v. Sheikh Sultan Bin Khalifa*, 115 F.3d 1020, 1027 (D.C.Cir. 1997) (internal citations and quotations omitted).

The parties agree that the present action is maintained against defendants in their official roles as the highest members of the Tanzanian government. . . . There is little question, therefore, that defendants are a "foreign state" for purposes of analysis under the FSIA.

* * * *

(ii) Burnett v. Al Baraka Investment and Development Corporation, 292 F. Supp. 2d 9 (D.D.C. 2003), involved an action brought by victims and representatives of victims of the terrorist attacks of September 11, 2001, against Prince Turki, Saudi Arabia's ambassador to the United Kingdom and former director of Saudi Arabia's Department of General Intelligence; and Prince Sultan, Saudi Arabia's third-ranking government official, who served as minister of defense and aviation, inspector general of the armed forces, chairman ex-officio of Saudi Arabian Airlines, chairman of the Supreme Council for Islamic Affairs, and head of the Special Committee of the Council of Ministers; and many other defendants. The complaint alleged that in making contributions to several Islamic charities that were sponsoring Osama bin Laden and the al Qaeda terrorist organization, the defendants were liable for funding and supporting the al Qaeda terrorist organization, which carried out the attacks. In granting motions to dismiss brought by Turki and Sultan, the court held, *inter alia*, that individual office holders can enjoy foreign sovereign immunity, but not for acts that are not committed in an official capacity. The court agreed with defendants'

contentions as excerpted below, and found in addition that the activities in question were not within the scope of either the commercial activities or non-commercial tort exceptions to the FSIA.

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Where there is a dispute about whether an individual was acting in an official capacity, "the relevant inquiry . . . focuses on the nature of the individual's alleged actions, rather than the alleged motives underlying them." [*Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020 at 1028 (D.C.Cir. 1997)]. And, if there was a convergence between official duties and personal interest, "[s]uch a circumstance does not serve to make [the] action any less an action of [a] sovereign." *Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, 1107 (9th Cir. 1990).

Prince Turki and Prince Sultan vigorously dispute the accuracy of the allegations against them. For purposes of their motions, however, they assert that, whatever their actions, they were performed in their official capacities. Prince Turki maintains that any acts he may have done with respect to the Taliban were consistent with his duties as the Director of Istakhbarat. Prince Sultan maintains that his role in providing financial assistance to the International Islamic Relief Organization, the Muslim World League, the World Assembly of Muslim Youth or Al-Haramain Islamic Foundation, was official, in his capacity either as Chairman of the Supreme Council, or as head of the Special Committee.

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(iii) In 2002, in the related cases *Doe v. Liu Qi*, and *Plaintiff A v. Xia Deren*, pending in the Northern District of California, the United States submitted a Statement of Interest regarding the application of the FSIA to various aspects of the claims asserted. *See Digest 2002* at 469–476. In June 2003 Magistrate Judge Chen issued a report and recommendations recommending *inter alia* that default judgment (limited to declaratory relief with no award of damages) should be granted in favor of the plaintiffs on certain of their

claims, and denied on others. In his view, the defendant mayor of Beijing is not entitled to sovereign immunity because he acted outside the scope of his official authority. Magistrate Chen also stated that the act of state doctrine applies to the case, even if the acts in question violate domestic or international law (including *jus cogens* norms). The report remained pending before the district court at year's end.

(2) Foreign consulate

In *Simons v. Lycee Francais de New York*, 2003 U.S. Dist. LEXIS 17644 (S.D.N.Y. 2003), the father of a student sued his son's private school, the French Consulate, and others, alleging that they had failed in their responsibilities toward the child. In granting defendants' motion to dismiss, the court noted that some courts have assumed that a foreign consul is a "foreign state" within the meaning of the FSIA (see *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987), *Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816 (S.D.N.Y. 1978)). The court continued that "[b]y parity of reasoning, one might regard a foreign consulate, which in substance is the office of a foreign consul, as a 'foreign state' [or] . . . that a foreign consulate is an agency or instrumentality of a foreign state, although it is unclear whether a foreign consulate is "a separate legal person' and thus within the statutory definition." The court found it unnecessary to decide the issue since, in either case, service of process had failed to meet the FSIA § 1608's specific requirements and the complaint "fails to allege any claim against the French Consulate that comes within any exception to the sovereign immunity of the Republic of France."

(3) Insurer as "organ"

Neither the FSIA itself nor its legislative history provides a definition of the term "organ" as used in § 1603(b)(2). In

USX Corporation v. Adriatic Insurance Company, 345 F.3d 190 (3rd Cir. 2003), the Third Circuit affirmed a district court finding that one of the defendant insurers, ICAROM, was an organ of the Republic of Ireland. In doing so, the court addressed the background and purpose of this provision in adopting a "flexible" approach, as excerpted below.

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We agree with the Court of Appeals for the Ninth Circuit that for an entity to be an organ of a foreign state it must engage in a public activity on behalf of the foreign government. Requiring less would open the door to situations in which a party only tangentially related to a foreign state could claim foreign state status and avail itself (and, incidentally, any other defendants in the case) of the FSIA's procedural provisions. . . .

. . . The Court of Appeals for the Ninth Circuit's definition finds a happy medium whereby an entity that engages in activity serving a national interest and does so on behalf of its national government qualifies for the protections of the FSIA, including a federal forum.

In making this assessment, factors employed by both the Courts of Appeals for the Ninth and Fifth Circuits are relevant, although no one is determinative: (1) the circumstances surrounding the entity's creation; (2) the purpose of its activities; (3) the degree of supervision by the government; (4) the level of government financial support; (5) the entity's employment policies, particularly regarding whether the foreign state requires the hiring of public employees and pays their salaries; and (6) the entity's obligations and privileges under the foreign state's laws. To this list, we should add an additional factor: (7) the ownership structure of the entity. Under the organ prong, as opposed to the majority ownership prong of section 1603(b)(2), a foreign state might own only 10% of an entity; it might own directly 50% of the entity; or it might own even 100% of a holding company that owns 100% of the entity. On the other hand it is possible that a foreign state might not own any portion of any entity that nevertheless is its organ as section 1603(b)(2) does not require a foreign state

to have any ownership interest in an entity for it to be its organ. Courts should consider how these different ownership structures might influence the degree to which an entity is performing a function "on behalf of the foreign government."

* * * *

(4) Agencies and instrumentalities: tiering and timing

In 2002 the United States filed an *amicus* brief before the U.S. Supreme Court on petition for a writ of certiorari to the Ninth Circuit Court of Appeals in *Patrickson v. Dole Food Company,* 251 F.3d 795 (9th Cir. 2001). The brief urged the Court to affirm the Ninth Circuit decision denying instrumentality status to certain companies in the case and provided the U.S. views on two interpretive issues involving "tiering" and "timing" in the definition of an "agency or instrumentality of a foreign state" in § 1603(b)(2), set forth in A.1. b. *supra*. *See Digest 2002* at 480–491.

On April 22, 2003, the Supreme Court affirmed the Ninth Circuit, holding

> first that a foreign state must itself own a majority of the shares of a corporation if the corporation is to be deemed an instrumentality of the state under the provisions of the FSIA; and . . . second that instrumentality status is determined at the time of the filing of the complaint.

Dole Food Co. v. Patrickson, 538 U.S. 468 (2003).

The litigation originated in Hawaii state court as a class action by Central American banana workers against Dole Food Company and others, alleging that the defendant companies had exposed them to harmful pesticides, causing injuries. The defendants impleaded Dead Sea Bromine Co. and Bromine Compounds, Ltd. ("Dead Sea Companies"), companies formerly owned indirectly by the Israeli government. The Dead Sea Companies claimed to be instrumentalities of Israel, entitling them to remove the case from state to federal court pursuant to 28 U.S.C. § 1441(d).

The Supreme Court held that the Dead Sea Companies did not meet the definition of "agency or instrumentality of a foreign state" to include an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof":

> The State of Israel did not have direct ownership of shares in either of the Dead Sea Companies at any time pertinent to this suit. Rather, these companies were, at various times, separated from the State of Israel by one or more intermediate corporate tiers . . .
>
> The Dead Sea Companies, as indirect subsidiaries of the State of Israel, were not instrumentalities of Israel under the FSIA at any time. . . . We hold that only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement.

In reaching this conclusion, the Court looked largely to principles of U.S. corporate law, under which "[a]n individual shareholder, by virtue of his ownership of shares, does not own the corporation's assets and, as a result, does not own subsidiary corporations in which the corporation holds an interest." Similarly, a corporate parent that owns the shares of a subsidiary "does not, for that reason alone, own or have legal title to the subsidiaries of the subsidiary. . . . The fact that the shareholder is a foreign state does not change the analysis."

Turning to the term "other ownership interest," as used in § 1603(b)(2), the Court found that the statute "had to be written for the contingency of ownership forms in other countries, or even in this country, that depart from conventional corporate structures," and not, as the Dead Sea Companies argued, "to include a state's 'interest' in its instrumentality's subsidiary." Similarly, the Court found that "[m]ajority ownership by a foreign state, not control, is the benchmark of instrumentality status."

As to timing, the Court held that, "the plain text of [1603(b)(2)], because it is expressed in the present tense, requires that instrumentality status be determined at the

time suit is filed." Because "[a]ny relationship recognized under the FSIA between the Dead Sea Companies and Israel had been severed before suit was commenced," the companies "would not be entitled to instrumentality status even if their theory that such status could be conferred on a subsidiary were accepted."

2. No *jus cogens* exception to FSIA

A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit held, in *Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C.Cir. 2003), that allegations of violations of *jus cogens* norms could not constitute an implied waiver of immunity under FSIA, as excerpted below. *See also Digest 2001* at 430–457; *Digest 2002* at 501–502.

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* * * *

The appellants argue that Japan impliedly waived its sovereign immunity by violating *jus cogens* norms against sexual trafficking. "A *jus cogens* norm is a principle of international law that is accepted by the international community of States as a whole as a norm from which no derogation is permitted." [citing to *Princz v. Federal Republic of Germany*, 26 F.3d 1166 at 1173 (D.C.Cir. 1994)] (internal citations and quotation marks omitted). In *Princz,* however, this court soundly rejected that argument when we construed the "intentionality requirement implicit in" the waiver provision of the FSIA, 28 U.S.C. § 1605(a)(1), to require "the foreign government's having at some point indicated its amenability to suit." 26 F.3d at 1174. And a sovereign cannot realistically be said to manifest its intent to subject itself to suit inside the United States when it violates a *jus cogens* norm outside the United States. *See id.*

The appellants therefore argue that we should revisit our decision in *Princz* due to intervening developments in international law. There is no need to revisit *Princz*, however; the fundamental premise of that decision—that a court cannot create a new exception to the general rule of immunity under the guise of an "implied waiver"—remains sound. *See id.* at 1174 n. 1 ("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"). No Supreme Court or circuit case has questioned this court's interpretation of 28 U.S.C. § 1605(a)(1) with respect to the violation of a *jus cogens* norm; indeed, two other circuit courts have since followed it, *see Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir. 2001); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996); and this panel is in any event bound by it.

* * * *

3. Retroactive Application of the FSIA*

a. In 2002 the Ninth Circuit Court of Appeals held, in *Altmann v. Austria*, 317 F.3d 954 (9th Cir. 2002), that Austria could be sued under the FSIA for its conduct during the Nazi era. *See Digest 2002* at 507–509. In that case, the American heir of the original owner of certain paintings sued the Republic of Austria and the state-owned Austrian Gallery, seeking return of the paintings on the ground they had been confiscated in violation of international law. Defendants

* As this volume was going to press, the U.S. Supreme Court issued its decision in *Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004), holding that the FSIA "applies to conduct, like petitioners' alleged wrongdoing, that occurred prior to 1976 and, for that matter, prior to 1952 when the State Department adopted the restrictive theory of sovereign immunity." The Supreme Court also granted certiorari and vacated and remanded the decisions in the following cases for further consideration in light of the decision in *Altmann*: *Société Nationale des Chemins de Fer Francais v. Abrams*, 124 S. Ct. 2834 (2004), *Republic of Austria v. Whiteman*, 124 S. Ct. 2835 (2004), *Republic of Poland v. Garb*, 124 S. Ct. 2835 (2004), and *Hwang Geum Joo v. Japan*, 124 S. Ct. 2835 (2004). Significant developments will be addressed in *Digest 2004*.

contested jurisdiction *inter alia* on the grounds that the FSIA, and in particular its expropriation exception, could not be applied retroactively to events that occurred long prior to enactment of the statute. The court of appeals affirmed the district court's denial of defendants' motion to dismiss, holding that the application of the FSIA to that action was not impermissibly retroactive and that the FSIA's expropriation exception applied.

Defendants obtained a writ of certiorari from the U.S. Supreme Court. *Republic of Austria v. Altmann*, 124 S. Ct. 46 (2003). In November 2003 the United States filed a brief *amicus curiae* arguing that the statute should not be applied retroactively in the situation at hand. The case remained pending at the end of 2003. Excerpts from the U.S. brief follow (footnotes omitted). The full text of the brief is available at *www.usdoj.gov/osg/briefs/2003/3mer/1ami/2003–0013.mer.ami.html.*

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* * * *

Petitioners Republic of Austria and the Austrian Gallery (collectively, Austria) challenge a court of appeals' decision arising from respondent's suit to recover artwork that was, respondent alleges, unlawfully confiscated from her uncle during the Holocaust. The court of appeals affirmed the determination of the United States District Court for the Central District of California, on Austria's motion to dismiss, that the FSIA confers jurisdiction over the suit and that respondent satisfied other procedural preconditions for bringing that action.

* * * *

Congress enacted the FSIA to provide statutory rules governing the scope of foreign sovereign immunity and to grant the courts responsibility for making immunity determinations pursuant to those legislatively prescribed principles. In part, the FSIA codified the immunity practices that the State Department had announced in 1952. But the FSIA also established new substantive rules of sovereign immunity, including a new exception from the general

rule of immunity allowing United States courts to exercise jurisdiction, in certain circumstances, over suits arising from a foreign nation's taking of property in violation of international law.

Respondent is mistaken in urging that the FSIA, and the expropriation provision in particular, should be applied retroactively to allow individuals to sue foreign states in United States courts based on conduct occurring sixty years ago. This Court's decisions governing non-retroactivity establish that, in the absence of a clear statement of contrary intent not present here, federal legislation does not apply new rules of substantive law to events long past. That principle has particular force in this case, where the type of conduct at issue is extensively addressed through treaties, agreements, and separate legislation that were all adopted against the background assumption that such claims could not be litigated in United States courts.

The court of appeals' retroactivity analysis rests on a fundamental misunderstanding of the United States' law and practice regarding foreign sovereign immunity before the 1952 Tate Letter. Contrary to that court's impression, the United States adhered to the "absolute" theory of immunity at the time of Austria's challenged conduct and did not recognize an exception to immunity for expropriations or other violations of international law. The United States did not follow any established exception allowing this Nation's courts to exercise jurisdiction over "unfriendly" nations. Indeed, even today, the FSIA does not provide any such categorical exception. The courts should not engage in an attempt to surmise whether, more than half a century ago, the Executive Branch would have denied immunity to a particular foreign state on some extraordinary or ad hoc basis, such as punishment for particularly egregious conduct. The courts of that era would never have presumed the authority to make such inherently political decisions, and the FSIA does not provide the courts of this era authority to speculate retroactively on what the Executive and the courts might have done.

A. This Court's Retroactivity Decisions Preclude Application Of The FSIA's Expropriation Exception To Claims That Arose Before Enactment Of The FSIA

1. The FSIA is subject to established retroactivity principles. This Court's decisions establish that any statute that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," is presumed to apply prospectively only. Landgraf v. USI Film Prod., 511 U.S. 244, 280 (1994). That presumption applies to statutes that, although termed "jurisdictional," change the law in a way that "eliminates a defense to * * * suit." Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 948 (1997). Such a change "does not merely allocate jurisdiction among forums." Id. at 951. "Rather, it creates jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well." Ibid. "Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to [the] presumption against retroactivity as any other." Ibid.

* * * *

2. The application of those retroactivity principles depends on the particular FSIA provision at issue. Federal statutes are frequently an amalgam of procedural and substantive provisions. As a result, retroactivity principles must be applied in light of the content of the particular provisions at issue. On the one hand, some provisions of a statute may be properly characterized as procedural or as not affecting substantive rights, and they are properly applied to all pending cases. On the other hand, provisions that create new substantive obligations and liabilities are properly presumed to apply only prospectively unless Congress clearly expresses a contrary intent. See, e.g., INS v. St. Cyr, 533 U.S. 289 (2001).

Most significantly, new exceptions to the general rule of foreign sovereign immunity that abrogate past protections from suit are properly viewed under Hughes as abridging substantive rights. In that situation, however, care must be taken in examining the character of the right in question. For example, the FSIA's "commercial activity" exception (28 U.S.C. 1605(a)(2)), for the most part, codified past practice, but only as it had existed since the issuance of the Tate Letter in 1952, which announced that a foreign state's commercial activities could provide a predicate

for a cause of action in United States courts. See Verlinden, 461 U.S. at 488. Consequently, the FSIA's commercial activity exception generally can be applied, without raising retroactivity concerns, to conduct occurring after 1952. See Joo, 332 F.3d at 684; Carl Marks, 841 F.2d at 27; Jackson, 794 F.2d at 1497–1498.

3. The FSIA's expropriation exception created a new substantive liability that is subject to the presumption of non-retroactive application. Under the absolute theory of sovereign immunity, a foreign state, by definition, was not subject to liability for expropriations within its own borders. And even under the restrictive theory, a foreign state's act of expropriation was a public or "sovereign" act, as to which the foreign state retained its sovereign immunity. The expropriation exception very clearly did not exist in 1952 and, indeed, was a new development in the doctrine of sovereign immunity when the FSIA was enacted 24 years later.

* * * *

B. The Court Of Appeals Erred By Relying On Unfounded Speculation That, Before Enactment Of The FSIA, The Executive Branch Would Have Abridged A Foreign State's Sovereign Immunity In The Instance Of Holocaust Claims

* * *

2. The United States did not condition a foreign state's right to absolute immunity on whether the state was an "unfriendly" nation. The court of appeals mistakenly suggested that, before enactment of the FSIA, only "friendly" nations qualified for sovereign immunity. See Pet. App. 14a–15a (quoting Verlinden, 461 U.S. at 486). Although the term "friendly foreign sovereigns" does appear in some decisions from the time when the United States applied the absolute theory of immunity, there was no generally recognized exception to immunity for "unfriendly" sovereigns. That language has its origin in in rem cases and refers only to the unremarkable fact that the United States would not refrain from seizing an enemy's warships or other property during time of war. There is no support in this Court's decisions for the proposition that United States courts would have reached out to

exercise in personam or quasi in rem jurisdiction over a foreign state for sovereign acts taken within its own territory simply because the United States was not on "friendly" terms with that government during the period of the challenged conduct.

Contrary to the court of appeals' mistaken impression, the United States has not followed a practice of withholding sovereign immunity from "unfriendly" foreign states. Rather, the United States' longstanding policy and practice is to prevent courts from becoming entangled in the conduct of foreign relations and to resolve war-related claims through diplomatic or political, rather than judicial, means. Creating an exception for "unfriendly" nations would likely cause the very type of "embarrass[ment] * * * [to] the Government in conducting foreign relations" that the doctrine of immunity is intended to avoid. See Ex parte Republic of Peru, 318 U.S. at 588.

Indeed, even if the United States had followed a pre-FSIA practice of withholding immunity from "unfriendly" nations, the responsibility for drawing lines among foreign governments and determining when to strip them of immunity would have belonged with the political Branches that are charged with responsibility for this Nation's foreign relations. The court of appeals' approach would require courts to establish their own definition of "friendly," to assess historical relationships of the United States under that definition, and to decide how to weigh changes in relations during the period when suit might have been brought. That approach is not only unprecedented, but it is fraught with difficulties.

* * * *

b. On June 13, 2003, U.S. Court of Appeals for the Second Circuit decided, in *Abrams v. Société Nationale des Chemins de Fer Francais* ("SNCF"), 332 F.3d 173 (2d Cir. 2003), that claims of violations of international law arising from the defendant's alleged complicity in the deportation of Jews and others from France to Nazi death camps during World War II required an assessment of whether the French national railroad would have been immune from suit in the United States at the time of the events alleged. Plaintiffs based their suit on general federal question jurisdiction, 28 U.S.C. § 1331,

and on the Alien Tort Statute, 28 U.S.C. § 1350. In contrast to plaintiffs in other cases stemming from the Holocaust, plaintiffs in *Abrams* argued that the FSIA did not apply to their case involving conduct occurring prior to 1952 and that, under then-applicable law, defendant would have had no immunity "because it was organized as a corporate entity separate and distinct from the French government." The district court granted SNCF's motion to dismiss. *See Abrams v. Société Nationale des Chemins de Fer Francais*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001). The court of appeals recognized that the Supreme Court's recent decision in *Dole Food Co. v. Patrickson, supra*, A.1.b.(4), had held that an entity's status as an instrumentality of a foreign state should be "determined at the time of the filing of the complaint," and that the record established that SNCF was an agency or instrumentality of a foreign state as defined in § 1603(b) at that time. As to plaintiffs' arguments on appeal contending that "application of the statute to their claims would be impermissibly retroactive because it would impair their antecedent rights and settled expectations," the court found that Congressional intent regarding the FSIA's retroactivity was unclear. Therefore, the court of appeals reasoned that the issue would turn on whether plaintiffs could legitimately have expected to have their claims adjudicated in the United States long prior to the FSIA's enactment, and that question in turn required information regarding whether the State Department would likely have recognized immunity in such a case during World War II. The case was accordingly remanded to the district court.

c. As described in *Digest 2002* at 492–494, *Garb v. Republic of Poland*, 207 F. Supp. 2d 16 (E.D.N.Y. 2002), involved a class action brought on behalf of Polish Jews against the Polish government, seeking compensation for a post-World War II nationalization program that they claimed allegedly expropriated property owned by Polish citizens. The district court dismissed the suit *inter alia* on the ground that the FSIA was not retroactively applicable. On appeal, that case was consolidated with *Whiteman v. Republic of Austria*, 2002

U.S. Dist. LEXIS 19984 (S.D.N.Y. 2002), involving claims by present and former Jewish citizens and residents of Austria based on alleged confiscation of property during World War II. The consolidated appeals presented the questions, *inter alia*, whether and on what terms the federal courts have jurisdiction under the FSIA to adjudicate the liability of foreign governments for actions preceding the enactment of that statute.

In August 2003 in an unpublished order, a different panel of the Second Circuit relied on the analysis in *Abrams, supra*, in vacating the district court's decision in *Garb*. The court remanded the consolidated actions to permit the district courts to make determinations as to the State Department's policy, prior to enactment of the FSIA, respecting Poland and Austria's sovereign immunity in relation to such claims. In the Second Circuit's view, the retroactive application of provisions of the FSIA depended upon whether citizens could have legitimately expected to have their claims adjudicated in the United States under then-prevailing law and legal principles. *Garb v. Republic of Poland*, 72 Fed.Appx. 850 (2d Cir. 2003). Petitions for certiorari were filed in *Garb* and *Whiteman*.

d. In *Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), *supra*, A.2., the appellate court affirmed the dismissal of a case brought by former "comfort women" against the Government of Japan. Plaintiffs, including 15 women from China, Taiwan, South Korea, and the Philippines, alleged they had been abducted and forced into sexual slavery by the Japanese army before and during World War II. As discussed in A.2. *supra*, the court of appeals affirmed the district court's holding that Japan had not waived its sovereign immunity through violations of *jus cogens* norms. On appeal, the United States filed a brief *amicus curiae* setting forth its views with respect to Japan's immunity from suit, arguing among other things that the FSIA should not be applied retroactively. See *Digest 2002* at 494–501; *see also Digest 2001* at 430–457. The court held that the commercial-activity exception does

not apply retroactively to events prior to the date of the so-called "Tate letter," of May 19, 1952, noted in A. *supra*, and that "in any event, the 1951 Treaty [of Peace with Japan, 3 U.S.T. 3169] created a settled expectation, left undisturbed by the Congress, that Japan would not face suit in the courts of the United States for its actions during World War II." For this and other reasons, the court declined to follow the Ninth Circuit Court of Appeals decision in *Altmann*, A.3.a. *supra*.

4. Exceptions to Immunity

a. Waiver

The FSIA allows a foreign state to waive its immunity either "explicitly or by implication." 28 U.S.C. § 1605(a)(1). As discussed in A.2., *supra*, courts have found that violations of *jus cogens* norms do not constitute an implied waiver under the FSIA.

(1) In *Atlantic Tele-Network Inc. v. Inter-American Development Bank*, 251 F. Supp. 2d 126 (D.D.C. 2003), plaintiff, a telecommunications provider, sought to enjoin approval by the Inter-American Development Bank ("IDB") of a loan to the Government of the Republic of Guyana to finance construction of a competing telecommunications system. The action was brought under the Inter-American Development Bank Act and the Foreign Assistance Act against the IDB and two officials of the U.S. government and under the FSIA against the government of Guayana. In granting Guayana's motion to dismiss, the district court held, *inter alia*, that a contractual waiver of immunity clause in Guyana's contract with the plaintiff was insufficient, when considered in connection with adjacent choice-of-law and choice-of-forum clauses, to constitute a waiver with respect to the instant suit. Excerpts follow. *See also* D.2. below.

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* * * *

As a general rule of interpretation, language purporting to effect a waiver of sovereign immunity should be construed narrowly. *See Corzo v. Banco Central De Reserva Del Peru*, 243 F.3d 519, 523 (9th Cir. 2001) ("the waiver exception to sovereign immunity must be narrowly construed . . . a foreign sovereign cannot be sued in the United States unless it could have contemplated that its actions would subject it to suit here"); *see also Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52, 59 (D.D.C. 2001). Indeed, the Supreme Court has instructed that a foreign sovereign may not be deemed to have voluntarily waived immunity to suit in the United States unless the language of waiver is explicit to that effect. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442–43, 109 S.Ct. 683, 102 L. Ed. 2d 818 (1989) ("nor do we see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States"); *Wasserstein Perella Emerging Markets Finance, LP v. Province of Formosa*, 2000 WL 573231, at *4 (S.D.N.Y. May 11, 2000) ("explicit waiver is generally found when the contract language itself clearly and unambiguously states that the parties intended waiver, and therefore, adjudication, in the United States").

* * * *

(2) With respect to implicit waivers of immunity, the court in *Elixir Shipping, LTD, v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 267 F. Supp. 2d 659 (S.D. Tex. 2003), held that an Indonesian corporation that was concededly a state agency or instrumentality of the Government of Indonesia had not implicitly waived its sovereign immunity by filing suit in Singapore for damages suffered as a result of a collision between its vessel and another vessel in Indonesian waters, as excerpted here.

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* * * *

. . . The Fifth Circuit has held, based on the legislative history of the FSIA, that an implicit waiver is ordinarily found in one of only

three situations: (1) a foreign state agrees to arbitration in another country; (2) a foreign state agrees that a contract is governed by the laws of a particular country; (3) the state files a responsive pleading without raising the immunity defense. *Rodriguez v. Transnave, Inc.*, 8 F.3d 284, 287 (5th Cir. 1993). "The implicit waiver clause of section 1605(a)(1) has . . . been narrowly construed; courts rarely find that a nation has waived its sovereign immunity without strong evidence that this is what the foreign state intended." *Id.*

Elixir Shipping argues that in accordance with [*Ipitrade Intern., S. A. v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C., 1978)], this Court should find that Pertamina implicitly waived its sovereign immunity. *Ipitrade*, however, did not involve the filing of a suit in a foreign country, but rather involved an instance where a foreign government *agreed to arbitrate* in the territory of a State that had signed the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") and where the foreign government was also a signatory to the Convention. 465 F. Supp. at 826 (emphasis added). In so doing, the court held that the foreign government implicitly waived sovereign immunity under the FSIA by agreeing to arbitrate in accordance with the Convention. *Id.* The District of Columbia Circuit Court of Appeals subsequently clarified *Ipitrade*, noting that implicit waiver was found because the foreign signatory therefore contemplated an enforcement in other signatory States, including the United States. *See Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 123 (D.C.Cir. 1999) (distinguishing *Ipitrade* on this basis, and noting that "when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states."). As the *Creighton* court observed, in order for a court to find an implicit waiver, the foreign sovereign must intend to waive immunity *in the United States*. *Id.* at 122 (emphasis added). *See also Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377, 377 n. 10 (7th Cir. 1985) (observing that "most courts have refused to find an implicit waiver of immunity to suit in American courts from a contract clause providing for arbitration in a country other than

the United States," and noting "[t]he only case to the contrary, *Ipitrade*, has never been followed.") (internal citation omitted).

In *Corzo v. Banco Cent. de Reserva del Peru*, 243 F.3d 519, 523–24 (9th Cir. 2001), the Ninth Circuit affirmed the district court's rejection of the argument that a sovereign's submission to litigation in another country constitutes an implied waiver of sovereign immunity. In *Corzo*, the district court stated that "submission of a foreign sovereign to its own courts or the courts of nations other than the United States does not by itself evidence an intent by the foreign sovereign to waive its immunity from suit in the United States." *Id.* at 523. The Ninth Circuit affirmed, concluding that "[s]ubmitting to jurisdiction in the courts of one nation should in no way put a foreign sovereign on notice that it has thereby subjected itself to personal jurisdiction in the United States." *Id.* at 523–24.

Pertamina has satisfied none of the three conditions for implicit waiver announced by the Fifth Circuit in *Rodriguez*, nor is there any evidence, much less "strong evidence," that Pertamina intended to waive immunity from suit in the United States by filing a suit in Singapore. Accordingly, the Court finds that Pertamina has not waived its sovereign immunity under the FSIA.

* * * *

(3) The waiver exception to immunity was also addressed in the context of international extradition in *Blaxland v. Commonwealth Director of Public Prosecutions*, 323 F.3d 1198 (9th Cir. 2003). Plaintiff Blaxland brought a tort action in the Superior Court of California against two Australian government instrumentalities and two individual employees, alleging that in connection with a request for Blaxland's extradition, defendants made false or misleading statements in affidavits and wrongfully opposed Blaxland's bail applications. The actions were allegedly taken as part of a scheme to coerce Blaxland into accepting a plea agreement because defendants knew that they did not have enough evidence to convict him. Blaxland asserted claims for malicious prosecution, abuse of process, intentional infliction of emotional distress, and false imprisonment. Australia removed the case to federal district

court and moved to dismiss on the ground of sovereign immunity. On appeal from the denial of that motion, Australia was held to be entitled to immunity under the tort exception to the FSIA, as discussed in 4.c.(2) below. In addition, the court of appeals found no waiver of sovereign immunity based on Australia's invocation of its rights under the extradition treaty, as explained in excerpts below. *See Digest 2001* at 475–485 for excerpts from the U.S. brief on appeal from the district court decision.

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* * * *

As an initial matter, we agree with Blaxland that a foreign country's use of United States courts can be sufficient to trigger a § 1605(a)(1) implied waiver under *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). We held in *Siderman* that Argentina impliedly waived sovereign immunity as to plaintiff Siderman's causes of action for torture and expropriation. In that case, the Argentine military junta imprisoned and tortured Siderman in 1976 because he was Jewish. When released from prison, Siderman fled to the United States. The government of Argentina continued to persecute him by bringing a bogus fraud action in an Argentine court. Argentina filed a letter rogatory with the Los Angeles Superior Court to request assistance in serving papers on Siderman—a Los Angeles resident at the time—concerning the fraud action. We held that since "Argentina has engaged our courts in the very course of activity for which the Sidermans seek redress, it has waived immunity as to that redress." *Id.* at 722.

Siderman remains good law in this circuit. A crucial difference distinguishes this case from *Siderman*, however, and compels the conclusion that Australia did not impliedly waive its sovereign immunity by seeking and obtaining Blaxland's extradition.

Here, the Australian government did not itself apply to our courts for assistance but instead invoked its rights under the Extradition Treaty by applying to the executive branch of our government. Australia's invocation of its extradition treaty rights, unlike Argentina's direct engagement of our courts in *Siderman*, cannot constitute an implied waiver of sovereign immunity.

Siderman involved Argentina's issuance of a letter rogatory to an American court. A letter rogatory is a direct communication from the courts of one country to the courts of another. . . .

We emphasized in *Siderman* that "[t]he FSIA's waiver exception is narrowly construed," and that "[t]o support a finding of implied waiver [of sovereign immunity], there must exist a direct connection between *the sovereign's activities in our courts* and the plaintiff's claims for relief," 965 F.2d at 720, 722 (emphasis added). By petitioning the Los Angeles Superior Court via a letter rogatory, the Argentine government, we held in *Siderman*, engaged the American courts sufficiently to waive its immunity by implication. In this case, by contrast, we confront only the invocation by Australia of proceedings to secure Blaxland's extradition *under the auspices of the executive branch of our government*.

Unlike a letter rogatory, which is a direct court-to-court request, extradition is a diplomatic process carried out through the powers of the executive, not the judicial, branch. . . .

[A]ll extradition-related judicial proceedings are initiated and conducted by the U.S. Department of Justice. The executive branch conducts the procedure on behalf of the foreign sovereign. The foreign sovereign makes no direct request of our courts, and its contacts with the judiciary are mediated by the executive branch. . . .

Consistent with these principles, the extradition treaty between the United States and Australia provides that extradition be initiated through diplomatic channels and that decisions also be communicated diplomatically. . . . Nothing in the Extradition Treaty indicates an intent to waive sovereign immunity in extradition proceedings. *See id.*

Additionally, American judicial officers conduct a circumscribed inquiry in extradition cases. *See* 18 U.S.C. § 3184; *United States v. Lui Kin-Hong*, 110 F.3d 103, 110 (1st. Cir. 1997) ("[I]nquiry is limited to a narrow set of issues concerning the existence of a treaty, the offense charged, and the quantum of evidence offered."). If the evidence is sufficient to sustain the charge, the inquiring magistrate judge is required to certify the individual as extraditable to the Secretary of State and to issue a warrant. *Lopez-Smith*, 121 F.3d at 1326.

Once a magistrate judge confirms that an individual is extraditable, it is the Secretary of State, representing the executive branch, who determines whether to surrender the fugitive. . . .

The uniqueness of the extradition process is further demonstrated by the rule of non-inquiry. . . . As we have stated, the rule of non-inquiry limits the judicial role, although "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." *Lui Kin-Hong*, 110 F.3d at 111.

Extradition treaties have produced a global network of bilateral executive cooperation that aims to prevent border crossing from becoming a form of criminal absolution. Unwarranted expansion of judicial oversight may interfere with foreign policy and threaten the ethos of the extradition system.

Expressing these kinds of concerns, the Supreme Court of Canada recently concluded that a foreign sovereign does not waive its sovereign immunity under the Canadian State Immunity Act by seeking extradition. *Schreiber v. Canada (Attorney General)*, 2002 SCC 62. In addressing tort claims against the German government, *Schreiber* examined a very similar question to that raised in this case under the FSIA and held that by requesting extradition, Germany had not "initiate[d] proceedings" in a court that would negate its immunity under the Canadian Act. *Id.* at ¶ 20. Instead, the Canadian Court noted that

> Germany['s] request to arrest and imprison the appellant was made to the executive branch of government pursuant to the Extradition Treaty. It was the [executive branch which applied] for an arrest warrant. . . . There is nothing in the wording of the legislation or in the Extradition Treaty, to suggest that Germany would impliedly waive its sovereign immunity from law suits in the Canadian courts every time it exercised its treaty-based right to request extradition.

Id. at ¶ 24.

The Supreme Court of Canada concluded in *Schreiber* that "it would be contrary to the concepts of comity and mutual respect between nations to hold that a country that calls upon Canada to assist in extradition only does so at the price of losing its sovereign immunity and of submitting to the domestic jurisdiction of Canadian courts in matters connected to the extradition request, and not only in respect of the extradition proceeding itself." *Id.* at ¶ 27. We conclude, similarly, that given the executive-focused nature of the extradition process, Australia did not impliedly waive its sovereign immunity by extraditing Blaxland pursuant to the Extradition Treaty.

Our conclusion holds whether or not Australia's use of the extradition process was fraudulent. Contrary to Blaxland's argument, a foreign sovereign's responsibility for documents filed in American courts as part of the extradition process cannot constitute an implied waiver of sovereign immunity under § 1605(a)(1), for the purpose—but only for the purpose—of claims arising from domestic torts of malicious prosecution and abuse of process. There cannot be *implied* waiver of sovereign immunity, for purposes of claims that malicious prosecution and abuse of process occurred in this country, solely through tortious conduct limited to the very activities that constitute those torts, as any other conclusion would void the operation of § 1605(a)(5)(B). Were the waiver explicit, or were the tort causes of action alleged ones that do not turn on activities in court—such as libel, for example—recognizing a waiver would not render null the explicit exceptions contained in § 1605(a)(5)(B). Such circumstances are not present here, however. We find no waiver of sovereign immunity by Australia.

b. Commercial activity

Section 1605(a)(2) of the FSIA provides that a foreign state is not immune from suit in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the

territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." Decisions concerning application of this exception are typically fact-dependent; examples from 2003 are discussed below.

(1) In *Soudavar v. Islamic Republic of Iran*, 67 Fed.Appx. 618 (D.C.Cir. 2003), an Iranian national brought an action against the Islamic Republic of Iran over transfer of real estate in Iran. Affirming the lower court's dismissal for lack of jurisdiction, the court of appeals stated that the acts at issue, registering deeds and affirming the judgment of a lower court, were government acts, not "commercial activities" under the FSIA, and moreover that a mere financial loss by a resident of the United States did not constitute "direct effect" in the United States sufficient to satisfy the requirements of the third clause of § 1605(a)(2).

(2) In *Cho v. Republic of Korea*, 66 Fed.Appx. 124 (9th Cir. 2003), the court found that a government's alleged forgery of private individuals' signatures and certification of their thumbprints on a corporate document pertaining to a corporate takeover fell within the commercial activity exception even if the forgery was part of larger scheme to nationalize Korean corporations.

(3) In *Human Rights in China v. Bank of China*, 2003 U.S. Dist. LEXIS 16436 (S.D.N.Y. 2003), a human rights organization brought an action in New York against a Chinese bank, concededly an agency or instrumentality of the Government of the People's Republic of China, for fraud, aiding and abetting fraud, negligent misrepresentation, unjust enrichment, conversion, breach of express and implied contracts, breach of implied covenant of commercial good faith and fair dealing, money had and received, and violation of New York's Uniform Commercial Code. The district court held that the FSIA's exception for commercial acts carried on in the United States or acts performed in the United States

in connection with commercial activity elsewhere did not apply to the conduct as alleged. In the court's view, messages to and from the bank's offices in New York were plainly insufficient to abrogate sovereign immunity under either the first or second clause of the commercial activity exception. As to the third clause of the commercial activity exception, which applies when a lawsuit is "based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States," claims arising from the bank's alleged collusion with Beijing police that resulted in transferred funds' confiscation were found to be insufficient as a matter of law to come within the exception. The court concluded: "[W]e cannot exercise jurisdiction over this aspect of the plaintiff's claim because the Bank's alleged communication to, and cooperation with, the Chinese authorities was political by nature, and not connected with the Bank's commercial activities."

c. Tort

Section 1605(a)(5) provides that a foreign state is not immune to suit in any case ". . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." The exception does not, however, apply to "(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

(1) In *Simons v. Lycee Francais de New York*, A.1.b.(2), *supra*, the father of a student sued his son's private school, the French Consulate, and others, alleging that they had

failed in their responsibilities toward the child. In granting defendants' motion to dismiss, the court determined *inter alia* that the alleged activities of the French consulate in ignoring or being unresponsive to the supposed problems of a student attending private school in New York on a French government scholarship involved the alleged exercise or failure to exercise discretionary functions, and therefore did not fall within the FSIA's tort claims exceptions to the sovereign immunity of the Republic of France.

(2) The scope of the domestic tort exception to immunity was also addressed in *Blaxland v. Commonwealth Director of Public Prosecutions*, A.4.a.(3), *supra*. The court of appeals noted that § 1605(a)(5)(B) expressly bars claims for malicious prosecution and abuse of process. Because that section refers to "any claim arising out of malicious prosecution [or] abuse of process," the court held that Blaxland's "emotional distress and loss of consortium claims are also barred, since they 'arise from' the core claims and derive from the same corpus of allegations concerning his extradition." The court also dismissed Blaxland's claim of false imprisonment as "the wrong tort for the conduct alleged." The court explained: "Blaxland does not allege that Australia extra-judicially imprisoned him, but rather that Australia misused legal procedures to detain, extradite, and prosecute him. Blaxland cannot overcome sovereign immunity for claims of malicious prosecution and abuse of process by calling them a different name."

(3) Jursidiction over some tortious activity may be founded on a theory of "purposeful availment." This issue was addressed in *Burnett v. Al Baraka Investment and Development Corporation*, 292 F. Supp. 2d 9 (D.D.C. 2003), an action brought by victims and representatives of victims of the terrorist attacks of September 11, 2001, against Prince Turki, the Director of Saudi Arabia's Department of General Intelligence, and Prince Sultan, Saudi Arabia's third-ranking government official. As discussed in A.1.b.(1)(ii) *supra*, the court upheld defendants' immunity for acts committed in

> their official capacities. However, plaintiffs argued among other things that Prince Sultan brought himself within the jurisdiction of U.S. courts when, in his personal capacity, he "purposefully directed" his allegedly tortious activities at residents of the United States. Excerpts from the court's opinion rejecting this argument follow.

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* * * *

This jurisdictional argument invokes the Supreme Court's decisions in *Calder v. Jones,* 465 U.S. 783, 104 S.Ct. 1482, 79 L. Ed. 2d 804 (1984), and *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174, 85 L. Ed. 2d 528 (1985). *Calder* was brought by California residents in California state court against Florida residents who had published an allegedly libelous article in a national journal. The Supreme Court overruled the defense of lack of personal jurisdiction, holding that "about 600,000 copies of the publication were sold in California, and that jurisdiction was proper based on the 'effects' in California of th[e defendants] Florida-based conduct." *United States v. Ferrara*, 54 F.3d 825, 828 (D.C.Cir. 1995) (citing *Calder,* 465 U.S. at 785, 789–90, 104 S.Ct. 1482). The D.C. Circuit's *Ferrara* decision explained that *Calder* was based on the Supreme Court's observations

> that the defendants' allegedly tortious actions were 'expressly aimed' at California; that they knew the article 'would have a potentially devastating impact' on its subject in California; and that, under these circumstances, they should have anticipated being 'haled into court' in that State.

Id. (internal citations omitted).

In *Burger King*, the Supreme Court held that due process was not offended when a federal court in Florida asserted personal jurisdiction over a Michigan franchisee in a breach of contract action by a Florida franchisor, rejecting "talismanic jurisdiction formulas," 471 U.S. at 485, 105 S.Ct. 2174, but finding after a detailed factual analysis that the franchisee had established a substantial and continuing relationship with the franchisor's

Miami headquarters, had received fair notice from the contract documents and the course of dealing that he might be subject to suit in Florida, and had failed to demonstrate how jurisdiction in that forum would otherwise be fundamentally unfair, *id.* at 487, 105 S.Ct. 2174.

The sum of plaintiffs' allegations against Prince Sultan in his personal capacity is that he personally donated money to [several Islamic charities], knowing that those foundations funded terrorist organizations including Al Qaeda. The [third amended complaint] stops well short of alleging that Prince Sultan's actions were "expressly aimed" or "purposefully directed" at the United States, allegations that might have satisfied *Burger King, supra*, and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774–75, 104 S.Ct. 1473, 79 L. Ed. 2d 790 (1984). Plaintiffs do argue that anyone whose actions have led to terrorist activity in the United States should reasonably anticipate that he might be subject to suit here whether or not he himself has targeted the United States. As Justice Brennan observed in *Burger King*, however:

> [T]he Court has consistently held that [foreseeability of causing injury in another State] is not a "sufficient benchmark" for exercising personal jurisdiction. Instead, "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." ". . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or third person."

471 U.S. at 474–75, 105 S.Ct. 2174 (internal citations omitted); *see also Wallace v. Herron*, 778 F.2d 391, 394–95 (7th Cir. 1985). It was a commercial course of dealing that made it foreseeable

that Burger King's Michigan franchisee would be haled into court in Florida. Nothing like that sort of purposeful availment is alleged here.

* * * *

d. Acts of terrorism

In 1996 Congress modified the FSIA to provide an additional exception to immunity for acts of terrorism in certain circumstances. Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104–132, Title II, § 221(a), 110 Stat. 1214 (1996). New subsection 1605(a)(7) provides that a foreign state is not immune from U.S. courts in any case "in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency . . . ." The exception does not apply "(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. app. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371)* at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia." Moreover, it does not apply if "(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or (ii) neither the claimant

* *See* Chapter 3.B.1.

nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act [8 U.S.C. § 1101(a)(22)]) when the act upon which the claim is based occurred."

Shortly after the adoption of this provision, Congress adopted a provision entitled "Civil Liability for Acts of State Sponsored Terrorism," Pub. L. No. 104–208, § 589, 110 Stat. 3009–172 (1996), which created a private right of action for conduct described in § 1605(a)(7). *See* 28 U.S.C. § 1605 note. It provides:

> An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national . . . for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) . . . for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).

This provision is known as the "Flatow Amendment," in recognition of the family of Alisa Flatow, a woman who died as the result of a terrorist bombing in Gaza. *See Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998).

(1) Private cause of action

In *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222 (D.D.C. 2002), a district court concluded that the Flatow Amendment created a cause of action against a foreign state, despite the absence of any express language to that effect in the text. *See Digest 2002* at 529–534. *See also Pugh v. Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54 (D.D.C. 2003). On several occasions during 2003, however, the Court of Appeals for the District of Columbia expressed misgivings about this view; *see Roeder* v. *Islamic Republic of Iran*, 333

F.3d 228, 234 & n.3 (D.C.Cir. 2003) (question is "unclear"); *Bettis* v. *Islamic Republic of Iran*, 315 F.3d 325, 329–30 (D.C.Cir. 2003).

In December 2003, in response to a request from the court, the United States filed a brief *amicus curiae* before the D.C. Circuit in *Cicippio-Puleo v. Islamic Republic of Iran*, No. 02–785, setting forth the U.S. view that § 1605(a)(7) of the FSIA creates no private rights of action and that the Flatow Amendment creates a private right against foreign government officials in their individual capacities, but not against foreign governments. The case remained pending at the end of 2003. Excerpts from the government's submission follow.

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* * * *

I. Section 1605(a)(7) Abrogates Foreign Sovereign Immunity, But Does Not Create A Private Right Of Action.

A. The Supreme Court has instructed that jurisdictional statutes do not create private rights of action. See, e.g., Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979) (it is improper to look for an implied cause of action in a statute that "grants jurisdiction to the federal courts and provides for venue and service of process," but "creates no cause of action of its own force and effect [and] imposes no liabilities"); United States v. Testan, 424 U.S. 392, 398 (1976) ("The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages.").

More generally, the Supreme Court has required caution in determining whether statutes create private rights of action. . . .

B. In light of these rules, Section 1605(a)(7) manifestly does not create a private right of action against foreign states or any other category of putative defendants. Instead, it merely abrogates the foreign sovereign immunity of designated state sponsors of terrorism for hostage taking, torture, and other misconduct engaged in by their officers, employees, or agents. Moreover, as a direct result of that abrogation, this statute confers subject-matter jurisdiction upon the federal district courts. See 28 U.S.C. § 1330(a).

By its terms, Section 1605(a)(7) addresses only the question of foreign sovereign immunity:

> *A foreign state shall not be immune from the jurisdiction* of courts of the United States or of the States in any case. . . .

28 U.S.C. § 1605(a)(7)(A) (emphasis added). This text gives no hint of creating a cause of action. And its placement within Section 1605(a), which addresses the circumstances in which "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States" (emphasis added), further confirms its exclusively jurisdictional purpose.

* * * *

II. The Flatow Amendment Provides A Private Right Of Action Against Individuals Acting On Behalf Of A Foreign State, But Not Against A Foreign State Itself.

* * * *

A. By its terms, the Flatow Amendment creates a private right of action only against an "official, employee, or agent of a foreign state" designated as a sponsor of international terrorism, and only for acts undertaken "within the scope of his or her office, employment, or agency." 28 U.S.C. § 1605 Note. On its face, the Amendment affords no private right of action against any foreign government, as opposed to the natural persons who are its officers, employees, or agents.

This construction is reinforced by the textual contrast between the Flatow Amendment and Section 1605(a)(7). In April 1996, Congress denied sovereign immunity to "[a] foreign state" for specified acts engaged in by its officials, employees, or agents. 28 U.S.C. § 1605(a)(7). Then, five months later, when Congress created a private right of action for the acts described in Section 1605(a)(7), it specified that the cause of action would run against any "official, employee, or agent of a foreign state," but it declined to "list 'foreign states' among the parties against whom * * * an

action may be brought." Price, 294 F.3d at 87. Under familiar interpretive principles, that glaring omission cannot plausibly be deemed inadvertent.

See, e.g., Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation omitted).

The minimal legislative history of the Flatow Amendment is consistent with its plain language. . . .

The construction of the Flatow Amendment and Section 1605(a)(7) should not turn on later enactments by subsequent Congresses. In some statutes enacted after 1996, Congress provided mechanisms for the payment or enforcement of judgments entered against foreign states in cases brought under Section 1605(a)(7). See Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, § 201(a) & (d)(4), 116

Stat. 2322, 2337–39. And Congress has directed the United States to pay certain plaintiffs who hold such judgments. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 2002, 114 Stat. 1464, 1541–43. But nothing in those later statutes addresses the basis for a cause of action (if any) supporting those judgments, and they certainly say nothing about whether the Flatow Amendment or Section 1605(a)(7) should be read, counter-textually, to provide such a cause of action. As this Court explained in Roeder, these statutes merely provide for payment "if an individual has a judgment against Iran," but they do not address or resolve the anterior question "whether plaintiffs are legally entitled to such a judgment." See 333 F.3d at 239 (emphasis added).

* * * *

B. Even if the text of the relevant statutes were otherwise unclear (and we think it is not), several additional considerations would bar construing the Flatow Amendment to create a private right of action against foreign governments.

* * * *

. . . Throughout the history of this Nation, the problem of dealing with rogue or hostile foreign states has been the power and duty of the Executive Branch, as contemplated by Article II of the Constitution. See, e.g., American Ins. Ass'n v. Garamendi, 123 S. Ct. 2374, 2386 (2003) (President has "vast share of responsibility for the conduct of our foreign relations" (quotation marks omitted)); Department of the Navy v. Egan, 484 U.S. 518, 529 (1988) (foreign policy is "the province and responsibility of the executive"). This core foreign relations power includes the authority to impose sanctions on terrorist states and, where diplomacy yields progress, to lift such sanctions and indeed to compromise or preclude private-party litigation against such states. See, e.g., Garamendi, 123 S. Ct. at 2386; Dames & Moore v. Regan, 453 U.S. 654, 679–80 (1981).

This crucial exercise of executive power—adjusting the use of economic weapons brought to bear against terrorist states as warranted by the particular circumstances of individual cases—would be substantially impeded to the extent that the use of such weapons were determined not by the public acts of the President, but by the Article III or state courts acting at the behest of private parties, in litigation that typically proceeds to judgment by default. Courts should not lightly presume that Congress would effect such a dramatic and potentially counterproductive change in an area associated so intimately with the way this Country conducts its foreign affairs. See Roeder, 333 F.3d at 237–38 (requiring clear statement before finding that Congress meant to undermine the conduct of foreign affairs by the Executive Branch). Nothing in the Flatow Amendment suggests, much less makes clear, that Congress intended such a drastic effect here.

Moreover, this Court has described Section 1605(a)(7) as the product of a "delicate legislative compromise" between the interests of victims of international terrorism (who desired greater opportunities to seek compensation for their injuries) and those of the Executive Branch (which sought to maintain control over the conduct of foreign policy with respect to rogue nations that sponsor terrorism). See Price, 294 F.3d at 88–89. A similar description could fairly characterize the enactment of the Flatow Amendment some five months later. And given the "delicate legislative

compromise" reflected in the text of these provisions, the proper judicial course is simply to enforce them as written, without upsetting the compromise through the creation of additional remedies beyond those specifically provided by Congress.

Finally, we note that victims of mistreatment by foreign states are not left without any possible remedies. In appropriate circumstances, the United States can bargain with foreign governments on behalf of those victims, see, e.g., Dames & Moore, 453 U.S. at 679–80, and can espouse the claims of those victims in dealing with the foreign governments, which might be amenable to diplomatic pressure as regimes change or as those governments seek to end their status as international pariahs.

C. As we have shown, the Flatow Amendment must be construed to create a private right of action against foreign government officials, but not against foreign governments. For all of the same reasons, the Flatow Amendment also must be construed to create a private right of action against those officials in their individual, as opposed to their official, capacities. As the Supreme Court repeatedly has explained, an *official*-capacity claim against a government official is in substance a claim against the government itself. . . . Thus, to construe the Flatow Amendment as permitting official capacity claims would eviscerate the recognized distinction between suits against governments and suits against individual government officials. As explained above, the text of the Flatow Amendment and Section 1605(a)(7), as well as all relevant background interpretive principles, should foreclose any such construction.

There is nothing conceptually odd about providing for individual-capacity suits for acts undertaken within the scope of a government official's office, employment, or agency. In the domestic context, such individual-capacity suits are ubiquitous, both against federal officials under Bivens and against state officials under 42 U.S.C. § 1983. Indeed, in construing Section 1983, the Supreme Court has expressly rejected a contention that "state officials may not be held liable in their personal capacity for actions they take in their official capacity." Hafer v. Melo, 502 US 21, 25 (1991). Where Congress has so provided, as in the Flatow Amendment

and in Section 1983, individual liability may result from conduct taken on behalf of a government.

Nor are there any odd jurisdictional consequences with construing the Flatow Amendment to authorize only individual-capacity suits against foreign government officials. For immunity purposes, an individual-capacity defendant is not entitled to treatment as a foreign sovereign. See, e.g., Jungquist v. Sheikh Sultan Bin Khalifa al Nahyan, 115 F.3d 1020, 1028–30 (D.C.Cir. 1997). Thus, a claim arising under the Flatow Amendment would not be barred by foreign sovereign immunity, and would fall squarely within the jurisdictional grant for cases arising under federal law. See 28 U.S.C. § 1331.

* * * *

(2) Effect of legislative and executive actions

(i) In *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003), 17 former prisoners of war ("POWs") during the Gulf War in 1991 and 37 of their immediate family members sued the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein (in his official capacity) under the FSIA to recover damages for the injuries they allege they suffered as a result of torture inflicted while in Iraqi captivity. They sought compensatory damages for bodily injury, emotional distress, economic injury, pain and suffering, and solatium, as well as punitive damages. The defendants failed to appear.

On July 7, 2003, the district court rendered its decision and determined that jurisdiction was proper under § 1605(a)(7).

The court awarded the POW plaintiffs substantial compensatory and punitive damages not only for bodily injury but also for intentional infliction of emotional distress. The plaintiff family members were also awarded damages for intentional infliction of emotional distress and solatium.

Shortly after the district court's entry of default judgment in favor of the plaintiffs, the United States moved to intervene in the proceedings and to vacate the judgment on the ground

that the court lacked jurisdiction. The United States argued that the May 7, 2003, Presidential Determination (No. 2003–23), issued pursuant to the Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA"), made inapplicable to Iraq any "provision of law that applies to countries that have supported terrorism," including the exception to sovereign immunity, set forth in 28 U.S.C. § 1605(a)(7), on which the suit relied. *See* summary of U.S. actions in this regard during 2003 in A.5.b. below and Chapter 16.A.2. As a result, the United States argued, the district court was divested of jurisdiction of the lawsuit as of May 7, 2003, two months before the default judgment entered. On August 6, 2003, the district court denied the U.S. motion to intervene as untimely and held that Iraqi sovereign immunity could not be restored by the Presidential Determination. *Acree v. Republic of Iraq*, 276 F. Supp. 2d 95 (D.D.C. 2003). The United States appealed the district court decision on August 22, 2003. Excerpts from the U.S. brief on appeal concerning the effect of the legislation and Presidential Determination, filed December 29, 2003, are set forth below. The U.S. brief also argued, as in *Cicippio*, *supra*, that neither the FSIA nor the Flatow Amendment creates a cause of action against a foreign state. The case was pending in the D.C. Circuit at the end of 2003.

The full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

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SUMMARY OF THE ARGUMENT

After the United States removed the Hussein regime from power in Iraq, our foreign policy toward that nation changed fundamentally. Now, rather than seeking to impose sanctions on Iraq, Congress and the President have sought to provide assistance to facilitate the prompt and orderly reconstruction of Iraq, and thereby to promote the emergence of a stable, peaceful, and

democratic new Iraqi government. This dramatic change in foreign policy is at the heart of this appeal.

I. A. The EWSAA and May 7 Presidential Determination are essential components of the Nation's new foreign policy toward Iraq. Through them, Congress and the President have rendered inapplicable to Iraq the numerous statutory provisions that had applied to it as a state sponsor of terrorism. Both the text and purpose of the EWSAA confirm that section 1605(a)(7) is among the provisions that no longer apply to Iraq. By its plain language, section 1605(a)(7) is a "provision of law that applies to countries that have supported terrorism," as the section provides jurisdiction only over countries designated by the Secretary of State as state sponsors of terrorism. Moreover, rendering section 1605(a)(7) inapplicable to Iraq was important to achieving the goals of our new foreign policy toward Iraq. As is evident from the President's Message to Congress as well as Executive Order 13303 and United Nations Security Council Resolution 1483, the prospect of judgments against Iraq like that obtained by plaintiffs here threatened the critical task of reconstruction. Even if there were some ambiguity as to the EWSAA's scope, the President's construction of this foreign policy statute is, at the very least, reasonable and entitled to deference.

B. Although the district court did not dispute that section 1605(a)(7) had been rendered inapplicable to Iraq, it erroneously refused to give immediate effect to the EWSAA and Presidential Determination in this case.

1. The district court first incorrectly relied upon a "waiver" rationale. However, waiver is inapplicable here. The court's jurisdiction did not depend on Iraq's waiver of its immunity, but on the abrogation and subsequent restoration of that immunity by Congress and the President.

2. The district court also erred in refusing to give immediate effect to the May 7 Presidential Determination respecting section 1605(a)(7) absent a "clear statement" that it applied to pending litigation. The most natural reading of section 1503 and the Presidential Determination is that on May 7, 2003, section 1605(a)(7) was immediately rendered unavailable as a basis for rendering judgment against Iraq. This straightforward construction

is confirmed by the context and purpose behind section 1503 and the Presidential Determination. The prospect of judgments and attachments growing out of pending litigation posed an immediate threat to the Iraqi reconstruction effort, as recognized and addressed in Executive Order 13303 and UNSCR 1483.

Contrary to the district court's understanding, there is no "clear statement rule" that limits the immediate application of jurisdiction-ousting statutes. Rather, the Supreme Court and this Court repeatedly have held that jurisdiction-stripping enactments are to be given immediate effect in pending cases absent a savings clause that preserves the courts' jurisdiction over previously filed suits. These principles apply where a new law eliminates a judicial forum, leaving the plaintiff with only an administrative remedy.

* * * *

The elimination of a judicial forum for plaintiffs' claims has not deprived them of vested rights or settled expectations of the kind that the presumption of non-retroactivity is meant to protect. There is reduced room for such expectations in the context of foreign affairs, especially with respect to claims concerning the sovereign acts of foreign states. Such claims have traditionally been resolved not through litigation, but through espousal by the Executive Branch. . . .

As the Supreme Court has confirmed, such foreign policy considerations are critical in assessing the temporal scope of intervening statutes. It was error for the district court to frustrate the manifest foreign policy purposes of section 1503 and the Presidential Determination through invocation of a "clear statement" rule.

3. The district court's alternative rationale for rejecting the United States' jurisdictional arguments, that only Iraq could assert its immunity from suit, was also erroneous. Under the terms of the FSIA, as the Supreme Court has made clear, the district court has an independent obligation to ascertain its jurisdiction over a claim against a foreign state. Indeed, the district court's reasoning was inconsistent with its own recognition that it had a responsibility to consider the jurisdictional question *sua sponte*.

4. Finally, the district court erred in holding that, even if it had been deprived of jurisdiction over Iraq, it retained jurisdiction over the Iraqi Intelligence Service and Saddam Hussein sued in his official capacity. The Iraqi Intelligence Service is a part of Iraq for purposes of the FSIA, and jurisdiction over it pursuant to section 1605(a)(7) fell at the same time that jurisdiction over Iraq pursuant to that provision ended. Nor could the district court continue to exercise jurisdiction under that provision over the former Iraqi President in his official capacity, which would be, in substance, the same thing as a claim against the government itself.

II. The District Court's Denial of the United States' Motion to Intervene Was Also Reversible Error.

The government's motion to intervene was plainly not untimely under the circumstances here. . . . The timing of the United States' motion, which sought to raise only jurisdictional issues, did not prejudice plaintiffs in any way because the district court was required, with or without the United States' participation, to consider the question of its jurisdiction. The United States' foreign policy and national security interests in this case are weighty, and cannot be adequately protected absent intervention.

> *(ii)* In *Roeder v. Iran*, 195 F. Supp. 2d 140 (D.D.C. 2002), the U.S. District Court for the District of Columbia vacated a default judgment and dismissed a suit brought by former American hostages held for 444 days in Tehran from 1979 to 1981 on the ground that the suit was contrary to U.S. obligations in the Algiers Accords that require the United States to bar such claims. *See Digest 2002* at 523–527.
>
> On July 1, 2003, the United States Court of Appeals for the District of Columbia Circuit affirmed. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003). The court of appeals agreed with the district court that a 2002 amendment to the FSIA, adding a specific reference to the pending litigation to the exception to immunity contained in § 1607 (a)(7), "created an exception, for this case alone, to Iran's

sovereign immunity, which would otherwise have barred the action." In so doing, the court noted that it was not deciding "whether the amendments, relating as they did specifically to a pending action, violated separation-of-powers principles by impermissibly directing the result of pending litigation." The court affirmed the district court's conclusion that the case must be dismissed, however, because the amendments in question did not abrogate the Algiers Accords.

Excerpts below provide the court's analysis of the sovereign immunity issue. The failure of the amendments to abrogate obligations under the Algiers Accords is discussed in Chapter 8.B.3.

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* * * *

After the United States moved to intervene and vacate the default judgment [originally entered against Iran in the case], Congress amended the FSIA. A provision in an appropriations act stated that § 1605(a)(7)(A) would be satisfied (that is, the immunity of the foreign state would not apply) if "the act is related to Case Number 1:00CV03110(ESG) [sic] in the United States District Court for the District of Columbia." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, § 626(c), 115 Stat. 748, 803 (2001). Six weeks later, Congress corrected an error in the case number: "Section 626(c) of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 2002 (Public Law No. 107-77) is amended by striking '1:00CV03110(ESG)' and inserting '1:00CV03110(EGS).' " Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to the Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, Div. B, § 208, 115 Stat. 2230, 2299 (2002) (currently codified at 28 U.S.C.A. § 1605(a)(7)(A) (Supp. 2003)).

Together, these amendments created an exception, for this case alone, to Iran's sovereign immunity, which would otherwise have barred the action. The evident purpose was to dispose of the government's argument, in its motion to vacate, that plaintiffs'

action should be dismissed because Iran had not been designated a state sponsor of terrorism at the time the hostages were captured and held, and that Iran's later designation (in 1984) rested not on the hostage crisis but on its support of terrorism outside its borders. . . .

* * * *

(3) Other issues

(i) Bettis v. Islamic Republic of Iran, 315 F.3d 325 (D.C.Cir. 2003), involved an action for intentional infliction of emotional distress by the estate and family members of Father Lawrence M. Jenco, an ordained Catholic priest who was abducted in Beirut by Hezbollah, the Islamic terrorist organization, and held captive for 564 days, against the Islamic Republic of Iran and its Ministry of Information and Security ("MOIS"), which allegedly funded and controlled the terrorist group that had kidnapped and tortured the victim. The district court entered a default judgment in favor of the estate and the victim's siblings, *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27 (D.D.C. 2001), but rejected claims of his 22 nieces and nephews. The nieces and nephews appealed. The court of appeals affirmed the dismissal, holding that the appellants were not direct victims entitled to seek recovery for emotional distress damages, nor were they members of the victim's immediate family entitled to recover as indirect victims.

(ii) Two American citizens brought suit in 1997 against Libya for alleged torture and hostage taking. In 2000 the district court denied defendant's motion to dismiss for lack of jurisdiction. *Price v. Socialist People's Libyan Arab Jamahiriya*, 110 F. Supp. 2d 10 (D.D.C. 2000) ("*Price I*"). On appeal, the Court of Appeals for the District of Columbia affirmed the lower court's jurisdictional decision but held *inter alia* that plaintiffs had failed to state a proper claim for torture or hostage-taking under § 1605(a)(7) of the FSIA. It dismissed

the hostage-taking claim, stating that "under no reasonable reading of the plaintiffs' complaint does their admittedly unpleasant imprisonment qualify as hostage taking so defined," and remanded to the district court to permit plaintiffs to amend their complaint to state a proper claim for torture under the FSIA. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C.Cir. 2002) ("*Price II*"). Following remand, Libya again moved to dismiss, and plaintiffs moved for summary judgment. The district court held that principles of *res judicata* precluded the hostage-taking claims but that the alleged acts of Libyan prison officials, if proven, "satisf[ied] the high standards required by the FSIA for setting forth a claim for mental torture." *Price v. Socialist People's Libyan Arab Jamahiriya*, 274 F. Supp. 2d 20 (D.D.C. 2003) ("Price III"). The remaining torture claim was pending in the district court at the end of 2003.

(iii) In *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C.Cir. 2003), a U.S. citizen passenger who had allegedly been forcibly removed from a cruise ship by Libyan authorities when it sought refuge from a storm in Benghazi harbor brought a *pro se* action against Libya for hostage taking and torture, seeking compensatory and punitive damages. On interlocutory appeal from the lower court's denial of the motion to dismiss, the court of appeals rejected Libya's contention that the case should be dismissed for lack of jurisdiction because plaintiff's offer to arbitrate was neither timely nor reasonable as required under § 1605(a)(7). The court rejected Libya's assertion that the provision should be read to "require that the offer to arbitrate be made prior to (or at least concurrent with) the filing of the complaint." Because Libya had received the offer almost two months before responding to the complaint, the court found that it had reasonable opportunity to arbitrate. The court determined, however, that plaintiff's factual allegations failed to state a claim for torture or for hostage taking as those terms are used in the FSIA and other relevant statutes. It reversed the lower court as to torture but remanded to

allow plaintiff to amend her complaint as to hostage taking because it appeared possible that she might be able to allege facts supporting such a claim. The case was pending at the end of 2003.

(v) In *Smith v. The Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003), which consolidated complaints by the estates of two victims of the September 11 terrorist attacks, plaintiffs sought to recover damages against defendants including the Islamic Emirate of Afghanistan, the Taliban, al Qaeda/Islamic Army, Osama Bin Laden, Saddam Hussein, and the Republic of Iraq. *See* A.1.a.(3), *supra*. Claims against Osama bin Laden, al Qaeda, the Taliban and the Islamic Emirate of Afghanistan (" the al Qaeda defendants") were based on tort law and the Antiterrorism Act of 1991, 18 U.S.C. § 2333, which provides:

> Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefore in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

The court determined that the events in question constituted "acts of international terrorism" (rather than "domestic terrorism") within the meaning of § 2333 and that plaintiffs had provided evidence to support a default judgment against those defendants.

Claims against Iraq and Saddam Hussein were brought pursuant to the Flatow Amendment and the exception to sovereign immunity in § 1605(a)(7) of the FSIA. The court dismissed the claim against Saddam Hussein as not meeting the requirements of the Flatow Amendment. As to Iraq, the court found that plaintiffs had presented satisfactory evidence that Iraq had provided material support to Osama bin Laden and al Qaeda, as required for entry of default judgment under

the FSIA, and that awards of solatium damages under the Flatow Amendment were appropriate.

None of the defendants was held liable for punitive damages because (1) section 2333, on which claims against the al Qaeda defendants were based, does not provide for punitive damages and (2) section 1606 of the FSIA precludes award of punitive damages against Iraq as a foreign state.

5. Collection of Judgments

Section 201 of the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 ("TRIA"), made blocked assets belonging to a "terrorist party" available for satisfaction of a judgment against that party for compensatory (but not punitive) damages based upon an act of terrorism. Section 201 provides:

> Notwithstanding any other provision of law, . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) . . . the blocked assets of that terrorist party . . . shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

See Digest 2002 at 410–413. Several cases involving attempts to collect on judgments against Iran and Iraq pursuant to TRIA during 2003 are discussed below.

a. Iran

(1) In *Hegna v. Islamic Republic of Iran*, 287 F. Supp. 2d 608 (D.C.Md. 2003), plaintiffs (the widow and children of an American killed in an aircraft hijacking allegedly carried out by Hezbollah and MOIS) had obtained a default judgment

against Iran and MOIS in 2002 and then sought to attach various blocked diplomatic and consular properties and bank accounts containing monies related to Iran's diplomatic and consular activities in the United States. The United States District Court for the District of Maryland quashed writs of attachment. The court stated as follows.

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* * * *

[T]he term "blocked assets" as used in section 201(a) is defined to exclude "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations . . . [that] is being used exclusively for diplomatic or consular purposes." Terrorism Risk Insurance Act of *2002, Pub.L. No. 107-297,* § *201(d)(2)(B)(ii)*. It is undisputed that the subject properties are subject to the Vienna Conventions on Diplomatic Relations and Consular Relations. Therefore, the question becomes whether they are "being used exclusively for diplomatic or consular purposes. . . ."

That question must be answered in the affirmative. The United States has an international legal obligation under the Vienna Conventions [on Diplomatic Relations and Consular Relations] 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 are severed. The conventions recognize that diplomatic properties belong to the state that established them, not to the government that controls the state. The conventions also recognize that host states have the duty to hold in trust for future generations the diplomatic properties of a state with whom they have a dispute, however severe and violent, that has caused the severance of diplomatic relations. As treaties into which the United States has voluntarily entered, the conventions are part of the fundamental fabric of the nation's law. Likewise, the goal of assuring that the United States is in compliance with its treaty obligations is quintessentially "diplomatic." Therefore, in protecting the subject properties the United States clearly is using them for a "diplomatic purpose."

* * * *

(2) Following entry of judgment in *Weinstein v. The Islamic Republic of Iran,* 184 F. Supp. 2d 13 (D.D.C. 2002*), see Digest 2002* at 527, plaintiff sought to attach Iranian assets, pursuant to TRIA. The U.S. Government moved to quash plaintiffs' writs of attachment *inter alia* on grounds of its own sovereign immunity and because some of the assets in question qualified as "diplomatic and consular properties," exempted from attachment under TRIA.

In July 2003 the district court granted the government's motion with respect to funds in the Iran Foreign Military Sales ("FMS") Program account held by the U.S. Treasury, and in two diplomatic bank accounts held by a private bank. The court found that the funds in the FMS account and in one of the bank accounts "are the property of the United States" and concluded, contrary to plaintiffs' contention, that "section 201 of the Terrorism Risk Insurance Act does not provide an express waiver of federal sovereign immunity." The court found that a second account, entitled "U.S. Department of State, Office of Foreign Missions, Iranian Renovation Account," fit within the TRIA's definition of property that is "being used exclusively for diplomatic and consular purposes," and therefore the funds were "not subject to attachment because they do not constitute 'blocked assets' under the TRIA." The court concluded that the remaining accounts, both checking accounts that had been used by Iranian consulates in the United States, were "not presently being used for any diplomatic or consular purpose," and were therefore subject to attachment. *Weinstein v. Islamic Republic of Iran,* 274 F. Supp. 2d 53 (D.D.C. 2003).

See also Mousa v. Islamic Republic of Iran, No. 00-2096 (D.D.C., Aug. 19, 2003); *Elahi v. Islamic Republic of Iran*, No. 9-02802 (D.D.C., July 22, 2003).

b. Iraq

During 2003 the United States took several steps regarding blocked Iraqi assets in the United States. These included 1) Executive Order 13290, issued by President Bush on

March 20, 2003, vesting certain blocked Iraqi assets; 2) section 1503 of Emergency War Supplemental Appropriations Act ("EWSAA"), enacted on April 16, 2003, authorizing the President to "suspend the application of any provision of the Iraq Sanctions Act of 1990" and to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that supported terrorism," with certain exceptions; and 3) Presidential Determination No. 2003-23, issued by President Bush on May 7, 2003, exercising his authority in keeping with the legislation. In his "Message to Congress Reporting the Declaration of a National Emergency with Respect to the Development Fund for Iraq" of May 22, 2003, the President stated specifically that the Determination No. 2003-23 made § 201 of TRIA inapplicable to Iraq. *See* discussion in Chapter 16.A.2.

These actions directly affected the ability of persons attempting to collect on judgments against Iraq pursuant to TRIA in several cases during 2003.

(1) On May 16, 2003, the U.S. District Court for the Southern District of New York entered a default judgment against the Islamic Emirate of Afghanistan, the Taliban, al Qaeda, Osama bin Laden, Saddam Hussein and the Republic of Iraq, and in favor of relatives of two victims of the September 11 World Trade Center attack. *Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003); *see* 4.d.(3)(v), *supra*. None of the defendants had appeared in the case. In its final judgment, entered July 14, 2003, the court awarded $104 million in damages, of which Iraq was deemed responsible for $63.5 million. Plaintiffs then brought a declaratory judgment action against the Federal Reserve Bank of New York and John W. Snow, Secretary of the Treasury, seeking to satisfy their judgment against Iraq by attaching certain Iraqi assets held by the Federal Reserve Bank pursuant to § 201 of TRIA. The district court granted summary judgment in defendants' favor. *Smith v. Fed. Reserve Bank*, 280 F. Supp. 2d 314 (S.D.N.Y. 2003).

On October 3, 2003, the U.S. Court of Appeals for the Second Circuit issued an opinion affirming the district court's decision on the grounds that the funds had been vested in the United States. 346 F.3d 264 (2d Cir. 2003). In so doing, the Second Circuit rejected plaintiffs' efforts to characterize TRIA as an appropriations bill and arguments that powers granted to the President by the International Emergency Economic Powers Act on which he relied in issuing his March 20 Order confiscating the Iraqi funds were extinguished by TRIA's inclusion of the phrase "notwithstanding any other provision of law." The court concluded

> that on March 20, 2003, well before Plaintiffs had obtained a final judgment against the Republic of Iraq from the district court, the President was within his authority conferred by IEEPA § 1702(a)(1)(C) in ordering the confiscation of blocked Iraqi assets. By the time Plaintiffs obtained a final judgment, the President had vested title in the confiscated assets in the United States Department of the Treasury and there simply were no more "blocked assets" in the Federal Reserve Bank's custody against which Plaintiffs could execute (fn. omitted). Because Plaintiffs cannot establish that section 201 of TRIA segregated the Assets specifically for their use or that the President's confiscation of the Assets was unlawful, their claim must fail. We therefore affirm the district court on this basis.

Having resolved the appeal on this basis, the court of appeals did not address the district court's further conclusion that the Presidential Determination of May 7, 2003, had "'made [TRIA] inapplicable with respect to Iraq,' pursuant to section 1503 of EWSAA . . ."

(2) On July 7, 2003, the U.S. District Court for the District of Columbia awarded $653 million in compensatory and $306 million in punitive damages to seventeen prisoners of war held by Iraq during the Gulf War, their spouses and family members. *Acree v. Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003),

discussed in 4.d.(2)(i) *supra*. On July 30, 2003, the District Court for the District of Columbia dismissed plaintiffs' efforts to collect on that judgment through attachment of blocked Iraqi assets under the terms of TRIA. The court held that the April legislation and May Presidential Determination, both prior to the date of the *Acree* judgment, made TRIA inapplicable to Iraq and rendered the assets unavailable. *Acree v. Snow*, 276 F. Supp. 2d 31 (D.D.C. 2003). On appeal, the D.C. Circuit issued a brief unpublished opinion dated October 7, 2003, in which it "ordered and adjudged that the judgment of the district court is affirmed for the reasons stated in *Smith v. Federal Reserve Bank of New York*," *i.e.*, that the assets had become U.S. property as of March 20, 2003.

6. Service of Process

a. In *Simons v. Lycee Francais de New York*, 2003 U.S. Dist. LEXIS 17644 (S.D.N.Y. 2003), purported service of process on the French Consulate in New York was held defective for failure to comply with the requirements of FSIA §§ 1608(a)(3) or (4) or 1608(b)(3). While the facts were in dispute, the court said, (the French consulate claimed that plaintiff left a summons-notice and verified complaint with a security guard at the consulate who was employed by an independent security firm, while plaintiff claimed that the summons and complaint were handed to a representative of the Consulate), it made no difference since no special arrangement existed for service of process between plaintiff and either the Republic of France or the French consulate. *See also* A.1.b.(2) *supra*.

b. In *Prewitt Enterprises, Inc., v. Organization of Petroleum Exporting Countries*, 353 F.3d 916 (11th Cir. 2003), plaintiff, an Alabama corporation that purchased substantial quantities of gasoline and other refined petroleum products for resale at its gasoline station, brought suit against the Organization of Petroleum Exporting Countries (OPEC), alleging violations of the Sherman Act for illegal price-fixing agreements on production and export of crude oil and seeking equitable

relief pursuant to the Clayton Act. The district court's dismissal for insufficient service of process was upheld by the Eleventh Circuit, which noted that OPEC was neither a "foreign state" nor a "political subdivision of a foreign state" pursuant to the FSIA. Nor could it be characterized as an "international organization" within the meaning of the International Organizations Immunities Act. Non-consensual service of process by international registered mail, return receipt requested, would be contrary to the relevant law of Austria, where OPEC had been headquartered since 1965. That law clearly provides protection to OPEC as an international organization from all methods of service of process without its consent and also requires that any service of process from abroad be effected through Austrian authorities. In this case, the appellate court said, OPEC had made clear that it refuses to consent expressly to service of process by Prewitt. Thus, the district court did not abuse its discretion in denying Prewitt's motion to authorize alternative means of service.

B. HEAD OF STATE IMMUNITY

1. Head of State Immunity and Inviolability to Service of Process

Plaintiff A v. Jiang Zemin, 282 F. Supp. 2d 875 (N.D.Ill. 2003), involving allegations of human rights abuses perpetrated by the PRC against Falun Gong practitioners, was brought against Jiang Zemin, while he was president of the People's Republic of China, and the Falun Gong Control Office. The United States submitted a Statement of Interest asserting that President Jiang was entitled to head of state immunity and that as head of state he enjoyed inviolability to service of process. Excerpts from the U.S. Statement filed under the name *Wei Ye v. Jiang Zemin*, are set out in *Digest 2002* at 547–552 and 585–595. The district court held the United States suggestion of immunity included in its Statement of Interest to be dispositive and dismissed the

claims against then former President Jiang Zemin. The court nevertheless went on to address plaintiffs' arguments against the existence of immunity in the case, relying on its recent decision in *Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003), discussed in 1.b. below. In this analysis, the court rejected the proposition that the FSIA applies to heads of state and pointed to broad immunity for heads of state under the common law. Furthermore, the court noted that "the rationale for head-of-state immunity is no less implicated when a former head of state is sued in a United States court for acts committed while head of state than it is when a sitting head of state is sued." As to the Falun Gong Control Office, the court found that President Jiang's inviolability to service of process as head of state does not operate as a barrier to service "directed at a third party entity with which he is claimed to be associated," but that it was not effective in this case. The district court decision was pending on appeal before the U.S. Court of Appeals for the Seventh Circuit at the end of 2003.

Excerpts from the district court's decision follow (footnotes omitted). The court also suggested the possibility that the FSIA might apply to the Fulan Gong Control Office, but did not address the issue.

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DISCUSSION

A. Head-of-State Immunity

In its *amicus* submission, the government suggests that Jiang is immune from the jurisdiction of the Court because he is China's former head of state. Citing Supreme Court precedent that the Court discusses below, the government maintains that courts are bound by the Executive Branch's determinations of immunity. Plaintiffs argue that although such deference was once the rule, courts are no longer bound by suggestions of immunity and that immunity is not appropriate in this case because head-of-state immunity does not shield former heads of state.

The enactment of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1602 *et seq.*, altered the practice of court deference to the Executive Branch's immunity suggestions on behalf of foreign states. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486–88, 103 S.Ct. 1962, 76 L. Ed. 2d 81 (1983). Whereas under traditional practice immunity determinations were made by the Executive Branch, the FSIA placed that responsibility—at least with regard to states—in the courts. 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States. . . ."). Although plaintiffs acknowledge that the FSIA does not govern the immunity claims of individuals, they maintain that "the principle embodied in the FSIA to treat [immunity] claims through the judicial process rather than diplomatically [also applies] to immunity claims raised by government officials." Pls.' Mem. on Preliminary and Jurisdictional Issues at 2 (hereinafter Pls.' Mem.). The Court has recently considered the deference that must be accorded the Executive Branch's suggestions of immunity for heads of state as well as the effect that the FSIA's enactment had on the immunity-suggestion procedure. The following discussion is taken largely from the Court's opinion in *Abiola v. Abubakar,* 267 F. Supp. 2d 907 (N.D.Ill. 2003).

Under traditional common law, a foreign head of state was absolutely immune from suit in United States courts. The Supreme Court articulated this principle of customary international law in its 1812 decision, *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 3 L. Ed. 287 (1812). . . . As the principles articulated in *The Schooner Exchange* evolved into a general doctrine of foreign sovereign immunity, the courts consistently "deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden,* 461 U.S. at 486, 103 S.Ct. 1962. The Supreme Court articulated the rationale for such deference:

> [I]t is a guiding principle in determining whether a court should exercise or surrender its jurisdiction . . . , that the courts should not so act as to embarrass the executive arm

> in its conduct of foreign affairs. "In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.

Republic of Mexico v. Hoffman, 324 U.S. 30, 35, 65 S.Ct. 530, 89 L. Ed. 729 (1945) (quoting *United States v. Lee*, 106 U.S. 196, 209, 1 S.Ct. 240, 27 L.Ed. 171 (1882)). Thus emerged a system under which the State Department determined the availability of sovereign immunity, and the courts deferred to its decisions. *Verlinden*, 461 U.S. at 487, 103 S.Ct. 1962.

* * * *

Plaintiffs maintain that although the FSIA does not apply to heads of state, the statute's elimination of the immunity-suggestion procedure for foreign states also displaced the suggestion procedure for heads of state. Plaintiffs thus urge the Court to make an independent determination regarding the availability of immunity for Jiang rather than defer to the Executive Branch's suggestion.

Neither the FSIA's text nor its legislative history, however, indicates an intent to alter the traditional suggestion procedure with respect to heads of state. The FSIA's definition of "foreign state" noticeably omits heads of state. "Foreign state" is defined to include an "agency or instrumentality of a foreign state," which is further defined as "any *entity* (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id.* § 1603(b)(emphasis added). The House Report's discussion of the definition of "foreign state" further underscores the Act's applications to state *qua* state and state entities, not heads of state. The FSIA's reference to a foreign state's "agency or instrumentality" is meant to cover

> a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. Rep. at 16. Although the term "foreign state" is thus to be read broadly enough to cover such entities, there is no indication that heads of state are to be included in the definition. Moreover, the Act's legislative history indicates that it was not meant to affect diplomatic or consular immunity: "Section 1605(a)(5) would not govern suits against diplomatic or consular representatives but only suits against the foreign state." H.R. Rep. at 21.

It is logical to infer from the FSIA's legislative history and the omission of heads of state from the definition of "foreign state" that the statute was not intended to alter traditional immunity for heads of state. *See Tachiona v. Mugabe*, 169 F.Supp.2d 259, 277 (S.D.N.Y. 2001) ("With a legislative record devoid of any explicit contrary expression, a deliberate purpose to depart from generally prevalent international customs and practices as regards immunity for heads-of-state should not be ascribed to Congress."). The pre-1976 suggestion of immunity procedure thus survives the statute's enactment with respect to heads of state. The Court must defer to the United States's suggestion of immunity for Jiang, *Republic of Mexico*, 324 U.S. at 35, 65 S. Ct. 530, and we therefore dismiss all claims made by the plaintiffs against him.

In reaching this determination, we join several courts that have concluded that the immunity-suggestion procedure remains intact with respect to heads of state. . . .

Although the Court finds the government's suggestion of immunity dispositive, we nevertheless address plaintiffs' arguments as to why immunity should not be recognized in this case. First, plaintiffs argue that because the government has accepted the role of *amicus curiae*, its assertion of immunity should not be given the deference that courts have traditionally afforded "Official Suggestions of Immunity." Pls.' Mem. at 36. The Court, however, fails to see—and plaintiffs have not cited any persuasive authority to support—the significance of this distinction. . . .

Plaintiffs also contend that head-of-state immunity does not shield former heads of state. Although Jiang may at one time have enjoyed head-of-state immunity, they argue, he no longer has this protection because he is no longer China's head of state. In support of this argument, plaintiffs rely on the policy behind head-of-state immunity. . . .

Plaintiffs cite no holding by any court that head-of-state immunity for acts committed during one's tenure as ruler disappears when a leader steps down. The Second Circuit has stated in *dictum* that "there is respectable authority for denying head-of-state immunity to former heads-of-state." *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988). However, the cases the court cited in support of this proposition suggest merely that a former head of state may not be entitled to immunity (1) for his private acts, *see The Schooner Exchange*, 11 U.S. (7 Cranch) at 145; *Republic of Philippines v. Marcos*, 806 F.2d 344, 360 (2d Cir. 1986) (stating in dicta that head-of-state immunity may not "go [ ] so far as to render a former head of state immune as regards his *private* acts" (emphasis added)), or (2) when the foreign state waives the immunity of its former leader, *see In re Grand Jury Proceedings*, 817 F.2d 1108, 1111 (4th Cir. 1987). Neither scenario is present here. Moreover, the cornerstones of foreign sovereign immunity, comity and the mutual dignity of nations, are not implicated by denying immunity in the types of matters cited in *Doe*—in the first scenario because the head of state is being sued for acts taken as a private person and in the second because the foreign state disavows immunity for its former leader. By contrast, the rationale for head-of-state immunity is no less implicated when a former head of state is sued in a United States court for acts committed while head of state than it is when a sitting head of state is sued.

Plaintiffs also contend that immunity should not be recognized in the context of the types of wrongs alleged in their complaint. Violations of *jus cogens* norms, they maintain, are outside the scope of immunity protections. However, the opposite actually seems to be true. At common law, heads of state and foreign states enjoyed coextensive immunity until the FSIA limited the situations in which immunity would be recognized for states. *Abiola*, 267 F.Supp.2d at 911–14. A head of state, like the state

itself, can therefore be understood to enjoy any immunity that states retain after the FSIA's enactment. *Id.* at 916. States are immune from claims arising from the alleged "abuse of the power of [a state's] police" because, "however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." *Saudi Arabia v. Nelson*, 507 U.S. 349, 361, 113 S. Ct. 1471, 123 L.Ed.2d 47 (1993). *A fortiori*, the same is true for a head of state.

B. Defendant Falun Gong Control Office

* * * *

1. Inviolability

Plaintiffs argue that even if head-of-state immunity shields Jiang from the Court's jurisdiction, such protection does not extend to the Falun Gong Control Office, which—they claim—was properly served with process through service on Jiang. The government maintains that because Jiang enjoys head-of-state immunity, he is personally inviolable and thus incapable of being served in any capacity. It argues that for this reason, Jiang could not properly be served as an agent for Office 6/10.

Personal inviolability is a core attribute of diplomatic immunity. Satow's Guide to Diplomatic Practice 120 (Lord Gore-Booth ed., 5th ed. 1979) (hereinafter Satow's Guide) ("Personal inviolability is of all the privileges and immunities of missions and diplomats the oldest established and the most universally recognized. . . ."). The Vienna Convention on Diplomatic Relations provides that "[t]he person of a diplomatic agent shall be inviolable." Vienna Convention on Diplomatic Relations, art. 29, *done* Apr. 18, 1961, *United States accession*, Dec. 13, 1972, 23 U.S.T. 3227, 500 U.N.T.S. 95 (hereinafter Vienna Convention). And a visiting head of state is "given the same personal inviolability . . . [as] an accredited diplomat." Restatement (Third) of Foreign Relations Law § 464, note 14 (1987). According to the Vienna Convention, inviolability means that the "diplomatic agent . . . shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent

any attack on his person, freedom or dignity." Vienna Convention, art. 29. This articulation of the principle is consistent with its origins—a diplomat serving his country on potentially hostile foreign territory required personal inviolability "to allow him to perform his functions without any hindrance from the government of the receiving state." Satow's Guide at 120–21. In addition to arrest and detention, the case law addressing inviolability involves, for example, searches of the person, baggage or premises; subpoenas to provide evidence at legal proceedings; and initiation of criminal or civil proceedings against a diplomat who claims immunity. *See Tachiona*, 169 F.Supp.2d at 304.

The question in this case is whether this inviolability is broad enough to insulate Jiang from all service of process, even process directed at a third party entity with which he is claimed to be associated. Several factors lead the Court to conclude that inviolability does not operate as a barrier to service of process in such a situation. First, the justifications for inviolability and immunity—that a foreign diplomat should not be hindered in his official functions and that a foreign nation should not suffer an affront to its dignity—are clearly implicated if legal compulsion is asserted directly against a head of state. But these concerns are not implicated to the same degree when service of process is related, not to the assertion of jurisdiction over the head of state himself, but to jurisdiction over a third-party organization. *Cf. Tachiona*, 169 F.Supp.2d at 305 ("Service of process . . . would not demand the official's appearance in court nor subject him in other ways to the court's compulsory powers in a manner that could be deemed an assertion of territorial authority over the foreign dignitaries and, by extension, over the foreign state they represent").

Second, the service provisions of the FSIA suggest that personal inviolability does not present an absolute bar to service in an agency capacity. The Act provides that one way to effect service on an agency or instrumentality of a foreign state is "by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States." 28 U.S.C. § 1608(b)(2). Nothing in the statute would prevent service to be effected through an officer who "also happens

to be a state official or diplomat otherwise entitled to immunity —theoretically including even a head-of-state who satisfies the statutory criteria defining the persons upon whom service is authorized to be made." *Tachiona*, 169 F.Supp.2d at 306. Because the FSIA does not foreclose the possibility that a diplomat may receive process as an agent, the statute lends weight to the proposition that inviolability does not bar service under all circumstances.

And perhaps the strongest indication that inviolability does not always preclude service is the possibility that heads of state may not be immune in all situations. As far back as 1812 the Supreme Court, when articulating the principle of sovereign immunity in *The Schooner Exchange*, indicated the possibility that, although a prince was absolutely immune for his official acts, he could be subject to suit for certain private acts: "A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual." *The Schooner Exchange*, 11 U.S. (7 Cranch) at 145. Likewise, international law permits actions against heads of state involving real property abroad, private services as an executor of an estate, or personal commercial activities. *See* Vienna Convention, art. 31; Satow's Guide at 10. These limited exceptions to immunity presuppose that a head of state is amenable to service of process, even in instances when his presence in court may be required. Service of process therefore cannot be seen under all circumstances to be an affront to a head of state's inviolability.

2. Service on Office 6/10

Although inviolability does not necessarily prevent service on Jiang in an agency capacity, that does not resolve the matter. . . .

* * * *

. . . [S]ubmissions [by plaintiffs] do not amount to a showing that Jiang was either an agent or an officer of Office 6/10. The claim that Jiang established the Office and exerted control over it in his

capacity as leader of the ruling party does not by itself mean that he was, at the time process was supposedly served, an agent or an officer of the Office. Without something more definitive than plaintiffs' conclusory allegations of agency, the Court cannot determine whether Jiang was in fact an agent or officer of Office 6/10.

3. Personal Jurisdiction

Although the Court is not convinced that Jiang properly could be served in an agency capacity on behalf of Office 6/10, we nevertheless consider the next question in the analysis: assuming Jiang was an agent of Office 6/10, was service on him effective to establish the Court's personal jurisdiction over the Office?

* * * *

Federal due process permits personal jurisdiction over a nonresident defendant when it has had "certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L.Ed. 95 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L.Ed. 278 (1940)). What is meant by "minimum contacts" depends on whether general or specific jurisdiction is asserted. *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1277 (7th Cir. 1997). General jurisdiction is permitted only when a defendant has "continuous and systematic" contacts with the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S. Ct. 1868, 80 L.Ed.2d 404 (1984). Specific jurisdiction exists when the cause of action "arise[s] out of or relate[s] to the defendant's contacts with the forum." *Id.* at 414 n. 8, 104 S. Ct. 1868. Plaintiffs claim that both specific and general jurisdiction are available. Pls.' Mem. at 43–45.

[As to general jurisdiction] . . . [t]he Seventh Circuit has stated that contacts, to be considered "continuous and systematic,"

> must be so extensive to be tantamount to [the defendant's] being constructively present in the state to such a degree that it would be fundamentally fair to require it to answer

> in an [Illinois] court in *any* litigation arising out of *any* transaction or occurrence taking place *anywhere* in the world.

Purdue, 338 F.3d at 787 (emphasis in original) . . . .

* * * *

Office 6/10's alleged creation of a blacklist on which the names of seven Illinois residents happen to appear does not constitute a contact with Illinois. The list evidently was created in China, and as best as we can tell, without regard to the residency of the persons named. The persecution, torture, and detention in China of individuals who later became Illinois residents is likewise not a contact by Office 6/10 with Illinois. The alleged atrocities occurred in China; the fact that the victims later became Illinois residents is insufficient to confer jurisdiction. *Purdue*, 338 F.3d at 780 ("[I]t must be the activity of the defendant that makes it amenable to jurisdiction, not the unilateral activity of the plaintiff or some other entity."); *cf. Helicopteros*, 466 U.S. at 417, 104 S. Ct. 1868 (suggesting that "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction"); *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L.Ed.2d 1283 (1958) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State").

Office 6/10's alleged attempts to suppress Falun Gong demonstrations in Illinois through the assault of demonstrators, intimidation of Chicago hotels, and the destruction of leaflets and signs are, obviously, contacts with Illinois. But although these contacts may have occurred on more than one occasion, they do not rise to the level of "continuous and systematic" contacts, such that Office 6/10 "could reasonably foresee being haled into court in [Illinois] for *any* matter," *Purdue*, 338 F.3d at 787 (emphasis added), even a case unrelated to those contacts. Nor do they equate to the constructive presence of Office 6/10 in Illinois. *Id.* Although such activities may potentially confer specific jurisdiction for claims

arising from those activities, they do not justify the assertion of general jurisdiction.

We next consider the availability of specific jurisdiction. As stated above, for specific jurisdiction to exist, the plaintiffs' claims must arise from the defendant's contacts with the forum. In this case they do not. . . .

Based on the foregoing, even if Jiang was an agent or officer of Office 6/10 and thus capable of receiving service on its behalf, such service was insufficient to confer personal jurisdiction over Office 6/10 because the Office is not subject to the jurisdiction of Illinois courts. *See* Fed.R.Civ.P. 4(k)(1)(a). Because the Court lacks personal jurisdiction over the Falun Gong Control Office, we dismiss the claims against it.

* * * *

2. Determination in Absence of Executive Branch Suggestion of Immunity

In *Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003), on which the court relied in *Jiang Zemin, supra*, several Nigerian nationals filed suit against General Abdusalami Abubakar, the former head of state of Nigeria. The suit alleged human rights abuses perpetrated while Abubakar was a high-ranking member of the Nigerian Provisional Ruling Council (between 1993 and 1998) and head of state (June 1998 to May 1999). Unlike *Jiang Zemin*, however, no suggestion of immunity had been filed by the executive branch in *Abubakar.* The court noted:

> [b]ecause the FSIA did not alter head-of-state immunity, common law immunity—and the practice of following the State Department's immunity determinations—remains intact with respect to heads of state. The State Department, however, has not intervened to suggest immunity for Abubakar. In the absence of guidance from the Executive Branch, "courts may decide for themselves whether all the requisites of immunity exist." *Republic of*

Mexico, 324 U.S. at 34–35, 65 S. Ct. 530; *Noriega*, 117 F.3d at 1212; *In re Doe*, 860 F.2d at 45.

The court's subsequent analysis of Abubakar's immunity is reflected in excerpts from *Jiang, supra*. The court concluded as set forth below.

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* * * *

In the absence of any doctrine restricting a head of state's immunity for the type of conduct alleged in the complaint or a denial of immunity from the State Department, the Court determines that Abubakar is entitled to head-of-state immunity for his acts during the period that he was Nigeria's head of state. Abubakar asserts, and plaintiffs concede, that he was Nigeria's head of state from June 8, 1998 to May 29, 1999. He is immune from suit only for acts committed during that period. *See, e.g., Tachiona*, 169 F.Supp.2d at 289 ("[C]ourts uniformly have accepted the claim [of immunity] as to heads-of-state and heads-of-government."); *El-Hadad v. Embassy of the United Arab Emirates*, 69 F.Supp.2d 69, 82 n. 10 (D.D.C. 1999) (declining to extend head-of-state immunity "to cover all agents of the head of state"), *rev'd in part on other grounds*, 216 F.3d 29 (D.C.Cir. 2000); *First American Corp. v. Al-Nahyan*, 948 F.Supp. 1107 (D.D.C. 1996) (declining to recognize head of state immunity of Minister of Defense of the United Arab Emirates); *Republic of Philippines v. Marcos*, 665 F.Supp. 793, 797 (N.D.Cal. 1987) (stating that the "two traditional bases for a recognition or grant of head-of-state immunity" are a defendant's position as either sovereign or foreign minister). We therefore turn to the complaint to determine if immunity is available with respect to each plaintiff's allegations.

* * * *

3. Suggestions of Immunity Filed in 2003

In 2003 the United States suggested immunity from suit in U.S. courts for foreign heads of state and government from Azerbaijan, Israel, and Saudi Arabia.

a. Two of these suggestions were filed in *Daventree Limited v. Republic of Azerbaijan*, No. 02 Civ. 6356 (S.D.N.Y. Oct. 15, 2003), a case involving allegations that the Government of Azerbaijan and high-ranking Azeri officials participated in a fraudulent scheme to privatize the State Oil Company of the Azerbaijan Republic. Originally, the United States suggested the immunity only of Azeri President Heydar Aliyev; however, after his son, Ilham, was elected Prime Minister of Azerbaijan, the United States also recognized his immunity from suit as a sitting head of government. The court dismissed the claims against both Heydar and Ilham Aliyev pursuant to the Suggestions of Immunity. Both Suggestions are available at *www.state.gov/s/l/c8183.htm.*

b. A Suggestion of Immunity filed on behalf of Prime Minister Ariel Sharon of Israel was pending at the end of 2003 before the United States District Court for the District of Columbia in *Doe v. State of Israel,* No 02-1431 (D.D.C., filed Jul. 18, 2003). In that case, Palestinian-Americans seek damages for death, injury, and property damage resulting from alleged illegal acts perpetrated in the Occupied Territories and in the Sabra and Shatila refugee camps by the State of Israel, its armed forces and security services, and its settler population. The plaintiffs allege that Prime Minister Sharon knew and approved of the acts allegedly committed by the Israeli defense, security, and police services and that he is both individually culpable and has command responsibility for those acts. The Suggestion of Immunity filed for Prime Minister Sharon is available at *www.state.gov/s/l/c8183.htm.*

c. The United States also suggested immunity on behalf of King Fahd of Saudi Arabia in both federal and state court in California in a suit based on a private, domestic dispute. *Al Fassi v. King Fahd Bin Abdulaziz*, No. 03-3841 ABC (C.D. Cal filed Aug. 4, 2003); *Al Fassi v. King Fahd Bin Abdulaziz*, Case No. BC 266084 (Sup. Ct. Los Angeles). Neither court ruled on the Suggestions of Immunity, however.

The United States District Court for the Central District of California remanded the case prior to considering the head-of-state immunity issue, and the California state court dismissed the claims against the King pursuant to a settlement before reaching a decision on his immunity. Both Suggestions are available at *www.state.gov/s/l/c8183.htm*. The decisions are unreported.

* * * *

C. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

1. Immunities at the United Nations

a. Permanent representative

In *Lawton v. The Republic of Iraq*, plaintiffs, survivors of the Murrah Building bombing in Oklahoma City or representatives of persons killed in the bombing, filed suit for damages from the Republic of Iraq, alleging that Iraq orchestrated, assisted, and aided that bombing. To prove these allegations, plaintiffs sought to depose Mohammed al-Douri, then Iraq's Ambassador to the United Nations. When Ambassador al-Douri failed to appear for the deposition, plaintiffs moved the U.S. District Court for the Southern District of New York to hold him in contempt. The court held, however, that at the relevant times (attempted service of the subpoena and scheduled deposition), Ambassador Al-Douri enjoyed diplomatic immunity as a result of his status as an accredited representative of the Government of Iraq to the United Nations, pursuant to the United Nations General Convention on Privileges and Immunities, 21 U.S.T 1480 (1970), and was thus not subject to service of the subpoena for deposition. *Lawton v. The Republic of Iraq*, Misc. Case No. M8–85 (Order dated April 16, 2003.)

b. Discovery against archives of a mission to the United Nations

The Supreme Court for the State of New York requested the views of the Department of State concerning the position of the Mission of Saudi Arabia to the United Nations on defendants' motion to compel production of official correspondence, archives, and other documents from the archives of the Saudi Mission or strike the complaint. In response, the United States informed the court that such documents are protected in accordance with the Vienna Convention on Diplomatic Relations, which applies to missions to the United Nations through the United Nations Headquarters Agreement, 61 Stat. 3416, T.I.A.S. 167 (1947), and the United Nations Convention on Privileges and Immunities. Article 24 of the Vienna Convention renders archives and documents of a mission inviolable, and article 27 provides that the official correspondence of a mission is inviolable. Further, the United States pointed out that the filing of a lawsuit does not waive the inviolability of documents subject to articles 24 and 27. The United States, however, took no position on whether there was a demonstrated need for the documents. *See, e.g., Taiwan v. District Court for the Northern District of California*, 128 F.3d 712 (9th Cir. 1997). The court declined defendants' motion to strike the complaint and instead found that defendants should obtain evidence through other means, such as depositions of persons involved in the underlying transaction. *Mission of Saudi Arabia to the United Nations v. Kirkwood, Ltd.*, Index No. 112122/01 (Order dated April 10, 2003).

2. Status of Dependents

In *United States v. Al-Hamdi*, the Department of State's certification of the status and immunities of a diplomatic dependent has been held to be conclusive in view of the Department's role in interpreting the Vienna Convention on Diplomatic Relations and the reasonableness of the Department's interpretation of provisions concerning dependents.

United States v. Al-Hamdi, No. 03-CR-158 (E.D.Va., filed Apr. 17, 2003).

On February 25, 2003, Ibrahim Al Hamdi, the son of a Yemeni diplomat, was arrested and charged with a firearms offense. On March 31, 2003, the Department of State sent a letter to the Embassy of Yemen terminating as of that date the diplomatic status of Mr. Al Hamdi's father. Mr. Al Hamdi sought dismissal of the charge against him on grounds that sections 3 and 4 of the Diplomatic Relations Act, 22 U.S.C. §§ 254b and 254c, required dismissal of any action or proceeding against an individual who is entitled to immunity under the Vienna Convention on Diplomatic Relations. He argued that, as the son of a Yemeni diplomat accredited to the United States on the date of his arrest, he was immune from criminal jurisdiction and inviolable under articles 37, 31 and 29 of the Convention.

The United States responded that the Department of State, which is charged with interpreting and administering U.S. responsibilities under the Vienna Convention, has long taken the position that it determines who is a "family member" in the United States and that children of diplomatic agents lose their status as "family members" and their immunity from criminal prosecution at age 21 unless they are full-time students, in which case they automatically lose their status at age 23. The United States provided the court with the Department's Circular Diplomatic Note to Chiefs of Diplomatic Missions in the United States, issued on November 15, 1989, and still in effect, informing diplomatic missions of the Department's position concerning the status of dependents. The Department of State also furnished a certification regarding Mr. Al Hamdi's diplomatic status, to the effect that Department records reflected that he automatically lost his diplomatic status, and thus his immunities, on his 21st birthday in 1998.

The U.S. District Court for the Eastern District of Virginia declined to dismiss the indictment, finding that it was entitled to rely on the Department's certification as conclusive. At the end of 2003, an appeal was pending.

D. INTERNATIONAL ORGANIZATIONS

1. European Central Bank

The privileges, exemptions, and immunities provided by the International Organization Immunities Act, 22 USC §§ 288-288f-6 ("IOIA"), were extended to the European Central Bank by Executive Order 13307 on May 29, 2003. 68 Fed. Reg. 33,338 (May 29, 2003). United States Government participation as a member in an international organization is generally required for designation under the IOIA. In this instance, however, extension of the provisions of the Act to the European Central Bank was possible as a result of a statutory amendment specifically authorizing such action. 22 U.S.C. §§ 288, 288f-5.

2. Inter-American Development Bank

In *Atlantic Tele-Network Inc. v. Inter-American Development Bank*, 251 F. Supp. 2d 126 (D.D.C. 2003), discussed in A.4.a.(1), *supra*, the IDB moved to dismiss on grounds that it "possesses the equivalent of sovereign immunity from suit in cases like this." The court agreed, as set forth in excerpts below.

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* * * *

The IDB is an international financial institution designated by executive order for protection as an international organization under the International Organizations Immunities Act (IOIA), 22 U.S.C. §§ 288 et seq. (1994). See Exec. Order No. 10,873, 25 Fed. Reg. 3,097 (1960); Exec. Order No. 11,019, 27 Fed. Reg. 4,145 (1962). The IOIA confers upon the IDB "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a(b).

ATN . . . argues that [IDB] has waived that immunity for cases such as this in the limited waiver of immunity found in Section 3 of Article XI of the IDB Charter. That section provides: "Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities." Agreement Establishing The Inter-American Development Bank, April 8, 1959, Art. XI, Section 3.

While some older decisions may have intimated a broader scope to the waiver of immunity represented by Section 3 of Article XI, in *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C.Cir. 1998), the D.C. Circuit has most recently adopted an interpretation of the Section 3 waiver effectively narrowing its scope to a minimum. In *Atkinson*, the D.C. Circuit held that "the Bank's immunity should be construed as *not waived* unless the particular type of suit would *further* the Bank's objectives." *Atkinson*, 156 F.3d at 1338 (emphasis in original).

As the IDB points out, were this suit to be allowed, virtually any U.S. citizen with a commercial grievance against a debtor nation could challenge an IDB loan to that nation without any "corresponding benefit" accruing thereby to the IDB whatsoever. *Atkinson*, 156 F.3d at 1338. ATN suggests that this suit will aid the IDB in attracting responsible borrowers as well as encouraging American investment in developing nations generally. Both, however, are objectives the IDB can well pursue on its own without help from private litigants. Accordingly, the Court holds that the IDB has not waived its immunity from suits such as this, and is, therefore, immune to this action.

* * * *

3. Protection of the UN Headquarters District

Plaintiff organization sought a preliminary injunction permitting it to hold a march of some 100,000 people on First Avenue directly along the perimeter of the United Nations headquarters. The United States filed a Statement

of Interest, noting that as host country to the United Nations, the United States has specific obligations to assure that the important business of the United Nations and the diplomatic missions connected to the United Nations can be conducted and executed without interruption, and asking the court to weigh heavily its interest in the security of and access to the United Nations headquarters following the events of September 11, 2001.

The U.S. District Court for the Southern District of New York denied plaintiff's request. *United for Peace and Justice v. City of New York*, 243 F. Supp. 2d 19 (S.D.N.Y. 2003). Noting that the city had previously offered to permit a stationary rally that would border on Dag Hammarskjöld Park across from the United Nations, the district court found that "the United Nations Headquarters is uniquely sensitive among locations in New York City because of its function, our country's treaty obligations and its history as a terrorist target." *Id*. at 23. The United States Court of Appeals for the Second Circuit upheld the district court's decision. *United for Peace and Justice v. City of New York*, 323 F.3d 175 (2d Cir. 2003).

Excerpts from the U.S. Statement of Interest follow (footnotes omitted). The full text of the Statement of Interest is available at *www.state.gov/s/l/c8183.htm*.

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On August 8, 1945, the United Nations Charter was ratified by the President of the United States, with the advice and consent of the Senate, and came into force on October 24, 1945. *See* United Nations Charter, Intr.; 59 Stat. 1031, 3 Bevans 1153 (1945). Several months after the United Nations 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 United Nations negotiated the Agreement Between the United Nations and the United States of America Regarding

the Headquarters of the United Nations, June 26–Nov. 21, 1947, S.J. Res. 144, 61 Stat. 756; 12 Bevans 956 (the "United Nations Headquarters Agreement") (a copy of the United Nations Headquarters Agreement is annexed hereto as Exhibit A).

The United Nations Headquarters Agreement establishes the headquarters of the United Nations in New York City and regulates the relationship between the United States and the United Nations. Pursuant to the United Nations Headquarters Agreement, the United Nations "headquarters district" includes the land area bound by 42nd Street on the south, 48th Street on the north, Franklin D. Roosevelt Drive (the "FDR") on the east, and First Avenue on the west. *See* United Nations Headquarters Agreement, Art. 1 (referencing Annex 1). As host country to the United Nations, the United States has assumed specific obligations to assure that the important business of the United Nations and the diplomatic missions connected to the United Nations can be conducted and executed without interruption. For example, the United States is obligated to ensure members and officials of the United Nations open access to and from the headquarters district. *See, e.g.*, United Nations Headquarters Agreement, § 11.

Under the United Nations Headquarters Agreement, the United States is required to assure that the business of the diplomats and dignitaries in attendance at the United Nations can be conducted and executed without interruption or disturbance. Section 16 of the United Nations Headquarters Agreement provides, in pertinent part, that:

> (a) The appropriate American authorities shall exercise due diligence to ensure that the tranquility of the headquarters district is not disturbed by the unauthorized entry of groups of persons from outside or by disturbances in its immediate vicinity and shall cause to be provided on the boundaries of the headquarters district such police protection as is required for these purposes.

United Nations Headquarters Agreement, § 16(a).

The United States Mission to the United Nations coordinates the United States' compliance with the above-described obligations.

To meet these obligations, the United States Mission to the United Nations works closely with the City of New York, and in particular, the New York City Police Department. The United States Mission to the United Nations relies upon both the experience and expertise of the New York City Police Department to not only identify, but also address the unique security and access issues that arise within the vicinity of the United Nations headquarters district. The United States' obligation to ensure the safety of the United Nations and access to the United Nations headquarters represents a substantial federal interest. Specifically, the United States must ensure the safety of and access to the United Nations headquarters district at all times, as the United Nations functions seven days a week, particularly to address threats to international peace and security. Following the events of September 11, 2001, issues involving security of and access to the United Nations headquarters must be given serious consideration. The United States respectfully submits that this interest should be heavily weighed by this Court in considering plaintiff's specific request to march on First Avenue between 42nd and 48th Streets. *See, e.g.*, *International Society of Krishna Consciousness, Inc. v. City of New York*, 501 F. Supp. 684, 693 (S.D.N.Y. 1980) (rejecting plaintiff's constitutional challenge to the police department's restriction on certain activities along the east side of First Avenue between 42nd and 48th Streets after concluding that the police department had a substantial interest in protecting the United Nations headquarters and the United Nations officials).

E. THE ACT OF STATE DOCTRINE

Under the act of state doctrine as developed by courts in the United States, U.S. courts generally abstain from sitting in judgment on acts of a governmental character done by a foreign state within its own territory. Because this doctrine is often invoked in cases involving issues of immunities, act of state is addressed here.

In *United States v. Labs of Virginia, Inc.*, the U.S. District Court for the Northern District of Illinois held that the act

of state doctrine did not bar a prosecution brought under the Lacey Act amendments of 1981, 16 U.S.C. §§ 3371–3378, 272 F. Supp. 2d 764 (N.D. Ill. 2003). In that case, defendants' importation of wild-caught, crab-eating macaque monkeys into the United States from Indonesia was alleged to have violated the Lacey Act's prohibition against the importation of wildlife "taken, possessed, transported or sold in violation of any law or regulation of any State or in violation of any foreign law." In rejecting the defendants' invocation of the act of state doctrine, the court held that the mere fact that the case involved export decisions made by the Government of Indonesia, possibly under the influence of bribery, did not merit dismissal of portions of the indictment. The court's decision is excerpted below.

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. . . The act of state doctrine prohibits United States courts from sitting in judgment of official acts taken by another country within its own borders that might frustrate the conduct of foreign relations by the political branches of the government. *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp. Int'l*, 493 U.S. 400, 408, 110 S. Ct. 701, 107 L. Ed. 2d 816 (1990). The policies underlying the doctrine include "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *Id.* . . . Thus, the doctrine requires that courts "not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state." *Mol, Inc. v. Peoples Rep. of Bangl.*, 572 F. Supp. 79, 83 (D.Or. 1983) (internal citations and quotations omitted). That is, act of state issues arise only when "a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine." *W.S. Kirkpatrick*, 493 U.S. at 406, 110 S. Ct. 701.

Defendants offer several reasons why the act of state doctrine should apply in this case. First, Defendants posit that the

Government must prove as a part of its case that the issuance of the [export] permits was corrupted by bribery and that the outcome of the case turns upon the effect of the alleged bribery on the issuance of the permits and the export of the monkeys. The Government responds that Count V does not implicate the act of state doctrine because it does not require this Court to inquire into the validity or legality of any public act by the Indonesian government. Rather, according to the Government, the relevance of the bribery allegations goes only to whether the defendants knew that the shipments contained wild-caught monkeys even though the permits for the shipments specified captive-bred monkeys. The Government further contends that its responses to the bill of particulars does not alter this fact because it could prove its case without any reference to the alleged bribery. Accordingly, the Government concludes that nothing in this case with respect to the Indonesian official's actions in issuing the permits requires this Court to "declare invalid, and thus ineffective . . . the official act of a foreign sovereign." *Id.* at 405, 110 S. Ct. 701.

We agree. . . . [T]he outcome of this case does not turn upon whether the CITES permits were procured through bribery; Indonesian law was violated when the wild-caught monkeys left the country, regardless of the permit issuer's intent.

Next Defendants claim that the act of state doctrine should apply because Count V impinges on international comity and the need to avoid embarrassment to the Executive Branch in its conduct of foreign relations. But this case is an enforcement action *brought by* the Executive Branch that implicates a treaty signed by both countries. Both the United States and Indonesia have committed to uphold the CITES treaty and its underlying principles and both countries have enacted legislation or decrees to that end. As discussed below, the existence of a controlling treaty alters the parties' otherwise-unfettered interaction. Accordingly, when both states are parties to a binding treaty, concerns of international comity and conduct of foreign relations are minimized because the United States and the foreign government have already agreed, at least to some extent, on the principles governing their conduct.

Finally, Defendants point out that export decisions traditionally are considered sovereign acts covered by the act of state doctrine. But the cases Defendants cite are inapposite. . . . First, as the Government notes, each of those cases involved situations where a foreign government *denied* an application for a license to remove resources from or to carry on business within that country. Even more importantly, the foreign governments' decisions in those cases were taken in the absence of a controlling treaty to guide or govern their actions. . . . In this case the CITES treaty established a framework that influenced, if not dictated, Indonesia's export decisions generally and with respect to these particular monkeys. . . . Thus the fact that this case involves export decisions does not automatically warrant application of the act of state doctrine.

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Cross-Reference:

U.S. sovereign immunity, **Chapter 8.B.2.b.(2).**

CHAPTER 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Montreal Convention and Hague Protocol

On November 4, 2003, the 1999 Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal, May 28, 1999 ("Montreal Convention" or "Montreal 1999"), S. Treaty Doc. No. 106–45 (1999), entered into force. The deposit of the U.S. instrument of ratification on September 5, 2003, brought the number of instruments deposited to thirty, thus satisfying the requirement for entry into force under Article 53(6). On December 14, 2003, the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on October 12, 1929, done at The Hague, September 28, 1955 ("The Hague Protocol"), S. Treaty Doc. No. 107–14 (2002), also entered into force. *See* 149 CONG. REC. S10,870 (daily ed. July 31, 2003) for Senate advice and consent to U.S. ratification of the two instruments. *See also Digest 2000* at 668–674; S. Exec. Rpt. No. 108–8 (2003).

The new Montreal Convention modernizes, and is intended ultimately to replace, the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Oct. 12, 1929), 49 Stat. 3000 ("Warsaw Convention") and its related protocols. In testimony before the Senate Foreign Relations Committee on June 17, 2003, John R. Byerly,

Deputy Assistant Secretary for Transportation Affairs, Department of State, summarized the benefits and history of the two instruments, as excerpted below.

The full text of Mr. Byerly's testimony is available in S. Exec. Rpt. No. 108–8 and at *www.state.gov/e/eb/rls/rm/2003/21869.htm*.

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The Montreal Convention

The Montreal Convention is a remarkable accomplishment for U.S. aviation policy and U.S. diplomacy. The U.S. delegation at the diplomatic conference that negotiated this agreement in May of 1999 achieved all of America's core objectives. The new Convention has the potential to eliminate the patchwork of airline liability regimes around the world and replace it with a new, uniform set of rules appropriate for today's airlines and today's passengers and shippers.

Indeed, the 1999 Montreal Convention is the culmination of almost a half century of efforts by the United States to increase, and later to eliminate, the unconscionably low limits of liability applicable under the 1929 Warsaw Convention when passengers are killed or injured in international air carrier accidents. The Convention contains all of the key provisions sought by the United States at the outset of the negotiations. At the same time, since major portions of the Convention are based on, and generally follow the language of, the 1929 Warsaw Convention and a related protocol to which the United States is already a party (Montreal Protocol No. 4), prior judicial interpretations under those treaties are expected to have continuing validity.

Benefits Under the Montreal Convention

The significant new benefits of the Montreal Convention include:

- The new Convention eliminates the meager and arbitrary limits of liability applicable under the Warsaw Convention

when passengers are killed or injured in international air carrier accidents. These limits applied in all cases, except where the harm was due to the carrier's willful misconduct.

- Under the Convention, in almost every case, American survivors of international aircraft accidents and the families of American accident victims will have access to U.S. courts in seeking damages for the losses they suffered.
- The Convention requires air carriers to make payments of up to approximately $141,000 of proven damages on behalf of accident victims, without regard to whether the airline was negligent.
- An escalation clause provides that monetary limits and thresholds that survive in the Convention will be adjusted for inflation.
- Provisions on code sharing and similar arrangements clarify that when the airline operating a flight is not the airline from which the transportation was purchased, a passenger may recover from either the airline operating the aircraft at the time of the accident or the airline whose code is carried on the passenger's ticket.
- The Convention furthers U.S. efforts to ensure that U.S. air cargo carriers and shippers can take advantage of technological innovations now available to facilitate and expedite the processing of international air cargo.
- The Convention simplifies litigation and promotes fairness through the passenger benefits described above, including eliminating all arbitrary limits on compensatory damages for passenger death and injury claims, among others, and by barring non-compensatory damages in all cases, consistent with existing law; and by establishing, in clear language, its exclusivity in the area of claims for damages arising in the international transportation of passengers, baggage and cargo.
- While the Convention provides essential improvements upon the Warsaw Convention in many respects to improve the rights of passengers, it also preserves established law relating to other aspects of the Warsaw Convention that were acceptable, to avoid unnecessary litigation. For

> example, the Convention preserves the status quo relative to legal actions against airline employees (Articles 30, 43). Consistent with existing law in the United States, the Montreal Convention extends to a carrier's employees acting within the scope of their employment all of the "conditions and limits of liability" available to the carrier under the Convention—referring to the monetary limits set out in Articles 21 and 22 of the Convention and the conditions under which those monetary limits may be exceeded.

The Montreal Convention has been signed by 71 countries, and has been ratified by 29 countries to date—only 1 short of the 30 required to bring the Convention into effect. In addition, given the importance of the United States and its airlines in international aviation, many countries are thought to be awaiting U.S. ratification before taking action themselves.

History of Efforts To Modernize the Warsaw Convention

To date, in the area of claims for damages arising in the international transportation of passengers, baggage and cargo, the United States has ratified only the Warsaw Convention and the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Done at Warsaw 12 October 1929 as Amended by the Protocol Done at The Hague 28 September 1955, Done at Montreal 25 September 1975 ("Montreal Protocol No. 4").

Under Montreal Protocol No. 4, which entered into force for the United States on March 4, 1999, the Warsaw Convention's rules relating to international air cargo operations were fully modernized. However, only 51 states are parties to Montreal Protocol No. 4. Moreover, the Warsaw Convention's unamended provisions relating to airline liability for death or injury to passengers are grossly inadequate. There were several attempts to modernize those provisions through international negotiations, but those efforts were unsuccessful.

In the early 1950s, multilateral negotiations achieved only a doubling of the original Warsaw Convention's per passenger liability limit (to what is now approximately $20,000), as codified in The Hague Protocol of 1955. The United States did not ratify The Hague Protocol.

Efforts to amend the Warsaw Convention in 1975 focused on cargo issues, including the negotiation of Montreal Protocol No. 4, which modernized Warsaw Convention provisions relevant to the air-cargo industry. The United States ratified Montreal Protocol No. 4 in 1998. In the area of airline liability for passenger claims, provisions developed in a protocol done at Guatemala City in 1971 were incorporated into Montreal Protocol No. 3 (1975), but neither instrument was ratified by the United States or entered into force.

In the absence of progress on airline liability for passenger deaths or injuries at the intergovernmental level, the major carriers of the world stepped into the breach, first in 1966 and again in 1996 with the encouragement of the Civil Aeronautics Board and Department of Transportation, respectively. An inter-carrier agreement in 1966 raised liability limits for airlines serving the United States to $75,000 per passenger. A 1996 inter-carrier agreement provided for airlines to waive liability limits with respect to claims for passenger injury or death. Although these private agreements provided a reasonable interim fix, the inter-carrier agreements are not an adequate substitute for international agreements, particularly in light of their narrow focus and their voluntary nature.

In response to the inadequacy of the Warsaw Convention liability limits, a number of States have adopted domestic laws or regulations, further complicating the maze of rules comprising the international liability regime. The Montreal Convention has the potential to end the patchwork of airline liability regulation. U.S. consumers of international air transportation will benefit from its modernized liability provisions, and U.S. airlines will benefit from a uniform international liability regime and a leveling of the playing field in relation to airlines that now benefit from more limited liability regimes.

The 1955 Hague Protocol

The President has also submitted for Senate advice and consent to ratification the 1955 Hague Protocol to the Warsaw Convention. U.S. ratification of The Hague Protocol would clarify for the cargo industry the rules on cargo documentation that apply to the carriage of cargo between the United States and 86 countries that are parties to that instrument, but not to Montreal Protocol No. 4. It would secure for U.S. carriers application of The Hague Protocol provisions in such cases, which significantly streamline the antiquated cargo documentation requirements of the Warsaw Convention.

Although The Hague Protocol also doubles the Warsaw Convention passenger liability limit to what is now approximately $20,000, the inter-carrier agreements of 1966 and 1996 have, as a practical matter, superseded this meager recovery limit.

A recent U.S. court decision (*Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301 (2d Cir. 2000), *cert. denied*, 533 U.S. 928 (2001)) held that, where the United States had ratified the Warsaw Convention but had not ratified The Hague Protocol, and the Republic of Korea had ratified The Hague Protocol but not the Warsaw Convention, Korea's adherence to The Hague Protocol did not make it a party to the unamended Warsaw Convention and there were no treaty relations between the United States and Korea under either instrument.

Although the *Chubb* decision did not address Montreal Protocol No. 4, which entered into force in 1999 for the United States, it focused industry attention on the question of whether the United States, by reason of its adherence to Montreal Protocol No. 4, automatically became a party to The Hague Protocol as such and therefore entered into treaty relations under The Hague Protocol with other countries party to that instrument (but not to Montreal Protocol No. 4).

If the courts were to conclude that Montreal Protocol No. 4 does not create treaty relations under The Hague Protocol, the United States' treaty relations with the 79 countries that are parties to both the Warsaw Convention and The Hague Protocol, but not to Montreal Protocol No. 4, would be based on the Warsaw

Convention, unamended by any later protocol, at least until such countries become parties to the new Montreal Convention. (Nine of these countries have ratified the Montreal Convention so far.) Further, in that situation, the United States would have no treaty relations whatsoever under the Warsaw Convention system with Korea and six other countries that are parties only to The Hague Protocol. (None of these seven countries has ratified the Montreal Convention to date.)

This is an unsatisfactory result. The 1929 Warsaw Convention contains outdated rules in the area of cargo documentation, requiring much specific information on the air waybill that has no commercial significance today. These requirements: make international air cargo transactions time consuming and inefficient, driving up their costs; inhibit the free flow of international air commerce; and serve as a barrier to electronic information exchanges. Under the Warsaw Convention, U.S. cargo carriers must comply with these outmoded documentation rules or risk deprivation by courts of the Convention's benefits.

Ratification of The Hague Protocol will eliminate any ambiguity and secure for the U.S. industry The Hague Protocol's more modern cargo documentation rules, which are critical to the efficient movement of air cargo, in relations with the 86 countries party to that instrument (but not to Montreal protocol No. 4), pending the entry into force and widespread ratification of the Montreal Convention.

2. Warsaw Convention

a. "Accident" as used in Article 17

In August 2003 the United States filed a brief in the U.S. Supreme Court as *amicus curiae* supporting respondents/plaintiffs in *Olympic Airways v. Husain*, No. 02–1348, on writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit.

Plaintiff's husband Dr. Abid Hanson died as the result of an asthma attack brought on by an allergic reaction to second-hand cigarette smoke on a flight aboard Olympic Airways.

The district court held that the repeated refusal of an Olympic flight attendant to assign Dr. Hanson to a seat further from the smoking section of the aircraft when his wife indicated that he needed to be moved for medical reasons was an "accident" within the meaning of Article 17 of the Warsaw Convention. *Husain v. Olympic Airways*, 2000 U.S. Dist. LEXIS 17581 (N.D.Cal. 2000). Article 17 imposes liability on an airline for a passenger's death or bodily injury caused by an "accident" that occurrs in connection with an international flight. The court held further that the flight attendant's refusal to reseat Dr. Hanson caused his death and that the flight attendant engaged in "willful misconduct," thereby removing the limits on compensatory damages under the Warsaw Convention. The district court also found that Dr. Hanson was contributorily negligent in not attempting to switch seats independently; consequently, the court reduced respondents' recovery by half. In affirming the lower court's conclusion that the airline's failure to act constituted an "accident," the Ninth Circuit held that "[t]he failure to act in the face of a known, serious risk satisfies the meaning of 'accident' within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane." 316 F.3d 829 (9th Cir. 2002). The U.S. Supreme court granted certiorari in May 2003. 538 U.S. 1056(2003).

The case rests on interpretation of the Warsaw Convention, reproduced following the note at 49 U.S.C. § 40105, because the events involved in the case occurred in 1997. The United States did not become party to Montreal Protocol No. 4 until 1999.

In its amicus brief, the United States described its interest as follows:

> As a party to the Warsaw Convention, the United States has a substantial interest in the manner in which the Convention is interpreted by the courts of this Country. The United States also has a substantial interest in the

> achievement of a sensible balance between protecting U.S. citizens who travel by air outside this Country, including assuring compensation for those who are killed or injured in doing so, and protecting U.S. air carriers from undue and excessive liability. . . .

Excerpts below from the U.S. brief set forth the views of the United States that the lower courts' decisions should be affirmed. (Footnotes omitted.) A decision was pending at the end of 2003.

The full text of the U.S. submission is available at *www.usdoj.gov/osg/briefs/2003/3mer/1ami/2002-1348.mer.ami.html*.

* * * *

AN AIRLINE'S UNREASONABLE REFUSAL TO COME TO THE AID OF AN ILL PASSENGER IS AN "ACCIDENT" THAT CAN GIVE RISE TO LIABILITY UNDER THE WARSAW CONVENTION

If airline personnel refuse to render reasonable assistance to a passenger who becomes ill on an international flight, an "accident" has occurred within the meaning of Article 17 of the Warsaw Convention. Any resulting bodily injury or death of the passenger is actionable under the Convention. That conclusion satisfies the definition of an Article 17 "accident" that this Court articulated in Air France v. Saks, 470 U.S. 392 (1985), is consistent with the text and structure of the Convention, and serves the Convention's purpose of balancing the interests of passengers and air carriers. That conclusion also accords with the United States' interpretation of the Convention, to which "[r]espect is ordinarily due." El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 168 (1999); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–185 (1982). Accordingly, the courts below correctly held that the refusal of petitioner's flight attendant to respond to repeated requests to reseat an asthmatic passenger away from the smoking section of the aircraft was an "accident" under Article 17.

A. An Airline Employee's Response To A Medical Crisis Can Constitute An "Accident" Within The Meaning Of Article 17 Of The Warsaw Convention

1. Article 17 of the Warsaw Convention, the article that establishes an airline's prima facie liability for a passenger's death or bodily injury, provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if *the accident* which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Art. 17 (emphasis added). The governing French text of Article 17 similarly refers to damage caused by "l'accident." 49 Stat. 3005. Recovery is available under the Convention, therefore, only if a passenger's death or bodily injury results from an "accident" that occurred in connection with the flight.

In *Saks*, this Court held that a passenger's "loss of hearing proximately caused by normal operation of the aircraft's pressurization system" was not an "accident" within the meaning of Article 17. 470 U.S. at 395, 407. . . .

The Court concluded that an "accident" of the sort that can give rise to liability under the Warsaw Convention is "an unexpected or unusual event or happening that is external to the passenger." 470 U.S. at 405. In contrast, the Court observed that, "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406. The Court made clear that the definition of "accident" in Article 17 "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Id.* at 405.

Consistent with the definition of "accident" articulated in Saks, passengers may seek recovery under the Warsaw Convention for death or bodily injury resulting from airplane crashes. . . . Such

events are "unexpected or unusual" in the operation of an aircraft and are "external to the passenger." *Saks*, 470 U.S. at 405.

Under that definition, however, passengers cannot recover for death or bodily injury resulting from heart attacks, strokes, or similar medical events that occur on an aircraft but are unrelated to its operation. . . . Nor may passengers recover for death or bodily injury caused by the routine operation of an aircraft, such as hearing loss resulting from a normal change in pressurization, as in Saks, or deep-vein thrombosis resulting from tight seating arrangements, . . . As a general matter, such injuries are the result of "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." Saks, 470 U.S. at 406.

2. A different situation is presented when, as here, a passenger seeks to recover not for death or bodily injury resulting from his medical condition alone, but for death or bodily injury resulting from an airline's response to his medical condition. In appropriate circumstances, the airline's response, including a refusal to respond, satisfies the definition of an "accident" under the Warsaw Convention, applied with the "flexib[ility]" that Saks requires, 470 U.S. at 405.

Airline personnel's acts, or refusals to act, in a medical crisis necessarily are events "external to the passenger." *Saks*, 470 U.S. at 405. A flight attendant's response to a passenger's illness, like a pilot's response to severe weather or an equipment malfunction, is part of the "operation of the aircraft." Id. at 406. And, if that response deviates from what would be "usual, normal, and expected" in the circumstances, ibid., the Warsaw Convention's requirement of an "accident" is satisfied. . . .

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It still must be established, of course, that the "accident"—that is, the airline's objectively unreasonable action or inaction-caused the passenger's death or bodily injury. . . . If . . . it is established that the passenger's death would not have occurred, or his injury would not have been as severe, but for the flight crew's "unexpected or unusual" response to his medical condition, the death or bodily injury would not have "result[ed] from the passenger's own internal reaction to the *usual, normal, and*

expected operation of the aircraft," *ibid.* (emphasis added), but instead from an aberration in the aircraft's operation.

3. The same analysis applies whether the asserted "accident" involves action or inaction on the part of the airline. In the context of international air travel, an airline employee's refusal to assist an ill passenger, as occurred in this case, is not meaningfully distinguishable from an airline employee's affirmative act. . . . It would create perverse incentives, moreover, if a flight attendant's coming to the aid of an ill passenger could give rise to liability under the Warsaw Convention, if done negligently or wrongfully, whereas a flight attendant's ignoring increasingly desperate requests to assist the passenger could never do so. . . .

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More generally, common carriers have traditionally been understood to have a duty to provide reasonable assistance to passengers who become ill or injured, so that a failure to act in those circumstances can give rise to liability. See Restatement (Second) of Torts § 314A(1) (1965) (see p. 23, infra). The law imposes liability in other circumstances as well for failure to act when under a duty to do so.

4. The text and structure of the Warsaw Convention are fully consistent with the conclusion that an "accident" includes an airline's unreasonable response to a medical situation that arises during flight. Petitioner's arguments to the contrary are without merit.

As the Court recognized in Saks, the Warsaw Convention does not define an "accident" for purposes of Article 17. 470 U.S. at 399. Nor does the context provide any clear indication of which events causing a passenger's death or injury qualify as an "accident." Ibid. It therefore cannot be, as petitioner asserts (Br. 16), that "the express language of Article 17" resolves the question here.

In *Saks*, the Court discerned only two textual "clues to the meaning of 'accident'" in the Warsaw Convention: (i) the distinction between an "accident," the event giving rise to liability for death or bodily injury under Article 17, and an "occurrence," the event giving rise to liability for loss or damage of baggage

under Article 18, and (ii) the distinction in Article 17 itself between the "accident" and the "injury." See 470 U.S. at 398–399. Both distinctions are preserved by treating an airline's "unexpected or unusual" response to a medical crisis as an "accident." Such an "accident" is distinct from whatever death or bodily injury it causes. And, other causes of death or bodily injury, such as the passenger's own internal response to ordinary aircraft conditions, remain mere "occurrences" outside the coverage of Article 17.

* * * *

5. Two foreign courts, which follow the Saks definition of an "accident" under the Warsaw Convention, have suggested that the definition is satisfied in circumstances such as those here.

In a recent decision of the Court of Appeals of England and Wales, Lord Phillips held that an "accident" could not arise from airlines' failure to minimize, or warn of, the risks of deep-vein thrombosis. Re Deep Vein Thrombosis & Air Travel Group Litig., [2003] EWCA Civ 1005 (July 3, 2003) (Transcript: Smith Bernal). Lord Phillips reasoned that an "omission to act" of that sort cannot constitute an accident. Lord Phillips nonetheless viewed the flight attendant's refusal to reseat Dr. Hanson in this case—as well as the airline's refusal to make an emergency landing after a passenger suffered a heart attack in Fulop, 175 F. Supp. 2d at 673—as involving conduct that can constitute an accident under the Convention. With respect to this case, Lord Phillips observed that "[t]he refusal of the flight attendant to move Dr. Hanson cannot properly be considered as mere inertia, or a non-event," but instead "was a refusal to provide an alternative seat which formed part of a more complex incident, whereby Dr. Hanson was exposed to smoke in circumstances that can properly be described as unusual and unexpected."

The Supreme Court of Victoria, in an Australian case under the Warsaw Convention also involving deep-vein thrombosis, described the present case as "illustrat[ing] the point that an accident, as Saks uses the word, may include action or inaction by airline staff" or the airline itself. Povey v. Civil Aviation Safety Auth., 7223 of 2001, No. BC 200207836 (Dec. 20, 2002). The court added that, "[w]here, objectively viewed, an airline would

be expected to act in a particular way (or refrain from doing so) having regard to what is usual or expected in air travel at the time of injury, its failure to so act could constitute an accident."

B. Subjecting Airlines To Liability Under The Warsaw Convention For Injuries Caused By Their Unreasonable Response To A Medical Crisis Properly Balances The Interests Of Passengers And Airlines

Allowing passengers to seek recovery for death or bodily injury caused by an airline's "unexpected or unusual" response to a medical crisis accords with the Warsaw Convention's purpose "to accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability." *Tseng*, 525 U.S. at 170. The interests served by imposing liability on airlines in such circumstances are substantial; the interests served by precluding recovery are not.

The Court has recognized that a flexible application of the "accident" definition ameliorates the harshness to passengers of the Warsaw Convention's exclusivity in affording a remedy for their injuries and prevents airlines from "escap[ing] liability" for their own wrongful conduct. *Tseng*, 525 U.S. at 172. . . .

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The airline industry is unlikely to be burdened significantly by recognizing such incidents to be "accidents." Cases similar to this one, fortunately, are relatively few. It remains available to the airline, moreover, to establish that its conduct was not "unexpected or unusual" in the particular circumstances or was not a cause of the passenger's injury. Other defenses, such as comparative fault, that may reduce or eliminate the airline's liability may be available as well. And even when an airline is found liable, the payment of compensation would typically be limited to a single passenger's death or bodily injury, in contrast to cases involving crashes and similar events involving the death or bodily injury of many passengers.

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b. Claim for mental injuries under Article 17

On August 15, 2003, the United States filed a brief as *amicus curiae*, at the request of the U.S. Court of Appeals for the Second Circuit, in *Ehrlich v. American Airlines, Inc.*, No. 02–9462 (2nd Cir.). In that case, an airplane on which plaintiffs were passengers had landed at a high rate of speed, traveled past the end of the runway, and stopped abruptly on an arrestor bed. The passengers were then evacuated from the aircraft. As a result of the landing and evacuation, plaintiffs claimed to have suffered physical injuries as well as mental injuries consisting of nightmares and a fear of flying. The District Court for the Eastern District of New York granted defendants' summary judgment as to plaintiffs' claims for mental injuries, concluding (footnote omitted):

> Substantial and persuasive authority exists among courts in this Circuit as well as others for the position that damages for emotional distress [under the Warsaw Convention] are permitted only to the extent that the emotional distress is caused by bodily injury. . . . This Court adopts that rule in this case.
>
> * * * *
>
> . . . Plaintiffs have not raised a genuine issue of fact regarding a causal connection between their alleged bodily injuries and their mental suffering. . . . [P]laintiffs acknowledge in their depositions that these mental harms stem from the landing and evacuation itself, not from their physical injuries. . . . Therefore, defendants' motion for partial summary judgment is granted and plaintiffs may not recover for their emotional trauma resulting solely from the aberrant landing and evacuation.

2002 U.S. Dist. LEXIS 21419 (E.D.N.Y. 2002).

The accident in this case occurred in 1999 and thus is governed by the Warsaw Convention and not by the Montreal

1999 discussed in A.1. of this chapter, which had not yet entered into force for the United States. The U.S. brief noted that "[t]he negotiating history of Montreal 1999 is described in some detail here, however, because it was the most recent occasion for the signatories to Warsaw to discuss liability of air carriers for mental or emotional injuries."

Below are excerpts from the U.S. amicus brief in which the United States contends that the lower court's decision should be affirmed. (Footnotes omitted.) A decision was pending at the end of 2003.

The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

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EMOTIONAL INJURIES CANNOT BE RECOVERED UNDER THE WARSAW CONVENTION WHERE THERE IS NO CAUSAL RELATIONSHIP TO A PHYSICAL INJURY SUSTAINED IN AN AIRPLANE ACCIDENT

A. It is well-established that the Warsaw Convention does not allow recovery for mental or emotional injuries alone. In [*Eastern Airlines v. Floyd*, 499 U.S. 530 (1991)] passengers brought suit for alleged mental injuries incurred when their aircraft lost all engine power and cabin pressure and the flight crew informed passengers that they would be forced to ditch in the Atlantic Ocean. The flight crew was subsequently able to restart some of the engines and to land safely. After examining the original French text of the Warsaw Convention, the Supreme Court concluded that the French term "lésion corporelle" used in the Warsaw Convention is properly interpreted to mean "bodily injury" and to exclude purely mental injuries. 499 U.S. at 542. The Supreme Court declined to decide "whether passengers can recover for mental injuries that are accompanied by physical injuries." *Id.*

Since the Supreme Court's decision in *Floyd*, the majority of courts to have examined the issue have held that psychological

injuries are recoverable only if they result from physical injuries sustained in the accident. . . .

Most notably, the United States Court of Appeals for the Eighth Circuit has interpreted Article 17 to require that "damages for mental injury must proximately flow from physical injuries caused by the accident." *See Lloyd* [*v. American Airlines, 291 F.3d 503* (8th Cir. 2002), 291 F.3d at 510. . . .

B. . . . [J]ust as in *Floyd*, plaintiffs' mental injuries are wholly separate from any physical injuries incurred during the accident. It is the considered view of the United States that, under these circumstances, the district court appropriately held that these plaintiffs may not collect damages for their claimed mental injuries. The United States' interpretation of the treaty provisions is entitled to great weight. *See Tseng*, 525 U.S. at 168–69 ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.") (citing *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184–85 (1982)).

The rule endorsed by the district court is an equitable one. It allows for recovery of damages arising out of a bodily injury sustained in an accident including any mental injuries that may arise from that bodily injury, such as pain and suffering or other emotional distress (if permitted by local law). To hold otherwise would create an anomalous situation where one plaintiff who happens to suffer even minor physical injuries during an accident could recover fully for his or her mental distress while another plaintiff without any physical injuries would be barred from recovery for his or her mental injuries caused by their equally distressing experience. *See Lloyd*, 291 F.3d at 510 (quoting *Jack*, 854 F. Supp. at 668).

C. None of plaintiffs' arguments in support of reversal of the district court's opinion withstand scrutiny.

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3. . . . [P]laintiffs argue that the United States and the vast majority of the parties to the Warsaw Convention believe that mental injuries are fully compensable under Article 17 where a physical injury has occurred. Plaintiffs base their argument on

certain statements made by the United States delegation at the negotiation of the Montreal 1999 Convention that mental injuries may be recoverable under the Warsaw Convention if "accompanied by" physical injuries . . . Relying heavily on the use of the word "accompany," plaintiffs argue that it is the position of the United States government that, as long as some physical injury exists, all mental injuries, even those completely separate from the physical injury, are compensable under Article 17 of the Warsaw Convention. *Id.* at 22–23.

Plaintiffs' reliance on the United States delegation's use of the word "accompanied" in this context is misplaced. At Montreal, the United States delegation was not addressing the issue presented in this case about whether mental injuries that do not arise out of physical injuries are recoverable under Article 17 of the Warsaw Convention. The statements made by the United States delegate were made during discussions at Montreal regarding to what extent mental injury should be compensable under the new Convention. In those negotiations, the U.S. delegation supported a new provision that would have explicitly permitted recovery for mental injury independent of any bodily injury, and at a minimum sought to ensure that any new language that might be adopted in Montreal 1999 did not represent a narrowing of recovery for mental injury compared to what was available to passengers under the Warsaw Convention under developing jurisprudence at the time. It was in that very different context that the United States delegation made the statements on which plaintiffs rely.

Moreover, the use of the word "accompany" by the United States delegation is, at best, ambiguous. . . .

The trend in the district court cases since Montreal, and the subsequent decision of the Eighth Circuit decision in *Lloyd*, make clear that a plaintiff may recover for mental or emotional injury only if such injury arises out of the physical injury sustained in the accident. Consistent with this emerging case law, the United States has never taken an affirmative position that a plaintiff may state a claim for mental injuries under Article 17 of the Warsaw Convention that does not arise out of physical injuries or death. The narrower reading of Article 17 is also consistent with the primary purpose of the contracting parties to the Warsaw

Convention: limiting liability of air carriers to foster the growth of commercial aviation. *See Tseng*, 525 U.S. at 169–70 (purpose of Warsaw is to balance interest of passengers seeking recovery with interest of air carriers seeking to limit potential liability).

The Supreme Court has instructed that the task of interpreting a treaty "begin[s] with the text of the treaty and the context in which the written words are used." *Floyd*, 499 U.S. at 534. The Court further explained that because multilateral treaties, negotiated and drafted by numerous international delegates, are unlikely to meet the standards of linguistic precision applicable to private contracts and domestic statutes, courts may "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Id.* at 535; *see also Zicherman*, 516 U.S. at 226. Thus, it is notable that plaintiffs here do not identify any textual support in Article 17 or the negotiating history of the Warsaw Convention to support their position.

The treaty language and history in fact support the district court's ruling. In *Floyd*, the Court held the Warsaw Convention's term "bodily injury" could not properly be read to encompass free standing emotional injuries arising from an airplane accident. As *Floyd* noted, many jurisdictions did not recognize recovery for mental injuries at all at the time of adoption of the Warsaw Convention. Accordingly, the Court concluded that the treaty's reference to "bodily injury" precludes the recover of free standing emotional injuries. *Floyd*, 499 U.S. at 542. As the Eighth Circuit concluded in *Lloyd*, the same treaty language and background, mandating "bodily injury" as a prerequisite to recovery, similarly lead to the conclusion that it is not proper to permit recovery for emotional injuries that do not result from a physical injury sustained in the same accident.

Moreover, as discussed above, "the practical construction," *Floyd*, 499 U.S. at 535, by most courts of the term is that "bodily injury" does not include emotional damages unrelated to physical injuries sustained in the accident.

Thus, plaintiffs' reliance on the Montreal 1999 Minutes to support their more liberal construction of the Warsaw Convention misconstrues the Minutes and is, in any event, unavailing. In this

case, plaintiffs' alleged emotional injuries include nightmares and a fear of flying. These injuries undoubtedly arose out of the American Airlines accident on May 8, 1999. These injuries, however, do not arise out of plaintiffs' bodily injuries. Accordingly, the district court did not err in dismissing plaintiffs' claim for emotional damages.

* * * *

3. Bilateral Air Services Agreements

a. Thailand

On October 18, 2003, the United States signed a protocol amending a 1996 agreement with Thailand. Protocol to the Air Transport Agreement Between the Government of the United States of America and the Government of the Kingdom of Thailand, signed at Bangkok May 8, 1996. Under the terms of the protocol, it was applied provisionally from the date of signature and entered into force on December 9, 2003.

The amendments to the agreement with Thailand establish a liberal "open skies" regime for air cargo transportation by, among other things, eliminating restrictions on routing and capacity for air cargo, and permitting cargo carriers to set prices based on commercial considerations in the marketplace. The protocol also requires each party to allow prices for air transportation of cargo to be established by each designated airline based upon commercial considerations.

b. Additional agreements

On September 24, 2003, the United States signed an open skies agreement with Albania. On December 4, 2003, a press release issued by the U.S. Department of Transportation described the first-ever comprehensive U.S.-Vietnam air services agreement, signed by U.S. Transportation Secretary

Norman Y. Mineta and Vietnamese Transport Minister Dao Dinh Binh, on December 4, 2003, as follows:

> Today's historic agreement allows the airlines of both countries to provide U.S.-Vietnam air service with their own aircraft as well as unlimited code sharing. It contains some restrictions on air services, and will remain in effect for five years. The two sides agreed to meet within four years to consider a further expansion of air service opportunities, at which time the United States will seek a fully liberalized Open-Skies agreement.

The full text of the press release is available at *www.dot.gov/affairs/dot13203.htm*.

B. NORTH AMERICAN FREE TRADE AGREEMENT ("NAFTA")

1. New Transparency Measures

On October 7, 2003, U.S. Trade Representative Robert B. Zoellick, Canadian Minister for International Trade Pierre S. Pettigrew and Mexican Secretary of Economy Fernando Canales held the annual meeting of the NAFTA Free Trade Commission ("FTC") in Montreal, Quebec, Canada. A press release issued by the Office of the U.S. Trade Representative reported the key issues addressed at the meeting, including new transparency measures.

The full text of the release, excerpted below, as well as other documents from the annual meeting, including statements on non-disputing party participation and notices of intent referred to in the press release and other joint statements by the three governments, are available at *www.ustr.gov/regions/whemisphere/nafta.shtml*.

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* * * *

As part of the ongoing commitment to make the NAFTA more responsive to the needs of the public, the Commission produced

two statements to enhance the transparency and efficiency of NAFTA's investor-state arbitration (Chapter 11 of the NAFTA Agreement):

— an affirmation of the authority of investor-state tribunals to accept written submissions (amicus curiae briefs) by non-disputing parties, coupled with recommended procedures for tribunals on the handling of such submissions; and
— endorsement of a standard form for the Notices of Intent to initiate arbitration that disputing investors are required to submit under Article 1119 of the NAFTA.

"We are pleased that we have been able to take further steps to enhance the public participation and understanding of the dispute settlement process," Ambassador Zoellick said. Separately, the United States and Canada affirmed that they will consent to opening to the public hearings in Chapter 11 disputes to which either is a party, and to request the consent of disputing investors to such open hearings. The United States and Canada will continue to work with Mexico on this matter.

The Commission agreed to commence a study of the most favored nation tariffs of the three countries, in order to determine if harmonizing these tariffs could further promote trade by reducing transaction costs. The Commission also agreed to pursue further liberalization of the rules of origin. Since nearly all tariffs between the Parties have been eliminated, reducing the costs associated with trade, such as those associated with compliance with the rules of origin, will generate additional benefits for exporters.

* * * *

a. Non-disputing party participation

In the FTC statement on non-disputing party participation in NAFTA arbitrations under Chapter 11, the FTC recommended that Chapter 11 tribunals adopt procedures governing acceptance of written submissions by such non-disputing

parties. On December 30, 2003, the International Centre for Settlement of Investment Disputes ("ICSID") announced that the tribunal in *Methanex Corporation v. United States*, discussed in B.2.c. below, had adopted the procedures set out in part B of the FTC statement. *See www.worldbank.org/icsid/methanex.htm.*

The full text of the FTC statement, set forth below, is available at *www.ustr.gov/regions/whemisphere/nafta2003/statement-nondisputingparties.pdf.*

A. Non-disputing party participation

1. No provision of the North American Free Trade Agreement ("NAFTA") limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party (a "non-disputing party").

2. Nothing in this statement by the Free Trade Commission ("the FTC") prejudices the rights of NAFTA Parties under Article 1128 of the NAFTA.

3. Considering that written submissions by non-disputing parties in arbitrations under Section B of Chapter 11 of NAFTA may affect the operation of the Chapter, and in the interests of fairness and the orderly conduct of arbitrations under Chapter 11, the FTC recommends that Chapter 11 Tribunals adopt the following procedures with respect to such submissions.

B. Procedures

1. Any non-disputing party that is a person of a Party, or that has a significant presence in the territory of a Party, that wishes to file a written submission with the Tribunal (the "applicant") will apply for leave from the Tribunal to file such a submission. The applicant will attach the submission to the application.

* * * *

4. The application for leave to file a non-disputing party submission and the submission will be served on all disputing parties and the Tribunal.

5. The Tribunal will set an appropriate date by which the disputing parties may comment on the application for leave to file a non-disputing party submission.

6. In determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
(b) the non-disputing party submission would address matters within the scope of the dispute;
(c) the non-disputing party has a significant interest in the arbitration; and
(d) there is a public interest in the subject-matter of the arbitration.

7. The Tribunal will ensure that:

(a) any non-disputing party submission avoids disrupting the proceedings; and
(b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

8. The Tribunal will render a decision on whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal will set an appropriate date by which the disputing parties may respond in writing to the non-disputing party submission. By that date, non-disputing NAFTA Parties may, pursuant to Article 1128, address any issues of interpretation of the Agreement presented in the non-disputing party submission.

9. The granting of leave to file a non-disputing party submission does not require the Tribunal to address that submission at

any point in the arbitration. The granting of leave to file a non-disputing party submission does not entitle the non-disputing party that filed the submission to make further submissions in the arbitration.

10. Access to documents by non-disputing parties that file applications under these procedures will be governed by the FTC's Note of July 31, 2001.

b. Open hearings

The United States issued a statement on open hearings in NAFTA Chapter Eleven arbitrations dated October 7, 2003, set forth below and available at *www.ustr.gov/regions/whemisphere/nafta.shtml.*

Having reviewed the operation of arbitration proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the United States affirms that it will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven disputes to which it is a party be open to the public, except to ensure the protection of confidential information, including business confidential information. The United States recommends that tribunals determine the appropriate logistical arrangements for open hearings in consultation with disputing parties. These arrangements may include, for example, use of closed-circuit television systems, Internet webcasting, or other forms of access.

2. Claims under Chapter Eleven Against the United States

a. Award in ADF Group Inc. v. United States

On January 9, 2003, an arbitration tribunal issued an award dismissing all claims against the United States in *ADF Group Inc. v. United States*. It found that ADF Group Inc. ("ADF"), a Canadian company, had not demonstrated a national-treatment violation under section 1102 with respect to the

measure at issue—a "Buy America" condition for federal funding of state highway projects. As to the steel product at issue, the tribunal found that although the measure treats Canadian and U.S. products differently, ADF did not show that the measure treated Canadian and U.S. investors differently. The tribunal also found that ADF had not shown a breach of the customary international law minimum standard of treatment incorporated by Article 1105(1) and that the July 31, 2001, Free Trade Commission interpretation of Article 1105(1) was binding on the parties. Finally, the tribunal found in any event that the measure was excepted from the investment chapter's national-treatment, most-favored-nation-treatment and performance-requirement obligations because what was at issue was "procurement by a party" falling within the exception provided by Article 1108. *See also* discussion of the case in *Digest 2002* at 641–661 and *Digest 2001* at 611–623.

The full text of the award, excerpted below, is available at *www.state.gov/s/l/c3754.htm.*

VI. AWARD

199. The conclusions the Tribunal has reached may be summed up in the following terms:

(1) The Tribunal has jurisdiction to pass upon the Investor's claim that the U.S. measures in question are inconsistent with NAFTA Article 1103.
(2) The Investor's claims concerning construction projects other than the Springfield Interchange Project have not been considered in this proceeding because they are inadmissible and are, accordingly, dismissed without prejudice.
(3) The Tribunal does not find that the U.S. measures in question are inconsistent with NAFTA Article 1102. Assuming, however, arguendo, that the U.S. measures are inconsistent with the provisions of Article 1102, the

Respondent is, in any event, entitled to the benefit of NAFTA Article 1108(7)(a) which renders inapplicable the provisions of, inter alia, Article 1102 in case of procurement by a Party. Procurement by the Commonwealth of Virginia for, or in connection with, the Springfield Interchange Project, constitutes procurement by a Party within the meaning of Article 1108(7)(a). The Investor's claim concerning Article 1102 is, accordingly, denied.

(4) The Investor has shown prima facie that the U.S. measures in question are inconsistent with the requirements of NAFTA Article 1106(1)(b) and (c). The Respondent is, however, entitled to the benefit of NAFTA Article 1108(8)(b) which renders inapplicable the provisions of Article 1106(1)(b) and (c) in case of procurement by a Party. The Springfield Interchange Project involves procurement by the Commonwealth of Virginia, which constitutes procurement by a Party in the sense of Articles 1106(1)(b) and (c) and 1108(8)(b). The Investor's claim concerning Article 1106 is, accordingly, denied.

(5) The Tribunal does not find it necessary to resolve the issue of whether the U.S.-Albania and the U.S.-Estonia bilateral investment treaties accord treatment more favorable than the treatment available under NAFTA Article 1105(1). The Investor is not entitled to the benefits claimed under NAFTA Article 1103, which Article is inapplicable by virtue of NAFTA Article 1108(7)(a) in case of procurement by a Party. The Investor's claim concerning Article 1103 is, accordingly, denied.

(6) The Tribunal does not find that the U.S. measures in question are inconsistent with the requirements of NAFTA Article 1105(1) as construed in the FTC Interpretation of 31 July 2001, which Interpretation is binding upon the Tribunal.

200. In its Counter-Memorial, the Respondent asked the Tribunal for an order requiring the Investor to bear the costs of this proceeding, including the fees and expenses of the Members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the United

States by reason of this proceeding. Having regard to the circumstances of this case, including the nature and complexity of the questions raised by the disputing parties, the Tribunal believes that the costs of this proceeding should be shared on a fifty-fifty basis by the disputing parties, including the fees and expenses of the Members of the Tribunal and the expenses and charges of the Secretariat. Each party shall bear its own expenses incurred in connection with this proceeding.

b. Award in Loewen Group Inc. and Raymond L. Loewen v. United States

On June 26, 2003, the tribunal in *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* ("Loewen") issued an award dismissing all claims against the United States concerning the U.S. judicial process, on the ground that Loewen's reorganization as a U.S. company deprived the tribunal of jurisdiction. In addition, the tribunal denied all claims on the merits because the Loewen companies failed to exhaust remedies reasonably available under the domestic judicial system, notably in the form of a petition for certiorari to the U.S. Supreme Court. *See* discussion of the case in *Digest 2001* at 623–642.

The full text of the decision, excerpted below, is available at *www.state.gov/s/l/c3755.htm.*

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137. In the light of the conclusions reached in paras. 119–123 (inclusive) and 136, the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment. However, because the trial court proceedings are only part of the judicial process that is available to the parties, the rest of the process, and its availability to Loewen, must be examined before a violation of Article 1105 is established. . . .

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215. . . . Loewen failed to present evidence disclosing its reasons for entering into the settlement agreement in preference to pursuing other options, in particular the Supreme Court option which it had under active consideration and preparation until the settlement agreement was reached. . . .

216. Although entry into the settlement agreement may well have been a reasonable course for Loewen to take, we are simply left to speculate on the reasons which led to the decision to adopt that course rather than to pursue other options. It is not a case in which it can be said that it was the only course which Loewen could reasonably be expected to take.

217. Accordingly, our conclusion is that Loewen failed to pursue its domestic remedies, notably the Supreme Court option and that, in consequence, Loewen has not shown a violation of customary international law and a violation of NAFTA for which Respondent is responsible.

* * * *

225. Claimant TLGI urges that since it had the requisite nationality at the time the claim arose, and, antedate the time that the claim was submitted, it is of no consequence that the present real party in interest—the beneficiary of the claim—is an American citizen. Both as a matter of historical and current international precedent, this argument must fail. In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*.

226. Claimants' first argument strand is that NAFTA itself, in Articles 1116 and 1117, require nationality only to the date of submission. However, those articles deal only with nationality requirements at the *dies a quo*, the beginning date of the claim. There is no language in those articles, or anywhere else in the treaty, which deals with the question of whether nationality must continue to the time of resolution of the claim. It is that silence in the Treaty that requires the application of customary international law to resolve the question of the need for continuous national identity.

* * * *

229. There is only limited dispute as to the history of the requirement of continuous nationality to the end of any international proceeding. When investment claims were negotiated and resolved only at a governmental level, any change in nationality of the claimant defeated the only reason for the negotiations to continue. The claiming government no longer had a citizen to protect. This history has changed as the nature of the claim process has changed. As claimants have been allowed to prosecute claims in their own right more often, provision has been made for amelioration of the strict requirement of continuous nationality. But those provisions have been specifically spelled out in the various treaties that TLGI cites as proof that international law has changed. Thus, in the claims settlement agreement between Iran and the United States arising out of the hostage crisis, the requirement of continuous nationality was specifically altered in the agreement. Many of the bilateral investment treaties, the so-called "BITs", contain specific modifications of the requirement. But such specific provisions in other treaties and agreements only hinder TLGI's contentions, since NAFTA has no such specific provision.

230. As with most hoary international rules of law, the requirement of continuous nationality was grounded in comity. It was not normally the business of one nation to be interfering into the manner in which another nation handled its internal commerce. Such interference would be justified only to protect the interests of one of its own nationals. If that tie were ended, so was the justification. As international law relaxed to allow aggrieved parties to pursue remedies directly, rather than through diplomatic channels, the need for a rigid rule of *dies ad quem* also was relaxed. But as was previously noted, such relaxations came about specifically in the language of the treaties. There is no such language in the NAFTA document and there are substantial reasons why the Tribunal should not stretch the existing language to affect such a change.

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233. . . . Rights of action under private law arise from personal obligations (albeit they may be owed by or to a State) brought

into existence by domestic law and enforceable through domestic tribunals and courts. NAFTA claims have a quite different character, stemming from a corner of public international law in which, by treaty, the power of States under that law to take international measures for the correction of wrongs done to its nationals has been replaced by an ad hoc definition of certain kinds of wrong, coupled with specialist means of compensation. These means are both distinct from and exclusive of the remedies for wrongful acts under private law: see Articles 1121, 1131, 2021 and 2022. It is true that some aspects of the resolution of disputes arising in relation to private international commerce are imported into the NAFTA system via Article 1120.1(c), and that the handling of disputes within that system by professionals experienced in the handling of major international arbitrations has tended in practice to make a NAFTA arbitration look like the more familiar kind of process. But this apparent resemblance is misleading. The two forms of process, and the rights which they enforce, have nothing in common. There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states. If the effects of a change of ownership are to be ascertained we must do so, not by inapt analogies with private law rules, but from the words of Chapter Eleven, read in the context of the Treaty as a whole, and of the purpose which it sets out to achieve.

* * * *

ORDERS

For the foregoing reasons the Tribunal unanimously decides—

(1) That it lacks jurisdiction to determine TLGI's claims under NAFTA concerning the decisions of United States courts in consequence of TLGI's assignment of those claims to a Canadian corporation owned and controlled by a United States corporation.

(2) That it lacks jurisdiction to determine Raymond L. Loewen's claims under NAFTA concerning decisions of the United States courts on the ground that it was not shown that he owned or controlled directly or indirectly TLGI when the claims were submitted to arbitration or after TLGI was reorganized under Chapter 11 of the United States Bankruptcy Code.
(3) TLGI's claims and Raymond L. Loewen's are hereby dismissed in their entirety.
(4) That each party shall bear its own costs, and shall bear equally the expenses of the Tribunal and the Secretariat.

XXXI. CONCLUSION

241. We think it right to add one final word. A reader following our account of the injustices which were suffered by Loewen and Mr. Raymond Loewen in the Courts of Mississippi could well be troubled to find that they emerge from the present long and costly proceedings with no remedy at all. After all, we have held that judicial wrongs may in principle be brought home to the State Party under Chapter Eleven, and have criticised the Mississippi proceedings in the strongest terms. There was unfairness here towards the foreign investor. Why not use the weapons at hand to put it right? What clearer case than the present could there be for the ideals of NAFTA to be given some teeth?

242. This human reaction has been present in our minds throughout but we must be on guard against allowing it to control our decision. Far from fulfilling the purposes of NAFTA, an intervention on our part would compromise them by obscuring the crucial separation between the international obligations of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of every nation towards litigants of whatever origin who appear before its national courts. Subject to explicit international agreement permitting external control or review, these latter responsibilities are for each individual state

to regulate according to its own chosen appreciation of the ends of justice. As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort. The line may be hard to draw, but it is real. Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.

c. Methanex v. United States

On December 5, 2003, the United States filed its amended statement of defense in *Methanex v. United States*. Methanex, a Canadian marketer and distributor of methanol, submitted a claim to arbitration under the UNCITRAL Arbitration Rules on its own behalf and on behalf of its investments for alleged injuries resulting from a California ban on the use or sale in California of the gasoline additive MTBE. Methanol is an ingredient used to manufacture MTBE. Methanex contended that a California executive order and regulations banning MTBE in California gasoline effective December 31, 2003, expropriated a substantial portion of its investments in the United States in violation of Article 1110, denied it fair and equitable treatment in accordance with international law in violation of Article 1105, and denied it national treatment in violation of Article 1102. Methanex claimed damages of $970 million. The United States denied that the tribunal had jurisdiction over the claims and denied that any of the alleged

measures violated the NAFTA. *See* discussion in *Digest 2001* at 574–611.

In a partial award, issued August 7, 2002, the tribunal found that Methanex's original statement of claim did not support jurisdiction because the California measure did not sufficiently relate to Methanex and its investments so as to be covered by NAFTA's investment chapter. It found further that the only basis for Methanex's amended statement of claim that could potentially meet this requirement was its allegation that California intended to harm foreign methanol producers on the basis of their nationality. The tribunal also concluded that it had no power to rule on U.S. challenges to admissibility of certain claims at the jurisdictional stage. The tribunal ordered Methanex to file a "fresh pleading" addressing the intentional harm issue within ninety days of the partial award. *See Digest 2002* at 616–623.

In response, Methanex filed a Second Amended Claim on November 5, 2002. The United States filed a Supplemental Statement of Defense on Intent on March 21, 2003, and, following resolution of certain procedural issues, filed its second Amended Statement of Defense on December 5, 2003.

Excerpts below from the December 5 filing provide the arguments of the United States that Methanex and its investments received treatment no less favorable than that accorded their U.S. counterparts; the measures do not violate Article 1105(1)'s minimum standard of treatment, and Methanex's expropriation claim under Article 1110 is baseless. (Most footnotes have been deleted in the excerpts that follow; deleted footnotes are indicated with asterisks [*]).

The full text of filings, orders and awards in Methanex is available at *www.state.gov/s/l/c5818.htm*.

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III. METHANEX AND ITS INVESTMENTS RECEIVED TREATMENT NO LESS FAVORABLE THAN THAT ACCORDED THEIR U.S. COUNTERPARTS

281. The 1999 Executive Order and the CaRFG3 regulations accord Methanex and its investments precisely the same treatment that they accord U.S. investors and U.S.-owned investments that produce, market and sell methanol. Faced with this undisputed fact, Methanex is left to argue that it is entitled to the same treatment that is accorded to U.S. *ethanol* producers and marketers. U.S. investors and U.S.-owned investments that produce or market ethanol, however, are not in like circumstances with Methanex and its U.S. investments. Methanex's argument, in effect, is that it is entitled to treatment *better than* that accorded to the methanol producers and marketers that are in like circumstances with it and its affiliates. This is not, however, what Article 1102 prescribes. Methanex's national treatment claim is without merit.

* * * *

A. Methanex And Its Investments Received The Same Treatment As U.S. Investors And Their Investments In Precisely The Same Circumstances

284. Article 1102 requires that the NAFTA Parties accord to investors of another Party and to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors and investments "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."* To establish a national treatment violation, Methanex must identify U.S. investors and U.S.-owned investments that are or would be in like circumstances with it and its investments. Methanex must also prove that it or its investment has been or would have been accorded less favorable treatment in comparison to the U.S. investor or U.S.-owned investment with respect to the activities specified in Article 1102.

285. Methanex fails to carry either burden here. This is not surprising, since U.S. investors and their investments exist that are in like circumstances with Methanex and its investments—and those investors and investments have received treatment that is *precisely the same* as that accorded Methanex and its U.S. investments. . . .

* * * *

296. . . . [T]he record establishes that Methanex and its investments received precisely the same treatment as that accorded to U.S. investors and investments in the methanol industry—investors and investments that, undeniably, are in like circumstances with Methanex and its investments. This showing, in itself, establishes that Methanex's national treatment claim is fatally defective.*

B. Methanex's Argument That It Should Be Compared To Investors And Investments In Other Industries Is Without Legal Or Factual Merit

297. Methanex asks this Tribunal to compare the treatment it and its U.S. investments are accorded with that accorded to companies that produce and market a product it does not produce and does not market—ethanol. Methanex, in short, asks this Tribunal to compare it to investors and investments that are *not* in like circumstances with it.

* * * *

1. Neither Article 1102 Nor The Record Supports Methanex's Contention That It Is In Like Circumstances With ADM

300. There is no merit to Methanex's argument based on GATT "like products" jurisprudence that it should be compared to investors and investments in a different industry on the ground that the industry produces a product that is "like" methanol. Article 1102, unlike the GATT, makes no reference to "like products." Instead, it refers to treatment, "in like circumstances," of "investors"

and "investments."* The ordinary meaning of treatment "in like circumstances" of "investors" and "investments" is not the same as that of treatment of "like products."[493] The terms used in Article 1102 demonstrate an overriding concern with the activity of investment and the circumstances of the investment and the treatment. By contrast, the terms used in the GATT demonstrate a concern with the activity of importation of goods and their "sale, offering for sale, purchase, transportation, distribution or use," and whether the goods can be considered "like products."[494]

301. The use of the phrase "in like circumstances," as well as its placement in the provision so that it could modify either the treatment accorded or the investor or the investments, indicates that Article 1102 contemplates that broad account be taken of the circumstances of the treatment, the investor and the investment.* Depending on the treatment in question, the product produced by an investment might be *part* of the relevant circumstances contemplated by Article 1102—or it might not be. By contrast, the GATT provision narrowly focuses on the good in question and whether it is like other goods. Nothing in the ordinary meaning of Article 1102 supports Methanex's contention that Article 1102 contemplates a singular focus on the goods produced or marketed by an investment and whether those goods are sufficiently similar to others to be considered "like products."

302. Nor does the context of Article 1102 support Methanex's contention.[496] The NAFTA Parties were well aware of how to draft a national treatment provision addressing "like products" and, in fact, did so in Article 301 of the NAFTA (which *cannot* be the subject of an investor-State claim).* The fact that the NAFTA Parties did not draft Article 1102 to address "like products" confirms that they meant something other than what they intended in Article 301, which expressly does address "like products." Indeed, in the GATT context it is recognized that "like products"

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[494] Article III:4 of the GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 . . .

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may not necessarily have the same meaning in different provisions of that agreement.[498] The context of the NAFTA provides no basis for importing the content of "like products" in one article of the GATT into a provision of a different agreement addressing a different subject (investment) using terms that little resemble those in the GATT (in like circumstances).

303. Finally, the relevant object and purpose of the NAFTA is significantly different from that of the GATT.* The objective of the NAFTA relevant to the investment chapter is to "increase substantially investment opportunities in the territories of the Parties."[500] By contrast, the GATT is concerned entirely with international trade in goods.[501] Managing the flow of goods between the NAFTA Parties, however, is not the objective of the NAFTA's investment chapter, which, naturally, centers on *investment*, not trade in goods.

304. As the tribunal in the *OSPAR* case recently observed:

> "[T]he application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts,

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[498] *See European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R ¶ 88 (Mar. 12, 2001) ("*Asbestos* A/B") ("the term [like products] must be interpreted in light of the context, and of the object and purpose, of the provision at issue, *and of the object and purpose of the covered agreement in which the provision appears*.") (emphasis added); *see also id.* ¶ 89; *id.* ¶ 95.

[500] NAFTA art. 102(1)(c). Because of the broad scope of the NAFTA, its objectives also include ones related to trade in goods, but those are addressed in Part Two of the treaty ("Trade in Goods"), not by Part Five ("Investment, Services and Other Matters").

[501] *See* GATT, preamble ("Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to . . . expanding the production and exchange of goods, Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce. . . .").

> objects and purposes, subsequent practice of the parties and *travaux préparatoires*."[502]

Given the significant differences between the texts, the contexts and the objects and purposes here, there is no basis for reading Article 1102 to incorporate a GATT "like products" analysis. For these reasons, the GATT and WTO authorities cited by Methanex are inapposite.

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IV. THE MEASURES DO NOT VIOLATE ARTICLE 1105(1)'S MINIMUM STANDARD

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A. The FTC Interpretation Precludes Any Claim That An Alleged Breach Of Article 1102 Gives Rise To An Additional Breach Of Article 1105(1)

350. Methanex's contention that a breach of Article 1102 breaches Article 1105(1) has been foreclosed by the Free Trade Commission (the "FTC") established under Article 2001 of the NAFTA.

351. The July 31, 2001 FTC interpretation clarifies that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."* The FTC also authoritatively stated that "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international

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[502] *Access to Information under Article 9 of the OSPAR Convention (Ireland v. U.K.)* (July 2, 2003) (Final Award) ¶ 141 (quoting *MOX Plant (Ire. v. U.K.)*, ITLOS Case No. 10, *Order on Provisional Measures*, ¶ 51 (Int'l Trib. for the Law of the Sea Dec. 3, 2001)).

agreement, does not establish that there has been a breach of Article 1105(1)."* This clarification repudiates the view stated by two members of the tribunal in the *S.D. Myers* case, and precludes Methanex's current argument relying on that opinion.*

352. . . . [W]e . . . note that four intervening decisions by NAFTA tribunals [in *Mondev, UPS v. Canada, ADF*, and *Loewen*] have repudiated Methanex's contention that this Tribunal may disregard this binding interpretation of the treaty by its Parties through the FTC.*

353. As these tribunals recognized, a claimant must do more than assert that it received treatment that was "unfair and inequitable" in a colloquial sense, as Methanex's current Article 1105(1) claim appears to do. . . .

354. In light of the FTC interpretation and the decisions of four other Chapter Eleven tribunals that have rendered awards since the interpretation was issued, Methanex's asserted Article 1105(1) claim fails as a matter of law to the extent that it is based on a supposed breach of Article 1102's national treatment provisions or by virtue of conduct that is supposedly "unfair and inequitable" without contravening established principles of customary international law.

B. Chapter Eleven's Specific Provisions Comprehensively Address Discrimination And Supersede Any General Prohibition Of Discrimination In Article 1105(1)

355. As stated in its Second Amended Statement of Claim, Methanex's assertion of a breach of Article 1105(1) is no different than its assertion of a breach of Article 1102. Methanex contends that "the California measures were intended to discriminate against foreign investors and their investments," and that such "intentional discrimination" violates Article 1105(1) as well as Article 1102.*

356. Such a claim of nationality-based discrimination is properly brought under provisions of Chapter Eleven other than Article 1105(1). Chapter Eleven includes a comprehensive and specific legal regime governing nationality-based discrimination,

permitting discrimination under certain circumstances, and proscribing it under others. Article 1102, under which Methanex has brought a separate claim, is just one part of this comprehensive regulation of nationality-based distinctions.*

357. Interpreted "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,"* Article 1105(1) cannot be read to incorporate the general obligation of non-discrimination that Methanex posits.

358. *First*, the ordinary meaning of the title of the article ("Minimum Standard of Treatment") and the phrases used in the text ("treatment in accordance with international law," "fair and equitable treatment" and "full protection and security") signals an *absolute*, minimum standard of treatment. . . .

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361. *Second*, the context confirms that Article 1105(1) does not incorporate the general obligation of non-discrimination posited by Methanex. Notably, Article 1108, entitled "Reservations and Exceptions," sets forth numerous exceptions to the general obligations of non-discrimination provided in Articles 1102 and 1103. The exceptions apply to a range of measures, sectors of the economy, and economic activities, some of which are specified in the text of Article 1108, and some of which are set forth in Annexes I through IV of the treaty—which together span well over a hundred pages of text. It is clear, from Article 1108 and these annexes, that the NAFTA Parties agreed that it was *permissible* to discriminate with respect to the measures, sectors and activities specified.

362. But Article 1108 lacks any exception from the application of Article 1105(1) for these otherwise acceptable types of discrimination. Thus, if Article 1105(1) incorporated a general obligation of non-discrimination, measures and activities permissible under the provisions of the NAFTA specifically addressing discrimination (notably Articles 1102 and 1103) would be rendered violations of the NAFTA under Article 1105(1). This would render ineffective the exceptions set forth in Article 1108 and scores of

pages of annexes, contrary to the principle that treaties should be construed to render their provisions effective.[581]

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365. Accordingly, general claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Eleven that specifically address that subject, not Article 1105(1). Methanex's claim under Article 1105(1) therefore fails for this reason alone—as well as on the ground that, as already demonstrated above in the discussion of Article 1102, Methanex has established and can establish no discrimination here in any event.

C. Methanex Has No Claim Of Non-Discrimination Under International Law's Minimum Standard of Treatment In Any Event

366. Even if the Tribunal were to find it necessary to analyze Methanex's discrimination claim under Article 1105(1), that claim fails because Methanex has not shown, and cannot show, any violation of NAFTA's "Minimum Standard of Treatment." To establish a claim under Article 1105(1), Methanex bears the burden of demonstrating the existence of the rule of customary international law that has allegedly been violated.[586] The purported

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[581] *See Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6 ¶ 51 (Feb. 3) (collecting authorities supporting "one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness"); *accord Anglo-Iranian Oil Co. (U.K. v. Iran)*, 1952 I.C.J. 93, 105 (July 22) (the principle "that a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text . . . should in general be applied when interpreting the text of a treaty"); *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 24 (Apr. 9) ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.").

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[586] *See ADF* Award ¶ 185 ("The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That

"rule" Methanex asserts is that "intentional discrimination is, by definition, unfair and inequitable."* But Methanex supplies no legal support for its suggestion that discrimination is *per se* violative of customary international law's minimum standard.

367. As demonstrated below, and contrary to Methanex's contention, customary international law contains no general prohibition on economic discrimination against aliens. In contrast to the treaty-based obligation of national treatment, the customary international law minimum standard does not mandate equivalent treatment between nationals and foreigners. State practice condones many forms of economic discrimination, prohibiting discrimination only in certain limited contexts that are irrelevant here. Methanex thus has not shown, and cannot show, that the measures at issue violate any principle of customary international law.

1. International Law Does Not Prohibit Discrimination Against Aliens

368. As Methanex's own legal expert has explained, "a degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law."[588] . . . As a general proposition, a State may

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burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts."); *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 200 (Aug. 27) (quoting *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20)) ("'The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.'"); NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 330 § 214 (6th ed. 1999) (burden on party "who relies on a custom to establish its existence and exact content") ("c'est à [la partie] qui s'appuie sur une coutume d'en établir l'existence et la portée exacte") (translation by counsel); BROWNLIE at 11 ("In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings.").

[588] SIR ROBERT JENNINGS & SIR ARTHUR WATTS, 1 OPPENHEIM'S INTERNATIONAL LAW 932 (9th ed. 1992)("1 OPPENHEIM'S").

treat foreigners and nationals differently, and it may also treat foreigners from different states differently.*

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2. State Practice Condones Economic Discrimination Against Foreigners

371. State practice, moreover, confirms that non-discrimination is not a "categorical rule" under customary international law.[593] States typically grant political rights (such as voting) and economic rights (such as the right to work) to nationals while severely limiting or denying altogether such rights for aliens.[594] The United States has consistently advocated the view that such discrimination does not violate international law.[595]

372. As to economic rights in particular, States practice numerous forms of discrimination against aliens that, as is widely recognized, do not violate customary international law. . . .

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[593] *See* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 315 (1991); FREEMAN at 506–07 ("Finally, the equality argument is utterly erroneous in so far as it pretends that aliens are entitled to be put on the same footing as nationals in every respect, for this reason: in the present state of international law, a State has not only the right to impose differences in treatment between its *ressortissants* and foreigners; but it has also the right to create, within certain limits, distinctions between the *ressortissants* of different foreign nations. It may, for example, prevent aliens from acquiring title to land, from engaging in certain professions . . . These and many other permissible restrictions combine to demonstrate that the concept of equality is incompatible with State practice and will swiftly lead to error in the handling of concrete cases.").

[594] *See*, *e.g.*, BROWNLIE at 526 ("[I]t is agreed on all hands that certain sources of inequality are admissible. Thus it is not contended that the alien should have political rights in the host state as of right. Moreover, the alien must take the local law as he finds it in regard to regulation of the economy and restriction on employment of aliens. . . .").

[595] 1 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 656 (1945) ("A State may exercise a large control over the pursuits, occupations and modes of living of the inhabitants of its domain. In so

3. Those Few Rules Of Non-Discrimination Recognized By International Law Apply In Limited Contexts Not Present Here

373. Customary international law does recognize certain rules of nondiscrimination, but their application is limited to contexts that have no bearing on Methanex's claim. While some scholars may state the rule more broadly,* the more accurate expression of the state of customary international law is that discrimination constitutes an international wrong only under certain circumstances.

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374. One of these circumstances is expropriation, where it is well-established that international law prohibits discriminatory takings.[601] Prohibitions on discrimination often appear in the context of describing what constitutes an illegal expropriation.*

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doing it may doubtless subject resident aliens to discrimination without necessarily violating any principles of international law."); 8 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 379 (1967) (quoting Statement of U.S. Representative Patricia R. Harris on the text of art. 2(3) of the Covenant on Economic, Social and Cultural Rights) ("'International law and specific treaties recognize the right of States to make appropriate distinctions with regard to nonnationals in certain respects. This right is clearly recognized for all States, regardless of their stage of economic development, and finds expression in numerous constitutions and laws in both developing and developed countries.'").

[601] *See, e.g.*, *BP Exploration Co. (Libya) Ltd. v. Libyan Arab Republic*, 53 I.L.R. 297, 329 (1979) (Award of Aug. 1, 1974) ("the taking . . . clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character."); *Libya v. Libyan Am. Oil Co.*, 20 I.L.M. 1, 114–15 (1981) (Award of April 12, 1977) ("It is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well established in international legal theory and practice."); *American Independent Oil Co. (AMINOIL) v. Kuwait*, 21 I.L.M. 976 ¶ 87 (1982) (considering the question "whether the nationalization of Aminoil was not thereby tainted with discrimination", but finding that there were legitimate reasons for nationalizing one company and not the other.); *see also* RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 712 (1987) ("A state is responsible under international law for injury resulting from . . . a taking by the state of the property of a national

375. A second circumstance where non-discrimination is a recognized principle under international law's minimum standard for the treatment of aliens is denial of justice. The principle of denial of justice includes the notion that aliens should not be discriminated against in terms of access to judicial remedies or treatment by the courts. . . .

376. A third circumstance where non-discrimination is a recognized principle of international law is in times of mob violence or unrest, armed conflict or civil strife. The international minimum standard obliges the State to compensate aliens and nationals on an equal basis for damages incurred during such times of violence, insurrection, conflict or strife.[604]

377. Other than in these limited circumstances, no established rule of customary international law has emerged that prohibits economic discrimination against aliens.

378. None of these contexts where international law prohibits discrimination exists in Methanex's case. First, as to expropriation, Methanex asserts a separate Article 1110 claim that includes allegations of intentional discrimination.* Article 1110(1)(b) explicitly recognizes the international rule of non-discrimination in the expropriation context. As explained more fully in Section V below, Methanex's Article 1110 claim fails as a matter of law and fact. Second, Methanex's claim cannot be fit into the rubric of

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of another state that . . . is discriminatory . . ."); *id.* § 712 Comment f ("Formulations of the rules on expropriation generally include a prohibition of discrimination . . ."); BROWNLIE at 541 n.96 (there is "much authority for" the proposition that the "category of types of expropriation which are illegal apart from a failure to provide compensation" includes seizures which "are discriminatory, being aimed at persons of particular racial groups or nationals of particular states.") (collecting authority).

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[604] See, e.g., *Standard Oil Co. (U.S. v. Germ.)*, 2 R.I.A.A. 781, 794–95 (1926); League of Nations, *Bases of Discussion: Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners*, League of Nations Doc. C.75.M.69.1929.V. at 104–23 (1929), *reprinted in* 2 SHABTAI ROSENNE, LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW [1930] 526–45 (1975). . . .

denial of justice as there are no allegations here that any domestic adjudicatory remedies were foreclosed to Methanex or that it was discriminated against in U.S. courts. Third, clearly, the circumstances of mob violence or other unrest do not exist in this case.

379. In sum, Methanex has failed to establish any general obligation of nondiscrimination under customary international law. Although customary international law does recognize an obligation of non-discrimination in certain limited contexts, none of those contexts has any application here.

4. Methanex Can Show No Violation Of Customary International Law On These Facts

380. Moreover, Methanex cannot establish, and has not established, any violation of customary international law on these facts. As noted below, State practice clearly excludes any customary international law bar to the only genre of discrimination alleged by Methanex—discrimination against foreign-produced goods in favor of domestically produced goods. And the record establishes no such discrimination in any event.

381. Discrimination against foreign goods is only proscribed to the extent set forth in international agreements, and is otherwise permissible under international law. For example, an essential feature of the global trading system today is that goods generally receive different levels of treatment depending on the membership of their country of origin in free trade areas. . . .

382. Methanex charges that "protectionism," as the counterpart of discrimination, is an international wrong.* In reality, protecting domestic industries and goods is a common State practice. International law, for example, permits the oft-used practice of granting government contracts on a preferential basis to domestic firms.[609] In the *ADF* case, another NAFTA tribunal accepted as lawful domestic content and performance requirements in governmental procurement, acknowledging that the practices are common not only to the NAFTA Parties, but "are to be found in the

[609] SCHACHTER at 316.

internal legal systems or in the administrative practice of many States."[610]

383. Discrimination against foreign goods therefore does not constitute a violation of customary international law. But even if it did, Methanex's Article 1105(1) claim would still fail. As demonstrated by the discussion in Section III above, the California measures do not, in fact, discriminate against foreign-supplied methanol. The measures were motivated by concern for California's water supply and were not directed at methanol at all.

384. Also as a factual matter, the California measures do not discriminate between domestic and foreign methanol producers. Methanex has not received less favorable treatment than similarly-situated U.S. producers of methanol. Thus, even if Methanex's theory were accepted, and Article 1105(1) were interpreted to guarantee national treatment, its national treatment claim would fail for the reasons explained in Section III above.

V. METHANEX'S EXPROPRIATION CLAIM UNDER ARTICLE 1110 IS BASELESS

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387. Methanex's new claim that a "substantial portion of [Methanex US's, Methanex Fortier's or its] customer base, goodwill and market in California" were expropriated fails for several reasons. *First*, Methanex's fresh pleading does not even attempt to identify what "portions" of which investment were expropriated. Its pleading is thus facially deficient. *Second*, Methanex's claim fails because goodwill, market share and customer base are not, by themselves, "investments" that are capable of being expropriated. *Third*, Methanex's claim, which boils down to an allegation that its investments' profitability will be negatively

[610] *ADF* Award ¶ 188. *See also*, Paul Carrier, Domestic *Price Preferences in Public Purchasing: An Overview and Proposal of the Amendment to the Agreement on Government Procurement*, 10 N.Y. INT'L L. REV. 59, 67 (1997) ("The public procurement systems of virtually ever country protect domestic suppliers and contractors of goods, services and construction services from external competition.").

impacted by the measures, fails because such an allegation cannot support a finding of expropriation, and Methanex has failed to carry its burden of proof in any event. *Finally*, the type of regulatory action taken by California cannot, absent extraordinary circumstances not present in this case, be deemed expropriatory.

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B. Methanex Has Failed To Identify Any "Investment" That Has Allegedly Been Expropriated

391. Methanex's claim that a "substantial portion of [its investments'] customer base, goodwill and market in California"* has been expropriated also fails because goodwill, customer base and market share are not, by themselves, investments that are capable of being expropriated.

392. Article 1139 provides an exhaustive list of what may constitute an investment for purposes of Chapter Eleven.* Neither goodwill, customer base nor market share are among the items listed in Article 1139. In addition, customary international law has long recognized that in order for there to be an expropriation, a *property* right or interest must have been taken.*

393. Goodwill, market share and customer base, however, are not property rights or interests that, by themselves, are capable of being expropriated. International law authorities have thus drawn a distinction between property that may be expropriated by itself, and goodwill and market share which may be taken into account when valuing an enterprise that has been expropriated but are not, by themselves, capable of being expropriated. . . .

394. International tribunals have similarly rejected claims that customer base, goodwill and market share are, by themselves, property interests that can be expropriated. In the *Oscar Chinn* case, for example, the Permanent Court of International Justice denied an expropriation claim for failure to identify a property right.[623] There, a British river carrier operator claimed that the

[623] *(U.K. v. Belg.)* 1934 P.C.I.J. ser. A/B, No. 63, 65 (Dec. 12).

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Belgian Congo had expropriated its property when the government increased its funding for a state-owned competitor, which resulted in that competitor being granted a *de facto* monopoly. In denying the claim, the Court held that it was "unable to see in [claimant's] original position—which was characterized by the possession of customers . . . anything in the nature of a genuine vested right."* The Court reasoned that "[f]avourable business conditions and goodwill are transient circumstances, subject to inevitable changes."*

395. Because customer base, goodwill and market share are not, by themselves, property rights capable of being expropriated, Methanex's expropriation claim fails as a matter of law.

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D. The Measures At Issue Are Not Expropriatory

409. Quite apart from the infirmities in Methanex's expropriation claim reviewed above, Methanex's claim fails because the measures Methanex challenges cannot be considered expropriatory. The 1999 Executive Order and the CaRFG3 Regulations were actions taken by California to protect the public health by safeguarding its citizens' drinking water supply. Absent extraordinary circumstances not present here, such actions are not expropriatory under customary international law.

410. It is a principle of customary international law that, where economic injury results from a *bona fide* regulation within the police powers of a State, compensation is not required.[638] As Professor Friedman notes:

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[638] *See*, *e.g.*, FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 50–51 (1953) (collecting cases where harmful activities were suppressed and no compensation was paid, including "lotteries, the manufacture of oleo-margarine and pool halls" in the United States, "prohibition on the manufacture and sale of alcoholic liquor introduced in 1926" in the United States and similar measures in France); *Lauder (U.S.) v. Czech Republic* (Sept. 3, 2002) (Final Award) ¶ 198 (The "detrimental effect on the economic value of property is not sufficient; Parties to the Treaty are not liable for economic injury that is the consequence of *bona fide* regulation within the accepted police powers of the State.").

> State practice contains numerous examples of the suppression of particular activities which may be carried out. . . . In the first place, the activity may be regarded as harmful at a given time although it was perfectly legal hitherto and may indeed become so again. . . . In all these cases where a particular activity was suppressed, with a resulting destruction of important corporeal and incorporeal property rights, no compensation was paid to those suffering damage in consequence of the measures taken.[639]

411. Thus, as a general matter, States are not liable to compensate aliens for economic loss incurred as a result of a nondiscriminatory action to protect the public health.[640] For example, in *Parsons (Gr. Brit.) v. United States*, when United States military authorities destroyed a British national's stock of liquor deemed to be poisonous (it contained methanol), an international tribunal found this action to be noncompensable.[641] Similarly, in the *Bischoff (Italy) v. Venezuela* case, an international tribunal declined to award compensation for the taking of the claimant's carriage by Venezuelan police authorities, where the authorities believed the carriage was contaminated with smallpox.[642]

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[639] FRIEDMAN at 50–51.

[640] *See*, *e.g.*, RESTATEMENT (SECOND) OF THE LAW OF FOREIGN RELATIONS § 197(1) (1965) ("Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice indicated in § 165 if it is reasonably necessary for (a) the maintenance of public order, safety, or health, . . ."); BROWNLIE at 539 (1998) ("Cases in which expropriation is allowed to be lawful in the absence of compensation are within the narrow concept of public utility prevalent in *laissez-faire* economic systems, i.e. exercise of police power, health measures, and the like."); Christie, 33 BRIT. Y.B. INT'L L. at 338 ("If, however, such prohibition can be justified as being reasonably necessary to the performance of a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no 'taking' of property."); . . .

[641] 6 R.I.A.A. 165, 165–66 (1955) (Award of Nov. 30, 1925).

[642] VENEZUELAN ARBITRATIONS OF 1903, 581 (1904) ("Certainly during an epidemic of an infectious disease there can be no liability for the

412. The text of the NAFTA is consistent with the view that it is a State's sovereign right to protect public health and the environment. The preamble of the NAFTA notes the Parties' resolve to "PRESERVE their flexibility to safeguard the public welfare; . . . STRENGTHEN the development and enforcement of environmental laws and regulations . . . [and] UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation."[643] Article 1101(4) requires that Chapter Eleven be construed so as not "to prevent a Party from providing a service or performing a function such as . . . social welfare . . . [or] health." And, Article 1114(2) includes the NAFTA Parties' recognition that:

> [I]t is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.[644]

These provisions strongly suggest that the NAFTA Parties did not intend for nondiscriminatory regulatory measures to protect the public health and the environment, like the measure at issue here, to be the subject of an expropriation claim.

413. As demonstrated above, the California measures are *bona fide*, nondiscriminatory regulatory actions taken to protect the public drinking water supply. . . .

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reasonable exercise of police power"). While denying the expropriation claim, the tribunal awarded damages for the "unreasonable length of time [of the detention] and injuries to the carriage during [the detention] period." . . .

[643] *See also* North American Agreement on Environmental Cooperation, Sept. 8, 9, 12, 14, 1993, Can.-Mex.-U.S. art. 3, 32 I.L.M. 1480 (1993). . . .

[644] *See also* NAFTA art. 1114(1) ("Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.").

414. Methanex cannot and does not dispute that even small concentrations of MTBE make large quantities of groundwater unpotable.* In the mid-1990s, California experienced a crisis of MTBE contamination. Drinking water wells at dozens of sites around the state were affected by releases of MTBE into the drinking water supply.* Water boards across the state received complaints from their customers that the water from their taps "smelled like turpentine."* Dozens of concerned citizens testified before the California Environmental Protection Agency during the hearings on the U.C. Report, urging California to remove MTBE from gasoline.* For example, Stephen Hall of the Association of California Water Agencies testified that

> The fact that MTBE is detectable with taste and odor at very low levels presents, to us, a particularly urgent problem. It's a crisis of confidence among our customers. If they can taste and smell something that tastes and smells like turpentine in their water, they won't trust that drinking water. . . . [G]iven our state's growing need for water and its limited supply, we simply can't afford to squander the available resources that we have.[654]

415. It was the detection of MTBE contamination in California's drinking water wells that compelled the state to take regulatory action to safeguard its citizens' drinking water supply from MTBE's potent taste and odor effects.* Governor Davis explicitly states as much in the Executive Order. He directed California's executive agencies to act based on "the environmental threat to groundwater and drinking water" posed by MTBE.[656] Likewise, CARB indicated in its Resolution adopting the CaRFG3 standards that "the people of California will not accept drinking

[654] Transcript of UC Report Hearing no. 2 at 173 (Feb. 23, 1999) (15 JS tab 22 at 936).

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[656] 1999 EXECUTIVE ORDER pmbl. (1 JS tab 1(c)).

water in which they can taste MTBE; Accordingly, the threat posed by MTBE . . . makes it necessary to prohibit the use of MTBE in California gasoline."[657]

416. The measures thus establish on their face that their purpose was to regulate to protect public health. There is, in international law, a "necessary presumption that States are 'regulating' when they say they are 'regulating,' and they are especially to be honored when they are explicit in this regard.[658] Nothing in this record overcomes that presumption.

417. In sum, California's actions, which were taken to protect its citizens' drinking water and were not discriminatory, may not be deemed expropriatory. Methanex's claim under Article 1110 is without legal or factual support. It should be dismissed with prejudice.

d. Canfor Corp. v. United States

On June 9, 2002, Canfor Corporation, a Canadian forest products company, initiated arbitration under the UNCITRAL Arbitration Rules on its own behalf. Its Statement of Claim alleged losses suffered as a result of certain U.S. antidumping, countervailing duty, and material injury determinations on softwood lumber. The U.S. Department of Commerce issued final antidumping and countervailing duty determinations on softwood lumber in March 2002. In May 2002 the U.S. International Trade Commission issued a final determination that the U.S. softwood lumber industry was threatened with material injury by reason of imports from Canada of softwood lumber. As a result of those determinations, a

[657] CARB Resolution 99–39 at 6–7 (Dec. 9, 1999) (16 JS tab 24 at 1215–16).

[658] Burns H. Weston, *Constructive Takings Under International Law: A Modest Foray Into the Problem of "Creeping Expropriation,"* 16 VA. J. INT'L L. 103, 121 (1975); *see also*, Christie, 38 BRIT. YB. INT'L L L. at 332. . . .

Canfor subsidiary is required to pay increased duties on softwood lumber products imported to the United States.

Canfor's notice alleges that the United States, by virtue of these determinations, has breached NAFTA Chapter Eleven by not according it national treatment (Art. 1102) or most-favored nation treatment (Art. 1103); by not according it treatment in accordance with international law (Art. 1105); and by expropriating its investment without compensation (Art. 1110). The notice claims damages of not less than $250 million.

Excerpts below from the Objection to Jurisdiction of Respondent United States of America, filed October 16, 2003, set forth the U.S. argument that the NAFTA parties intended all matters arising under a party's antidumping and countervailing duty laws to be addressed under Chapter Nineteen of the NAFTA, to the exclusion of all other chapters. Footnotes have been omitted.

The full text of the U.S. objection to jurisdiction and other submissions and orders in Canfor are available at *www.state.gov/s/l/c7424.htm*.

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I. THE UNITED STATES HAS NO OBLIGATION UNDER CHAPTER ELEVEN TO ARBITRATE CANFOR'S CLAIMS

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A. The Ordinary Meaning Of Article 1901(3) Establishes That The United States Did Not Consent To Arbitrate Canfor's Claims Under Chapter Eleven

The plain language of Article 1901(3) demonstrates that the United States did not consent to arbitrate Canfor's claims under Chapter Eleven of the NAFTA. Article 1901(3) states:

> Except for Article 2203 (Entry into Force), no provision of any other Chapter of this Agreement shall be construed as imposing obligations on a Party with respect to the Party's antidumping law or countervailing duty law.

The "ordinary meaning" and effect of this provision is clear: the United States has no obligations under the NAFTA with respect to its antidumping and countervailing duty laws except those specified in Chapter Nineteen and Article 2203. Chapter Nineteen sets forth a unique, self-contained mechanism for dealing with sensitive and complex antidumping and countervailing duty claims. The Parties intended for matters arising under a Party's antidumping and countervailing duty laws to be addressed exclusively under Chapter Nineteen. No provision of any other chapter, including Chapter Eleven, can be construed as imposing any obligation on the United States with respect to such laws.

Canfor's claims—as to both jurisdiction and liability—are based entirely on obligations found in Chapter Eleven. Its claim that the United States is obliged to arbitrate this dispute is based on the provisions of Section B of Chapter Eleven. Canfor alleges that the United States is liable to it for failure to accord it and its investments "national treatment," "most-favored-nation treatment" and the "minimum standard of treatment" in violation of NAFTA Articles 1102, 1103 and 1105 respectively, and for expropriating Canfor's investments in the United States in breach of Article 1110.

Canfor's claims, however, are clearly based on obligations "with respect to [U.S.] antidumping and countervailing duty law." Canfor's allegations are based on Commerce's and the ITC's interpretation of U.S. antidumping and countervailing duty laws and regulations, and in particular on the methodologies and procedures Commerce used in calculating the duties at issue. Canfor alleges, for example, that Commerce improperly calculated dumping margins using a "zeroing" technique, did not provide a reasoned analysis that the stumpage was "specific" to an enterprise or industry and inappropriately denied Canfor a company-specific countervailing duty rate. These are precisely the types of claims that are—and in fact *were*—submitted to, and decided by, binational panels constituted under Chapter Nineteen.

The result compelled by the ordinary meaning of the terms of Article 1901(3) is clear: Chapter Eleven of the NAFTA cannot be construed to impose any obligation on the United States with respect to the category of claims asserted by Canfor. The United States has no substantive obligations under the provisions alleged to have been breached upon which any claim here could be based. And, most important for purposes of this Objection, the provisions of Chapter Eleven relied upon by Canfor to invoke the jurisdiction of this Tribunal—under the plain terms of the treaty—impose no obligation on the United States. Because the United States did not consent to investor-State arbitration with respect to Canfor's claims, there is no agreement between the parties upon which the Tribunal's jurisdiction could be founded.

B. The Context Of Article 1901(3) Confirms That The United States Did Not Consent To Investor-State Arbitration Of Canfor's Claims

As noted above, a treaty is to be interpreted "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." As demonstrated below, an examination of the context of Article 1901(3) confirms that Chapter Nineteen provides the *exclusive* forum under the NAFTA for disputes arising under a Party's antidumping and countervailing duty law.

First, although the NAFTA establishes in Chapter Twenty a State-to-State dispute resolution mechanism for controversies concerning the Agreement, even that mechanism does not apply to antidumping or countervailing duty matters. The Chapter Twenty mechanism has an unusually broad reach: it applies to "all disputes concerning the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement." [citing NAFTA art. 2004]. One category of disputes, however, is expressly excluded: those "*matters covered in Chapter Nineteen* (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters)." Thus, the only

type of dispute that a NAFTA Party may *not* bring under Chapter Twenty is that pertaining to another Party's antidumping and countervailing duty laws.

This element of the context confirms what Article 1901(3) plainly says: that Chapter Nineteen exclusively governs disputes concerning antidumping and countervailing duty laws. It would make no sense for the NAFTA to prohibit the *NAFTA Parties themselves* from pursuing State-to-State dispute resolution pertaining to a Party's antidumping and countervailing duty laws outside of Chapter Nineteen, but accord *private claimants* the privilege of doing so under Chapter Eleven.

Second, this conclusion is further reinforced by Article 1112(1), which subordinates Chapter Eleven to all other chapters of the NAFTA. Article 1112(1) provides that "[i]n the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of that inconsistency." It would be particularly odd for investor-State arbitration under Chapter Eleven to afford greater rights to private claimants than to the NAFTA Parties given the subordinate position of the investment chapter in the treaty.

Moreover, Canfor's apparent position—that private claimants may pursue remedies under both Chapters Nineteen and Eleven with respect to antidumping and countervailing duty laws—would give rise to critical inconsistencies that would, under Article 1112(1), be resolved in favor of Chapter Nineteen. The dispute resolution mechanisms provided under the two chapters are so dramatically different—from constitution of the panel to governing law, from the remedies available to review and enforcement mechanisms—as to be irreconcilable. Contrary to Canfor's suggestion, however, the NAFTA Parties did not craft a treaty with two irreconcilably different methods of dispute resolution for the same matter—though if they had, Article 1112(1) would compel the same result as that provided for in Article 1901(3).

Third, Chapter Eleven itself indicates that, although the drafters expressly envisioned a certain overlap in competence between the investor-State arbitration mechanism established in Section B and the State-to-State mechanism in Chapter Twenty, they envisaged

no such overlap for antidumping and countervailing duty matters in Chapter Nineteen. Article 1115 provides as follows:

> *Without prejudice to the rights and obligations of the Parties under Chapter Twenty* (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

The opening clause of the Article provides that the submission of a measure to investor-State arbitration does not waive a Party's right to submit the same measure to the State-to-State arbitration mechanism set forth in Chapter Twenty. Article 1115 thus contemplates that the same measure could be the subject of dispute resolution under both Chapter Eleven and Chapter Twenty. Had, as Canfor implicitly suggests, the Parties contemplated that the same measure could be the subject of proceedings under both Chapters Eleven and Nineteen, a reader would expect there to be some mention of Chapter Nineteen in Article 1115. That the Parties did not find it necessary to mention the possibility that the same measures could be subject to dispute resolution under Chapter Nineteen suggests that the Parties did not contemplate that the types of measures that are subject to the Chapter Nineteen bi-national panels could ever be a subject of arbitration under Chapter Eleven.

Finally, the fact that the NAFTA expressly required amendments to domestic law to permit the use of business proprietary information in Chapter Nineteen proceedings—but contemplated no such amendments for Chapter Eleven—further confirms that the Parties did not envisage that antidumping and countervailing duty matters could be submitted to Chapter Eleven arbitration. Under provisions of U.S. law of which the drafters of the treaty were well aware, business proprietary information relied upon in antidumping or countervailing duty investigations could not and cannot legally be shared with either the State Department attorneys who generally act for the United States in Chapter Eleven arbitrations, counsel for claimants or the members of tribunals

established under that chapter. Despite clear knowledge of that provision of U.S. law, the NAFTA Parties required an amendment with respect to Chapter Nineteen, but did not with respect to Chapter Eleven. This element of the context provides further evidence that the NAFTA does not contemplate the submission of antidumping or countervailing duty disputes to Chapter Eleven arbitration.

C. The NAFTA's Object And Purpose Confirm That The United States Did Not Consent To Arbitrate Canfor's Claims Under The Investment Chapter

The final element of the Vienna Convention's cardinal rule of treaty interpretation focuses on the treaty's object and purpose. 101 NAFTA Article 102 states in pertinent part as follows:

> The objectives of this Agreement, as elaborated more specifically through its principles and rules, . . . are to: . . . (e) create *effective* procedures . . . for the resolution of disputes.

. . . . Reading Article 1901(3) as establishing Chapter Nineteen panels as the exclusive forum under the NAFTA for antidumping and countervailing duty matters is fully consonant with this object and purpose of the treaty.

* * * *

3. Claims under Chapter 11 Against Mexico

GAMI Investments v. Mexico

GAMI Investments, Inc., a U.S. corporation claiming to hold a 14.18 percent interest in a Mexican sugar production company, submitted a claim against Mexico to arbitration under the UNCITRAL Arbitration Rules. In September 2001 Mexican authorities issued a decree for the stated purpose of revitalizing the Mexican sugar industry. GAMI alleges that,

pursuant to that decree, Mexican authorities expropriated sugar mills owned by five subsidiaries of its investment. GAMI further contends that Mexican authorities regulated the sugar industry in a discriminatory and arbitrary manner. GAMI claims that Mexico's actions amounted to a denial of national treatment as required by NAFTA Article 1102, a failure to provide treatment in accordance with international law as required by Article 1105(1), and an expropriation of GAMI's investment without the compensation required by Article 1110. GAMI claims damages of over US$27 million.

On June 30, 2003, the United States filed a submission pursuant to NAFTA Article 1128 "to address certain questions of interpretation of the NAFTA arising in the case." In doing so, as always in such submissions, the United States explained that it "takes no position on how the interpretations . . . apply to the facts of this case" nor on "whether the issues addressed here go to the merits of the claim or the jurisdiction of the Tribunal." Footnotes have been omitted from the excerpts below.

The full text of the U.S. Article 1128 submission is available at *www.state.gov/s/l/c7119.htm*.

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Standing of Minority Non-Controlling Shareholders Under Chapter Eleven

6. The United States agrees with the claimant that minority shareholders of a Party who hold shares of a company incorporated in the territory of another Party are of the class of investors that may bring a claim for loss or damage on their own behalf under Article 1116.2 A minority non-controlling shareholder, under the definition provided in NAFTA Article 1139, is an "investor of a Party."

7. A minority non-controlling shareholder may not, however, bring a claim on behalf of an enterprise. Only investors that own

or control an enterprise of another Party directly or indirectly have standing to bring a claim for loss or damage suffered by that enterprise under Article 1117. The investment that the minority non-controlling shareholder owns and controls is its ownership interest in the enterprise. If a minority non-controlling shareholder were permitted to bring a claim on behalf of an enterprise, the definition of "investment of investor of a Party" would be deprived of meaning.

Relationship Between Articles 1116 and 1117

8. The interpretation of Articles 1116 and 1117 presented in this submission is informed by an examination of the principles of customary international law addressing the status of corporations against which the provisions were drafted.

9. Under customary international law, no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. Only *direct* loss or damage suffered by shareholders is cognizable. A classic example of direct loss or damage suffered by shareholders is when the host State wrongfully expropriates the shareholders' ownership interests, whether directly through an expropriation of the shares, or indirectly by expropriating the corporation as a whole. Another example of direct loss or damage sustained by a shareholder is that incurred by the shareholder as a result of it having been denied its right to vote its shares in a company incorporated in the territory of the host State.

10. The second customary international law principle against which Articles 1116 and 1117 were drafted is that no international claim may be asserted against a State on behalf of the State's own nationals.

11. Against these background principles, a common situation is left without a remedy under customary international law. Investors often choose to make an investment through a separate legal entity, such as a corporation, incorporated in the host State. If the host State were to injure that enterprise in a manner that does not directly injure the investor/shareholders, no remedy would

ordinarily be available under customary international law. In such a case, the loss or damage is suffered by the corporation. As the investor has not suffered direct loss or damage, it does not have standing to bring a claim. Nor may the corporation itself maintain an international claim against the State of which it is a national.

12. Article 1117 addresses this problem by creating a right to present a claim not found in customary international law. Where the investment is an enterprise of another Party, an investor of a Party that owns or controls the enterprise may submit a claim on behalf of the enterprise for loss or damage incurred by the enterprise. Thus, Article 1117 derogates from the principles described above.

13. Article 1116 also derogates from customary international law to the extent that it permits individual investors to assert claims for State responsibility under international law that could otherwise be asserted only by States. The United States agrees with the claimant to this extent that the language of Article 1116 "supersedes inconsistent customary international law." The United States also agrees with the claimant that, in granting this sort of claim, Article 1116 does not distinguish between investors that own or control an investment and minority shareholders.

14. However, the United States does not believe that Article 1116 can fairly be construed to reflect an intent to derogate from the rule that shareholders may assert claims only for injuries to their interests and not for injuries to the corporation. It is well-recognized that "an important principle of international law should not be held to have been tacitly dispensed with by an international agreement, in the absence of words making clear intention to do so." [citing *See Loewen Group Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, (Award of June 26, 2003) ¶ 160 (*citing Elettronica Sicula SpA (ELSI) (U.S. v. Italy)* 1989 I.C.J. 15,42), *available at www.state.gov/documents/organization/22094.pdf*]. Nothing in the text of Article 1116 suggests an intent to derogate from customary international law restrictions on the assertion of claims on behalf of shareholders. By contrast, the view of at least one of the Parties as to the intent of the three NAFTA countries was expressed in the contemporaneous United States Statement of

Administrative Action in terms that are quite clear: consistent with the prevailing rule under customary international law, Article 1116 provides standing for direct injuries; Article 1117 provides standing for indirect injuries. [citing North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. 103–159, Vol. I (1993) at 145]. Were minority noncontrolling shareholders to be permitted to bring a claim under Article 1116 for indirect injuries, Article 1117 would be superfluous.

15. The awards in *Pope and Talbot* and *S.D. Myers* do not provide examples where claims for indirect injuries were allowed under Article 1116. In each of those cases, the damages awarded were limited to losses suffered directly by the investor bringing the claim, not by the investment/enterprise.

16. Nor does Article 1117(3) suggest that Article 1116 was intended to derogate from the customary international law rule that restricts shareholders from asserting a claim for loss or damage suffered by a corporation. That provision makes clear, among other things, that nothing prevents an investor that owns or controls an enterprise, in an appropriate case, from submitting claims under both Articles 1116 and 1117. For example, if a NAFTA Party violated Article 1109(1)'s requirement that "all transfers relating to an investment of an investor of another Party in the territory of the Party . . . be made freely and without delay," the investor might be able to claim under Article 1116 damages stemming from interference with its right to be paid corporate dividends. If the investor owns or controls the enterprise, it might also be able to claim under Article 1117 damages relating to its enterprise's inability to make payments necessary for the day-today conduct of the enterprise's operations. A minority non-controlling shareholder under such a scenario, however, would have standing to submit only a claim for damages to its own interests as a shareholder—the loss of dividends—under Article 1116.

17. The distinction between Articles 1116 and 1117 is also critical to ensuring that creditors' rights with respect to the investment are respected. Under Article 1135(2)(a) and (b), where a claim is made under Article 1117(1), the award must provide that any restitution be made, or monetary damages be paid, to the enterprise. This prevents the investor from effectively stripping

away a corporate asset—the claim—to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors. This goal is reflected in Article 1135(2)(c), which provides that where a claim is made under Article 1117(1), the award must provide that it is made without prejudice to any person's right (under applicable domestic law) in the relief. If a minority non-controlling shareholder could bring a claim under Article 1116 for loss or damage incurred directly by the enterprise, this goal would be thwarted and both Articles 1117 and 1135(2) would be rendered ineffective.

18. In addition, the distinct functions of Articles 1116 and 1117 ensure that there will be no double recovery. When an investor that owns or controls an enterprise submits a claim under Article 1117 for loss or damage suffered by that enterprise, any award in the claimant investor's favor will make the enterprise whole and the value of the shares will be restored. A very different scenario arises if an investor that does not own or control an enterprise is permitted to bring a claim for loss or damage suffered by that enterprise under Article 1116. In such a case, for example, nothing would prevent the enterprise from also seeking available remedies under domestic law for the same injury. A NAFTA Party could then be forced to defend against such claims in separate, consecutive proceedings, risking duplicative awards for the same loss or damage arising from the same breach.

Articles 1116 and 1117 Require Proximate Causation, Not A Lesser Standard

19. Finally, an investor has standing to bring a claim under Article 1116 for direct loss or damage, or under Article 1117 for indirect loss or damage, only when "the investor has incurred loss or damage by reason of or arising out of, that breach." The United States disagrees with the claimant that "the ordinary meaning of 'arising out of' and even 'by reason of' is obviously broader than proximate or direct causation." The ordinary meaning of these terms, as has been repeatedly recognized by international tribunals, is a reference to the customary international law rule of proximate cause.

20. In sum, a minority non-controlling shareholder may not bring a claim under the NAFTA for loss or damage incurred directly by an enterprise. A minority non-controlling shareholder has standing to bring a claim only for loss or damage to itself proximately caused by a breach.

C. WORLD TRADE ORGANIZATION ("WTO")

A review of U.S. participation in WTO negotiations, implementation, and dispute settlement is provided in Chapter II of the 2004 Trade Policy Agenda and 2003 Annual Report of the President of the United States on the Trade Agreements Program ("2003 Annual Report of the President"), available at *http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Trade_Policy_Agenda/Section_Index.html*. Panel and Appellate Body reports are available on the WTO website; *see www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm*.

Selected cases are discussed below.

1. WTO Cases Brought by the United States

a. EU measures affecting the approval and marketing of biotech products

On May 13, 2003, the United States filed a consultation request with respect to a moratorium imposed by the European Union ("EU") on all new biotech approvals, and the banning by six member states (Austria, France, Germany, Greece, Italy and Luxembourg) of imports of certain biotech products previously approved by the EU. A press release by USTR on that date, excerpted below, is available at *www.ustr.gov/releases/2003/05/03-31.htm*.

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U.S. Trade Representative Robert B. Zoellick and Agriculture Secretary Ann M. Veneman today announced the United States,

Argentina, Canada, and Egypt will file a World Trade Organization (WTO) case against the European Union (EU) over its illegal five-year moratorium on approving agricultural biotech products. Other countries expressing support for this case by joining it as third parties include: Australia, Chile, Colombia, El Salvador, Honduras, Mexico, New Zealand, Peru and Uruguay.

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"The EU's moratorium violates WTO rules. People around the world have been eating biotech food for years. Biotech food helps nourish the world's hungry population, offers tremendous opportunities for better health and nutrition and protects the environment by reducing soil erosion and pesticide use," said Zoellick. "We've waited patiently for five years for the EU to follow the WTO rules and the recommendations of the European Commission, so as to respect safety findings based on careful science. The EU's persistent resistance to abiding by its WTO obligations has perpetuated a trade barrier unwarranted by the EC's own scientific analysis, which impedes the global use of a technology that could be of great benefit to farmers and consumers around the world."

* * * *

The WTO agreement on sanitary and phytosanitary measures (SPS) recognizes that countries are entitled to regulate crops and food products to protect health and the environment. The WTO SPS agreement requires, however, that members have "sufficient scientific evidence" for such measures, and that they operate their approval procedures without "undue delay." Otherwise, there is a risk countries may without justification use such regulations to thwart trade in safe, wholesome, and nutritious products.

Before 1999, the EU approved nine agriculture biotech products for planting or import. It then suspended consideration of all new applications for approval, and has offered no scientific evidence for this moratorium on new approvals. As EU Environment Commissioner Margot Wallstrom said almost three years ago (July 13, 2000): "We have already waited too long to act. The moratorium

is illegal and not justified . . . the value of biotechnology is poorly appreciated in Europe."

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Following consultations that did not resolve the issue, the United States requested the establishment of a dispute settlement panel. The Dispute Settlement Body ("DSB") established the panel on August 29, 2003 (WT/DS291).

In the meantime, the European Parliament approved legislation on food labeling and traceability on July 2, 2003. In response to a question from the press, the Department of State explained the U.S. position on the new legislation and the broader issue of the moratorium as set forth below, available at *www.state.gov/r/pa/prs/ps/2003/22236.htm*.

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The European Parliament's approval of legislation on food labeling and traceability is part of a process of establishing regulations on biotech products. It does not lift the European Union's illegal moratorium on biotech products.

The United States believes that the objective of any regulation should be to protect consumer health and safety while maximizing informed consumer choice. We agree that consumers should have information about the products they purchase so they can make choices. That is what the United States has done for years, but this information should be non-prejudicial in presentation and feasible for producers to provide. We are concerned that the regulations that the European Parliament approved do not meet this standard. The European Union's practice may lead other countries to block trade by imposing similar needlessly burdensome labeling, traceability and documentation requirements, and thus could prompt a host of new, non-tariff barriers just when we are trying to stimulate global trade. We have conveyed our concerns to the European Union and hope they will modify their proposal before adoption. If and when these regulations are adopted, we will examine them in light of the European Union's World Trade Organization obligations.

The European Union's five year moratorium on new biotech approvals is not based on scientific analysis, it blocks consumer choice, and jeopardizes the benefits biotechnology offers to the environment and to feeding the world's hungry. It conflicts with the analysis of six national academies of science, including the French Academy of Science and Medicine; and over 3,200 scientists, including 20 Nobel Laureates. We urge the European Union to lift this moratorium immediately.

b. EU restrictions on registration of geographical indicators

On April 4, 2003, the Office of the United States Trade Representative announced that it was adding a new claim to an ongoing WTO dispute with the European Union regarding restrictions on registration of geographic indicators. The United States requested the establishment of a panel on August 18, and a panel was established on October 2, 2003.

The full text of a press release of the same date, excerpted below, is available at *www.ustr.gov/releases/2003/04/03-25.htm. See also* 2003 Annual Report of the President, at *http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Trade_Policy_Agenda/Section_Index.html* at 34.

The Office of the United States Trade Representative today announced that it has added a new claim to an ongoing World Trade Organization (WTO) dispute with the European Union regarding the EU's failure to protect U.S. trademarked geographic names. Such trademarked names are important in signifying the quality and origin of products such as Idaho Potatoes and Florida Oranges. The dispute is currently in the consultation phase, the initial required step in WTO disputes.

The United States originally requested consultations regarding the EU's denial of national treatment and denial of appropriate protection for trademarks under trade rules contained in the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS). The purpose of the new consultation request is to

add an additional claim to the existing WTO case asserting that the EU regulation violates national treatment and most favored nation treatment trade rules contained in another agreement, the General Agreement on Tariffs and Trade (GATT).

The EU does not allow the geographical indications of other Members to be registered to obtain protection unless the other Member provides the same TRIPS-plus protection as the EU. Such "reciprocity" provisions are inconsistent with national treatment and most favored nation obligations under both trade agreements (TRIPS and GATT).

By not allowing the names of food products from the United States or other Members of the WTO to be registered—absent reciprocity, the EU regulation treats imported products in a less favorable manner than EU products and does not grant the advantages that EU products receive to the products of non-EU Members. For example, the EU regulation provides government monitoring and enforcement of European geographical indications, but does not provide the same benefits to non-EU geographical indications.

This is of particular concern to the United States and other WTO Members as the EU is currently pressing for additional protection for EU geographical indications in the Doha Development Agenda while at the same time failing to meet its existing WTO obligations to protect the geographical indications of other WTO Members under its regulation. The United States, Australia, New Zealand, Canada, Chile and a coalition of other WTO Members sponsored a paper in the WTO outlining why the existing TRIPS Agreement provides sufficient protection for the geographical indications of all WTO Members thus making the EU proposal both unnecessary and prejudicial to Members' existing rights under the Agreement.

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c. Japanese import restrictions on U.S. apples

On July 15, 2003, the Office of the U.S. Trade Representative announced a report of a WTO Panel finding that Japanese

restrictions on imports of apples from the United States are not justified and violate Japan's WTO obligations. *See* USTR announcement at *www.ustr.gov/releases/2003/07/03-45.pdf.* The Appellate Body upheld the panel findings in a report of November 26, 2003, and the DSB adopted the reports on December 10, 2003. United States—Measures Affecting the Importation of Apples (DS245), WT/DS245/9. *See www.wto.org/english/news_e/news03_e/dsb_10dec03_e.htm.*

The 2003 Annual Report of the President describes the case as excerpted below.

On March 1, 2002, the United States requested consultations with Japan regarding Japan's measures restricting the importation of U.S. apples in connection with fire blight or the fire blight disease-causing organism, Erwinia amylovora. These restrictions include: the prohibition of imported apples from U.S. states other than Washington or Oregon; the prohibition of imported apples from orchards in which any fire blight is detected; the prohibition of imported apples from any orchard (whether or not it is free of fire blight) should fire blight be detected within a 500 meter buffer zone surrounding such orchard; the requirement that export orchards be inspected three times yearly (at blossom, fruitlet, and harvest stages) for the presence of fire blight for purposes of applying the above-mentioned prohibitions; a post-harvest surface treatment of exported apples with chlorine; production requirements, such as chlorine treatment of containers for harvesting and chlorine treatment of the packing line; and the post-harvest separation of apples for export to Japan from those apples for other destinations. Consultations were held on April 18, 2002, and a panel was established on June 3, 2002. . . .

In its report issued on July 15, 2003, the panel agreed with the United States that Japan's fire blight measures on U.S. apples are inconsistent with Japan's WTO obligations. In particular, the panel found that: (1) Japan's measures are maintained without sufficient scientific evidence, inconsistent with Article 2.2 of the SPS Agreement; (2) Japan's measures cannot be provisionally maintained under Article 5.7 of the SPS Agreement (an exception

to the obligation under Article 2.2); and (3) Japan's measures are not based on a risk assessment and so are inconsistent with Article 5.1 of the SPS Agreement. Japan appealed the panel's report on August 28, 2003.

The Appellate Body issued its report on November 26, 2003, upholding panel findings that Japan's phytosanitary measures on U.S. apples, allegedly to protect against introduction of the plant disease fire blight, are inconsistent with Japan's WTO obligations. In particular, the Appellate Body upheld the three panel findings, detailed above, that Japan had appealed. The DSB adopted the panel and Appellate Body reports on December 10, 2003.

d. Mexican antidumping measures on beef and rice

In June 2003 the United States requested consultations on Mexico's antidumping measures on beef and rice and other violations. On November 7, 2003, the Dispute Settlement Body established a panel on the measure on rice (WT/DS295). At the end of 2003 consultations on the measure on beef were ongoing.

The 2003 Annual Report of the President describes the case as set forth below. *See http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Trade_Policy_Agenda/Section_Index.html* at 36.

On June 16, 2003, the United States requested consultations on Mexico's antidumping measures on rice and beef, as well as certain provisions of Mexico's Foreign Trade Act and its Federal Code of Civil Procedure. The specific U.S. concerns include: (1) Mexico's injury investigations in the two antidumping determinations; (2) Mexico's failure to terminate the rice investigation after a negative preliminary injury determination and its decision to include firms that were not dumping in the coverage of the antidumping measures; (3) Mexico's improper application of the "facts available"; (4) Mexico's improper calculation of the antidumping rate applied to non-investigated exporters; (5) Mexico's improper

limitation of the antidumping rates it calculated in the beef investigation; (6) Mexico's refusal to conduct reviews of exporters' antidumping rates; and (7) Mexico's insufficient public determinations. The United States also challenged five provisions of Mexico's Foreign Trade Act. The United States alleges violations of various provisions of the Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures, and the GATT 1994. Consultations were held July 31 and August 1, 2003. The United States requested the establishment of a panel on the measure on rice on September 19, 2003, and the DSB established a panel on November 7, 2003. Consultations on the measure on beef continue.

2. WTO Cases Against the United States

a. U.S. Continued Dumping and Subsidy Offset Act of 2000

On January 16, 2003, the WTO Appellate Body found that the U.S. Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), Pub. L. No. 106–387, 114 Stat. 1549, 19 U.S.C. § 1675c, is inconsistent with the WTO Agreement on Implementation of Article VI of the GATT and the Agreement on Subsidies and Countervailing Measures. CDSOA provides:

> (a) In general. Duties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures. Such distribution shall be known as the "continued dumping and subsidy offset".

The term "affected domestic producer" is defined as any operating petitioner or interested party in a case in which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered. The Dispute Settlement Body adopted the report on January 27, 2003. United States—Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) (DS217/234). *See www.wto.org/*

english/news_e/news03_e/dsb_27jan03_e.htm. The report is available at *www.wto.org/English/tratop_e/dispu_e/dispu_status_e.htm#2001*.

The 2003 Annual Report of the President described the current status of the case as excerpted below. See *http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Trade_Policy_Agenda/Section_Index.html* at 43.

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The panel [consolidating complaints from eleven parties] issued its report on September 2, 2002, finding against the United States on three of the five principal claims brought by the complaining parties. Specifically, the panel found that the CDSOA constitutes a specific action against dumping and subsidies and therefore is inconsistent with the WTO Antidumping and SCM Agreements as well as GATT Article VI. The panel also found that the CDSOA distorts the standing determination conducted by the Commerce Department and therefore is inconsistent with the standing provisions in the Antidumping and SCM Agreements. The United States prevailed against the complainants' claims under the Antidumping and SCM Agreements that the CDSOA distorts the Commerce Department's consideration of price undertakings (agreements to settle AD/CVD investigations). The panel also rejected Mexico's actionable subsidy claim brought under the SCM Agreement. Finally, the panel rejected the complainants' claims under Article X:3 of the GATT, Article 15 of the Antidumping Agreement, and Articles 4.10 and 7.9 of the SCM Agreement.

The United States appealed the panel's adverse findings on October 1, 2002. The Appellate Body issued its report on January 16, 2003, upholding the panel's finding that the CDSOA is an impermissible action against dumping and subsidies, but reversing the panel's finding on standing. The DSB adopted the panel and Appellate Body reports on January 27, 2003. At the meeting, the United States stated its intention to implement the DSB recommendations and rulings. On March 14, 2003, the complaining parties requested arbitration to determine a reasonable

period of time for U.S. implementation. On June 13, 2003, the arbitrator determined that this period would end on December 27, 2003. On June 19, 2003, legislation to bring the Continued Dumping and Subsidy Offset Act into conformity with U.S. obligations under the AD Agreement, the SCM Agreement and the GATT of 1994 was introduced in the U.S. Senate (S. 1299).

b. U.S. safeguard measures for steel imports

On March 5, 2002, President George W. Bush issued Proclamation 7529, implementing safeguard measures with regard to imports of certain steel products pursuant to section 203 of the Trade Act of 1974, as amended, 19 U.S.C. § 2253. 67 Fed. Reg. 10,553 (March 7, 2002). As required by section 202(b) of the Trade Act, the International Trade Commission ("ITC") had determined (or for some products had been equally divided as to the determination) that such products were "being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat of serious injury, to the domestic industries producing like or directly competitive articles. . . ." In response to complaints brought by the European Commission and others, on June 3, 2002, the WTO Dispute Settlement Body established a panel to examine the U.S. safeguard measures. *See Digest 2002* at 693–697.

The panel issued its report on July 11, 2003, which the Appellate Body upheld in a report of November 10, 2003. The DSB adopted the reports on December 10, 2003. United States—Definitive Safeguard Measures on Imports of Certain Steel Products; *see http://www.wto.org/english/news_e/news03_e/dsb_10dec03_e.htm*.

Excerpts below from the 2003 Annual Report of the President describe the 2003 developments. *See http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Trade_Policy_Agenda/Section_Index.html* at 45.

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In a report issued on July 11, 2003, the Panel found that each of the ITC determinations was inconsistent with WTO rules because the ITC did not properly establish that imports caused injury to domestic steel producers, or that any injury was the result of "unforeseen developments." Having found against the ITC determination, the Panel did not address the Administration's decisions on what safeguard measures to apply in response to the ITC determinations.

The United States appealed the report on August 11, 2003. The Appellate Body issued its report on November 10, 2003, and upheld the Panel's ultimate conclusion that each of the ten U.S. safeguard measures imposed is inconsistent with WTO rules. Specifically, it found with regard to all of the safeguard measures that the United States: (1) failed to demonstrate that the injurious imports were the result of unforeseen developments and (2) failed to establish that, after exclusion of our FTA partners, imports from the remaining countries by themselves caused serious injury to the relevant U.S. industries. The Appellate Body also upheld the panel's finding that the ITC failed to provide an adequate explanation of its finding that imports of certain carbon flat-rolled steel, stainless steel rod, and hot-rolled bar increased. In light of these findings, the Appellate Body did not address the U.S. appeal regarding the panel's conclusions on causation. The DSB adopted the panel and Appellate Body reports on December 10, 2003.

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On December 4, 2003, President George W. Bush issued Proclamation 7741 terminating certain safeguard measures implemented in Proclamation 7529. 68 Fed. Reg. 68,483 (Dec. 8, 2003). Specific products had already been excluded from the safeguard measures during 2002 and 2003. *See* 67 Fed. Reg. 16,484 (April 5, 2002), 67 Fed. Reg. 46,221 (July 12, 2002), 67 Fed. Reg. 56,182 (Aug. 30, 2002), and 68 Fed. Reg. 15,494 (March 31, 2003).

A fact sheet released December 4 by the U.S. Trade Representative described the basis of the President's action as follows:

- Prior to the time President Bush imposed temporary safeguard measures, steel prices were at 20-year lows, and the U.S. International Trade Commission (ITC) found that a surge in imports to the U.S. market was causing serious injury to our domestic steel industry.
- Since then, steel prices have stabilized, imports are at their lowest level in years, and U.S. steel exports are at record levels.

The President's determination was based on significant improvements in the U.S. steel industry and other changed circumstances since last year, including:

- Industry consolidation and restructuring that have reduced production costs and increased productivity;
- New labor agreements that increase flexibility, boost productivity, protect retiree welfare, and empower steel workers; and
- An improving economy that will create new opportunities for America's steel industry.

The fact sheet is available at *http://www.ustr.gov/assets/Trade_Sectors/Manufacturing/Steel/asset_upload_file135_5253.pdf.*

Excerpts below from the December 4 proclamation provide the legal basis for the termination of the safeguard measures and the continuation of steel import licensing.

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* * * *

5. Section 204(b)(1)(A) of the Trade Act (19 U.S.C. 2254(b)(1)(A)) authorizes the President to reduce, modify, or terminate a safeguard action if, after taking into account any report or advice submitted by the ITC and after seeking the advice of the Secretary of Commerce and the Secretary of Labor, he determines that changed circumstances warrant such reduction, modification, or termination. The President's determination may be made, *inter alia*, on the basis that the effectiveness of the action taken under section 203 has been impaired by changed economic circumstances.

6. In view of the information provided in the ITC report, and having sought advice from the Secretary of Commerce and the Secretary of Labor, I determine that the effectiveness of the actions taken under section 203(a)(3)(A) and (B) of the Trade Act with respect to imports of certain steel products and the exclusions from and technical corrections to the coverage of Proclamation 7529 has been impaired by changed economic circumstances. Accordingly, I have determined, pursuant to section 204(b)(1)(A)(ii), that termination of the actions taken under section 203(a)(3)(A) and (B) set forth in Proclamation 7529 taken with respect to certain steel imports is warranted. The action taken under section 203(a)(3)(I) set forth in the Memorandum of March 5, 2002, [67 Fed. Reg. 10,593 (Mar. 7, 2002) implemented by regulations published on December 31, 2002, 67 Fed. Reg. 79,845 (Dec. 31, 2002)] requiring the licensing and monitoring of imports of certain steel products remains in effect and shall not terminate until the earlier of March 21, 2005, or such time as the Secretary of Commerce establishes a replacement program.

c. Foreign Sales Corporation tax provisions

In 2002 the WTO Dispute Settlement Body adopted a final report finding that the extraterritorial income exclusion provisions of U.S. tax law were inconsistent with U.S. obligations under the WTO. The European Union had originally challenged the Foreign Sales Corporation ("FSC") provisions in 1997. Following panel and Appellate Body reports adopted in March and April 2000, the United States enacted the Extraterritorial Income Exclusion Act of 2000 ("the ETI Act"), which repealed and replaced the FSC provisions. The DSB adopted panel and Appellate body reports finding that the ETI also violated U.S. WTO obligations. In August 2002 an arbitrator approved countermeasures sought by the European Union. *See Digest 2001* at 653–663*; Digest 2002* at 677–691.

On May 7, 2003, the DSB authorized imposition of countermeasures up to $4.043 billion. The full text of the

report, United States—Foreign Sales Corporation ("FSC") tax provisions (DS108) is available at *www.wto.org/English/tratop_e/dispu_e/dispu_status_e.htm#1998*.

The 2003 USTR Annual Report provides the history of the case and describes developments in 2003 as follows:

> Following the adoption of the panel and Appellate Body reports, legislation was introduced in the U.S. House of Representatives to repeal the ETI Act. After holding hearings, both the House Ways and Means committee and the Senate Finance Committee reported out bills.
>
> On May 7, 2003, the DSB authorized the European Communities ("EC") to impose countermeasures up to a level of $4.043 billion in the form of an additional 100 percent ad valorem duty on various products imported from the United States. On December 8, 2003, the Council of the European Union adopted council Regulation (EC) No. 2193/2003, which provides for the graduated imposition of countermeasures beginning on March 1, 2004.

The case description is available at *www.ustr.gov/reports/2004Annual/II-wto.pdf* at 36.

d. Copyright

The Fairness in Music Licensing Act, section 110(5) of the U.S. Copyright Act, permits certain retail establishments to play radio or television music without paying royalties to songwriters and music publishers. In 1999 a panel was established in response to a claim by the European Union that § 110(5) results in a violation of U.S. TRIPS obligations. On July 27, 2000, the DSB adopted a panel report finding that one of the two exemptions provided for in that section was inconsistent with U.S. WTO obligations. United States—Section 110(5) of the Copyright Act (DS160). The United States informed the DSB of its intention to respect its WTO obligations. To date the statute has not been amended.

On June 23, 2003, the United States and the EU reached agreement on a temporary arrangement regarding the dispute.

The history of the dispute following the DSB decision and current status is provided in excerpts below from the 2003 Annual Report of the President, available at *http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Trade_Policy_Agenda/Section_Index.html* at 38–39.

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On October 23, 2000, the European Union requested arbitration to determine the period of time to be given the United States to implement the panel's recommendation. By mutual agreement of the parties, Mr. J. Lacarte-Muró was appointed to serve as arbitrator. He determined that the deadline for implementation should be July 27, 2001. On July 24, 2001, the DSB approved a U.S. proposal to extend the deadline until the earlier of the end of the then-current session of the U.S. Congress or December 31, 2001.

On July 23, 2001, the United States and the European Union requested arbitration to determine the level of nullification or impairment of benefits to the European Union as a result of section 110(5)(B). In a decision circulated to WTO Members on November 9, 2001, the arbitrators determined that the value of the benefits lost to the European Union in this case is $1.1 million per year. On January 7, 2002, the European Union sought authorization from the DSB to suspend obligations vis-à-vis the United States. The United States objected to the details of the EU request, thereby causing the matter to be referred to arbitration. However, because the United States and the European Union have been engaged in discussions to find a mutually acceptable resolution of the dispute, the arbitrators suspended the proceeding pursuant to a joint request by the parties filed on February 26, 2002.

On June 23, 2003, the United States and the EU notified to the WTO a mutually satisfactory temporary arrangement regarding the dispute. Pursuant to this arrangement, the United States

made a lump-sum payment of $3.3 million to the EU, to a fund established to finance activities of general interest to music copyright holders, in particular awareness-raising campaigns at the national and international level and activities to combat piracy in the digital network. The arrangement covers the three-year period ending December 21, 2004.

e. Cotton subsidies

On May 18, 2003, the DSB established a panel in response to a request by Brazil. As described in the USTR Annual Report of 2003,

> Brazil's panel request pertains to "prohibited and actionable subsidies provided to US producers, users and/or exporters of upland cotton, as well as legislation, regulations and statutory instruments and amendments thereto providing such subsidies (including export credit guarantees), grants, and any other assistance to the US producers, users and exporters of upland cotton" [footnote omitted].

In requesting consultations in 2002, Brazil claimed that the alleged subsidies and measures were inconsistent with U.S. commitments and obligations under the Agreement on Subsidies and Countervailing Measures, the Agreement on Agriculture, and the General Agreement on Tariffs and Trade 1994.

The summary of the case is available at *http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Trade_Policy_Agenda/Section_Index.html* at 47.

f. Gambling and betting services

On July 21, 2003, the DSB established a panel in response to a request from Antigua and Barbuda regarding its claim that "U.S. federal, state and territorial laws on gambling violate U.S. specific commitments under the General Agreement on

Trade in Services ('GATS'), as well as Articles VI, XI, XVI, and XVII of the GATS, to the extent that such laws prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States."

The summary of the case is available in the 2003 Annual Report of the President, available at *http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Trade_Policy_Agenda/Section_Index.html* at 48.

3. U.S. Proposals Submitted to WTO

a. Transparency

On February 10, 2003, the United States proposed amendments to the Dispute Settlement Understanding or decisions of the Dispute Settlement Body to put into effect its previous proposals on transparency. *See also Digest 2002* at 711–715.

The submission, entitled "Further Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency" (WT/DSB/M/2), is available at *http://docsonline.wto.org.*

The United States has made proposals intended to help achieve a more open and transparent dispute settlement process (TN/DS/W/13). The United States is providing the following amendments to the Dispute Settlement Understanding or decisions of the Dispute Settlement Body to put into effect each element of those proposals.[1]

[1] Additional conforming amendments, such as corrections to Article references, may be needed or appropriate once the substantive text has been agreed upon.

1) OPEN MEETINGS

U.S. proposal:

The DSU should provide that the public may observe all substantive panel, Appellate Body and arbitration[2] *meetings with the parties except those portions dealing with confidential information (such as business confidential information or law enforcement methods). The DSU could provide a basic set of procedures for this purpose with some flexibility for the relevant body to refine these in light of the particular circumstances of a specific proceeding. For example, the procedures could provide a number of options for allowing the public to observe the meetings, such as broadcasting meetings to special viewing facilities.*

To reflect the proposal in the text of the DSU:

a) Article 18 of the DSU is amended by inserting the following new paragraph 3:

> "3. All substantive meetings with the parties of a panel, the Appellate Body, or an arbitrator[3] shall be open for the public to observe,[4] except for those portions dealing with confidential information.[5]"

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[2] This would include arbitration under Articles 21.3(c), 22.6, and 25 of the DSU.

[3] As used in this Article, the expression "arbitrator" means any arbitrator under paragraph 3(c) of Article 21, paragraph 6 of Article 22, or Article 25. [NOTE: this list is intended to include all arbitration proceedings under the DSU and the references would need to be updated to reflect any amendments to the DSU.]

[4] The expression "observe" does not require physical presence in the meeting.

[5] For purposes of this Article, the term "confidential information" shall mean certain factual information designated as such by the party or third party to the dispute at the time that party or third party submitted the information.

b) Appendix 3 is amended by deleting paragraph 2.

Conforming changes to reflect the inclusion of arbitrators in Article 18:
c) Article 18 is amended by deleting in the title "with the Panel or Appellate Body".
d) Paragraph 1 of Article 18 is amended by inserting ", arbitrator," after "panel" both places that it occurs.

2) TIMELY ACCESS TO SUBMISSIONS

U.S. proposal:

The DSU should provide that parties' submissions and written versions of oral statements in panel, Appellate Body, or arbitration proceedings are public, except those portions dealing with confidential information.

To help facilitate public access to these documents, the Secretariat should maintain them in a central location that would be responsible for making these documents available to the public.

To reflect the proposal:

e) Paragraph 2 of Article 18 is amended to read as follows:

"2. A Member's documents[6] provided to a panel, the Appellate Body, or an arbitrator shall be public, except for confidential information. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. A Member shall not disclose another Member's confidential information. The Member submitting the confidential information shall provide within 15 days of the request

[6] The term "documents" does not include documents concerning an interim report or that are purely administrative in nature.

of another Member a non-confidential summary of the information."

f) Appendix 3 is amended by deleting paragraph 3 and renumbering the subsequent paragraphs accordingly.
g) A decision by the DSB:

"The Dispute Settlement Body directs the Secretariat to maintain the documents referenced in paragraph 2 of Article 18 in a central location and make these documents available to the public, other than confidential information."

3) TIMELY ACCESS TO FINAL REPORTS

U.S. proposal:

The WTO should make a final panel report available to WTO Members and the public once it is issued to the parties, although only circulation would trigger the relevant DSU deadlines.

Text to reflect the proposal:

h) A decision by the DSB:

"A final report issued by a panel to the parties shall be an unrestricted document, except for any confidential information (as defined in Article 18). Any interim report considered final by operation of the last sentence of paragraph 2 of Article 15 shall be unrestricted when considered final.

"This decision is without prejudice to the practice concerning the date of circulation of the report.[7]"

[7] That practice was established on a trial basis and under that practice a document is deemed to be circulated on the "date printed on the WTO document to be circulated with the assurance of the Secretariat that the date printed on the document was the date on which this document was effectively put in the pigeon holes of delegations in all three working languages."

4) AMICUS CURIAE SUBMISSIONS

U.S. proposal:

In light of the experience to date with amicus curiae submissions to panels and the Appellate Body, Members may wish to consider whether it would be helpful to propose guideline procedures for handling amicus curiae submissions to address those procedural concerns that have been raised by Members, panels and the Appellate Body.

The United States notes with interest the procedures proposed by the European Communities for handling *amicus curiae* submissions (TN/DS/W/1) and looks forward to working with the European Communities and other Members on this issue. The United States does not believe that an amendment to the Dispute Settlement Understanding is necessary for this purpose.

b. Flexibility and member control

On March 11, 2003, the United States and Chile provided to the special session of the Dispute Settlement Body proposed amendments to the Dispute Settlement Understanding on improving flexibility and member control in WTO dispute settlement, set forth below.

The proposal, entitled "Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement," TN/DS/W/52 (March 14, 2003), is set forth below and is available through *http://docsonline.wto.org*.

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a) making provision for interim reports at the Appellate Body stage, thus allowing parties to comment to strengthen the final report.

Proposed text:

Paragraph 5 of Article 17 is amended as follows:

> "5. (a) As a general rule, the proceedings shall not exceed ~~60~~ 90 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within ~~60~~ 90 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed ~~90~~ 120 days.
>
> (b) Following the consideration of submissions and oral arguments, the Appellate Body shall issue an interim report to the parties, including both the descriptive sections and the Appellate Body's findings and conclusions. Within a period of time set by the Appellate Body, a party may submit a written request for the Appellate Body to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the Appellate Body shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final report and circulated promptly to the Members. The final Appellate Body report shall include a discussion of the arguments made at the interim review stage."[1]

b) providing a mechanism for parties, after review of the interim report, to delete by mutual agreement findings in the report that are not necessary or helpful to resolving the dispute, thus continuing to allow the parties to retain control over the terms of reference.

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[1] [NOTE TO READERS: this proposed language replicates the language in DSU Article 15.2.]

Proposed text:

Paragraph 7 of Article 12 is amended by inserting after the second sentence the following new sentence:

> "The panel shall not include in the final panel report any finding, or basic rationale behind a finding, that the parties have agreed is not to be included."

Paragraph 13 of Article 17 is amended to read as follows:

> "Where the parties to the dispute have failed to develop a mutually satisfactory solution, the Appellate Body shall submit its findings in the form of a written report to the DSB. In such cases, the report of the Appellate Body shall set out the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.[2] The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel. The Appellate Body shall not include in the final report any finding, or basic rationale behind a finding, that the parties have agreed is not to be included."

c) making provision for some form of "partial adoption" procedure, where the DSB would decline to adopt certain parts of reports while still allowing the parties to secure the DSB recommendations and rulings necessary to help resolve the dispute.

Paragraph 4 of Article 16 is amended to read as follows:

> "4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting[3] unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by

[2] [NOTE TO READERS: the proposed new sentences replicates the language in the first two sentences of DSU Article 12.7.]

[3] [No change proposed to footnote in current DSU.]

consensus not to adopt the report. However, the DSB may by consensus decide not to adopt a finding in the report or the basic rationale behind a finding. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report."

Paragraph 14 of Article 17 is amended as follows:

"14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.[4] However, the DSB may by consensus decide not to adopt a finding in the report or the basic rationale behind a finding. A party to the dispute does not need to accept any finding or basic rationale that the DSB has not adopted. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report."

DSB decision on the procedure for partial adoption:

"A Member proposing that a finding, or basic rationale behind a finding, in a panel or Appellate Body report should not be adopted by the Dispute Settlement Body shall submit the proposal in writing to the Dispute Settlement Body no later than 3 days (or the WTO working day following the 3rd day if the 3rd day is a non-working day for the WTO) after the issuance of the airgram convening the meeting at which the report is proposed to be considered.[5] The

[4] [No change proposed to footnote in current DSU.]

[5] In the case of a panel report, the Member shall submit the proposal no later than 3 days (or the WTO working day following the 3rd day if the 3rd day is a non-working day for the WTO) after the issuance of the airgram

> Member shall specify in the proposal the finding, or the basic rationale, behind a finding at issue and give a brief description of the reason not to adopt."

d) providing the parties a right, by mutual agreement, to suspend panel and Appellate Body procedures to allow time to continue to work on resolving the dispute.

Paragraph 12 of Article 12 is amended as follows:

> "12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. The panel shall suspend its work where the parties so agree. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, ~~paragraph 1 of~~ [6]Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse."

In addition to the amendment under item (a) above, paragraph 5 of Article 17 is amended by adding at the end:

> "(c) The Appellate Body shall suspend its work where the parties so agree. In the event of such a suspension, the time-frames set out in this paragraph, Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended."

e) ensuring that the members of panels have appropriate expertise to appreciate the issues presented in a dispute.

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convening either: (1) the meeting at which the panel report is proposed to be considered if no party has filed a notice of appeal; or (2) the meeting at which the panel report together with the Appellate Body report is proposed to be considered if a party has filed a notice of appeal.

[6] [NOTE TO READERS: proposed deletion of "paragraph 1 of" is to correct an error in the current DSU since Article 20 only has one paragraph.]

Paragraph 2 of Article 8 is amended as follows:

> "2. Panel members should be selected with a view to ensuring the independence of the members, expertise to examine the matter at issue in the dispute, a sufficiently diverse background and a wide spectrum of experience."

[Further elaboration could be developed in discussions with Members.]

f) providing some form of additional guidance to WTO adjudicative bodies concerning i) the nature and scope of the task presented to them (for example when the exercise of judicial economy is most useful) and ii) rules of interpretation of the WTO agreements.

[To be supplied after further discussions with Members.]

4. TRIPS and Public Health

On August 30, 2003, the General Council approved a decision entitled "Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health," WT/L/540. Ambassador Linnet F. Deily, Permanent U.S. Representative to the World Trade Organization and Deputy U.S. Trade Representative, welcomed the action in a statement of the same date, excerpted below.

The full text of Ambassador Deily's statement is available at *www.ustrade-wto.gov/03083101.html*.

We welcome today's decision and are pleased that all the Members of the WTO have come together to resolve this very complex and important issue. Over the past eight months many participants from our government, from other countries, and from the pharmaceutical industry, have worked together to find a constructive balance that ensures access to medicines by those most in need

while not undermining intellectual property rights that foster the research and development necessary to produce life-saving drugs.

Today's decision by the General Council strikes exactly that appropriate balance. The decision will ensure that patent rules do not prevent a country that lacks capacity to produce medicines for itself from obtaining them from abroad. At the same time it will put appropriate safeguards in place to ensure that the solution be used only for its intended purposes.

* * * *

The text of the agreement, available at *www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm*, provided, among other things, for waivers as set forth below in articles 2 and 3. (Footnotes deleted.)

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2. The obligations of an exporting Member under Article 31(f) of the TRIPS Agreement shall be waived with respect to the grant by it of a compulsory licence to the extent necessary for the purposes of production of a pharmaceutical product(s) and its export to an eligible importing Member(s) in accordance with the terms set out below in this paragraph:

(a) the eligible importing Member(s) has made a notification to the Council for TRIPS, that:
   (i) specifies the names and expected quantities of the product(s) needed;
   (ii) confirms that the eligible importing Member in question, other than a least developed country Member, has established that it has insufficient or no manufacturing capacities in the pharmaceutical sector for the product(s) in question in one of the ways set out in the Annex to this Decision; and
   (iii) confirms that, where a pharmaceutical product is patented in its territory, it has granted or intends to grant a compulsory licence in accordance with Article 31 of the TRIPS Agreement and the provisions of this Decision;

(b) the compulsory licence issued by the exporting Member under this Decision shall contain the following conditions:
   (i) only the amount necessary to meet the needs of the eligible importing Member(s) may be manufactured under the licence and the entirety of this production shall be exported to the Member(s) which has notified its needs to the Council for TRIPS;
   (ii) products produced under the licence shall be clearly identified as being produced under the system set out in this Decision through specific labelling or marking. Suppliers should distinguish such products through special packaging and/or special colouring/shaping of the products themselves, provided that such distinction is feasible and does not have a significant impact on price; and
   (iii) before shipment begins, the licensee shall post on a website the following information:
      — the quantities being supplied to each destination as referred to in indent (i) above; and
      — the distinguishing features of the product(s) referred to in indent (ii) above;

(c) the exporting Member shall notify the Council for TRIPS of the grant of the licence, including the conditions attached to it. The information provided shall include the name and address of the licensee, the product(s) for which the licence has been granted, the quantity(ies) for which it has been granted, the country(ies) to which the product(s) is (are) to be supplied and the duration of the licence. The notification shall also indicate the address of the website referred to in subparagraph (b)(iii) above.

Where a compulsory licence is granted by an exporting Member under the system set out in this Decision, adequate remuneration pursuant to Article 31(h) of the TRIPS Agreement shall be paid in that Member taking into account the economic value to the importing Member of the use that has been authorized in the exporting Member. Where a compulsory licence is granted for the same products in the eligible importing Member, the obligation of that Member under Article 31(h) shall be waived in respect of

those products for which remuneration in accordance with the first sentence of this paragraph is paid in the exporting Member.

* * * *

Prior to adopting the Decision, the United States and other members reached several shared understandings regarding the Decision that were recorded in a statement from the General Council Chairperson, available at *www.wto.org/english/news_e/news03_e/trips_stat_28aug03_e.htm.*

. . . Before adopting this Decision, I would like to place on the record this Statement which represents several key shared understandings of Members regarding the Decision to be taken and the way in which it will be interpreted and implemented. I would like to emphasize that this Statement is limited in its implications to paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health.

First, Members recognize that the system that will be established by the Decision should be used in good faith to protect public health and, without prejudice to paragraph 6 of the Decision, not be an instrument to pursue industrial or commercial policy objectives.

Second, Members recognize that the purpose of the Decision would be defeated if products supplied under this Decision are diverted from the markets for which they are intended. Therefore, all reasonable measures should be taken to prevent such diversion in accordance with the relevant paragraphs of the Decision. In this regard, the provisions of paragraph 2(b)(ii) apply not only to formulated pharmaceuticals produced and supplied under the system but also to active ingredients produced and supplied under the system and to finished products produced using such active ingredients. It is the understanding of Members that in general special packaging and/or special colouring or shaping should not have a significant impact on the price of pharmaceuticals.

In the past, companies have developed procedures to prevent diversion of products that are, for example, provided through

donor programmes. "Best practices" guidelines that draw upon the experiences of companies are attached to this statement for illustrative purposes. Members and producers are encouraged to draw from and use these practices, and to share information on their experiences in preventing diversion.

Third, it is important that Members seek to resolve any issues arising from the use and implementation of the Decision expeditiously and amicably:

- To promote transparency and avoid controversy, notifications under paragraph 2(a)(ii) of the Decision would include information on how the Member in question had established, in accordance with the Annex, that it has insufficient or no manufacturing capacities in the pharmaceutical sector.
- In accordance with the normal practice of the TRIPS Council, notifications made under the system shall be brought to the attention of its next meeting.
- Any Member may bring any matter related to the interpretation or implementation of the Decision, including issues related to diversion, to the TRIPS Council for expeditious review, with a view to taking appropriate action.
- If any Member has concerns that the terms of the Decision have not been fully complied with, the Member may also utilise the good offices of the Director General or Chair of the TRIPS Council, with a view to finding a mutually acceptable solution.

Fourth, all information gathered on the implementation of the Decision shall be brought to the attention of the TRIPS Council in its annual review as set out in paragraph 8 of the Decision.

In addition, as stated in footnote 3 to paragraph 1(b) of the Decision, the following Members have agreed to opt out of using the system as importers: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom and United States of America.

Until their accession to the European Union, Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia agree that they would only use the system as importers in situations of national emergency or other circumstances of extreme urgency. These countries further agree that upon their accession to the European Union, they will opt out of using the system as importers.

As we have heard today, and as the Secretariat has been informed in certain communications, some other Members have agreed that they would only use the system as importers in situations of national emergency or other circumstances of extreme urgency: Hong Kong China, Israel, Korea, Kuwait, Macao China, Mexico, Qatar, Singapore, Chinese Taipei, Turkey, United Arab Emirates.

Attachment

"Best practices" guidelines

Companies have often used special labelling, colouring, shaping, sizing, etc. to differentiate products supplied through donor or discounted pricing programmes from products supplied to other markets. Examples of such measures include the following:

- Bristol Myers Squibb used different markings/imprints on capsules supplied to sub Saharan Africa.
- Novartis has used different trademark names, one (Riamet®) for an anti-malarial drug provided to developed countries, the other (Coartem®) for the same products supplied to developing countries. Novartis further differentiated the products through distinctive packaging.
- GlaxoSmithKline (GSK) used different outer packaging for its HIV/AIDS medications Combivir, Epivir and Trizivir supplied to developing countries. GSK further differentiated the products by embossing the tablets with a different number than tablets supplied to developed countries, and plans to further differentiate the products by using different colours.

- Merck differentiated its HIV/AIDS antiretroviral medicine CRIXIVAN through special packaging and labelling, i.e., gold-ink printing on the capsule, dark green bottle cap and a bottle label with a light-green background.
- Pfizer used different colouring and shaping for Diflucan pills supplied to South Africa.

Producers have further minimized diversion by entering into contractual arrangements with importers/distributors to ensure delivery of products to the intended markets.

To help ensure use of the most effective anti-diversion measures, Members may share their experiences and practices in preventing diversion either informally or through the TRIPS Council. It would be beneficial for Members and industry to work together to further refine anti-diversion practices and enhance the sharing of information related to identifying, remedying or preventing specific occurrences of diversion.

D. OTHER TRADE AGREEMENTS

1. Free Trade Agreements with Chile and Singapore

On September 3, 2003, the United States-Chile Free Trade Agreement Implementation Act (Pub. L. No. 108–77, 117 Stat. 909) and the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. No. 108–78, 117 Stat. 948, both at 19 U.S.C. § 3805 note) were enacted, approving U.S. free trade agreements with Chile and Singapore, respectively. The two agreements were approved pursuant to the Bipartisan Trade Promotion Authority Act of 2002, Pub L. No. 107–210, 116 Stat. 933, 19 U.S.C. § 3801 note. *See Digest 2002* at 719–722.

President George W. Bush issued proclamations on December 30, 2003, implementing the agreements, 40 WEEKLY COMP. PRES. DOC. 1 (Jan. 5, 2004), available at *www.whitehouse.gov/news/releases/2003/12/20031230-2.html* and 40 WEEKLY COMP. PRES. DOC. 3 (Jan. 5, 2004) *www.whitehouse.gov/news/releases/2003/12/20031230-3.html.*

The proclamation implementing the U.S.-Chile Free Trade Agreement is excerpted below. The texts of the agreements with Chile and Singapore are available at *www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html*.

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1. On June 6, 2003, the United States entered into the United States-Chile Free Trade Agreement (USCFTA). The Congress approved the USCFTA in section 101(a) of the United States-Chile Free Trade Agreement Implementation Act (the "USCFTA Act") (Public Law 108–77, 117 Stat. 909) (19 U.S.C. 3805 note).

2. Section 105 of the USCFTA Act authorizes the President to establish or designate within the Department of Commerce an office that shall be responsible for providing administrative assistance to panels established under Chapter 22 of the USCFTA.

3. Section 201 of the USCFTA authorizes the President to proclaim such modifications or continuation of any duty, such continuation of duty-free or excise treatment, or such additional duties, as the President determines to be necessary or appropriate to carry out or apply articles 3.3 (including the schedule of United States duty reductions with respect to originating goods set forth in Annex 3.3 to the USCFTA), 3.7, 3.9, and 3.20(8), (9), (10), and (11) of the USCFTA.

4. Section 202 of the USCFTA Act provides certain rules for determining whether a good is an originating good for the purpose of implementing tariff treatment under the USCFTA. I have decided that it is necessary to include these rules of origin, together with particular rules applicable to certain other goods, in the Harmonized Tariff Schedule of the United States (HTS).

5. Consistent with section 201(a)(2) of the USCFTA Act, Chile is to be removed from the enumeration of designated beneficiary developing countries eligible for the benefits of the Generalized System of Preferences (GSP). Further, consistent with section 604 of the Trade Act of 1974 (the "1974 Act") (19 U.S.C. 2483), as amended, I have determined that other technical and conforming changes to the HTS are necessary to reflect that Chile is no longer eligible to receive benefits of the GSP.

6. Section 208 of the USCFTA Act authorizes the President to direct the Secretary of the Treasury to take certain actions related to verifications conducted consistent with Article 3.21 of the USCFTA.

7. Subtitle B of title III of the USCFTA Act authorizes the President to take certain actions in response to a request by an interested party for relief from imports that are a cause of serious damage, or actual threat thereof, to a domestic industry producing certain textile or apparel articles.

8. Executive Order 11651 of March 3, 1972, as amended, establishes the Committee for the Implementation of Textile Agreements (CITA) to supervise the implementation of textile trade agreements.

9. Section 604 of the 1974 Act, as amended, authorizes the President to embody in the HTS the substance of relevant provisions of that Act, or other acts affecting import treatment, and of actions taken thereunder, including the removal, modifica-tion, continuance, or imposition of any rate of duty or other import restriction.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, acting under the authority vested in me by the Constitution and the laws of the United States of America, including but not limited to sections 105, 201, 202, and 208 of the USCFTA Act, section 604 of the 1974 Act, and section 301 of title 3, United States Code, do proclaim that:

(1) In order to provide generally for the preferential tariff treatment being accorded under the USCFTA, to set forth rules for determining whether goods imported into the customs territory of the United States are eligible for preferential tariff treatment under the USCFTA, to provide certain other treatment to originating goods for the purposes of the USCFTA, to provide tariff-rate quotas with respect to certain originating goods, to reflect Chile's removal from the enumeration of designated beneficiary developing countries for purposes of the GSP, and to make technical and conforming changes in the general notes to the HTS, the HTS is modified as set forth in Annex I of Publication 3652 of the United States International Trade

Commission, entitled Modifications of the Harmonized Tariff Schedule of the United States Implementing the United States-Chile Free Trade Agreement (Publication 3652), which is incorporated by reference into this proclamation.

(2) In order to implement the initial stage of duty elimination provided for in the USCFTA, and to provide for future staged reductions in duties for products of Chile for purposes of the USCFTA, the HTS is modified as provided in Annex II of Publication 3652, effective on the dates specified in the relevant sections of such publication and on any subsequent dates set forth for such duty reductions in that publication.

* * * *

GEORGE W. BUSH

2. New Free Trade Agreement ("FTA") Negotiations

a. Negotiations commenced

During 2003 negotiations on free trade agreements were launched with Morocco and with the Southern Africa Customs Union ("SACU"), both notified to Congress in 2002. Negotiations with Morocco were announced on January 21, 2003, *see www.ustr.gov/Document_Library/Letters_to_Congress/2003/Section_Index.html*. Negotiations with SACU, composed of Botswana, Lesotho, Namibia, South Africa and Swaziland, began June 2, 2003. This is the first U.S. FTA in sub-Saharan Africa and the first time the SACU nations have jointly negotiated such an agreement. *See www.ustr.gov/Trade_Agreements/Bilateral/Southern_Africa_FTA/Fact_Sheets/Section_Index.html.*

b. Future negotiations notified to Congress

On August 4, 2003, U.S. Trade Representative Robert B. Zoellick notified Congress, pursuant to the Bipartisan Trade

Promotion Authority Act of 2002, Pub L. No. 107–210, 116 Stat. 933, of the Administration's intent to initiate negotiations for a free trade agreement with Bahrain in January 2004. On the same date, he notified the Administration's intent to initiate negotiations for an FTA with the Dominican Republic, and to "seek to integrate the Dominican Republic into the agreement that we are currently negotiating with Central America." For letters to Congress for both countries *see www.ustr.gov/Document_Library/Letters_to_Congress/2003/Section_Index.html.*

On November 18, 2003, Ambassador Zoellick sent two letters to Congress, formally notifying it, on behalf of President Bush, of the Administration's intent to initiate negotiations for an FTA with the Republic of Panama and an FTA with Colombia, Peru, Ecuador, and Bolivia, Andean Trade Preference Act beneficiary countries. Negotiations were expected to begin during the second quarter of 2004.

As to the latter FTA, the press release indicated that the administration planned to negotiate initially with Colombia and Peru and "would work intensively with Ecuador and Bolivia with a view to including them in the agreement as well."

The press releases for Panama and the Andean countries are available at *www.ustr.gov/Document_Library/Press_Releases/2003/November/Section_Index.html.* The letters of intent to Congress are available at *www.ustr.gov/Document_Library/Letters_to_Congress/2003/Section_Index.html.*

3. Central America Free Trade Agreement

On December 17, 2003, the United States, El Salvador, Guatemala, Honduras, and Nicaragua concluded negotiation of the U.S.-Central America Free Trade Agreement ("CAFTA"). Negotiations commenced in January 2003 with these countries and Costa Rica. In announcing the conclusion of the negotiations, Ambassador Robert Zoellick, U.S. Trade Representative, indicated that Costa Rica was undertaking further

consultations at home before moving forward to finalize its participation in CAFTA.

As noted above, the administration anticipated that the Dominican Republic would be integrated into the CAFTA, with negotiations anticipated to begin in January. *See www.ustr.gov/Document_Library/Press_Releases/2003/January/Section_Index.html.*

The text of the agreement and a detailed fact sheet prepared by the Office of the U.S. Trade Representative are available through links from *www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html.*

The full text of a December 17 press release announcing the completion of the negotiations is available through the same link and is excerpted below.

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* * * *

The culmination of a year of intense negotiations, CAFTA fulfills a key U.S. objective of opening markets with free trade partners, while continuing to push trade liberalization hemispherically through the Free Trade Area of the Americas (FTAA) and globally in the Doha talks in the World Trade Organization (WTO).

* * * *

The draft text of the agreement will be released in January. Under the Trade Act of 2002, the Administration must notify Congress at least 90 days before signing the agreement. The Administration expects to notify Congress early next year of its intent to sign the CAFTA. It will also continue to consult with Congress on the agreement to prepare the way for eventual consideration.

Summary:

New Opportunities for U.S. Workers and Manufacturers: More than 80 percent of U.S. exports of consumer and industrial goods will become duty-free in Central America immediately, with remaining tariffs phased out over 10 years. Key U.S. export sectors will benefit, such as information technology products, agricultural

and construction equipment, paper products, chemicals, and medical and scientific equipment.

Expanded Markets for U.S. Farmers and Ranchers: More than half of current U.S. farm exports to Central America will become duty-free immediately, including high quality cuts of beef, cotton, wheat, soybeans, key fruits and vegetables, processed food products, and wine, among others. Tariffs on most remaining U.S. farm products will be phased out within 15 years. U.S. farm products that will benefit from improved market access include pork, beef, poultry, rice, fruits and vegetables, corn, processed products and dairy products.

Textiles and Apparel: Textiles and apparel will be duty-free and quota-free immediately if they meet the Agreement's rule of origin, promoting new opportunities for U.S. and Central American fiber, yarn, fabric and apparel manufacturing. The agreement's benefits for textiles and apparel will be retroactive to January 1, 2004. An unprecedented provision will give dutyfree benefits to some apparel made in Central America that contains certain fabrics from NAFTA partners Mexico and Canada. This provision encourages integration of the North and Central American textile industries, and is a step to prepare for an increasingly competitive global market.

Access to Services: The Central American countries will accord substantial market access across their entire services regime, offering new access in sectors such as telecommunications, express delivery, computer and related services, tourism, energy, transport, construction and engineering, financial services, insurance, audio/visual and entertainment, professional, environmental, and other sectors. Central American countries have agreed to change "dealer protection regimes" and loosen restrictions that lock U.S. firms into exclusive or inefficient distributor arrangements.

A Trade Agreement for the Digital Age: State-of-the-art protections and non-discriminatory treatment are provided for digital products such as U.S. software, music, text, and videos. Protections for U.S. patents, trademarks and trade secrets are strengthened.

Strong Protections for Worker Rights: Goes beyond Chile and Singapore FTAs to create a three-part strategy on worker

rights that will ensure effective enforcement of domestic labor laws, establish a cooperative program to improve labor laws and enforcement, and build the capacity of Central American nations to monitor and enforce labor rights.

An Innovative Environment Chapter: Goes beyond Chile and Singapore FTAs in seeking to develop a robust public submissions process to ensure that views of civil society are appropriately considered, and for benchmarking of environmental cooperation activities and input from international organizations.

Strong Protections for U.S. Investors: The agreement establishes a secure, predictable legal framework for U.S. investors in Central America.

Open and Fair Government Procurement: Provides groundbreaking anti-corruption measures in government contracting. U.S. firms are guaranteed a fair and transparent process to sell goods and services to a wide range of Central American government entities.

4. Middle East Trade Initiative

On May 9, 2003, President George W. Bush proposed the establishment of a U.S.-Middle East Free Trade Area. A press release of that date set forth the steps to be taken by the United States, as set forth below.

The text of the release is available at *usinfo.state.gov/mena/Archive/2004/Feb/04-660011.html.*

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* * * *

. . . Building on our free trade agreements (FTAs) with Israel and Jordan, the United States will take a series of graduated steps:

- Help reforming countries become members of the World Trade Organization;
- Negotiate Bilateral Investment Treaties and Trade and Investment Framework Agreements (TIFA) with governments determined to improve their trade and investment regimes;

- Complete our negotiations on a free trade agreement with Morocco by the end of this year;
- Continue to pursue a FTA with the reform-focused leadership in Bahrain;
- Launch, in consultation with Congress, new bilateral free trade agreements with governments committed to high standards and comprehensive trade liberalization; and
- Provide assistance to build trade capacity and expansion so countries can benefit from integration into the global trading system.

E. OTHER ISSUES

1. Bilateral Investment Treaties

a. Understanding Concerning Certain U.S. Bilateral Investment Treaties

On September 2, 2003, the United States, the European Commission, and acceding and candidate countries for accession to the European Union signed an Understanding Concerning Certain U.S. Bilateral Investment Treaties ("BITs"), excerpted below. The Czech Republic, Estonia, Latvia, Lithuania, Poland, and the Slovak Republic—which are expected to accede to the EU on May 1, 2004—signed as acceding countries, and Bulgaria and Romania—which are expected to join the EU in 2007—signed as candidate countries. The understanding records the intention of all the participants to seek "compatibility between [the countries'] obligations that arise from membership in the EU, and thereafter under EU law, and their obligations arising from their BITs with the U.S."

(1) Terms of Understanding

As provided in the concluding provisions, the understanding is not an agreement binding under international law, but

rather "constitutes a political arrangement reflecting the Participants' intentions with regard to the matters it addresses." In keeping with those intentions, the United States and its counterparts were engaged in negotiations throughout the remainder of 2003 with the goal of completing the process of amending and interpreting acceding countries' BITs by April 30, 2004, and candidate countries' BITs as soon as possible, "but no later than the date established for accession in their accession agreement with the EU." By the end of 2003, the United States had concluded protocols containing amendments to its bilateral investment treaties with seven of the eight acceding and candidate countries.

The full text of the understanding, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

The United States ("U.S."), the European Commission ("Commission"), and Acceding and Candidate Countries for accession to the European Union ("Acceding Countries" and "Candidate Countries," respectively) identified in Annex A (collectively "the Participants") wish to confirm their intent to support enlargement of the European Union ("EU"), the economic integration of new EU members, and a positive framework for continued U.S. investment in Acceding and Candidate Countries as they move toward full membership in the EU and thereafter.

The Participants recognize that bilateral investment treaties ("BITs") between the U.S. and Acceding and Candidate Countries contribute to investor confidence and encourage U.S. investment in these countries.

The Participants also recognize that U.S. investors will benefit from Acceding and Candidate Countries' accession to the EU and that long-term business relations will be fostered by EU enlargement.

The Participants also acknowledge the importance of granting protection to existing foreign investments when measures at the community level are enacted that might affect the rights of foreign investors.

At the same time, the Participants acknowledge that enlargement of the EU is based on the principle of full acceptance and implementation, upon the Acceding and Candidate Countries' accession, of the *acquis communautaire*, including obligations under Article 307 of the Treaty Establishing the European Community ("EC Treaty").

The Participants further recognize that, consequently, Acceding Countries have committed in Article 6.10 of the Act of Accession, and as a condition for the closure of chapter 26 of the negotiations (external relations), to take steps before accession to eliminate incompatibilities between the *acquis* and their agreements with third countries, and that similar commitments may be undertaken by Candidate Countries.

Therefore, the Participants wish to express their intent to seek compatibility between the Acceding and Candidate Countries' obligations that arise from membership in the EU, and thereafter under EU law, and their obligations arising from their BITs with the U.S.

In furtherance of these objectives:

1. The U.S., the Commission and the Acceding and Candidate Countries have held a series of discussions and meetings since mid-2002;
2. The Commission has identified, to the extent possible, EU measures in certain sectors that raise questions of compatibility with respect to Acceding and Candidate Countries' obligations in U.S. BITs;
3. The U.S. has reviewed these measures, and the Commission's and Acceding and Candidate Countries' assessment of them, and concurs with their conclusion that it would be desirable to take steps in the interest of avoiding incompatibilities with respect to U.S. BITs with Acceding and Candidate Countries; and
4. The Participants have concluded that the possibility exists that decisions that may be taken by the EU in the future may raise both issues relating to the compatibility of EU obligations and U.S. BITs, and questions regarding the protection of existing U.S. investments.

Therefore, the Participants: (a) express their intention to address the matters identified below [capital movements, performance requirements, measures in sensitive sectors or matters, obligations with respect to third parties arising from EU membership, future developments in EU law, Article 48 "European Companies," and protecting existing investments] by relying on interpretations and specific amendments to Acceding and Candidate Countries' BITs with the U.S., including specific sectoral exceptions, as well as consultations where appropriate; (b) intend that making the interpretations and specific amendments outlined in this Understanding will eliminate incompatibilities between obligations of the Acceding and Candidate Countries that arise as a result of membership in the EU and their obligations in their BITs with the U.S.; and (c) undertake the political commitment to make good faith efforts, as necessary, to seek to avoid or to remedy further incompatibilities.

* * * *

Concluding Provisions

1. This Understanding constitutes a political arrangement reflecting the Participants' intentions with regard to the matters it addresses and is not an agreement binding under international law.
2. The Participants acknowledge that certain matters addressed in this Understanding require approval of national legislatures. The Participants will inform one another should difficulties arise in this regard.
3. The Participants will act to complete the steps outlined in this Understanding to amend or interpret Acceding Countries' BITs with the United States as soon as possible, but no later than April 30, 2004, and Candidate Countries' BITs with the United States as soon as possible, but no later than the date established for accession in their accession agreement with the EU.
4. Participants acknowledge that enlargement negotiations may be launched between the EU and future candidates for EU membership that are also Parties to U.S. BITs on

the principle of full acceptance and implementation upon their accession of the acquis communautaire, including obligations under EC Treaty Article 307, and that this Understanding may be useful in eliminating incompatibilities between the obligations of EU membership and obligations under U.S. BITs.

(2) Statement concerning Article 48 of the Treaty Establishing the European Community

Among the reasons the European Commission sought clarification and modification of the non-discrimination commitments of the acceding and candidate countries' BITs with the United States was the operation of Article 48 of the Treaty Establishing the European Community. For that reason, Annex G to the understanding provides an explanation from the European Commission concerning the scope and operation of Article 48, set forth below.

Article 48 reads as follows:

> *"Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.*
>
> *"Companies or firms means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non‹profit‹making."*

1. Article 48 EC is a provision complementing Article 43 EC, which is the basic rule in the chapter defining the right of establishment under the EC Treaty. The latter refers to "nationals of a Member State" only, but Article 48 makes it clear that the

right of establishment is not only accorded to private individuals but also to (all) "companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community."

Subparagraph 2 adds a definition of "companies and firms" as meaning "companies or firms constituted under civil or commercial law, including co-operative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

The provision is important because company law and the law of legal persons had not been harmonised at all in the beginning of the EEC and are still far away from substantial harmonisation. Even mutual recognition of companies in a broader meaning has not been achieved (*cf.* Article 293, third stroke EC). Article 48 expresses therefore a kind of mutual recognition of legal personality under national law for the purpose of exercising the right of establishment.

In addition, companies as defined in Article 48 benefit from the freedom to provide services in the EU by virtue of Article 55 EC, which extends the application of the provisions of Articles 45–48 to services.

2. As is the case for the provision that it complements (Article 43), Article 48 confers individual rights, which are to be protected in courts.[1]

Article 48 does not distinguish between companies or firms according to the nationality of their owner. A company or firm, endowed with legal personality, is treated like a natural person of the Member State under which law it is registered or in which it has its central administration or principal place of business. That means that the provisions of Article 43–47 EC apply fully to such companies or firms, irrespective of the nationality of the owners.

This includes also Article 46 EC, which permits "special treatment for foreign nationals on grounds of public policy,

[1] *Cf.* the recent judgment (5.11.2002) of the ECJ in case C-208/00—Überseeing B.V. ./. NCC Nordic Construction Company.

public security or public health." This provision, which, being a derogation to fundamental freedoms, must be interpreted in a very restrictive way, aims principally at allowing expulsion of natural persons in case of persistent unlawful behaviour, which is not possible with respect to a State's own nationals. It can, however, also be applied to companies and firms and would allow differentiation between them for reasons of and according to foreign ownership (*e.g.*, in the case of a sanctions policy against a foreign country and their nationals, state of war or other public security and policy measures).

3. As Article 48 confers individual rights on companies and firms, any restriction imposed upon them by a Member State in the exercise of their right of free establishment can be challenged in national Courts, which have to grant the necessary protection required by the EC Treaty.

If in such a case a question concerning the interpretation of Articles 43–48 EC occurs, the national Court may, and if it takes a final decision, must, submit this question to the Court of Justice of the European Communities for a preliminary ruling which binds the national court (Article 234, first subparagraph, letter a), second and third subparagraph EC Treaty).

Moreover, a company or firm which considers that its rights under Article 48 have been violated or its right of establishment impeded may address a complaint to the European Commission, which, if it considers the complaint well-founded, may take action against the Member State concerned according to Article 226 EC (infringement procedure). The Court of Justice will decide whether the action is well-founded or not. According to ECJ case law (*see* "Francovich," 19 November 1991, case C-6/90, ECR 1991, page I-5357 and "Brasserie du pêcheur," 5 March 1996, ECR 1996, page I-1029), a company or firm which considers that its rights under Article 48 have been violated by a Member State can bring a compensation claim against that Member State under national law.

4. Article 48 does not prevent the EC legislator to provide for different treatment of third country companies and firms according to their ownership in the pursuit of a common policy or when adopting measures under specific treaty provisions (*e.g.*, Article

57.2 EC). The provision would however not allow the EC legislator to authorise individual Member States to adopt measures which are not consistent with that Article.[2]

b. Additional protocol to investment treaty with Romania

Also on September 22, 2003, the United States signed protocols amending its bilateral investment treaties with five of the eight acceding and candidate countries. The first to be submitted by Secretary of State Colin L. Powell to President George W. Bush was the Additional Protocol between the Government of the United States of America and the Government of Romania to the Treaty Concerning the Reciprocal Encouragement and Protection of Investment of May 28, 1992. On December 9, 2003, President Bush transmitted the protocol to the Senate for advice and consent to ratification. S. Treaty Doc. No. 108–13. *See also* S. Treaty Doc. No. 108–15 (transmitting the protocol with Bulgaria). In his transmittal letter, the President explained that the protocol was the result of the understanding discussed in 1.a., *supra*. He concluded:

> This Additional Protocol preserves the U.S. BIT with Romania, with which the United States has an expanding relationship, and the protections it affords U.S. investors even after Romania joins the EU. Without it, the European Commission would likely require Romania to terminate its U.S. BIT upon accession because of existing and possible future incompatibilities between our current BIT and EU law.

The President's letter also stated that he "expected[ed] to forward to the Senate shortly analogous Additional Protocols

[2] *Cf.* Cases 80 and 81/77—Société Les Commissaires Réunis ./. Receveur des douanes, ECR 1978, p. 927 (concerning a Council act authorizing a Member State to derogate from Article 28 EC, former Article 30 EEC. The Court declared the Council act unlawful).

for Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Poland, and the Slovak Republic."

The accompanying report of Secretary of State Colin Powell submitting the protocol to the President, dated October 31, 2003, explained the role of the understanding and the substantive articles of the protocol with Romania, as excerpted below.

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* * * *

The understanding is designed to preserve our bilateral investment treaties ("BITs") with these countries after their accession to the EU by establishing a framework for avoiding or remedying present and possible future incompatibilities between our BITs with these eight countries and their future obligations of EU membership. In this regard, the understanding expresses the U.S. intent to conclude substantively identical amendments and formal interpretations of the BITs with each of these eight countries.

In addition, the understanding establishes a framework for addressing any future incompatibilities that may arise as European Union authority in the area of investment expands and evolves in the future. It endorses the principle of protecting existing U.S. investments in these countries from any future EU measures that may restrict foreign investment in the EU, and also clarifies certain protections afforded to U.S. investments in individual member states of the EU under the Treaty Establishing the European Community ("EC Treaty").

Finally, the understanding calls for the United States and each BIT partner to interpret, through an exchange of notes, two BIT provisions: (1) the right of each BIT Party to take measures necessary for the protection of its own essential security interests, and (2) the BIT prohibition on performance requirements. Both interpretations were undertaken at the request of the European Commission to confirm the mutual understanding of the United States and Romania in the context of EU enlargement. For example, the interpretation of the BIT provision on essential security interests confirms that, for Romania, these interests may include interests deriving from Romania's membership in the EU. As concerns the

BIT prohibition on performance requirements, many U.S. BITs include a provision explicitly stating that the prohibition on performance requirements does not extend to conditions for the receipt or continued receipt of an advantage. The interpretation relating to performance requirements makes this explicit with respect to the U.S.-Romania BIT. The two interpretations are enclosed for the information of the Senate.

Investment by the United States has played an important role in the economic transformation of these eight countries, and the U.S. BITs have afforded important protections to U.S. investors. Prior to acceding to the EU, however, the European Commission has required that these countries terminate any international treaty containing incompatibilities with EU law. Without the understanding and the steps contemplated therein, including the specific amendments in this protocol, these countries would be required to terminate their U.S. BITs and the great majority of protections these treaties afford U.S. investors. Therefore, the understanding, together with the interpretations and specific amendments in the protocol, will preserve the benefits of these treaties and provide important additional protections for U.S. investors as the EU continues to evolve.

THE U.S.-ROMANIA ADDITIONAL PROTOCOL

The United States champions EU enlargement and, at the same time, intends that this BIT will continue to mutually benefit U.S. and Romanian investors. By undertaking these amendments of the BIT with Romania, which would be brought into force just prior to its accession, incompatibilities between BIT protections and EU law are eliminated, and any future problems in this respect are addressed through a framework for consultations. This action preserves our BIT with Romania after its accession to the EU, and is consistent with the policy of the United States to welcome market driven foreign investment and to permit capital to flow freely to seek its highest return. Romania is one of the newly democratized countries in Europe transitioning to a market economy, and foreign direct investment into Romania is very much in both our countries'

interests. Protection for investors facilitates investment activity, and thus directly supports U.S. policy objectives.

The principal substantive articles of the protocol provide as follows.

Article I: that the article of the BIT prohibiting performance requirements does not limit Romania's ability to impose, as necessary under EU law, certain kinds of performance requirements in the agricultural and audiovisual sectors;

Article II: that the terms of the free trade area/customs union exception of the BIT shall apply, without limitation, to all of a Party's obligations stemming from its membership in an economic integration agreement that includes a free trade area or customs union, such as the EU;

Article III: that the BIT Parties will consult promptly whenever either Party believes that steps are necessary to assure compatibility between the BIT and the EC Treaty;

Article IV: that, in certain specified sectors or matters, Romania may take a reservation against the national treatment and most-favored-nation treatment obligations of the BIT, provided such reservation is necessary to meet Romania's obligations under EU law, and subject to the following exception; that, notwithstanding any such new reservation, existing U.S. investments in Romania shall remain protected under the national treatment and most-favored nation treatment obligations of the BIT for at least 10 years from the date of the relevant EU law necessitating the reservation; and finally, that the United States reserves the right to make or maintain limited exceptions to the national treatment obligation in two new sectors or matters, fisheries and subsidies, and to the most-favored-nation treatment obligation in one new sector, fisheries.

With respect to future developments in EU law, the United States recognizes that the possibility exists that these amendments may not suffice to ensure compatibility, and that consultations would be necessary to avoid or eliminate any incompatibilities that may arise. As noted above, the United States and Romania expressly agree to such consultations in the protocol.

* * * *

2. International Telecommunication Union

At the conclusion of the International Telecommunication Union ("ITU") World Radiocommunication Conference, June 9-July 4, 2003, in Geneva, Switzerland, the United States entered declarations to the Final Acts contained in ITU Documents 399-E (#56), July 3, 2003 and 401-E (#78), July 4, 2003.

During the course of the Plenary session, Cuba submitted a statement from the floor (#139), objecting to certain U.S. television transmissions to Cuba on channel 13 from an "Air Force C-13 military aircraft." At the close of the Plenary session, Cuba also submitted a declaration reserving for its government, inter alia, "the right to take such measures as it may deem necessary to safeguard its interests should other Member States fail to comply with the provisions of these Final Acts." In response to both Cuban statements, the United States entered a declaration and reservation (#78), ITU Document 401-E on the issue, set forth below. *See also* Chapter 7.D.

The United States of America, noting Declaration 64 entered by the delegation of Cuba, and the statement by the delegate of Cuba contained in Document 139 of the World Radiocommunication Conference (Geneva, 2003), recalls its right to broadcast to Cuba on appropriate frequencies free of jamming and other wrongful interference and reserves its right with respect to existing interference and any future interference by Cuba with US broadcasting.

In addition, the United States joined with other countries in the following declaration concerning claims of certain countries to exercise sovereign rights over segments of the geostationary-satellite orbit, set forth as #80 in ITU Document 401-E.

The delegations of the above-mentioned countries referring to the declaration made by the Republic of Colombia (No. 41), inasmuch

as this statement refers to the Bogota Declaration of 3 December 1976 by equatorial countries and to the claims of those countries to exercise sovereign rights over segments of the geostationary-satellite orbit, and similar statements, consider the claims in question cannot be recognized by this conference. Further, the above-mentioned delegations wish to affirm or reaffirm the declarations made on behalf of a number of the above-mentioned administrations in this regard when signing the Final Acts of previous conferences of the International Telecommunication Union as if these declarations were here repeated in full.

The above-mentioned delegations also wish to state that reference in Article 44 of the Constitution to the "geographical situation of particular countries" does not imply a recognition of claim to any preferential rights to the geostationary-satellite orbit.

Finally, the United States filed a declaration and reservation on behalf of the Government of the Federated States of Micronesia (# 79), ITU Document 401-E.

After having considered the declarations and reservations contained in Document 399, the delegation of the United States of America, acting on behalf of the Government of the Federated States of Micronesia pursuant to Article 31 of the International Telecommunication Union Convention (Geneva, 1992), as amended by the Plenipotentiary conference (Kyoto, 1994), declares that it reserves for the Government of the Federated States of Micronesia the right to make any declarations or reservations necessary to Micronesian interests should declarations or reservations made by other Member States jeopardize the proper operation of the telecommunication services of the Federated States of Micronesia.

3. Madrid Agreement Concerning the International Registration of Marks

On August 1, 2003, the United States deposited its instrument of accession to the Protocol Relating to the Madrid Agreement

Concerning the International Registration of Marks, adopted at Madrid, June 27, 1989 ("Madrid Protocol").

The Madrid Protocol entered into force for the United States on November 2, 2003. *See* S. Treaty Doc. No. 106–41 (2000); S. Exec. Rept. 107–1 (2001); *see also Digest 2000* at 297–301. The instrument, signed by President George W. Bush, recorded one understanding and three declarations contained in the resolution of accession adopted by the Senate on October 17, 2002.

The Senate resolution of accession also contained additional conditions, not required to be included in the instrument of accession. Among other things, these included a declaration that the Protocol is not self-executing in the United States and a condition requiring the President to notify the Senate of any "nonconsensus vote of the European Community, its member states, and the United States within the Assembly of the Madrid Union in which the total number of votes cast by the European Community and its member states exceeded the number of member states of the European Community." 148 CONG.REC. S10640 (Oct. 17, 2002).

The full text of the instrument of accession is available at *www.state.gov/s/l/c8183.htm.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

CONSIDERING THAT:

The Protocol Relating to the Madrid Agreement Concerning the International Registration of marks was adopted at Madrid on June 27, 1989; and

The Senate of the United States of America by its resolution of October 17, 2002, two-thirds of the Senators present concurring therein, gave its advice and consent to accession of the Protocol, subject to the understanding:

> That no secretariat is established by the Protocol and that nothing in the Protocol obligates the United States to appropriate funds for the purpose of establishing a permanent secretariat at any time.

The Senate's advice and consent is subject to the following declarations:

> TIME LIMIT FOR REFUSAL NOTIFICATION.-Pursuant to Article 5(2)(b) of the Protocol, the United States declares that, for international registrations made under the Protocol, the time limit referred to in subparagraph (a) of Article 5(2) is replaced by 18 months.
>
> NOTIFYING REFUSAL OF PROTECTION.-Pursuant to Article 5(2)(c) of the Protocol, the United States declares that, when a refusal of protection may result from an opposition to the granting of protection, such refusal may be notified to the International Bureau after the expiry of the 18-month time limit.
>
> FEES.-Pursuant to Article 8(7)(a) of the Protocol, the United States declares that, in connection with each international registration in which it is mentioned under Article 3ter of the Protocol, and in connection with each renewal of any such international registration, the United States chooses to receive, instead of a share in revenue produced by the supplementary and complementary fees, an individual fee the amount of which shall be the current application or renewal fee charged by the United States Patent and Trademark Office to a domestic applicant or registrant of such a mark.

NOW THEREFORE, I, George W. Bush, President of the United States of America, approve accession of the United States of America to the said Protocol, subject to the above understanding and declarations.

* * * *

The Madrid Protocol Implementation Act of 2002, Public Law 107–273, 116 Stat. 1758, 1913–1921 ("MPIA") amends the Trademark Act of 1946 to implement the provisions of the Madrid Protocol in the United States. The MPIA was enacted on November 2, 2002, and became effective on November 2, 2003. On September 26, 2003, the Department of Commerce issued Rules of Practice for Trademark-Related Filings Under the Madrid Protocol Implementation Act as a final rule, effective November 2, 2003. 68 Fed. Reg. 55,748 (Sept. 26, 2003), as modified, 68 Fed. Reg. 63,019 (Nov. 7, 2003). The September 26 Federal Register notice explained the background and operation of the regulation as set forth below.

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. . . The MPIA provides that: The owner of a U.S. application or registration may seek protection of its mark in any of the other 58 countries party to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol) by submitting a single international application through the Office to the International Bureau of the World Intellectual Property Organization (IB); and the owner of an application or registration in a country party to the Madrid Protocol may obtain an international registration from the IB and request an extension of protection of its mark to the United States.

* * * *

The Madrid Protocol and the Common Regulations Under the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to that Agreement (April 1, 2002) (Common Regulations) are available on the World Intellectual Property Organization's (WIPO) Web site, currently at *http://www.wipo.int/madrid/en/*. The Common Regulations are the procedures agreed to by the parties to the Madrid Protocol regarding the administration of the Madrid Protocol, pursuant to Article 10(2)(iii).

* * * *

Background

The Madrid Protocol provides a system for obtaining an international registration. The IB maintains the system in accordance with the guidelines set forth in the Common Regulations. To apply for an international registration under the Madrid Protocol, an applicant must be a national of, be domiciled in, or have a real and effective business or commercial establishment in one of the countries that are members of the Madrid Protocol (Contracting Parties). An international application must be based on a trademark application or registration in one of the Contracting Parties (basic application or basic registration). The international application must be for the same mark and include a list of goods and/or services identical to or narrower than the list of goods and/or services in the basic application or registration. The international application must designate one or more Contracting Parties in which an extension of protection of the international registration is sought.

The international application must be submitted through the trademark office of the Contracting Party in which the basic application is pending or basic registration is held (office of origin). The office of origin must certify that the information in the international application corresponds with the information in the basic application or registration, and transmit the international application to the IB.

The IB will review an international application to determine whether the Madrid Protocol filing requirements have been met and the required fees have been paid. If an international application is unacceptable, the IB will notify both the applicant and the office of origin of the "irregularity." If the Madrid Protocol requirements have been met and the fees have been paid, the IB will immediately register the mark, publish the international registration in the *WIPO Gazette of International Marks*, send a certificate to the holder, and notify the offices of the designated Contracting Parties in which an extension of protection of the international registration is sought. Registration by the IB does not mean that the mark is automatically granted protection in the designated Contracting Parties.

The holder of an international registration may designate additional Contracting Parties in a subsequent designation. A subsequent designation is a request by the holder of an international registration for an extension of protection of its international registration to additional Contracting Parties. Each Contracting Party designated in an international application or subsequent designation will examine the request for extension of protection as a national application under its laws, and if it complies with the requirements for registration, grant protection of the mark in its country. A Contracting Party must notify the IB of the refusal of a request for extension of protection within the time limits set forth in Article 5(2) of the Madrid Protocol. If a notification of refusal is not sent to the IB within the required time limits, the Contracting Party must grant protection of the mark in its country.

4. Rough Diamonds: Kimberley Process

On April 25, 2003, President George W. Bush signed into law the Clean Diamond Trade Act, Pub. L. No. 108–19, 117 Stat. 631, 19 U.S.C. § 3901 note. As explained in the President's statement, the act implements the Kimberly Process Certification Scheme "developed by more than 50 countries to exclude rough 'conflict diamonds' from international trade, while promoting legitimate trade." *See Digest 2002* at 728–729. The statement also addresses several constitutional concerns with the language of the act, as excerpted below.

The full text of the President's statement is available at *www.whitehouse.gov/news/releases/2003/04/20030425-9.html.*

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* * * *

Conflict diamonds have been used by rebel groups in Africa to finance their atrocities committed on civilian populations and their insurrections against internationally recognized governments. The United States has played a key role over the past 2 years in

forging an international consensus to curb such damaging trade and has therefore strongly supported the "Kimberley Process." Diamonds also are critical to the economic growth and development of African and other countries, so preserving their legitimate trade is an important foreign policy objective.

This Act directs the President to implement regulations to carry out the Kimberley Process Certification Scheme (KPCS). Although under this Act I have discretion to issue regulations consistent with future changes to the KPCS, under the Constitution, the President cannot be bound to accept or follow changes that might be made to the KPCS at some future date absent subsequent legislation. I will construe this Act accordingly.

Section 15 of the Act provides that the legislation takes effect on the date the President certifies to the Congress that either of two specified events has occurred. The first event is that "an applicable waiver that has been granted by the World Trade Organization is in effect." The second event is that "an applicable decision in a resolution adopted by the United Nations Security Council pursuant to Chapter VII of the Charter of the United Nations is in effect." Once the Act takes effect, it "shall thereafter remain in effect during those periods in which, as certified by the President to the Congress, an applicable waiver or decision" by the World Trade Organization or the United Nations Security Council, respectively, "is in effect."

If section 15 imposed a mandatory duty on the President to certify to the Congress whether either of the two specified events has occurred and whether either remains in effect, a serious question would exist as to whether section 15 unconstitutionally delegated legislative power to international bodies. In order to avoid this constitutional question, I will construe the certification process set forth in section 15 as conferring broad discretion on the President. Specifically, I will construe section 15 as giving the President broad discretion whether to certify to the Congress that an applicable waiver or decision is in effect. Similarly, I will construe section 15 as imposing no obligation on the President to withdraw an existing certification in response to any particular event. Rather, I will construe section 15 as giving the President the discretion to determine when a

certification that an applicable waiver or decision is no longer in effect is warranted.

Section 4 of The Clean Diamond Trade Act requires the President to "prohibit the importation into, or exportation from, the United States of any rough diamond, from whatever source, that has not been controlled through the Kimberley Process Certification Scheme" unless the President waives the requirements for a particular country because it "is taking effective steps to implement the Kimberley Process Certification Scheme; or the President determines that the waiver is in the national interests of the United States." Section 5 authorizes the President to issue "proclamations, regulations, licenses, and orders, and conduct such investigations, as may be necessary to carry out this Act." Section 8 establishee both civil and criminal penalties for violations of a license, order, or regulation issued under the act.

On July 29, 2003, the President issued Executive Order 13312 implementing these provisions in keeping with his signing statement. 68 Fed. Reg. 45,151 (July 31, 2003). Key provisions of the executive order are set forth below.

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Clean Diamond Trade Act (Public Law 108–19) (the "Act"), the International Emergency Economic Powers Act, as amended (50 U.S.C. 1701 *et seq.*), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), section 5 of the United Nations Participation Act, as amended (22 U.S.C. 287c), and section 301 of title 3, United States Code, and in view of the national emergency described and declared in Executive Order 13194 of January 18, 2001, and expanded in scope in Executive Order 13213 of May 22, 2001, I, GEORGE W. BUSH, President of the United States of America, note that, in response to the role played by the illicit trade in diamonds in fueling conflict and human rights violations in Sierra Leone, the President declared a national emergency in Executive Order 13194 and imposed restrictions on the importation of

rough diamonds into the United States from Sierra Leone. I expanded the scope of that emergency in Executive Order 13213 and prohibited absolutely the importation of rough diamonds from Liberia.

I further note that representatives of the United States and numerous other countries announced in the Interlaken Declaration of November 5, 2002, the launch of the Kimberley Process Certification Scheme (KPCS) for rough diamonds, under which Participants prohibit the importation of rough diamonds from, or the exportation of rough diamonds to, a non-Participant and require that shipments of rough diamonds from or to a Participant be controlled through the KPCS. The Clean Diamond Trade Act authorizes the President to take steps to implement the KPCS. Therefore, in order to implement the Act, to harmonize Executive Orders 13194 and 13213 with the Act, to address further threats to international peace and security posed by the trade in conflict diamonds, and to avoid undermining the legitimate diamond trade, it is hereby ordered as follows:

Section 1. *Prohibitions.* Notwithstanding the existence of any rights or obligations conferred or imposed by any contract entered into or any license or permit granted prior to July 30, 2003, the following are, except to the extent a waiver issued under section 4(b) of the Act applies, prohibited:

(a) the importation into, or exportation from, the United States on or after July 30, 2003, of any rough diamond, from whatever source, unless the rough diamond has been controlled through the KPCS;
(b) any transaction by a United States person anywhere, or any transaction that occurs in whole or in part within the United States, that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this section; and
(c) any conspiracy formed to violate any of the prohibitions of this section.

* * * *

Sec. 4. *Definitions.* For the purposes of this order and Executive Order 13194, the definitions set forth in section 3 of the Act shall apply, and the term "Kimberley Process Certification Scheme" shall not be construed to include any changes to the KPCS after April 25, 2003.

* * * *

The Office of Foreign Assets Control, U.S. Department of the Treasury, issued an interim final rule, effective July 30, 2003, implementing Executive Order 13312. 68 Fed. Reg. 45,777 (Aug. 4, 2003). The rule includes the Rough Diamonds Control Regulations and revised Rough Diamonds (Sierra Leone and Liberia) Sanctions Regulations. The Federal Register explained the background to these regulations as excerpted below.

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On July 29, 2003, the President issued Executive Order 13312, taking into account enactment of the Clean Diamond Trade Act (Pub. L. 108–19), which implements the multilateral Kimberley Process Certification Scheme for rough diamonds (KPCS), and recent developments in Sierra Leone and Liberia. The Clean Diamond Trade Act requires the President, subject to certain waiver authorities, to prohibit the importation into, and exportation from, the United States of any rough diamond not controlled through the KPCS. This means shipments of rough diamonds between the United States and non-Participants in the KPCS generally are prohibited, and shipments between the United States and Participants are permitted only if they are handled in accordance with the standards, practices, and procedures of the KPCS set out in these regulations. Executive Order 13312 implemented the Clean Diamond Trade Act and the KPCS and amended Executive Orders 13194 and 13213, which are described below.

* * * *

The United Nations Security Council decided to allow the ban against the importation of rough diamonds from Sierra Leone

without a certificate of origin to expire on June 4, 2003, taking into account the Government of Sierra Leone's increased efforts to control and manage its diamond industry and ensure proper control over diamond mining areas, as well as the Government's full participation in the KPCS. In addition, however, on May 6, 2003, the Security Council renewed for one year the absolute import ban on rough diamonds from Liberia based on evidence that the Government of Liberia continues to breach the measures imposed by UNSCR 1343 (2001).

Executive Order 13312 authorized the Secretary of the Treasury to promulgate rules and regulations as may be necessary to carry out the purposes of the order. To implement the order, the Office of Foreign Assets Control, acting pursuant to delegated authority, is issuing the Rough Diamonds Control Regulations and revising the Rough Diamonds (Sierra Leone & Liberia) Sanctions Regulations.

* * * *

5. Expropriation

a. Nicaragua

Section 527 of the Foreign Relations Authorization Act, FY 94–95 ("FRAA") provides that no funds made available under the FRAA, under the 1961 Foreign Assistance Act, or under the Arms Export Control Act may be provided to governments of countries that have expropriated the property of, or repudiated a contract with, or taken any other action that has the effect of seizing ownership or control of the property of any U.S. person, unless the governments have taken certain remedial steps. It further stipulates that the United States must instruct U.S. executive directors of international financial institutions to vote against loans to such countries unless the assistance is directed specifically to programs serving basic human needs of its citizens. Under the terms of the statute, these prohibitions apply to Nicaragua while U.S. citizens' property claims against the Government

of Nicaragua are outstanding. Section 527, however, also authorizes the President to waive the prohibitions on an annual basis if he determines that doing so is in the national interest and so notifies Congress.

In July 2003 Paul V. Kelly, Assistant Secretary, Legislative Affairs, U.S. Department of State, notified Congress that Secretary of State Colin Powell, acting by delegation from the President, had determined that it was in the national interest of the United States to waive the prohibitions on assistance and support with respect to Nicaragua set forth in § 527. The waiver was made effective July 29, 2003 through July 29, 2004. Mr. Kelly's letter attached the determination by the Secretary and a memorandum of justification for that determination, set forth below.

The full text of the letter and attachments is available at *www.state.gov/s/l/c8183.htm.*

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Section 527 applies only to the claims of persons who were U.S. citizens at the time their claims arose. The United States assesses the GON's progress both by reference to those persons covered under Section 527 and by reference to all U.S. citizen claims eligible for restitution or compensation under Nicaraguan law. This approach does not represent a departure from international claims law principles or past U.S. practice, as the United States has not espoused the claims of persons who were not U.S. citizens at the time of the takings. We have sought to ensure that the GON resolves all U.S. citizen claims in accordance with its own law.

* * * *

Since July 2000, we have set forth certain specific benchmarks at the time the waiver was granted, which will be used to evaluate the decision for the coming waiver year. We believe we should grant Nicaragua a waiver of Section 527 sanctions until July 2004, based on the GON's achievement of the benchmarks set in July 2002. Specifically, in granting the waiver last year, we stipulated

to the GON that all decisions regarding future waivers would be subject to the GON's successful resolution over the course of the waiver year of a substantial number of the claims covered by Section 527 provisions and registered by American citizen claimants on the U.S. Embassy's database. We informed the GON of this benchmark and of three additional benchmarks to which we would subject the July 2003 waiver decision: (a) Return of additional GON-held properties including those of the Army; (b) Efforts to assure judicial impartiality in the Property Appeals Court; and (c) Efforts toward changing a law that has the effect of legitimizing invalid property transactions through subsequent third party purchases.

For waiver year 2002–2003, we have concluded that the GON has fulfilled the terms of the first two benchmarks. Because the Nicaraguan executive lacks the necessary political support to effect significant reform in the judicial and legislative branches of government, however, it has been unable to achieve the last two benchmarks.

1) In the first eleven months of this waiver year, the GON has resolved more Embassy-registered claims and compensated more claimants than in any of the previous four full waiver years. Through July 1, the GON had resolved 168 of the claims registered on the U.S. Embassy's database, after having resolved 160 in the previous waiver year. By the end of the waiver period, Embassy Managua expects that several more GON cases will be resolved.
2) The GON has worked diligently, including at the ministerial level, to resolve some very difficult and longstanding cases, including claims of properties held by the Nicaraguan government. The GON has also solved some complex cases through means other than the standard means of compensation of 15-year property indemnification bonds (BPIs). These strategies have included returning lands, land swaps and settlements involving payments of cash and one-year bonds. The face value of the BPIs issued to the other claimants for their properties is approximately U.S. $18 million.
3) The third benchmark, reform of the Property Appeals Court to assure judicial impartiality was not satisfied. Given the

current political situation, it is not realistic to expect that the GON can achieve this substantial judicial reform. In December 2002, the Property Courts were consolidated into one court, but remaining Property Court is as susceptible to outside influence and lack of impartiality as other Nicaraguan judicial institutions.

4) In the first half of the waiver year, the GON convened a legal working group to study the feasibility of amending the law that legitimizes the transfer of confiscated property to third party buyers, the fourth benchmark. Under the current Nicaraguan Civil Code, the "law of third-party acquirers in good faith" presumes subsequent transfers are legitimate, granting the new owner clean title. Through the use of proxies, a series of transactions can thus "launder" ownership. However, a bill was never drafted due to a lack of political support for the Administration in the National Assembly.

Application of these conditions has caused the GON to resolve several difficult, long-standing cases during the past year. Based on its success, we plan to continue the policy of subjecting waiver decisions to specific achievable benchmarks.

* * * *

b. Cuba

Title III of the Cuban Liberty and Democratic Solidarity ("Libertad") Act of 1996, Pub. L. 104–114, 110 Stat. 785, 22 U.S.C. § 6021 note, allows U.S. nationals that own claims to confiscated property in Cuba to file suit in U.S. courts against those who traffic in such property. Section 306(c) of the act allows the President to suspend for six months this right to file suit if the President determines that a suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba. The right to bring such an action was suspended after enactment of the Libertad Act in March 1996, and the suspension has been renewed every six months since that time. On January 16

and July 16, 2003, President George W. Bush exercised this authority for an additional six months. *See www.whitehouse.gov/news/releases/2003/01/20030116-7.html* and *www.whitehouse.gov/news/releases/2003/07/20030716.html.*

Cross-references

Individual claims for expropriation, **Chapter 4.C.; Chapter 8.B.4., 5.**
World Summit on Information Society, **Chapter 6.D.2.a.**
International Telecommunication Union amendments, **Chapter 7.D.**
Trade and environment, **Chapter 13.A.4.b.**
Commercial private international law, **Chapter 15.A.**
International civil litigation, **Chapter 15.D.**
Sanctions, **Chapter 16**
U.S.-Iran Treaty of Amity, Economic Relations and Consular Rights in Oil Platforms case in ICJ, **Chapter 18.A.5.**

CHAPTER 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA

1. United Nations Convention on the Law of the Sea

On October 14 and 21, 2003, the Senate Foreign Relations Committee ("SFRC") held hearings on the 1982 United Nations Convention on the Law of the Sea ("Convention") and the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 ("1994 Agreement"). President William J. Clinton had transmitted both instruments to the Senate for advice and consent to accession and ratification, respectively, in 1994. S. Treaty Doc. No. 103–39 (1994). A number of administration witnesses testified in support of approving the Convention and 1994 Agreement, stressing the advantages to the United States in becoming a party while also addressing certain concerns. Excerpts from several of the witnesses and questions and answers submitted for the record follow.

The testimony is available at *http://foreign.senate.gov/hearing2003.html*. Testimony and questions and answers for the record are included in S. Exec. Rept. 108–10 (2004), reporting the Convention and the 1994 Agreement out of committee. The SFRC recommended that the Senate grant advice and consent, subject to certain reservations, understandings, and declarations. Further information,

including updated status of both instruments, is available at *http://www.un.org/Depts/los/index.htm.*

a. Testimony before Senate Foreign Relations Committee

On October 21, 2003, William H. Taft IV, Legal Adviser of the U.S. Department of State, testified in support of the Convention and the 1994 Agreement amending the deep seabed mining regime of the Convention. His prepared testimony, excerpted below, provides a description of the two instruments, discusses customary international law in this area and advantages to the United States of becoming a party, and addresses certain identified concerns.

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THE CONVENTION

The Convention sets forth a comprehensive framework governing uses of the oceans. It was adopted by the Third United Nations Conference on the Law of the Sea, which met between 1973 and 1982 to adopt a treaty regulating all matters relating to the law of the sea.

The Convention establishes international consensus on the extent of jurisdiction that States may exercise off their coasts and allocates rights and duties among States in all marine areas. It provides for a territorial sea of a maximum breadth of 12 nautical miles, within which the coastal State may generally exercise plenary authority as a function of its sovereignty. The Convention also establishes a contiguous zone of up to 24 nautical miles from coastal baselines, in which the coastal State may exercise limited control necessary to prevent or punish infringements of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea. It also gives the coastal State sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources, whether living (e.g., fisheries) or non-living (e.g., oil and gas), in an exclusive economic

zone (EEZ) that may extend to 200 nautical miles from the coast. In addition, the Convention accords the coastal State sovereign rights over the continental shelf both within and beyond the EEZ where the geological margin so extends.

The Convention carefully balances the interests of States in controlling activities off their own coasts with those of all States in protecting the freedom to use ocean spaces without undue interference. It specifically preserves and elaborates the rights of military and commercial navigation and overflight in areas under coastal State jurisdiction and on the high seas beyond. It protects the right of passage for all ships and aircraft through, under, and over straits used for international navigation and archipelagos. It protects the high seas freedoms of navigation, overflight, and the laying and maintenance of submarine cables and pipelines, as well as other internationally lawful uses of the sea related to those freedoms, consistent with the other provisions of the Convention.

In recognizing the sovereign rights and management authority of coastal States over living resources within their EEZs, the Convention brings most fisheries under the jurisdiction of coastal States. (Some 90 percent of living marine resources are harvested within 200 nautical miles of the coast.) The Convention imposes on coastal States a duty to conserve these resources and also imposes obligations upon all States to cooperate in the conservation of fisheries populations on the high seas and of populations that are found both on the high seas and within the EEZ (highly migratory stocks, such as tuna, as well as "straddling stocks"). In addition, it contains specific measures for the conservation of anadromous species, such as salmon, and for marine mammals, such as whales. These provisions of the Convention give the United States the right to regulate fisheries in the largest EEZ in the world, an area significantly greater than U.S. land territory, which contains some of the most resource-rich waters on the planet.

With respect to non-living natural resources, the Convention recognizes the coastal State's sovereign rights over the exploration and development of mineral resources, including oil and gas, found in the seabed and subsoil of the continental shelf, out to 200 nautical miles and beyond, to the outer edge of the geological continental margin. It lays down specific criteria and procedures

for determining the outer limit of the margin. The United States has large areas of continental shelf seaward of 200 nautical miles in the Atlantic Ocean, the Gulf of Mexico, and the Arctic Ocean north of Alaska. In the Arctic, our shelf could run as far as 600 miles to the north.

For the non-living resources of the seabed beyond the limits of national jurisdiction (i.e., beyond the EEZ or continental margin, whichever is farther seaward), the Convention establishes an international regime to govern exploration and exploitation of such resources. It defines the general conditions for access to deep seabed minerals by commercial entities and provides for the establishment of an international organization, the International Seabed Authority, to oversee such development. The 1982 Convention's provisions on deep seabed mining, as will be discussed shortly, have been fundamentally amended by the 1994 Agreement.

The Convention sets forth a comprehensive legal framework and basic obligations for protecting the marine environment from all sources of pollution: from vessels, from dumping, from seabed activities, and from land-based activities. This framework also allocates regulatory and enforcement competence to balance the interests of coastal States in protection of the marine environment and its natural resources with the rights and freedoms of navigation.

The essential role of marine scientific research in understanding and managing the oceans is also secured. The Convention affirms the right of all States to conduct marine scientific research and sets forth obligations to promote and cooperate in such research. It confirms the right of coastal States to require consent for such research undertaken in marine areas under their jurisdiction. These rights are balanced by specific criteria to ensure that coastal States exercise the consent authority in a predictable and reasonable fashion to promote maximum access for research activities. More U.S. scientists conduct marine scientific research in foreign waters than scientists from almost all other countries combined.

The Convention establishes a dispute settlement system to promote compliance with its provisions and the peaceful settlement of disputes. These procedures are flexible, providing options as to the appropriate means and forums for resolution of disputes. They are also comprehensive, in subjecting the bulk of the Convention's

provisions to enforcement through mechanisms that are binding under international law. Importantly, the system also provides Parties with means of excluding matters of vital national concern from the dispute settlement mechanisms (e.g., disputes concerning maritime boundaries, military activities, and EEZ fisheries management). A State is able to choose, by written declaration, one or more means for the settlement of disputes under the Convention. The Administration recommends that the United States elect arbitration under Annex VII and special arbitration under Annex VIII.

Subject to limited exceptions, the Convention excludes from dispute settlement mechanisms disputes relating to the sovereign rights of coastal States with respect to the living resources in their EEZs. In addition, the Convention permits a State, through a declaration, to opt out of dispute settlement procedures with respect to one or more enumerated categories of disputes, namely disputes regarding maritime boundaries between neighboring States, disputes concerning military activities and certain law enforcement activities, and disputes in respect of which the United Nations Security Council is exercising the functions assigned to it by the Charter of the United Nations. The Administration recommends that the United States elect to exclude all three of these categories of disputes from dispute settlement mechanisms.

I would like to discuss a particularly important issue that arises with respect to the category of disputes concerning military activities. The military activities exception has long been of importance to the United States. The U.S. negotiators of the Convention sought and achieved language reflecting a very broad exception, successfully defeating attempts by certain other countries to narrow its scope. The U.S. has consistently viewed this exception as a key element of the dispute settlement package, which carefully balances comprehensiveness with protection of vital national interests.

Over the past year, the Administration reexamined the Convention's dispute settlement provisions to ensure that they continue to meet U.S. national security needs. Now, more than ever, it is critical that U.S. military activities, such as military surveys and reconnaissance flights over EEZs, are not inappropriately subject to international dispute resolution procedures, which could have

a major impact on our military operations and national security interests.

As part of our review of this serious issue, we considered whether the U.S. declaration on dispute settlement should in some way particularly highlight the military activities exception, given both its importance and the possibility, however remote, that another State Party might seek dispute settlement concerning a U.S. military activity, notwithstanding our declaration invoking the exception. We have concluded that each State Party has the right to determine whether its activities are military activities and that such determination is not reviewable. We also concluded that it was very important to highlight our understanding of the operation of this exception. As such, the Administration recommends that the U.S. declare that its consent to accession to the Convention is conditioned upon the understanding that each Party has the exclusive right to determine which of its activities are "military activities" and that such determination is not subject to review. We will provide the Committee with language for the dispute settlement declaration.

The achievement of a widely accepted and comprehensive law of the sea convention—to which the United States can become a party—has been a consistent objective of successive U.S. administrations for the past thirty years. As I noted before, the United States decided not to sign the Convention upon its adoption in 1982 because of serious defects in the regime it would have established for managing the development of seabed mineral resources beyond national jurisdiction. While the other parts of the Convention were judged to advance basic U.S. ocean policy interests, the United States and other industrialized countries determined the deep seabed regime of Part XI to be inadequate and in need of reform before they would ever consider becoming party to the Convention.

The 1994 Agreement

As a result of the important international political and economic changes of the late 1980s and early 1990s—including the end of the Cold War and growing reliance on free market principles—widespread recognition emerged, not limited to

industrialized nations, that the collectivist approach of the seabed mining regime of the Convention required basic change. Thus, informal negotiations were launched in 1990 during the first Bush Administration, under the auspices of the United Nations Secretary-General. An agreement was adopted in July 1994.

The Agreement, signed by the United States on July 28, 1994, contains legally binding changes to that part of the LOS Convention dealing with mining of the deep seabed beyond the limits of national jurisdiction (Part XI). It is to be applied and interpreted together with the Convention as a single instrument.

The legally binding changes set forth in the 1994 Agreement overcome each one of the objections of the United States to Part XI of the Convention and meet our goal of guaranteed access by the U.S. industry to deep seabed minerals on the basis of reasonable terms and conditions. All other major industrialized nations have now signed the Agreement and most have become party to the Convention and the Agreement as a package.

The Agreement overhauls the decision-making procedures of Part XI to accord the United States, and others with major economic interests at stake, decisive influence over future decisions on possible deep seabed mining. The Agreement guarantees a seat for the United States on the critical decision-making body and requires financial decisions to be based on a consensus of major contributors.

The Agreement restructures the deep seabed mining regime along free market principles. It scales back the structure of the organization to administer the mining regime and links the activation and operation of institutions to the actual development of concrete interest in seabed mining. A future decision, which the United States and a few of its allies could block, is required before the organization's potential operating arm (the Enterprise) may be activated, and any activities on its part are subject to the same Convention requirements as other commercial enterprises. States have no obligation to finance the Enterprise, and subsidies inconsistent with GATT/WTO are prohibited. Equally important, the Agreement eliminates all requirements for mandatory transfer of technology and production controls that were contained in the original version of Part XI.

The Agreement provides for grandfathering the seabed mine site claims established on the basis of the exploration work already conducted by companies holding U.S. licenses on the basis of arrangements "similar to and no less favorable than" the best terms granted to previous claimants. It also strengthens the provisions requiring consideration of the potential environmental impacts of deep seabed mining.

The Agreement entered into force on November 16, 1998.

STATUS OF THE CONVENTION AND THE AGREEMENT

One hundred and fifty-two States signed the Convention during the two years it was open for signature between 1982 and 1984. The Convention entered into force on November 16, 1994, one year after the sixtieth nation consented to be bound by it. As of today, there are 143 Parties to the Convention, including virtually all of our NATO and OECD allies, as well as Russia and China.

The 1994 Agreement was concluded on July 28, 1994, and was signed by 99 nations, including the United States. As of today, 115 States and the European Community have consented to be bound by the Agreement.

II.

I would like now to address some perceived disadvantages of U.S. adherence to the Convention.

First, it might be argued that the United States should not join the Convention because, as a party, we would be required to make financial contributions to run the Convention's institutions. However, payments to the Convention's institutions are modest. For the 2003–2004 biennial budget, the U.S. assessment for the International Seabed Authority would be a little over $1 million. The U.S. assessment for the International Tribunal for the Law of the Sea for 2004 would be a little less than $2 million (24% of the total budget) and 22% of the total for the 2005–2006 budget years. We do not anticipate the budget for either institution to increase substantially in later years.

Second, some would argue that we should not be joining and participating in a new bureaucracy for deep seabed mining. The International Seabed Authority has, however, now been restructured in ways that meet the objections raised by the United States and others. The United States has a guaranteed seat on the 36-member Council, an effective veto (in combination with two other consumer States) in the Council, and an absolute veto in the Finance Committee with respect to any decision with financial or budgetary implications. Moreover, as a practical matter, U.S.-based companies will not be able to engage in mining the deep seabed, without operating through another State Party, unless we are party to the Convention.

Third, it might be argued that the United States should not join the Convention because we would have to pay a contribution based on a percentage of oil/gas production beyond 200 miles from shore. However, the revenue-sharing provisions of the Convention are reasonable. The United States has one of the broadest shelves in the world. Roughly 14% of our shelf is beyond 200 miles, and off Alaska it extends north to 600 miles. The revenue-sharing provision was instrumental in achieving guaranteed U.S. rights to these large areas. It is important to note that this revenue-sharing obligation does not apply to areas within 200 nautical miles and thus does not affect current revenues produced from the U.S. Outer Continental Shelf. Most important, this provision was developed by the United States in close cooperation with representatives of the U.S. oil and gas industry. The industry supports this provision. Finally, with a guaranteed seat on the Finance Committee of the International Seabed Authority, we would have an absolute veto over the distribution of all revenues generated from this revenue-sharing provision.

Finally, as to whether it is sufficient to continue to rely only on customary international law, the distinct advantages of joining the Convention include the following:

- U.S. accession would enhance the authoritative force of the Convention, likely inspire other States to join, and promote its provisions as the governing rules of international law relating to the oceans.

- The United States would be in a stronger position invoking a treaty's provisions to which it is party, for instance in a bilateral disagreement where the other country does not understand or accept them.
- While we have been able to rely on diplomatic and operational challenges to excessive maritime claims, it is desirable to establish additional methods of resolving conflict.
- The Convention continues to be implemented in various forums, both within the Convention and outside the Convention (such as at the International Maritime Organization or IMO). The United States would be in a stronger position defending its military interests and other interests in these forums if it were a party to the Convention.
- Becoming a party to the Convention would permit the United States to nominate members for both the Law of the Sea Tribunal and the Continental Shelf Commission. Having U.S. members on those bodies would help ensure that the Convention is being interpreted and applied in a manner consistent with U.S. interests.
- Becoming a party to the Convention would strengthen our ability to deflect potential proposals that would be inconsistent with U.S. interests, including freedom of navigation.

Beyond those affirmative reasons for joining the Convention, there are downside risks of not acceding to the Convention. U.S. mobility and access have been preserved and enjoyed over the past twenty years largely due to the Convention's stable, widely accepted legal framework. It would be risky to assume that it is possible to preserve *ad infinitum* the stable situation that the United States currently enjoys. Customary international law may be changed by the practice of States over time and therefore does not offer the future stability that comes with being a party to the Convention.

Having elaborated the basic elements of the Convention and Agreement and the advantages of U.S. accession, allow me to raise two final serious issues.

Because the global context for the Convention is rapidly and continually changing, a way needs to be found to ensure that the

Convention continues to serve U.S. interests over time. We must ensure that, in obtaining the stability that comes with joining the Convention, we nonetheless retain sufficient flexibility to protect U.S. interests. After U.S. accession, the Executive Branch will conduct biennial reviews of how the Convention is being implemented and will seek to identify any changes in U.S. and/or international implementation that may be required to improve implementation and to better adapt the Convention to changes in the global environment. After ten years, the Executive Branch will conduct a more comprehensive evaluation to determine whether the Convention continues to serve U.S. interests. The results of these reviews will be shared with the Senate. (Another option that we considered is that of a sunset provision, i.e., limiting the length of time that the United States is a party to the Convention, which has disadvantages as well as advantages.) Needless to say, the United States could, of course, withdraw from the Convention if U.S. interests were seriously threatened.

In addition, I would like to note that the Convention includes simplified procedures for the adoption and entry into force of certain Convention amendments and implementation and enforcement measures that raise potential constitutional issues. We intend to sort these and other legal and policy issues out with the Senate, confident that they can be satisfactorily resolved.

Let me join with Assistant Secretary [of State for Oceans and International Environmental Affairs] Turner in underscoring that becoming a party to the Convention, as modified by the 1994 Agreement, represents the highest priority of United States international oceans policy—a bipartisan priority—and to this end the Administration recommends that the Senate give its advice and consent to accession to the Convention and ratification of the Agreement.

Admiral Michael G. Mullen, Vice Chief of Naval Operations, U.S. Navy, also testified in support of the Convention on October 21. Excerpts from his testimony below elaborated on the advantages of U.S. accession from a military perspective.

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The Administration, including the Military Departments, the Joint Chiefs of Staff and the Combatant Commanders, strongly support U.S. accession to the Convention. Entry into force for the United States will enhance the worldwide mobility our forces require and our traditional leadership role in maritime matters, as well as position us better to initiate and influence future developments in the law of sea.

The Administration has identified three areas of serious concern, one of which could have a direct impact on U.S. military activities. The Administration believes, however, that we can resolve these problems by working closely with the Senate. Military operations since September 11—from Operation Enduring Freedom to Operation Iraqi Freedom to the Global War on Terrorism—have dramatically increased our global military requirements. U.S. Forces are continuously forward deployed worldwide to deter threats to our national security and are in position to respond rapidly to protect U.S. interests, either as part of a coalition or, if necessary, acting independently. U.S. military strategy envisions rapid deployment and mobility of forces overseas anytime, anywhere. A leaner, more agile force with a smaller overseas footprint places a premium on mobility and independent operational maneuver. Our mobility requirements have never been greater.

Future threats will likely emerge in places and in ways that are not yet fully clear. For these and other undefined future operational challenges, U.S. naval and air forces must take maximum advantage of the customary, established navigational rights that the Law of the Sea Convention codifies. Sustaining our overseas presence, responding to complex emergencies, prosecuting the global war on terrorism, and conducting operations far from our shores are only possible if military forces and military and civilian logistic supply ships and aircraft are able to make unencumbered use of the sea and air lines of communication. This is an enduring principle that has been in place since the founding of our country.

In addition to Operations Enduring Freedom and Iraqi Freedom, our ships and aircraft have been deployed overseas to

intercept terrorists in the Mediterranean Sea, the Pacific Ocean and the Arabian Sea. They have also been deployed to the Pacific and Indian Oceans to ensure security in vital lines of communication in Southeast Asia, as well as to the waters off Central and South America to interdict the flow of illicit traffic from that region. Our forces are now engaged in laying the groundwork for implementation of the President's Proliferation Security Initiative. The international coalition assembled as part of the President's initiative will work together to disrupt the flow of weapons of mass destruction, their delivery systems, and related materials throughout the world.

The navigation and overflight freedoms we require through customary international law are better served by being a party to the Convention that codifies those freedoms. Being a party to the Convention is even more important because the trend among some coastal states is toward limiting historical navigational and overflight freedoms. Would-be adversaries, or nations that do not support the particular missions or activities we undertake, will be less likely to dispute our lawful use of the sea and air lanes if we are parties to the Convention. We support the Convention because it protects military mobility by codifying favorable transit rights in key international straits, archipelagic waters, and waters adjacent to coastal states where our forces must be able to operate freely.

The Law of the Sea Convention serves some very important U.S. military interests. Specifically, the Convention, codifies:

- High seas freedoms of overflight and vessel navigation without discriminating against military exercises, military surveys, research and development activities, ordnance testing, and space and telecommunications activities;
- Limitation of territorial seas to 12 nm in the face of increasing pressure by some coastal states to expand those seas well beyond that limit, and to assert other claims that have the practical effect of extending coastal state control over the U.S. military's legitimate uses of those seas;
- Unimpeded overflight and passage rights through critical international straits such as the Straits of Hormuz, Gibraltar and Malacca;

- Unimpeded overflight and passage rights through archipelagic states such as Indonesia and the Philippines under a balanced regime of archipelagic sea lanes;
- The right of innocent passage of ships through the territorial seas of coastal states, without prior notification or permission;
- Limitation of the jurisdiction of coastal states in their exclusive economic zones (EEZ) to legitimate resource-related concerns, while preserving high seas freedoms for other states;
- The right to conduct hydrographic and military surveys on the high seas and within foreign EEZs.

In addition to the rights that I just mentioned, the Convention guarantees the right to conduct transits through international straits in "normal modes," which means that submarines may stay submerged and air-capable ships may launch, recover, and operate aircraft. It further means that ships may steam in formation. This right to conduct transit in "normal modes," which is frequently challenged, is particularly important to our naval units because it ensures their ability to maintain appropriate readiness and defensive postures through many of the most important choke points in the world.

Moreover, the Convention also recognizes the right of ships to navigate in international waters and through territorial seas without regard to cargo or means of propulsion. Since many of the Navy's major combatants are nuclear powered, the importance of this right cannot be overemphasized as a component of strengthening the military's ability to respond globally.

The right of transit passage through international straits and the related regime of archipelagic sea lanes passage are particularly important. More than 150 international straits are overlapped by 12 nm territorial seas. Of these, we consider approximately a dozen to be "strategic" for commercial and military purposes.

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In conclusion, from an operational perspective, two fundamental points support accession to the Convention: First, the diversity of

challenges to our national security combined with a more dynamic force structure make strategic mobility more important than ever. Second, the oceans are fundamental to that maneuverability and, by joining the Convention, we further assure the freedom to get to the fight, twenty-four hours a day and seven days a week, as necessary in the national security interests of the United States.

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b. Questions and answers for the record

U.S. officials responded in writing to additional questions submitted for the record by certain members of the SFRC, as excerpted below. The full text of the questions and answers submitted for the record is available in S. Exec. Rpt. 108–10 (2004).

Responses of William H. Taft, IV, Legal Adviser, and Hon. John F. Turner, Assistant Secretary of State, Bureau of Oceans and International Environmental and Scientific Affairs, to Additional Questions for the Record Submitted by Senator Richard G. Lugar

Question 1. Describe the circumstances under which the Convention would provide for the United States to permit foreign fishers to fish in waters subject to U.S. jurisdiction. Has the United States ever had an unharvestable surplus of any relevant fish species that would be subject to allocation under the treaty? Is the United States likely to have any such surplus in the future?

Answer. During the 1970s and 1980s, U.S. fishermen did not have the capacity to harvest all of the allowable catch in waters within 200 miles of our coast. Indeed, one of the driving forces behind the Fishery Conservation and Management Act of 1976 was to develop U.S. capacity and eventually to replace foreign fleets with American ones in the U.S. 200-mile zone. The Act requires the regional fishery management councils to determine the optimum yield from each fishery, and then to estimate what

part of that yield could be harvested by U.S. fishermen (16 U.S.C. Sec. 1821(d), Sec. 1853(a) (3) and (4)). The surplus, or "total allowable level of foreign fishing" (TALFF), is then to be allocated to foreign fleets (16 U.S.C. Sec. 1821(e)). This scheme is completely consistent with the treaty, which gives each coastal State the discretion to determine the allowable catch within its EEZ (article 61(1)), to ensure that resources are not overexploited (article 61(2)), and to determine its capacity to harvest such resources and to give other States access to any surplus under reasonable conditions (article 62(2)); see also article 297(3)(a).

The United States achieved the goal of full capacity in the early 1990s. With one small exception (Atlantic mackerel and herring in 2001), no regional fishery management council has identified a TALFF in more than a decade. The United States is unlikely to have any surplus in the future, as American capacity to take most species far exceeds the allowable catch.

Senator Stevens, in his testimony before the Committee, raised this question in the context of Alaska fisheries, where the council sets an "acceptable biological catch" for each fishery, and then sets an annual "total allowable catch." The difference between the ABC and the TAC is not considered surplus. The difference between the two is a cushion dictated by conservative management, in accordance with article 61(2). Only if U.S. fishermen could not harvest the entire TAC would the question of surplus arise (article 62(2)).

It should be noted that no other party to the Convention could bring the United States to binding dispute resolution over the issue of fisheries allocations within the U.S. exclusive economic zone (article 297(3)(a)).

Question 2. The Executive Branch's 1994 transmittal package indicates that, at that time, the United States had Governing International Fishery Agreements (GIFAs) in force with five nations. Has the United States concluded any additional GIFAs since then? Is the United States currently negotiating any additional GIFAs?

Answer. No new GIFAs have been negotiated or concluded since 1994. Those in force are with Lithuania, PRC, and the

Russian Federation. The Russian GIFA, under which a mackerel and herring joint venture has been conducted in Narragansett Bay, will expire December 31, 2003, unless it is extended. A GIFA with Estonia expired June 30, 2003, and is in the process of being renewed; an expired GIFA with Latvia might also be renewed.

Question 3. How, if at all, would the Convention require the United States to change its regulation of fisheries under the Magnuson-Stevens Fishery Conservation and Management Act?

Answer. No change would be required. The Act fully enables the United States to exercise its rights and to implement its obligations with respect to the provisions of the Convention relating to fisheries. U.S. law and practice are also fully consistent with the provisions of the Convention relating to fishing on the high seas and dealing with particular categories of species, such as straddling fish stocks and anadromous stocks.

Question 4. Beyond the specific oceans policy advantages of joining the Convention mentioned in the administration's testimony, are there also more general advantages for U.S. policy to joining the Convention at this time?

Answer. Yes. We believe that U.S. accession to a major multilateral treaty such as the Law of the Sea Convention would yield foreign policy benefits. U.S. adherence would signal that we remain engaged in multilateral regimes that address important environmental and economic issues. U.S. accession would also demonstrate to the international community that, when the United States asks for a treaty to be modified to address particular concerns and those modifications are made, we will join the treaty.

Question 5. What issues are raised for U.S. interests by the claim filed by Russia with the Commission on the Limits of the Continental Shelf to define the extent of its outer continental shelf? How would being party to the Convention affect the ability of the United States to protect such interests?

Answer. As reflected in the Convention, a coastal State exercises sovereign rights over the continental shelf for the purpose of

exploring it and exploiting its natural resources, including, e.g., oil and gas. The Convention permits a coastal State to claim continental shelf beyond 200 miles from its baselines, provided it meets certain criteria. For example, the continental margin does not include the deep ocean floor with its oceanic ridges.

A coastal State claiming shelf beyond 200 miles from its baselines is to make a submission to the Commission on the Limits of the Continental Shelf, which makes recommendations to coastal States related to establishing the outer limits of their shelf. To the extent a coastal State establishes its outer limits based on such recommendations, its outer limits are final and binding.

The United States has an obvious stake in the effective functioning of the Commission, which only recently received its first submission. The United States expects to submit scientific evidence to support its own extended shelf, e.g., off the Atlantic Coast, in the Bering Sea, and in the Arctic Ocean off Alaska. We also have a strong interest in ensuring that the submissions of other States meet the Convention's criteria. Finally, the proper interpretation and application of the Convention's provisions are important for the stability and general acceptability of the law of the sea regime reflected in the Convention.

Specifically with respect to Russia's submission, the United States is concerned that it included certain extensive ridges in the Arctic Ocean that we do not consider meet the Convention's criteria for the continental shelf. The United States submitted its views, with supporting documentation, to the Commission (posted on the CLCS Web site). The resolution of this issue has implications for natural resource development, scientific research, and strategic interests in the Arctic.

By becoming party to the Convention, the United States would be better able to protect its interests in several ways. U.S. comments on other parties' submissions to the Commission would carry added weight. The United States would be able to nominate a commissioner, whose expertise would help shape the Commission's recommendations. Finally, a U.S. submission of scientifically sound information on the outer limits of the broad continental shelf off our coasts would enable us to establish our outer limits as final and binding in accordance with article 76(8).

Question 6. What effect, if any, would the Convention have on the ability of the United States to implement its existing regulations requiring oil tankers calling at U.S. ports to be double-hulled?

Answer. The Convention does not affect our ability to implement the provision of the Oil Pollution Act of 1990 (OPA 90) that requires oil tankers intending to enter a U.S. port to be fitted with a double hull, in accordance with a statutorily established phase-in schedule. Concerning U.S. tankers, article 211(2) of the Convention in fact affirmatively calls upon States to adopt laws and regulations for the prevention, reduction, and control of pollution of the marine environment from vessels flying their flag or of their registry. Concerning foreign tankers, article 211(3) specifically recognizes the right of port States to establish their own requirements relating to vessel source pollution as a condition of entry of foreign vessels into their ports or internal waters or for a call at their offshore terminals. It obligates States to give due publicity to any such requirements and to communicate them to the International Maritime Organization (IMC).

Therefore, implementation of the double hull provisions in OPA 90 for oil tankers, whether foreign-flagged or domestic, is fully consistent with and supported by the Convention.

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Responses of Rear Admiral John E. Crowley, Chief Counsel and Judge Advocate General, U.S. Coast Guard, to Additional Questions for the Record Submitted by Senator Joseph R. Biden, Jr.

Question 1. Article 27 indicates that a coastal State has criminal jurisdiction over a foreign ship that is passing through the territorial sea if the consequences of the crime extend to the coastal State.

- How is this interpreted with respect to transnational crimes that we believe affect all states, like terrorism and the illicit trafficking of people and arms?

- Is there any corollary right on the high seas or in the contiguous zone? If not, are there other legal regimes that do provide such a right?

Answer. Article 27, concerning criminal jurisdiction on board a foreign ship, is taken almost verbatim from Article 19 of the 1958 Territorial Sea Convention, to which the United States is a party. As such, it continues the codification of a longstanding principle of international law.

This Article attempts to strike a reasonable balance between the criminal jurisdiction of the coastal State and that of the flag State. On the one hand, States with shipping interests wish to suffer as little disruption or interference as possible as their vessels transit through the territorial waters of another State. On the other hand, coastal States may regard certain actions by or aboard the transiting ship as so inimical to their interests that they require invocation of their criminal laws. Article 27 is the result of international negotiation that resolves these competing interests.

Article 27 sets forth several bases for coastal State exercise of criminal jurisdiction on board a foreign ship passing through the territorial sea, including crimes where the consequences of the crime extend to the coastal State and where the crime was of a kind to disturb the peace of the country or the good order of the territorial sea. Depending upon the particular facts, there are a host of criminal statutes primarily contained within Title 18 of the United States Code that could be applied to prosecute those involved in terrorist acts and the trafficking of persons and arms in our territorial sea.

On the high seas, there are various circumstances under which the United States could exercise jurisdiction over a foreign flagged vessel, including, among others, where the flag State consents, or in situations involving acts of piracy, unauthorized broadcasting, or slavery. In the contiguous zone, a coastal State may, without flag State consent, exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.

It should also be noted that the Convention does not affect the inherent right of self-defense under international law.

Question 2. Article 99 allows for the boarding of ships on the high seas if they are engaged in the slave trade.

- Is this right being used to effectively help stem the tide of trafficking of women and girls? If not, are there other legal regimes that do provide such a right?
- Is there any similar right on the high seas if the ship is thought to be preparing for an act of terrorism? If not, are there other legal regimes that do provide such a right?

Answer. Article 99 is identical to Article 13 of the High Seas Convention and relates to the Convention to Suppress the Slave Trade and Slavery of September 25, 1926, 46 Stat. 2183, TS No. 778, 2 Bevans 67, 60 LNTS 253; the Protocol of December 7, 1953 Amending the Slavery Convention of September 25, 1926, 7 UST 479, TOAS No. 3532, 182 UNTS 51; and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of September 5, 1956, 18 UST 3201, TIAS No. 6418, 266 UNTS 3. This obligation is implemented in 18 U.S.C. Sec. Sec. 1581–88 (1982), and gives effect to the policy enunciated by the Thirteenth Amendment to the Constitution of the United States. The Slavery Convention, Amending Protocol, and Supplementary Convention do not authorize non-consensual boarding of foreign vessels. Nevertheless, Article 22(1) of the High Seas Convention authorized non-consensual boarding by a warship where there exist reasonable grounds for suspecting that a vessel is engaged in the slave trade. Article 110(1)(b) of the LOS Convention reaffirms this approach. Given that the instruments cited above authorize boarding of ships that are engaged in the slave trade, those provisions can be used to authorize boarding of ships used to traffic any person for any type of forced labor.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which is a supplement to the UN Convention Against Transnational Crime, includes "slavery or practices similar to slavery" as a form of "exploitation" that the Protocol seeks to prevent. See Article 3(a), UN Doc. A/55/383, pages 54–55 (2000). This Protocol does not contain provisions

on the boarding of ships in international waters. In addition, since this Protocol (1) addresses a wide range of human exploitation and (2) has not yet entered into force, the non-consensual boarding provisions of Article 110 are dependent upon the particular facts.

It should also be noted that the Protocol Against the Smuggling of Migrants by Land, Sea and Air, another supplement to the UN Convention against Transnational Organized Crime, provides a framework for States parties to request and obtain authorization to stop and board vessels engaged in the smuggling of migrants by sea. Additionally, any State may request from any other State on an ad hoc basis authorization to board and search the other State's vessels on the high seas. Thus, the ship-boarding provisions of Migrant Protocol could be used if the persons being transported are believed to be smuggled migrants. Because many, if not most, trafficking victims are smuggled migrants, the ship-boarding provisions of the Migrants protocol could be effective tool in identifying trafficking victims and combating trafficking in persons.

With respect to ships on the high seas that are preparing for an act of terrorism, the Convention does not affect the right of self-defense under international law.

Question 3. Article 19(2) provides that a foreign ship shall be considered prejudicial to the peace, good order, or security of the coastal State if it engages in any of the enumerated activities.

- Who determines whether the foreign ship is undertaking any of the proscribed activities?
- Would, in the case where the ship's purpose was clearly a terrorist act or an act threatening to the coastal State, the provision of subparagraph (a) apply?

Answer. The Convention does not accord priority to either the coastal or flag State in terms of determining whether a ship is engaged in one or more of the activities set forth in Article 19(2). To the extent that a coastal State sought to assert authority beyond that provided in the Convention with respect to innocent passage,

for example, it would need to conclude that a ship was engaged in activities rendering its passage non-innocent within the meaning of Article 19. As appropriate, a coastal State that questions whether the particular passage of a ship through its territorial sea is innocent might inform the ship of the reasons why it questions the innocence of the passage and provide the ship with an opportunity to clarify its intentions or change its conduct in a reasonably short period of time.

As to the applicability of Article 19(2)(a) to a terrorist act or act threatening the use of force, this subparagraph would likely apply, recognizing that it would ultimately depend upon the precise facts.

It should also be noted that nothing in the Convention restricts the inherent right of individual or collective self-defense or rights during armed conflict, and the administration is recommending that the United States express such an understanding.

Responses of Admiral Michael G. Mullen, Vice Chief of Naval Operations, Joint Chiefs of Staff, Department of the Navy, to Additional Questions for the Record Submitted by Senator Joseph R. Biden, Jr.

Question 1. Article 50 states that activities in the EEZ must be done with "due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal States . . ."

a. What happens when a coastal State claims that military exercises are being performed that do not meet this criteria?
b. In particular, if a coastal State's environmental protection laws conflict with the operation of military equipment, how is this resolved?

Answer. First, it is the duty of the flag State, not the right of the coastal State, to enforce the "due regard" obligation to comply with laws and regulations adopted by a coastal State. [U.S. Commentary on the LOS Convention, Sen. Treaty Doc. 103–39,

at 24, 34 I.L.M. 1411 (1995), Appendix 7.] The Convention reflects the particular sensitivity of military activities and the special status of warships and other sovereign immune vessels (see, e.g., Articles 95, 236 and 298). Consistent with U.S. policy, the Department of Defense operates with the appropriate "due regard." The Department dedicates the resources necessary to operate in a responsible manner, including from an environmental point of view, as well as to set a standard that other nations will follow.

The concept of "due regard" in the Convention balances obligations of both the coastal State and other States in the exclusive economic zone (see, e.g., Articles 56 and 58). This balance permits coastal States to adopt certain measures to protect the marine environment close to their shores and the right of a flag State to exercise its high seas freedoms in waters beyond the territorial sea.

Article 58 preserves recognized high seas uses including the full range of military activities, such as anchoring, launching and landing of aircraft, operating military devices, intelligence collection, exercises, operations, and conducting military surveys. Under Article 58, all States have the right to conduct military activities within the exclusive economic zone, and may do so consistent with the obligation to have due regard to coastal State resource and other rights, as well as the rights of other States as set forth in the Convention.

Despite the status of warships and other sovereign immune vessels as reflected in the convention (see, e.g., Articles 95, 96 and 236), in accordance with U.S. policy, the Department of Defense has emphasized that protection of the marine environment is an integral component of the national security strategy. This commitment is consistent with the obligation of all parties, under Article 236, to ensure that their public vessels and aircraft operate in a manner consistent with the Convention, insofar as is reasonable and practicable and does not impair operations or operational capabilities of such vessels and aircraft. As discussed above, the Department of Defense had dedicated significant resources to operate in an environmentally sound manner worldwide.

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Responses of Hon. John F. Turner, Assistant Secretary of State, Bureau of Oceans and International Environmental and Scientific Affairs, to Additional Questions for the Record Submitted by Senator Joseph R. Biden, Jr.

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Question 3. Article 61 of the Convention says that a coastal state shall determine the allowable catch in its EEZ. It also makes reference to determining the "maximum sustainable yield, as qualified by relevant environmental and economic factors."

a. What method does the United States use to determine allowable catch in the EEZ?
b. How does the United States define maximum sustainable yield? Is it consistent with the provision in Article 61?
c. Is there any way in which another nation could use the Convention to change or alter U.S. determinations and definitions in this area?
d. What other methodologies are available to measure the best method of protecting fisheries? (For example some have suggested that the model must be based on fishing below the maximum sustainable yield as essential due to advances in technology and increased consumer demand).
e. Would other methodologies be allowed under the Convention?

Answer. The Regional Fishery Management Councils established by the Magnuson-Stevens Fishery Conservation and Management Act, in conjunction with the Secretary of Commerce, determine the allowable catch for EEZ fisheries. The allowable catch must be consistent with the "optimum yield" specified in an approved fishery management plan. 16 U.S.C. 1853(a)(3). Optimum yield is based on maximum sustainable yield, as reduced by any relevant economic, social, or ecological factor. 16 U.S.C. 1802(28). The Secretary of Commerce issues regulations to implement an approved fishery management plan or amendment.

Maximum sustainable yield (MSY) "is the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions." 50 C.F.R. 600.310(c)(1)(i). Article 61 does not define MSY, but the definition in the NOAA guidelines quoted above is the generally accepted one.

Article 61 gives each coastal State the discretion to determine the allowable catch within its EEZ, to ensure that resources are not overexploited, and to determine its capacity to harvest such resources.

No other party to the Convention could bring the United States to binding dispute resolution with respect to the living resources in its EEZ, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States, and the terms and conditions established in its conservation and management laws and regulations. Article 297(3)(a). Another party could, however, request submission of a dispute on certain of these issues to conciliation. Article 297(3)(b).

With respect to other methodologies for protecting fisheries, the Sustainable Fisheries Act of 1996, Pub.L. 104–297, recognized that setting catch levels above those that would produce MSY, as allowed in the original Magnuson-Stevens Act, allowed too much fishing effort and sometimes resulted in overfished stocks. The definition of "optimum yield" was amended so that the allowable catch cannot be set above MSY.

NOAA guidelines (50 C.F.R. 600.310(c) (2) and (3)) offer numerous options for estimating MSY through choice of an MSY control rule (e.g., removal of a constant catch; removal of a constant fraction of the biomass; allowance of a constant level of escapement; variance of the fishing mortality rate as a function of stock size). In mixed-stock fisheries, or where there is insufficient data, an indicator or proxy MSY is acceptable. The guidelines also list a number of factors that can be used to set the allowable catch ("optimum yield") below MSY.

These and other methodologies are acceptable under Article 61. Article 61(3) provides that measures are to be designed to maintain or restore fish populations to levels that can produce

MSY, but lists many factors that may qualify that requirement, in either direction. Other paragraphs in the same article require managers to take into account the best scientific evidence available, to consider the effects of the fishery on bycatch species and predator-prey relationships ("associated or dependent species"), and to ensure that living resources are not over-exploited. Article 61 thus gives coastal States a great deal of discretion in methods of setting allowable catches and methods of measuring the success of management measures.

Question 4. Article 62 of the Convention indicates a coastal State "shall . . . give other States access to the surplus of allowable catch."

a. Who determines if there is surplus allowable catch?
b. How would another State enforce its right to that surplus?

Answer. The coastal State determines if there is surplus allowable catch. Article 62(2). In the United States, the Regional Fishery Management Council or the Secretary of Commerce makes that determination. 16 U.S.C. 1853(a)(4). Another State cannot force the United States to identify surplus or to allocate it (see Answer 3 above).

Question 5. Article 210(5) requires the express prior approval of the coastal State for dumping within the territorial sea and the EEZ or the continental shelf. The provisions of the Ocean Dumping Act (e.g., 33 U.S.C. 1411) with regard to material outside the United States extend only to the territorial sea and the contiguous zone. What legal authority exists for the United States to implement this provision?

Answer. Article 210(5) does not require a coastal State to have a mechanism in place to grant its approval for dumping in the EEZ. To the extent a coastal State has not exercised its authority to grant such approval, dumping would not be permitted. The Ocean Dumping Act currently applies to ocean dumping in the EEZ (and beyond) of matter transported from the United States for the purpose of dumping, or of matter transported from any

location by a vessel or aircraft registered in the U.S. or flying the U.S. flag. It also prohibits the dumping of industrial waste and sewage sludge in the territorial sea and EEZ. The President has inherent authority to grant permission on behalf of the United States but, of course, cannot waive any applicable restriction under domestic law.

Question 6. Article 210(6) requires that national laws, regulations and measures to implement that article shall be "no less effective" than "global rules and standards" in this regard. What is the meaning of the term "global rules and standards" as used in this paragraph?

Answer. The analysis of whether there are "global rules and standards" needs to be carried out on a case-by-case basis, taking into account a variety of factors, such as: whether the rule/standard has been formally adopted; whether it is in force; the number and type of the States adopting the standard; the extent to which the group represents States whose vital interests are affected by the standard; and State practice. The global regime addressing pollution of the marine environment by dumping is long-established; the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the London Convention) governs the ocean dumping of all wastes and other matter.

Question 7. Article 211(2) requires States to adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag, and that such laws and regulations shall "at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference." Does the term "generally accepted international rules and standards" have a different meaning than the term "global rules and standards" in Article 210(6)? Please elaborate.

Answer. Despite the difference in phraseology between "generally accepted international rules and standards" and "global rules and standards," it does not appear from the negotiating history or relevant commentary that a legal distinction was intended. It

appears, rather, that the absence of the term "generally accepted" before "global rules and standards" in the article on pollution by dumping reflected the fact that the 1972 London Convention already covered the relatively narrow (compared to vessel source pollution) field of ocean dumping. With respect to new ocean dumping rules and standards, the same analysis would apply as for generally accepted international rules and standards.

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Responses of Hon. William H. Taft, IV, the Legal Adviser, Department of State, to Additional Questions for the Record Submitted by Senator Joseph R. Biden, Jr.

Question 1. On September 19, 1996, Secretary of State Christopher wrote to Chairman Helms to urge favorable action on the Convention, and stated "we have reviewed existing laws and have determined that implementing legislation is not necessary before United States accession."

a. Does the Executive Branch continue to support the statement by Secretary Christopher?
b. Please elaborate on the basis of this statement by Secretary Christopher. Describe the scope of the review undertaken, the period of time during which the review was conducted, and whether it was conducted on an inter-agency basis, by each relevant agency separately, or by the Department of State only.
c. Seven years have passed since Secretary Christopher's letter was sent to the committee. Has a review of domestic law as compared to the obligations of the Convention been conducted since 1996? If so, please elaborate. If not, why not?
d. Did the Bush administration's review of the Convention in 2001 or in the last year (as described by Mr. Esper) focus, in any respect, on the current domestic legal framework for implementing the Convention? Please elaborate.
e. Please provide a copy of the 1996 review, and any subsequent review.

Answer. The Executive Branch continues to consider that implementing legislation is not necessary before U.S. accession. Given that the U.S. is a party to the 1958 law of the sea convention, that the U.S. heavily influenced the development of the 1982 Convention, and that the U.S. has since 1983 been acting in accordance with the provisions of the Convention governing traditional uses of the oceans, U.S. law and practice are already compatible with the Convention.

Between the time the Convention was transmitted to the Senate in 1994 and Secretary Christopher's letter in 1996, Executive Branch agencies reviewed the provisions of the Convention in light of U.S. law and practice and concluded that implementing legislation was not necessary before U.S. accession. The involvement of particular agencies depended upon the provisions in question. NOAA was particularly involved, for example, in considering whether U.S. obligations related to deep seabed mining could be met under the Deep Seabed Hard Minerals Resource Act. Concerning Part XII on protection of the marine environment, many agencies were engaged in an interagency review led by the State Department.

The Administration is considering whether Article 39 of Annex VI of the Convention (concerning the Sea-bed Disputes Chamber) needs to be implemented through legislation and may be proposing an understanding in this regard. In any event, given the current undeveloped state of deep seabed mining, such legislation would not be necessary before U.S. accession.

Although the Administration's decision to support the Convention did not specifically address the current domestic legal framework, its support for the Convention was facilitated by the longstanding ability of the United States to act in accordance with the Convention within the framework of U.S. domestic law and practice.

Question 2. In submitting the Convention to the Senate, the Executive Branch provided an extensive Commentary on the Convention.

a. Is this Commentary to be considered an authoritative representation of the Executive Branch insofar as any

information in the Commentary is directing to the meaning and legal effect of a term or provision of the Convention?

b. Has the Commentary been reviewed since 1994 by the Executive Branch? Is it still accurate, or does it require modification? If it requires modification, please provide it to the committee.

Answer. Generally, the Commentary appropriately analyzes and interprets the Convention. The Administration has engaged in a detailed multi-agency review that has resulted in an initial package of proposed declarations and understandings that further refine the Commentary; the Administration's proposed declarations and understandings will prevail over the Commentary in the case of any inconsistency.

In addition, certain factual points have been overtaken by more recent events. For example, there are now 145 Parties to the Convention; additional agreements have been concluded (e.g., Annex VI to the MARPOL Convention, which is before the Senate as Treaty Doc. 108–7); and the United States claimed a 24-nautical mile contiguous zone by Presidential Proclamation 7219, 2 September 1999.

It should also be noted that the GPO print of the treaty texts and the Commentary contained some typographical errors and omitted the text of Article 19 of Annex VI (Expenses of the Tribunal); these errors were corrected in the version contained in the Dispatch Supplement of February 1995.

Question 3. Does the Executive Branch regard any of the provisions of the Convention as self-executing? If so, which provisions? Please elaborate.

Answer. The Convention does not itself create private rights of action in U.S. courts. (Although Article 39 of Annex VI might be read to create such a right directly, the Administration's view is that it does not. . . . As noted in the answer to question 1, the Administration is considering an understanding concerning the provision.)

Whether a Convention provision would otherwise be self-executing, including whether it would be directly enforceable as

U.S. law, would depend upon the provision in question, as well as upon whether the Senate and Executive Branch express a view concerning such provision. In this connection, some provisions of the Convention would clearly not be self-executing, such as those contemplating future action by a State Party or those addressing administrative or institutional matters. The Administration would consider as self-executing those provisions setting forth various privileges and immunities to be accorded by States Parties (such as Articles 177–183); such provisions are generally treated as self-executing, and current U.S. law would not otherwise be adequate for the U.S. to implement its obligations under such provisions.

With respect to other provisions, the Administration will be proposing language for the Senate's resolution of advice and consent that would ensure, among other things, that criminal defendants in U.S. courts, such as those accused of environmental pollution, will not be able to invoke the Convention's provisions.

Question 4. Does the Executive Branch believe that any provisions of the Convention may pre-empt state laws? If so, which provisions? Please elaborate.

Answer. Most of the Convention addresses marine areas that are beyond the purview of the states. Within the territorial sea, the Convention contains certain obligations, such as with respect to innocent passage of foreign flag vessels. Such provisions are reflective of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, to which the United States is already a party, and customary international law. We are not aware of any state laws that infringe upon freedom of navigation in the territorial sea.

Concerning Article 39 of Annex VI, while this provision might be read to be directly enforceable and, in some instances, potentially preempt state contract law that would otherwise be applicable to deep seabed mining transactions, the Administration does not consider it directly enforceable. . . . As noted, . . . the Administration is considering an understanding concerning the provision.

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Question 6. Does the Executive Branch believe that any provisions of the Convention provide a private right of action? If so, which provisions?

Answer. The Convention does not itself provide for private rights of action in U.S. courts. Article 187 provides for access by private parties to the Sea-bed Disputes Chamber. Article 292(2) would not preclude a private person from seeking the prompt release of a vessel on behalf of the flag State in an international tribunal, as set forth in Article 292(1). As noted in the answer to Question 3, although Article 39 of Annex VI might be read to create such a right directly, the Administration's view is that it does not . . . the Administration is considering an understanding concerning the provision.

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Question 9. How does the Executive Branch interpret the prohibition on laws relating to the "design, construction, manning or equipment of foreign ships" in Article 21(2) with respect to environmental regulation of matters like contaminated ballast water and double-hulls?

Answer. A double-hull requirement would be considered a law relating to the "design, construction, manning or equipment" (or "CDEM") of a ship. With respect to potential restrictions on the discharge of ballast water for ships transiting the territorial sea, there are many types of restrictions that would, in fact, not apply to the design, construction, manning or equipment of a ship. For example, we would not consider prohibitions on the discharge and/or uptake of ballast water to apply to CDEM of a ship. Thus, the United States could potentially establish no-discharge zones and/or specially designated discharge zones for vessels in transit through the territorial sea or impose a requirement that such ships perform ballast water exchange prior to discharge, without hampering innocent passage. Moreover, most foreign vessels in the U.S. territorial sea are traveling to or from U.S. ports; the United States can and does impose CDEM restrictions as a condition of entry to U.S. ports.

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Question 11. Article 33 allows coastal states to exercise the control necessary in the contiguous zone to prevent and punish infringement of its "customs, fiscal, immigration or sanitary laws and regulations."

a. How does the United States interpret "sanitary laws," as used in this article?
b. Does "sanitary laws" include all the direct and indirect protection of human health and the marine environment?
c. How does the United States interpret "customs and fiscal laws," as used in this article?

Answer. The term "sanitary laws" is not a defined term in the Convention. It tracks Article 24 (the contiguous zone provision) of the 1958 Territorial Sea and Contiguous Zone Convention, to which the United States is already a party. The term does not have as wide a scope as all laws aimed at the protection of human health and the marine environment, although there are likely areas of overlap. Regarding the term "customs and fiscal laws," this is also not a defined term but would include, for example, illegal importation of drugs.

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Question 20. Article 230 allows for non-monetary penalties if violations of law are committed in the territorial sea that are "a willful and serious act of pollution" in the territorial sea.

a. Please describe the current U.S. legal framework governing enforcement of measures related to marine pollution in the territorial sea.
b. Does current U.S. law permit civil penalties or use of a court's injunctive powers? Are such penalties permitted under Article 230?
c. How does the United States interpret "willful and serious act of pollution"? What is the applicable standard under U.S. law? Are these standards, in the view of the Executive Branch, equivalent? Why or why not?
d. Are there any applicable state laws in this regard? How, if at all, would they be affected by Article 230?

Answer. There are a variety of U.S. environmental statutes that regulate pollution from vessels in the territorial sea. Not all of these statutes are relevant to Article 230, which applies only to pollution from foreign flag vessels and not, for example, to other types of pollution, such as by dumping. Most of these domestic statutes authorize a range of penalties, sanctions, and other remedies, including administrative, civil, and criminal.

Consistent with the Commentary submitted to the Senate in 1994, and with a proposed understanding on Article 230, we interpret the references to "monetary penalties only" to exclude only imprisonment and not the range of other administrative, civil, and criminal penalties, sanctions, and other remedies available under domestic statutes.

The "willful and serious" standard set forth in Article 230(2) uses terminology different in two respects from relevant U.S. environmental criminal laws:

- most environmental statutes make it a crime to "knowingly" engage in the conduct; the Clean Water Act, as amended, also criminalizes certain negligent violations of that statute; and
- most environmental statutes do not impose a requirement that an offense be "serious," although some prohibit pollution that is harmful or hazardous.

In essence, however, U.S. law is largely consistent with the Convention, and U.S. interpretations of key terms, as reflected in the proposed understandings, will harmonize the terminology.

We have recommended that the United States express its understanding, with respect to Article 230:

- that it applies only to natural persons aboard the foreign vessels at the time of the act pollution;
- that the references to "monetary penalties only" exclude only imprisonment;
- that the requirement that an act of pollution be "willful" in order to impose non-monetary penalties would not

constrain the imposition of such penalties for pollution caused by gross negligence;

- that, in determining what constitutes a "serious" act of pollution, a State may consider, as appropriate, the cumulative or aggregate impact on the marine environment of repeated acts of pollution over time; and
- that, among the factors relevant to the determination whether an act of pollution is "serious," a significant factor is non-compliance with a generally accepted international rule or standard, e.g., such a rule or standard under the MARPOL Convention.

In addition, the Administration has recommended that the United States express its understanding that sections 6 and 7 of Part XII (which include but are not limited to Article 230) do not limit the authority of a State to impose penalties, monetary or non-monetary, for nonpollution offenses, such as false statements, obstruction of justice, and obstruction of government or of judicial proceedings, wherever they occur, or for any violation of national laws and regulations or applicable international rules and standards for the prevention, reduction, and control of pollution of the marine environment that occurs while a foreign vessel is in the internal waters or in any port or offshore terminal under the jurisdiction of that State.

Question 21. The Secretary of State's Letter of Submittal indicates that when the United States signed the Agreement, it stated that doing so would ensure the implementation of regimes that would be consistent with U.S. seabed mining interests and consistent with existing U.S. laws and regulations.

a. Please describe existing U.S. seabed mining interests and how the regime is consistent with them.
b. Please detail which U.S. laws and regulations impact seabed mining and how the regime is consistent with them.

Answer. The United States is interested in both a secure supply of the materials found in manganese nodules (nickel, copper,

manganese, and cobalt) and in an acceptable law of the sea regime covering a broad range of ocean uses, including deep seabed mining. A full presentation of U.S. deep seabed mining interests, how the Convention and the Agreement meet these interests, and the relationship to domestic law and regulations can be found on pages 33–43 of the Commentary accompanying the 1994 Letter of Transmittal.

There is one U.S. company with a U.S. deep seabed mining license. The 1994 Agreement provides for recognition of the exploration rights of this consortium by considering it under the treaty regime based on arrangements no less favorable than those granted to holders of claims already registered by Japan, France, Russia, India, Japan, China, South Korea, and an Eastern European consortium. If the United States, as a party to the Convention, certified that the U.S. license holder is financially and technically qualified, and the license holder paid a $250,000 application fee, the consortium would be entitled to exploration rights to areas as large as 150,000 sq. km. for 15 years, rights that can be renewed in five-year increments.

The Deep Seabed Hard Mineral Resources Act (30 U.S.C. 1401–1473; "DSHMRA") and its implementing regulations (15 CFR Parts 970, 971) establish the permitting and licensing regime governing the U.S. citizens engaged in exploration and commercial recovery of deep seabed hard mineral resources. Although the DSHMRA predated the Convention and Agreement, basic principles embodied in the Convention and the Agreement are consistent with those in the DSHMRA (e.g., disclaimer of sovereignty over the deep seabed; establishment of a mining regime based on first-in-time priority of right; nondiscriminatory criteria; and security of tenure through granting of exclusive rights for a fixed period of time and with limitations of the ability to modify authorizations).

The DSHMRA also provides for transition to an international agreement that enters into force for the United States, with a view to assuring continuity of any ongoing U.S. mining operations (30 U.S.C. 1442). The only one existing U.S. exploration license holder has not applied for commercial development permits under the DSHMRA. At this time, there is no conflict between the area

covered by the existing U.S. license and those authorized for other States under the Convention.

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Responses of William H. Taft, IV, Legal Adviser, Department of State, to Additional Questions for the Record Submitted by Senator John F. Kerry

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Question 5. Article 211 states that coastal States may adopt laws and regulations for the prevention, reduction and control of pollution from vessels in the EEZ "conforming to and giving effect to generally accepted international rules and standards established through the competent international organization."

- Is it clear that this clause means that in the absence of any international agreement, the U.S. could regulate pollution from vessels not entering a U.S. port in the EEZ, outside of the territorial sea? Would the double-hull requirements of the Oil Pollution Act of 1990 be consistent with this clause? Is it clear whether "conforming to" sets a ceiling or merely a floor on what the U.S. can do domestically?

Answer. The Convention's provisions relating to pollution from vessels are a significant part of the overall balance between coastal and maritime interests the Convention is designed to maintain over time. Paragraph 1 requires States to establish international rules and standards to prevent, reduce and control vessel source pollution. In that regard, the IMO has developed several conventions that, directly or indirectly, address vessel source pollution, including the MARPOL Convention and its several annexes, as well as the SOLAS Convention, the International Convention on Standards of Training, Certification and Watchkeeping (STCW), and the International Convention on Oil Pollution Preparedness, Response, and Cooperation.

In recognition of a coastal State's sovereignty within its territorial sea, Article 21 affirms the authority of the coastal State to establish requirements relating to pollution from foreign vessels, including vessels exercising the right of innocent passage, with certain provisos. In the EEZ, where all States' interest in navigation is greater than in the territorial sea, a coastal State's requirements relating to pollution from foreign vessels must conform to and give effect to generally accepted international rules and standards. This approach is designed to avoid a global patchwork of unilateral requirements in various EEZs and to protect freedom of navigation.

There are two respects in which generally accepted international rules and standards (or the absence of any such rules and standards) set a "floor:"

- First, States are free to adopt laws for the regulation of pollution from vessels flying their flag that have "at least" the same effect as that of generally accepted international rules and standards; thus, a State could choose to impose more stringent standards upon its own vessels.
- Second, where the international rules and standards are inadequate to meet special circumstances and a coastal State considers that a particular area of its EEZ requires greater protection, a coastal State may pursue IMO approval for designation of one or more special areas, as well as mandatory measures that exceed international rules and standards.

Concerning the double-hull requirement of the Oil Pollution Act of 1990, there would be no inconsistency with Article 211. The House Conference Report indicates that section 3703(a) ". . . is not intended to apply to vessels transiting U.S. waters or transiting the Exclusive Economic Zone in innocent passage. . . ."

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Question 7. Please discuss whether UNCLOS could be used to challenge U.S. trade measures under the Pelly Amendment, Section 609 of P.L. 101–162, and other laws to protect species such as sea turtles and dolphins from destructive fishing practices?

Answer. The Convention would not provide a basis for a challenge to U.S. trade measures designed to promote or require compliance with conservation and environmental laws, norms, and objectives, such as the protection of sea turtles and dolphins. The Administration will recommend to the Senate that the resolution of advice and consent reflect that nothing in the Convention limits the right of a State to prohibit or restrict imports into its territory in order to, inter alia, promote or require compliance with environmental and conservation laws, norms, and objectives.

2. Salvage at Sea: Sovereign Title to Sunken Vesssels

a. French vessel in Gulf of Mexico

On March 31, 2003, the United States and France signed an agreement regarding the sunken vessel *La Belle*, a seventeenth-century French vessel that sank in the Gulf of Mexico. At the same time, representatives of the Texas Historical Commission and the French National Marine Museum signed a related administrative arrangement authorized by the agreement concerning custody and exhibit of the physical remains of the vessel and associated artifacts.

Excerpted below is a joint statement by the two governments released April 1, 2003.

The full text is available at *www.state.gov/r/pa/prs/ps/2003/19237.htm*.

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The Agreement reflects an important principle of international law—that title to identifiable sunken State vessels remains vested in the Sovereign unless expressly abandoned, and is not lost by the passage of time. This principle is of great importance because it helps to ensure appropriate treatment and respect for sunken warships and aircraft around the world, many of which contain the human remains of men and women who died in the service of their country.

The wreck of "*La Belle*" and its associated artifacts will remain in Texas on a long-term loan under the custody and control of the Texas Historical Commission, except for temporary loans for the purpose of public exhibition of some of the artifacts.

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Article 1 of the agreement sets forth the elements of continued French title as follows:

> 1. At the time of its sinking, *La Belle* was an auxiliary vessel of the French Navy.
> 2. The French Republic has not abandoned or transferred title of the wreck of *La Belle* and continues to retain title to the wreck of *La Belle*.

Other key issues included the arrangements for long-term loan under the custody of the Texas Historical Commission and for ensuring that the physical remains of *La Belle* and its associated artifacts and human remains are preserved and exhibited in accordance with international professional standards as they evolve over time.

The full text of the agreement is available at *www.state.gov/s/l/c8183.htm.*

b. Rejection of salvage claims by United States

On July 17, 2000, the U.S. Court of Appeals for the Eleventh Circuit reversed and remanded a decision by the U.S. District Court for the Southern District of Florida that had allowed salvage operations to proceed in the face of opposition by the U.S. Government. *International Aircraft Recovery, L.L.C. v. Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255 (11th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001).

Plaintiff in the case had salvaged portions of a U.S. Navy "Devastator" TBD-1 torpedo bomber that crashed during World War II in international waters approximately eight miles east of Miami Beach on July 1, 1943. The United States intervened and objected to the salvage of the aircraft. The district court found that plaintiff could salvage the aircraft

and retained jurisdiction to determine any applicable salvage fee. 54 F. Supp. 2d 1172 (S.D.Fl. 1999). In reversing the district court, the Eleventh Circuit concluded that plaintiff had no right to salvage if the United States, as owner, had objected to salvage efforts. The court noted that "some courts have entertained the possibility that laws regulating the use of public property could provide a 'constructive rejection' of salvage of publicly owned vessels." Finding that the evidence on the record was inconclusive as to whether the Navy had acquiesced, the court of appeals remanded for the district court to consider "when the United States effectively rejected the salvage efforts. . . ." 218 F.3d at 1263.

On remand, the district court found that the United States had effectively rejected the salvage efforts in a letter dated February 8, 1991, three years before plaintiff conducted its first salvage operation, and granted summary judgment in an unpublished order. Case No. 98-1637-CIV-KING (August 22, 2002). Plaintiff appealed that order, arguing that subsequent discussions with the Navy superseded the 1991 letter. In its brief to the Eleventh Circuit, filed in August 2003, the United States reiterated the argument adopted by the district court, that the United States had "effectively rejected" plaintiffs' salvage services in the letter of February 1991, which rejected any salvage efforts undertaken without an agreement in writing with the Navy and that no such agreement was ever reached. Excerpts below from the August brief address the issue of "constructive rejection" mentioned in the Eleventh Circuit opinion of 2002. At the end of 2003 the case was still pending with the Eleventh Circuit.

The full text of the August 2003 brief is available at *www.state.gov/s/l/c8183.htm.*

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(2) *The Doctrine of "Constructive Rejection" Applies to this Aircraft.*

In its previous opinion in this case, this Court considered "the possibility that laws regulating the use of public property could

provide a 'constructive rejection' of salvage of publicly owned vessels," 218 F.3d at 1263. In this case, since it is clear that the United States actually rejected IAR's salvage efforts before any salvage took place, this Court need not reach the issue of "constructive rejection".

"The law of salvage presumes that the owner desires the salvage service," *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 963 (4th Cir. 1999). But, this is not a case where a salvor has come upon an operating vessel or aircraft which is *in extremis* and in need of immediate assistance. This was a historic aircraft which had crashed in the Atlantic Ocean and had remained there for some 40 years before being located. Even in the absence of an affirmative rejection, it cannot be presumed that the government would want to salvage the plane.

The admiralty rules of salvage, which were historically developed for the purpose of rescuing operating craft and returning them to commercial service, are simply not applicable in "historic salvage" situations where "the owner of the property [the United States] may not even have desired for the property to be 'rescued.' " *Klein v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir. 1985). *See also Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F.Supp. 953 (M.D. Fla. 1993).

According to Dr. William S. Dudley, the Director of the Naval Historical Center and Curator of the Navy, the TBD is a historic aircraft which is eligible for inclusion in the National Register of Historic Places under the criteria established pursuant to the National Historic Preservation Act of 1966 ["NHPA"], 16 U.S.C. §§ 470 *et seq*. (Dudley aff., R-1-20, Ex. 1 ¶ 10). Further, as of April 1999, some 3,500 shipwrecks and 5,500 plane wrecks were known to be owned by the U.S. Navy all over the world (Dudley dep. 100). The decision to recover or not recover these wrecks is often a thorny policy decision which is driven by the availability of funds for salvage and restoration services, as well as the need to ensure proper methods of recovery. *See*, Letter of Dr. J. Bernard Murphy of June 25, 1993.

The NHPA does not mandate that the government undertake every possible historic salvage or preservation activity which might

be urged upon it by interested parties, whether those parties are motivated by policy-based historic preservation goals, *see National Trust for Historic Preservation et al. v. Blanck*, 938 F.Supp. 908, 922 (D.D.C. 1996), *aff'd*, 203 F.3d 53 (D.C. Cir. 1999), or are simply trying to sell their salvage services. Such a mandate would be impossible to control fiscally, and would remove from the government a necessary policy judgment as to which of these activities to undertake and how best to perform them.[9] Thus even in the absence of an "effective rejection", it cannot be assumed that the Navy "desires" salvage or restoration services, or is even able or willing to pay for it. The doctrine of "constructive rejection" therefore necessarily applies to historic wrecks.

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3. Navigation Freedom

A listing of U.S. armed forces' operational assertions of U.S. navigation and overflight rights during fiscal years 2000–2003 under the U.S. Freedom of Navigation program is available at *www.defenselink.mil/policy/is/fon_fy00-03.html.*

a. Nuclear

On March 26, 2003, the United States delivered a diplomatic note to the government of Chile protesting its amended Nuclear Safety Law (Law 19,825). The new law requires certain vessels and planes transiting Chile's territorial sea

[9] The NHPA requires that the Navy manage and maintain its historic artifacts "in a way that considers the preservation of their historic, archaeological, architectural, and cultural values", 16 U.S.C. § 470h-2(a)(2)(B) and to take into account the effect of any "undertaking" on such artifacts before approving or licensing same, 16 U.S.C. § 470(f). The NHPA thus does not allow private parties to engage in unauthorized salvage of federally owned historic property in a way that undermines the preservation policy of the responsible federal agency. In many cases, the preferred policy is simply to allow preservation *in situ*, *see*, Varmer, "Sunken Treasure: Law, Technology and Ethics": Third Session: Non-Salvor Interests: The Case Against the 'Salvage' of the Cultural Heritage, 30 J. Mar. L. & Com. 279 (1999).

and exclusive economic zone to seek prior authorization from the Chilean Commission of Nuclear Energy. The text of the diplomatic note is set forth below:

[The United States] . . . refers to Chilean Law No. 19,825, published in the Diario Oficial on October 1, 2002, which amends Law No. 18,302 on Nuclear Safety.

The Government of the United States of America considers that Law No. 19,825 is not in conformity with international law as reflected in the United Nations Convention on the Law of the Sea (LOS Convention). In particular, Article 4 of the new Chilean law states, in part, that "authorization will be required . . . for the entry into or transit through the national territory, exclusive economic zone, mar presencial and national airspace of nuclear substances or radioactive materials. . . ." This requirement of authorization prior to transiting a country's territorial sea, exclusive economic zone and the high seas clearly exceeds the provisions of international law as reflected in the LOS Convention. As a result, the United States does not accept the application of Law No. 19,825.

One of the fundamental tenets in the international law of the sea is that ships of all States, regardless of cargo, armament, or means of propulsion, enjoy the right of innocent passage through the territorial sea of other States without prior authorization or notification. Beyond the limits of the territorial sea, all ships and aircraft have the freedom to navigate and overfly without prior permission or notification.

The United States also would like to refer to the term "mar presencial" used in Article 4 of Law No. 19,825 and to note that this term has no meaning under the international law of the sea. As that term is used by Chile to encompass large areas of the high seas, the United States does not accept the application of Law No. 19,825 to such areas and, accordingly, reserves all its high seas rights and freedoms in such areas.

The United States requests that the Government of Chile review this law with a view to amending those provisions that exceed those permitted by international law.

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b. Archipelagoes

A telegram from the Department of State to the American embassy in Jakarta, Indonesia, dated August 8, 2003, explained that prior to the Third UN Conference on the Law of the Sea (1973–1982), international law did not permit archipelagic claims. The United States worked closely with Indonesia to reach agreement on a regime for mid-oceanic island states "to achieve international recognition of their special status as archipelagic States." The telegram continued:

> Under the regime agreed to in Part IV of the 1982 Law of the Sea Convention, an archipelagic State is entitled to draw archipelagic straight baselines around the outermost points of the outermost islands and drying reefs of the archipelago and thereby convert high seas areas within the archipelago into archipelagic waters under the sovereignty of the archipelagic State. In return, the archipelagic State recognized the right of ships and aircraft of all states to transit the archipelagic waters and adjacent territorial sea in the normal mode for the continuous, expeditious and unobstructed transit (i.e., the right of archipelagic sea lanes passage (ASLP)) through all routes normally used for international navigation through those waters until such time as the archipelagic State, in conjunction with the International Maritime Organization (IMO), designated archipelagic sea lanes (ASL) through the archipelago adopted by the IMO.

The United States recognized Indonesia's claim to status as an archipelagic state, conditioned on Indonesia's commitment that application of its claim was and would be in full conformity with international law reflected in Part IV of the Law of the Sea Convention. The United States had also worked with Indonesia and Australia in identifying three

mutually acceptable ASLs, adopted by the IMO in 1998, at a time when East Timor was under the control of Indonesia.

The telegram requested the embassy to present a diplomatic note to the Government of Indonesia requesting clarification on four points in connection with Indonesia's June 28, 2002, Regulation No. 37 on the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lanes Passage. An English copy of the regulation, which formally designated the three north-south ASLs, was made available in July 2003 through the IMO. The text of the diplomatic note, setting forth the U.S. requests for clarification, is provided below.

The full text of the telegram is available at *www.state.gov/s/l/c8183.htm*.

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[The United States] . . . refers to Indonesian Regulation No. 37 of 28 June 2002 on the Rights and obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lanes Passage through designated archipelagic sea lanes, and seeks as a matter of some urgency clarification of several of its provisions.

The United States recalls the Exchange of Notes accompanying the United States-Indonesia Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and Related Protocol, of July 11, 1988, by which the Government of the Republic of Indonesia agreed that it will apply the archipelagic States principles "in accordance with Part IV of the 1982 United Nations Convention on the Law of the Sea and . . . respect() the international rights and obligations pertaining to transit of the Indonesian archipelagic waters in accordance with international law and reflected in that Part."

The Government of the United States has carefully reviewed the English translation of Indonesian Regulation No. 37 of 2002 as publicized by IMO circular SN/Circ.200/Add.l of July 3, 2003.

The United States is pleased to inform the Government of the Republic of Indonesia that it considers for the most part the Regulation and its Annexes faithfully follow the provisions of

Part IV of the 1982 Law of the Sea Convention and the sea lanes adopted by the IMO in 1998. In that connection, the Government of the United States wishes to inform the Government of the Republic of Indonesia of its understanding that:

— as this is a partial designation of archipelagic sea lanes through the Indonesian archipelago, the right of the ships and aircraft of all States to exercise archipelagic sea lanes passage continues on all normal routes used for international navigation through other parts of the Indonesian archipelago, as provided in Article 53(12) of the Law of the Sea Convention and paragraph 6.7 of Part H of the IMO Ships' Routeing Guide, and
— the right of innocent passage exists for the ships of all States in all of Indonesia's archipelagic waters (except for internal waters within archipelagic waters) and territorial sea, as provided in Article 52(1) of the Law of the Sea Convention and paragraph 6.5 of Part H of the IMO Ships' Routeing Guide.

The United States would appreciate a note in reply confirming that Indonesia agrees with these understandings.

In addition, the United States would appreciate being advised of the coordinates (latitude and longitude) of the southern termination of the axes of Spurs IIIA and IIIB resulting from the change in status of East Timor since the sea lanes were adopted by the IMO in 1998.

Finally, the United States would appreciate being informed of Indonesia's intentions with regard to those archipelagic straight baselines that are measured from basepoints on East Timor territory pursuant to Law No. 4 of 1960.

The United States would appreciate an early reply so that it may provide appropriate guidance to its forces prior to the implementation of the sea lanes and regulation on December 27, 2003.

The United States is prepared to engage in any necessary consultation with Indonesia officials as may be necessary to reach a mutually satisfactory clarification of these points.

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4. Prohibition on Alien Crewmen Performing Longshore Work

On December 15, 2003, the Department of State issued a final rule, effective January 14, 2004, concerning the right of alien longshoremen to work in the United States. 68 Fed. Reg. 69,600 (Dec. 15, 2003). This action makes final a proposed rule published in the Federal Register on February 12, 2002 (67 Fed. Reg. 6447). *See also Digest 2002* at 756–757. Excerpts below from the December 15 Federal Register describe the basis for and effect of the rule.

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Section 258 of the Immigration and Nationality Act of 1952 (the "Act"), 8 U.S.C. 1288, as added by the Immigration Act of 1990, Pub. L. No. 101–649, and subsequently amended, has the effect that alien crewmen may not perform longshore work in the United States. Longshore work is defined to include "any activity relating to the loading or unloading of cargo, the operation of cargo-related equipment (whether or not integral to the vessel), and the handling of mooring lines on the dock when the vessel is made fast or let go, in the United States or the coastal waters thereof." The Act goes on, however, to define a number of exceptions to the general prohibition on such work.

Among certain other exceptions, section 258(e), entitled the "Reciprocity exception," allows the performance of activities constituting longshore work by alien crewmen aboard vessels flagged and owned in countries where such activities are permitted by crews aboard U.S. ships. The Secretary of State (hereinafter, "the Secretary") is directed to compile and annually maintain a list, of longshore work by particular activity, of countries where performance of such a particular activity by crewmembers aboard United States vessels is prohibited by law, regulation, or in practice in the country. The Attorney General will use the list to determine whether to permit an alien crewmember to perform an activity constituting longshore work in the United States or its coastal waters, in accordance with the conditions set forth in the Act.

The Department bases the list on reports from U.S. diplomatic posts abroad and submissions from interested parties in response to the notice-and-comment process. On the basis of this information, the Department is hereby issuing an amended list. The list includes 24 countries not previously listed: Albania, Antigua, Barbados, Brunei, Chile, Cook Islands, Grenada, Kazakhstan, Latvia, Lebanon, Macau, Namibia, Nigeria, Oman, Russia, St. Christopher and Nevis, Singapore, Sudan, Syria, Tonga, Turkey, Tuvalu, United Arab Emirates and Vietnam. Two countries were dropped from the list because the most recent information indicates that they do not restrict longshore activities by crewmembers of U.S. vessels: Estonia and Micronesia.

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B. OUTER SPACE

1. General Remarks

The 42nd Session of the Legal Subcommittee ("LSC") of the UN Committee on the Peaceful Uses of Outer Space ("COPUOS") met in Vienna March 24-April 4, 2003. Excerpts below from general remarks by D. Stephen Mathias, U.S. Representative to the LSC, review basic space instruments and the need for greater adherence to them by members of COPUOS.

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. . . This year marks the 40th anniversary of UN General Assembly Resolution 1962, the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, adopted December 13, 1963. This Declaration was adopted at a time when space exploration and international interaction in outer space were new realities. Member States recognized that outer space, extraordinary in many respects, also presented unique legal issues. They also understood at the time that the extraordinary nature of outer space and the rapid development of human activities

in it would be best served by a pragmatic and gradual approach to these legal issues. The approach that Member States chose —commencing with the study of questions relating to legal aspects, proceeding to the formulation of non-binding principles of a legal nature and, then, incorporating such principles in general multilateral treaties—produced a legal framework that has stood the test of time. The adoption of Resolution 1962 represented a significant first step in this regard. It established the fundamental principles for the orderly use and exploration of outer space and set the stage for the negotiation and conclusion of the four core treaties that govern our activities in space today.

The year 2003 also marks the 35th anniversary of the entry into force of the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space. This "Rescue and Return" Agreement was founded upon a commitment to international cooperation in the peaceful exploration and use of outer space, and upon recognition of the need for international cooperation in responding to accidents, emergencies or other forms of distress. It remains as important today as it was at its inception. The treaty elaborates on the simple, but profound, humanitarian notion, as contained in the 1967 Outer Space Treaty and General Assembly Resolution 1962, that astronauts shall be regarded as envoys of mankind in outer space and shall be rendered all possible assistance in the event of accident, distress or emergency. Unfortunately, space exploration remains a dangerous enterprise and the possibility of accidents or emergencies is real. This Agreement establishes a framework for prompt and effective international response.

Notwithstanding the continuing relevance of the core outer space law instruments—the Outer Space Treaty, the Rescue and Return Agreement, and the Liability and Registration Conventions —several key States, including some members of COPUOS, have not accepted key treaties. The United States wishes to stress the need for this Subcommittee to invite States to consider ratifying and implementing the four core space law instruments cited above. Once ratified, of course, States that have accepted the core instruments should assess the sufficiency of their nation's laws to implement them.

The principles contained in the core space law instruments establish a framework that has encouraged the exploration of outer space and benefited both spacefaring and non-spacefaring nations. It is important that we not lose sight of how much has been—and continues to be—achieved for humanity's common benefit within this framework. The language of Articles 1 and 2 of the Outer Space Treaty, which is based in large part upon the Principles in General Assembly resolution 1962, establishes that the exploration and use of outer space is to be carried out for the benefit and in the interests of all peoples, that outer space exploration and use are open on a non-discriminatory basis, that there is freedom of scientific investigation in outer space, and that outer space is not subject to national appropriation. The United States fully supports these principles and remains highly engaged in activities that benefit non-spacefaring nations as well as other spacefaring ones. Data from U.S. meteorological satellites are routinely provided to users around the globe at no cost. These data are invaluable for weather forecast, protection of the natural environment and disaster mitigation. In addition, the U.S. Government will continue to provide service from the Global Positioning System (GPS) for peaceful civil, commercial, and scientific use on a continuous, worldwide basis, free of direct user fees. This is true today and will be equally true in the future. It is our own intention that GPS will remain a high quality and reliable service provided at no/no costs to users. Finally, U.S. space and Earth science data are shared with the world scientific community through cooperative programs or by making them available in accessible data archives, some at no cost and other data only at the cost of reproduction. These include data relevant for fundamental science research as well as data relevant for key applications, such as sustainable development.

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2. Comments on Specific Agenda Items

As to agenda item 6, the United States reiterated its views from previous years that "there is no need to seek a legal definition or delimitation for outer space. Activities in

outer space and in airspace are flourishing and have raised no practical need for a definition or limitation between the spheres. In the absence of a real need, any attempt to develop a definition would be ill-advised as there would be no experience to call upon in agreeing upon any particular definition or delimitation."

In further statements on specific agenda items, excerpted below, the United States addressed the role of international organizations, the UNIDROIT space assets protocol, and the practice of states in registering space objects.

The full text of the U.S. statements is available at *www.state.gov/s/l/c8183.htm.*

a. Information on the activities of international organizations

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As you are well aware, the outer space treaties were drafted to permit international intergovernmental organizations that conduct space activities to do so within the treaty framework. The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, the Liability Convention and the Registration Convention each contain provisions specific to international intergovernmental organizations. Specifically, an international intergovernmental organization that conducts space activities can be a "launching authority" under the Rescue and Return Agreement and the core articles of the Liability and Registration Conventions can be deemed to apply to such an international intergovernmental organization. For this to occur, however, each Convention sets forth two basic requirements. (Rescue and Return Agreement, Article 6; Liability Convention, Article XXII(1); Registration Convention, Article VII(1).) The international intergovernmental organization must declare its acceptance of rights and obligations under the applicable treaty *and* the majority of the State members of the organization must have adhered to both the Outer Space Treaty and to the applicable treaty (either the Rescue and Return Agreement, the Liability Convention or the Registration Convention, as the case may be).

As my government has noted on several previous occasions, several extremely important international intergovernmental organizations conducting space activities are not conducting those activities within the frameworks of the Rescue and Return Agreement and the Liability and Registration Conventions because not enough of their members have become Party to both the Outer Space Treaty and, respectively, to either the Rescue and Return Agreement, the Liability Convention or the Registration Convention. We believe that the framework established by the Rescue and Return Agreement, the Liability Convention and the Registration Convention is an important and beneficial one for global conduct of space activities. It is surely desirable for international organizations to conduct their space activities under the coverage of these significant instruments.

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b. UNIDROIT Space Assets Protocol

As I stated last year, the United States firmly supports the goals of the proposed Space Assets Protocol. As we are all aware, the range and volume of activities in outer space being conducted by the private sector have increased dramatically over the last several decades, and particularly within the last five to ten years. The growth and development of the commercial space sector will benefit States in all regions and at all levels of economic development.

Commercial space systems are extremely capital intensive to plan, design, construct, insure, launch and operate. They can take years to complete. In light of the increasing importance of commercial space activities, and the benefits that flow from those activities to all regions and all levels of economic development, the facilitation of financing for commercial space activities—through modern private financing mechanisms—is a pressing need.

It is precisely this need that the draft Space Assets Protocol to the Cape Town Convention on International Financing of Mobile Equipment aims to address. Through its emphasis on asset-based and receivables financing, it has considerable potential to enhance

the availability of commercial financing for outer space activities. This in turn could prove crucial to furthering the provision of services from space to countries in all regions and at all levels of development.

We are pleased that the examination of the preliminary draft Space Assets Protocol has remained on the LSC's agenda and would like to comment on the two issues identified for discussion. The first issue on the agenda is the possibility of the United Nations serving as a Supervisory Authority for the registry established under the preliminary draft protocol. . . . As we are all aware, any registry established under a Space Assets Protocol would be a separate and distinct entity from the UN Registry established under the Registration Convention and from any Radiocommunication Sector of the International Telecommunication Union record keeping with respect to the use of orbital locations and related radio frequencies. Although the draft Space Assets Protocol is in early stages of development, we anticipate that it will likely approach the registry in a similar manner as has been done pursuant to the Aircraft Protocol; specifically, the registry would be a computer-based registry including only minimal information as to possible pre-existing claims to priority with respect to registered space assets. Since the registry operator—the "registrar"—would not review information filed nor provide any assurances as to its accuracy, we anticipate that registry requirements for staff and other resources would be quite modest. The Supervisory Authority, if an intergovernmental organization, would need generally to be immune from legal or administrative process for any issues relating to the registry and its operation. As with the Aircraft Financing Protocol, the registry operator would likely be a private sector body that would bear liability. Given these anticipated parameters, we are open to giving further consideration of an existing UN body, such as OOSA, taking on the Supervisory Authority role.

A second issue on the agenda is the relationship between the terms of the preliminary draft protocol and the rights and obligations of States under the legal regime applicable to outer space. Initially, I would like to note that the Space Assets Protocol is not intended to affect rights and obligations of States party to the outer space treaty system or the International Telecommunication

Union treaties. It is intended to address the distinct and important issue of financing for commercial space activities, rather than the parameters for the conduct of those activities. Nonetheless, we will need to give further consideration to the implications of transfers under the draft Space Assets Protocol and UNIDROIT Convention on the Outer Space Treaty system and the International Telecommunication Union (ITU) Constitution, Convention and Radio Regulations. Under the UNIDROIT Convention and proposed Space Assets Protocol thereto, in the event of default or insolvency, possession of or control over a space asset could be transferred from a national of one State to a national of another, or from one State to another. Such transfers can and do happen today, but a Space Assets Protocol would likely increase their frequency. How will such transfers affect the responsibility of a State Party to the Outer Space Treaty, including State responsibility to supervise certain activities in outer space? Further, we need to examine whether State obligations and rights relating to return of objects launched into outer space would be affected. Moreover, the ITU has established procedures concerning satellite use of radio frequencies. ITU member states will want to examine whether transfers under the UNIDROIT agreements could affect their rights and obligations under the ITU treaties, and if so, how. States may also need to ensure that the Space Assets Protocol provides for State consideration of the transfer of any satellite license. One important issue to consider is whether it will be possible to address these questions in advance of particular transactions—through arrangements between States that become party to the UNIDROIT Space Assets Protocol or through language in the protocol text itself that would then be effective as between those States parties—or whether it will be necessary to address them as they arise.

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c. Practice of states in registering space objects

Pursuant to the 1975 UN Convention on the Registration of Objects Launched into Outer Space, the United Nations established a Register to record information on space objects launched into

earth orbit or beyond as provided by launching States. At the time, three reasons were advanced to justify the establishment of a centralized Registry: traffic management, safety, and identification of space objects. Over the years, the Register has served a useful function in regard to each of these concerns.

Since the establishment of the Register, activities in space have dramatically increased and changed in nature to include increasing commercial activities. While the Registration Convention remains both useful and relevant, it has become increasingly evident that State and international organization practice in recording space objects on the UN Registry is widely divergent.

We believe that the LSC could play a useful role in promoting adherence to the Registration Convention with respect to registration of space objects. Through a multi-year work plan the LSC would examine State and international organization practice in recording space objects on the Registry established under the Registration Convention with the view to identifying common elements.

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Cross-references:

Control of "submerged lands" off the coast of the Commonwealth of the Northern Mariana Islands, **Chapter 5.B.3.**
Diplomatic protection of ships' crews, **Chapter 8.A.1.**
Declaration concerning geostationary satellite orbit, **Chapter 11.E.2.**

CHAPTER 13

Environment and Other Transnational Scientific Issues

A. ENVIRONMENT

1. Pollution and Related Issues

a. Conference of the Parties to the UN Framework Convention on Climate Change

On December 4, 2003, Dr. Harlan L. Watson, senior climate negotiator and special representative and head of the U.S. Delegation, addressed the Ninth Session of the Conference of the Parties to the UN Framework Convention on Climate Change, in Milan, Italy. His remarks reviewed U.S. actions reaffirming commitment to the Framework Convention.

The full text of his remarks, excerpted below, is available at *www.state.gov/g/oes/rls/rm/2003/26894.htm*. Other U.S. statements on these issues are available at *www.state.gov/g/oes/climate/*.

President Bush's climate change policy reaffirms the U.S. commitment to the United Nations Framework Convention on Climate Change and its ultimate objective—to stabilize atmospheric greenhouse gas (GHG) concentrations at a level that will prevent dangerous human interference with the climate. It has three basic components designed to address both the near-term and long-term aspects of this global challenge.

The first component involves a series of near-term actions aimed at slowing the growth of our greenhouse (GHG) emissions. The President set a national goal of reducing U.S. GHG intensity (GHG emissions per dollar of GDP) by 18 percent over the next 10 years—a nearly 30% improvement over business-as-usual. Meeting the President's commitment will achieve more than 500 million metric tons of carbon-equivalent emissions reductions from business-as-usual estimates through 2012—an amount equal to taking 70 million cars off the road.

The second component focuses on laying the groundwork for both current and future action—investments in science, technology, and institutions. We need better science to promote better decision-making; better technology to slow GHG emissions growth; and better institutions to enable us to pursue the lowest-cost emissions reduction opportunities.

The third component is international cooperation, which is of critical importance to the development of any effective and efficient global response to the complex and long-term challenge of climate change. This includes bilateral and multilateral cooperation on both near-term efforts to slow the growth in emissions and on longer-term science and technology initiatives.

Since 2001, the U.S. has revitalized or initiated 13 formal bilateral climate change partnerships with both developed and developing countries and we look forward to continuing to work closely with our partners to advance climate change science and technology, as well as capacity-building activities that will benefit us all.

With regard to technology, there is a growing realization that existing energy technologies, even with substantial improvements, cannot meet the growing global demand for energy while delivering the emissions reductions necessary to stabilize atmospheric GHG concentrations. We need to develop and deploy globally revolutionary changes in the technologies of energy production, distribution, storage, conversion, and use. Some examples include carbon sequestration, hydrogen, and advanced nuclear technologies. The U.S. is not only pursuing these domestically, but is also leading three major multilateral international technology efforts [Carbon Sequestration Leadership Forum, International Partnership for the

Hydrogen Economy, and Generation IV program working on new fission reactor designs].

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b. Forest conservation

A fact sheet released by the White House Office of the Press Secretary on September 30, 2003, summarized U.S. domestic and international initiatives concerning global climate change, including those discussed by Dr. Watson, above. In addition, the fact sheet referenced two international initiatives related to forest conservation, as excerpted below.

The full text of the fact sheet is available at *www.state.gov/g/oes/rls/fs/2003/25758.htm.*

President's Initiative Against Illegal Logging. On July 28, 2003, Secretary of State Powell launched the President's Initiative Against Illegal Logging, developed with the objective of assisting developing countries in their efforts to combat illegal logging, including the sale and export of illegally harvested timber, and in fighting corruption in the forest sector. The initiative represents the most comprehensive strategy undertaken by any nation to address this critical sustainable development challenge, and reinforces the U.S. leadership role in taking action to counter the problem and preserve forest resources that store carbon. For more information, please visit http://www.state.gov/r/pa/prs/ps/2003/22843.htm.

Tropical Forest Conservation. In FY '04, the Bush Administration will direct $50 million for tropical forest conservation. These funds will provide the resources needed to pursue additional "debt-for-nature" projects under the Tropical Forest Conservation Act and contribute to the Congo Basin Forest Partnership launched by Secretary of State Powell and then-EPA Administrator Whitman in September 2002 to preserve eleven key landscapes in Cameroon, the Central African Republic, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, and the Republic of the Congo.

To view the fact sheet, please visit http://www.state.gov/g/oes/rls/fs/2003/22973.htm.

> In July 2003 the United States and Panama concluded a debt-for-nature swap agreement under the 1998 Tropical Forest Conservation Act, Pub. L. No. 105–214, 112 Stat. 885, 22 U.S.C. §§ 2431–2431k. In this arrangement, the United States provided certain debt relief to Panama in exchange for Panama's commitment to fund conservation activities in the Chagres National Park over a fourteen-year period and create a permanent endowment to provide sustainable funding to the park.
>
> In remarks on the launching of the President's initiative against illegal logging, Secretary Powell commented on law-related aspects as excerpted below.
>
> The full text of Secretary Powell's remarks is available at *www.state.gov/secretary/rm/2003/22845.htm.*

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* * * *

The World Bank estimates that illegal logging costs developing countries some $10–15 billion every year in lost resources and in lost revenues. . . .

But the toll goes far beyond mere dollars and cents. Such blatant disregard for the law weakens governments, encourages corruption, undermines democracy, and then, in turn, saps the faith of the people in the democratic system. It wreaks havoc on the fragile environment, destroying watersheds, devastating wildlife, and demolishing livelihoods.

Revenues from illegal logging also finance regional conflicts that devastate entire societies and plant despair in the hearts of millions of people who are in need.

You have undoubtedly read the newspaper reports from Liberia and you have viewed the heart-rending scenes on television. According to reports from groups such as Global Witness and the International Crisis Group, Liberia's Charles Taylor has used revenues from the timber industry, which is now under UN sanctions, to buy arms and fuel violence throughout the region.

In the process, Liberia's logging industry is depleting its hardwood tropical forest on behalf of a corrupt elite and destroying an important source of the natural wealth the people of Liberia need for their own development and will need desperately once we are able to put a ceasefire in place, and ECOWAS peacekeepers supported by the United States are able to put a political transformation process in place as well. . . .

The impact of these crimes—and let's call them for what they are—crimes—the impact of these crimes does not stop with the land and the people of the forest that has been despoiled. We are all impoverished whenever environmental crime [destroys] a tree that absorbs carbon dioxide . . . and removes the replenishing value that that tree provides to our atmosphere and its life-giving oxygen that comes out from our vegetation. We are all at risk when deforestation plants the seed of despair in a new human heart.

* * * *

c. Protection of the ozone layer

(1) Implementing regulations

In 2003 the United States completed the necessary changes in Environmental Protection Agency ("EPA") regulations for the United States to join the 1997 Montreal Amendment and 1999 Beijing Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer. The U.S. Senate gave advice and consent to the ratification of the Beijing and Montreal Amendments on October 9, 2002.

The first regulatory change, a final rule effective August 18, 2003, added chlorobromomethane ("CBM") to the list of substances subject to production and consumption controls under the Clean Air Act, 42 U.S.C. §§ 7401–7671q and EPA's implementing regulations. 68 Fed. Reg. 42,883 (July 18, 2003). "EPA needs to have put in place (prior to the deposit of the instrument of ratification) final regulatory programs that will

implement and ensure U.S. compliance with the provisions of the Beijing Amendment package." The Federal Register explained further that,

> [t]oday's action creates a new Group (Group VIII) of class I substances for CBM, and designates the value of CBM's "ozone depleting potential" (ODP) as 0.12. In accordance with the Protocol, today's action will phase out CBM production and consumption upon publication of this rule with permitted exemptions. Today's action also restricts trade in CBM with countries who are not Parties to the Beijing Amendments to the Protocol.

A second final rule, effective October 23, 2003, "reflect[ed] the Montreal Amendments to the Protocol, which ban the import or export of methyl bromime (class I, Group VI controlled substance) from or to countries that are not Parties to the 1992 Copenhagen Amendments [to the Montreal Protocol, which] included an accelerated phaseout of [ozone-depleting substances] production and consumption." 68 Fed. Reg. 43,930 (July 25, 2003).

The United States deposited its instruments of ratification for both the Montreal and Beijing amendments on October 1, 2003. They entered into force on December 30, 2003.

(2) Interpretation of "State not party to this Protocol"

In the twenty-third meeting of the open-ended working group of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, held in Montreal, July 7–11, 2003, the United States raised the issue of the implications of entry into force of the Beijing Amendment as it related to trade in and supply of hydrochlorofluorocarbons ("HCFCs"). The statement of the U.S. representative as coordinator of a contact group that met subsequently on the interpretation of the Beijing amendment regarding trade

measures for HCFCs is included in the report of the twenty-third meeting.

The U.S. representative summarized the issue as follows:

> 2. . . . At issue is how to interpret paragraph 9 of article 4. That paragraph reads as follows: "For the purposes of this Article, the term 'State not party to the Protocol' shall include with respect to a particular controlled substance, a State [or regional economic integration organization] that has not agreed to be bound by the control measures in effect for that substance."
>
> 3. Thus, paragraph 9 of article 4 has to date meant that where an amendment imposes control measures for a substance, a State that is not a party to that amendment will be treated as a non-party under the Protocol for purposes of the trade measures on that substance.
>
> 4. The present difficulty arises because, for the first time under the Protocol, control measures for a single substance—HCFCs—have been imposed in two different amendments. In Copenhagen, the parties agreed to control measures on the consumption of HCFCs. Subsequently, in Beijing, the Parties agreed to control measures on the production of HCFCs. At issue, therefore, is how one should interpret paragraph 9 of article 4 where control measures for a substance are found in two separate amendments.

See Statement by the Coordinator of the Contact Group on the Interpretation of the Beijing Amendment Regarding Trade Measures for HCFCs (United States of America) Presented to the Twenty-Third meeting of the Open-Ended Working Group, 10 July 2003, UNEP/OzL.Pro/WG.1/23/5, Annex V, available at *www.unep.org/ozone/oewg/23oewg/23oewg-5.e.pdf.*

At the fifteenth meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer in Nairobi, November 10–14, 2003, Decision XV/3 was adopted to address this issue. The United States explained the agreement embodied in the decision as set forth below.

A summary of the U.S. position and the text of Decision XV/3 are available in the Report of the Fifteenth Meeting, available at *www.unep.org/ozone/mop/15mop/15mop-9.e.pdf.*

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* * * *

85. The representative of the United States of America, speaking as coordinator of the contact group, reported on the work of the group at its meeting on 8 November and presented a conference room paper containing a draft decision on the obligations of Parties to the Beijing Amendment under Article 4 of the Montreal Protocol with respect to HCFCs. . . .

86. The contact group had tried to reach an agreement on the interpretation of the term "State not party to this Protocol" and to provide a clear understanding, since failure to reach agreement would leave it up to each State to interpret the term in its own way, which would have impacted significantly on trade in HCFCs. Noting that the group had reached a common understanding on the way forward, he outlined key elements of the draft decision.

87. First, the Parties would recognise that the term "State not Party to this Protocol" did not apply to Article 5 Parties* until 2016, when they would have HCFC consumption and production control measures in effect, in accordance with the Copenhagen and Beijing amendments. Second, the term included all remaining Parties that had not agreed to be bound by the Beijing Amendment. To avoid being a "State not Party to the Protocol", therefore, any non-Article 5 Party would need to have consented to both the Copenhagen and Beijing amendments.

88. Third, all the participants in the contact group recognised that the problem with the 1 January 2004 trade measures had not become evident until July 2003, and that the interpretation he had just laid out could cause difficulties for some countries which had

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* [Editors' note: Article 5 Parties are countries that, having been deemed by the Parties to be developing countries and meeting certain criteria set out in the Protocol, are entitled to a ten-year grace period in meeting their control obligations.]

previously operated under a different interpretation. To address that concern, he recommended that the Meeting of the Parties should acknowledge that if a State that had not consented to the Beijing Amendment took certain agreed steps, it would not fall within the definition of the term "State not party to this Protocol" until the conclusion of the Seventeenth Meeting of the Parties. To qualify, those States would need to indicate their intention to ratify the Beijing Amendment and certify their compliance with Copenhagen Amendment, accompanied by supporting data.

* * * *

93. The preparatory segment decided to forward the draft decision on the obligations of Parties to the Beijing Amendment under Article 4 of the Montreal Protocol with respect to HCFCs, as editorially revised by the coordinator, to the high-level segment for adoption.

* * * *

3. Protection of the Marine Environment and Marine Conservation

a. Oceans

On November 24, 2003, Benjamin Gilman, U.S. Public Delegate to the 58th UN General Assembly, addressed the General Assembly on Agenda Item 52a, "Oceans and the Law of the Sea." His remarks, excerpted below, stressed U.S. support for the development of the Global Marine Assessment and a model audit scheme, and the importance of dealing with marine debris.

The full text is available at *www.un.int/usa/03_241.htm.*

* * * *

Within the Oceans resolution, we are particularly pleased to welcome the continued support and further development of the Global Marine Assessment—the GMA. Launched at WSSD as a concept for a regular process for the global reporting and

assessment of the state of the world's oceans, we look forward to working together with the nations of the world to make certain that the GMA is able to develop a comprehensive information collection process—carried out over time—of reliable physical, chemical and biological data. From this data we will be able to assess the impact of human activities on marine systems. We hope that these assessments will provide a scientific basis for decisions by policy makers, as well as valuable information for integrated management and sustainable development strategies for coastal and marine areas.

Designing and implementing a successful GMA is clearly an ambitious undertaking, but one that we believe the United Nations community, by working together, can accomplish. We look forward to further developing this critical tool in June. . . .

* * * *

The Oceans resolution also encourages member states of the International Maritime Organization—the IMO—to accelerate development of a voluntary model audit scheme. This scheme will provide an independent review and analysis by a team of IMO experts of a State's compliance with its treaty obligations, including as a flag state, coastal state, and port state. Constructive confidential recommendations will be made by the audit team to the audited State on actions to address problems or deficiencies. The United States fully supports accelerated development of the model audit scheme as an important mechanism to deal with substandard shipping and to enhance maritime safety, security, and marine environmental protection. While we appreciate that the model audit scheme is currently being developed as a voluntary program, we firmly believe that its effectiveness and impact will be significantly improved by making it mandatory at the earliest opportunity. We hope that delegations represented here will join us in this effort at the IMO.

* * * *

b. Pollution from ships

On May 15, 2003, President George W. Bush transmitted to the Senate for advice and consent to ratification the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified. S. Treaty Doc. No. 108–7 (2003). Excerpts below from the letter of Secretary of State Colin L. Powell submitting the protocol to the President for transmittal provide the context and key aspects of the protocol, which addresses prevention of air pollution from ships, as well as proposed declarations and one understanding.

LETTER OF SUBMITTAL

The Secretary of State,
Washington, DC.

The President,
The White House.

The President: I have the honor to submit to you with a view to its transmittal to the Senate for advice and consent to ratification, the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 thereto (hereinafter the "Protocol of 1997"). The Protocol of 1997, which would add Annex VI, Regulations for the Prevention of Air Pollution from Ships, to the International Convention for the Prevention of Pollution from ships, 1973, as Modified by the Protocol of 1978 thereto (hereinafter the "MARPOL Convention"), was signed by the United States on December 22, 1998. I also enclose, for the information of the Senate, Resolution 2 of the 1997 MARPOL Conference with the annexed Technical Code on Control of Emission of Nitrogen Oxides from Marine Diesel Engines, and a detailed analysis of Annex VI prepared by the Department.

The MARPOL Convention is the global agreement to control accidental and operational discharges of pollution from ships. It currently includes a framework agreement setting forth general obligations, and five annexes that relate to particular sources of marine pollution from ships. Two of these annexes are mandatory for all MARPOL Convention Parties—Annexes I and II, that relate, respectively, to the transport of oil and the transport of harmful substances carried in bulk. The other three annexes are optional—Annex III, which relates to the transport of harmful substances in packaged form, and Annexes IV and V, which regulate ship-generated sewage and garbage respectively. The Convention and the Protocols of 1978 and 1997 are to be interpreted as one single instrument between Parties to the same Protocol.

On August 12, 1980, the United States ratified the Protocol of 1978 (which incorporates with modifications the 1973 Convention), along with Annexes I and II. The MARPOL Convention and Annexes I and II entered into force for the United States on October 2, 1983. On December 30, 1987, the United States ratified Annex V, which entered into force on December 31, 1988. On December 3, 1991, the United States ratified Annex III, which entered into force on July 1, 1992. While Annex IV, concerning ship-generated sewage, is expected to enter into force internationally on September 27, 2003, the Administration is not requesting Senate advice and consent to ratification of that Annex.

Substantive provisions of Annex VI

Annex VI seeks to reduce air pollution from ships at sea and in port. It does so by limiting the emission of nitrogen oxides (NOx) from marine diesel engines above 130 kW (175 hp); governing the sulfur content of marine diesel fuel; prohibiting the deliberate emission of ozone-depleting substances; regulating the emission of volatile organic compounds during transfer of cargoes between tankers and terminals; and setting international standards for shipboard incinerators and fuel oil quality. Annex VI also establishes similar requirements for platforms and drilling rigs at sea, with some exceptions. The NOx Technical Code attached to Resolution 2 of the 1997 MARPOL Conference contains testing and certification procedures for the engine NOx limits. The

substantive provisions of Annex VI are discussed in this and subsequent sections of this report and the attached analysis of the regulations.

* * * *

Article 3 of the MARPOL Convention of 1973 exempts warships, naval auxiliary and other ships owned or operated by a State and used in governmental non-commercial service, from the application of the provisions of the annexes. The State Parties participating in the 1997 MARPOL Conference that produced the Protocol of 1997 therefore agreed that such ships will be exempt from the application of the provisions of Annex VI under Article 3(3) of the MARPOL Convention of 1973. However, each Party will still be required to take appropriate measures not impairing the operations or operational capabilities of such ships owned or operated by it, to ensure that such ships act in a manner consistent, so far as is reasonable and practicable, with Annex VI. In the case of the U.S. Navy, most of its fossil fuel-powered ships now use gas turbines, which are not regulated by Annex VI, for main propulsion. U.S. Navy ships that do use diesel engines for main propulsion use low (1%) sulfur distillate fuel that is much cleaner than the heavy fuel oils used by many commercial marine diesel engines. In addition, new classes of U.S. Navy surface ships are no longer constructed to use CFCs in shipboard air conditioning and refrigeration equipment, nor halons in shipboard fire-fighting equipment.

Domestic regulation of NOx emissions

The Environmental Protection Agency has proposed to regulate NOx emissions from Category 3 marine diesel engines pursuant to section 213 of the Clean Air Act, 42 U.S.C. Sec. 7547. . . .

Possibility of more stringent standards

As noted in the 1977 Secretary of State's Report to the President on the International Convention for the Prevention of Pollution from Ships, 1973, recommending its transmittal to the Senate for advice and consent to ratification, the United States and other States defeated attempts at the 1973 Conference to "restrict national powers to apply domestic regulations more stringent than

prevailing international standards to foreign vessels in ports." Such authority is also preserved under customary international law as reflected in the 1982 United Nations Convention on the Law of the Sea. Thus, the Protocol of 1997 does not, as a matter of international law, prohibit Parties from imposing more stringent measures as a condition of entry into their ports or internal waters, unless a particular regulation in Annex VI expressly imposes such a limitation.

In this context, it should be noted that Regulation 15, Volatile Organic Compounds, obligates Parties to provide notice to the IMO of the ports and terminals under their jurisdiction to be subject to vapor emission control requirements and to include in such notification the information specified in paragraph 2 of that Regulation, including a requirement that notification occur six months before the effective date of the controls. Regulation 15 also requires such States to take into account the safety guidance developed by the IMO, that such systems are operated in a safe manner, and to avgoid undue delay to ships. In light of these obligations, Parties may not specify requirements inconsistent with these obligations (e.g., imposing vapor emission controls on vessels or cargoes that take effect before the six month notification period, stipulating unsafe procedures, or causing undue delay to ships). Regulation 15 does not, however, establish actual emission standards. Recognizing this, Parties are free to prescribe standards applicable to VOC emissions consistent with the obligations noted above.

It should also be noted that Regulation 15 applies only to VOC emission recovery associated with cargo transfer operations between tankers and port facilities.

The Department of State believes it is important to memorialize clearly the scope of these requirements, and accordingly, I propose that the following declaration be included in the U.S. instrument of ratification of the Protocol of 1997:

> The Government of the United States of America understands that Regulation 15 applies only to safety aspects associated with the operation of vapor emission control systems that may be applied during cargo transfer

operations between a tanker and port-side facilities and to the requirements specified in Regulation 15 for notification to the International Maritime Organization of port State regulation of such systems.

* * * *

In view of [recent technological] developments, the Department of State favors revision of the emission standards set forth in Regulation 13 to achieve the greatest degree of emission reduction achievable through the application of the new technology, taking into account the availability of such technology and its cost. The Department of State views it as essential that the IMO agree on such reductions in NOx emissions on an urgent basis and amend these technical provisions of Annex VI accordingly.

Resolution 1 of the 1997 MARPOL Conference invited the Marine Environment Protection Committee (MEPC) of the IMO, if the conditions for entry into force of the Protocol of 1997 had not been met by December 31, 2002, to initiate at its first meeting thereafter as a matter of urgency a review to identify the impediments to entry into force of the Protocol and any necessary measures to alleviate those impediments. At the request of the IMO Assembly, the MEPC has agreed to initiate that review at its first meeting in 2003, now tentatively scheduled for July 14–18, 2003. The United States intends to press the IMO to set more stringent NOx emission standards on an expedited basis and encourages other States to ratify the Protocol so it may enter into force promptly; amendments to Annex VI could then be adopted and enter into force through the long-established simplified amendment procedure specified in Article 16(2) of the MARPOL Convention of 1973. At the same time, consistent with its rights and obligations under the Protocol of 1997, the United States government retains the prerogative to consider imposing more stringent standards as a condition of port entry, especially in the event it is not possible to develop credible and effective NOx emission standards through the IMO.

The United States is also considering whether the Annex VI sulfur oxide limits should be lowered under this Convention, particularly in SOx Emission Control Areas.

With the foregoing considerations in mind, I propose that the following declaration be included in the U.S. instrument of ratification of the Protocol of 1997:

> The Government of the United States of America notes that at the time of adoption of the Protocol of 1997, the NOx emission control limits contained in Regulation 13 were those agreed as being achievable by January 1, 2000, on new marine diesel engines, and further notes that Regulation 13(3)(b) contemplated that new technology would become available to reduce on-board NOx emissions below those limits. As such improved technology is now available, the United States expresses its support for an amendment to Annex VI, that would, on an urgent basis, revise the agreed NOx emission control limits contained in Regulation 13 in keeping with new technological developments.

Similarly, I propose that the following understanding be included in the U.S. instrument of ratification of the Protocol of 1997:

> The Government of the United States of America understands that, with respect to emissions of nitrogen oxides pursuant to Regulation 13 of Annex VI, the Protocol of 1997 does not, as a matter of international law, prohibit Parties from imposing more stringent measures than those identified in the Protocol as a condition of entry into their ports or internal waters.

The simplified amendment procedure detailed in Article 16(2) of the MARPOL Convention of 1973 has been used with regard to all four MARPOL Convention Annexes after their entry into force. It was established to permit more effective and rapid adoption and entry into force of technical amendments to the MARPOL Convention. Pursuant to longstanding practice under the MARPOL Convention, U.S. acceptance of amendments to Annex VI will not require further advice and consent by the Senate.

c. Marine wildlife

(1) 1990 Protocol Concerning Specially Protected Areas and Wildlife

On March 17, 2003, the United States became party to the Protocol Concerning Specially Protected Areas and Wildlife ("SPAW Protocol") to the 1983 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region ("Cartagena Convention"). *See* S. Treaty Doc. No. 103–5 (1990), S. Exec. Rept. 107–8 (2002). A media note issued on that date by the Department of State is provided below. *See also Digest 2002* at 792–794.

The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2003/18788.htm*.

. . . . By ratifying the SPAW Protocol, the United States becomes the eleventh Party to this groundbreaking international agreement, which paves the way for greater coordination and protection of marine biodiversity in the Wider Caribbean region. The SPAW Protocol highlights the region's growing recognition of the need to conserve threatened and endangered fauna and flora and the habitats on which they depend. . . . The SPAW Protocol, adopted in 1990, is one of three Protocols under the framework of the Cartagena Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region. The other two Protocols deal with cooperation to combat oil spills (the "Oil Spills Protocol," adopted in 1983), and land-based sources of marine pollution (the "LBS Protocol," adopted in 1999). The Convention and its Protocols constitute legal mechanisms that enable the 28 countries of the region to protect, develop and manage their common coastal and marine resources individually and jointly in the Caribbean. As a Party to the Cartagena Convention, the Oil Spills Protocol and SPAW Protocol, and as a Signatory to the LBS Protocol, the United States is one of the leading supporters of regional efforts in the Wider Caribbean to protect and conserve the common marine resources of the region.

Many of the region's economies are highly dependent on their coastlines for tourism, fishing, and other marine resources. However, these very same resources are disappearing or are seriously threatened, with wildlife being depleted through over-exploitation and destruction of habitats. The SPAW Protocol responds to this problem through detailed provisions addressing the establishment of protected areas and buffer zones for the conservation of wildlife, both national and regional cooperative measures for the protection of wild flora and fauna, the introduction of non-native or genetically altered species, environmental impact assessment, research, education and other topics. The SPAW Protocol stresses the importance of protecting habitats as an effective method of protecting endangered species.

(2) Sea turtle conservation and shrimp imports

On April 30, 2003, the Department of State certified to Congress 39 nations and Hong Kong as meeting criteria set forth in § 609 of P.L. 101–162, 103 Stat. 988 (1989), 16 U.S.C. § 1537 note, which prohibits the importation of shrimp and products of shrimp harvested in a manner that may adversely affect sea turtles. A media note issued by the U.S. Department of State on May 2, 2003, explained the certification process and decisions.

The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2003/20152.htm*.

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Section 609 prohibits importation of shrimp and products of shrimp harvested in a manner that may adversely affect sea turtle species. This import prohibition does not apply in cases where the Department of State certifies annually to Congress, not later than May 1, that the government of the harvesting nation has taken certain specific measures to reduce the incidental taking of sea turtles in its shrimp trawl fisheries—or that the fishing environment of the harvesting nation does not pose a threat to sea turtle species.

Such certifications are based in part on verification visits made to countries by teams of experts from the State Department and the U.S. National Marine Fisheries Service.

The chief component of the U.S. sea turtle conservation program is a requirement that commercial shrimp boats use sea turtle excluder devices (TEDs) to prevent the accidental drowning of sea turtles in shrimp trawls. The fifteen nations meeting this standard are: Belize, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Mexico, Nicaragua, Nigeria, Pakistan, Panama, Suriname, Thailand, and Trinidad and Tobago.

Twenty-four nations and one economy were certified as having fishing environments that do not pose a danger to sea turtles. Of these, eight nations and one economy—the Bahamas, China, the Dominican Republic, Fiji, Hong Kong, Jamaica, Oman, Peru and Sri Lanka—harvest shrimp using manual rather than mechanical means to retrieve nets, or use other fishing methods not harmful to sea turtles. Sixteen nations have shrimp fisheries only in cold waters, where the risk of taking sea turtles is negligible. They are: Argentina, Belgium, Canada, Chile, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Russia, Sweden, the United Kingdom, and Uruguay. Honduras and Venezuela remain uncertified from January of this year.

Importation of shrimp from all other nations will be prohibited unless harvested by aquaculture, in cold waters, or by specialized fishing techniques that do not threaten sea turtles. . . .

> On January 29, 2003, the Department of State had determined that Honduras and Venezuela, which had both been certified in 2002, no longer met the requirements set by § 609. As explained in a media note dated March 6, 2003:
>
> > . . . As a result of this determination, importation of shrimp harvested in Honduras and Venezuela with commercial fishing technology that may adversely affect endangered sea turtles will be prohibited. However, imports of shrimp harvested in Honduras and Venezuela by other means, including by aquaculture and with artisanal methods, may continue.

> In making this determination, the Department expressed the hope that the import prohibition will be a brief measure. The Department will work closely with the Governments of Honduras and Venezuela to address concerns that led to this determination. In particular, the Department will explore the possibility of sending teams of experts to Honduras and Venezuela to work with fisheries and law enforcement officials and to assess steps taken by the Governments of Honduras and Venezuela to enforce their requirements to protect sea turtles in the course of shrimp harvesting.

The media note is available at *www.state.gov/r/pa/prs/ps/2003/18421.htm*.

(3) International fisheries conservation and compliance issues

(i) Illegal, unreported, and unregulated fishing

On September 11, 2003, David A. Balton, Deputy Assistant Secretary for Oceans and Fisheries, U.S. Department of State, testified before the House Committee on Resources, Subcommittee on Fisheries Conservation, Wildlife and Oceans. His testimony focused on efforts to fight illegal, unreported, and unregulated ("IUU") fishing within regional fisheries management organizations, and through a U.S. national plan of action to prevent, deter, and eliminate such fishing. As noted in his testimony, the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, to which the United States is a party, entered into force on April 24, 2003. S. Treaty Doc. No. 103–24 (1994), S. Exec. Rept. 103–32 (1994).

The full text of Mr. Balton's testimony, excerpted below, is available at *www.state.gov/g/oes/rls/rm/2003/24725pf.htm*.

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* * * *

Compliance Agreement

In its letter of invitation, the Subcommittee asked about the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas ("the Compliance Agreement"). The Compliance Agreement entered into force on April 24, 2003, upon the deposit of the 25th instrument of acceptance with the UN Food and Agriculture Organization (FAO), which serves as depository for this treaty. Most of the major fishing States are party to this treaty, including the United States, Canada, Japan, Mexico, South Korea, Norway, and the European Community.

The Compliance Agreement is one of three global fisheries instruments of vital significance that have been adopted in the past decade, along with the UN Fish Stocks Agreement and the non-binding Code of Conduct for Responsible Fisheries. The United States played a pivotal role in the development of each of these instruments and has steadfastly urged all States to implement them.

Building on the general framework of the 1982 United Nations Convention on the Law of the Sea, the Compliance Agreement seeks to address the threat to international fisheries management posed by vessels that do not abide by agreed fishing rules. The Agreement contains three basic requirements:

- Each flag State must ensure that its vessels do not engage in any activity that undermines the effectiveness of international fishery conservation and management measures, whether or not the flag State is a member of the regional fishery organization that adopted such measures.
- No flag State shall allow any of its vessels to be used for fishing on the high seas unless the Flag State has specifically authorized it to do so.
- No flag State shall grant such authority to a vessel unless the Flag State is able to control the fishing activities of that vessel.

These three rules represent a new vision for high seas fisheries. To abide by these rules, flag States may no longer allow their fishing

vessels to venture out onto the high seas the way that the early explorers ventured out beyond the frontiers of known society. Flag States must now actively oversee the high seas fishing operations of their vessels. They must decide on a case-by-case basis whether to authorize any vessel to fish on the high seas. Most importantly, they may not permit any vessel to fish on the high seas at all, unless they are able to prevent the vessel from undermining agreed conservation rules. The Agreement also seeks to increase the transparency of high seas fishing operations through the collection and dissemination of data. Parties must submit to FAO a wide range of information on each of their respective high seas fishing vessels.

If all States were parties to the FAO Compliance Agreement and other relevant international agreements, and if all States fully implemented their commitments under these instruments, there would be virtually no IUU fishing. Unfortunately, most of the flag States whose vessels are the greatest source of IUU fishing are not parties to these treaties. Encouraging these States to accede to these treaties and to implement effective control over their fishing vessels remains a top priority.

I do not want to give the impression, however, that only vessels flying the flags of non-parties to these agreements conduct IUU fishing. Even responsible fishing nations, such as the United States, do not achieve 100% compliance by their vessels. Ocean fishing, by its very nature, is difficult and costly to monitor. As fish stocks decline, the temptation to evade fishing rules grows. To deal with this daunting situation, the United States has been among the leaders of the international community in fashioning a comprehensive "toolbox" of measures to crack down on IUU fishing.

National Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing

As part of the implementation of the Code of Conduct for Responsible Fisheries, the FAO has adopted a number of International Plans of Action (IPOA) to address specific international fisheries problems. Most recently, the FAO undertook a concerted effort to develop a comprehensive "toolbox" of measures that

States could take, both individually and collectively, to address the problems of IUU fishing. This effort culminated with the adoption in 2001 of the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

As its title suggests, the objective of the IPOA is to prevent, deter and eliminate IUU fishing. The principles to guide the pursuit of this objective include:

1. broad participation and coordination among States, as well as representatives from industry, fishing communities, and non-governmental organizations;
2. the phasing-in of action to implement the IPOA on the earliest possible timetable;
3. the use of a comprehensive and integrated approach, so as to address all impacts of IUU fishing;
4. the maintenance of consistency with the conservation and long-term sustainable use of fish stocks and the protection of the environment;
5. transparency; and
6. non-discrimination in form or in fact against any State or its fishing vessels. States were charged to develop their own National Plans of Action to implement the IPOA.

The draft U.S. National Plan of Action was developed over the past two years . . . and should be released shortly.

. . . In addition to describing what the United States already does to fight IUU fishing, the National Plan of Action also lays out a wide range of recommendations for enhancing our abilities in this regard, such as changes to vessel registration rules, increased sanctions and penalties, tightened port controls, and broader outreach and capacity-building with other States.

ICCAT and other Regional Fisheries Management Organizations

My colleague from NOAA Fisheries has provided a thorough overview of the issues surrounding member compliance and illegal fishing within ICCAT. Although, with U.S. leadership, the International Commission for the Conservation of Atlantic Tuna

("ICCAT") has been at the forefront of developing innovative approaches towards controlling IUU fishing, it has become clear that ICCAT's existing tools need to be re-examined and updated to reflect the changing nature of IUU fishing. As part of that effort, the Department welcomes Congressional action to support U.S. efforts in ICCAT such as H.Con.Res. 268, which reiterates U.S. commitment toward ensuring compliance with ICCAT measures and offers specific guidance how we should support that commitment. We do note that some parts of H.Con.Res. 268 would change the standard of review for taking trade measures from looking at the actions of a number of vessels to the actions of a single vessel. While we agree the United States should take every possible action to fight IUU fishing, such a narrow standard may present significant implementation difficulties. We would be happy to discuss this issue with staff.

In addition to the work carried out within the FAO and ICCAT, the United States is working in other regional organizations to address the issue of IUU fishing. In particular, the Inter-American Tropical Tuna Commission (IATTC) has been working actively to address the issues of IUU fishing in the area regulated by the IATTC. In 2002, the IATTC adopted a resolution on purse seine fleet capacity. Among other things, the resolution specified that any purse seine vessel not included on the IATTC vessel register is not authorized to fish in the IATTC area. In the fall of 2002, a number of vessels from the western Pacific crossed over into the eastern Pacific to fish on a large biomass of yellowfin tuna that moved from the west into the eastern Pacific. The flag states of these vessels ordered the vessels to withdraw from the area once they were notified by the Director of the IATTC that the vessels were fishing in violation of the IATTC rules.

More recently, at its annual meeting in June 2002, the IATTC adopted measures, similar to the measures adopted in ICCAT, both for a catch certification scheme for bigeye tuna and for the development of a "positive list" of large-scale longline fishing vessels authorized to fish in the area regulated by the IATTC. The Commission also adopted a set of criteria for identifying "cooperating non-parties." Key to such designation is that vessels from such non-parties provide all relevant data about their operations

and that they respect all rules, regulations and resolutions governing fishing for highly migratory species in the IATTC area.

Finally, at a special meeting of the IATTC scheduled for this fall, the IATTC will consider a U.S. proposal on steps to be taken by members and cooperating non-parties of the IATTC in cases of non-compliance with IATTC conservation and management measures.

The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) also provides a model of how a more comprehensive "negative" vessel list approach could work. Last year, CCAMLR adopted measures that establish lists of both member and non-member vessels of any kind that are diminishing the effectiveness of CCAMLR. Under the CCAMLR measures, the flag state of vessels on the lists may be identified and subject to further action, but the vessels themselves are also subject to restrictions on access to certain fisheries. We will be watching the implementation of these new measures carefully in the next year or two. . . .

(ii) Shark finning

On November 24, 2003, the UN General Assembly adopted a resolution entitled "Sustainable Fisheries, including through the 1995 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, and related instruments." UN Doc. A/RES/58/14. Among other things, the resolution addressed the issue of shark finning. A media note released by the Department of State the same day commented as follows on the shark finning issue.

The media note is available at *www.state.gov/r/pa/prs/ps/2003/26595.htm.*

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U.S. negotiators, including representatives from the State Department's Bureau of Oceans and International Environmental and Scientific Affairs and the Department of Commerce, proposed in July that the UN promote shark conservation.

Shark finning is a wasteful practice that involves killing sharks for their fins and discarding the carcass. Shark fins are used for a traditional Asian soup that can cost as much as $100 a bowl.

The resolution urges countries to adopt conservation and management measures to ensure the long-term survival and sustainability of sharks, and to consider banning the practice of catching sharks solely for the purpose of harvesting shark fins. It also encourages a global assessment of shark stocks. The resolution comes as shark populations are dwindling worldwide. Shark populations are particularly vulnerable to overfishing because of their slow growth, late maturity, and small number of offspring. As a top predator, sharks play a key role in equalizing marine ecosystems.

The resolution adopted today is in keeping with the Shark Finning Prohibition Act (Public Law 106–557), a U.S. law that bans the practice in federal waters and directs the U.S. to work toward international finning restrictions and increased shark research worldwide.

Representative Benjamin Gilman, U.S. Public Delegate, welcomed the adoption of the resolution. In remarks to the UN General Assembly, he noted that

> [a]lthough we would have preferred stronger language in this resolution concerning the wasteful and unsustainable practice of finning sharks at sea, we are encouraged by the constructive nature of the debate on this issue during the negotiations, and the ultimate approach to shark conservation and management that are reflected in this resolution. In the coming months, we look forward to working with all interested parties in finding meaningful ways to implement this year's language on sharks at the FAO and through relevant regional fisheries management organizations.

The full text of Representative Gilman's remarks is available at *www.un.int/usa/03_241.htm.*

(iii) Treaty on fisheries with Pacific Island states

On February 11, 2003, President George W. Bush transmitted to the Senate for advice and consent to ratification the amendments to the 1987 Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America, with annexes and agreed statements, done at Port Moresby, April 2, 1987, at Koror, Palau, March 30, 1999, and at Kiritimati, Kiribati, March 24, 2002. S. Treaty Doc. No. 108–2, S. Exec. Rept. 108–7 (2003). The President's transmittal letter described the significance of the amendments and the underlying 1987 treaty, excerpted below. *See also Digest 2002* at 186–190.

The Senate gave its advice and consent to ratification on July 31, 2003. 149 CONG. REC. S10870 (July 31, 2003).

LETTER OF TRANSMITTAL

The White House, February 11, 2003.

To the Senate of the United States:

* * * *

The United States enjoys positive and constructive fisheries relations with the Pacific Island Parties through the implementation and operation of the Treaty, which is one of the cornerstones of our overall foreign relations with the Pacific Island Parties. This Treaty, and the good relationships it has fostered, has provided new opportunities for collaboration between the Pacific Island Parties and the United States on fisheries conservation and management issues. The relationships established as a result of the Treaty have also helped to safeguard U.S. commercial and security interests in the region.

The Amendments to the Treaty will, among other things, allow U.S. longline vessels to fish in high seas portions of the Treaty Area; streamline the way amendments to the Treaty Annexes are agreed; and allow the Parties to consider the issue of capacity in the Treaty Area and, where appropriate, to promote consistency between the Treaty and the relevant fisheries management convention, which is likely to come into force during the duration of the extended operation of the Treaty.

Existing legislation, including the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 et seq. and the South Pacific Tuna Act of 1988, Public Law 100–330, provides sufficient legal authority to implement U.S. obligations under the Treaty. Therefore, no new legislation is necessary in order for the United States to ratify these Amendments. However, minor amendments to section 6 of the South Pacific Tuna Act of 1988, Public Law 100–330 will be necessary to take account of the Amendment to paragraph 2 of Article 3 "Access to the Treaty Area," which opens the high seas of the Treaty Area to fishing by U.S. longline vessels.

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(iv) Convention for the Strengthening of the Inter-American Tropical Tuna Commission

On November 14, 2003, the United States hosted the signing of the Convention for the Strengthening of the Inter-American Tropical Tuna Commission, adopted by the Inter-American Tropical Tuna Commission on June 27, 2003, in Antigua, Guatemala ("Antigua Convention"). The Convention is open to the parties to the 1949 Convention Between the United States of America and Costa Rica; other states with a coastline bordering the Convention area; and other states and regional economic integration organizations whose vessels fish for fish stocks covered by this Convention or that are invited to accede. The United States signed the Antigua Convention on November 14, subject to ratification.

A November 18 press release by the Department of State described the Convention as set forth below, available at *www.state.gov/r/pa/prs/ps/2003/26337.htm*. The text of the convention is available at *www.iattc.org*.

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The revised Inter-American Tropical Tuna Convention brings the original 1949 Agreement between the United States and Costa Rica into the 21st century by reflecting the development and evolution of international law over the past half century. In particular, the revised Convention seeks to incorporate the new international legal regime as reflected in the 1982 Law of the Sea Convention, 1995 United Nations Fish Stocks Agreement and other important legal instruments governing the conservation and management of fishery resources.

The objective of the revised Convention is to ensure, through proper management, the long-term conservation and sustainable use of highly migratory fish stocks in the Eastern Pacific Ocean. In this regard, it recognizes the need for a precautionary approach to fisheries conservation and management and contains provisions to ensure that impacts on associated and dependent species and species associated with the same ecosystem are taken into consideration in managing the fishery. Additional provisions provide for addressing bycatch and discards of juvenile tunas and non-target species, and stress the need to ensure that management measures are based on the best scientific evidence available.

(v) Amendment to U.S.-Canada treaty related to albacore tuna fishing

On January 9, 2003, President George W. Bush transmitted to the Senate for advice and consent to ratification the Agreement Amending the Treaty between the Government of the United States of America and the Government of Canada on Pacific Coast Albacore Tuna Vessels and Port

privileges, done at Washington May 26, 1981, effected by an exchange of diplomatic notes at Washington on July 17, 2002, and August 13, 2002. S. Treaty Doc. No. 108–1 (2003), S. Exec. Rept. 108–7 (2003). As explained in the President's letter of transmittal, the original treaty provided for unlimited fishing for albacore tuna by vessels of each party in waters under the jurisdiction of the other party. The amendment to the treaty embodied in the agreement

> not only allows the Parties to redress the imbalance of benefits received by U.S. fishers that has developed in the operation of the Treaty, but also preserves U.S. interests under the Treaty, including the interest of U.S. fishers to fish in Canadian waters at times when the albacore stock moves northward, the interest of U.S. processors to continue to receive Canadian catches for processing, and the U.S. interest in being able to conserve and manage the stock.

The Senate gave advice and consent to ratification on July 31, 2003. 149 CONG. REC. S10869 (July 31, 2003).

(4) International Whaling Commission

The Fifty-fifth Annual Meeting of the International Whaling Commission ("IWC") was held June 16–19, 2003, in Berlin. A fact sheet issued by the Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, addressed issues related to the conflict over the moratorium on commercial whaling, as excerpted below.

The full text of the fact sheet is available at *www.state.gov/g/oes/rls/fs/2003/21640.htm*.

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Meetings of the IWC are marked by the ever-increasing polarization between those members that seek to lift the moratorium on

commercial whaling as soon as possible and those that oppose lifting the moratorium—either permanently or at least not before the Revised Management Scheme is put into place. The portion of the Scheme dealing with how to calculate stock-specific catch limits was completed in 1992; the portion of the Scheme dealing with establishing a system of observation, monitoring, and data collection remains unfinished.

* * * *

Since October 2002, Iceland has been a member of the IWC with a reservation to the moratorium on commercial whaling. Eighteen countries—including the United States—have deposited objections to Iceland's reservation. Of these, three members (i.e., Italy, Mexico, and New Zealand) do not recognize Iceland as a member of the Commission.

* * * *

Each year, Japan takes 440 minke whales in the Antarctic and 150 minke, 50 Bryde's ("broodis"), 50 sei, and 10 sperm whales in the North Pacific Ocean under the Whaling Convention's provision allowing scientific whaling without approval from the Commission; such whaling is not subject to the moratorium on commercial whaling.

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2. Completing a Revised Management Scheme (RMS)

The United States continues to stress the need for equitable compromises to complete an effective and broadly supported Revised Management Scheme.

The United States has offered compromises dealing with placement of international observers, the use of DNA to verify catches of whales, and the sharing of the costs of the RMS.

The whaling nations have shown no flexibility and have offered no compromises.

The United States will not consider lifting the moratorium on commercial whaling until an effective and transparent management scheme is in place.

4. Other Conservation Issues

a. Biosafety

Pursuant to the invitation of the Secretariat of the Convention on Biological Diversity to parties and governments, during 2003 the United States submitted views regarding the Biosafety Protocol to the Convention on Biological Diversity ("Biosafety Protocol") on both compliance (Article 34) and liability (Article 27) issues discussed below. The United States signed the Convention on Biological Diversity on June 4, 1993, and submitted it to the Senate for advice and consent to ratification November 20, 1993. S. Treaty Doc. No. 103–20 (1993). Although the Senate Foreign Relations Committee reported the treaty out recommending advice and consent with seven understandings, no vote in the Senate has occurred. *See* S. Exec. Rept. No. 103–30 (1994). The United States has not signed the Biosafety Protocol.

The views of the United States were included in compilations of views issued December 18, 2003, for the Conference of the Parties to the Convention on Biological Diversity Serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety, scheduled to meet in February 2004 at Kuala Lumpur, available at *www.biodiv.org/doc/meeting.aspx?mtg=MOP—1&tab=1.*

(1) Compliance

On September 22, 2003, the United States submitted comments on draft procedures and mechanisms on compliance under the Biosafety Protocol, supporting a cooperative mechanism that would assist parties with compliance issues in a facilitative manner. In its general comments, the United States explained:

> [A] general point, which has been recognized in the development of several other MEA [multilateral environmental agreement] compliance regimes, is that a multilateral

> compliance process is to be distinguished from bilateral State-to-State dispute settlement. Even where a multilateral compliance process permits a Party to submit information with respect to another Party's compliance, the first Party's involvement in the case should end at the point when the compliance institution decides to take up the case. Thus, section IV.4 should be amended as follows: "A Party, in respect of which a submission is made or which makes a submission, is entitled to participate in the deliberations of the Committee."

See UNEP/CBD/BS/COP-MOP/1/INF/4, available at *www.biodiv.org/doc/meetings/bs/mop-01/information/mop-01-inf-04-en.pdf.*

(2) Liability

On September 23, 2003, the United States submitted its views on terms of reference for an open-ended ad hoc group of legal and technical experts on liability and redress in the context of Article 27 of the Biosafety Protocol. *See* UNEP/CBD/BS/COP-MOP/1/INF/7. As set forth in excerpts below, the United States noted that existing liability regimes should first be analyzed before parties decide whether there is a need for the elaboration of international rules and procedure in this area, and also offered its views on what constitutes damage resulting from trade in living modified organisms ("LMOs"). *See also* the U.S. response to a questionnaire on liability and redress for damage resulting from transboundary movement of LMOs, submitted September 25, 2003, and contained in UNEP/CBD/BS/COP-MOP/1/INF/6.

The two documents are available at *www.biodiv.org/doc/meetings/bs/mop-01/information/mop-01-inf-06-en.pdf* and *www.biodiv.org/doc/meetings/bs/mop-01/information/mop-01-inf-07-en.pdf.*

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Establishment
A request for comments on terms of reference for an ad hoc experts group presupposes establishment of such a group.

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Assuming such a group had an appropriate composition (see below) and were given an appropriate mandate (see below) , the United States would support the establishment of an open-ended ad hoc legal and technical experts group on liability and redress.

Operation

- The group should operate in stages, with periodic reports back to the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety for further mandates as appropriate.
- Because the Protocol provides for the adoption of a process with respect to the "appropriate elaboration" of international rules and procedure for liability and redress, the initial stage should address:
- Whether there is a need for the elaboration of international rules and procedure and, if so:
  - for what specific purpose(s); and
  - why national systems are inadequate.
- Assuming, arguendo, the Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety were to agree that there was a need for some kind of international rules and procedures, the group could then focus on the kinds of operational issues raised in the questionnaire, such as channelling liability, liability limits, etc.

Composition

- As indicated in our responses to the questionnaire, it is imperative that the issue of liability and redress, which are intimately related to risk and damage, benefit from the expertise of scientists.

* * * *

- Also, the group should include representatives of Parties, Governments, industry and relevant international organizations. . . .

* * * *

Issues

- In terms of the substantive mandate of the group, the group should avoid leaping directly to legal solutions before identifying problems.
- Rather, the legal solutions, if international legal solutions are even ultimately necessary, should be tailored to address identified problems.
- As noted above, the group should initially focus on whether there is a need for the elaboration of international rules and procedures for liability and redress for damage resulting from transboundary movements of LMOs.
- In that regard, a critical threshold step of a scientific nature is to analyze responses to the questionnaire regarding perceived risk to biological diversity from transboundary movements of LMOs, including analyzing whether the risk from LMO transboundary movement is any different from the risk from non-LMO transboundary movements.
- Another threshold issue of a more legal nature is to analyze the current liability regime(s) to deal with damage from non-LMO transboundary movements and assess how they could also be applied to LMO transboundary movements.
- It would also be useful for the group to assess what lessons can be learned from ongoing processes in international law in the field of liability and redress.
- Finally the group should analyze how damage resulting from transboundary movements of LMOs is redressed through existing national liability regimes or national liability regimes that could be developed.

b. Trade and environment

(1) Doha Declaration

The United States submitted views on two aspects of paragraph 31 of the Doha Declaration to the Special Session of the WTO Committee on Trade and Environment ("WTO/CTE"). Paragraph 31 provides:

> 31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:
>
> (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;
> (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
> (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

The U.S. communication of February 10, 2003, addressed sub-paragraph 31(i), noting the negotiated limits in the mandate, identifying six specific trade obligations set out in multilateral environmental agreements that fell within this limited mandate, and noting the wide variety in the form and content of those specific trade obligations. TN/TE/W/20. The U.S. submission, excerpted below, and the Doha Declaration are available at *www.wto.org*.

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II. LIMITS IN THE MANDATE

3. In reviewing WT/CTE/W/160/Rev.1, the United States was mindful of the parameters set forth in the mandate in sub-paragraph 31(i). In particular, the United States focused on those provisions that could be categorized as "specific trade obligations."

- First, a specific trade obligation is one that *requires* an MEA party to take, or refrain from taking, a particular action. Such action must be mandatory and not simply permitted or allowed by a provision in an MEA. In other words, it cannot be discretionary.
- Additionally, a specific trade obligation must be "set out" in an MEA.
- For purposes of the immediate inquiry into examples of specific trade obligations, a further limit in the mandate is relevant. That is, the mandate only covers trade obligations among parties. Thus, it would include only those provisions in which parties to an MEA agree to bind themselves to trade obligations vis-à-vis each other. It would not include obligations requiring parties to take particular trade action in relation to non-parties.

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IV. CATEGORIES OF SPECIFIC TRADE OBLIGATIONS IN MEAS

7. It is interesting to note that, even among specific trade obligations set out in MEAs, there appears to be a wide variety in terms of form and content. Variations include:

Obligations, whether regulating exports or imports, that seek to:

- help conserve something in the party of export (e.g., specimens of endangered species);
- help protect an importing party from something potentially harmful (e.g., hazardous wastes or hazardous chemicals); and
- avoid harm to a global resource (e.g., the ozone layer);

for the sub-set of export obligations intended to protect an importing party from something harmful, those that require:

- notifying an importing party of action taken by the exporting party;
- notifying an importing party of a proposed export;
- restricting export if an importing party does not want it;
- restricting export if the exporting party believes it cannot be handled in an environmentally sound manner in an importing party;
- restricting export altogether;

obligations that vary according to their role in an agreement, including:

- core obligations that directly regulate trade (e.g., certain provisions of CITES);
- obligations that support core ones by establishing substantive standards to control production and/or use of particular substances (e.g., certain provisions in the Montreal Protocol);
- obligations that address ancillary aspects of import or export restrictions (e.g., designation of an import or export authority);
- obligations that apply independently of any particular decision on the part of a party and obligations that depend upon a party's prior decision to restrict imports or exports;
- obligations that specify procedures for modifying the scope of a trade obligation (e.g., for adding new species to the appendices of CITES or new chemicals to Annex III in the Rotterdam Convention).

8. Additionally, procedures differ among agreements on modifying the scope of a trade obligation. Some can require consensus of all parties, whereas others permit modifications upon the agreement of a certain number of parties less than consensus.
9. While the preceding examples provide some picture of the variety of potential specific trade obligations in MEAs, they are by no means definitive in terms of categorizing kinds of obligations.

V. IDENTIFICATION OF EXAMPLES OF SPECIFIC TRADE OBLIGATIONS COVERED UNDER THE MANDATE

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11. As noted by the United States in the October 2002 meeting of the CTE in Special Session, there appear to be specific trade obligations set out in six MEAs listed in WT/CTE/160/Rev.1. These are: CITES, the Montreal Protocol, the Basel Convention, the Rotterdam (PIC) Convention, the Stockholm (POPs) Convention and the Cartagena (Biosafety) Protocol. (TN/TE/R/3, paragraph 30.)

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On July 9, 2002, in a communication concerning paragraph 31(iii), the United States encouraged delegations to consider a list of environmental goods developed by Asia-Pacific Economic Cooperation ("APEC") as the starting point for discussion on the reduction or elimination of tariff and non-tariff barriers to environmental goods or services. TN/TE/W/8*, available at *www.wto.org*.

(2) Bilateral environmental cooperation agreements

In June 2003 the United States signed instruments on environmental cooperation with Chile and Singapore associated with the environment chapter of the free trade agreement signed with each of those countries discussed in Chapter 11.D.1.

The full texts of the two instruments as well as the joint statements excerpted below and related documents are available at *www.state.gov/g/oes/env/tr/*.

On June 13, 2003, the United States and Singapore signed the Memorandum of Intent Between the United States and the Republic of Singapore on Cooperation in Environmental Matters ("Memorandum"). In their joint statement issued at the time of the signing, the two countries described the Memorandum as excerpted below.

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The Memorandum, which is associated with the environment chapter of the recently signed United States-Singapore Free Trade Agreement, encourages bilateral cooperation in environmental protection. It also reflects both countries' commitment to enhance their capacities to protect the environment and promote sustainable development in concert with the strengthening of bilateral trade and investment relations.

The Memorandum will provide a framework for the two countries to cooperate in promoting sustainable environmental policies, practices and measures in support of sustainable development. Bilateral cooperative activities envisaged include technical information sharing, exchange of experts, capacity-building training, and joint research projects. Possible areas of cooperation are expected to include improvements in energy efficiency; natural resource management; endangered species conservation; public/private partnerships; and environmental education.

Under the Memorandum, the United States and Singapore also intend to cooperate on activities aimed at promoting regional exchange of information on environmental best practices, and capacity building for third countries in Asia.

Both the U.S. and Singapore agree that the conclusion of the Memorandum of Intent will further reinforce bilateral relations and provide an additional means to benefit from each other's experiences in environmental protection.

On June 17, 2003, the United States and Chile signed an instrument addressing similar issues, the Agreement Between the Government of the United States of America and the Government of the Republic of Chile on Environmental Cooperation. The joint statement issued by the two countries indicates particular aspects of that agreement, as excerpted below.

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Even before the Free Trade Agreement negotiations had been concluded, the United States and Chile had already identified eight cooperative environmental projects that they are pursuing or will pursue for the advancement of their common commitment to the achievement of sustainable development. These projects include initiatives to help protect wildlife and reduce environmental hazards.

The Environmental Cooperation Agreement will establish a lasting framework for further cooperation between the two countries to promote sustainable development. The future cooperative activities will reflect national priorities as agreed by both countries, which will be set forth in a work plan. The work plan will be developed by a Joint Commission for Environmental Cooperation that is also established under this Agreement.

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B. MEDICAL AND HEALTH ISSUES

1. Framework Convention on Tobacco Control

On March 21, 2003, the United States joined consensus on the adoption of the Framework Convention on Tobacco Control ("FCTC") at the World Health Assembly in Geneva. The United States participated actively in the six sessions of the intergovernmental negotiating body established by the World Health Assembly in May 1999 to draft and negotiate such a convention. *See* WHA52.18.

As set out in the introductory articles, the FCTC is intended to provide for basic tobacco control measures to be implemented by all parties through domestic law. The objective of the FCTC is to protect "present and future generations from devastating health, social, environmental and economic consequences" of tobacco use and to reduce the prevalence of tobacco use and exposure to tobacco smoke. The FCTC addresses the demand for and the supply of tobacco through various means, including smoking prevention and cessation, health warnings on packaging, restrictions

on tobacco advertising and sponsorship, and measures to combat illicit trade. Promoting public awareness of the adverse health effects of tobacco use is also a key element of the treaty. Parties must support measures to protect against exposure to tobacco smoke in public venues, and prohibit cigarette sales to minors. The FCTC is open for signature at the United Nations in New York until June 29, 2004. The treaty will enter into force after 40 States have signed and ratified it.

Tommy G. Thompson, Secretary of the U.S. Department of Health and Human Services, provided the views of the United States on joining consensus in adoption of the FCTC, as excerpted below.

The full text of Secretary Thompson's remarks is available at *www.usmission.ch/press2003/0521ThompsonFCTC.htm.*

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The reduction of illness, disability and death related to smoking is a key public health objective for the United States. We are keenly aware that smoking presents a real threat to public health. The imperative to act at home and abroad is clear.

Our domestic agenda to counter this threat is multifaceted. . . . . [I]nternationally we have dedicated ourselves to support comprehensive global smoking prevention and control. For example, to help monitor the global tobacco epidemic, the United States in collaboration with the WHO developed the global youth tobacco survey, which now has been completed in 150 countries. We have also worked with WHO and international sports organizations through our tobacco-free sports initiative to reduce or eliminate tobacco advertising and sponsorship for sporting events.

As part of the United States commitment to the negotiations of the convention and to facilitate understanding on one aspect of the framework, the United States hosted an international conference at the United Nations in New York to consider measures to address the global problem of illicit trade in tobacco. The treaty recognizes that.

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. . . [T]here can be no questioning the profound dedication of the United States to controlling the public health threat from smoking. I am very proud of that, and we look forward to working with partners from around the world to prevent future death and disease through effective and sustainable global prevention and control efforts.

The global dialogue begun through the FCTC negotiations has been a significant step forward for public health. It is already bearing fruit, as countries start to adopt their own domestic measures to curb smoking.

* * * *

The United States is carefully reviewing the text of the convention that we adopted today. We and our outstanding partners worked hard on this treaty.

Together, we can and will make the global threat of smoking a thing of the past.

2. HIV/AIDS

a. Drug patents

On January 28, 2003, President George W. Bush announced the President's Emergency Plan for AIDS Relief. The focus of the $15 billion plan was to commit resources to "help the most afflicted countries in Africa and the Caribbean wage and win the war against HIV/AIDS, extending and saving lives." A fact sheet released by the White House on January 29, 2003, outlined funding initiatives and reiterated a decision to permit override of certain patents:

> The President is also committed to ensuring that African and other developing countries have greater access to emergency life-saving pharmaceuticals, including advanced antiretroviral drugs and test kits needed to treat HIV/AIDS. That is why the United States announced on December 20, 2002, that it would permit these countries to override patents on drugs produced outside

> their countries to fight HIV/AIDS, malaria, tuberculosis and other infectious epidemics, including those that may arise in the future. This is an immediate, practical solution that will provide life-saving drugs to those truly in need.
>
> The full text of the fact sheet is available at *www.state.gov/p/af/rls/fs/17033.htm*.

b. Maintenance of peace and security

On November 17, 2003, Ambassador James B. Cunningham, Deputy U.S. Permanent Representative to the United Nations, addressed the Security Council on the issue of implementation of Resolution 1308, "HIV/AIDS, Peace and Security" (2000). Ambassador Cunningham's remarks, excerpted below, address the link between the disease and the maintenance of peace and security.

The full text of Ambassador Cunningham's remarks is available at *www.un.int/usa/03_232.htm*.

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Nearly four years ago, on January 10, 2000, we witnessed the very first meeting of the Security Council to discuss a health issue: HIV/AIDS. I recall very well that we debated at first whether we even ought to be addressing the issue, whether HIV/AIDS did indeed present a threat to international peace and security. In the end, members of the Council reached agreement that it merited the attention of the Council because HIV/AIDS threatens to kill more people and undermine more societies than any specific conflicts we deal with in the Security Council, indeed how could it not be a threat to international peace and security. Moreover, because AIDS strikes the young—young soldiers, young parents, young doctors, young government workers, young teachers—it threatens the futures of many countries.

As U.S. Secretary of State Powell said in his remarks at the United Nations General Assembly Special Session in June 2001, "no war on the face of the earth is more destructive than the AIDS

pandemic." Ambassador Jones Parry noted in his comments to the Special Session in September of this year, there can't be any doubt that today, nearly four years after that first discussion in the Council and three years after the adoption of Resolution 1308, that HIV/AIDS remains an urgent threat to peace and security.

Resolution 1308 addresses the linkages among HIV/AIDS, peace and security. The last discussion held on Resolution 1308 took place in January 2001, nearly three years ago. Today we have heard from UNAIDS and the Department of Peacekeeping Operations on the challenges of implementation and the progress made so far and they do indeed have much to report, more than could be easily contained in brief oral presentations to the Security Council.

Much of what we have heard today is encouraging. It is good to hear of the strengthened cooperation between UNAIDS and DPKO. We are pleased with the placement of an HIV/AIDS Policy Adviser in the Department of Peacekeeping Operations. We note the significant progress that this individual has made on implementing DPKO's responsibilities with regard to Resolution 1308. We note also the placement of HIV/AIDS Policy Advisers and designation of focal points in certain missions. They should be with all missions and I note Mr. Guéhenno's description of DPKO's intent to see that they are. We are also pleased to hear of the significant efforts DPKO is making with regard to awareness training. The HIV/AIDS Awareness Cards that were called for in January 2001 now represent a powerful tool in the education of not only peacekeepers, but also all national and regional armed forces, and they should be standard issue for all peacekeeping operations as soon as possible.

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3. Cloning

On October 21, 2003, Carolyn Willson, Deputy Counselor for Legal Affairs, U.S. Mission to the United Nations, addressed the Sixth Committee on agenda item 158, "International Convention Against the Reproductive Cloning of Human

Beings." She reiterated that the U.S. "Support[s] a ban on all human cloning, both for reproductive [and] experimental or therapeutic purposes." On November 6, 2003, the Sixth Committee (Legal) voted to postpone debate on cloning for two years. On December 9, 2003, the UN General Assembly voted to postpone further discussion for one year.

The full text of Ms. Willson's remarks is available at *www.un.int/usa/03_187.htm*. *See also* position paper released by the U.S. Mission to the United Nations in August 2003, available at *www.un.int/usa/cloning-paper.htm* and *Digest 2002* at 807–809.

C. OTHER TRANSNATIONAL SCIENTIFIC ISSUES

1. UNESCO Declaration on Human Genetic Data

On October 16, 2003, at its 32nd Session, UNESCO adopted the International Declaration on Human Genetic Data. The declaration and related documents, including the press release excerpted below, are available at *www.unesco.org/confgen/2003/genetic*.

A press release issued by UNESCO on that date included the following concerning the legally non-binding declaration:

> The Declaration's objective is clearly stated—to ensure the respect of human dignity and the protection of human rights and fundamental freedoms, in keeping with the requirements of equality, justice and solidarity, while giving due consideration to freedom of thought and expression, including freedom of research. It undertakes to define the principles that should guide States in formulating their legislation and their policies on these issues.
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> The respect of international laws protecting human rights is the principal safeguard established by the instrument. It is a recurring theme, evoked in each instance that the

> Declaration allows exceptions or restrictions to the major principles it sets out.
>
> The specific nature of genetic data and the purposes for which they should be collected, treated, used and stored are also defined. Concerning procedures, the Declaration calls for collecting, treating, using and storing data on the basis of transparent and ethically acceptable procedures. It proposes that independent, multidisciplinary, and pluralist ethics committees be promoted and established at national, regional, local, or institutional levels.

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The Oral Report of the President of Commission III (Natural Sciences/Social and Human Sciences) stated the U.S. views as follows:

> After Commission III had approved the draft International Declaration on Human Genetic Data, the distinguished delegate of the United States of America noted that her country intended to give due consideration to the provisions of the Declaration as consistent with both U.S. domestic law and good scientific and medical practice standards. She added that the United States of America was pleased to associate itself with the adoption of the International Declaration on Human Genetic Data. 32 C/INF. 29 at 7 (Oct. 31, 2003), available at http://unesdoc.unesco.org/images/0013/001324/13249e.pdf

Cross References:

Access to medications to treat HIV/AIDS, **Chapter 6.D.2.d.(2); Chapter 13.B.2.a.**

Funding of certain specialized environmental entities, **Chapter 7.B.2.**

EU measures affecting export of biotech products, **Chapter 11.C.1.a.**

TRIPS and public health, **Chapter 11.C.4.**

Chapter 14

Educational and Cultural Issues

A. IMPORT RESTRICTIONS

During 2003 the United States took action to protect cultural property in Cyprus and in Cambodia, as discussed below. The actions were taken at the request of the respective foreign countries, pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 U.N.T.S. 232 (1972), ratified by the United States in 1983 ("1970 UNESCO Convention"), as implemented for the United States by the Convention on Cultural Property Implementation Act, Pub. L. No. 97–446, 96 Stat. 2329, 19 U.S.C. §§ 2601–2613. These authorities enable the United States to impose import restrictions on certain archaeological or ethnological material when pillage of these materials places the cultural heritage of another state party to the Convention in jeopardy. They also provide the basis for long-term strategies for protecting cultural heritage and access to the protected material for cultural, educational, and scientific purposes.

Further information, including copies of relevant documents, is available at *http://exchanges.state.gov/culprop/list.html*.

1. Cyprus

Effective September 4, 2003, the Bureau of Customs and Border Protection, Department of Homeland Security,

extended for an additional three years an emergency import restriction on Byzantine ecclesiastical and ritual ethnological material from Cyprus unless such material is accompanied by an export permit issued by the Government of the Republic of Cyprus. 68 Fed. Reg. 51,903 (Aug. 29, 2003). Excerpts below from the Federal Register notice explain the action and the applicable legal framework.

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Pursuant to the provisions of the 1970 UNESCO Convention, codified into U.S. law as the Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601, et seq.) (the Act), the United States, after a request was made by the Government of Cyprus on September 4, 1998, imposed emergency import restrictions on Byzantine ecclesiastical and ritual ethnological material from Cyprus for a period of 5 years from the date of the request. These restrictions and the list of materials covered by them were published in the Federal Register (64 FR 17529, April 12, 1999) by the U.S. Customs Service in Treasury Decision (T.D.) 99–35. The T.D. amended Sec. 12.104g(b) of the Customs Regulations which lists emergency import restrictions on cultural property imposed under the Act. The restrictions became effective on April 12, 1999.

Under 19 U.S.C. 2603(c)(3), emergency restrictions may be extended for a period of 3 years upon a determination by the United States that the emergency condition continues to apply with respect to the articles covered by the restrictions. On August 25, 2003, the Acting Assistant Secretary for Educational and Cultural Affairs, Department of State, issued the determination that the emergency condition continues to apply to the articles covered in T.D. 99–35. Accordingly, Customs and Border Protection is amending Sec. 12.104g(b) to reflect the extension of the emergency import restrictions for a 3-year period; this extension of restrictions commences on September 4, 2003. The list of ethnological materials contained in T.D. 99–35 and an accompanying image database may also be found at the following Internet website address: http://exchanges.state.gov/culprop.

Based on the foregoing, importation of these materials continues to be restricted unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met. For example, these materials may be permitted entry if accompanied by appropriate export certification issued by the Government of Cyprus or by documentation showing that exportation from Cyprus occurred before April 12, 1999.

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2. Cambodia

On September 19, 2003, the United States and Cambodia signed an agreement to protect Cambodia's national cultural heritage. As explained in a media note released by the Department of State November 19, 2003, the action was taken "in response to the alarming rate of pillage in Cambodia, which places its national cultural heritage in jeopardy and endangers important monuments and sites . . ." *See www.state.gov/r/pa/prs/ps/2003/26673.htm.* The text of the agreement and related documents are available at *http://exchanges.state.gov/culprop/cbfact.html.*

Based on the agreement, effective September 22, 2003, BCBP issued a final rule amending Customs regulations to reflect the imposition of import restrictions on certain archaeological materials originating in Cambodia. 68 Fed. Reg. 55,000 (Sept. 22, 2003).

Excerpts below from the Federal Register describe the basis for the import instructions.

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Determinations

Under 19 U.S.C. 2602(a)(1), the United States must make certain determinations before entering into an agreement to impose import restrictions under 19 U.S.C. 2602(a)(2). With respect to the import restrictions in the instant case, these determinations, made initially on August 25, 1999, by the then Associate Director

for Education and Cultural Affairs, United States Information Agency, and subsequently affirmed on January 23, 2003, by the Assistant Secretary of Educational and Cultural Affairs, Department of State, provide the following: (1) That the cultural patrimony of Cambodia is in jeopardy from the pillage of the archaeological materials described further below in the list of designated materials; (2) that Cambodia has taken measures consistent with the Convention to protect its cultural patrimony; (3) that import restrictions imposed by the United States would be of substantial benefit in deterring a serious situation of pillage, if applied in concert with similar restrictions implemented or to be implemented by those nations having a significant import trade in such material, and remedies less drastic are not available; and (4) that the application of import restrictions is consistent with the general interests of the international community in the interchange of the designated archaeological materials among nations for scientific, cultural, and educational purposes.

The Agreement

On September 19, 2003, the United States and Cambodia entered into a bilateral agreement (the Agreement) pursuant to the provisions of 19 U.S.C. 2602(a)(2) covering certain Khmer stone, metal, and ceramic archaeological material ranging in date from the 6th century through the 16th century A.D. Accordingly, Customs and Border Protection (CBP; the bureau of the new Department of Homeland Security that includes much of the former U.S. Customs Service) is amending Sec. 12.104g(a) of the Customs Regulations (19 CFR 12.104g(a)) to indicate that import restrictions have been imposed pursuant to the Agreement. The archaeological materials subject to the restrictions are described further below.

Restrictions

CBP notes that emergency import restrictions (19 U.S.C. 2603) on certain stone archaeological materials from Cambodia were imposed under T.D. 99–88 (64 FR 67479, December 2, 1999). These materials covered by T.D. 99–88 are subsumed in the recently signed bilateral Agreement and continue to be subject to

import restrictions. Thus, this document amends the Customs Regulations to remove the listing of Cambodia from Sec. 12.104g(b) pertaining to emergency actions. Importation of the materials described in the list below, including those which, up to now, have been subject to the restrictions of T.D. 99–88, are subject to the restrictions of 19 U.S.C. 2606 and Sec. 12.104g(a) of the Customs Regulations (19 CFR 12.104g(a)) and will be restricted from entry into the United States unless the conditions set forth in 19 U.S.C. 2606 and Sec. 12.104c of the regulations (19 CFR 12.104c) are met. For example, these materials may be permitted entry if accompanied by appropriate export certification issued by the Government of Cambodia or by documentation showing that exportation from Cambodia occurred before December 2, 1999, with respect to the Khmer stone archaeological materials that have been covered under T.D. 99–88, and September 22, 2003, with respect to the Khmer archaeological materials not covered previously under T.D. 99–88 (See 19 U.S.C. 2606(b)(1) and (2)(B); 19 CFR 12.104c(a) and (c); see also 19 U.S.C. 2606(a) and 2604.)

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B. IMMUNITY OF ART AND OTHER CULTURAL OBJECTS

On July 27, 2003, the Los Angeles County Museum of Art ("LACMA") opened an exhibition of French art on temporary loan to LACMA from the permanent collection of the State Pushkin Museum of Fine Arts in Moscow, Russia ("the Pushkin"). LACMA was scheduled to close the exhibition on October 13, 2003, at which point the 76 works would be returned to the Pushkin. On July 15, 2003, prior to the exhibition's opening, Andre Marc Delocque-Fourcaud of France filed suit in the U.S. District Court for the Central District of California claiming ownership interests in twenty-five of the works in the exhibition (the "Contested Objects"). *Delocque-Fourcaud v. The Los Angeles County Museum of Art*, No. CV 03–5027–R(CTx). Delocque-Fourcaud alleges that in 1918 the new Soviet government nationalized many valuable

works of art, including twenty-five in the exhibition from his grandfather, Sergei Shchukin. He asserts that the nationalization of the art was illegal, and therefore, as an heir to his grandfather's estate, he has an ownership interest in the Contested Objects and that Pushkin's claim of ownership is invalid. Plaintiff requested a judgment requiring LACMA to withdraw the Contested Objects from the exhibition or requiring LACMA to pay him treble the proceeds earned from the Exhibition if it included the Contested Objects and declaring that the Contested Objects are not entitled to immunity from seizure under 22 U.S.C. § 2459. Plaintiff contended that if the State Department had known about the adverse claims of ownership, it would not have made the § 2459 determinations, *see* 67 Fed. Reg. 55,907 (Aug. 30, 2002); therefore, the determinations is void *ab initio*.

Excerpts below from the Memorandum of Points and Authorities filed by the United States with its motion for dismissal, October 20, 2003, provide the views of the United States that plaintiff's action is precluded by the statute and that the action improperly seeks to deprive LACMA of "custody or control" of the Contested Objects. (Footnotes have been omitted.)

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The Act

Enacted in 1965, [Pub. Law No. 89–259, 79 Stat. 985 (Oct. 19, 1965),] 22 U.S.C. § 2459 provides the following:

> Whenever any work of art or other object of cultural significance is imported into the United States from any foreign country, pursuant to an agreement entered into between the foreign owner or custodian thereof and . . . one or more cultural or educational institutions within the United States providing for the temporary exhibition or display thereof within the United States at any cultural

> exhibition . . . administered, operated, or sponsored, without profit, by any such cultural or educational institution, no court of the United States, any State, . . . may issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving such institution . . . of custody or control of such object if before the importation of such object the President or his designee has determined that such object is of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest, and a notice to that effect has been published in the Federal Register.

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IV

THE COURT SHOULD DISMISS THE FIRST AMENDED COMPLAINT WITH PREJUDICE

Plaintiff's Action Is Precluded By Both The Plain Text
And The Purpose Of § 2459

1. The Act

Congress intended § 2459 to prevent this very kind of litigation from being brought. Plaintiff seeks an order and judgment that would have the "purpose" or the "effect" of depriving LACMA of "custody or control" over the Contested Objects. Under the plain terms of § 2459, this Court has no power to issue such an order or judgment.

Congress established a bright-line trigger for the Act's protections: a cultural object is protected by § 2459(a) if the State Department has made the "cultural significance" and "national interest" determinations and published them in the Federal Register before the object is imported. Here, the State Department made such determinations and published the appropriate notice in a timely fashion. Therefore, the Contested Objects are entitled to immunity from judicial process.

Plaintiff's principal contention is that the State Department's publication of its § 2459 determinations should somehow retroactively be declared invalid because the State Department allegedly was not informed of the competing claims to ownership of the Contested Objects by plaintiff and his family. That contention is meritless. Section 2459's protections do not turn on *how* the State Department made its immunity determinations of "cultural significance" and "national interest"; all that matters is *whether* those determinations were made.

Indeed, the very purpose of the Act—to provide advance assurances of a safe harbor from litigation—would be undermined if the propriety of the State Department's determinations were to be allowed to be called into question after the objects have already been imported into the United States. Institutions such as LACMA and the Pushkin rely on these determinations in arranging for exhibitions of cultural objects in the United States. Such reliance would be impossible if those determinations could be retroactively overturned by the courts.

Precisely this conclusion was reached in Magness v. Russian Federation, 84 F.Supp. 2d 1357 (S.D.Ala. 200), the only published decision construing § 2459. . . .

As the court recognized in Magness, if persons such as plaintiff are allowed to bring suit in American courts challenging State Department determinations under § 2459, the protections offered by the Act will soon be of little worth. As a result, foreign institutions will be less willing to loan cultural objects for display, American institutions will be less willing to host exhibitions of such objects, and ultimately the American public will enjoy fewer opportunities to view and learn from such exhibitions.

2. The History Behind The Act

The history behind the Act demonstrates that the statute was intended to facilitate the exhibition of cultural objects from foreign countries in the United States, even if there may be competing claims to those objects. Ironically, it was a remarkably similar situation in the early 1960's, involving the importation for

temporary exhibition of cultural objects from the Soviet Union, which gave rise to the enactment of § 2459:

> A strong sponsor of the bill was Senator Harry F. Byrd, Sr. of Virginia. The motivation for his staunch support of the bill was a pending exchange between a Soviet museum and the University of Richmond, through which the Virginia gallery sought to import several artworks that had been appropriated by the Soviet government from expatriots. As a condition to the loan, the Soviets insisted on a grant of immunity from seizure as protection against former Soviet citizens who had valid claims to the title of the works. Thus, the enactment of the statute was stimulated in part by a desire to facilitate a pending exchange with the Soviet Union, despite the presence of valid claims to the artwork by United States citizens.

Rodney M. Zerbe, Comment, *Immunity from Seizure for Artworks on Loan to United States Museums*, 6 Nw. J. Intl. L. Bus. 1121, n.21 (1984/85) (Exhibit 12).

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3. Plaintiff's Action Seeks Improperly To Deprive LACMA Of "Custody Or Control" Of The Contested Objects

While plaintiff does not seek to seize the works at issue outright, the protection by the Act extends well beyond "seizure" to include "any judicial process . . . for the purpose of or having the effect of depriving" an exhibiting institution of "custody or control" of a cultural object. Plaintiff's request for an order enjoining LACMA from exhibiting the Contested Objects directly threatens LACMA's "control" over the works.[1]

The damages and constructive trust sought by plaintiff also would "have the effect" of depriving LACMA of control over the Contested Objects, in that "control" over the objects must be considered to include the ability to collect fees for their display. The purpose of § 2459 is to ensure that cultural and educational

institutions such as LACMA are not deterred by the threat of litigation from importing culturally significant objects for temporary display. Depriving a museum of the means to recoup the costs of an exhibition has the same deterrent effect in this sense as enjoining the museum from putting on the exhibition at all.

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C. UNESCO INSTRUMENTS

1. Cultural Diversity

In October 2003, Commission IV (Culture) of the UNESCO General Conference, meeting at Paris in its 32nd Session, adopted a resolution in which it decided "that the question of cultural diversity as regards the protection of the diversity of cultural contents and artistic expressions shall be the subject of an international convention." The resolution as adopted is available in the Report of Commission IV, Doc. 32 C/74 at pp. 26–27, at *http://portal.unesco.org/en/ev.php@URL_ID=14375&URL_DO=DO_TOPIC&URL_SECTION=201.html*.

On October 9, 2003, the United States submitted a proposed alternative resolution that called for full discussion in UNESCO "before starting a drafting process on a legal instrument whose goals, at this time, are unclear." The U.S. resolution, Doc. 32 C/COM.IV/DR.5, is available at *http://portal.unesco.org/en/ev.php@URL_ID=16522&URL_DO=DO_TOPIC&URL_SECTION=201.html*.

On October 17, 2003, following adoption of the final text of the resolution, Richard Terrell Miller, Deputy Assistant Secretary, Bureau of International Organizations, U.S. Department of State, provided the views of the United States as set forth below.

The full text of his statement is available at *www.state.gov/s/l/c8183.htm*.

Mr. Chairman, the United States acknowledges and supports the wish of each nation to preserve and promote its unique cultural values and identity in a culturally diverse global society.

We believe that UNESCO has an important role to play in promoting cultural diversity within and among countries. We understand that the overwhelming majority of members came to this Conference prepared to support a resolution calling for work to begin on a convention on cultural diversity. The United States appreciates the willingness of our fellow members to modify the resolution to address some of the concerns we have raised, and it is in this spirit of cooperation that we did not ask for a vote on this resolution. We plan to work constructively with all members to address our concerns during the negotiating process on the convention.

Mr. Chairman, we remain seriously concerned that the proposed convention could conflict with the mandates of other international organizations, could seek to legitimize restrictions on the flow of cultural information or goods or services, and could have serious human rights implications.

It is our hope that, in undertaking consultations with WTO, UNCTAD and WIPO, the Director General will seek to ensure that the proposed cultural diversity convention does not conflict with nor undermine existing legal structures and obligations.

The UNESCO Constitution states that among UNESCO's primary purposes is to "recommend such international agreements as may be necessary to promote the free flow of ideas by word and image" and to "initiate methods of international cooperation calculated to give the people of all countries access" to the materials of others. We trust that, as work proceeds of the proposed convention, member states will keep these purposes in mind.

We recall that some twenty years ago UNESCO embarked on an effort to regulate the flow of information, an effort now broadly acknowledged as misguided. We hope the current effort can avoid the mistakes of that endeavor.

We hope that, as work on the cultural diversity convention progresses, we will focus on the ways we can work together to promote and support cultural diversity, both within and among nations, and not on ways to insulate ourselves from each other

and from the artistic, social and political enrichment that diverse sources of culture bring to our lives.

2. Cultural Heritage

Commission IV also adopted a non-legally binding Declaration on Intentional Destruction of Cultural Heritage, calling on states to "take all appropriate measures to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage, wherever such heritage is located." The United States joined consensus. *See* Report of Commission IV, Doc. 32 C/74, *supra,* at 32.

In addition, the UNESCO General Conference in its October meeting adopted the International Convention on the Preservation of the Intangible Cultural Heritage, available at *http://portal.unesco.org/en/ev.php@URL_ID =16631&URL_DO=DO_TOPIC&URL_SECTION=201.html.* The United States abstained in the vote.

Cross-references:

U.S. rejoins UNESCO, **Chapter 7.B.1.**

CHAPTER 15

Private International Law

A. COMMERCIAL LAW

1. Overview

Set forth below is a review of developments in economic and commercial law in 2003 in the field of international private law, provided in a memorandum of December 1, 2003, to the American Bar Association Section on International Law and Practice. The report, prepared by Harold Burman of the Office of Private International Law, Office of the Legal Adviser, U.S. Department of State, and government liaison to the Council on Private Law Matters, addresses developments relevant to the actions of the Council.

International organization overview

Elections this year returned the U.S. as a member of an expanded UN Commission on International Trade Law (UNCITRAL), and the U.S. candidate for the UNIDROIT Governing Council was elected by a strong margin. Both had been of concern because of possible reactions to U.S. policies in other areas of international law (the U.S. candidate in a previous election for UNIDROIT several years earlier was unsuccessful). The expansion of UNCITRAL from 36 to 60 member states, by action of the UN General Assembly, reflected the fact that from 20 to 30 states

regularly attended Commission meetings as observers. The U.S. supported expansion as long as existing percentages were maintained between the UN geographic groups.

Non-government bodies (NGO's) who are technically qualified continued to participate at UNIDROIT and the Hague Conference, and at UNCITRAL as technical advisers upon invitation of the Commission (i.e. they do not attend as of right merely by being recognized as an NGO under ECOSOC procedures). Their role at UNCITRAL is in contrast to their often more restricted and controversial role at a number of other GA bodies. The American Bar Assoc. is a leading example, with technical representatives appearing at UNCITRAL on insolvency law, secured finance, electronic commerce, and litigation and arbitration matters. SILP Section members are encouraged to participate in this effort by the ABA.

The probable future status of the European Union as a party to certain private law instruments was explored. Two new private law conventions, the 2001 Cape Town Convention on mobile equipment finance, affecting the globally important field of aircraft finance in its first Protocol, and the 2002 Hague Conference Convention on securities intermediaries both contain similar provisions allowing REIO's (regional economic intergovernmental organizations) to accede and undertake the obligations of a State party. This recognized inter alia the mixed competency of the EU and its member states in certain areas of the private law, such as jurisdiction and insolvency. EU accession arguably would allow EC control over the application of those areas of law over which it had competence, and clear the way for its member states to ratify as to all other provisions. That said, since transactional and financing parties need a high level of reliance on provisions of private law treaties, it will be necessary to spell out more clearly what it means to state that the EU is a "party" to such an instrument.

Outer space finance law

UNIDROIT held its first intergovernmental meeting in October 2003 at Rome on the draft Protocol on secured finance rights in

outer space equipment to the Cape Town Convention. This placed squarely on the table the intersection between the existing UN Outer Space Treaty of 1967, and its follow-on treaties on registration of space objects, liability of damage by satellites, and return of space objects, and the UNIDROIT / ICAO Cape Town convention system that would set forth financing rights to equipment in space as between transacting parties. The same issues arise with the International Telecommunications Union (ITU) regulatory treaty regime for transmittal and orbital rights. The States and industry representatives involved agreed that there was no conflict between these private and public law treaties, in that a private law treaty affecting transacting parties would have no effect on State obligations under the public law instruments. Further, it was agreed that secured creditors seeking to enforce international interests created by the Space finance protocol would remain subject to regulatory regimes in many States as to transference of rights to satellites.

It became clear that a protocol for space finance was not likely to track the previous aircraft finance protocol in some important respects. First, the degree to which States would interpose regulatory review prior to allowing transference of satellite operations or other interests could make that potential market uncertain, which in turn would necessitate additional financial assurances to create an workable secured finance market. In addition, some States sought to extend protection to contractual arrangements for public services, which could undermine a secured finance market. Unlike the air finance protocol, the interests to be covered by secured rights under the treaty was proposed to be extended to the manufacturing phase, in addition to covering equipment already in space, by bringing in concepts of project finance. Without some treaty-based secured finance regime, available investment for space operations will continue to be in short supply and overly costly. Whether that is enough incentive for States to create a treaty regime that works in the financial markets for a risky area remains to be seen.

The intersection of the treaty systems is also under review by the UN's Committee on the Peaceful Uses of Outer Space (UNCOPUOS). Participants agreed that while the private law

protocol could affect States inter se, it could not affect obligations of States under the COPUOS-prepared Outer Space treaty system. As with the air finance registry to be supervised by ICAO (International Civil Aviation Organization), the space finance protocol would require a similar UCC-type filing system. Proposals that the Secretariat of the UN's Outer Space Committee (OOSA) might perform some functions related to the registry, as it now does for the UN space object registration treaty, met with some resistance, in part on concerns about the UN staff being authorized to facilitate private financing systems.

Secured finance

The U.S. was expected to sign the 2001 UN (UNCITRAL) Convention on assignments of receivables financing.* Discussions have already begun informally on possible joint action by the U.S. and the EU, which depend in part on the resolution of competency issues between the EU and its member states on secured financing and related areas of commercial law. The Convention tracks modern finance law as reflected in UCC Article 9, which however would be a sharp change in legal traditions for a number of EU States; the role of the EU therefore and the possibility that unanimity could be required have to be resolved, along with the need to revise the existing EU Rome Convention on law applicable to contracts, to bring about compatibility with the UNCITRAL text, should the latter be adopted by EU States. This Convention, unlike Cape Town and The Hague securities law conventions noted above, does not have an "REIO" clause allowing the EU to accede as a party.

On other secured finance fronts, UNCITRAL's Working Group VI continued its effort to conclude a UN legal guide on secured finance law reform. The present scope emphasizes inventory and trade finance; studies will be done as to whether to extend that to intellectual property rights and deposit accounts and other banking

* [Editors' note: The United States signed the convention on December 30, 2003; *see* A.5. below.]

mechanisms. Secured rights in investment securities would not be covered, since that is the subject of a new project by UNIDROIT. U.S. participants, including the State Department, the ABA and others have emphasized economic functionality as a test for what recommendations should be made to States, rather than theory or past practices. Some of those issues remain unresolved, such as whether priority requires transparent publicity.

The UNIDROIT project will seek to harmonize some aspects of substantive securities transaction law, such as closing and settlement, intermediaries' rights and obligations, and other matters, something not attempted before (although it should be noted that secured finance generally was, before the mid-1990's, always rejected as a topic for private law harmonization on grounds that that was not possible to achieve).

As to completed conventions, the Administration sent the Cape Town Convention to the Senate in November 2003 for advice and consent to ratification, and the Transportation Department sent draft implementing legislation for FAA's role in the new international registry to both Houses. Action on these was expected hopefully in mid-2004.

Insolvency law reform

UNCITRAL, the World Bank and the International Monetary Fund continued to develop new guidelines for insolvency law reform, now seen as a critical part of a State's ability to manage financial tailspins as well as to attract investment or start-up capital for its enterprises. The absence of an efficient legal system for recycling assets of failed enterprises was seen as one factor contributing to certain well-known meltdowns, and continues to be a major factor restricting the inflow of investment capital for many states. UNCITRAL's text is clearly the more detailed, but also more flexible, and has a significant degree of support through participation of experts and ministry representatives from over fifty countries. IMF has tentatively supported the UNCITRAL text as the likely core of future standards which would be adopted jointly by the Fund and the Bank to assess activities in recipient States. The draft Legal Guide now contains, and in part rests on,

more robust treatment of U.S.-type reorganization and refinancing options, rather than just liquidation for failed enterprises. In addition, U.S. proposals for inclusion of expedited proceedings, supported by IMF, the World Bank, the Asian Development Bank and others, which are designed to allow quicker initial workout of debts to major investors, such as banks, so as to allow new rescue financing to be possible, are now included. Both initiatives, seen by some as critical to achieving economic progress, especially for developing and emerging States, were barely on the agenda when this effect began. Completion of the UNCITRAL project is now expected in 2004.

International electronic commerce

UNCITRAL moved forward with its draft convention on formation of contracts in e-commerce, which would encompass enabling provisions, a number of which are derived from UNCITRAL's first 1996 e-commerce Model Law. Provisions on location, time and place of dispatch and receipt, and error, are unresolved. While essentially validating e-communications for contract purposes, earlier draft provisions on disclosure obligations were removed. Standards for determining location are also unresolved, but necessary if the present limitation of scope to cross-border activities is maintained. While e-commerce may inherently be international, as is air transportation, it would be much more difficult to gain acceptance for a text that would replace domestic law. This would be so even in the U.S., where existing law, the Uniform Electronic Transactions Act (UETA) and the Federal E-signature and Global E-commerce Act, also draw substantially on the UNCITRAL Model Law, so few changes would result.

Treaty law aspects of the new convention will need buy-in by enough countries to become effective. In addition to application directly to covered transactions, the draft Convention states that its provisions will also apply to certain listed UN Conventions, such as the Vienna Convention on Contracts for the Sale of Goods (CISG), as well as certain other conventions or treaties, so that terms in those instruments can be interpreted in a manner consistent

with modern technology and practices. Such a provision would be effective only *inter se*, that is between any two or more States that adopt the new Convention, and would not affect obligations of those States to any other States party to that or other conventions affected. As now drafted, the new convention would in addition apply to other treaties and conventions so listed in declarations by a ratifying State (or alternatively could be written in reverse fashion, that is it would apply to all treaty instruments per se, unless excepted by declaration. The former approach is more likely to be approved. Either way, the purpose is to extend the "footprint" of modern e-commerce law to more States than have adopted such measures so far.

Carriage of goods by sea, and effect on inland transportation

After more than 80 years disharmony amongst international legal regimes, the carriage by sea mini-world may be on the way to a new convention that will cover liability issues for ocean carriage and can extend to certain aspects of inland rail and road transportation as well. A draft convention, prepared by the Brussels-based Comite Maritime Internationale (CMI), which involved national maritime law associations and other industry groups, as well as a variety of governments, is now under negotiation at UNCITRAL. After compromise was reached between various U.S. groups representing shippers, carriers, cargo interests, and others, itself a feat, a combined U.S. proposal (UN Doc.A/CN.9/WG III/WP.34) was tabled at UNCITRAL in October 2003 that would package together resolution of certain issues that are key to U.S. support. These include the scope provisions; degree to which it applies to carriers and shippers; application to some aspects of road and rail legs; exemptions from liability, including navigational fault; ocean liner service agreements; party autonomy, and forum selection rules. There is little support at the Commission to take on a full multimodal convention, i.e. one that substantively covers all modes of transportation under a unified regime, which would require unanimity between ocean, rail and road interests.

2. Judgments

On September 12, 2003, Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, responded to an inquiry from the National Association of Insurance Commissioners concerning enforceability of U.S. judgments in foreign jurisdictions and the status of negotiations of a proposed convention on jurisdiction and the recognition and enforcement of foreign judgments. Excerpts below from Mr. Kovar's letter address specific issues raised in the request.

The full text of the letter is available at *www.state.gov/s/l/8183.htm*.

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WHAT IS THE CURRENT STATE OF THE LAW WITH RESPECT TO ENFORCEMENT OF U.S. JUDGMENTS IN FOREIGN JURISDICTIONS?

Our best information is that law and practice in most foreign countries is not generally favorable to the prompt, predictable enforcement of U.S. civil judgments. Law and practice vary widely. In a few countries, notably Canada, conditions are relatively favorable, particularly for money judgments in commercial matters. But in some of these countries there may be a host of technical obstacles for the unwary litigant. In a substantial number of other countries the written law appears to be more favorable than the actual practice. Finally, in many countries enforcement is not possible absent a treaty.

WHAT IS THE PURPOSE OF THE PROPOSED CONVENTION ON FOREIGN JUDGMENTS?

The purpose of the proposed convention on jurisdiction and the recognition and enforcement of foreign judgments is to level the international playing field for civil judgments. State law

and practice in the U.S. is the most open in the world to the enforcement of foreign judgments. We believe that if other countries were to provide the same level of comity to U.S. and other foreign judgments there would be a substantial benefit to international trade and commerce.

WHY DOES THE U.S. VIEW THESE NEGOTIATIONS AS IMPORTANT?

The growth in international trade and investment has not been matched by developments in judicial dispute resolution. The Department of State and other U.S. Government agencies regularly receive inquiries from American attorneys and businesses seeking advice about how to pursue their legal rights with foreign parties. To achieve a convention that would provide a common legal structure and rules for the enforcement of judgments in the courts of our major trading partners would be of significant benefit for judgment-holders around the world. The Department of State has been seeking such a convention off and on for nearly 40 years.

WHICH FACTORS AFFECTING THE ENFORCEABILITY OF JUDGMENTS DO YOU ANTICIPATE MAY BE RESOLVED BY THE CONVENTION? ARE THERE OTHER FACTORS THAT MAY REMAIN UNRESOLVED?

The current negotiations have been underway more than a decade at the Hague Conference on Private International Law. The original, broad-scale project was recently set aside after it became clear that consensus could not be reached on many of the difficult issues raised. A new effort is underway to negotiate a narrower convention—one focused on the enforcement of choice of forum agreements in commercial contracts and the enforcement of resulting judgments. This narrower project holds the promise of developing a convention that would be a companion to the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards.

WHAT IS THE EXPECTED TIMEFRAME FOR DEVELOPMENT AND ADOPTION OF THE PROPOSED CONVENTION?

It is very hard to judge how long a negotiation might take. An intergovernmental negotiation is scheduled for the first week of December to consider the new choice-of-court text that was produced by an informal working group in the last year. Progress in that session will give a better sense of the overall timeframe.

WHICH JURISDICTIONS ARE PARTICIPATING IN THE NEGOTIATIONS?

There are over 60 member states of the Hague Conference, which includes virtually all major U.S. trading partners.

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DO YOU FORESEE ANY SPECIAL CIRCUMSTANCES ARISING WITH REGARD TO INSURANCE CASES IN THE NEGOTIATIONS?

European Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which is in force for the European Community (except Denmark), has special rules related to insurance contracts that permit an insured to sue in its home jurisdiction in many instances in spite of a choice of forum agreement specifying another forum. While we have had no official contacts on this point, our impression is that the EC countries may seek special dispensation for these rules in the upcoming negotiations. . . .

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3. Draft Instrument on Carriage of Goods

On July 11, 2003, the United States submitted to the United Nations Commission on International Trade Law ("UNCITRAL") a paper outlining its position on ten aspects of a draft instrument on the carriage of goods by sea. As noted in A.1. *supra*, the paper was provided to Working Group III (Transport Law) in preparation for its twelfth session in Vienna, October 6–17, 2003. A/CN.9/WG.III/WP.34, available at *www.uncitral.org/english/workinggroups/wg_3/wp-34-e.pdf*. Excerpts below from the submission cover four of the key issues included in the position paper: scope of coverage, treatment of performing parties, forum selection clauses, and contractual freedom to derogate from the terms of the convention.

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I. Scope of application and performing parties

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5. As part of the overall package, the United States supports a door-to-door regime on a uniform liability basis as between the contracting parties, subject to a limited network exception. This means that the contracting carrier's liability to the cargo interests would always be resolved under the Instrument's own substantive liability provisions (including the Instrument's own limitation and exoneration provisions) except when the network principle applies to supersede these provisions. To provide the maximum degree of uniformity possible, we would keep the network exception as narrow as possible. The narrow network exception contained in article 4.2.1 of the Draft Instrument would be acceptable to the United States.

6. In addition to establishing the liability regime between the contracting carrier and the cargo interests, the Instrument should provide the substantive liability rules for "maritime performing parties," meaning those that perform or undertake to perform the

contracting carrier's obligations for the port-to-port aspect of the carriage. Maritime performing parties would thus include, for example, ocean carriers, feeder carriers, stevedores working in the port area, and marine terminal operators.

7. With regard to other performing parties, the Instrument should not create new causes of action or preempt existing causes of action. For example, the liability of an inland carrier (e.g., a trucker or a railroad) should be based on existing law. In some countries, this may be a regional unimodal convention such as CMR. In others, it may be a mandatory or nonmandatory domestic law governing inland carriage, or the generally applicable tort law. In some countries, cargo interests may not have a cause of action against inland performing parties. Preserving the status quo in this regard would, of course, preserve whatever rights an inland performing party may have under applicable national law to rely on a Himalaya clause to claim the benefit of the contracting carrier's rights under the Instrument. The Instrument should neither increase nor decrease these existing rights.

8. To implement this proposal with respect to performing parties, the United States supports the adoption of the performing party definition suggested in paragraph 16 of the commentary to the Draft Instrument. The definition in article 1.17, which requires "physical" handling of the cargo, is too restrictive. A slightly broadened definition that refers to a party that "performs or undertakes to perform" the contracting carrier's duties would be more appropriate. A party that undertakes to perform a portion of the carriage but then fails to perform at all should not be in a better position than a similarly-situated party that attempts to perform in good faith but does so negligently. Furthermore, to the extent that the motivation to restrict the definition was based on a desire to avoid imposing liability on inland parties that did not physically handle the goods, that concern is addressed by our proposal to exclude all inland performing parties from the Instrument's liability terms.

9. Recommendations: To implement this aspect of the proposal, article 1.17 of the Draft Instrument should be amended along the lines proposed in paragraph 16 of the commentary. An additional definition should be added to clarify which performing parties are

"maritime" performing parties. Articles 6.3.1 and 6.3.2(b) of the Draft Instrument should be revised so that the Instrument creates a direct cause of action against maritime performing parties only, and article 6.3.3 of the Draft Instrument should be revised so that automatic Himalaya clause protection is extended only to the maritime performing parties that assume liability under the Instrument.

* * * *

V. Forum selection

A. General Rule

30. As part of the overall package, the United States believes that the Instrument should limit the permissible forum for litigating or arbitrating claims to certain reasonable places. As a general rule, an approach substantially along the lines adopted in the Hamburg Rules would be acceptable, but two principal revisions would be necessary. First, the Hamburg Rules give the choice among the specified forums to "the plaintiff," leaving open the possibility that a carrier (the potential defendant in a claim for cargo damage) could bring an action as the plaintiff for a declaration of non-liability, thus preempting the choice that properly belongs to the injured claimant. The Instrument should clarify that the choice is the claimant's. Second, the list of reasonable forums should be defined as:

(i) the place where the goods are initially received by the carrier or a performing party from the consignor, or the port where the goods are initially loaded on an ocean vessel;
(ii) the place where the goods are delivered by the carrier or a performing party pursuant to article 4.1.3 or 4.1.4, or the port where the goods are finally discharged from an ocean vessel;
(iii) the principal place of business or habitual residence of the defendant; or
(iv) the place specified in the contract of carriage or other agreement.

31. This list differs from the Hamburg Rules list in two principal respects. It uses the places of receipt and delivery in addition to the ports of loading and discharge. This change simply recognizes the Instrument's potential door-to-door application (in contrast with the Hamburg Rules' port-to-port application). The place of contracting is also omitted from the list. In today's era of electronic contracting, the place of contracting is often difficult to determine, and is generally irrelevant to the transaction even when it can be determined. Furthermore, it can easily be manipulated if there is any advantage to doing so.

32. Determining the relevant "place" that qualifies as an appropriate forum for cargo claims could be handled in several ways. The Hamburg Rules' approach (to look to the court that has jurisdiction over the precise physical location mentioned) would be acceptable. This solution, of course, leaves considerable scope to the domestic laws regulating court procedure.

33. The Instrument's door-to-door application and its treatment of performing parties also require special attention in the drafting of the provision governing forum selection. In our view, the list of acceptable forums should apply only to actions between the carrier and the cargo interests. The listed forums may not be suitable for actions against a performing party. To the extent that a cargo claimant has a cause of action under the Instrument against a performing party, the plaintiff should be permitted to bring suit in any forum having jurisdiction over the defendant.

B. Exceptions to general rule in OLSA cases

34. Although an approach substantially along the lines adopted in the Hamburg Rules would be acceptable as a general rule, two exceptions should be allowed in cases involving an OLSA [Ocean Liner Service Agreement, discussed in Part IV of the submission]. First, the parties to an OLSA, as between themselves, should have the ability (for reasons explained above) specifically to agree in writing to derogate from all or part of the Instrument—including the forum provision. Thus the OLSA parties may agree that their

own litigation will be in any specified forum (even if this agreement may not bind third parties). This choice should be in lieu of any other choices provided by the Instrument. This freedom may be important in situations in which the parties know that no transport documents will be negotiated to third parties (e.g., a shipment from a company to an overseas branch, or a shipment in which the carrier's contractual counterpart is the consignee).

35. Second, when the parties to an OLSA designate a forum for cargo claims, we believe that the Instrument should provide for the extension of the chosen forum to a subsequent third party (e.g., the consignee or subsequent holder of the bill of lading) under certain conditions, thus binding both the carrier and the third party in actions between them. (The third party would not be bound by any designated forum in an action against a performing party.) In particular, we propose to allow such an extension under the following conditions:

(i) the parties to the OLSA must expressly agree in the OLSA to extend the forum selected to a subsequent party;
(ii) the subsequent party to be bound must be provided written or electronic notice of the place where the action can be brought (e.g. in the bill of lading or otherwise);
(iii) the place or places chosen by the OLSA parties must be
  (a) the place where the goods are initially received by the carrier or a performing party from the consignor, or the port where the goods are initially loaded on an ocean vessel, or
  (b) the place where the goods are delivered by the carrier or a performing party pursuant to article 4.1.3 or 4.1.4, or the port where the goods are finally discharged from an ocean vessel, or
  (c) the principal place of business or habitual residence of the defendant, with regard to one or more shipments moving under the relevant OLSA; and
(iv) the place selected in the OLSA must be located in a country that has ratified the Instrument.

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4. Convention on International Interests in Mobile Equipment and Protocol on Matters Specific to Aircraft Equipment

On November 5, 2003, President George W. Bush transmitted the Convention on International Interest in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment to the Senate for advice and consent to ratification. S. Treaty Doc. No. 108-10 (2003). Excerpts below from the President's transmittal letter and the accompanying report from Secretary of State Colin L. Powell submitting the treaty and protocol to the President for transmittal, dated September 8, 2003, provide the views of the United States on the importance and effect of the instruments.

LETTER OF TRANSMITTAL

The White House, November 5, 2003.

To the Senate of the United States:

I transmit herewith, for Senate advice and consent to ratification, the Convention on International Interest in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment, concluded at Cape Town, South Africa, on November 16, 2001. The report of the Department of State and a chapter-by-chapter analysis are enclosed for the information of the Senate in connection with its consideration.

The essential features of the Convention and Aircraft Protocol are the establishment of an international legal framework for the creation, priority, and enforcement of security and leasing interests in mobile equipment, specifically high-value aircraft equipment (airframes, engines, and helicopters), and the creation of a worldwide International Registry where interests covered by the Convention can be registered. The Convention adopts "asset-based financing" rules, already in place in the United States, enhancing the availability of capital market financing for air carriers at lower cost. The Convention's and Protocol's finance provisions are consistent with the Uniform Commercial Code with regard to secured financing in the United States.

This new international system can significantly reduce the risk of financing, thereby increasing the availability and reducing the costs of aviation credit. As a result, air commerce and air transportation can become safer and environmentally cleaner through the acquisition of modern equipment facilitated by these instruments. The new international system should increase aerospace sales and employment, and thereby stimulate the U.S. economy.

Negotiation of the Convention and Protocol has involved close coordination between the key Federal agencies concerned with air transportation and export, including the Departments of State, Commerce, and Transportation, as well as the EXIM bank, and U.S. interests from manufacturing, finance, and export sectors.

Ratification is in the best interests of the United States. I therefore urge the Senate to give early and favorable consideration to the Cape Town Convention and Aircraft Protocol, and that the Senate promptly give its advice and consent to ratification, subject to the seven declarations set out in the accompanying report of the Department of State.

George W. Bush.

LETTER OF SUBMITTAL

* * * *

BACKGROUND

The Convention and Protocol were negotiated over a five-year period under the auspices of UNIDROIT, an international body dealing with private law conventions, and ICAO, the International Civil Aviation Organization. They were concluded in November 2001 at a Diplomatic Conference at Cape Town, South Africa, attended by 68 States and 14 international organizations, and involved the active participation at all stages of the Conference by private sector air transportation and finance interests. Negotiations were intended to track existing air finance practices in the major capital markets and thereby facilitate new transactions, especially

in developing and emerging countries, which will be increasingly significant in coming decades.

Analyses of the markets indicated that a treaty extending financing methods which are already in place in the United States through the Uniform Commercial Code (UCC) would benefit other countries as well as U.S. manufacturing, employment, finance and export interests.

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SCOPE OF THE CONVENTION AND PROTOCOL

Major Provisions

The Convention, which relates to air transportation and interstate and foreign commerce, provides for the creation of internationally recognized finance rights and enforceable remedies designed to give greater security to financiers of highly mobile equipment, particularly in markets where country or business risk would not otherwise support such transactions. . . .

The Cape Town Convention can produce significant macroeconomic benefits in the United States, principally by enhancing (i) aerospace sales and increasing employment in the aerospace sector, (ii) risk reduction for U.S. private sector financial institutions, (iii) risk reduction to EXIM Bank, which has already evidenced its firm support by offering financing advantages to airlines located in States that ratify the Convention, and (iv) operational and fleet flexibility for airline operators with crossborder routes or interests. Importantly, U.S. leadership will bolster and significantly accelerate wide adoption of these instruments.

The Convention is designed as a "multi-equipment" treaty system, an outcome strongly supported by the United States. The protocol being submitted is the Aircraft Protocol, which applies to airframes, aircraft engines and helicopters above a minimum size or power threshold. The establishment of such thresholds maximized the U.S. ability to achieve consensus on the fundamental issues addressed in the Convention. The Convention can apply to other categories of high-value mobile equipment defined in additional protocols adopted through diplomatic procedures and that would be subject in the United States to ratification. Such

protocols to the Convention would most likely recognize specialized forms of financing applicable to the category of equipment covered. This would permit the development of best practices consistent with the needs of different sectors.

Key Financing Concepts

The Cape Town Convention creates an international secured finance system that may be summarized by the following points:

1. The Convention establishes an "international interest", that is, a secured credit or leasing interest with defined rights. Those rights consist principally of (a) the ability to repossess and sell or lease the equipment in the case of default by an airline operator (remedies), and (b) the holding of an objectively determined and transparent finance priority in the equipment, where competing claims are made against such equipment (priority).

2. Quiet possession rights attached to an international interest will be enforced and recognized in all States party to the Convention and Protocol, thus assuring airline operators of continued rights of usage of the equipment absent default or contrary agreement.

3. Priority of interests will be established through a "notice-based" filing system, recorded in a high-technology international registry, which will determine the priority of competing interests on a first-in-time basis, subject to certain exceptions. Pursuant to a declaration recommended below, the FAA will serve as the authorizing entry point to the International Registry for aircraft having or intended to have U.S. nationality (this Convention does not deal with nationality of aircraft).

4. Associated rights, such as future payment rights and receivables in aircraft financing arising under contracts directly related to the financing arising under contracts directly related to the financing of equipment, are subject to rules similar to those applicable to international interests.

5. The Convention promotes predictable and timely remedies in the case of default, reflecting basic principles underlying asset-based financing and leasing. This permits reliance on the value of the asset to reduce overall transactional risk, thereby reducing the cost of credit. States are given a number of options, in the form

of permitted declarations, which directly relate to the timing of remedies, both in and out of insolvency. These include certain basic concepts found in U.S. law, such as the availability of non-judicial remedies, the timing of remedies in the event of airline insolvency, and efficient deregistration and export of aircraft in the event of default, subject to national safety and airworthiness rules and regulations.

6. Transaction party autonomy, the ability of creditors and debtors to agree as among themselves on basic elements of their contract and its enforcement, is central to the Convention.

7. The international finance Registry, a basic component of the Convention, is similar to notice filing systems in the United States and Canada. Unlike a documentary system, where transaction documents are vetted before filing, a notice system involves posting minimal information only, so that other potential financing interests can make inquiries of possible superior interests prior to financings.

ICAO will supervise the International Registry. A Preparatory Commission, in which the United States is a very active member, will establish the requirements for and determine the initial host State of the Registry. The host State is expected to fund the creation of the International Registry and users will pay sustaining use fees, which are expected to be low since the system is wholly electronic. The feasibility of the system has already been tested by a prototype developed by a body affiliated with airline associations.

Effect on Other Treaties

The relationship of the Cape Town Convention to existing aviation conventions was carefully worked out. The 1948 Convention on the International Recognition of Rights in Aircraft ("Geneva Convention") is the only convention in force for the United States to which the relationship rule will initially apply. As between parties to the Aircraft Protocol, the Cape Town Convention will supersede the Geneva Convention, to the extent matters are covered or affected by the new instrument. The Geneva Convention will continue to apply to matters not covered by the Cape Town Convention and will remain fully in force as

between States party to it which are not parties to the Cape Town Convention.

Related International Developments

The Cape Town Convention would represent a change in the financing laws for many other States. However, two new related international legal texts have recently been negotiated in other bodies, by some of the same States—one at UNCITRAL (a new Convention on Accounts Receivable Financing, approved by the UN General Assembly in December 2001), and the other at the Organization of American States (an Inter-American Model Law on Secured Financing, completed at an OAS Diplomatic Conference in February 2002). Both adopted an approach to secured financing similar to that in the Cape Town Convention.

DECLARATIONS IN CONNECTION WITH U.S. RATIFICATION

In order to allow States to tailor the Convention to particular economic needs, a number of declarations are provided for, consistent with practice in international private law conventions. Since the United States already has a well functioning capital market for air finance, only a limited number of declarations are needed for the United States. The situation differs for many other States, where the economic value of the Convention is linked to the making of declarations designed to substantially upgrade the substantive law in that State, especially where that is needed to lower country and credit risk.

Seven declarations (three for the Convention [pursuant to Articles 39(1)(a), 39(1)(b), and 54(2)], and four for the Protocol [for Articles VII, XII, XIII and XIX(1) and (2)], proposed for the United States were approved by the Departments of Transportation, Commerce, State and DOD through the FAA's Interagency Group on International Aviation (IGIA), as well as by EXIM Bank. Where possible, the declarations follow the recommended UNIDROIT form in order to promote uniformity. . . .

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U.S. statements to be made at time of ratification

Owing to the fact that in large measure the Convention and Protocol reflect existing U.S. law, the declarations made by the United States are expected to be different than those made by a number of other States. However, since the particular declarations made by other States may determine the extent of economic benefits under the treaty system, the Executive Branch intends to ask the Depositary to circulate three statements of a policy nature in order to bring to the attention of other States the importance that we attach to their declarations in the fields addressed. No Senate action is requested with respect to these statements.

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IMPLEMENTING LEGISLATION

No implementing legislation is required, except for technical amendments to certain authorities of the FAA relating to the filing of interests in registries through the FAA, discussed below. Otherwise, the UCC will apply, and no changes to the Code are required.

5. UN Convention on the Assignment of Receivables in International Trade

On December 30, 2003, the United States signed the United Nations Convention on the Assignment of Receivables in International Trade, approved by the UN General Assembly and opened for signature December 12, 2001. A/RES/56/81. A memorandum prepared by the Office of Private International Law provides an overview of the convention, excerpted below. *See also* discussion of the convention in A.1. *supra.*

The full text of the memorandum is available at *www.state.gov/s/l/c8183.htm.*

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. . . The Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL) over a

five-year period involving more than 60 States, together with a number of international organizations and trade and finance associations. The United States supported the negotiation as an effort to promote commerce to and from the United States and to enhance the credit and economic capacity of developing and emerging States. The model for many of the Convention's provisions was the modern capital markets approach to commercial law, such as that now adopted in the United States through uniform state laws.

Cross-border market liberalization through trade agreements or otherwise often cannot reach an appropriate level of transactions in the absence of lower cost commercial finance, or where there is a disparity between such credit facilities between two trading country partners. Adoption of this type of law through the Convention can significantly enhance a country's credit capacity by converting payment rights into collateral, thus freeing up a substantial source of collateral for commercial undertakings, which in turn can support cross-border commerce.

6. Enforcement of Foreign Tax Claims in U.S. Courts

On August 14, 2003, the U.S. Court of Appeals for the Eleventh Circuit invoked the common law "revenue rule" to uphold a district court judgment dismissing claims by three countries under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 2062–2968 ("RICO") involving alleged schemes by tobacco companies ("Big Tobacco") to avoid tax laws of the foreign countries. *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253 (11th Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 110 (2004). *See Digest 2002* at 837–841 for discussion of a similar case in the Second Circuit.

As explained in the Eleventh Circuit decision, the Republics of Belize, Honduras, and Ecuador ("Republics") "tax tobacco products as a means of regulating smoking in their various countries and providing funds for anti-smoking activities. The Republics allege that Big Tobacco engaged in various illegal schemes to avoid paying these taxes."

Excerpts below from the court's opinion describe the revenue rule and its application in this case. Footnotes and internal citations have been omitted.

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The revenue rule is a long-standing common law rule that prevents the courts of one sovereign from enforcing or adjudicating tax claims from another sovereign. Although 18th century English courts originally developed the rule to protect British trade, it has a long history of recognition and application in this country. The rule was originally justified in England on the basis of nationalistic commercial protectionism, but its application in this country is based and justified on the grounds of respect for sovereignty and the separation of powers.

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For the reasons [discussed in its opinion], we adopt the revenue rule as the law of this circuit. We also hold that the revenue rule requires this court to abstain from considering the Republics' claims because, not to do so, would necessarily require us to pass judgment on unadjudicated foreign tax claims for which the political branches of our government have not provided an enforcement mechanism. Finally, we hold that neither the RICO Act nor the Patriot Act altered the application of the revenue rule to such claims. Accordingly, we affirm the judgment of the district court dismissing the Republics' claims.

B. FAMILY LAW

New Multilateral Convention on Child Maintenance

In May 2003 Mary Helen Carlson, Office of Private International Law, delivered the U.S. opening statement at the Hague Conference Special Commission on Maintenance. As reflected in her remarks, excerpted below, the United States supports the negotiation of a multilateral convention on child maintenance, with certain conditions.

The full text of Ms. Carlson's remarks is available at *www.state.gov/s/l/c8183.htm.*

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The United States is pleased to be taking part in this very worthwhile effort to develop a modern, global convention for the reciprocal enforcement of child support obligations. The number of child support cases involving the custodial parent and child living in a different country than the non-custodial parent is certain to increase as the global economy continues to expand. It is vitally important for the protection of children and families that we develop improved mechanisms for international cooperation in this area. We believe that the new instrument needs to be practical and flexible. For us, the goal of this effort is to develop a system for international child support cases that is predictable, efficient, affordable, swift, and consistent.

The United States is not a party to any of the existing multilateral maintenance conventions. Those conventions have worked reasonably well for a number of countries and they contain many useful provisions. Some of them, however, contain mandatory rules of jurisdiction that pose insurmountable constitutional problems for us. In addition, and as noted by many others, the multilaterals have become outmoded and do not adequately address the needs of the 21st century. The United States has, instead, entered into bilateral child support arrangements with a number of countries. The federal government has broad statutory authority to conclude such bilateral arrangements, which do not require further congressional approval. Like the multilateral conventions, our bilateral arrangements have their strengths and weaknesses. In order to gain support within the United States for this new convention, we will need to demonstrate that it will produce more reliable support for children than our existing bilateral approach. We are committed to work together with other countries to produce an instrument that accomplishes this result.

It will also be essential to U.S. adherence to the new instrument that it not be used to facilitate recovery of maintenance from

a U .S. non-custodial parent in circumstances where the child has been wrongfully removed or retained. The instrument should not disturb national law, whatever it may be, regarding enforcement of maintenance obligations in those circumstances.

The United States will be guided in these discussions by two underlying principles, one philosophical and the other practical.

The central philosophical issue for us is this: children must be able to rely on their parents, and parents must live up to their responsibility to their children. There is no substitute, in our view, for this reliance and this responsibility. That's the lesson we learned in our welfare program. Government subsidies, for housing, child-care, food, cash, etc., are no substitute for the kind of income security for which children ought to be able to depend on their parents. Parents should be able to and should be expected to work, to earn, and to use their income to live up to their responsibility to their children. The question we will be asking ourselves as we consider proposals for the new convention is: does it present or remove obstacles from children being able to rely on support from their parents and parents meeting their responsibilities to their children?

Now, the practical principle that will be our guide is this: How likely is it that the new instrument will produce better results, outcomes, and performance. While it is of course essential that the new instrument provide a clear legal basis for the enforcement of support obligations, that is only part of our task. We also need to ensure that the new instrument augments this legal framework with provisions that will foster full and complete implementation of the convention's obligations by states parties. One of the lessons learned from the [Hague] Abduction Convention and from the existing maintenance conventions is the crucial importance of such implementation mechanisms. Provisions dealing with responsibilities of central authorities, administrative cooperation, accountability, training, data collection, reports by parties concerning their practice under the convention—all of these are the types of things that can help insure that, at the end of the day, the convention produces results in the form of more reliable support for more children. A flexible legal framework that can be accepted by all countries and a strong web of implementation

provisions—both of these, plus each party's commitment, according to its ability, of sufficient resources, are necessary for a successful convention.

* * * *

C. JUDICIAL ASSISTANCE

1. Special Commission to Review Hague Service, Evidence, and Legalization Conventions

The Special Commission of the Hague Conference on Private International Law met in The Hague from October 28 to November 4, 2003, to review the practical operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (658 U.N.T.S. 165, "Hague Service Convention"), of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (847 U.N.T.S. 241, "Hague Evidence Convention"), and of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (527 U.N.T.S. 190, "Hague Legalization Convention") ("Special Commission").

In preparation for the meeting of the Special Commission, states parties were requested to respond to questionnaires on each of the relevant conventions. The questionnaires, responses by individual states, and other relevant documents, including Conclusions and Recommendations of the Special Commission, are available at *http://hcch.net/e/workprog/lse_intro.html*. Texts of the conventions with information on ratifications and accessions are available at *www.hcch.net/e/conventions/index.html*.

Questionnaire relating to the Hague Evidence Convention

The questionnaire concerning the Hague Evidence Convention noted that the convention "has received 39 accessions

or ratifications from Member States (35) and non-Member States (4) of the Hague Conference." Excerpts are provided below from the questionnaire and the responses of the United States. The U.S. response attaches two annexes prepared by the International Litigation Committee of the Section on International Law and Practice of the American Bar Association: Annex A is a list of 116 cases citing the Hague Evidence Convention following the U.S. Supreme Court decision in *Societé Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987); Annex B is a report on the results of a survey of U.S. attorneys' experience using the Hague Evidence Convention abroad.

The full text of the U.S. responses, with annexes, is available at *www.hcch.net/doc/lse_20us2.pdf.*

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[Question 3. Have you encountered practical difficulties connected with application of the Convention?]

3. The U.S. Central Authority believes it is able to provide evidence in most circumstances in a form compatible with foreign legal systems. Evidentiary requests that are received by the Central Authority are typically referred to the United States Attorney's Office for the federal judicial district in which the evidence subject to the request is located. In most circumstances the United States Attorney's office will attempt to obtain compliance of an evidentiary request through voluntary means, without having to rely upon the compulsory mechanisms available through the domestic judicial system. In many cases, the evidence can be obtained relatively quickly and with minimal difficulty. Not all requests, however, can be easily complied with. In particular, when the requested entity to whom the evidentiary request is directed refuses to provide voluntary compliance, it becomes necessary to go to court in order to utilize mechanisms available only through court auspices, such as the issuance of an appropriate subpoena or the like to compel compliance. At times, this can result in considerable delays in the United States' ability to respond to the

evidentiary request. In addition, other difficulties can arise, and compliance delayed, when the request seeks information that may be subject to disclosure limitations or substantive privileges. For example, requests that seek information involving company confidential information or privileged information may require significant litigation to ascertain whether it can be compelled.

Beyond that, not all requests can be complied with. A complicated evidentiary request, such as a request for detailed banking information from a United States domestic entity, may be so difficult or time consuming that it will be significantly delayed if it can be accomplished at all. Other evidentiary requests seek to have the Central Authority or the U.S. Attorney's Office to which the requests are referred do more than obtain existing documents or physical evidence or to ask specific questions of a witness. Such requests may ask the Central Authority to perform research or to hire experts to render opinions on complex matters. We believe such requests go beyond the scope of the Convention, or may put unreasonable demands on the United States Attorney's Offices, and will usually be returned to the sending state. An example of such a request that must be returned to the requesting entity as beyond the scope of the Convention or being beyond what the Central Authority can be reasonably requested to perform, might include a request that an accounting expert be retained to render an opinion as to the books and records of a corporation doing business within the United States.

* * * *

[Question 7: The Permanent Bureau has been faced on several occasions with the issue whether the Convention applies to arbitration proceedings. This issue was discussed at the Special Commission in May 1985, but the Commission had considered at the time that there was no need to adopt a Protocol in this respect. For its part, the 1989 Special commission stated that the law of certain countries provided for legal assistance to obtain evidence in arbitration matters, in which case the Convention might be used in order to seek evidence abroad.

The position advised by the Permanent Bureau is that the benefit of the Convention may extend to arbitration proceedings

insofar as the arbitration panel sends its request to obtain evidence abroad to a judicial authority of its State, which will then assume forwarding to the State addressed of the request to obtain evidence: as the arbitration panel cannot be treated as a judicial authority for the purposes of the Convention, it cannot itself forward the request to obtain evidence directly to the State addressed.

Have you had occasion to deal with such requests to obtain evidence in the course of arbitration proceedings?

Do you share the view of the Permanent Bureau?]

7. There are no U.S. court rulings regarding the application of the Convention to arbitration proceedings. This question has arisen under 28 U.S.C. 1782, however. That provision, which is independent of the Convention, allows "any interested person" to seek judicial assistance from a U.S. court in obtaining evidence. "for use in a proceeding in a foreign or international tribunal." A few courts have had occasion to consider whether an arbitrator or arbitration tribunal may be considered a "foreign or international tribunal" within the meaning of Section 1782. The first court to consider the issue, a district court in New York, answered that question in the affirmative in 1994. That decision has been superseded, however, by a 1999 ruling of the Court of Appeals for the Second Circuit (which includes New York) that "Congress did not intend for [Section 1782] to apply to an arbitral body established by private parties." The Fifth Circuit Court of Appeals reached the same conclusion in another 1999 decision. See, Republic of *Kazakhstan v. Biedermann Int'l*, 168 F. ed 880 (5th Cir. 1999) This issue continues to be the subject of scholarly debate in the United States, and courts in other judicial circuits could conceivably reach a result that is contrary to the Second and Fifth Circuits. Nevertheless, even in that event, it is unlikely that evidentiary requests referred directly to the Central Authority by an arbitral panel would be considered subject to the Convention. In that regard, the term, "foreign or international tribunal", as used in Section 1782, would appear to be broader than the term "judicial authority", as used in the Convention. We are not aware of any U.S. Court rulings involving Convention letters of request

that were issued by a judicial authority at the initiative of an arbitration panel."

* * * *

[Question 9: Do you allow the representatives of a requesting Court to take part in the execution pursuant to Article 8 of the Convention?]

9. The United States generally has no objection to representatives of a requesting court taking part in proceedings pursuant to Article 8 of the Convention.

* * * *

2. Authentication of Documents

In a letter of November 26, 2003, Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, provided guidance on compliance with the Hague Legalization Convention by governments of states of the United States. The letter responded to an inquiry from the Office of the Secretary of the Commonwealth of Massachusetts regarding difficulties Massachusetts residents had encountered with acceptance of Massachusetts apostilles and authentications abroad.

The full text of the letter is available at *www.state.gov/s/l/c8183.htm.*

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As you know, the purpose of an authentication (or in the case of countries party to the Hague Legalization Convention—an apostille) is to ensure the authorities in one country that a public document coming from another country is genuine so that it may be recognized in that first country. In the case of traditional legalizations this is done through the chain method of authentication, whereby public authorities authenticate the signature and seal serially from the origin of the document through each level of government authority. Finally, diplomatic channels are used to

pass the chain of authentication from one country to the other. In such cases, the Massachusetts state authentication is authenticated by the Authentications Office in the Department of State, which is then authenticated by consular authorities in the foreign country.

In the case of apostilles, the chain is done away with in favor of a single act of authentication carried out by the apostille authority designated in the Hague Convention. For documents coming from U.S. states, the United States has designated the Secretary of State offices in each state to issue apostilles. Therefore, unlike with traditional authentications (*e.g.*, with China, which is not a party to the Hague Convention), the Massachusetts state apostille goes directly to the foreign authority without passing through the Department of State (*e.g.*, with Russian, which is a party to the Hague Convention). It must therefore withstand foreign scrutiny without the benefit of Department of State authentication.

We have noted a number of developments in the way U.S. states prepare and execute apostilles that we believe are contributing to the increased rate of rejection abroad. First, there is a marked increase in the United States of the number of states generating apostilles by laser printer. Many states using laser printed apostilles have dropped the use of hand embossed or gold foil seals and/or dispensed with original hand signatures in favor of producing these on the laser printer. Second, there is a general trend away from traditional means for securing the apostille *allonge* to the public document to be authenticated. We have seen an increase in the number of states that use staples or other informal means of attachment. We also find that some state offices do not ensure that the pages of the document to which the apostille is attached are permanently bound together.

The result is that in many cases the apostille simply appears too casual or easily reproduced to satisfy the foreign authority that it has not been reproduced or attached through fraudulent methods. More traditional methods of creating and attaching apostilles, including by stamping the apostille form directly to the document to be authenticated, securing documents with ribbons and wax seals, hand embossing of seals, hand signatures, and permanent methods of affixing documents such as grommets, give higher degrees of confidence to these authorities.

We recently attended a meeting at the Hague Conference on Private International Law where we discussed these issues in great detail. We came away with assurances from the other contracting parties to the Hague Convention that there is nothing per se wrong with using laser printer produced apostilles, using printed signatures and seals, or attaching by staple. However, it was clear that . . . there is no way to avoid the situation where foreign authorities may raise questions about the genuineness of apostilles like this.

We therefore strongly recommend to you and to all U.S. state authorities that you make every effort to add elements to your apostilles to help satisfy foreign authorities that they have not been fraudulently produced. These elements may include:

— Use of special paper stock, with heavy weight and special watermark properties.
— A hand-embossed or externally applied (stick-on) embossed foil seal.
— A hand-written, auto-pen, or stamped signature.
— A permanent attachment of the apostille *allonge* to the underlying document (e.g., by grommet, or by staple that is further secured from tampering by a seal or some other method)

In addition, it is extremely important that you or the applicant secure the underlying document when it consists of more than one page by permanent attachment (*e.g.*, grommet, drilled hole with ribbon).

* * * *

3. Service of Process: Change in Procedure in United States

On June 4, 2003, Secretary of State Colin L. Powell sent a circular note to chiefs of mission in the United States informing them of certain changes to the way judicial assistance is afforded to foreign tribunals and to litigants before such tribunals by the United States. The changes are the result of the U.S. Department of Justice delegating

the service of process function to a private contractor. As explained in the U.S. response to a questionnaire on the Hague Convention on the Hague Service Convention, in preparation for the October Special Commission meeting discussed in C.l., *supra*:

> [i]n the past, requests for formal service made to the Central Authority would be forwarded to the U.S. Marshall Service for the federal judicial district where the service recipient resided. Given the heavy workloads in many large urban jurisdictions, there could be significant delays in having the Marshal Service complete service. Under the new contract with Process Forwarding International, all service must be made and the certificates of service returned within six weeks; in many cases service is completed even sooner. In contrast, prior to the outsourcing of service of process functions, a service request could take any where from six months to one year or longer to complete.

Response to Question 8.3, Questionnaire Accompanying the Provisional Version of the new Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, available at *http://www.hcch.net/doc/lse_us.pdf.*

The full text of the circular note, excerpted below, is available at *www.state.gov/s/l/c8183.htm.*

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Personal service will be the preferred method used on all requests. In the event personal service is impossible to effect, Process Forwarding International will serve process by such other method or methods as may be permitted under the law of the jurisdiction. In addition, Process Forwarding International is required to complete service of documents for return to the foreign requesting authority within six weeks of receipt.

* * * *

Countries not party to the Hague or Inter-American Conventions on service of documents may continue to send requests for service through the diplomatic channel, but they must be accompanied by the fee noted above. These requests will be sent to Process Forwarding International for further handling. It should be noted, however, that use of the diplomatic channel is not obligatory, and countries not party to these service Conventions may prefer to send their requests and receive their certificate of service directly from Process Forwarding International. The outsourcing of these activities formerly provided by the U.S. Department of Justice will increase efficiency. The Department of State therefore encourages all countries to avoid the use of the diplomatic channel for routine matters and take advantage directly of the new procedures.

The Secretary of State notes that there is no requirement under U.S. federal law that requests for judicial assistance be referred to the Department of State or the Department of Justice's contractor for execution. The United States has no objection to the informal delivery of such documents by members of diplomatic or consular missions in the United States, through the mails or by private persons if that would be effective under applicable law, provided no compulsion is used.

A letter of April 30, 2003, from David Epstein, Director, Office of Foreign Litigation, Civil Division, U.S. Department of Justice, to Enrique Lagos, Assistant Secretary for Legal Affairs, Organization of American States ("OAS") transmitted the same information to the OAS. In addition to explaining the use of the new service for incoming requests and the fact that no fee would be charged for requests under the Inter-American Convention on Letters Rogatory and Additional Protocol because the United States agreed to no-fee services on accession to the Convention, the letter stated:

> [f]or the Inter-American Convention and Additional protocol, the U.S. Central Authority not only receives

> incoming requests, but also transmits outgoing requests. The Department of Justice has contracted the transmittal of outgoing requests for service of process abroad under the Inter-American Convention on Letters Rogatory and Additional Protocol to Process Forwarding International.

The full text of the April 30 letter is available at *www.state.gov/s/l/c8183.htm*.

D. INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS

1. Concurrent Proceedings in Foreign Courts

Anti-suit injunctions

During 2003 U.S. courts were at times presented with requests by litigants in international disputes to enjoin opposing parties from pursuing suit in foreign courts concurrently. Two examples follow.

(1) In *In re Lernout & Hauspie Securities Litigation*, 2003 U.S. Dist. LEXIS 22466 (D. Mass. 2003), KPMG-B, an accounting firm required to produce documents by the U.S. District Court for the District of Massachusetts (*In Re Lernout & Hauspie Securities Litigation*, 218 F.R.D. 348 (D. Mass. 2003), discussed in 2.b.(2) below), filed an *ex parte* writ with the Court of the First Instance of Brussels. The writ sought "to enjoin each plaintiff in these coordinated actions from taking any step to enforce or rely on [the U.S. district court] discovery order and to penalize each plaintiff 1 million Euros if they take any such steps to rely on or enforce the order." In this case, plaintiffs in the original action moved for an order from the U.S. district court to enjoin defendants' attempt to obtain an injunction from the Belgian court.

The district court preliminarily enjoined KPMG-B from proceeding with its writ and ordered it to withdraw its writ in the Belgian court. In doing so, the court explained the public policy bases for its decision, as excerpted below.

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* * * *

. . . "While it is well-settled that a federal court has the power to enjoin a party before it from pursuing litigation before a foreign tribunal, such an order often effectively restricts the jurisdiction of the foreign tribunal and should therefore be used sparingly." *United States v. Davis*, 767 F.2d 1025, 1038 (2d Cir. 1985) (citations omitted). "The equitable circumstances surrounding each request for an injunction must be carefully examined to determine whether . . . the injunction is required to prevent an irreparable miscarriage of justice. Injunctions are most often necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of the important public policies of the forum." L*aker Airways Ltd. v. Sabena, Belgian World Airlines*, 235 U.S. App. D.C. 207, 731 F.2d 909, 927 (D.C. Cir. 1984). *See Canadian Filters, Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578–79 (1st Cir. 1969) (stating that while courts should be "reluctant to interfere with courts of foreign countries . . . there are times when comity, a blend of courtesy and expedience must give way, for example when the forum seeks to enforce its own substantial interests. . . .").

An antisuit injunction is necessary to protect this Court's jurisdiction over discovery, and to vindicate the important public policy of protecting investors from security fraud. If the Court does not grant the injunction and the Belgian court grants KPMG-Belgium's writ, plaintiffs will be unable to rely on the Federal Rules of Civil Procedure in order to obtain important discovery from KPMG-Belgium. . . .

Moreover, the equities favor granting the injunction. KPGM-Belgium, which has never contested jurisdiction, disregarded this Court's discovery Order. Then, without pursuing the appropriate routes of review in federal court (i.e., seeking a stay of that Order or filing timely objections to the Order with this Court), KPGM-Belgium filed an *ex-parte* writ in the Belgian court on Thanksgiving Day, essentially seeking to reverse and nullify this Court's Order. The Court may act to protect the litigants' rights to fair pretrial proceedings and its own jurisdiction. . . . While counsel for the

defendant assures the Court that the Belgian Court will only hold a procedural hearing on December 16, 2003, and that it will not seek to enforce a Belgian judgment for 30 days after its entry, the penalties sought against plaintiffs are stiff. Plaintiffs will suffer irreparable harm if the Belgian court enters a judgment against them. They would have no appeal of the Belgian court's judgment in this jurisdiction.

Defendant protests that it is on the horns of a dilemma in Belgium because it faces criminal penalties if it turns over confidential accounting documents even pursuant to an order issued by a court that has jurisdiction. There is no evidence that any prosecutor has threatened criminal charges against KPMG-Belgium. More likely, that argument is a pretext. I find that any harm to the defendant is remote.

I must examine the public interest. I issue this order with reluctance because the Belgian courts and law must be treated with great respect. Nonetheless, KPMG-Belgium's end-run on this Court's jurisdiction and on the federal securities laws cannot be tolerated.

* * * *

(2) In *In re Rare*, 298 B.R. 762 (Bankr. D. Colo. 2003), the U.S. Bankruptcy Court for the District of Colorado granted plaintiff's motion for preliminary injunction to enjoin creditors in this U.S. bankruptcy proceeding from pursuing claims in foreign proceedings. In this case, the American debtor sold fine wines and wine futures from the Bordeaux region of France. The American creditors, defendants in the case, had placed wine futures orders with the debtor. When the debtor did not deliver the wines that were subject to those futures, defendants found that the debtor had used defendants' money to pay for only a fraction of the futures that debtor had ordered pursuant to defendants' requests. Furthermore, debtor was unable to obtain delivery of any wines due to unpaid debts for other wines owed to the same wine merchants. As part of an effort to obtain direct delivery of some of the wines still in the hands of the French merchants, defendants instituted legal proceedings in French courts

to obtain possession of the wines in which they claimed an interest. The French actions resulted in the seizure of wines subsequent to the filing of the bankruptcy petition.

After the filing of the bankruptcy petition, defendants did not seek to stay the French proceedings, nor did they seek a lifting of the automatic stay imposed by statute in the bankruptcy proceedings, 11 U.S.C. § 362, claiming that the French actions related to property that was not property of the bankruptcy estate. On May 1, 2003, the plaintiff, the debtor in the bankruptcy proceeding, filed a motion for preliminary injunction, seeking a determination that defendants violated the automatic stay, and seeking injunctive relief, determination of a preferential transfer, and damages.

In its decision granting the preliminary injunction, the court began by noting that "[d]efendants have taken it upon themselves to make the determination of what is and is not property of the bankruptcy estate. They did, and continue to do so, at their peril, for it lies within the exclusive province of the bankruptcy courts to determine what interests are part of the estate." The court concluded that the plaintiff had met all the requirements necessary for issuance of an anti-suit injunction. Excerpts below provide the court's analysis of comity interests and its conclusion that the interest of the U.S. court in enforcing the statutory injunction in the bankruptcy proceeding outweighs the interests of the French courts.

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. . . Defendants argue that the anti-suit injunction doctrine prohibits this Court from entering any injunction against a foreign court or against parties participating in a foreign proceeding.

Of course, the automatic stay injunction arises, not by any action of this Court, but by operation of statute upon the filing of a bankruptcy petition. This Court's duty is to enforce that statutory injunction and it is committed to doing so. . . . This case does not present the kind of issues that would make the anti-suit injunction

doctrine a real issue. After all, the Marcianos are American creditors of an American Debtor in an American bankruptcy proceeding.

The Court is not insensitive to the interests of comity in the context of transnational insolvency proceedings. However, invocation of the anti-suit injunction doctrine in the present case goes to the very heart of the Court's jurisdiction. There can be no question of this Court's jurisdiction of the Debtor's property interests whatever those interests are and wherever they are located. . . . The automatic stay is fundamental to the exercise of that jurisdiction. . . . Whatever comity interest may exist in this case does not overcome this Court's interest in maintaining its jurisdiction. If this court cannot maintain control over the Debtor's property, then, as a practical matter, the Debtor loses its opportunity to attempt reorganization.

This Court has not been asked to make determinations, under French law, as to the security rights that the French suppliers may claim in wines which they possess, or to make any other legal determination of French law. The only issue the Court has been asked to address is whether the automatic stay is applicable to property interests which were created in this country between citizens of this country. The interest of the French courts in adjudicating a matter that, at its core, is a dispute between American citizens is minor compared to the interest of this Court in determining the applicability of the automatic stay which is the very cornerstone of this Court's jurisdiction.

* * * *

2. Evidence

a. Discovery in the United States for use in foreign forum

Section 1782 of Title 28 of the U.S. Code sets forth conditions under which U.S. courts may provide assistance to foreign and international tribunals and litigants before those tribunals. The statute provides in pertinent part that a district court may order a person to "give his testimony or statement

or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."

In the cases discussed below, U.S. courts addressed issues of statutory interpretation and judicial discretion in responding to requests by litigants in foreign proceedings to compel individuals located in the United States to produce requested evidence.

(1) On November 10, 2003, the Supreme Court granted certiorari in *Intel Corp. v. Advanced Micro Devices*, 124 S. Ct. 531 (2003). *See* discussion of Ninth Circuit opinion, *Advanced Micro Devices v. Intel Corp.*, 292 F.3d 664 (9th Cir. 2002) in *Digest 2002* at 875–877. In an *amicus* brief filed in October 2003, the United States had urged the Court to grant the petition for certiorari on the three questions presented, all of which had been answered in the affirmative by the Ninth Circuit:

1. Whether Section 1782 authorizes a district court to order production of materials, for use in a foreign tribunal, when the foreign tribunal itself would not compel production of the materials.
2. Whether Section 1782 authorizes production of materials for presentation in an anti-competitive practice investigation by the Commission of European Communities, on the theory that the investigation will lead to "a proceeding in a foreign or international tribunal."
3. Whether, for purposes of Section 1782, a party that files a complaint with the Commission of European Communities is an "interested person."

As to question one, the United States argued that a conflict among the circuits on the question of foreign discoverability merits the Court's resolution, stating:

> 1. The courts of appeals have divided on whether Section 1782 imposes a "foreign discoverability" requirement. Relying on the text of the statute, the Second, Third, and Ninth Circuits have held that Section 1782 contains no such requirement. . . .

> In contrast, the First and Eleventh Circuits have construed 28 U.S.C. 1782 to include such a requirement implicitly. . . .
>
> The conflict on whether Section 1782 implicitly contains a foreign discoverability requirement has recurring significance and warrants this Court's resolution. The conflict results in inconsistent treatment of similarly situated litigants based on the forum in which discovery is sought. Indeed, because a litigant might seek discovery under Section 1782 in more than one judicial district, the conflict can subject a single litigant to inconsistent treatment when making multiple requests for discovery in different districts. Because Section 1782 provides for discovery in response to requests from foreign or international courts and foreign officials, inconsistent judicial treatment resulting from the circuit conflict can potentially affect the United States' foreign relations.

In addition, the brief noted that "[t]he discretion of the district court is an important point that the Ninth Circuit did not discuss, but that is critical to the proceedings on remand." Excerpts below from the brief address this issue (footnotes omitted).

The full text of the U.S. amicus brief is available at *www.usdoj.gov/osg/briefs/2003/3mer/1ami/toc3index.html.* A U.S. amicus brief on the merits was scheduled to be filed in January 2004.

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. . . A district court is entitled to examine whether a request for discovery under Section 1782 is unduly burdensome or otherwise improper. See, e.g., Bayer AG v. Betachem, Inc., 173 F.3d 188, 191 (3d Cir. 1999) (affirming district court decision denying request for unredacted documents as cumulative). The court may likewise examine whether the party seeking assistance under Section 1782 is trying to circumvent foreign discovery rules or other policies of a foreign country or this nation that would make the requested

discovery inappropriate. See, e.g., Four Pillars Enters., 308 F.3d at 1080–1081 (affirming decision to provide applicant with only limited Section 1782 assistance in light of, inter alia, applicant's conviction for conspiracy to steal trade secrets). The Federal Rules of Civil Procedure provide the district courts with tools for resolving such disputes.

Those matters are best resolved on a case-by-case basis. For example, should a particular Section 1782 request implicate submissions to the European Commission's Leniency Program, see European Commission Amicus Br. 6–7, the district court would have the responsibility, in properly exercising its discretion over the request, to consider the Commission's views on the appropriateness of such discovery and the potential harm to the Leniency Program. See In re Application of Merck & Co., 197 F.R.D. 267, 270 (M.D.N.C. 2000) (district court "has inherent authority to require that other parties to the foreign litigation be notified of the [Section 1782] application and be allowed to present their views to the Court"). "If a district court is concerned that granting discovery under § 1782 will engender problems in a particular case, it is well-equipped to determine the scope and duration of that discovery." In re Application of Esses, 101 F.3d at 876.

* * * *

3. In this case, the court of appeals was correct in ruling that Section 1782 does not categorically exclude a complainant in European Commission proceedings from seeking judicial assistance from United States courts. Nevertheless, the particular characteristics of the request in this case weigh against granting the requested discovery as a matter of discretion. The European Commission has described its pending proceeding as investigative, rather than adjudicative. European Commission Amicus Br. 4–5. While AMD filed a complaint that initiated the investigation, and that company may submit supporting material to the Commission, AMD is not the government entity conducting the investigation. And although the Commission's investigation may lead the Commission to take action, the Commission itself has not requested the district court's judicial assistance. There accordingly is no current reason to believe that the Commission would find the requested discovery of use

in any future judicial proceeding. Significantly, AMD has no entitlement to initiate the civil enforcement action in which, AMD claims, the information may be used.

AMD points out that, if the Commission elects not to pursue a civil action, AMD may invoke its right to seek judicial review of the Commission's decision not to proceed. See p. 3, supra. AMD cannot claim, however, a current need for judicial assistance in aid of that possible proceeding. Equally important, AMD's judicial challenge to the Commission's enforcement decision would be limited to review of the record before the Commission. Because AMD would have no right to submit new evidence in the judicial review proceeding, it could "use" evidence in that proceeding only by submitting it to the Commission in the current, investigative stage. Yet the Commission's amicus brief suggests that the Commission, which is capable itself of invoking Section 1782, does not need or want the district court's assistance.

The court of appeals did not adequately acknowledge the district court's discretion to determine whether judicial assistance may be authorized but inappropriate in a particular case. There are substantial reasons why the district court could conclude, in the exercise of its discretion on remand, that such assistance should not be provided under the facts presented here. . . .

(2) In *In the Matter of the Application of Michael Schmitz*, 259 F. Supp. 2d 294 (S.D.N.Y. 2003), the U.S. District Court for the Southern District of New York considered a request by petitioners, four plaintiffs in pending lawsuits in the Federal Republic of Germany against Deutsche Telekom, to obtain documents produced by Deutsche Telekom in a securities class action pending before the district court. Approximately 300,000 documents had been produced to plaintiffs' counsel in the U.S. securities class action, pursuant to a confidentiality order.

The documents at issue had originally been produced to the Public Prosecution Office in Bonn, Germany, in connection with an ongoing criminal investigation of Deutsche Telekom. Prior to their request before the U.S. district court, petitioners had attempted to obtain the documents from

that office, and had been denied. As explained by the district court, a letter from Dr. Hansjorg Geiger, State Secretary of the German Federal Ministry of Justice in Berlin to Larry D. Thompson, Deputy Attorney General, U.S. Department of Justice, February 13, 2003,

> is very clear that "disclosure of the documents concerned may jeopardize German sovereign rights," that the German authorities have so far denied access to the Documents to these same petitioners in Germany, that the Bonn Public Prosecution Office made copies of the Documents available for the discovery proceedings in the American Action "on the condition that they be used exclusively in those U.S. proceedings" under a confidentiality order and that, in the view of the German Ministry of Justice, production pursuant to section 1782 would "result in a circumvention of the German law of criminal procedure." Ministry of Justice Letter at 1–2. Petitioners have not provided any documentation to the Court from German governmental sources disputing these concerns.

Excerpts below provide the court's analysis in concluding that:

> [e]ven though the statutory prerequisites of 28 U.S.C. § 1782 have been met, this Court exercises its discretion to deny the petition on the grounds that the twin aims of the statute—providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts—would not be furthered if the petition were granted.

Footnotes have been omitted.

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The Second Circuit has explicitly "rejected any requirement that evidence sought in the United States pursuant to *section*

1782(a) be discoverable under the laws of the foreign country that is the locus of the underlying proceeding." [In re]Metallgesellschaft, [121 F.3d 77, 79 (2d. Cir. 1997)]; *Aldunate*, 3 F.3d at 59 (same); *Malev*, 964 F.2d at 100 ("requiring an interested person first to seek discovery from the foreign or international tribunal is at odds with the twin purposes of [*section 1782*] . . . It would undermine the policy of improving procedures for assistance to foreign and international tribunals by imposing an additional burden on persons seeking assistance from our federal courts for matters relating to international litigation. Additionally, it would undermine the policy of prompting foreign courts to act similarly based on our own generous example.").

Similarly, this Court refuses to "read extra-statutory barriers to discovery into section 1782." *Aldunate*, 3 F.3d at 59. However, it is legitimate to take Germany's explicitly stated sovereignty concerns into account. Failing to acknowledge these concerns would undermine the statute's purposes by discouraging foreign countries from heeding similar sovereignty concerns posited by our governmental authorities to foreign courts. See *In re Aldunate*, 3 F.3d at 62 (approvingly citing the district court's determination that discovery under section 1782 would "not be an affront to the Chilean court or the Chilean sovereignty."); *Euromepa, S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1101.

* * * *

Citing Metallgesellschaft, petitioners argue that the petition should be granted unless there is authoritative proof that the foreign tribunal would reject the Documents. There is indeed no "authoritative proof" that the German court would reject the Documents—there is simply a letter from the Ministry of Justice noting that granting the petition would invade German sovereignty rights and letters from the District Court of Frankfurt stating that it would take notice of the documents it is given but not declaring that it supported the granting of this petition.

However, petitioners misconstrue Metallgesellschaft. That case did not hold that the petition should be granted in the absence of authoritative proof that the foreign tribunal would reject the Documents. Rather, it stated that "a district court should not

refrain from granting the assistance afforded" under section 1782 based simply on allegations that the foreign tribunal would reject the Documents. *Metallgesellschaft*, 121 F.3d at 80.

In addition, this is not a case where Germany can "easily protect itself from the effects of any discovery order by the district court that inadvertently offended [German] practices," *Euromepa*, 51 F.3d at 1101, since the fact of permitting petitioners to have access to the Documents may itself jeopardize the ongoing criminal investigation, as set forth in the Letter from the German Ministry of Justice. . . . Certainly, to grant the section 1782 petition in these circumstances would not effectuate the twin aims of the statute—providing efficient means of assistance to participants in international litigation and encouraging other countries by example to provide similar means of assistance to our courts. Rather, there is a significant chance that doing so would hinder the efforts of German prosecutors and courts and discourage German assistance to U.S. courts in later applications made in Germany.

It is worth noting that the German civil court "may request the production of documents from the public prosecutor," . . . but it has not, as of yet, made such a request. In these circumstances, it is difficult to perceive how providing for discovery "in order to aid a foreign court in doing what that court can readily do itself, but has chosen not to" would favorably prompt foreign courts to assist our courts in future actions. . . .

2. Germany May Provide Petitioners Discovery of the Documents in the Future

Another factor this Court considers in denying the petition is that Germany has specifically left the door open for petitioners to obtain access to the Documents at some point in the future. See Ministry of Justice Letter at 2 ("[The public prosecutor has] not ruled out that the Public Prosecution Office will grant [petitioners] access to the files in connection with the German investigations at a later stage in the proceedings."); Bonn Letter ("Access can be granted at the earliest if and when the pieces of evidence have been made accessible for all criminal defenders.").

III. Conclusion

Considering (1) the specific requests by German authorities to not provide discovery, (2) the possibility of discovery of the Documents at a later juncture by petitioners, (3) the possible affront to German sovereignty; and (4) circumvention of German criminal procedure and the possibility of jeopardizing the ongoing German criminal investigation, among other factors, granting petitioner's application would not promote section 1782's aims. It would in fact encourage foreign countries to potentially disregard the sovereignty concerns of the United States and generally discourage future assistance to our courts. See *Metallgesellschaft*, 121 F.3d at 79. . . .

* * * *

(3) In *In re Letter Rogatory from the Nedenes District Court, Norway*, 216 F.R.D. 277 (S.D.N.Y. 2003), the United States brought a motion, on behalf of the Nedenes District Court in Norway, to compel Joseph Alan Shammah, an individual residing in the United States, to give a blood sample for use in a paternity suit brought in a Norwegian court. On September 25, 2000, the Norwegian court issued letters rogatory pursuant to the Hague Evidence Convention, reproduced following 28 U.S.C. § 1781, seeking judicial assistance and requesting the deposition of Shammah to be taken in the United States, in connection with the paternity suit. The letters rogatory requested a blood sample from Shammah should he not admit to being the father of the child. Finding that the requirements of § 1782 and relevant procedural rules were met, the court granted the U.S. motion, and ordered Shammah to submit to a blood test in New York. As in *Schmitz, supra*, the court considered its discretion to deny discovery, but found no reason to do so in this case.

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The circumstances under which petitioner seeks the blood sample satisfy the aims of the statute. The Norwegian Court specifically requested the assistance of this Court: accordingly, there are no

Norwegian sovereignty concerns that could hinder that court's efforts. See *In re Schmitz*, 259 F. Supp. 2d 294, 298 (S.D.N.Y. 2003) (acknowledging the concerns of the German government that permitting discovery "may jeopardize German sovereign rights"). Additionally, following the guidance of the Second Circuit, this Court declines to undertake an inquiry into whether Norwegian laws would permit the ordering of blood samples. See *Metallgesellschaft*, 121 F.3d at 79; *In re Houck*, 1997 WL 1052017, *2 (D. Conn. Oct. 10, 1997) (ordering a respondent to provide a blood sample pursuant to letters rogatory issued by Swedish Courts); *In re Boras*, 153 F.R.D. 31, 35 (E.D.N.Y. 1994) (same).

Therefore, granting a motion to compel Shammah to provide a blood sample would efficiently assist a request made by the Norwegian Court and would encourage Norway to provide similar assistance to our courts. See also *In re Amtsgericht Ingolstadt*, 82 F.3d 590 (4th Cir. 1996) (granting a request pursuant to section 1782 for a blood sample); *In re Smith*, 154 F.R.D. 196 (N.D. Ill. 1994) (same); *In re Pforzheim*, 130 F.R.D. 363 (W.D. Mich. 1989) (same).

* * * *

b. Discovery abroad for use in U.S. forum

(1) The Hague Evidence Convention

Because the United States is a party to the Hague Evidence Convention, U.S. litigants may seek judicial assistance for evidence abroad under its terms where the other country is also a party. In *Tulip Computers Int'l v. Dell Computer Corp.*, 254 F. Supp. 2d 469 (D. Del. 2003), a Dutch corporation with its principal place of business in the Netherlands, initiated a patent infringement action against Dell, a Delaware corporation, concerning a U.S. patent held by Tulip. Dell denied infringement of Tulip's patent, and asserted that the patent was invalid and unenforceable. Dell filed motions pursuant to the Hague Evidence

Convention and 28 U.S.C. § 1781 requesting international judicial assistance to take evidence from two Dutch citizens residing in the Netherlands. As explained by the court, Tulip opposed the motions, contending that

> . . . the Court must apply a much higher standard than is applied in this country when ordering discovery, if the Court authorizes Dell's request to proceed pursuant to the Hague Evidence Convention, since use of the Convention raises issues of territoriality and comity. In particular, Tulip argues that Article 23 of the Convention prohibits the broad document inquiry sought by Dell because Dell's requests do not conform to the Netherlands' reservations with regard to Article 23, which may be characterized as prohibiting American-style discovery "fishing expeditions." . . . . In addition, asserts Tulip, the Court should deny Dell's requests because much of the evidence Dell seeks is privileged information. Moreover, maintains Tulip, the evidence sought is either irrelevant to the proceedings or constitutes inadmissible hearsay.

The court stated at the outset that the "[t]he Hague Evidence Convention serves as an alternative or 'permissive' route to the Federal Rules of Civil Procedure for the taking of evidence abroad from litigants and third parties alike. . . ." Excerpts below provide the court's analysis of these issues in deciding to grant the motions for judicial assistance (internal cross-references omitted).

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* * * *

Pursuant to the Convention, a Letter of Request [as employed by Dell in this case] must provide the contracting state with specific information regarding the lawsuit and the information sought. Hague Evidence Convention, Art. 3. The signatory state, upon receipt and consideration, "shall [then] apply the appropriate measure of compulsion" as is customary "for the execution of orders issued by the authorities of its own country." Hague

Evidence Convention, Art. 10. Signatory states may refuse to execute a Letter of Request if the request "does not fall within the function of the judiciary" or if the "sovereignty or security" of the contracting state would be prejudiced but, execution "may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it." Hague Evidence Convention, Art. 12.

The person to whom the discovery requests in a Letter of Request are directed has the right to "refuse to give evidence" to the extent that the person has a privilege under the law of the State of execution or the State of origin. Hague Evidence Convention, Art. 11. However, the Netherlands has stated that "only the court which is responsible for executing the Letter of Request shall be competent to decide whether any person concerned by the execution has a privilege or duty to refuse to give evidence under the law of a State other than the State of origin; no such privilege or duty exists under Dutch law." Hague Evidence Convention, Netherlands 2i, Art. 11.

The Netherlands has also adopted reservations to the Hague Evidence Convention pursuant to Article 23 of the Convention, which provides that "[a] Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries." Hague Evidence Convention, Netherlands 2i. Thus, as implemented by the Netherlands, Letters of Request may not be acted upon if "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." Hague Evidence Convention, Netherlands 2i, Art. 23. The Netherlands, therefore, may choose not to enforce Letters of Request for pre-trial discovery of documents which require a person to state the relevancy of the documents to the proceedings for which the documents are sought or Letters of Request that ask a person "to produce any document other than particular documents specified in the Letter of Request as being documents which the court which is conducting the proceedings believe to be in his possession, custody or power." *Id.*

* * * *

C. Analysis

"A party which seeks the application of the Hague [Evidence] Convention procedures rather than the Federal Rules [of Civil Procedure] bears the burden of persuading the trial court" of the necessity of proceeding pursuant to the Hague Evidence Convention. . . . That burden is not great, however, since the "Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention." . . . Factors relevant to the Court's decision include "considerations of comity, the relative interests of the parties including the interest in avoiding abusive discovery, and the ease and efficiency of alternative formats for discovery." . . .

Resort to the Hague Evidence Convention in this instance is appropriate since both Mr. Duynisveld and Mr. Dietz are not parties to the lawsuit, have not voluntarily subjected themselves to discovery, are citizens of the Netherlands, and are not otherwise subject to the jurisdiction of the Court. Those factors restricting the availability of the evidence Dell seeks weigh in favor of proceeding under the Hague Evidence Convention. . . .

Tulip's arguments go more particularly to the scope of the discovery Dell seeks pursuant to the Hague Evidence Convention. The arguments do not justify wholly precluding Dell's efforts to acquire the evidence it seeks. Tulip's primary argument is that the evidence sought is privileged and Mr. Duynisveld and Mr. Dietz, therefore, should not be placed in a position to determine for themselves what information is or is not privileged in the case. Tulip contends, therefore, that in order to prevent an abuse of privilege the Court should deny Dell's requests *in toto*. The Court disagrees. Mr. Duynisveld and Mr. Dietz may avail themselves of the privilege provided in this country and in the executing country under Article 11 of the Convention. Presumably, they may also obtain counsel, if they wish, and Tulip will be free to express its own views on privilege and, if necessary, to seek this Court's opinion with respect to those views.

The Court is also not persuaded by Tulip's assertions with regard to the Netherlands reservations pursuant to Article 23

of the Convention as applied to Dell's proposed document requests. "The emerging view of this exception to discovery is that it applies only to 'requests that lack sufficient specificity or that have not been reviewed for relevancy by the requesting court.' " *Aerospatiale*, 482 U.S. at 564 (Blackmun, J., concurring in part, dissenting in part) (citations omitted). "Thus, in practice, a reservation is not the significant obstacle to discovery under the Convention that the broad wording of Article 23 would suggest." *Id.* If Dell's document requests are overly broad under the law of the Netherlands, as Tulip maintains, then the requests will presumably be narrowed by the appropriate judicial authorities in the Netherlands before any documents are produced. The Court is content that such officials will make the appropriate determination under their own law. . . .

* * * *

(2) Foreign discovery laws

In *In Re Lernout & Hauspie Securities Litigation*, 218 F.R.D. 348 (D. Mass. 2003), an ongoing litigation concerning alleged securities violations by Lernout & Hauspie ("L&H") and other companies, plaintiffs moved to compel a large-scale production of documents by defendant Belgian company Klynveld Peat Marwick Goerderler Bedrijrsrevisoren ("KPMG-B") relating to KPMG-B's audit of L&H. The plaintiffs sought KPMG-B's audit papers, audit manuals, and other information. After unsuccessfully attempting to discover such documents for over a year, plaintiffs subsequently became civil claimants in criminal proceedings in Belgium against L&H, and were allowed access to between 25–30 boxes of KPMG-B's audit work papers for the years 1998–2001 by Belgian prosecutors. Although plaintiffs' counsel were permitted to review these documents, which are a subset of the documents sought here, they were not allowed to copy them.

KPMG-B asserted that it was precluded by Belgian secrecy law from providing the requested documents. It relied on

the fact that article 458 of the Belgian Criminal Code subjects specified professionals who disclose any "secret" entrusted to them by a client to "punishment comprising imprisonment of from one week to six months and a fine of between one hundred francs and five hundred francs." Belgian law making that provision applicable to auditors provided further sanctions for violations, including warning, reprimand, a ban on accepting or continuing certain assignments, suspension for up to a year, and a ban on practicing in Belgium. Plaintiffs argued that disclosure was appropriate pursuant to exceptions to Article 458, which allow a Belgian company to turn over documents necessary to defend itself in a civil or criminal action, documents for which a client has consented to disclosure, and documents subject to a court order. Plaintiffs also argued that because plaintiffs' counsel had already viewed some of the documents, "such documents have already been disclosed, [and] are therefore no longer confidential and thus there is no reason that KPMG-B cannot simply turn over copies of the documents that the plaintiffs have already seen."

The court noted that when a country, such as Belgium, is not a party to the Hague Evidence Convention, U.S. courts may look to the Federal Rules of Civil Procedure ("FRCP") when ruling on motions regarding discovery abroad. In this case, however, where a party asserted a privilege under the domestic law of the state in which the sought-after materials are located, the court decided "to take into consideration Belgian discovery procedures and interpret Belgian law, rather than to rely solely on the Federal Rules."

With respect to KPMG-B's audit papers, the court found that "[i]n light of the self defense exception, the court order exception and simple common sense, this Court's position is that KPMG-B must turn over copies of the audit work papers that the plaintiffs have already seen in Belgium." The court also found that KMPG-B's audit manuals are not protected by Article 458 because that law "applies only to confidential information that has been entrusted to the auditor by the client," which is not the case with audit

manuals. The court ordered the parties to meet and confer to make a good faith attempt to agree on the scope of the rest of the discovery requested.

The subsequent anti-suit injunction sought and obtained by plaintiffs to stop KPMG-B's efforts to obtain an injunction against compliance with the discovery order from a Belgian court is discussed in D.1. (1) *supra.*

3. Service of Process

a. Service under the Hague Service Convention

As noted in C.3., *supra*, the United States is a party to the Hague Service Convention. The convention requires state parties to create a central authority to receive service requests, serve nationals domestically, and return proof of service. Articles 8, 9, 11 and 19 provide alternative methods of service, including use of diplomatic or consular channels, private agents, and mutually agreed-upon methods, or any method allowed by the internal law of the receiving state. Article 10 states that "provided the State of destination does not object, the present convention shall not interfere with (a) the freedom to send judicial documents, by postal channels, directly to persons abroad . . . ." U.S. circuit courts are split as to whether article 10's use of the word "send" is the equivalent of service of process or applies only to mailing of other judicial documents. *See Digest 2002* at 877–879.

In *Denlinger v. Chinadotcom Corp.*, 110 Cal. App. 4th 1396 (Cal. Ct. App. 2003), Paul Denlinger filed suit for wrongful termination in Santa Clara County, California, against directors and officers of Chinadotcom, a corporation incorporated in the Cayman Islands with offices in Hong Kong. In January 2002 defendants were served with Denlinger's first amended complaint and summons by registered mail in Hong Kong, where defendants work and reside. Defendants moved to quash the service of summons by mail, asserting that such service was invalid under the Hague Service Convention.

The trial court found that the service was invalid "because Article 10(a) [of the Hague Service Convention], which does apply to Hong Kong, does not allow for service of summons and complaint by mail." Denlinger appealed. The California court of appeals began by noting the conflicting decisions by courts in the United States on this issue. It concluded, however, that "closer examination of the issue in conjunction with application of the rules regarding the interpretation of treaties persuades us that Denlinger's contention represents the better, and more modern, view."

Excerpts below provide the court's analysis in concluding that article 10(a) allows service of process by mail (footnotes omitted).

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* * * *

We start our analysis by reviewing the rules of interpreting treaties. To interpret a treaty, we begin with the treaty's text and the context in which the words are used. For difficult or ambiguous passages, other rules of construction may be used. . . .

Both the text and context of the Convention demonstrate that the Convention is meant to apply *only* to service of process, and that fact undermines respondents' claim that article 10(a) is meant to cover the mailing of *nonservice of process* judicial documents only. For example, article 1 of the convention states: "The present Convention shall apply, in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document *for service abroad*." (Italics added.) Likewise, the Convention preamble advises that the Convention signatories desire "to create appropriate means to ensure that judicial or extrajudicial documents *to be served abroad* shall be brought to the notice of the addressee in sufficient time," and desire "to improve the organization of mutual judicial assistance for *that purpose* by simplifying and expediting *the procedure*, . . ." (Italics added.)

The United States Supreme Court's analysis also shows that the Convention was meant to apply *only* to service of process. (*Volkswagenwerk Aktiengesellschaft v. Schlunk, supra*, 486 U.S. at p. 700.). In examining the Convention's negotiating history,

Volkswagenwerk decided that article 1 "refers to service of process in the technical sense." (*Ibid.*) The court explained that Hague Convention delegates had criticized early drafts of the Convention because they were concerned that its language could apply to transmissions that did not involve service of process. Consequently, the final text of article 1 was altered to make clear that the Convention "applies only to documents transmitted for service abroad." (*Id.* at p. 701.)

Given this scope and purpose of the Convention as revealed by its text and the United States Supreme Court, the view that article 10(a) does *not* apply to service of process makes little sense. As one court observed, "[t]he placement of one lone subprovision dealing with the mailing of nonservice documents in the midst of fifteen articles addressing service of process, would be inconsistent with the structure of the entire convention." . . . . In finding that article 10(a) applied to service of process, another court reasoned: "Were that not the case—if the contrary interpretation were correct—then the Article 10(a) provisions would be terribly misplaced. It would be a provision that allows for the use of the mails, but would not provide any guidance on the issue of service of documents abroad—the only issue that the Hague Convention was intended to address." . . . .

In addition, although it is correct that the word "serve" or "service" is used relatively consistently within the Convention, article 10(a) is not the only provision within the Convention that does not use those terms. Specifically, article 21 requires official notification by member states if they object to "methods of transmission" provided for under articles 8 and 10. Quite obviously, "transmission" is used under article 21 as a synonym for "service.". . . Thus, the Convention's drafters did not rely exclusively upon the word "service" to describe the concept of formal service of process and that weakens respondents' position that the word "send" should not be considered a synonym for service of process.

Sources used as aids in interpreting treaties strongly support the view that article 10(a) authorizes service of process by mail. For instance, in 1977 and 1989, a special commission comprised of experts chosen by signatory governments met and debated the

topic of the Convention. The discussion resulted in the 1983 publication of a handbook to be used as a guide to the Convention, and a 1992 update to that handbook. (See Practical Handbook On The Operation Of The Hague Convention Of 15 November 1965 On The Service Abroad Of Judicial And Extrajudicial Documents In Civil Or Commercial Matters (2d ed. 1992) (hereinafter Handbook); see also *R. Griggs Group, Ltd. v. Filanto Spa, supra,* 920 F. Supp. at p. 1106.)

The Handbook indicates that article 10(a) refers to service of process. (Handbook, *supra*, at pp. 43–45.) The Handbook criticizes the line of cases, including the Eighth Circuit *Bankston* decision, that hold that article 10(a) does not allow mail service. (Handbook, *supra*, at pp. 43–45, see also *R. Griggs Group, Ltd. v. Filanto Spa, supra*, 920 F. Supp. at p. 1106.) According to the Handbook, the view of these courts "contradict what seem to have been the implicit understanding of the delegates at the 1977 Special Commission meeting, and indeed of the legal literature on the Convention and its predecessor treaties." (Handbook, *supra*, at p. 44.)

In concluding that article 10(a) permits service of process by mail, the Handbook observes that the French version of the three predecessor treaties to the 1965 Convention all used the verb "adresser" in substantially the same context. The 1965 Convention —which was the first text having an official English version—used the word "send" under article 10(a). Thus, the Handbook reasons that the Convention's history does not suggest that the word "send" under article 10(a) was intended to mean something other than service of process. (Handbook, *supra*, p. 44.)

The 1989 report of the special commission itself also indicates that article 10(a) allows service of process by mail. In discussing article 10(a), the report states: "It was pointed out that the postal channel for service constitutes a method which is quite separate from service via the Central Authorities or between judicial officers. Article 10[(a)] in effect offered a reservation to Contracting States to consider that service by mail was an infringement of their sovereignty. Thus, theoretical doubts about the legal nature of the procedure were unjustified." (Special Commission Report On The Operation Of The Hague Service Convention And The Hague Evidence Convention, reprinted at 28 I.L.M. 1556, 1561 (1989)

(hereinafter Special Commission Report).) As these comments reveal, the Commission believed article 10(a) referred to service of process by mail, with signatories being given the option of objecting to the procedure if they believed it infringed upon their sovereignty.*

Another source used as an aid in interpreting treaties, the Executive Branch, also convinces us that article 10(a) permits service of process by mail. In particular, the State Department has interpreted article 10(a) as allowing service of process by mail so long as the recipient country has not objected. (30 I.L.M. 260, 261 (1991).) The State Department expressly rejected the *Bankston* court's contrary holding: " 'We therefore believe that the decision of the Court of Appeals in Bankston is incorrect to the extent it suggests that the Hague Convention does not permit as a method of service the sending of a copy of the summons and complaint by registered mail to a defendant in a foreign country. . . .' "(30 I.L.M., *supra* at p. 26.) Courts often give great weight to treaty interpretations made by the Executive Branch. (See Rest.3d Foreign Relations Law of the U.S. (1986) § 326(2)

Review of the declarations of other signatories is also illuminating since they reveal a belief that article 10(a) referred to a method of service. For example, the declaration of Canada states: "Canada does not object to service by postal channels." (Convention, *supra*, as reprinted in Fed. Rules Civ. Proc., foll. rule 4, 28 U.S.C.) The declaration of Czechoslovakia states: "[I]n accordance with Article 10 . . . documents may not be served by another contracting State through postal channels. . . ." (*Id.* at p. 50.) The declaration of Pakistan provides: "Pakistan . . . has no objection to such service by postal channels directly to the persons concerned [Article 10(a)]. . . ." (*Id.* at p. 56.) The declaration of Turkey states: "[I]t is opposed to the use of the methods of serving documents listed in Article 10. . . ." (*Id.* at p. 59.) With regard to Article 10(a), the declaration of Venezuela provides that it "does not agree to the transmission of documents through postal

* [Editors' note: Paragraph 55 of the Conclusions and Recommendations of the 2003 Special Commission states: "[t]he S[pecial] C[ommission] reaffirmed its clear understanding that the term 'send' in Article 10(a) is to be understood as meaning 'service' through postal channels." *See* C.1., *supra*.]

channels." (*Id.* at p. 62.) The postratification understanding of signatory countries is a legitimate tool in determining the meaning of a treaty. . . .

* * * *

We think the view that article 10(a) allows service of process by mail represents the better position. As discussed above, permitting service by mail under article 10(a) is consistent with the logic and structure of the Convention itself, with the interpretative materials on the issue, including the special Commission report, the Handbook, and State Department documents, is consistent with the understanding of some of the signatories, and also furthers the Convention's primary purpose of establishing a uniform, simple and efficient system for establishing service abroad. Allowing service of process by mail, so long as the signatory does not object, promotes a smooth and efficient international legal system. Indeed, as methods of communicating continue to evolve, disallowing service of process by mail seems antiquated and out of step with the modern world. For all these reasons, we conclude that article 10(a) provides for service of process by mail.

* * * *

b. Service under Federal Rule of Civil Procedure 4; failure to object

Federal Rule of Civil Procedure 4(f) provides that, in the absence of an internationally agreed upon method of service, such as the Hague Service Convention, service may be effected upon individuals or entities in a foreign country, provided that service is reasonably calculated to give notice, (1) "in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;" (2) through letters rogatory, (3) "*unless prohibited by the law of the foreign country*, by delivery to the individual personally of a copy of the summons and the complaint; or any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the

party to be served;" or (4) "by other means not prohibited by international agreement as may be directed by the court." (Emphasis added.)

In *In re Ski Train Fire in Kaprun, Austria*, 2003 U.S. Dist. LEXIS 11961 (S.D.N.Y. July 15, 2003), the parents and grandparents of six U.S. individuals killed on a ski train in Austria brought suit against Waagner-Biro Binder AG ("WBB"), an Austrian company. Austria is not a party to the Hague Service Convention. Plaintiffs first attempted to effect service on WBB through letters rogatory, but were unsuccessful. The court then authorized service by ordinary mail pursuant to Federal Rule of Civil Procedure ("FRCP") 4(f) and permitted plaintiffs to amend their complaint to add additional defendants, collectively "the Waagner defendants." Plaintiffs allegedly mailed to all defendants in Austria a copy of the relevant complaint and summons issued by the U.S. District Court for the Southern District of New York.

Among other things, defendants attacked plaintiffs' service on the basis that it violated Austrian law and FRCP 4 because "1) the Waagner defendants were served directly on Austrian territory by mail; and 2) the Complaint was not accompanied by a certified translation." As excerpted below (footnotes omitted), the court held that although the Waagner defendants were correct that the service effected upon them violated Austrian law and the Federal Rules of Civil Procedure, the case should not be dismissed because defendants had failed to object to such service in a timely manner and did not allege that service was not effectuated or that they lacked actual notice.

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In Austria, like many other European civil law countries, the direct service of foreign legal documents by foreign authorities or by private individuals without the assistance or consent of Austrian authorities is regarded as an infringement of Austria's sovereignty. . . . *AHP*, 2003 U.S. Dist. LEXIS 5575, 2003 WL 1807148, at *7 (citing 1/7/03 Note Verbale to the United States Embassy

of America ("Note Verbale") at 1). Service of foreign legal documents must be "effected by letters rogatory through diplomatic channels, . . . and in the manner prescribed by Austrian law for the service of such documents." Note Verbale at 1.

Under Austrian federal law, "service of a foreign document in a foreign language, . . . to which no certified German translation is attached, shall only be permissible provided the recipient is willing to accept it." *AHP*, 2003 U.S. Dist. LEXIS 5575, 2003 WL 1807148, at *7 (quoting Note Verbale at 2). Acceptance is presumed unless within three days of the time of service the recipient instructs the Austrian authority that served the document to refuse acceptance. See id. (citing Note Verbale at 2).

Although service of the Waagner defendants was initially attempted by letters rogatory, it was ultimately achieved by direct mail, pursuant to court order. While Rule 4(f)(3) provides for substitute service "as may be directed by the court," any such service must comport with the laws of the foreign country. See Fed. R. Civ. P. 4(f) Advisory Committee Note. ("Service by methods that would violate foreign law is not generally authorized . . . Inasmuch as our Constitution requires that reasonable notice be given, an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law.") (emphasis added. . . . Because service by direct mail is prohibited by Austrian law, service was improper here under Rules 4(f)(2)(C)(ii) and 4(f)(3), as well as Austrian law.

Although service of process was invalid, the case should not be dismissed for the same reasons set forth in AHP, see *2003* U.S. Dist. LEXIS 5575, 2003 WL 1807148 at *7. First, the Waagner defendants have not alleged that service was not effectuated, that they lacked actual notice, or that the translations were inaccurate. Second, acceptance of the uncertified German translation is presumed since defendants did not refuse service of the documents within three days. See *AHP, 2003* (quoting Note Verbale at 2).*

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* [Editors' note: In the related case of *AHP*, the court did not need to resolve service of process issues because it dismissed the case for lack of personal jurisdiction. Nevertheless, on the basis of the same reasons enumerated here, the court concluded:

Finally, plaintiffs should not be penalized for complying with this Court's order.

* * * *

4. Forum Non Conveniens

On December 19, 2000, a number of foreign companies brought suit in the Southern District of New York against Russian companies for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961–1968, intentional interference with contract, and conversion, seeking damages of $3 billion. On March 27, 2003, the U.S. District Court for the Southern District of New York granted defendants' motion to dismiss on the basis of *forum non conveniens*. *Base Metal Trading v. Russian Aluminum*, 253 F. Supp. 2d 681 (S.D.N.Y. 2003).

Plaintiffs in this case claimed that defendants illegally took over Russia's two largest producers of aluminum and vanadium, Novokuznetsk Aluminum Zavod ("NKAZ") and Kochkanarsky GOK ("GOK") "by means including bribery of local Russian political officials, judicial corruption in Russia, and armed force," and "drove NKAZ and GOK into bankruptcy and then gained control of the companies through sham bankruptcy proceedings overseen by allegedly corrupt local Russian judges." In an amended complaint of August 3, 2001, plaintiffs had added seven new plaintiffs, including for the first time U.S. corporations, and twelve new defendants. The amended complaint alleged a

. . . Accordingly, AHP may have waived the service of process issue. See Kodec Dec. at 6 (stating that a party that actively takes part in a foreign proceeding after having been served in a manner contrary to Austrian law, may waive the service of process issue). Moreover, plaintiffs should not be penalized for complying with this Court's order. Thus, the defects in service of process here do not warrant dismissal of the Complaint. . . .]

> massive racketeering scheme beginning in the 1990's among, inter alia, the members of an international Russian-American organized crime group . . . and the Izmailovo Russian-American mafia group to take over and monopolize the Russian aluminum and other metals industries. . . .

With regard to the Russian judiciary's role in the illegal takeover of NKAZ and GOK, plaintiffs alleged, among other things, that the conspirators obtained a sham judgment against NKAZ using "the corrupt Russian regional court system," caused a local company to file an involuntary bankruptcy petition against GOK in March, 2000, which the Sverdlovsk Arbitrazh Court, a regional Russian court, unlawfully granted, and that the conspirators then fraudulently transferred GOK's registrar of shares to a company "friendly" to the conspirators, which was supported by several corrupt court orders. The conspiracy as to GOK was allegedly concluded by a sham settlement agreement between GOK and its creditors approved by the Arbitrazh Court for the Sverdlosk Oblast on April 19, 2001, and affirmed by the Appellate Instance of the Arbitrazh Court for the Sverdlovsk Oblast and the Federal Arbitrazh Court of the Urals Circuit.

In its consideration of the motion to dismiss, the court first restated the doctrine of *forum non conveniens*, as follows:

> The doctrine of *forum non conveniens* contemplates the dismissal of lawsuits brought by plaintiffs in their favored forum in favor of adjudication in a foreign court. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 101 (2d Cir. 2000). Pursuant to the recent decisions of the Court of Appeals for the Second Circuit, resolution of a motion to dismiss based on *forum non conveniens* requires a three step analysis: first, determination of the degree of deference to be afforded to the plaintiffs' choice of forum; second, analysis of whether an adequate alternative forum exists; and third, consideration of the private and public factors enumerated by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839

(1947). *See Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73–74 (2d Cir. 2001) (en banc).

The court first analyzed the degree of deference to be afforded in this case, and concluded that because the plaintiffs in the original action were not U.S. companies, and because the U.S. companies later joined had no connection to New York, and "appear[ed] to be nothing more than holding companies for shares of GOK and possibly other stocks," plaintiffs' choice of forum was entitled to little deference. The court noted that " '[w]here an American plaintiff chooses to invest in a foreign country and then complains of fraudulent acts occurring primarily in that country, the plaintiff's ability to rely upon citizenship as a talisman against *forum non conveniens* dismissal is diminished.' " The court also pointed out that only one of the numerous contracts at issue in this case has a New York forum selection clause. "Such a contract, if valid, constitutes a minuscule percentage of the damages in excess of $3 billion at issue in this case." The court concluded (footnote omitted):

> The fact that in no other relevant contract do the parties to this litigation agree to litigate in the United States supports the Court's view that it should afford little deference to the plaintiffs' current choice of forum. This type of forum shopping is the antithesis of the bona fide connection to the plaintiffs' chosen forum that would cause the Court to defer to the plaintiffs' desires. There is no indication that the parties anticipated litigating in the United States or that the choice of this forum is based on true motives of convenience. Instead, having pursued various remedies in the Russian court system with unsatisfactory results, the plaintiffs now seek to take their case to the United States. Such a tactical maneuver is not protected by the deference generally owed to the plaintiffs' choice of forum. . . .

Turning to the issue of whether Russia provided an adequate forum, the court first noted that "all twenty defendants have explicitly consented to jurisdiction in the

Russian courts." The court then analyzed plaintiffs' claim that "Russia is not an adequate alternative forum because of the alleged corruption of the Russian Courts, and the Arbitrazh courts that dealt with the NKAZ and GOK bankruptcies in particular." The court reasoned that the appropriate standard requires defendants to bear the ultimate burden of showing that Russia is an adequate forum, and that they had done so here.

The court noted it "must determine whether Russian law provides adequate, not identical, relief." It agreed with defendants' experts that the Russian civil and criminal codes supply causes of action analogous to the RICO and common law claims brought by plaintiffs in U.S. court. The court further found that the fact that Russia does not provide treble damages for such violations does not render Russia an inadequate forum.

In concluding that Russia is an adequate forum, the court responded to further arguments by plaintiffs concerning the previous decisions of the Russian courts and the corruption of both those proceedings and the Russian courts generally, as follows.

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The plaintiffs argue that the prior decisions of the Russian courts would be an obstacle to their relief in the Russian judicial system. On its face, this is a curious argument because this Court would also owe deference to decisions of foreign courts unless it could be demonstrated that the decisions were not entitled to deference because, for example, they were rendered in such a way as to deny fundamental standards of procedural fairness, which the plaintiffs have not shown in this case. . . . There are, however, ample means in the Russian judicial system to overturn decisions that were obtained as a result of corruption and this argument therefore is not a basis for finding that there are no adequate remedies in the Russian courts.

In Russia the plaintiffs may pursue either appellate review of the allegedly fraudulent judicial decisions or may seek relief through

wholly new claims. The appellate instance of the arbitrazh court has jurisdiction over allegations of wrongful conduct by the first instance arbitrazh court, as does the Federal Circuit Court and the Supreme Arbitrazh Court ("SAC"). . . .

* * * *

The second specific challenge to the adequacy of the Russian courts rests on the plaintiffs' arguments that the bankruptcy proceedings were themselves corrupt and this demonstrates, according to the plaintiffs, that they could not obtain fair results in the Russian courts. This argument fails on several levels. First, the defendants have shown that there are various ways of challenging the past decisions. Moreover, there are claims that are independent of the past decisions. Furthermore, on the current record, the Court could not conclude that there has been a sufficient showing of corruption in the underlying proceedings. This is particularly so in view of the appellate decisions in the Russian courts that have affirmed various decisions about which the plaintiffs complain but for which there is no persuasive showing of any corruption.

* * * *

Finally, the plaintiffs launch a breathtaking challenge to all of the Russian courts arguing that the Russian judiciary is so corrupt that the plaintiffs cannot obtain a fair decision anywhere in Russia. . . .

"The 'alternative forum is too corrupt to be adequate' argument does not enjoy a particularly impressive track record." . . . Other judges of this court have found Russia to be an adequate alternative forum. . . .

* * * *

The plaintiffs in this case have . . . pursued relief in the Russian courts until the results were not to their liking. Moreover, the plaintiffs voluntarily entered into numerous contracts in Russia relevant to this case that contain Russian forum selection clauses. The plaintiffs must have anticipated the possibility of litigation in Russia. . . . "There is a substantial temerity to the claim that the forum where a party has chosen to transact business . . . is inadequate." . . .

* * * *

Should the plaintiffs prevail on the motion to dismiss and the case proceed to trial in this Court, the Court would be forced to consider approximately 120 Russian legal decisions relating to NKAZ and GOK bankruptcies and the GOK change of control. These decisions involved almost 150 Russian judges. . . . This Court is not a court of appeals for the Russian legal system and will not act as such. To do so would amount to an act of judicial overreaching of the precise sort rejected by the Court of Appeals for the Second Circuit. The Court of Appeals has " 'repeatedly emphasized that it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.' " See Blanco, 997 F.2d at 982. (internal quotation marks omitted).

Considerations of comity also play an important role in the Court's *forum non conveniens*. In this light, the defendants have identified four Russian court decisions that are integral to this case but which, they claim, are not subject to the allegations of corruption. . . . The court has reviewed the record and finds the defendants' contention to be true: The plaintiffs have made little, if any, attempt to articulate substantive allegations of corruption against these decisions which are clearly at the core of the plaintiffs' case. . . . In view of this fact, it would be a particular affront to notions of international comity for the Court effectively to ignore or overrule the findings of the Russian courts in these decisions.

* * * *

The plaintiffs would have this Court believe that there is no court in Russia that could provide a fair, uncorrupted forum for this dispute. . . . To agree with this assertion would be to accept a mass indictment of the Russian judicial system that is not supported by the record. For the reasons explained above, Russia is an adequate alternative forum for this dispute."

Finally, the court considered the remaining private and public factors set forth by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), including "1) the relative

ease of access to sources of proof; 2) the convenience of willing witnesses; 3) the availability of compulsory process for attaining the attendance of unwilling witnesses; and 4) the other practical problems that make trial easy, expeditious, and inexpensive." The court found that this assessment supported dismissal on *forum non conveniens*, stating in part that it found "[t]he list of potential non-party witnesses who appear in the Amended Complaint alone demonstrates why this litigation should proceed in Russia."

5. Personal Jurisdiction Over Foreign Entities in U.S. Courts

Personal jurisdiction based on internet websites

(1) In *B.E.E. International v. Hawes*, 267 F. Supp. 2d 477 (M.D. NC 2003), the U.S. District Court for the Middle District of North Carolina dismissed for lack of personal jurisdiction a case brought against Belovo S.A., a Belgian corporation being sued, with other defendants, for trademark infringement, unfair competition, breach of contract, and other claims, by an Israeli corporation, one of its principals, and its U.S. subsidiary. The court noted that "Belovo S.A. is a Belgian corporation with its principal place of business outside the United States. None of its officers or directors reside in North Carolina; it owns no property in North Carolina; none of its products have been sold in North Carolina; it does not maintain an office in the state. Its contract with Plaintiff BEE was neither signed nor performed in North Carolina." After rejecting plaintiffs' other arguments in support of personal jurisdiction, the court also dismissed plaintiffs' contention that "Belovo S.A.'s electronic contacts with North Carolina subject it to personal jurisdiction." The court first explained the applicable test under Fourth Circuit jurisprudence and then applied it to the facts of the case, as excerpted below.

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The Fourth Circuit recently provided guidance to district courts trying to determine when a nonresident defendant such as Belovo S.A. conceptually "enters" a forum state by way of the Internet. "Adopting and adapting" a model first articulated in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D.Pa. 1997), the court explained that an assertion of personal jurisdiction comports with due process when the nonresident defendant "(1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts." ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002). The court placed the range of electronic contacts on a "sliding scale":

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Id. at 713–14 (quoting Zippo Mfg. Co., 952 F. Supp. at 1124). In general, " 'the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.' " Id. at 713 (quoting Zippo Mfg. Co., 952 F. Supp. at 1124).

Applying this standard, extending personal jurisdiction over Belova S.A. based on its electronic contacts would be inappropriate. Under the first prong of the ALS Scan analysis, Belovo S.A.'s Web site may be described as "minimally interactive." See Christian Sci. Bd. of Dirs. of the First Church of Christ, Scientist v. Nolan, 259 F.3d 209, 218 n.11 (4th Cir. 2001) (applying this term to a site that "invited visitors . . . to e-mail questions and information requests" to the nonresident defendant). The company posts information on its Web site enabling potential customers anywhere in the world to contact an appropriate distributor. For customers in the United States, that contact person is Michael Hawes in North Carolina. The site lists Mr. Hawes's postal address, telephone number, and fax number. It also contains an e-mail link to "Michael Hawes, Belovo US Inc." To the extent that Belovo S.A. hosts Mr. Hawes's e-mail account, this link permits an "exchange of information with the host computer," a capability beyond the mere passive posting of information. *ALS Scan, Inc.*, 293 F.3d at 714 (quoting *Zippo Mfg. Co.*, 952 F. Supp. at 1124). This fact does not, however, show that Belovo S.A. purposefully targets potential customers in North Carolina more or differently than potential customers anywhere else in the United States; indeed, the company has no customers in North Carolina. It also does not demonstrate that Belovo S.A. used the Internet purposefully "to contact persons within the State," the issue that the ALS Scan continuum addresses. See *id.* at 713; see also *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (observing that the ALS Scan test probes whether a defendant "manifested an intent to direct [its] website content . . . to a [forum state] audience") (emphasis added).

Under the second prong of the *ALS Scan* analysis, Belovo S.A.'s manifested intent is to place potential customers in touch with Mr. Hawes. As explained above, Mr. Hawes's activities are attributed more fairly to Belovo Inc., rather than Belovo S.A. The absence of any employment or contractual relationship between Mr. Hawes and Belovo S.A., and the fact that no Belovo S.A. products have been sold in North Carolina, support this conclusion. Despite Belovo S.A.'s bestowing upon Mr. Hawes the title of "exclusive agent," nothing in the record indicates that the Belgian

company either directed his activities or was bound by them. Belovo S.A.'s conduct is such that it has avoided substantial contact with the forum state. Under these circumstances, due process entitles the company to the "minimum assurance" that such conduct will not render it liable to suit. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490 (1980).

Finally, Belovo S.A.'s electronic contacts fail to satisfy the ALS Scan test's requirement that the electronic activity "create" the cause of action. *ALS Scan, Inc.*, 293 F.3d at 714. Plaintiffs' claims against Belovo S.A. arise from alleged trademark infringement, the retention of equipment and confidential information after the termination of the European distributorship agreement between BEE and Belovo S.A., and the relationship between Mr. Hawes and Belovo S.A. before Mr. Hawes left BEEI. None of these allegations arise from Belovo S.A.'s Web site and its minimally interactive features, including its e-mail link to Mr. Hawes. Following the rule announced in ALS Scan, the court concludes that Belovo S.A.'s electronic activity does not submit the company to personal jurisdiction in North Carolina for the purpose of this lawsuit.

* * * *

(2) The U.S. District Court for the District of Maryland applied the same test in dismissing a case for lack of personal jurisdiction based on website contacts in *Electronic Broking Services, Limited v. E-Business Solutions & Services*, 285 F. Supp. 2d 686 (D. Md. 2003). In that case, Electronic Broking Services, a British company that owns the trademark "EBS," brought suit against an Egyptian company based in Cairo, E-Business Solutions, that owns the trademark "eBS" in Egypt. E-Business Solutions has a website, using the name "eBS" that offers a number of products and services for banking and financial entities, resulting in numerous business relationships with multinational companies. A private investigator hired by plaintiff to investigate E-Business Solutions' contacts with the United States and Maryland was informed that, aside from the website, the extent of E-Business

Solutions' contacts in the United States was one customer in California, and one established partner in Maryland.

Noting that plaintiff "argues for personal jurisdiction based solely on E-Business Solutions' 'semi-interactive' website and the defendants' activities involving one Maryland corporation," the court applied the tests outlined in *B.E.E. International, supra*, to conclude that dismissal for lack of personal jurisdiction was appropriate in this case.

Cross References

Adoption and child abduction issues, **Chapter 2.B.**
Litigation concerning implementation of treaty on mutual legal assistance in criminal matters, **Chapter 3.A.2.b.**
Forum non conveniens, **Chapter 6.G.7.b.** and **Chapter 8.B.4.**
International comity as ground for dismissal, **Chapter 8.B.2.b(1)**
UNIDROIT Space Assets Protocol, **Chapter 12.B.3.**

Chapter 16

Sanctions

A. IMPOSITION, MODIFICATION, AND IMPLEMENTATION OF SANCTIONS

1. Exception to Economic Sanctions for Certain Humanitarian Activities

a. Exception for activities by nongovernmental organizations in Iran and Iraq

On March 12, 2003, the Office of Foreign Assets Control ("OFAC"), U.S. Department of the Treasury, issued an interim final rule adding § 575.527 to the Iraqi Sanctions Regulations. The new provision provided an exception to economic sanctions for certain humanitarian activities by nongovernmental organizations in Iraq and Iran. 68 Fed. Reg. 11,741 (Mar. 12, 2003). The interim rule summarized the new provisions as follows:

> [OFAC] is adding new provisions to the Iraqi Sanctions Regulations, 31 CFR part 575, to facilitate certain humanitarian activities in and around Iraq. These new regulations provide for the establishment of a registration program that would authorize nongovernmental organizations to engage in humanitarian activities in the areas of Iraq not controlled by the Government of Iraq. They also permit certain humanitarian assessment missions in Iraq. Related regulations are being added to the Iranian Transactions Regulations, 31 CFR part 560, authorizing

> certain activities in Iran by nongovernmental organizations to the extent necessary to support authorized humanitarian activities in Iraq, as well as certain assessment activities in Iran.

In a fact sheet entitled "Iraq Licensing: Registered Non-Governmental Organizations (NGOs)," released April 15, 2003, the Department of State announced that "for the purposes of non-governmental organizations registered with [OFAC] under the provisions of 31 C.F.R. § 575.527, the term 'areas of Iraq not controlled by the Government of Iraq' is described to mean, as of April 12, 2003, the *entire* territory of Iraq." *See www.state.gov/e/eb/rls/othr/19651.htm.*

b. Response to earthquake in Bam, Iran

Following the earthquake in Bam, Iran, on December 26, 2003, President George W. Bush directed the Secretaries of the Treasury and of State to ease restrictions to assist humanitarian relief activities for the earthquake victims. A press release of December 31, 2003, issued by the Department of the Treasury set forth the actions being taken on that date to expedite disaster relief and humanitarian aid operations.

The press release, excerpted below, is available at *www.treas.gov/press/releases/js1076.htm*. *See also* General License No. 1, effective December 26, 2003, available at *www.treas.gov/offices/eotffc/ofac/sanctions/sanctguide-iran.html.*

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The following authorizations and expedited procedures are being instituted today:

- Issuance of a General License (not requiring any application to, or further specific authorization from OFAC) authorizing cash donations to nongovernmental organizations to be used for disaster relief and humanitarian aid operations in response to the earthquake;

- Authorization to carry out humanitarian relief activities in Iran of any nongovernmental organization registered with, funded by, or under contract with the State Department/ USAID;
- In response to applications, immediate issuance of specific licenses to nongovernmental organizations not covered above previously authorized to engage in humanitarian activities in Afghanistan or countries currently subject to economic sanctions to carry out humanitarian relief activities in Iran;
- Expedited issuance of specific licenses to nongovernmental organizations not previously authorized by OFAC to engage in humanitarian activities in countries subject to economic sanctions.

* * * * *

2. Further Sanctions Issues Related to Iraq

a. Executive Order 13290: vesting Iraqi assets

On March 20, 2003, President George W. Bush issued Executive Order 13290. The order, excerpted below, vested more than $1 billion in blocked Iraqi accounts that were being held in U.S. banks. 68 Fed. Reg. 14,307 (March 24, 2003). The Iraqi assets had been blocked pursuant to Executive Order 12722, 55 Fed. Reg. 31,803 (Aug. 3, 1990) and the Iraq Sanctions Act of 1990, Pub. L. No. 101–513, 104 Stat. 1979.

* * * *

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), and section 301 of title 3, United States Code, and in order to take additional steps with respect to the national emergency declared in Executive Order 12722 of August 2, 1990,

I, GEORGE W. BUSH, President of the United States of America, hereby determine that the United States and Iraq are engaged in armed hostilities, that it is in the interest of the United States to confiscate certain property of the Government of Iraq and its agencies, instrumentalities, or controlled entities, and that all right, title, and interest in any property so confiscated should vest in the Department of the Treasury. I intend that such vested property should be used to assist the Iraqi people and to assist in the reconstruction of Iraq, and determine that such use would be in the interest of and for the benefit of the United States.

I hereby order:

Section 1. All blocked funds held in the United States in accounts in the name of the Government of Iraq, the Central Bank of Iraq, Rafidain Bank, Rasheed Bank, or the State Organization for Marketing Oil are hereby confiscated and vested in the Department of the Treasury, except for the following:

(a) any such funds that are subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoy equivalent privileges and immunities under the laws of the United States, and are or have been used for diplomatic or consular purposes, and
(b) any such amounts that as of the date of this order are subject to post-judgment writs of execution or attachment in aid of execution of judgments pursuant to section 201 of the Terrorism Risk Insurance Act of 2002 (Public Law 107–297), provided that, upon satisfaction of the judgments on which such writs are based, any remainder of such excepted amounts shall, by virtue of this order and without further action, be confiscated and vested.

* * * *

In reporting Executive Order 13290 to the Congress, President Bush explained his action and the intended use of the funds for the benefit of Iraq. Section 106 of the USA PATRIOT Act, referred to in excerpts from the message to Congress below, provided for certain vesting authority "when

the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals." 39 WEEKLY COMP. PRES. DOC. 345 (Mar. 24, 2003).

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* * * *

Consistent with section 203(a)(1)(C) of IEEPA, 50 U.S.C. 1702(a)(1)(C), as added by section 106 of the USA PATRIOT ACT, Public Law 107–56, I have ordered that certain blocked funds held in the United States in accounts in the name of the Government of Iraq, the Central Bank of Iraq, Rafidain Bank, Rasheed Bank, or the State Organization for Marketing Oil are hereby confiscated and vested in the Department of the Treasury. . . .

* * * *

I have exercised these authorities in furtherance of Executive Orders 12722 and 12724 with respect to the unusual and extraordinary threat to our national security and foreign policy posed by the policies and actions of the Government of Iraq. I intend that such vested property should be used to assist the Iraqi people and to assist in the reconstruction of Iraq, and have determined that such use would be in the interest of and for the benefit of the United States.

The power to vest assets of a foreign government with which the United States is engaged in armed hostilities is one that has been recognized for many decades. This power is being used here because it is clearly in the interests of the United States to have these funds available for use in rebuilding Iraq and launching that country on the path to speedy economic recovery. In addition, this authority is being invoked in a limited way, designed to minimize harm to third parties and to respect existing court orders as much as possible.

Secretary of the Treasury John Snow issued a statement on March 20, 2003, announcing the executive order and calling on other countries to impose similar economic sanctions. The statement, available at *www.treas.gov/press/releases/js119.htm*, is excerpted below.

Today we launched a financial offensive against the regime of Saddam Hussein.

First, the President today issued an Executive Order confiscating non-diplomatic Iraqi government assets in the United States. The Order authorizes Treasury to marshal the assets, and to use the funds for the benefit and welfare of the Iraqi people.

Second, the United States calls today upon the world to identify and freeze all assets of Saddam Hussein, the Iraqi regime, and their agents pursuant to established international obligations.

Third, we are directing a worldwide hunt for the blood money that Hussein and his cronies have stolen from the Iraqi people.

In 1990, the world community imposed economic sanctions on the Hussein regime to prevent the dictator from obtaining the means to threaten his neighbors and to develop weapons of mass destruction. The United States, the United Kingdom, and others took prompt action, freezing well in excess of two billion dollars and barring trade and commerce with the Hussein regime.

Now we call upon all nations to join us and to step forward to fulfill their obligations for the benefit of the Iraqi people.

The success of economic sanctions requires international cooperation and effective enforcement. The United States is committed to helping enforce these international obligations. For that reason, we reserve the right to take countermeasures and sanctions against any institution that does not comply with these international obligations including cutting off access to the U.S. financial system under provisions granted by the USA PATRIOT Act.

* * * *

b. Suspension of certain U.S. sanctions against Iraq

In legislation enacted April 16, 2003, Congress included language authorizing the President to "suspend the application of any provision of the Iraq Sanctions Act of 1990" (Pub. L. No. 101–513, 104 Stat. 1979) with some exceptions,

and to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism," with certain exceptions. Emergency Wartime Supplemental Appropriations Act, 2003, § 1503, Pub. L. No. 108–11, 117 Stat. 559.

On May 7, 2003, President George W. Bush issued Presidential Determination No. 2003–23 exercising his authority to suspend the Iraq Sanctions Act, make inapplicable certain statutory provisions related to Iraq, and delegating authorities. 68 Fed. Reg. 26,459 (May 16, 2003).

The determination is set forth below.

By virtue of the authority vested in me by the Constitution and the laws of the United States, including sections 1503 and 1504* of the Emergency Wartime Supplemental Act, 2003, Public Law 108–11 (the "Act"), and section 301 of title 3, United States Code, I hereby:

(1) suspend the application of all of the provisions, other than section 586E, of the Iraq Sanctions Act of 1990, Public Law 101–513, and
(2) make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87–195, as amended (the "FAA"), and any other provision of law that applies to countries that have supported terrorism.

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* Section 1504 of the act provided that the President "may authorize the export to Iraq of any nonlethal military equipment controlled under the International Trafficking in Arms Regulations on the United States Munitions List established pursuant to section 38 of the Arms Export Control Act (22 U.S.C. § 2778)," with prior notification to Congress that such export "is in the national interest of the United States" and that "the limitation regarding nonlethal military equipment shall not apply to military equipment designated by the Secretary of State for use by a reconstituted (or interim) Iraqi military or police force."

In addition, I delegate the functions and authorities conferred upon the President by:

(1) section 1503 of the Act to submit reports to the designated committees of the Congress to the Secretary of Commerce, or until such time as the principal licensing responsibility for the export to Iraq of items on the Commerce Control List has reverted to the Department of Commerce, to the Secretary of the Treasury; and,
(2) section 1504 of the Act to the Secretary of State. The functions and authorities delegated herein may be further delegated and redelegated to the extent consistent with applicable law.

Effective May 7, OFAC issued four general licenses to authorize additional transactions involving Iraq. *See* 68 Fed. Reg. 28,753 (May 27, 2003), amending Iraqi Sanctions Regulations to incorporate the four general licenses. As described in the Federal Register notice, the licenses authorize:

> non-commercial funds transfers (including family remittances) and related transactions, activities by the U.S. Government and its contractors or grantees, privately financed humanitarian transactions, and certain exports and reexports to Iraq. OFAC is also publishing a technical amendment to its regulatory definition of the terms "humanitarian activities," "humanitarian purposes," and "humanitarian support."

c. Development Fund for Iraq

(1) UN Security Council Resolution 1483

In a press conference on May 7, President Bush summarized the effect of Presidential Determination 2003–23 and stated:

> Soon, at the U.N. Security Council, the United States, Great Britain and Spain will introduce a new resolution

> to lift the sanctions imposed by the United Nations. The regime that the sanctions were directed against no longer rules Iraq. And no country in good conscience can support using sanctions to hold back the hopes of the Iraqi people.

See www.whitehouse.gov/news/releases/2003/05/20030507-15.html.

On May 22, 2003, as discussed in Chapter 18.A.1.d.(1), the Security Council adopted Resolution 1483 deciding that UN sanctions on Iraq, with the exception of prohibitions related to the sale or supply to Iraq of arms and related materiel other than those required by the occupation authority, would no longer apply. UN Doc. No. S/RES/1483 (2003). Among other things, Resolution 1483 addressed the establishment, funding, and use of the Development Fund for Iraq, as excerpted below.

The Security Council:

* * * *

12. *Notes* the establishment of a Development Fund for Iraq to be held by the Central Bank of Iraq and to be audited by independent public accountants approved by the International Advisory and Monitoring Board of the Development Fund for Iraq and looks forward to the early meeting of that International Advisory and Monitoring Board, whose members shall include duly qualified representatives of the Secretary-General, of the Managing Director of the International Monetary Fund, of the Director-General of the Arab Fund for Social and Economic Development, and of the President of the World Bank;

13. *Notes further* that the funds in the Development Fund for Iraq shall be disbursed at the direction of the Authority, in consultation with the Iraqi interim administration, for the purposes set out in paragraph 14 below;

14. *Underlines* that the Development Fund for Iraq shall be used in a transparent manner to meet the humanitarian needs of

the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq;

* * * *

23. *Decides* that all Member States in which there are:

(a) funds or other financial assets or economic resources of the previous Government of Iraq or its state bodies, corporations, or agencies, located outside Iraq as of the date of this resolution, or

(b) funds or other financial assets or economic resources that have been removed from Iraq, or acquired, by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, shall freeze without delay those funds or other financial assets or economic resources and, unless these funds or other financial assets or economic resources are themselves the subject of a prior judicial, administrative, or arbitral lien or judgement, immediately shall cause their transfer to the Development Fund for Iraq, it being understood that, unless otherwise addressed, claims made by private individuals or non-government entities on those transferred funds or other financial assets may be presented to the internationally recognized, representative government of Iraq; and *decides further* that all such funds or other financial assets or economic resources shall enjoy the same privileges, immunities, and protections as provided under paragraph 22;

* * * *

(2) U.S. implementation

Also on May 22, President Bush issued Executive Order 13303, entitled "Protecting the Development Fund for Iraq and

Certain Other Property in Which Iraq has an Interest." In the order, the President declared a national emergency under the International Emergency Economic Powers Act, as amended ("IEEPA") and took measures to protect Iraqi assets from attachment or other judicial process in order to keep the funds available for the benefit of Iraq. 68 Fed. Reg. 31,931 (May 28, 2003). The executive order is excerpted below.

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act, as amended (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), section 5 of the United Nations Participation Act, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code,

I, GEORGE W. BUSH, President of the United States of America, find that the threat of attachment or other judicial process against the Development Fund for Iraq, Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein, obstructs the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq. This situation constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States and I hereby declare a national emergency to deal with that threat.

I hereby order:

Section 1. Unless licensed or otherwise authorized pursuant to this order, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is prohibited, and shall be deemed null and void, with respect to the following:

(a) the Development Fund for Iraq, and
(b) all Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial

instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein, in which any foreign country or a national thereof has any interest, 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.

Sec. 2. (a) As of the effective date of this order, Executive Order 12722 of August 2, 1990, Executive Order 12724 of August 9, 1990, and Executive Order 13290 of March 20, 2003, shall not apply to the property and interests in property described in section 1 of this order.

(b) Nothing in this order is intended to affect the continued effectiveness of any rules, regulations, orders, licenses or other forms of administrative action issued, taken, or continued in effect heretofore or hereafter under Executive Orders 12722, 12724, or 13290, or under the authority of IEEPA or the UNPA, except as hereafter terminated, modified, or suspended by the issuing Federal agency and except as provided in section 2(a) of this order.

Sec. 3. For the purposes of this order:

* * * *

(e) The term "Development Fund for Iraq" means the fund established on or about May 22, 2003, on the books of the Central Bank of Iraq, by the Administrator of the Coalition Provisional Authority responsible for the temporary governance of Iraq and all accounts held for the fund or for the Central Bank of Iraq in the name of the fund.

* * * *

Sec. 4. . . . (b) Nothing contained in this order shall relieve a person from any requirement to obtain a license or other authorization in compliance with applicable laws and regulations.

Sec. 5. This order is not intended to, and does not, create any right, benefit, or privilege, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, entities, officers, employees, or agents, or any other person.

A message from the President to Congress, also dated May 22, 2003, explained the purpose and effect of the executive order and also explained the effect of the May 7 Presidential determination, as excerpted below. 39 WEEKLY COMP. PRES. DOC. 647 (May 26, 2003).

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* * * *

A major national security and foreign policy goal of the United States is to ensure that the newly established Development Fund for Iraq and other Iraqi resources, including Iraqi petroleum and petroleum products, are dedicated for the well-being of the Iraqi people, for the orderly reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, for the costs of indigenous civilian administration, and for other purposes benefiting the people of Iraq. The Development Fund for Iraq and other property in which Iraq has an interest may be subject to attachment, judgment, decree, lien, execution, garnishment, or other judicial process, thereby jeopardizing the full dedication of such assets to purposes benefiting the people of Iraq. To protect these assets, I have ordered that, unless licensed or otherwise authorized pursuant to my order, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is prohibited, and shall be deemed null and void, with respect to [the Development Fund for Iraq, and certain Iraqi petroleum interests].

In addition, by my memorandum to the Secretary of State and Secretary of Commerce of May 7, 2003 (Presidential Determination 2003–23), I made inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87–195, as amended, and any other provision of law that applies to countries that have supported terrorism. Such provisions of law that apply to countries that have supported terrorism include, but are not limited to, 28 U.S.C. 1605(a)(7), 28 U.S.C. 1610, and section 201 of the Terrorism Risk Insurance Act.

I also have ordered that Executive Order 12722 of August 2, 1990, and Executive Order 12724 of August 9, 1990, which blocked 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, and Executive Order 13290 of March 20, 2003, which confiscated and vested certain Government of Iraq accounts, shall not apply to the Development Fund for Iraq or to Iraqi petroleum or petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale and marketing thereof, and interests therein.

* * * *

On August 28, 2003, President Bush took further action, issuing Executive Order 13315 entitled "Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members, and Taking Certain other Actions," with annex, excerpted below. 68 Fed. Reg. 52, 315 (Sept. 3, 2003). As described in the President's message to Congress transmitting Executive Order 13315, the order "broadens the scope of persons whose assets may be frozen . . . by adding the immediate family members of former Iraqi senior officials whose assets may be frozen. This order also allows for the confiscating and vesting of some of those assets and provides for the transfer of all vested assets to the Development Fund for Iraq in a manner consistent with paragraph 23 of UNSCR 1483." 39 WEEKLY COMP. PRES. DOC. 1129 (Sept. 8, 2003).

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* * * *

I, GEORGE W. BUSH, President of the United States of America, hereby expand the scope of the national emergency declared in Executive Order 13303 of May 22, 2003, to address the unusual and extraordinary threat to the national security and foreign policy of the United States posed by obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in that country, and the development of political, administrative, and economic institutions in Iraq. I find that the

removal of Iraqi property from that country by certain senior officials of the former Iraqi regime and their immediate family members constitutes one of these obstacles. I further determine that the United States is engaged in armed hostilities and that it is in the interest of the United States to confiscate certain additional property of the former Iraqi regime, certain senior officials of the former regime, immediate family members of those officials, and controlled entities. I intend that such property, after all right, title, and interest in it has vested in the Department of the Treasury, shall be transferred to the Development Fund for Iraq. Such property shall be used to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, for the costs of Iraqi civilian administration, and for other purposes benefiting the Iraqi people. I determine that such use would be in the interest of and for the benefit of the United States. I hereby order:

Section 1. Except to the extent provided in section 203(b)(1), (3), and (4) of IEEPA (50 U.S.C. 1702(b)(1), (3), and (4)), or regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, all property and interests in property of the former Iraqi regime or its state bodies, corporations, or agencies, or of the following persons, 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, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(a) the persons listed in the Annex to this order; and
(b) persons determined by the Secretary of the Treasury, in consultation with the Secretary of State,
    (i) to be senior officials of the former Iraqi regime or their immediate family members; or
    (ii) to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any of the persons listed in the Annex to this order or determined to be subject to this order.

Sec. 2. The Secretary of the Treasury, in consultation with the Secretary of State, is authorized to confiscate property that is blocked pursuant to section 1 of this order and that he determines, in consultation with the Secretary of State, to belong to a person, organization, or country that has planned, authorized, aided, or engaged in armed hostilities against the United States. All right, title, and interest in any property so confiscated shall vest in the Department of the Treasury. Such vested property shall promptly be transferred to the Development Fund for Iraq.

Sec. 3. (a) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

* * * *

Sec. 5. I hereby determine that the making of donations of the type specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by or to persons determined to be subject to the sanctions imposed under this order would seriously impair my ability to deal with the national emergency declared in Executive Order 13303 and expanded in scope in this order and would endanger Armed Forces of the United States that are engaged in hostilities, and I hereby prohibit such donations as provided by section 1 of this order.

Sec. 6. For those persons listed in the Annex to this order or determined to be subject to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in Executive Order 13303 and expanded in scope in this order, there need be no prior notice of a listing or determination made pursuant to section 1 of this order.

* * * *

Sec. 10. This order shall not apply to such property as is or may come under the control of the coalition authority in Iraq. Nothing in this order is intended to affect dispositions of such property or other determinations by the coalition authority.

Sec. 11. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, officers or employees, or any other person.

3. Burmese Freedom and Democracy Act of 2003

On July 28, 2003, President George W. Bush signed into law the Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108–61, 117 Stat. 864. Among other things, the law requires the President to "ban the importation of any article that is a product of Burma."

In Executive Order 13310, issued the same day, President Bush expanded sanctions imposed against Burma dating to 1997. 68 Fed. Reg. 44,853 (July 30, 2003). The executive order also included notification to Congress required by section 3(b) of the act regarding exercise of Presidential waiver authorities. The executive order is excerpted below.

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* * * *

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), the Burmese Freedom and Democracy Act of 2003 (July 28, 2003), and section 301 of title 3, United States Code, and in order to take additional steps with respect to the Government of Burma's continued repression of the democratic opposition in Burma and with respect to the national emergency declared in Executive Order 13047 of May 20, 1997;

I, George W. Bush, President of the United States of America, hereby order:

Section 1. Except to the extent provided in section 203(b)(1), (3), and (4) of IEEPA (50 U.S.C. 1702(b)(1), (3), and (4)), the Trade Sanctions Reform and Export Enhancement Act of 2000 (title IX, Public Law 106–387) (TSRA), or regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, all property and interests in property of the following persons 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, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(a) the persons listed in the Annex attached and made a part of this order; and
(b) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State,
    (i) to be a senior official of the Government of Burma, the State Peace and Development Council of Burma, the Union Solidarity and Development Association of Burma, or any successor entity to any of the foregoing; or
    (ii) to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

Sec. 2. Except to the extent provided in section 203(b) of IEEPA (50 U.S.C. 1702(b)), the TSRA, or regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, the following are prohibited:

(a) the exportation or reexportation, directly or indirectly, to Burma of any financial services either
    (i) from the United States or
    (ii) by a United States person, wherever located; and

(b) any approval, financing, facilitation, or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited by this order if performed by a United States person or within the United States;

Sec. 3. Beginning 30 days after the effective date of this order, and except to the extent provided in section 8 of this order and in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to 30 days after the effective date of this order, the importation into the United States of any article that is a product of Burma is hereby prohibited.

Sec. 4. (a) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

* * * *

Sec. 6. I hereby determine that the making of donations of the type specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by or to persons whose property and interests in property are blocked pursuant to section 1 of this order would seriously impair my ability to deal with the national emergency declared in Executive Order 13047, and hereby prohibit such donations as provided by section 1 of this order.

Sec. 7. For those persons whose property and interests in property are blocked pursuant to section 1 of this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in Executive Order 13047, there need be no prior notice of a listing or determination made pursuant to this order.

Sec. 8. Determining that such a waiver is in the national interest of the United States, I hereby waive the prohibitions described in section 3 of the Burmese Freedom and Democracy Act of 2003 with respect to any and all articles that are a product of Burma to the extent that prohibiting the importation of such articles would conflict with the international obligations of the United States under the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the United Nations Headquarters Agreement, and other legal instruments providing equivalent privileges and immunities.

* * * *

Sec. 13. All provisions of this order other than section 3 shall not apply to any activity, or any transaction incident to an activity, undertaken pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that was entered into by a United States person with the Government of Burma or a nongovernmental entity in Burma prior to 12:01 a.m. eastern daylight time on May 21, 1997.

Sec. 14. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

* * * *

A letter from the President to the Speaker of the House of Representatives and the President of the Senate, also dated July 28, 2003, explained the action taken in the executive order, as excerpted below. 39 WEEKLY COMP. PRES. DOC. 993 (Aug. 1, 2003).

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* * * *

In 1997, the United States put in place a prohibition on new investment in Burma in response to the Government of Burma's large scale repression of the democratic opposition in that country. Since that time, the Government of Burma has rejected our efforts

and the efforts of others in the international community to end its repressive activities. In May of this year, that rejection manifested itself in a brutal and organized attack on the motorcade of Aung San Suu Kyi, a Nobel Peace Prize winner and leader of the peaceful democratic opposition party in Burma, the National League for Democracy. The Government of Burma has continued to ignore our requests for her to be released from confinement, for the other National League for Democracy leaders who were jailed before and after the attack to be released, and for the offices of the National League for Democracy to be allowed to reopen.

I have now determined that this continued and increasing repression by the Government of Burma warrants an expansion of the sanctions against that government. I applaud the Congress' efforts to address the Government of Burma's action. The prohibitions contained in my Order implement sections 3 and 4 of the Burmese Freedom and Democracy Act of 2003 and supplement that Act with additional restrictions.

* * * *

The Department of the Treasury, in consultation with the Department of State, will implement a remittance program authorizing limited personal transfers of funds and will authorize most transactions relating to humanitarian, educational, and official United States Government activities. Additionally, the Order grandfathers any activity, or trans-actions incident to any activity, other than the import of any products of Burma, undertaken pursuant to any agreement that was entered into by a United States person with the Government of Burma or a nongovernmental entity in Burma prior to May 21, 1997, the effective date of Executive Order 13047.

I have determined that the waiver of the prohibitions described in section 3 of the Burmese Freedom and Democracy Act of 2003 with respect to any or all articles that are a product of Burma is in the national interest of the United States to the extent that prohibiting the importation of such articles would conflict with the international obligations of the United States under the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the United Nations Headquarters Agreement,

and other legal instruments providing equivalent privileges and immunities. In addition, in the exercise of my constitutional authorities under Article II of the Constitution to conduct the foreign relations of the United States, I will construe the Act in a manner that will in no way impair the existing ability of United States diplomatic and consular officials to import articles that are a product of Burma that are necessary to the performance of their functions as United States Government officials in Burma.

* * * *

On August 25, 2003, Deputy Secretary of State Richard Armitage, by delegation, determined that a further waiver of the prohibition on importation contained in the Burmese Freedom and Democracy Act of 2003 was in the national interest of the United States. His determination covered the following:

(a) information and informational materials;
(b) personal or household effects, including accompanied baggage and articles for family use, purchased prior to July 28, 2003, of U.S. persons maintaining residence in Burma prior to July 28, 2003; and
(c) personal or household effects, including accompanied baggage and articles for family use, ordinarily incidental to the arrival of any Burmese national arriving in the United States after July 28, 2003.

The determination also provides that personal and household effects "may be imported without limitation provided that they were actually used by such persons or their family members in Burma, are not intended for any other person or for sale, and are not otherwise prohibited from importation under United States law."

The full text of the determination is available at *www.state.gov/s/l/c8183.htm*.

4. Government of Zimbabwe

On March 6, 2003, President George W. Bush issued Executive Order 13288, "Blocking Property of Persons Undermining Democratic Processes or Institutions in Zimbabwe." The order, effective March 7, imposed sanctions on named members of the Government of Zimbabwe, including President Robert Mugabe and 76 other Zimbabwean officials. 68 Fed. Reg. 11,457 (Mar. 10, 2003). The purpose of the sanctions and their effect is set forth in excerpts from the executive order, below.

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), and section 301 of title 3, United States Code,

I, GEORGE W. BUSH, President of the United States of America, have determined that the actions and policies of certain members of the Government of Zimbabwe and other persons to undermine Zimbabwe's democratic processes or institutions, contributing to the deliberate breakdown in the rule of law in Zimbabwe, to politically motivated violence and intimidation in that country, and to political and economic instability in the southern African region, constitute an unusual and extraordinary threat to the foreign policy of the United States, and I hereby declare a national emergency to deal with that threat.

I hereby order:

Section 1. [With certain exceptions], all property and interests in property of [persons listed in the annex to the order or later determined] 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, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

Sec. 2. (a) Any transaction or dealing by a United States person or within the United States in property or interests in property

blocked pursuant to this order is prohibited, including but not limited to the making or receiving of any contribution of funds, goods, or services to or for the benefit of any person listed in the Annex to this order or who is the subject of a determination under subsection 1(b) of this order.

(b) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, or attempts to violate any of the prohibitions set forth in this order is prohibited.
(c) Any conspiracy formed to violate the prohibitions set forth in this order is prohibited.

* * * *

5. The Former Yugoslavia

On May 28, 2003, President George W. Bush issued Executive Order 13304, terminating national emergencies previously declared with respect to the former Yugoslavia in Executive Orders 12808 and 13088. 68 Fed. Reg. 32,315 (May 29, 2003). At the same time, the President ordered new measures to address continuing concerns with the former Yugoslavia, including actions obstructing implementation of the Ohrid Framework Agreement, UN Security Council Resolution 1244, the Dayton Accords, the Conclusions of the Peace Implementation Conference Council, 1995, including the harboring of individuals indicted by the International Criminal Tribunal for the former Yugoslavia and the national emergency declared in Executive Order 13219.

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* * * *

I, GEORGE W. BUSH, President of the United States of America, have determined that the situations that gave rise to the declarations of national emergencies in Executive Order 12808 of May 30, 1992, and Executive Order 13088 of June 9, 1998, with respect to the former Socialist Federal Republic of Yugoslavia, have been

significantly altered by the peaceful transition to democracy and other positive developments in Serbia and Montenegro (formerly the Federal Republic of Yugoslavia (Serbia and Montenegro)). Accordingly, I hereby terminate the national emergencies declared in those orders and revoke those and all related orders (Executive Orders 12810 of June 5, 1992, 12831 of January 15, 1993, 12846 of April 25, 1993, 12934 of October 25, 1994, 13121 of April 30, 1999, and 13192 of January 17, 2001). At the same time, and in order to take additional steps with respect to continuing, widespread, and illicit actions that obstruct implementation of the Ohrid Framework Agreement of 2001, relating to Macedonia, United Nations Security Council Resolution 1244 of June 10, 1999, relating to Kosovo, or the Dayton Accords or the Conclusions of the Peace Implementation Conference Council held in London on December 8–9, 1995, including the decisions or conclusions of the High Representative, the Peace Implementation Council or its Steering Board, relating to Bosnia and Herzegovina, including the harboring of individuals indicted by the International Criminal Tribunal for the former Yugoslavia, and the national emergency described and declared in Executive Order 13219 of June 26, 2001, I hereby order:

Section 1. Pursuant to section 202 of the NEA (50 U.S.C. 1622), termination of the national emergencies declared in Executive Order 12808 of May 30, 1992, and Executive Order 13088 of June 9, 1998, shall not affect any action taken or proceeding pending not finally concluded or determined as of the effective date of this order, or any action or proceeding based on any act committed prior to such date, or any rights or duties that matured or penalties that were incurred prior to such date. Pursuant to section 207 of IEEPA (50 U.S.C. 1706), I hereby determine that the continuation of prohibitions with regard to transactions involving any property blocked pursuant to Executive Orders 12808 or 13088 that continues to be blocked as of the effective date of this order is necessary on account of claims involving successor states to the former Socialist Federal Republic of Yugoslavia or other potential claimants.

Sec. 2. The Annex to Executive Order 13219 of June 26, 2001, is replaced and superseded in its entirety by the Annex to this order.

Sec. 3. (a) Section 1(a) and 1(b) of Executive Order 13219 are revised to read as follows:

"Section 1. (a) Except to the extent provided in section 203(b)(1), (3), and (4) of IEEPA (50 U.S.C. 1702(b)(1), (3), and (4)), and the Trade Sanctions Reform and Export Enhancement Act of 2000 (Title IX, Public Law 106–387), and in regulations, orders, directives, or licenses that may hereafter be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, all property and interests in property of:

(i) the persons listed in the Annex to this order; and

(ii) persons designated by the Secretary of the Treasury, in consultation with the Secretary of State, because they are determined:

(A) to be under open indictment by the International Criminal Tribunal for the former Yugoslavia, unless circumstances warrant otherwise, or

(B) to have committed, or to pose a significant risk of committing, acts of violence that have the purpose or effect of threatening the peace in or diminishing the stability or security of any area or state in the Western Balkans region, undermining the authority, efforts, or objectives of international organizations or entities present in the region, or endangering the safety of persons participating in or providing support to the activities of those international organizations or entities, or

(C) to have actively obstructed, or pose a significant risk of actively obstructing, the Ohrid Framework Agreement of 2001 relating to Macedonia, United Nations Security Council Resolution 1244 relating to Kosovo, or the Dayton Accords or the Conclusions of the Peace Implementation Conference held in London on December 8–9, 1995, including the decisions or conclusions of the High Representative, the Peace Implementation Council or its Steering Board, relating to Bosnia and Herzegovina, or

(D) to have materially assisted in, sponsored, or provided financial, material, or technological support for, or goods or services in support of, such acts of violence or obstructionism or any person listed in or designated pursuant to this order, or

(E) to be owned or controlled by, or acting or purporting to act directly or indirectly for or on behalf of, any person listed in or designated pursuant to this order, that are or hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

(b) I hereby determine that the making of donations of the type specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by or to persons determined to be subject to the sanctions imposed under this order would seriously impair the ability to deal with the national emergency declared in this order, and hereby prohibit such donations as provided in paragraph (a) of this section."

Sec. 4. New sections 7 and 8 are added to Executive Order 13219 to read as follows:

"Sec. 7. For those persons listed in the Annex to this order or determined to be subject to the sanctions imposed under this order who might have a constitutional presence in the United States, I have determined that, because of the ability to transfer funds or assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to this order.

Sec. 8. The Secretary of the Treasury, in consultation with the Secretary of State, is authorized to determine, subsequent to the issuance of this order, that circumstances

no longer warrant inclusion of a person in the Annex to this order and that such person is therefore no longer covered within the scope of the sanctions set forth herein. Such a determination shall become effective upon publication in the Federal Register."

* * * *

B. TERMINATION OF SANCTIONS

National Union for the Total Independence of Angola

On May 6, 2003, President George W. Bush issued Executive Order 13298 terminating the emergency with respect to UNITA dating to 1993. The President acted "in view of United Nations Security Council Resolution 1448 of December 9, 2002," and found that:

> the situation that gave rise to the declaration of a national emergency in Executive Order 12865 of September 26, 1993, with respect to the actions and policies of the National Union for the Total Independence of Angola (UNITA), and that led to the steps taken in that order and in Executive Order 13069 of December 12, 1997, and Executive Order 13098 of August 18, 1998, has been significantly altered by the recent and continuing steps toward peace taken by the Government of Angola and UNITA.

68 Fed. Reg. 24,857 (May 8, 2003). *See also* 69 Fed. Reg. 3,004 (Jan. 22, 2004). Termination of national emergencies previously declared with respect to Yugoslavia are discussed in A.4. *supra*.

In a message to Congress of the same date, the President explained the effect of the order in lifting sanctions against UNITA, as set forth below.

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* * * *

The Order will have the effect of lifting the sanctions imposed on UNITA in Executive Orders 12865, 13069, and 13098. These trade and financial sanctions were imposed to support international efforts to force UNITA to abandon armed conflict and return to the peace process outlined in the Lusaka Protocol, as reflected in United Nations Security Council Resolutions 864 (1993), 1127 (1997), and 1173 (1998).

The death of UNITA leader Jonas Savimbi in February 2002 enabled the Angolan government and UNITA to sign the Luena Memorandum of Understanding on April 4, 2002. This agreement established an immediate cease-fire and called for UNITA's return to the peace process laid out in the 1994 Lusaka Protocol. In accordance therewith, UNITA quartered all its military personnel in established reception areas and handed its remaining arms over to the Angolan government. In September 2002, the Angolan government and UNITA reestablished the Lusaka Protocol's Joint Commission to resolve outstanding political issues. On November 21, 2002, the Angolan government and UNITA declared the provisions of the Lusaka Protocol fully implemented and called for the lifting of sanctions on UNITA imposed by the United Nations Security Council.

With the successful implementation of the Lusaka Protocol and the demilitarization of UNITA, the circumstances that led to the declaration of a national emergency on September 26, 1993, have been resolved. The actions and policies of UNITA no longer pose an unusual and extraordinary threat to the foreign policy of the United States. United Nations Security Council Resolution 1448 (2002) lifted the measures imposed pursuant to prior U.N. Security Council resolutions related to UNITA. The continuation of sanctions imposed by Executive Orders 12865, 13069, and 13098 would have a prejudicial effect on the develop-ment of UNITA as an opposition political party, and therefore, on democratization in Angola. For these reasons, I have determined that it is necessary to terminate the national emergency with respect to UNITA and to lift the sanctions that have been used to apply economic pressure on UNITA.

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Cross-References:

Passport restrictions, **Chapter 1.B.1.**
Terrorism sanctions, **Chapter 3.B.1.c.-e., 10.a.5.b.**
Narcotics-related sanctions, **Chapter 3.B.3.a., c.**
Money-laundering sanctions, **Chapter 3.B.7.**
American Servicemembers' Protection Act, **Chapter 3.C.2.c.**
Expropriations-related sanctions, **Chapter 11.E.5.**
Changes in Oil-for-Food sanctions, **Chapter 18.A.1.b.**
Nuclear nonproliferation sanctions, **Chapter 18.C.9.**
Arms embargoes, **Chapter 18.B.7.**

CHAPTER 17

International Conflict Resolution and Avoidance

A. REGIONAL EFFORTS

1. Role of the Organization of American States in Regional Stability

On June 9, 2003, Secretary of State Colin L. Powell addressed the Plenary of the General Assembly of the Organization of American States ("OAS") in Santiago, Chile. Secretary Powell noted that "[o]ur Inter-American Democratic Charter is correct to declare that 'democracy and social and economic development are interdependent and are mutually reinforcing.'" His remarks, excerpted below, focused on the role of the OAS in promoting stability in the region through regional cooperation.

The full text of the Secretary's remarks is available at *www.state.gov/secretary/rm/2003/21330.htm*.

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New democracies created with high hopes can founder if the lives of ordinary citizens do not change for the better. Transitions can be chaotic. Transitions can be wrenching. We know that corruption will squander a nation's treasure and more importantly, it will undermine public trust.

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. . . [R]egional cooperation is imperative, because so many of the domestic problems countries confront also have major transnational implications. Twelve years ago, the OAS didn't have the mechanisms for regional cooperation that were needed. Today, we do.

The Inter-American Convention Against Corruption and its follow-up mechanism immediately come to mind. Twelve years ago, it would have been unthinkable to suggest that the countries of the hemisphere should evaluate each other's efforts to combat corruption. But that is precisely what the [follow-up mechanism to the] convention provides for. The increased effectiveness of the Inter-American Drug Abuse Control Commission is another case in point. Inherent in the commission's mandate is the consensus that drug abuse and drug trafficking threaten all of our societies and that we must work in concert to stop them. After September 11, 2001, we worked together to reenergize the Inter-American Committee Against Terrorism. And our approval at last year's general assembly in Barbados of the Inter-American Convention Against Terrorism underscores our determination to protect our region against this vicious enemy that knows no limits, national or moral.

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Led by the efforts of OAS Assistant Secretary General Einaudi and the OAS Special Mission, the international community has provided substantial support for strengthening Haiti's institutional capacity and civil society. As a further sign of the commitment of the United States to this effort, I am pleased to announce that the United States will provide an additional $1 million to the OAS Special Mission to help improve the security climate for what we hope will be free and fair elections in Haiti. In addition, the United States has increased our humanitarian assistance to $70 million in the current fiscal year. However, if by this September the government of Haiti has not created the climate of security essential to the formation of a credible, neutral and independent provisional electoral council, we should reevaluate the role of the OAS in Haiti. . . .

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2. U.S.-Adriatic Charter

On May 2, 2003, the United States, Macedonia, Albania, and Croatia signed the U.S.-Adriatic Charter in Tirana, Albania. Remarks by Secretary of State Colin L. Powell at the signing ceremony are excerpted below.

The full text of remarks by Secretary Powell and Foreign Ministers Ilir Meta of Albania, Tonino Picula of Croatia, and Ilinke Mitreva of Macedonia are available at *www.state.gov/secretary/rm/2003/20158.htm*. A fact sheet summarizing the terms of the charter issued the same day is available at *www.state.gov/r/pa/prs/ps/2003/20153.htm*.

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When pledging America's support for further expansion of NATO, President Bush made it clear that the Europe of his vision does not end at the Drava or the Danube, but embraces all the peoples of the Continent, including those of Southeast Europe. As the President stated, every European democracy that seeks NATO membership and is ready to share in NATO's responsibilities should be welcomed in our Alliance.

In this spirit, we warmly welcome the initiative launched with our partners here today to draft the Adriatic Charter. This Charter will serve as a roadmap for them and their path to Euro-Atlantic integration as well as a guide for our collective efforts to help them achieve their aspirations. The Charter reaffirms our partners' dedication to work individually with each other and with their neighbors to build a region of strong democracies powered by free market economies. It underscores the importance we place on their eventual full integration into NATO and other European institutions. And most importantly, the Charter promises to strengthen the ties that bind the peoples of the region to the United States, to one another and to a common future within the Euro-Atlantic family.

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B. PEACE PROCESS AND RELATED ISSUES

1. Sudan

On October 21, 2002, President George W. Bush signed into law the Sudan Peace Act, Pub. L. No. 107–245, 116 Stat. 1504, 50 U.S.C. § 1701 note, "to facilitate famine relief efforts and a comprehensive solution to the war in Sudan." *See Digest 2002* at 922–925. Among other things, the act states that the President shall certify every six months that the Sudan government and the Sudan People's Liberation Movement are negotiating in good faith and that negotiations should continue. If the President certifies that the government has not engaged in good-faith negotiations or has unreasonably interfered with humanitarian efforts, the act states that the President, after consultation with the Congress, shall implement certain sanctions. Consistent with the act, on April 21 and again on October 21, 2003, President George W. Bush certified "that the Government of Sudan and the Sudan People's Liberation Movement are negotiating in good faith and that negotiations should continue." 68 Fed. Reg. 20,329 (April 25, 2003) and 63,977 (Nov. 10, 2003).

On October 22, 2003, the Department of State issued a fact sheet on the bases of the Presidential determination, excerpted below.

The full text of the fact sheet is available at *www.state.gov/r/pa/prs/ps/2003/25548.htm*. A fact sheet issued at the time of the April determination is available at *www.state.gov/r/pa/prs/ps/2003/19820.htm*.

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The President has made this determination and certification on the basis of the following considerations:

- The parties have continued negotiations since April, including five rounds of talks in which many of the

outstanding issues such as power sharing, wealth sharing, and the three conflict areas were constructively discussed.

- There has been high-level engagement in the peace talks between Sudanese Vice President Taha and Sudan People's Liberation Movement Chairman John Garang.
- On September 25, 2003 the parties signed an agreement on security arrangements in Naivasha, Kenya.
- The mediators and international observers continue to support the peace negotiations.
- We believe that the parties are close to a final agreement. However, if no comprehensive agreement is in place by January 21, 2004, and in furtherance of our efforts to keep Congress informed, the President intends to provide an assessment of the parties' participation in and commitment to the peace process.

In addition it should also be noted that the situation with respect to humanitarian access has improved dramatically in southern Sudan since October 2002. At the same time, access to significant populations in need of assistance outside of southern Sudan remains limited.

In October 2003 Secretary of State Colin L. Powell met with coordinators of the Sudanese peace process in Naivasha, Kenya. In his remarks following the meeting, Secretary Powell reiterated the U.S. commitment to work with the parties.

The full text of Secretary Powell's remarks is available at *www.state.gov/secretary/rm/2003/25525.htm.*

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. . . [The parties] have overcome key hurdles with the signing of the Machakos Protocol in July 2002, the signing of an agreement on cessation of hostilities, and, most recently, the signing of an agreement on security arrangements. And that agreement was probably the most difficult of the agreements that have to be concluded. But, they succeeded by their commitment and by their desire to help their people to sign that agreement and to continue

the process. And the way is now open, it is absolutely clear to me, that the way is now open to a final and comprehensive solution.

We must find a solution. This is a moment of opportunity that must not be lost. The people of Sudan have known hardship and devastation for too long. All the people of Sudan, Northerners and Southerners alike, are hungry, are desperate, for an end to this conflict. It is time now for the leaders assembled here to complete the final stage of this marathon, to enable the Sudanese people to experience a new way of life unclouded by the suffering of war.

Based on what I have heard here today, . . . I believe that the final agreement is within the grasp of the parties. . . . I can see the end in sight on the wealth sharing discussions. Power sharing, I think, can be dealt with in the near future. And the three conflict areas, I think can be dealt with, as well. And I know that is the basket of issues that will probably take the greatest work. But I think all of us are confident it can be resolved in the weeks ahead.

And now both parties have agreed to remain in negotiations and conclude a comprehensive settlement no later than the end of December. And both gentlemen have committed themselves to that goal of having a comprehensive settlement by the end of December. Once the parties have signed the final comprehensive agreement for peace, President Bush looks forward and has invited them to come to the White House so that he can recognize their achievement, and also endorse the agreement. And at that moment when the President does receive these leaders and other leaders at the White House, he will once again commit the United States to assisting in the implementation of the agreement. A lot of work will come after the agreement has been signed. The United States will remain just as committed to that work as it has been to the process so far.

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2. Haiti

As noted in Secretary Powell's remarks in A.1., *supra*, the United States was concerned by the failure of the Government of Haiti to comply with commitments it assumed in joining

consensus on OAS Resolution 822. On July 15, 2003, Marc Grossman, Under Secretary of State for Political Affairs, addressed U.S. policy toward Haiti in testimony before the Senate Foreign Relations Committee. His remarks concerning OAS Resolution 822 are excerpted below.

The full text of Mr. Grossman's remarks is available at *www.state.gov/p/22490.htm*.

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. . . [W]e support full implementation of OAS Resolution 822. Our support has included a $2.5 million financial contribution to the OAS Special Mission to Strengthen Democracy in Haiti.

The Government of Haiti joined consensus on Resolution 822; it committed itself to a series of actions that would promote a climate of security and confidence for free and fair elections to be held in 2003. Although the Government of Haiti has taken some steps, it has not complied with many of its most important commitments under Resolution 822, particularly those that would contribute to a climate of security.

Together with the OAS, the U.S. has repeatedly and consistently urged the Government of Haiti to meet its commitments under Resolution 822. Our efforts have included participation by Presidential Special Envoy for Western Hemisphere Affairs in the High-Level OAS/CARICOM delegation to Haiti in March. We also remind the opposition and civil society that they must participate in forming a credible, neutral, and independent Provisional Electoral Council once the Government takes concrete steps in good faith toward meeting its commitments.

Hemispheric patience is running out. . . .

3. Israeli-Palestinian Conflict

a. Roadmap for Peace

On April 30, 2003, the United States, Russia, the European Union, and the United Nations ("the Quartet") presented the Roadmap for Peace to Israel and the Palestinian Authority.

UN Doc. S/2003/529. In a press release of the same date, President Bush commented on recent positive developments:

> On March 14, I noted the important steps taken by the Palestinian Legislative Council (PLC) toward the creation of an empowered, accountable office of Prime Minister. The PLC has now confirmed a new Palestinian Prime Minister and Cabinet. Today, the roadmap for peace developed by the United States over the last several months in close cooperation with Russia, the European Union, and the United Nations has been presented to Israel and the Palestinians.

The text of the President's press release is available at *www.state.gov/p/nea/rls/rm/20115.htm*.

The text of the Roadmap released by the U.S. Department of State on the same day is set forth below and is available at *www.state.gov/r/pa/prs/ps/2003/20062.htm*.

The following is a performance-based and goal-driven roadmap, with clear phases, timelines, target dates, and benchmarks aiming at progress through reciprocal steps by the two parties in the political, security, economic, humanitarian, and institution-building fields, under the auspices of the Quartet. The destination is a final and comprehensive settlement of the Israel-Palestinian conflict by 2005, as presented in President Bush's speech of 24 June [2002], and welcomed by the EU, Russia and the UN in the 16 July and 17 September Quartet Ministerial statements.

A two-state solution to the Israeli-Palestinian conflict will only be achieved through an end to violence and terrorism, when the Palestinian people have a leadership acting decisively against terror and willing and able to build a practicing democracy based on tolerance and liberty, and through Israel's readiness to do what is necessary for a democratic Palestinian state to be established, and a clear, unambiguous acceptance by both parties of the goal of a negotiated settlement as described below. The Quartet will assist and facilitate implementation of the plan, starting in Phase I, including direct discussions between the parties as required. The

plan establishes a realistic timeline for implementation. However, as a performance-based plan, progress will require and depend upon the good faith efforts of the parties, and their compliance with each of the obligations outlined below. Should the parties perform their obligations rapidly, progress within and through the phases may come sooner than indicated in the plan. Non-compliance with obligations will impede progress.

A settlement, negotiated between the parties, will result in the emergence of an independent, democratic, and viable Palestinian state living side by side in peace and security with Israel and its other neighbors. The settlement will resolve the Israel-Palestinian conflict, and end the occupation that began in 1967, based on the foundations of the Madrid Conference, the principle of land for peace, UNSCRs 242, 338 and 1397, agreements previously reached by the parties, and the initiative of Saudi Crown Prince Abdullah —endorsed by the Beirut Arab League Summit—calling for acceptance of Israel as a neighbor living in peace and security, in the context of a comprehensive settlement. This initiative is a vital element of international efforts to promote a comprehensive peace on all tracks, including the Syrian-Israeli and Lebanese-Israeli tracks.

The Quartet will meet regularly at senior levels to evaluate the parties' performance on implementation of the plan. In each phase, the parties are expected to perform their obligations in parallel, unless otherwise indicated.

Phase I: Ending Terror And Violence, Normalizing Palestinian Life, and Building Palestinian Institutions—Present to May 2003

In Phase I, the Palestinians immediately undertake an unconditional cessation of violence according to the steps outlined below; such action should be accompanied by supportive measures undertaken by Israel. Palestinians and Israelis resume security cooperation based on the Tenet work plan to end violence, terrorism, and incitement through restructured and effective Palestinian security services. Palestinians undertake comprehensive political reform in preparation for statehood, including drafting a Palestinian constitution, and free, fair and open elections upon the basis of those measures. Israel takes all necessary steps to help normalize Palestinian life. Israel withdraws from Palestinian areas occupied

from September 28, 2000 and the two sides restore the status quo that existed at that time, as security performance and cooperation progress. Israel also freezes all settlement activity, consistent with the Mitchell report.

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Phase II: Transition—June 2003–December 2003

In the second phase, efforts are focused on the option of creating an independent Palestinian state with provisional borders and attributes of sovereignty, based on the new constitution, as a way station to a permanent status settlement. As has been noted, this goal can be achieved when the Palestinian people have a leadership acting decisively against terror, willing and able to build a practicing democracy based on tolerance and liberty. With such a leadership, reformed civil institutions and security structures, the Palestinians will have the active support of the Quartet and the broader international community in establishing an independent, viable, state.

Progress into Phase II will be based upon the consensus judgment of the Quartet of whether conditions are appropriate to proceed, taking into account performance of both parties. Furthering and sustaining efforts to normalize Palestinian lives and build Palestinian institutions, Phase II starts after Palestinian elections and ends with possible creation of an independent Palestinian state with provisional borders in 2003. Its primary goals are continued comprehensive security performance and effective security cooperation, continued normalization of Palestinian life and institution-building, further building on and sustaining of the goals outlined in Phase I, ratification of a democratic Palestinian constitution, formal establishment of office of prime minister, consolidation of political reform, and the creation of a Palestinian state with provisional borders.

* * * *

Phase III: Permanent Status Agreement and End of the Israeli-Palestinian Conflict—2004–2005

Progress into Phase III, based on consensus judgment of Quartet, and taking into account actions of both parties and Quartet

monitoring. Phase III objectives are consolidation of reform and stabilization of Palestinian institutions, sustained, effective Palestinian security performance, and Israeli-Palestinian negotiations aimed at a permanent status agreement in 2005.

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In May 2003 both the Palestinians and the Israelis accepted the Roadmap. In a joint press conference of May 11, 2003, with Secretary of State Colin L. Powell and Palestinian Prime Minister Mahmoud Abbas, in Jericho, Prime Minister Abbas, stated:

> We look forward to an active and engaged role for the U.S. Government on the roadmap, which was originally an American proposal endorsed by the Quartet and accepted by the Palestinian leadership.

The full text of the press conference is available at *www.state.gov/secretary/rm/2003/20453pf.htm*.

In a communiqué of May 25, 2003, the Government of Israel stated:

> Based on the 23 May 2003 statement of the United States Government, in which the United States committed to fully and seriously address Israel's comments to the Roadmap during the implementation phase, the Prime Minister announced on 23 May 2003 that Israel has agreed to accept the steps set out in the Roadmap.
>
> The Government of Israel affirms the Prime Minister's announcement, and resolves that all of Israel's comments, as addressed in the Administration's statement, will be implemented in full during the implementation phase of the Roadmap. . . .

The communiqué is available at *www.mfa.gov.il/mfa/government/communiques/2003/goverment%20meeting%20about%20the%20prime%20minister-s%20state*.

b. UN Security Council resolutions

On November 19, 2003, the UN Security Council adopted Resolution 1515 "[e]ndors[ing] the Quartet performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" and "[c]all[ing] on the parties to fulfill their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security." S/Res/1515 (2003). Ambassador John D. Negroponte, U.S. Representative to the United Nations, explained the U.S. vote in favor the resolution as excerpted below.

The full text of Ambassador Negroponte's remarks is available at *www.un.int/usa/03_236.htm.*

. . . We remain fully committed to the vision of two states, Israel and Palestine, living side by side in peace and security as outlined by President Bush on June 24, 2002. The road map is the way to realize this vision. That said, peace and security in the region can only be achieved through political dialogue and direct negotiations by the parties. As President Bush said today in London, achieving peace in the region is not just a matter of pressuring one side or the other on the shape of a border or the site of a settlement, crucial as those issues are. As we negotiate the details of peace we must stick to the heart of the matter, which is the need for Palestinian democracy. The long-suffering Palestinian people deserve better. They deserve true leaders capable of creating and governing a Palestinian state. While all parties have responsibility in bringing peace to the Middle East, ending terror must be the highest priority. Senior United States officials remain in close contact with both Israeli and Palestinian leadership.

On September 16, 2003, the United States vetoed a Security Council resolution addressing the situation in the Middle East because it failed to address terrorism. Ambassador Negroponte explained the U.S. position as follows:

> As we stated yesterday, while all parties have responsibilities in bringing peace to the Middle East, ending terrorism must be the highest priority. The resolution put forward today was flawed in that it failed to include the following three elements: a robust condemnation of acts of terrorism; an explicit condemnation of Hamas, the Palestinian Islamic Jihad, and the Al-Aqsa Martyr's Brigade as organizations responsible for acts of terrorism; and a call for the dismantlement of infrastructure, which supports these terror operations, wherever located, consistent with Resolution 1373.

The full text of Ambassador Negroponte's remarks is available at *www.un.int/usa/03_141.htm.*

c. UN Commission on Human Rights resolutions

The United States delegation to the 59th UN Commission on Human rights ("UNCHR") made similar points in calling for votes and voting no on a series of resolutions related to the Arab-Israeli situation. On April 14, 2003, for example, Ambassador Jeane J. Kirkpatrick explained the U.S. decision to call for a vote on the Resolution on the Situation in Occupied Palestine and to vote no.

See www.humanrights-usa.net/2003/statements/0415EOVItem5.htm. Resolutions adopted are available at *http://www.unhchr.ch/huridocda/huridoca.nsf/Documents?OpenFrameset.*

d. Request to International Court of Justice for advisory opinion

On December 8, 2003, the UN General Assembly, meeting in its resumed Tenth Emergency Special Session, adopted Resolution ES-10/14 entitled "Illegal Israeli Actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory." UN Doc. A/RES/ES-10/14 (2003). In the resolution, the General Assembly decided to request an

advisory opinion from the International Court of Justice on the following question:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

The United States voted against the resolution. Ambassador James B. Cunningham, Deputy U.S. Representative to the United Nations, provided the explanation of the U.S. position, set forth below, opposing the resolution as "undermin[ing], rather than encourag[ing], direct negotiations between the parties to resolve their differences."

The full text of Ambassador Cunningham's remarks is available at *www.un.int/usa/03_250.htm.*

This Emergency Special Session, which has been ongoing since 1997, does not contribute to the shared goal of implementing the roadmap. The path to peace is the "Quartet Performance-based Roadmap to a Permanent Two State Solution to the Israeli-Palestinian Conflict." The roadmap, endorsed in the Security Council Resolution 1515, very clearly outlines the obligations and responsibilities of the parties to achieve President Bush's vision of two states, Palestine and Israel, living side by side in peace and security.

The international community has long recognized that resolution of the conflict must be through negotiated settlement, as called for in UNSC Resolutions 242 and 338. This was spelled out clearly to the parties in the terms of reference of the Madrid Peace Conference in 1991. Involving the International Court of Justice in this conflict is inconsistent with this approach and could actually delay a two-state solution and negatively impact roadmap implementation. Furthermore, referral of this issue to

the International Court of Justice risks politicizing the court. It will not advance the court's ability to contribute to global security nor will it advance the prospects of peace.

The United States' policy on Israeli construction of the fence is clear and consistent. We oppose activities by either party that prejudge final status negotiations. As President Bush said on November 19, "Israel should freeze settlement construction, dismantle unauthorized outposts, end the daily humiliation of the Palestinian people, and not prejudice final negotiations with the placements of walls and fences."

But this meeting today and this resolution undermine, rather than encourage, direct negotiations between the parties to resolve their differences. This is the wrong way and the wrong time to proceed on this issue.

Furthermore, the resolution draft itself is one-sided and completely unbalanced. The text itself is clearly not designed to promote a process towards peace. It doesn't even mention the word terrorism. We will vote against this ill-advised resolution and urge Assembly members not to support it.

The request for an advisory opinion was transmitted to the ICJ by the Secretary-General of the United Nations in a letter dated December 8, 2003. By Order of December 19, 2003, the ICJ established January 30, 2004, as the date for filing of written statements and February 23, 2004, as the date for oral proceedings. The request, press releases and orders are available at *www.icj-cij.org.*

4. Burundi

On October 8, 2003, the Government of Burundi and the National Council for the Defense of Democracy-Forces for the Defense of Democracy signed an agreement on political and military integration. The United States welcomed the move toward a lasting peaceful resolution of the civil war that began in 1993 in a press statement released by the Department of State, excerpted below.

The full text of a press statement released by the Department of State on October 8, excerpted below, is available at *www.state.gov/r/pa/prs/ps/2003/25042pf.htm*.

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The United States Government hails the signing on October 8 of an agreement on political and military integration between the Government of Burundi and the National Council for the Defense of Democracy-Forces for the Defense of Democracy and we welcome the joint declaration announcing an immediate end to hostilities. This agreement was reached after marathon negotiation sessions in Pretoria, South Africa, led by South African President Thabo Mbeki and South African Deputy President Jacob Zuma. This is the most significant development in the Burundi Peace Process since the Arusha Peace Accords were signed in August 2000.

* * * *

We are confident that both sides will continue with these constructive efforts and resolve the few remaining issues during their next meeting scheduled to take place in Pretoria in two weeks.

We once again call on the rebel forces of the Party for the Liberation of the Hutu People-Forces for National Liberation under the command of Agathon Rwasa to immediately cease fighting and seek a peaceful resolution of their grievances.

5. Georgia

On November 23, 2003, President Eduard Shevardnadze of Georgia resigned and was replaced by Nino Burdzhanadze as acting president. The United States welcomed the peaceful transition in a press statement stating, "The U.S. supports the stability and sovereignty of a democratic Georgia and is committed to helping the Georgian people emerge from this crisis."

The full text of the press statement by Richard Boucher, Department of State Spokesman, is available at *www.state.gov/r/pa/prs/ps/2003/26548.htm*.

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6. Republic of Chechnya

The United States voted in favor of the UN Commission on Human Rights ("UNCHR") Resolution, "Situation of Human Rights in the Republic of Chechnya." E/CN.4/RES/2001/24. On April 16, 2003, Ambassador E. Michael Southwick of the U.S. delegation to the 59th CHR offered the following comments on the U.S. position, which addressed the constitutional referendum in Chechnya.

The statement, set forth below, is available at *www.humanrights-usa.net/2003/statements/0416chechnya.htm*. The resolution is available at *http://www.unhchr.ch/huridocda/huridoca.nsf/Documents?OpenFrameset*.

The United States will vote in favor of this resolution because of our deep concern over continuing human rights violations by Russian armed forces and security services in Chechnya. The resolution lays out violations of international human rights law and humanitarian law observed in Chechnya. They are very serious and must be addressed by the government of Russia if we are ever going to see a political resolution of this long and painful conflict. The people of Chechnya have been subjected to unendurable suffering as a consequence of this war.

However we wish to highlight other aspects of the resolution. It strongly condemns terrorist acts and assassinations of local officials in Chechnya, as well as the hostage taking in a Moscow theater and the suicide truck bombing of Grozny's main government building last year. These acts were carried out by certain Chechen groups fighting for the separation of the Republic of Chechnya from the Russian Federation. The United States

government has designated three Chechen combatant organizations as terrorist organizations, and the UN 1267 Committee has designated them as terrorist groups for their ties to the Taliban and al-Qa'ida. My government has also called on the Chechen authorities and insurgents to renounce terrorist acts. We have also demanded that the leadership of the Chechen separatist movement repudiate, in word and in deed, all ties to Chechen and international terrorists. But as far as we are able determine, the Chechen separatist leadership has not done so.

Finally, my government wishes to emphasize its hope that—as the resolution also states—the March 23 constitutional referendum in Chechnya will enable a political process to take hold that produces a lasting reconciliation in the area. My government finds encouragement in several promises made publicly by senior Russian government officials to alleviate the situation in Chechnya, including the promise of an amnesty, enforcement of observance of human rights, reduction in number of checkpoints, an agreement delimiting competencies between local authorities and Moscow, an increased flow of reconstruction funds into Chechnya, compensation for destruction of dwellings, and efforts to facilitate the voluntary return of Internally Displaced Persons to Chechnya. We hope this political process will bring an end to the violation of human rights in that troubled region of the Russian Federation.

7. Democratic Republic of the Congo

On July 18, 2003, Ambassador John D. Negroponte addressed the Security Council concerning the inauguration of a transitional government in the Democratic Republic of the Congo, stating:

> Mr. President, the United States welcomes the inauguration yesterday of the transitional government in the Democratic Republic of Congo and agree that this is an extremely important and vital step towards unifying the DRC, ending five years of war, and launching the country on a democratic path. And I would like to affirm here

> that the United States strongly supports the transitional government.
>
> The full text is available at *www.un.int/usa/03_104.htm*.

C. PEACEKEEPING MISSIONS AND RELATED ISSUES

1. Liberia

On August 1, 2003, the UN Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1497, which had been introduced by the United States. The resolution authorized the establishment of a multinational force in Liberia

> to support the implementation of the 17 June 2003 ceasefire agreement, including establishing conditions for initial stages of disarmament, demobilization and reintegration activities, to help establish and maintain security in the period after the departure of the current President and the installation of a successor authority, taking into account the agreements to be reached by the Liberian parties, and to secure the environment for the delivery of humanitarian assistance, and to prepare for the introduction of a longer-term UN stabilization force to relieve the Multinational Force.

The resolution noted further that "critical to this endeavour is the fulfillment of the commitment to depart from Liberia made by President Charles Taylor." Ambassador John D. Negroponte explained the U.S. support for the resolution and the deployment of the multinational force, headed by the Economic Community of West African States ("ECOWAS"), as excerpted below. *See also* Chapter 3.C.2.b.(2) for a discussion of language included in Resolution 1497 concerning countries not parties to the International Criminal Court.

The full text of Ambassador Negroponte's statement is available at *www.un.int/usa/03_120.htm*

. . . The United States is gratified by the swift action taken by the Security Council in adopting this important resolution (1497) on Liberia introduced by my delegation. Our sponsorship of this resolution reflects the importance that the United States places on finding the right and effective means to bring peace to Liberia. It is our conclusion that an effective response demands intensive involvement by ECOWAS and the international community, anchored by the United Nations. The United States will do its part to support this endeavor. We ask all Member States to show their support through contributions to the staffing, funding and sustenance of the Multinational Force and the United Nations Peacekeeping Mission to follow.

This resolution will permit the Multinational Force to deploy in Liberia under the authority of Chapter VII of the United Nations Charter. It also sets in motion the establishment of a United Nations Peacekeeping Mission. The resolution authorizes the peacekeeping forces in Sierra Leone to provide support to the initial phase of ECOWAS deployment without jeopardizing UNAMSIL's continuing mission. And it authorizes the Secretary General to take immediate steps to begin to prepare for deployment of a follow-on United Nations Peacekeeping Mission. . . .

The Multinational Force and a follow-on United Nations peacekeeping operation go hand in hand. The Multinational Force is a crucial short-term bridge to our goal of placing United Nations peacekeepers on the ground in Liberia as soon as possible.

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President Bush has directed the Secretary of Defense to position appropriate military capabilities to support the deployment of an ECOWAS force. A U.S. marine force will shortly reach the coast off Liberia. A first ECOWAS reconnaissance team has arrived in Monrovia. As part of the ECOWAS vanguard for the Multinational Force, a first Nigerian battalion is set to move into Liberia as soon as Monday. Clearly there was a manifest need for the Council to adopt this resolution quickly.

As the security situation deteriorates, humanitarian conditions already appalling continue to worsen at a devastating pace. Peacekeepers on the ground will secure the environment for the

delivery of humanitarian assistance. Their presence will support the implementation of the June 17 ceasefire agreement, including establishing conditions for initial stages of disarmament and demobilization activities. Very importantly, peacekeepers will safeguard security in the wake of Charles Taylor's departure from the Liberian presidency. I cannot emphasize how crucial it is for Taylor to leave now.

Furthermore, it is imperative that all Liberia parties who are signatories to the June 17 ceasefire agreement, in particular the LURD and MODEL leadership, immediately and scrupulously uphold the June 17 ceasefire agreement. In this regard, all Liberian parties must cooperate fully with the Multinational Force and ensure the forces safety and security in Liberia.

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President Taylor departed Liberia on August 11, 2003. On August 18, the Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United For Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and the Political Parties was signed in Accra, Ghana. *See www.usip.org/library/pa/Liberia/Liberia_08182003_cpa.html.*

On September 19, 2003, the Security Council adopted Resolution 1509 welcoming President Taylor's resignation and departure and reaffirming its support for the Comprehensive Peace Agreement. In Resolution 1509 the Security Council

> [d]ecided to establish the United Nations Mission in Liberia (UNMIL), the stabilization force called for in resolution 1497 (2003) for a period of 12 months, and requests the Secretary-General to transfer authority from the ECOWAS-ld ECOML forces to UNMIL on 1 October 2003 . . .

The UN Mission deployed on October 1, 2003. The United States welcomed the action, stating that the "United States is committed to its success." *See* press statement available at *www.state.gov/r/pa/prs/ps/2003/24813pf.htm.*

2. Western Sahara

On July 31, 2003, the United States supported adoption of Security Council Resolution 1495, renewing the mandate of the Mission for a Referendum in Western Sahara ("MINURSO"). MINURSO was deployed to the Western Sahara in 1991 to monitor a ceasefire agreement between the Government of Morocco and the Frente POLISARIO, and to organize and conduct a referendum that would allow the people of the Western Sahara to decide the territory's future status. *See www.un.org/Depts/dpko/missions/minurso/index.html.*

In a statement to the Security Council, Ambassador John D. Negroponte explained the U.S. position on the mission.

The full text is available at *www.un.int/usa/03_119.htm.*

The resolution (1495) we have adopted today responds to the Secretary-General's recommendations (S/2003/565 and Corr.1) on the way ahead in the Western Sahara. This resolution represents a considered recommendation of the Council to the parties and neighboring states, but does not constitute an imposition. All Council Members support the "Peace plan for the self-determination of the people of Western Sahara" as an optimum political solution to this longstanding dispute of nearly thirty years. The peace plan is a fair and balanced compromise, giving each party some, but not all, of what it wants. We call upon the parties and the neighboring states to seize the opportunity presented by the plan and cooperate closely and actively with the Secretary-General and his Personal Envoy—and with each other—to follow up this important Resolution. . . .

3. Afghanistan

On October 13, 2003, Ambassador John D. Negroponte provided a brief statement, acting in his national capacity at the time he was also president of the Council, supporting

adoption of UN Security Council Resolution 1510, authorizing the expansion of the International Security Assistance Force in Afghanistan.

The full text of his remarks is available at *www.un.int/usa/03print_168.htm*.

The Security Council has just voted unanimously to authorize the expansion of the International Security Assistance Force, to support the Afghan Transitional Authority and its successors in the maintenance of security in areas of Afghanistan outside of Kabul and its environs. The Council applauds the recent decision taken by the North Atlantic Treaty Organization to carry out the expansion.

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This resolution helps pave the way for the increased security in Afghanistan upon which nearly everything else is dependent.

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Cross-References

Termination of visa restrictions and other sanctions, **Chapter 1.C.6.; Chapter 16.A.4. and B.**
Rule of Law and Democracy, **Chapter 6.I.**
Protocols on accession to NATO, **Chapter 4.B.3. and Chapter 7.C.**
HIV/AIDS and peace and security, **Chapter 13.B.2.b.**
North Korea, **Chapter 18.C.4.**

Chapter 18

Use of Force and Arms Control

A. USE OF FORCE

1. Iraq

a. Military intervention in Iraq

On October 3, 2002, President George W. Bush signed into law the Joint Resolution to Authorize the Use of United States Armed Forces against Iraq. H.J. Res. 114, 107th Cong. (2002), Pub. L. No.107–243, 116 Stat. 1498. The joint resolution authorized use of force to "defend the national security of the United States against the continuing threat posed by Iraq" and "enforce all relevant United Nations Security Council resolutions regarding Iraq." Among other things, the joint resolution required the President, "prior to [exercising the authorization to use force] or as soon thereafter as may be feasible, but no later than 48 hours after exercising such authority," to make two determinations: (1) that "further diplomatic or other peaceful means alone" would not accomplish the objectives for which the use of force was authorized and (2) that such action "is consistent with the United States and other countries continuing to take the necessary actions against [terrorism]."

On November 8, 2002, the UN Security Council unanimously adopted Resolution 1441, which recognized "the threat Iraq's non-compliance with council resolutions and proliferation of weapons of mass destruction and long-range missiles

poses to international peace and security," and recalled the authorization in Resolution 678 to use "all necessary means" to uphold Resolution 660 and all subsequent relevant resolutions. It decided that Iraq remained "in material breach of obligations under relevant UN resolutions," provided Iraq with "a final opportunity to comply with its disarmament obligations," and recalled its repeated warnings to Iraq that it would "face serious consequences" for continued violations. Also on November 8, the United States issued a fact sheet summarizing Iraq's violations of sixteen UN Security Council resolutions.

On December 7, 2002, Iraq submitted a 12,200-page document in response to the requirement of Resolution 1441 for a "currently accurate, full and complete" declaration on all aspects of its weapons programs. On December 19, 2002, the Department of State issued a fact sheet entitled "Illustrative Examples of Omissions From the Iraqi Declaration to the United Nations Security Council," available at *www.state.gov/r/pa/prs/ps/2002/16118pf.htm*. On the same day, Secretary of State Colin L. Powell concluded in a press conference that "[t]he world is still waiting for Iraq to comply with its obligations. The world will not wait forever. Security Council Resolution 1441 will be carried out in full." *See www.state.gov/secretary/rm/2002/16123pf.htm*. These events of 2002 are discussed in *Digest 2002* at 933–947.

During the early months of 2003, the United States remained actively involved in monitoring whether Iraq was making efforts to comply with Resolution 1441. On February 5, 2003, following a January 27 Security Council briefing by the UN Monitoring, Verification and Inspection Commission ("UNMOVIC") and the International Atomic Energy Agency ("IAEA"), Secretary of State Powell appeared before the Security Council to present evidence concerning the Iraqi weapons programs. One purpose of his remarks, he stated, was "to support the core assessments made by Dr. Blix [UNMOVIC] and Dr. El Baradei [IAEA]." Dr. Blix reported to the Council on January 27 that "Iraq appears not to have come to a genuine acceptance, not even today, of

the disarmament which was demanded of it." Following presentation of additional information on "Iraq's weapons of mass destruction, as well as Iraq's involvement in terrorism, which is also the subject of Resolution 1441 and other earlier resolutions," Secretary Powell concluded as set forth below.

The full text of Secretary Powell's presentation is available at *www.state.gov/secretary/rm/2003/17300.htm.*

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My colleagues, over three months ago, this Council recognized that Iraq continued to pose a threat to international peace and security, and that Iraq had been and remained in material breach of its disarmament obligations.

Today, Iraq still poses a threat and Iraq still remains in material breach. Indeed, by its failure to seize on its one last opportunity to come clean and disarm, Iraq has put itself in deeper material breach and closer to the day when it will face serious consequences for its continue defiance of this Council.

My colleagues, we have an obligation to our citizens. We have an obligation to this body to see that our resolutions are complied with. We wrote 1441 not in order to go to war. We wrote 1441 to try to preserve the peace. We wrote 1441 to give Iraq one last chance.

Iraq is not, so far, taking that one last chance.

We must not shrink from whatever is ahead of us. We must not fail in our duty and our responsibility to the citizens of the countries that are represented by this body.

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On February 24, 2003, the United Kingdom tabled a draft resolution, cosponsored by the United States and Spain, addressing future action on Iraq in light of Iraq's failure to comply with Resolution 1441. Ambassador John G. Negroponte, Permanent Representative of the United States of America to the United Nations, explained that "[i]t is now apparent that instead of seizing this final opportunity, Iraq

has tried to continue business-as-usual. But the . . . Security Council must not allow itself to return to business-as-usual on Iraq. By presenting this resolution, we hope to clarify the thinking on Iraq." *See www.state.gov/p/io/rls/rm/2003/17935pf.htm.*

On March 17, 2003, Secretary of State Powell announced that the United States had concluded that no further efforts to obtain additional Security Council support were warranted in light of threats of veto. He also explained that the United States did not consider a further Security Council resolution necessary to provide legal authority for use of force against Iraq. Excerpts from Secretary Powell's statement and questions and answers with the press are set forth below.

The full text of the press briefing is available at *www.state.gov/secretary/rm/2003/18771pf.htm. See also* Secretary Powell's remarks to the press on September 3, 2003, available at *www.state.gov/secretary/rm/2003/23721.htm.*

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We said we believed that [Iraq's December 2002] false declaration was a material breach. We continued to support the inspectors, we continued to watch, and although we have seen some process improvements and some grudging movement on the part of Saddam Hussein's regime to provide some information and provide some equipment to the inspectors, it certainly wasn't the kind of compliance and total cooperation that 1441 required and that we were hoping but had no illusions about Iraq being able to accept and respond to.

As a result of this and as a result of a number of briefings that we received from UNMOVIC and IAEA, a week and a half ago, the United Kingdom, the United States and Spain put forward a resolution that would once again give Saddam Hussein one last chance to act or face the serious consequences that were authorized and clearly intended in UN Resolution 1441.

Unfortunately, over . . . a little less than two weeks that we have been debating this particular draft resolution, and despite best efforts to see whether or not language could be adjusted to

make it more acceptable to Council members, it is clear that there are some permanent members of the Council that would veto any such resolution or any resolution resembling the one that the British tabled Friday before last at the United Nations.

As a result of this, the United Kingdom, the United States and Spain decided to not call for a vote on this resolution. We spent a great deal of time overnight and early this morning talking to friends and colleagues around the world about the resolution and it was our judgment, reached by the United States, the United Kingdom and Spain that no further purpose would be served by pushing this resolution. So we are not going to ask for a vote on the resolution. The resolution will die anyway, because it had a built-in date of 17 March within the resolution, which has not been modified.

As you heard the President and the other leaders who assembled in the Azores yesterday for the Atlantic Summit say, the window on diplomacy is closing. . . . [This evening] President Bush will address the nation and the world on the situation as we now see it. . . .

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QUESTION: Back in November, when several [Security Council members] tried to dilute the resolution, and they did accomplish some word changes, would it be fair to say that they understood at the end that force was possible? Because they seem to give the impression they had succeeded in sidetracking force. And could you say if you think there will be permanent damage to the alliance with what the French have done with support from Germany and Russia?

SECRETARY POWELL: On your first question . . .

* * * *

there can be no confusion on this point. If you remember the debate that we were having before 1441 was passed, there were some nations who insisted that a second resolution would be required. And we insisted that a second resolution would not be required. And as we negotiated our way through that, we made it absolutely clear that we did not believe that the resolution as it

finally passed would require a second resolution. And, in fact, the resolution that we are not taking to a vote today is not a resolution that we believe was necessary. It was a resolution we're supporting along with the United Kingdom, who tabled it, and Spain. It was a resolution that would help some of our friends to show to their publics and to the world that we had taken one last step, we had made one last effort to see if Saddam Hussein would come into compliance.

The burden of this problem rests squarely on Saddam Hussein and his continuing efforts to deceive, to deny, to do everything to divide the Council, to take advantage of every meeting we have had over the last several months, to do something just before that meeting to suggest that he is complying when he really isn't. And the world should know that this crisis is before us because of this regime and its flagrant violation of obligations that it entered into over the last 12 years. That's where the burden lies.

In a television address on the same date, President George W. Bush announced that "Saddam Hussein and his sons must leave Iraq within 48 hours. Their refusal to do so will result in military conflict, commenced at a time of our choosing." The President explained the basis of his decision as set forth below.

The full text of the address is available at *www.whitehouse.gov/news/releases/2003/03/20030317-7.html*.

My fellow citizens, events in Iraq have now reached the final days of decision. For more than a decade, the United States and other nations have pursued patient and honorable efforts to disarm the Iraqi regime without war. That regime pledged to reveal and destroy all its weapons of mass destruction as a condition for ending the Persian Gulf War in 1991.

Since then, the world has engaged in 12 years of diplomacy. We have passed more than a dozen resolutions in the United Nations Security Council. We have sent hundreds of weapons inspectors to oversee the disarmament of Iraq. Our good faith has not been returned.

The Iraqi regime has used diplomacy as a ploy to gain time and advantage. It has uniformly defied Security Council resolutions demanding full disarmament. Over the years, U.N. weapon inspectors have been threatened by Iraqi officials, electronically bugged, and systematically deceived. Peaceful efforts to disarm the Iraqi regime have failed again and again—because we are not dealing with peaceful men.

Intelligence gathered by this and other governments leaves no doubt that the Iraq regime continues to possess and conceal some of the most lethal weapons ever devised. This regime has already used weapons of mass destruction against Iraq's neighbors and against Iraq's people.

The regime has a history of reckless aggression in the Middle East. It has a deep hatred of America and our friends. And it has aided, trained and harbored terrorists, including operatives of al Qaeda.

The danger is clear: using chemical, biological or, one day, nuclear weapons, obtained with the help of Iraq, the terrorists could fulfill their stated ambitions and kill thousands or hundreds of thousands of innocent people in our country, or any other.

The United States and other nations did nothing to deserve or invite this threat. But we will do everything to defeat it. Instead of drifting along toward tragedy, we will set a course toward safety. Before the day of horror can come, before it is too late to act, this danger will be removed.

The United States of America has the sovereign authority to use force in assuring its own national security. That duty falls to me, as Commander-in-Chief, by the oath I have sworn, by the oath I will keep.

Recognizing the threat to our country, the United States Congress voted overwhelmingly last year to support the use of force against Iraq. America tried to work with the United Nations to address this threat because we wanted to resolve the issue peacefully. We believe in the mission of the United Nations. One reason the U.N. was founded after the second world war was to confront aggressive dictators, actively and early, before they can attack the innocent and destroy the peace.

In the case of Iraq, the Security Council did act, in the early 1990s. Under Resolutions 678 and 687—both still in effect—the United States and our allies are authorized to use force in ridding Iraq of weapons of mass destruction. This is not a question of authority, it is a question of will.

Last September, I went to the U.N. General Assembly and urged the nations of the world to unite and bring an end to this danger. On November 8th, the Security Council unanimously passed Resolution 1441, finding Iraq in material breach of its obligations, and vowing serious consequences if Iraq did not fully and immediately disarm.

* * * *

In recent days, some governments in the Middle East have been doing their part. They have delivered public and private messages urging the dictator to leave Iraq, so that disarmament can proceed peacefully. He has thus far refused. All the decades of deceit and cruelty have now reached an end. Saddam Hussein and his sons must leave Iraq within 48 hours. Their refusal to do so will result in military conflict, commenced at a time of our choosing. For their own safety, all foreign nationals—including journalists and inspectors—should leave Iraq immediately.

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. . . [A]ll Iraqi military and civilian personnel should listen carefully to this warning. In any conflict, your fate will depend on your action. Do not destroy oil wells, a source of wealth that belongs to the Iraqi people. Do not obey any command to use weapons of mass destruction against anyone, including the Iraqi people. War crimes will be prosecuted. War criminals will be punished. And it will be no defense to say, "I was just following orders."

We are now acting because the risks of inaction would be far greater. In one year, or five years, the power of Iraq to inflict harm on all free nations would be multiplied many times over. With these capabilities, Saddam Hussein and his terrorist allies could choose the moment of deadly conflict when they are strongest. We choose to meet that threat now, where it arises, before it can appear suddenly in our skies and cities.

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On the evening of March 19, 2003, President Bush announced:

> American and coalition forces are in the early stages of military operations to disarm Iraq, to free its people and to defend the world from grave danger.
>
> On my orders, coalition forces have begun striking selected targets of military importance to undermine Saddam Hussein's ability to wage war. These are opening stages of what will be a broad and concerted campaign. More than 35 countries are giving crucial support—from the use of naval and air bases, to help with intelligence and logistics, to the deployment of combat units. Every nation in this coalition has chosen to bear the duty and share the honor of serving in our common defense.

The full text of the President's announcement is available at *www.whitehouse.gov/news/releases/2003/03/20030319-17.html.*

The next day, March 20, Ambassador Negroponte delivered a letter to the president of the Security Council providing the legal basis for the military action. The letter, reproduced in full below, is available at *www.un.int/usa/s2003_351.pdf.*

Coalition forces have commenced military operations in Iraq. These operations are necessary in view of Iraq's continued material breaches of its disarmament obligations under relevant Security Council resolutions, including resolution 1441 (2002). The operations are substantial and will secure compliance with those obligations. In carrying out these operations, our forces will take all reasonable precautions to avoid civilian casualties.

The actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991). Resolution 687 (1991) imposed a series of obligations on Iraq, including, most importantly, extensive disarmament obligations,

that were conditions of the ceasefire established under it. It has been long recognized and understood that a material breach of these obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678 (1990). This has been the basis for coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by the Secretary-General's public announcement in January 1993 following Iraq's material breach of resolution 687 (1991) that coalition forces had received a mandate from the Council to use force according to resolution 678 (1990).

Iraq continues to be in material breach of its disarmament obligations under resolution 687 (1991), as the Council affirmed in its resolution 1441 (2002). Acting under the authority of Chapter VII of the Charter of the United Nations, the Council unanimously decided that Iraq has been and remained in material breach of its obligations and recalled its repeated warnings to Iraq that it will face serious consequences as a result of its continued violations of its obligations. The resolution then provided Iraq a "final opportunity" to comply, but stated specifically that violations by Iraq of its obligations under resolution 1441 (2002) to present a currently accurate, full and complete declaration of all aspects of its weapons of mass destruction programmes and to comply with and cooperate fully in the implementation of the resolution would constitute a further material breach. The Government of Iraq decided not to avail itself of its final opportunity under resolution 1441 (2002) and has clearly committed additional violations. In view of Iraq's material breaches, the basis for the ceasefire has been removed and use of force is authorized under resolution 678 (1990).

Iraq repeatedly has refused, over a protracted period of time, to respond to diplomatic overtures, economic sanctions and other peaceful means, designed to help bring about Iraqi compliance with its obligations to disarm and to permit full inspection of its weapons of mass destruction and related programmes. The actions that coalition forces are undertaking are an appropriate response. They are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area. Further delay

would simply allow Iraq to continue its unlawful and threatening conduct. It is the Government of Iraq that bears full responsibility for the serious consequences of its defiance of the Council's decisions. I would be grateful if you could circulate the text of the present letter as a document of the Security Council.

On March 21, in response to questions from the press, Ambassador Negroponte confirmed that the United States was relying on the existing Security Council resolutions for the use of force against Iraq. The relevant question and answer are set forth below.

The full text of remarks to the press is available at *www.un.int/usa/03_038.htm.*

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Reporter: Ambassador, in your letter to the President of the Security Council . . . laying out justification for military action you cited 678, 687 and 1441. There was no mention of Article 51 or self-defense. There has been a lot of concern that the U.S. is . . . operating in Iraq under . . . a pre-emptive sort of doctrine. Can you give us some sense whether you are operating under the legal basis that you are operating under . . . Article 51 self-defense, or is that not the legal grounds?

Ambassador Negroponte: You saw the authorities that we cite in the letter. I think they are quite clear. The President said that in his speech the other night to the nation. He referred to Resolutions 678 and 687, and we laid out those arguments. We believe that we are acting to enforce existing Security Council Resolutions vis-à-vis Iraq. Thank you.

Background points provided in a telegram of March 20, 2003, to all U.S. diplomatic and consular posts elaborated on the legal analysis, as set forth below.

— United Nations Security Council resolutions already adopted by the Council provide authority under international law for use of force against Iraq.

— Before the Gulf War, the Security Council adopted UNSCR 678, authorizing use of "all necessary means" to uphold UNSCR 660 (demanding Iraq's withdrawal from Kuwait) and subsequent resolutions. and to "restore international peace and security in the area." This was the basis for use of force against Iraq during the Gulf War.
— In April 1991, the Security Council imposed WMD obligations on Iraq as a condition of the cease-fire declared under UNSCR 687. Because Iraq has materially breached these WMD obligations, which were essential to the restoration of peace and security in the area, the basis for the cease-fire has been removed, and the use of force is authorized under UNSCR 678.
— This has been the longstanding position of the United States and has been reflected in the Security Council's practice since UNSCR 687 was adopted in 1991. For example, when coalition forces used force against Iraq in 1993 in response to Iraqi violations, the UN Secretary General stated publicly that the coalition "had received a mandate from the Security Council according to resolution 678, and the cause of the raid was the violation by Iraq of Resolution 687 concerning the cease-fire. So, as Secretary-General of the United Nations, I can say that this action was taken and conforms to the resolutions of the Security Council and conformed to the Charter of the United Nations." No new resolution authorizing "all necessary means" was required.
— Coalition forces also relied on Iraq's material breaches of the UNSCR 687 cease-fire conditions—namely Iraq's ongoing WMD activities and its refusal to cooperate with UN weapons inspectors—as the international legal basis for airstrikes against Iraq in 1998, in operation Desert Fox.
— In UNSCR 1441 (2002), the Security Council unanimously decided again that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687. In the same resolution, the Council recalled that it had warned Iraq repeatedly that it would

face serious consequences as a result of its continued violations of its obligations.

— The Council decided, however, to afford Iraq a "final opportunity" to comply with its disarmament obligations. Regrettably, Iraq failed to submit a currently accurate, full and complete declaration of its WMD holdings and failed to cooperate fully in the implementation of the resolution. The Council had decided previously that such violations of UNSCR 1441 "shall constitute a further material breach."

— The legal authority to use force to address Iraq's material breaches is clear. Nothing in UNSCR 1441 requires a further resolution, or other form of Security Council approval, to authorize the use of force. "Material breaches" of the cease-fire conditions serve as a predicate for use of force against Iraq. And there can be no doubt that Iraq is in "material breach" of its obligations, as the Council reaffirmed in UNSCR 1441.

— As President Bush has said, we are now acting to compel Iraq's compliance with these resolutions because the risks of inaction would be far greater. In one year, or five years, the power of Iraq to inflict harm on all free nations would be multiplied many times over. With these capabilities Saddam Hussein and his terrorist allies could choose the moment of deadly conflict when they are strongest. We choose to meet that threat now, where it arises, before it can appear suddenly in our skies and cities.

[Concerning possible second Security Council resolution]:

— The USG indicated from the beginning that a second resolution would be politically desirable but not legally necessary.

— The basis for using force is as set out above. The fact that the Council did not agree on an additional decision does not negate the legal effect of what it previously decided.

President Bush had reported to Congress, making the two determinations required by section 3(b) of the joint resolution authorizing use of force against Iraq, Pub. L.

No. 107–243, 116 Stat. 1498 (2003). Letter of March 18, 2003, from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate.

The full text of the letter, excerpted below, is available at *www.whitehouse.gov/news/releases/2003/03/print/20030319-1.html.*

. . . I determine that:

* * * *

(1) reliance by the United States on further diplomatic and other peaceful means alone will neither (A) adequately protect the national security of the United States against the continuing threat posed by Iraq nor (B) likely lead to enforcement of all relevant United Nations Security Council resolutions regarding Iraq; and

(2) acting pursuant to the Constitution and Public Law 107–243 is consistent with the United States and other countries continuing to take the necessary actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.

b. Oil-for-Food program

On March 28, 2003, the UN Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1472. The resolution modified the Oil-for-Food ("OFF") program by, among other things, authorizing the Secretary-General "and representatives designated by him" to continue the provision of humanitarian relief to the Iraqi people under the program. Preambular paragraph 1 noted that

> under the provisions of Article 55 of the Fourth Geneva Convention (Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949), to the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food

> and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate . . . .

The preambular paragraphs also noted the decision made by the Secretary-General on March 17, 2003, to withdraw all UN and international staff "tasked with the implementation of the 'Oil-for-Food Programme' established under resolution 986 (1995)" and recorded the "urgent need to continue to provide humanitarian relief to the people of Iraq" and to "sustain the operation of the present national food basket distribution network."

In response to a question from a reporter on March 21, 2003, Ambassador Negroponte noted that the Security Council was seeking to address the issue, "absent an Iraqi authority, who will have the authority to deal with such matters as existing Oil-For-Food contracts, shipment points, destinations inside and outside of Iraq and details of that nature." The full text of his exchange with reporters is available at *www.un.int/usa/03_038.htm*.

Ambassador Negroponte explained the U.S. vote in favor of the resolution on March 28 as set forth below.

The full text is available at *www.un.int/usa/03_043.htm*.

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I think that today's Security Council vote modifying the Oil-for-Food Program marks an important step, which the United States has favored from the moment that the United Nations personnel were withdrawn and the program was suspended. . . .

We have full confidence that the Secretary-General and the UN's Office of the Iraq Program will effectively carry out the important task of resuming the program in the weeks ahead. For its part, the United States will facilitate the necessary coordination on the ground in Iraq between coalition authorities and the United Nations and associated relief agency staff as Oil-for-Food supplies and other humanitarian assistance arrive and are distributed, as circumstances on the ground permit.

* * * *

c. U.S. role in post-conflict Iraq

(1) Freedom Message to Iraqi People

On April 16, 2003, U.S. General Tommy R. Franks, Commander in Chief, U.S. Central Command, as Commander, Coalition Forces, issued the Freedom Message to the Iraqi People. The message announced the creation of the Coalition Provisional Authority "to exercise powers of government temporarily" and issued certain orders. The message is provided in full below.

Peace be upon you.

Coalition Forces in Iraq have come as liberators, not as conquerors. We have to come to eliminate an oppressive and aggressive regime that refused to comply with UN Security Council resolutions requiring the destruction of weapons of mass destruction. The Coalition is committed to helping the people of Iraq heal their wounds, build their own representative government, become a free and independent people and regain a respected place in the world. We will ensure that Iraq's oil is protected as a national asset of and for the Iraqi people. Iraq and its property belong to the Iraqi people and the Coalition makes no claim of ownership by force of arms. Coalition forces respect the Iraqi people, their religious practices, history and culture, and will safeguard Iraq's unity and territorial integrity.

We are working with the international community to ensure the delivery of humanitarian assistance and to promote law and order so that Iraqis can live in security, free from fear. We are establishing the stability that will allow early progress toward political freedom and economic prosperity. Our stay in Iraq will be temporary, no longer than it takes to eliminate the threat posed by Saddam Hussein's weapons of mass destruction, and to establish stability and help the Iraqis form a functioning government that

respects the rule of law and reflects the will, interests, and rights of the people of Iraq. Meanwhile, it is essential that Iraq have an authority to protect lives and property, and expedite the delivery of humanitarian assistance to those who need it. Therefore, I am creating the Coalition Provisional Authority to exercise powers of government temporarily, and as necessary, especially to provide security, to allow the delivery of humanitarian aid and to eliminate weapons of mass destruction. To facilitate these objectives, I proclaim the following:

Members of the armed forces and security organizations shall lay down their arms, stay away from their weapons, and remain in place. They shall obey the orders of the nearest Coalition military commander. All other Iraqis should continue their normal daily activities; officials should report to their places of work until told otherwise. All those engaged in the delivery of essential services should return to their jobs. The Arab Socialist Renaissance Party of Iraq (Hizb al Ba'th al-Arabi al'Ishtirabi al-Iraqi) is hereby disestablished. Property of the Ba'th party should be turned over to the Coalition Provisional Authority. The records of the Ba'th Party are an important part of the records of the Government of Iraq and should be preserved. All those with custody of the records of the Ba'th Party or the Government of Iraq should preserve and protect those records, and turn them over to the Coalition Provisional Authority. Saddam Hussein's intelligence and security apparatus, the Al-Mukhabarat al-Iraqiyya, is hereby deprived of all powers and authority. All Iraqis are now free to express their views without fear of retribution. At an appropriate time, free elections will make Iraqis self-governing in local, regional, and soon, national affairs. All parties and political groups may participate in Iraq's political life, except those who advocate or practice violence. Iraqis must not seek revenge. There will be a just legal process that will safeguard the honor and dignity of the Iraqi people. The Coalition Provisional Authority will seek a fair and prompt solution to the problem of displaced persons and refugees. There will be a legal, organized process to address restitution of homes that have been seized by the former regime. The Coalition will work with Iraqis to set up a commission to

deal with such claims. I call upon Iraqis to inform Coalition Forces regarding the location of weapons of mass destruction or related materials, facilities where such weapons are made, and individuals connected to weapons of mass destruction. All records concerning these activities should be preserved. Iraqis should not pass weapons of mass destruction to terrorists or terrorist organizations. I call upon Iraqis to inform Coalition Forces regarding the location of: foreign fighters and terrorists; members of the regime's security apparatus; and individuals who have perpetrated crimes against humanity or war crimes. All records concerning these activities should be preserved. Rewards may be provided for especially important information on these matters. All barriers to free movement of people and goods, including illegal roadblocks and checkpoints, must come down. We will work with regional leaders, entities and governments that are committed to peace and democracy to integrate them into the Coalition's activities. Coalition forces are here to ensure safety and security, and to help the people of Iraq create a better future for their country. We pledge our support to all Iraqis who seek Iraq's freedom and prosperity, and the blessings of peace and security.

(2) U.S. presence in Iraq

The Office of Reconstruction and Humanitarian Assistance ("ORHA") was established on January 20, 2003, originally under the operational control of the Commander, U.S. Central Command. As described in a report to the U.S. Congress, June 15, 2003, discussed in (4) below,

> [i]ts mission was to administer Iraq for a limited period of time, with the objective of the immediate stabilization of post-heavy combat Iraq. A Defense Department effort under the direction of Jay Garner, ORHA, was organized around three core functions: humanitarian assistance, reconstruction, and civil administration. Originally, ORHA was under the operational control of Commander, U.S. Central Command (USCENTCOM).

On May 9, 2003, President George W. Bush designated L. Paul Bremer as Presidential Envoy to Iraq, reporting through the Secretary of Defense. President Bush's letter setting forth Ambassador Bremer's authority is provided below in full.

Exercising my constitutional authority as Commander in Chief, and consistent with pertinent statutes, I hereby appoint you to serve as my Presidential Envoy to Iraq, reporting through the Secretary of Defense. Subject to the authority, direction, and control of the Secretary of Defense, you are authorized to oversee, direct, and coordinate all United States Government (USG) programs and activities in Iraq, except those under the command of the Commander, U.S. Central Command. This authority includes the responsibility to oversee the use of USG appropriations in Iraq, as well as Iraqi state- or regime-owned property that is properly under U.S. possession and made available for use in Iraq to assist the Iraqi people and support the recovery of Iraq, You and the Commander, U.S. Central Command, will communicate fully and continually, and cooperate in carrying out your respective responsibilities.

All USG elements in Iraq, other than those under the command of the Commander, U.S. Central—Command, will keep you fully informed, at all times, of their current and planned activities. You will regularly review the resources of these elements (other than those under the command of the Commander, U.S. Central Command) and exercise final authority with respect to their personnel composition, staff levels, and funding. Every USG agency under your authority must obtain your approval before changing the composition or mandate of its staff, regardless of the employment category, You have the authority to see all communications to or from all USG elements in Iraq, however transmitted, except as determined by the Secretary of Defense, or as specifically exempted by law or Presidential decision. All USG personnel other than those in Iraq under the command of the Commander, U.S. Central Command, must obtain country clearance before entering Iraq on official business. You may refuse

country clearance, at-place conditions or restrictions on such personnel, as you deem necessary.

As Presidential Envoy to Iraq, you are not only my personal representative in Iraq, but also that of our country: America remains engaged in the world by history and by choice. We will protect the American people and support freedom throughout the world.

On May 13, 2003, Mr. Bremer was designated Administrator of the Coalition Provisional Authority by Secretary of Defense Donald Rumsfeld. On June 16, 2003, ORHA was dissolved and "its functions, responsibilities and legal obligations assumed by the CPA." Memorandum from Deputy Secretary of Defense Paul Wolfowitz, June 16, 2003, available at *www.state.gov/s/l/c8183.htm*.

(3) U.S.-U.K. letter accepting responsibilities in Iraq

On May 8, 2003, the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland, John D. Negroponte and Jeremy Greenstock, respectively, sent a letter to the president of the Security Council accepting the responsibilities of their role and that of their coalition partners as occupying powers in post-conflict Iraq. S/2003/538. The text of the letter is set forth below in full.

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The United States of America, the United Kingdom of Great Britain and Northern Ireland and Coalition partners continue to act together to ensure the complete disarmament of Iraq of weapons of mass destruction and means of delivery in accordance with United Nations Security Council resolutions. The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq. We will act to ensure that Iraq's oil is protected and used for the benefit of the Iraqi people.

In order to meet these objectives and obligations in the post-conflict period in Iraq, the United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.

The United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall inter alia, provide for security in and for the provisional administration of Iraq, including by: deterring hostilities; maintaining the territorial integrity of Iraq and securing Iraq's borders; securing, and removing, disabling, rendering harmless, eliminating or destroying (a) all of Iraq's weapons of mass destruction, ballistic missiles, unmanned aerial vehicles and all other chemical, biological and nuclear delivery systems and (b) all elements of Iraq's programme to research, develop, design, manufacture, produce, support, assemble and employ such weapons and delivery systems and subsystems and components thereof, including but not limited to stocks of chemical and biological agents, nuclear-weapon-usable material, and other related materials, technology, equipment, facilities and intellectual property that have been used in or can materially contribute to these programmes; in consultation with relevant international organizations, facilitating the orderly and voluntary return of refugees and displaced persons; maintaining civil law and order, including through encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; eliminating all terrorist infrastructure and resources within Iraq and working to ensure that terrorists and terrorist groups are denied safe haven; supporting and coordinating demining and related activities; promoting accountability for crimes and atrocities committed by the previous Iraqi regime; and assuming immediate control of Iraqi institutions responsible for military and security matters and providing, as appropriate, for the demilitarization, demobilization, control, command, reformation, disestablishment, or reorganization of those institutions so that they no longer pose

a threat to the Iraqi people or international peace and security but will be capable of defending Iraq's sovereignty and territorial integrity.

The United States, the United Kingdom and Coalition partners recognize the urgent need to create an environment in which the Iraqi people may freely determine their own political future. To this end, the United States, the United Kingdom and Coalition partners are facilitating the efforts of the Iraqi people to take the first steps towards forming a representative government, based on the rule of law, that affords fundamental freedoms and equal protection and justice under law to the people of Iraq without regard to ethnicity, religion or gender. The United States, the United Kingdom and Coalition partners are facilitating the establishment of representative institutions of government, and providing for the responsible administration of the Iraqi financial sector, for humanitarian relief, for economic reconstruction, for the transparent operation and repair of Iraq's infrastructure and natural resources, and for the progressive transfer of administrative responsibilities to such representative institutions of government, as appropriate. Our goal is to transfer responsibility for administration to representative Iraqi authorities as early as possible.

The United Nations has a vital role to play in providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim authority. The United States, the United Kingdom and Coalition partners are ready to work closely with representatives of the United Nations and its specialized agencies and look forward to the appointment of a special coordinator by the Secretary-General. We also welcome the support and contributions of Member States, international and regional organizations, and other entities, under appropriate coordination arrangements with the Coalition Provisional Authority.

We would be grateful if you could arrange for the present letter to be circulated as a document of the Security Council.

(4) Report on operations in Iraq

A report submitted to Congress June 15, 2003, provided information relevant to the Authorization for Use of Military

Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, the Iraq Liberation Act of 1998, Pub. L. No. 105-338, 112 Stat. 3178, and the Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991). The report, covering approximately the period April 1—June 4, 2003, provides an overview of relief and reconstruction efforts, transition to democracy, and military operations for that period. The report is available at *www.state.gov/s/l/c8183.htm*. A fact sheet on reconstruction and stabilization in Iraq, issued by the U.S. Mission to the United Nations, September 29, 2003, listed the accomplishments to date. The list included rehabilitation of schools and clinics, training and arming 56,000 Iraqis for the police and army, establishment of an independent Iraqi Central Bank, and improvement to a wide variety of infrastructure projects. *See www.un.int/usa/fact12.htm.*

d. UN Security Council actions

(1) Security Council Resolution 1483

On May 22, 2003, the UN Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1483, lifting most restrictions on trade with Iraq, setting out the responsibilities of the United Nations in Iraq, and supporting the establishment of a transitional administration run by Iraqis. The resolution "not[es] the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognize[es] the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command. . . ." *See* c.(3), *supra*. Ambassador Negroponte explained the U.S. vote on the resolution in a statement to the Security Council, excerpted below.

The full text is available at *www.un.int/usa/03_075.htm*. *See also* fact sheet issued by the Department of State of the

same date, available at *www.state.gov/r/pa/prs/ps/2003/20888.htm.*

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In passing this resolution, we have achieved much for the Iraqi people. By recognizing the fluidity of the political situation and that decisions will be made on the ground, the Security Council has provided a flexible framework under Chapter VII for the Coalition Provisional Authority, member states, the United Nations and others in the international community to participate in the administration and reconstruction of Iraq and to assist the Iraqi people in determining their political future, establishing new institutions, and restoring economic prosperity to the country.

The resolution affirms our commitment to the development of an internationally recognized, representative government of Iraq. It creates a robust mandate for a Special Representative of the Secretary General, including to work with the people of Iraq, the Authority, and others concerned—including neighboring states—to help make this vision a reality.

The resolution establishes a framework for an orderly phase-out of the Oil-for-Food program, thereby preserving, for a transitional period, what has become an important safety net for the people of Iraq.

The resolution establishes transparency in all processes and United Nations participation in monitoring the sale of Iraqi oil resources and expenditure of oil proceeds. In that context, I am pleased to announce the creation of the Development Fund for Iraq in the Central Bank of Iraq. As the resolution underlines, the Authority will disburse the funds *only* for the purposes it determines to benefit the Iraqi people.

The resolution lifts export restrictions to Iraq, with the exception of trade in arms and related materiel not required by the Coalition Provisional Authority. Aviation restrictions are also lifted, but Iraq's disarmament obligations remain and member states remain barred from assisting Iraq in acquiring weapons of mass destruction, proscribed missile systems or proceeding with civil nuclear activities so long as those restrictions remain in effect.

The resolution provides Iraq with adequate time to recover capacity eroded during the sanctions years, yet it preserves its obligations to Kuwait and others who suffered from Saddam Hussein's aggression dating from 1990. It addresses Iraq's sovereign debt, protection of Iraqi antiquities and accountability for serious violations of human rights and international humanitarian law by the previous regime. It also directs member states to act quickly to seize and return to the Iraqi people money stolen by Saddam Hussein's regime.

But, Mr. President, we cannot be complacent. Now that we have adopted this resolution, the work must begin on implementing it. The Secretariat and the new Special Representative of the Secretary-General must prepare for their work on the urgent humanitarian, reconstruction and political tasks, to which it will contribute. Member states must work to fulfill the obligations and provisions contained in the resolution. For our part, in addition to our responsibilities in Iraq as leaders of the Coalition Provisional Authority, we will undertake to inform the Council on a quarterly basis of progress in implementing the resolution, in the spirit of Operational Paragraph 24.

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(2) Security Council Resolution 1500

In keeping with Resolution 1483's support for an Iraqi interim administration, the Security Council adopted Resolution 1500 on August 14, 2003, which welcomed the July 13, 2003, establishment of the Iraqi Governing Council "as an important step towards the formation by the people of Iraq of an internationally recognized, representative government that will exercise the sovereignty of Iraq." Resolution 1500 also established the United Nations Assistance Mission for Iraq. Ambassador Negroponte explained the U.S. vote in favor of the resolution, as set forth below.

The full text of Ambassador Negroponte's remarks is available at *www.un.int/usa/03_124.htm.*

The text that we have just voted as Security Council Resolution 1500 deals with two specific issues: the Governing Council of Iraq and the United Nations Assistance Mission in that country.

In its expression of support for the Governing Council of Iraq, this resolution hastens the day when the people of Iraq are in full command of their own affairs—a condition they have not known for some three decades.

When the Governing Council representatives came to speak before the Security Council on July 22, they took an important step in the process of reaching out to the international community to communicate their dreams and aspirations for the Iraqi people, and, equally importantly, their plans to achieve those aspirations. Through the resolution that we just passed, the Security Council has made clear that we heard the Governing Council's message, and that we will work with them as a broadly representative partner with whom the United Nations and the international community can engage to support them in their endeavors to build a better Iraq. This resolution helps pave the way towards the peace, stability, and democracy that the long-afflicted Iraqi people so richly deserve. It also sends a clear signal to those who oppose the political transformation underway in Iraq that they are out of step with world opinion.

In this resolution, we endorse again the vital role that the United Nations is playing in Iraq. The Secretary-General recommended the creation of a United Nations Assistance Mission for Iraq to better enable the United Nations, to fulfill its important responsibilities under Resolution 1483. We fully support the Secretary-General's request.

(3) Security Council Resolution 1511

On October 16, 2003, the UN Security Council, acting under Chapter VII, unanimously adopted Resolution 1511. The resolution determined that "the situation in Iraq, although improved, continues to constitute a threat to international peace and security." Acting under Chapter VII of the UN Charter, the Security Council

> [r]eaffirm[ed] the sovereignty and territorial integrity of Iraq, and underscore[d], in that context, the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003), which will cease when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority . . .
>
> The resolution is excerpted below.

The Security Council

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4. *Determines* that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the Authority;
5. *Affirms* that the administration of Iraq will be progressively undertaken by the evolving structures of the Iraqi interim administration;
6. *Calls upon* the Authority, in this context, to return governing responsibilities and authorities to the people of Iraq as soon as practicable and *requests* the Authority, in cooperation as appropriate with the Governing Council and the Secretary-General, to report to the Council on the progress being made;
7. *Invites* the Governing Council to provide to the Security Council, for its review, no later than 15 December 2003, in cooperation with the Authority and, as circumstances permit, the Special Representative of the Secretary-General, a timetable and a programme for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution;

8. *Resolves* that the United Nations, acting through the Secretary-General, his Special Representative, and the United Nations Assistance Mission in Iraq, should strengthen its vital role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government;

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13. *Determines* that the provision of security and stability is essential to the successful completion of the political process as outlined in paragraph 7 above and to the ability of the United Nations to contribute effectively to that process and the implementation of resolution 1483 (2003), and *authorizes* a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure;

14. *Urges* Member States to contribute assistance under this United Nations mandate, including military forces, to the multinational force referred to in paragraph 13 above;

15. *Decides* that the Council shall review the requirements and mission of the multinational force referred to in paragraph 13 above not later than one year from the date of this resolution, and that in any case the mandate of the force shall expire upon the completion of the political process as described in paragraphs 4 through 7 and 10 above, and *expresses* readiness to consider on that occasion any future need for the continuation of the multinational force, taking into account the views of an internationally recognized, representative government of Iraq;

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18. *Unequivocally condemns* the terrorist bombings of the Embassy of Jordan on 7 August 2003, of the United Nations headquarters

in Baghdad on 19 August 2003, and of the Imam Ali Mosque in Najaf on 29 August 2003, and of the Embassy of Turkey on 14 October 2003, the murder of a Spanish diplomat on 9 October 2003, and the assassination of Dr. Akila al-Hashimi, who died on 25 September 2003, and *emphasizes* that those responsible must be brought to justice;

19. *Calls upon* Member States to prevent the transit of terrorists to Iraq, arms for terrorists, and financing that would support terrorists, and *emphasizes* the importance of strengthening the cooperation of the countries of the region, particularly neighbours of Iraq, in this regard;

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21. *Urges* Member States and international and regional organizations to support the Iraq reconstruction effort initiated at the 24 June 2003 United Nations Technical Consultations, including through substantial pledges at the 23–24 October 2003 International Donors Conference in Madrid;

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23. *Emphasizes* that the International Advisory and Monitoring Board (IAMB) referred to in paragraph 12 of resolution 1483 (2003) should be established as a priority, and *reiterates* that the Development Fund for Iraq shall be used in a transparent manner as set out in paragraph 14 of resolution 1483 (2003);

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25. *Requests* that the United States, on behalf of the multinational force as outlined in paragraph 13 above, report to the Security Council on the efforts and progress of this force as appropriate and not less than every six months;

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In welcoming the adoption of the resolution, Ambassador Negroponte explained the position of the United States as set forth below. The full text of the statement is available at *www.un.int/usa/03_175.htm*.

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We started these discussions in the wake of the devastating trio of terrorist bombings at the Jordanian embassy, United Nations headquarters, and the Imam Ali mosque. These actions represented an assault on the new Iraq, as was the tragic assassination of Governing Council member Dr. Akila al-Hashimi.

To meet this challenge, it was necessary to recommit the international community, and in so doing expand the opportunities for participation by member states, regional organizations, and the United Nations. In crafting this resolution, we never lost sight of the conditions on the ground. Our consistent aim has been to support the Iraqis and those who have joined them in this unprecedented stabilization, reconstruction and recovery effort.

The resolution has four key elements. First, it confirms Iraqi leadership in establishing a political horizon for the transfer of power and makes clear that the interim Iraqi leadership embodies Iraqi sovereignty during the transition. In this regard, the resolution also reaffirms a point that the United States has never left in doubt: the exercise of governmental authorities in Iraq by the Coalition Provisional Authority is temporary in nature. We will not waver from our stated objective of transferring governing responsibilities and authorities to the people of Iraq as soon as practicable. Second, in addressing the crucially important process of political transition, the resolution provides for an expanded United Nations role, commensurate with the United Nations unique experience and expertise, subject to United Nations capacity in Iraq. Third, the resolution establishes a United Nations-authorized multinational force under unified United States command, and provides a platform for contributions to the training and equipping of Iraqi police and security forces. Fourth, the resolution encourages the international financial institutions and others to provide significant and sustained contributions to the reconstruction and development of Iraq's economy as tangible proof of their commitment to the economic health and political stability of Iraq.

By addressing the triad of politics, economics, and security, the resolution offers a solid base for expanded international

engagement. My government's careful consideration of text during these past weeks reflects our commitment to a multilateral approach to this compelling matter. We welcome those, including of course the co-sponsors, who have joined us, and urge all states to review how they might best contribute to Iraqi efforts to forge a better future. If there ever was a time to help Iraq, it is now.

(4) Phase-out of Oil-for-Food program

As explained in a fact sheet issued by the Department of State November 21, 2003, on that date:

> . . . the United Nations transferred responsibility for the administration of any remaining activity of the Oil-for-Food (OFF) program to the Coalition Provisional Authority (CPA), marking another important step towards economic self-sufficiency for Iraq. Initiated by the United States and administered by the UN, the OFF program provided for the humanitarian needs of Iraqis by enabling oil proceeds to be used for food, medicine, and other civilian goods. . . . The intention of Security Council members [in adopting Security Council Resolution 1483] was to allow the program to be phased out in a manner that ensured civilian needs would still be met.

The full text of the fact sheet, further excerpted below, is available at *www.state.gov/r/pa/prs/ps/2003/26540.htm*.

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Provisions have been made to ensure the Iraqi people continue to receive humanitarian support after the program's termination. The CPA and Iraqi ministries will ensure that priority goods under approved and funded contracts will continue to be delivered to Iraq: These deliveries are expected to extend until mid-2004. Several UN agencies have agreed to help provide logistical training and expertise. The World Food Program will continue to play an important role, carrying out its responsibilities for handling

renegotiation of remaining OFF food contracts and ensuring their delivery into Iraq through the end of June 2004. By that time, the Iraqi Ministry of Trade should be prepared to manage both the responsibility for the procurement and distribution of food. The longer-term goal is for Iraq to move to a market-based system for food provision. . . .

The CPA plans a timely and efficient transfer of responsibilities to Iraq as the country's own capacities are enhanced over the coming months. Under UN Security Council Resolution 1483, those contracts for humanitarian supplies and equipment that have been prioritized will be fulfilled, while other contracts will be turned over to a future Iraqi government for consideration. Remaining OFF funds will be deposited in the Development Fund for Iraq (DFI). Over $3 billion was transferred by the UN to this fund during the six-month wind-down period. CPA and Iraqi officials are establishing a Coordination Center in Baghdad to ensure the steady, secure and managed flow of non-food shipments. . . .

e. Capture of Saddam Hussein

On December 13, 2003, United States military forces captured Saddam Hussein. Announcing the capture on December 14, President George W. Bush stated that "now the former dictator of Iraq will face the justice he denied to millions."

The President's remarks are available at *www.whitehouse.gov/news/releases/2003/12/20031214-3.html.*

f. Redirection of Iraqi weapons of mass destruction experts

On December 18, 2003, the U.S. Department of State announced a program to support peaceful employment of Iraqi scientists, technicians, and engineers who formerly worked on weapons of mass destruction programs.

The State Department press statement is available in full at *www.state.gov/r/pa/prs/ps/2003/27408pf.htm*. A fact sheet

providing additional details of the short-term program is available at w*ww.state.gov/r/pa/prs/ps/2003/27409.htm*.

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The State Department, with the cooperation of the Coalition Provisional Authority, is launching a 2-year program to support the peaceful, civilian employment of Iraqi scientists, technicians and engineers formerly working on weapons of mass destruction programs. This program has two mutually reinforcing goals: to keep Iraqi scientists from providing their expertise to countries of concern; and to enable them to serve in the economic and technological rebuilding of Iraq.

The first step in a multi-stage process will be to establish a new, United States-funded office in Baghdad—the Iraqi International Center for Science and Industry (IICSI). The Center will identify needs and provide funding for specific scientific projects that use the expertise of personnel formerly involved in Iraq's weapons of mass destruction programs. Initial projects will focus on establishing priorities for future scientific work, training, and long-term cooperation between the United States and Iraqi scientific communities. These projects will begin within six months of the opening of the Center, and are expected to cost around $2 million, to be funded by the United States Nonproliferation Disarmament Fund (NDF).

Over the next two years, the Iraqi International Center for Science and Industry will work closely with the Iraqi government to identify, develop, and fund activities in support of Iraqi reconstruction. Of fundamental importance will be the need to provide Iraqis with weapons of mass destruction-related experience meaningful civilian employment in a democratic Iraq.

2. Protection of Humanitarian Workers in Combat Zones

On August 19, 2003, a car bomb exploded outside the UN Headquarters in Baghdad, killing twenty-four persons, including Sergio Vieira deMello, the UN special representative

to Iraq. In response, on August 26, 2003, the United Nations Security Council adopted Resolution 1502. S/RES/1502(2003). In preambular paragraph five, the resolution

> [e]mphasiz[ed] that there are existing prohibitions under international law against attacks knowingly and intentionally directed against personnel involved in a humanitarian assistance or peacekeeping mission undertaken in accordance with the Charter of the United Nations which in situations of armed conflicts constitute war crimes, and recall[ed] the need for States to end impunity for such criminal acts.

Preambular paragraph four reaffirmed the "obligation of all humanitarian personnel and United Nations and its associated personnel to observe and respect the laws of the country in which they are operating, in accordance with international law and the Charter of the United Nations. . . ." The resolution also condemned all forms of violence committed against those participating in humanitarian operations (operative paragraph ("OP") 1); urged states to ensure that crimes against such personnel do not go unpunished (OP 2); urged "all those concerned as set forth in international humanitarian law . . . . to allow full unimpeded access by humanitarian personnel to all people in need of assistance, and to make available, as far as possible, all necessary facilities for their operations, and to promote the safety, security and freedom of movement of humanitarian personnel and United Nations and its associated personnel and their assets" (OP 4); and reaffirmed the obligation of all parties to comply with relevant applicable principles of international law, "in particular international humanitarian law, human rights law and refugee law." (OP 3) The Security Council expressed its determination to take appropriate steps to ensure the safety and security of personnel, including efforts to have host countries adopt "key provisions of the Convention on the Safety of United Nations and Associated Personnel . . . in future [and] existing status-of-forces, status-of-missions and host country agreements negotiated between

the United Nations and those countries. . . ." (OP 5(a)) *See Digest 2001* at 355–363 for discussion of the Convention.

Excerpts below from the statement of Ambassador John D. Negroponte, welcoming the adoption of Resolution 1502, provide the views of the United States on several paragraphs of the resolution.

The full text of the statement is available at *www.un.int/usa/03_130.htm.*

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This resolution moves beyond previous measures in focusing the Security Council's attention on both the prevention of attacks on humanitarian, United Nations and associated personnel and on the accountability of those who commit such acts.

I would like to make a few observations about the consensus text. We note that Preambular Paragraph 4 reaffirms the general rule that humanitarian and UN personnel should observe and respect the laws of the country in which they are operating. This paragraph makes clear that this general rule must be applied in accordance with international law, which may provide for special rules that govern the relationship between such personnel and the laws of the host state.

We also note Operative Paragraph 3 creates no new international legal obligations, but rather reaffirms the existing obligation of all parties involved in an armed conflict to comply fully with the rules and principles of international law applicable to them during armed conflict.

Finally, we would note that Operative Paragraph 4 does not in itself create any new international legal obligations but rather urges concerned parties to implement their existing international legal obligations relating to access, the provision of facilities, and the promotion of safety, security and freedom of movement. In this connection, we recall that both the Hague Regulations and the Geneva Conventions recognize that, during a period of armed conflict, the extent to which a concerned party is able to allow such access, make available such facilities, or promote the security of such personnel may be limited to those

steps that are practicable and consistent with the security and operating environment.

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On October 23, 2003, in a statement in the Sixth Committee, Eric Rosand, Deputy Legal Counselor for the U.S. Mission to the United Nations, expressed general U.S. support for the Convention on the Safety of United Nations and Associated Personnel, as well as for a proposal to extend the scope of that convention through a protocol that would apply to a broader set of UN operations, excerpted below.

The full text is available at *www.un.int/usa/03_193.htm*.

The United States continues to support the 1994 Convention on the Safety of United Nations and Associated Personnel. It is currently before our Senate awaiting advice and consent, and it has been identified as a Convention that the Senate should take up promptly.

We are conscious of the risks faced by UN and associated personnel in a variety of contexts around the world and appreciate the bravery and sacrifice of those personnel. We join the other delegations in condemning the August 19, 2003 bombing of the UN compound in Baghdad and mourning the loss of Mr. Vieira de Mello and his colleagues. We are cooperating with local authorities in Iraq to see that the terrorists who committed the attacks against the UN headquarters in Iraq are located and held accountable.

With respect to the discussion in the ad hoc committee last spring and in the recently concluded working group about extending the application of the Convention to a broader set of UN operations, we continue to be generally supportive. We remain of the belief that a stand-alone protocol should be considered as the vehicle for possible expansion of the scope and that not all elements of the Convention would need to be included or are necessarily appropriate for inclusion in a protocol of expanded scope.

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3. Enemy Combatants Held by the United States

a. Prisoners of war in Iraqi conflict

(1) Status and treatment of prisoners

On April 7, 2003, W. Hays Parks, special assistant to the Judge Advocate General of the U.S. Army for law of war matters, and Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues, provided a briefing at the Pentagon entitled "Humane Treatment of Iraqi and U.S. POWs Under Geneva Conventions" and answered questions from the press. Excerpts below provide their views on relevant principles of law of war and their application to U.S. and Iraqi military personnel, including prisoners of war detained by the United States in Iraq, as well as prosecution of Iraqi war crimes committed in this and previous situations.

The full text of the briefing is available at *www.defenselink.mil/transcripts/2003/t04072003_t407genv.html* and *www.state.gov/s/wci/rm/19448.htm*.

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MR. PARKS: . . . The modern law of war as we know it today actually began when President Lincoln commissioned Professor —Dr. Francis Lieber to write a code for Union forces during the American Civil War. The Lieber Code, as its known—it was also U.S. Army General Order No. 100, and it was published in 1863—that really formed the foundation for everything we have in our modern law of war today. Professor Lieber didn't make it up. He actually went through history to find the practice of nations, and I think that's a very important point here, to understand that this is the way nations feel that they should conduct military operations.

Since the Lieber Code, there have been a number of other conferences: In The Hague in 1899 and 1907; one of the most important treaties to come out of the latter conference was the 1907 Hague Convention number IV for the Conduct of Military Operations on Land. There have been any number of Geneva

Conventions for the protection of war victims over the year—over the years. Today there are four 1949 Geneva Conventions. The first deals with military wounded and sick on the battlefield. The second deals with military wounded, sick and shipwrecked. The third refers to prisoners of war and their protection, and the fourth deals with enemy civilians or civilians in enemy hands. They are still in effect, and I'll mention them just a bit more.

I'll focus on the 1949 Geneva Convention relative to the prisoners—to the protection of prisoners of war. I'll also focus on Department of Defense policies with respect to the law of war and the current conflict with Iraq and Iraqi violations of the law of war.

With respect to the 1949 Geneva Conventions, they were negotiated after World War II. Out of 194 nations in the world today, 190 are states parties to those 1949 Geneva Conventions. That includes the United States and Iraq. There are more governments states parties to this—to these conventions than are member nations of the United Nations, giving you an idea of how widely accepted and received they are.

The protections apply when the members of the armed forces of one belligerent nation or their civilians fall into the hands of an enemy belligerent. In the case of prisoners of war, this can happen through capture or surrender to enemy military forces.

The Geneva Convention relative to the protection of prisoners of war, which I—we normally refer to as the GPW, contains some fundamental protections for prisoners of war. First, prisoners of war must at all times be humanely treated. Humane treatment is the baseline, but POW protections are much more extensive. Any act or omission that causes the death or endangers a prisoner of war is prohibited and is a serious breach of the convention.

Next, prisoners of war must be removed from the battlefield as soon as circumstances permit and at all times protected from physical and mental harm. Prisoners of war must be provided adequate food, shelter and medical aid. Prisoners of war must be protected, particularly against acts of violence or intimidation, and against insults and public curiosity.

If questioned, prisoners of war are required to provide their name, rank, serial number and date of birth. They may not be forced to provide any other information.

Prisoners of war may not be subjected to physical or mental torture. Those who refuse to answer questions may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind.

Subject to valid security reasons, prisoners of war are entitled to retain their personal property and protective equipment. These items may not be taken from a prisoner of war unless properly accounted for and receipted.

Representatives from the International Committee of the Red Cross must be permitted access to prisoners of war as soon as practical.

All prisoners of war must be protected against assault, including sexual assault. Female prisoners of war shall be treated with regard due to their gender, and like all prisoners of war, are entitled to respect for their person and their honor.

The United States and Iraq also are parties to the 1949 Geneva Convention on the Wounded and Sick that I mentioned earlier. The title of the convention is also a bit misleading, because it also deals with the protection and respect for enemy dead on the battlefield. In particular, this convention requires parties to the conflict to protect the dead against pillage and ill treatment, and requires parties to ensure that the dead are honorably interred, their graves respected, and information as to their identity, et cetera, provided to the International Committee of the Red Cross.

Let me talk a little bit about DOD policies and the conflict in Iraq. The United States and coalition forces conduct all operations in compliance with the law of war. No nation devotes more resources to training and compliance with the laws of war than the United States. U.S. and coalition forces have planned for the protection and proper treatment of Iraqi prisoners of war under each of the Geneva conventions I have identified. These plans are integrated into current operations.

Before describing our policies, I should note that in Operation Desert Storm in 1991, the United States and coalition partners detained 86,743 Iraqi prisoners of war. These Iraqi prisoners of war were given all the protections required by the Geneva conventions.

Our aims and acts are precisely the same in the current conflict. We are providing and will continue to provide captured Iraqi combatants with the protections of the Geneva conventions and other pertinent international laws. In addition, arrangements are in place to allow for representatives from the International Committee of the Red Cross to meet with Iraqi prisoners of war.

With respect to Iraqi violations of the Geneva conventions and other laws of war, the Iraqi regime is not complying with the Geneva conventions. Before turning to a summary of the Iraqi violations, I should note that in Operation Desert Storm, in 1991, the Iraqis mistreated U.S. and coalition prisoners and forces in numerous respects, including physical abuse and torture, forced propaganda statements, food deprivation, denial of International Committee of the Red Cross access until the day of repatriation, and much more.

The Iraqis similarly mistreated Iranian prisoners of war during the eight-year Iran-Iraq war in the 1980s. The Iraqi regime has thus displayed a pattern of systematic disregard for the law of war. Based upon initial reports, including those in the media, it appears Iraq has once again committed violations of the Geneva Conventions and related laws of war. I will mention just three.

First, Iraqi television and Al-Jazeera have aired a lengthy tape of deceased U.S. or coalition service members. I will not describe the tape in detail. Suffice it to say that the tape, made at the direction of the Iraqi regime, shows fundamental violations of the Geneva Convention obligations, to include prohibitions on pillage and ill treatment of the dead, the duty to respect the personal dignity of all captured combatants, and possibly prohibitions against willful killing, torture, inhumane treatment, or the willful causing of great suffering or serious injury to body or health of the POW.

Second, Iraqi television and Al Jazeera have aired a tape of U.S. soldiers answering questions in humiliating and insulting circumstances designed to make them objects of public curiosity, in violation of the prisoner-of-war convention.

Third, there are reports that the Iraqi regime has sent forces carrying white flags as if to indicate an intention to surrender, repeating an illegal act used by the Iraqi military in the 1991

coalition war to liberate Kuwait, or dressed forces as liberated civilians to draw coalition forces into ambushes. These acts of perfidy—the term that we use—are among the most fundamental violations of the law of war, endangering coalition forces and innocent Iraqi civilians.

These are the three obvious Iraqi law-of-war violations. Behind the tapes and initial reports from the field, there are likely to be additional violations.

The position of the United States government is to do everything in its power to bring to justice anyone who, by action or inaction, is responsible for violations of the law of war.

A war crimes investigation by the secretary of the Army to record Iraqi war crimes during the 1990–1991 Persian Gulf conflict resulted in a detailed report. Steps have been taken to begin a similar investigation and information collection effort. Ultimate disposition will depend upon evidence collected, identified violations, and individuals who come under U.S. control. . . .

AMBASSADOR PROSPER: Good morning. I'd like to focus on some of the broader war crimes issues and the violations we have been seeing committed by the Iraqi regime, as well as what our policy is relating to these abuses.

I think it's safe to say during the course of hostilities we have seen a systematic pattern of abuses committed by the Iraqi forces, to the extent that we can call them textbook. There has been a complete disregard for the law by the regime, as well as a complete disregard for human life. The Iraqi regime, by blurring the distinction between combatants and civilians, has caused numerous civilian casualties and has put thousands or countless of Iraqi civilians in harm's way. The list of violations that we have seen is long. The Iraqi people are suffering as a result of these abuses.

We know that the Iraqi regime—the forces have fired mortars and machine gun fire upon civilians as they've tried to flee harm's way and go into coalition forces' control. We have heard countless reports of the use of human shields, where civilians have involuntarily been put in a way—in harm's way and at times killed. We know that the Iraqi regime, by fighting in civilian clothes, has blurred the distinction, causing additional harm.

The Iraqi forces have also placed military weaponry in civilian structures, schools, hospitals, mosques and historical landmarks. We've heard reports that ambulances have been used to transport death squads and irregular fighters.

We also know that Iraqi civilians have been forced into combat at gunpoint or also by the threat of death to their family and loved ones. We have received reports of summary executions of military deserters. And as the battle for Baghdad unfolds, we must brace ourselves for additional abuses, because we know that this pattern of atrocities and war crimes is not new. The regime has a long history for the past two decades of inflicting violence and death upon its civilian population.

As a result, we have begun to catalogue the numerous abuses, both past and present that have been committed by the Iraqi regime. Our troops have been given the additional mission of securing and preserving evidence of war crimes and atrocities that they uncover.

As President Bush has stated, war criminals will be prosecuted. The day of Iraq's liberation will also be a day of justice. For any war crimes committed against U.S. personnel, our policy is that we will investigate and we will prosecute. We will also seek to prosecute, where feasible, those who committed or ordered war crimes against U.S. personnel during the Gulf War.

For any war crimes committed against Iraqi people during the course of this conflict, we'll explore the range of options available, work to ensure that justice is achieved for the Iraqi people. For past abuses, past atrocities, it is our view that there should be accountability. We will work with Iraqi people to create an Iraqi-led process that will bring justice for the years of abuses that have occurred.

In short, it is our view that we must reinstate the rule of law within Iraq. We must not tolerate the abuses of the Iraqi regime and deem them as "business as usual." There will be accountability for these abuses. . . .

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Q: *Are there any plans for U.S. military tribunals or commissions to address any of these matters or the possibility of international*

war crime tribunals? And also, are there plans for trials for the very top leadership—for Saddam Hussein, for his sons and other members of the top leadership?

AMBASSADOR PROSPER: I think what's important to understand here, to note, is that there is a timeline . . . of abuses, if you will: The current abuses and the past abuses. The past abuses, again, will be through an Iraqi-led process. We believe that it must have some indigenous roots in order to reinstate the rule of law. For the current abuses, the crimes particularly against U.S. personnel, we believe that we have the sovereign ability and right to prosecute these cases. There is a range of options, ranging from military proceedings to our civilian courts. We are of a view that an international tribunal for the current abuses is not necessary.

MR. PARKS: If I might add to that, there are three traditional statutory bases for trials by the United States: courts martial, military commissions, and federal district court. Obviously, there may be other governments that have an interest as well. The government of Kuwait suffered severely at the hands of the Iraqis in 1990, 1991, and it's entirely possible that the government of Kuwait may have some interest and having some of those persons turned over to them who were involved in the occupation of Kuwait and Kuwait City during that time.

So right now—our focus right now is on winning the war. And these are the kinds of decisions we're—basically in what I would call step one; trying to put together—collect the information, and then have the national leadership make those types of decisions, no doubt with some coordination with some of our coalition partners.

Q: *Can I just follow up the issue of the—are there plans for the trial of the very top leadership?*

AMBASSADOR PROSPER: Yeah, I think when we're, particularly discussing the abuses of the past as well as the current abuses, we need to look at the leadership. We have put, over the years, a sharp focus on the actions of Saddam Hussein, his sons, individuals such as "Chemical Ali" and others, because by the nature of the regime, we do understand that a lot of the orders for the atrocities came from the top.

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Q: *. . . [W]e've been struggling with . . . the issue of in uniform and out of uniform. Just as a specific issue, American forces do operate out of uniform in some settings. In Afghanistan, virtually all of the special operators operated out of uniform. Why is that considered a war crime, or is it only operating out of uniform in combination with other kinds of behavior?*

MR. PARKS: Let me first make a slight correction. Most of the Special Forces in Afghanistan operated in uniform, full uniform. There were some who worked in what we referred to as a non-standard uniform that was at least a partial uniform so they could be identified. They also carried their arms openly.

The basic distinction between those types of operations where there was no attempt to conceal their combatant status, and what we're saying with the Fedayeen Saddam in Iraqi is that they are purposely concealing their combatant status, concealing their weapons, wearing no part of a uniform, wearing no distinctive device, in order to engage in acts of treachery or perfidy, as I referred to earlier. They are purposely using the soldiers'—the U.S. soldiers' respect for civilians as a way to conceal their intent and engage in treacherous killing of coalition forces. So there is a big difference between the two.

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Q: *. . . [M]y question is concerning the unlawful combatants from the Iraqi side. I would like to know how we treat those unlawful combatants once they are taken into coalition custody? Do you grant them the status of POWs?*

MR. PARKS: When someone is captured, they go through a process of being taken from the capturing unit back to a collection unit and ultimately to the higher-level theater prisoner-of-war camps. And Article V of the Prisoner of War Convention, it specifies that if there is any doubt as to the status of a person, that person is entitled to prisoner-of-war protection until his or her status has been determined. That determination can be done by an Article 5 tribunal, which is a tribunal, set up by the military to look at the facts and circumstances of the capture and any other information.

They then make a determination or recommendation. Our past practice, in Vietnam as well as in the first Gulf War, was that if at any time there remains any doubt, that person will be entitled to prisoner-of-war status.

In the meantime, we use the Prisoner of War Convention as a basic template for anyone that we hold. We provide them the basic cares and protections that I laid out before, the best housing that we can give them under the circumstances, adequate food, medical care, anything else that they need, and visitations by the International Committee of the Red Cross.

At this point in time, that decision as to whether or not persons are members of the Fedayeen Saddam or whether they are members of the Iraqi regular military has not been fully exploited, because of the ongoing conflict. The British, I understand, have run some Article V tribunals and in some cases have found that some of the people they detained were civilians, and they have been released. So there is a process for doing this.

Q: *Would unlawful combatants have a different judicial channel? Do you envision it different than what a soldier would have?*
MR. PARKS: That's a very good distinction, I think, that needs to be made. The fundamental difference between an unlawful combatant and the prisoner of war is that a regular soldier, if he kills an enemy soldier, has committed a lawful act. An unlawful combatant, by its term, suggests that this person did not have authority to go onto the battlefield and engage in the killing of enemy soldiers or the attack of military property. So if a person is determined to be an unlawful combatant, he or she can be prosecuted for killing an ordinary soldier. So there would be a judicial process for that person. What that process would be is something that we've not determined as yet. . . .

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Q: *. . . What sort of penalties might apply to people in senior positions—senior military commanders, senior government ministers, even Saddam Hussein or his family members, insofar as they're involved in decision-making? And secondly, if you're not going to go to any of the established international tribunals, are*

you worried of creating the impression or creating an opinion worldwide about victor's justice or even creating martyrs in some form to be used as rallying points in the future?

AMBASSADOR PROSPER: Well, the range of penalties exists, from—obviously from incarceration to the death penalty. It's really dependent on the forum that is ultimately chosen to deal with these issues. Regarding the international tribunal, the only one that obviously is in existence is now the permanent international criminal court, and that court does not have jurisdiction over this conflict, because we are not a party to the treaty and Iraq is not a party to the treaty.

But I think what we must recognize is that any state, when they fall victim to war crimes, has the authority to prosecute these cases. So it's not a victor's justice, it's a fact that by being victimized, if you will, we can prosecute. For the crimes committed against the Iraqi people, we are prepared to work with the Iraqi people, who will have the sovereign right to address these cases as they occur. So it will be, obviously, a collaborative effort, where we can prosecute the crimes committed against us, our coalition partners have that same right and authority, and for the Iraqi people, we are prepared to work with them to achieve justice.

MR. PARKS: Let me offer a couple of other points. I mentioned that we have a statutory basis, three different ones, for prosecution of war crimes. One of the reasons we have that is because we, in a long-term practice, have prosecuted U.S. military personnel when they have engaged in violations of law of war. I can speak personally from this, having done this in Vietnam myself 35 years ago.

Now, if you go back to the history of the post-World War II trials, you'll see that there were, in fact, several different levels. There were the statutory courts at that time, or commissions, depending on whether it was United Kingdom, United States, who was running those. And they tried particular offenses that occurred at a specific level against nationals from their country. For instance, there was an Italian general tried in Italy by a U.S. military commission after World War II for the murder of American prisoners of war. There were international tribunals based upon the November 1st, 1943, Moscow Declaration that ultimately

established the Nuremberg tribunals for the trial of the major criminals for which there was no geographic specificity, and then there were some lower levels.

I would point out at the very lowest levels, the one that I identified initially, any number of nations carried those out after World War II—Australia, New Zealand, China, just about every single one of the Nazi-occupied territories in Europe. So there are a number of levels there, but you go back to that lowest level because we all have courts—we have an obligation under the conventions to ensure respect for the conventions and for the law of war. Part of our implementation of that is to have tribunals available for prosecution of American service persons should they commit a crime or for those who commit crimes against U.S. military personnel.

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Q: *. . . Of all the people in custody already, is there anyone who has been designated something other than POW?*
MR. PARKS: To the best of my knowledge, the United States has not yet run any Article 5 tribunals. I understand that process is under development, and it will be. At this time, everyone is being treated as a POW.

Q: *. . . Was anyone—anyone who was in custody after the first Gulf War, was anyone prosecuted among the people in custody after the first Gulf War?*
MR. PARKS: They were not. We found that of the individuals we had in custody, we had 99.9 percent enlisted personnel. Most of those came off the battlefield rather than from the occupation of Kuwait. The Iraqi officer corps had somehow vanished and was not there, and that's where the primary accountability probably would have been made, particularly for those of the occupation force. So as a result, they were given the opportunity to repatriate —be repatriated, which is a process we haven't discussed. It's something we work very closely with the International Committee of the Red Cross to do.

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Q: *Getting back to Iraqi armed forces have engaged in widespread and systematic violation of the laws of war, does that mean that as a military they are not entitled to the protections that the law of war provides?*
MR. PARKS: No, it's—one of the essential factors in the 1949 Prisoner of War Convention is that regular military forces are entitled to prisoner of war status, even if they violate the law of war. They can be prosecuted for their violations, but they still remain entitled to prisoner of war status.

Q: *On the subject of Iraqi Television, two questions. First, is the mere act of photographing a prisoner considered to be humiliating, or is there something about the way that they were photographed? And also, why did you—several television networks around the world aired that footage. Why did you feel the need to mention Al-Jazeera also?*
MR. PARKS: I think it was just a statement of fact, on the last part of that; not singling them out, it just happened to be that they were the ones who I think were—probably transmitted it most directly. It's not so much the photography of a prisoner of war, particularly, as you know, with our embedded media; every day, prisoners are being taken on the battlefield. That is a statement of fact. When they are photographed under those circumstances as they're surrendering, as they're receiving medical care, that's a statement of fact. The contrast is—and in fact, our embedded media and others, I think, have been superb in understanding our ground rules that you will not take photographs in such a way, either hopefully to avoid any . . . specific identification of the individuals or in the way that would be considered to be humiliating or degrading. The contrast here is that you have the state-owned Iraqi television forcing prisoners of war in their hands to appear before it for forced interviews, where it's very clear this is an act of intimidation and humiliation. So, there's a very delicate balancing, no question about it.

And as I said, I've been very pleased with the way the embedded media have recognized this. I was watching one of the channels, I guess about a week ago, when an Iraqi soldier came over the horizon with his hands up. He was probably a good 150 meters

away from the camera. The embedded journalist and his photographer said, "Look! There's one coming now." And the other one said, "Hey, can we take that picture?" And he said, "Yeah, I think we can, because we can't identify the person." So they understand the ground rules, they've been reinforced to them—and it's been quite good. But that is very distinctive from: I have this prisoner of war in my hands, I'm going to put them on the camera for one reason; that is, to coerce him into making—going through questions and to be used for propaganda purposes.

Q: *. . . [O]nce these people are in custody, if you decide to bring people here, put them in Guantanamo Bay, is there anything in the law of war that would prevent the U.S. from allowing somebody to go in and just photograph them in their conditions? Or is that just a matter of U.S. policy to not let people take pictures of prisoners down in Guantanamo?*
MR. PARKS: Well, let me back up to the first part of that. We have no plans to send anyone to Guantanamo Bay. But second, as a matter of policy and our interpretation of the prohibition in Article 13 on humiliating and degrading treatment, we do not allow persons to go into prisoner of war camps to take photographs of them.

Q: *If I can follow on that. What is the difference? Can you explain the difference, then, between the prisoners of war you're taking in Afghanistan and sending to Guantanamo Bay and these prisoners?*
MR. PARKS: Well, there's a substantial difference in the types of conflicts. What we—we are in the true, pure, traditional international armed conflict, for which the conventions were written. Many of the persons that we captured in Afghanistan were members of al Qaeda. This goes back to one of the previous questions. They were unprivileged belligerents, and they're not entitled to the complete protection of the law of war. . . .

At the same time, we are providing that template that I mentioned earlier and providing basic protections for them: meals, lodging, all the items they need—soap, towels, toothpaste—medical treatment and visits by the International Committee of the Red Cross. The basic distinction is the one I mentioned before, and that is, as unprivileged belligerents, they do not have the legal

right to attack military personnel, whereas now we're engaged—except for the Fedayeen Saddam, we're now engaged with a regular military force.

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Q: *I want to make sure I'm totally clear on this. When it comes to U.S. military uniforms, what is the bare minimum that is required to be considered "in uniform"? Is just wearing one's weapons openly enough?*
MR. PARKS: . . . Let me sort of break that in two places. Ninety-nine-point-999 percent of the time, our forces are going to be in full uniform.

In those rare circumstances where you might have someone in the military operating with indigenous personnel, which we saw in World War II in Nazi-occupied Europe and places like that, the basic requirements are that they be under the command of someone responsible for the subordinates; wear some sort of distinctive device, which can be a hat, a scarf, an armband, something like that, an American flag on their body armor; and carry their arms openly; and finally, most importantly—this is where the contrast comes with the Fedayeen Saddam—carry out their operations in accordance with the law of war.

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. . . Obviously, you've got a group—let's say an element of indigenous personnel—they tend to wear some sort of distinctive device, for their own identification of one another. And that's distinctive from what you see on a traditional international armed conflict conventional battlefield, where you have uniformed forces meeting uniformed forces.

The other factor there is one I mentioned earlier, though, and that is, you are not intending to pose as a civilian.

Q: *Going back to the list of countries, you said there [are] about 190 that are signed up to the conventions. Is Iraq one of those?*
MR. PARKS: Yes, it is.

Q: *A different topic. Are there plans on any of the Iraqi leadership, if the thought is that they haven't been killed but they're missing,*

they may have escaped or they're still in hiding, are there plans to hold trials without their presence?
MR. PARKS: The United States, as a matter of policy, generally has not carried out trials in absentia. . . .

Q: There are reports of some foreign fighters being involved in the conflict in Iraq, some actually in uniform, although they may not be Iraqi uniforms. Does that pose any particular legal issue here?
MR. PARKS: It's going to be—that's something we'd have to answer on a case-by-case basis. If they're fighting in Iraqi uniforms, that's going to be one of the key elements; if they have some sort of association with the Iraqi military. As you may know, in a number of conflicts in the past, for instance, in World War II, we had U.S. forces who joined the Royal Air Force before the United States was in the conflict. If they had been captured, they would have been treated—entitled to prisoner of war status.

So it's going to be factually dependent on what they're doing at the time of the capture, how they're dressed and what they're doing. . . .

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Q: And just so I understand, there is not a new body of law or procedures that you are trying to develop to deal with this particular conflict; you will fall back on historical precedent as much as you can?
MR. PARKS: It's not only historical precedent; it is existing law.

Q: And then finally, in your prisoner-of-war holding camps now, are you sorting individuals either by rank or by unprivileged belligerents or people in uniform? Is there any kind of sorting and identification that you are doing?
MR. PARKS: I don't have information as to what's being done at this time. I can tell you that generally when you go through this movement back, collection, sorting process—and let me say that a part of that is getting as full an accounting of the person that you have as possible so that we can take that information

and forward it to the International Committee of the Red Cross, because we want a full accounting of our prisoners of war as well. In that process, the Geneva Convention requires a separation of officers from enlisted. Now, whether there will be later on, as I indicated, this Article V screening when there's doubt as to someone's status, then there may be some additional separation. At this point in time though, I think right now the idea is to provide the protections required by the conventions, the medical treatment required, and then move into this Article V Tribunal phase in the next week or so.

Q: *To your knowledge, has Iraq yet allowed the ICRC to meet with any of the coalition POWs?*
MR. PARKS: It has not. And I think as I mentioned in my statement, in the course of the 1991 Gulf War, the Iraqis did not permit the ICRC to see U.S. and coalition prisoners of war in their hands until the war had ended and 24 hours out from the time of repatriation. The ICRC then handled the repatriation of coalition prisoners of war back to their forces and did a superb job.

Q: *Could the fact that the United States launched this invasion without U.N. approval—could that undercut your legal standing for conducting a war crimes tribunal?*
MR. PARKS: No. And the law of war, all of it, has taken the traditional view that it doesn't make any difference who started the war. What we do is gauge you upon the conduct of your operations on the battlefield itself. You could be totally justified in what you're doing; if your forces violate the law of war, it's still a violation of the law of war. The four 1949 Geneva Conventions specifically state in there that it doesn't make any difference who started the war, who is the party who was first off or what have you; that in any case, the conventions will apply. That's to sort of keep people from saying, "Well, he started it, and therefore, I don't have to follow the law of war." Regardless of who started the conflict, each side has an obligation to follow the law of war.

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Q: *. . . I'm interested to know two things. . . . Uday Hussein, obviously, was in charge of the occupation of Kuwait last time around, and has been responsible for the irregular forces whose behavior in Basra and others has given rise to suggestions that his troops are behaving in an illegal way. And are you targeting him for war crimes tribunals? And will you be looking back at his record in Kuwait, or just looking at this current war? That's the first question.*

Secondly, looking at the images we've seen of prisoners being taken there, hoods have been put over their heads when they've been arrested, and they seem to have been disoriented or pushed about a bit in the process of taken away. Is that legal or illegal?

MR. PARKS: Let me take two parts of that. The first part, we do have a very detailed record of our investigation that was conducted in 1990, '91, of the Iraqi occupation of Kuwait, and that certainly is available, should this individual be in our custody or the custody of others at the end of the conflict. Second, on the hooding, it is a standard procedure in most militaries to either blindfold or hood prisoners at the time of capture because every soldier is trained that the best time to attempt escape is at the time of capture. So the idea is, first, not to give them the opportunity to escape, and second, not to have them—give them the opportunity to collect military intelligence in the event they should escape. Obviously, the hooding is one method for doing that; the other I mentioned is blind-folding. They obviously can still breathe. It's not a matter of trying to abuse them in any way, it's a standard security procedure for most militaries, if not all, upon capture.

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Q: *Are either of you able to speak to this talk about whether or not tear gas, the use of tear gas by U.S. forces would be a violation of any of the laws of war or chemical weapons conventions? Is that—*

MR. PARKS: I can speak to that. The 1993 Chemical Weapons Convention prohibits the use of riot-control agents as a method of warfare. It's not a precisely defined term. The United States has an executive order that suggests that riot-control agents can be used

for defensive purposes to save lives. That's a very long-standing executive order.

It gives a few examples in there. One is combat search and rescue. The others are rioting prisoners of war. A third example is, if in fact an enemy placed civilians in front of it, to advance on your lines. There is a very careful process for the decision as to whether or not riot control agents may be used on the battlefield, requiring presidential authorization, which may be delegated to the combatant commander. But it's not something that we do lightly.

* * * *

(2) Release of detainees

During 2003 the coalition forces released thousands of Iraqi prisoners being held in Iraq. On April 18, for instance, the American Forces Press Service explained the release of 887 prisoners as set forth below, available at *www.defenselink.mil/news/Apr2003/n04182003_200304183.html* The reference to detaining the "doctor or cleric" is based on Article 28 of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, which provides that medical personnel and chaplains are generally not prisoners of war when captured but may be retained to perform "their medical and spiritual duties on behalf of prisoners of war."

Coalition forces have released 887 Iraqi prisoners being held in the Theater Internment Facility near Umm Qasr.

Pentagon officials said most were released because it was obvious they were not enemy combatants. The U.S. military did hold a tribunal under the Geneva Conventions Article V to determine the status of seven others.

Of those seven, two were declared noncombatants and released, four were determined to be lawful combatants and classified as

enemy prisoners of war, and one was a doctor or cleric and was detained to provide services to the camp population, said Army Maj. Ted Wadsworth, a DoD spokesman.

The facility is administered by the Army's 800th Military Police Brigade, an Army Reserve unit based in Uniondale, N.Y.

b. Detainees held at Guantánamo

(1) Release of detainees

During 2003 a number of detainees held at Guantánamo were released. The detainees had largely been apprehended in connection with U.S. military action in Afghanistan or in the context of the war against terror. *See* news releases by the U.S. Department of Defense on release of certain groups of detainees on May 9, July 18, and November 24, 2003, available at *www.dod.mil/news/detainees.html*. The news release of November 24, 2003, is excerpted below.

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* * * *

Senior leadership of the Department of Defense, in consultation with other senior U.S. government officials, determined that these detainees either no longer posed a threat to U.S. security or no longer required detention by the United States.

Transfer or release of detainees can be based on many factors, including law enforcement and intelligence, as well as whether the individual would pose a threat to the United States. At the time of their detention, these enemy combatants posed a threat to U.S. security.

In general terms, the reasons detainees may be released are based on the nature of the continuing threat they may pose to U.S. security.

During the course of the War on Terrorism, we expect that there will be other transfers or releases of detainees. Because of operational security considerations, no further details will be available.

(2) Detention and treatment

In August 2003 the United States presented its response to Opinion No. 5/2003 dated May 8, 2003, and the Communication Dated January 8, 2003, of the Working Group on Arbitrary Detention, UN Human Rights Commission, as excerpted below.

The full text of the response is available at *www.state.gov/s/l/c8183.htm*. The letter of April 2003 referred to in this submission is Doc. No. E/CN.4/2003/G/73, available at *www.unhchr.ch/huridocda/huridoca.nsf/Documents?OpenFrameset*.

The Government of the United States welcomes the opportunity to respond to the above-mentioned Opinion No. 5/2003 dated May 8, 2003, and the Communication dated January 8, 2003, relating to detention at Guantanamo Naval Base (Guantanamo). The Opinion took exception to the perceived lack of response of the United States Government to its January 8 communication and also concluded that, in the view of the Working Group on Arbitrary Detention, the detention of four named individuals at Guantanamo is "arbitrary, being in contravention of Article 9 of the Universal Declaration of Human Rights and Article 9 of the International Covenant on Civil and Political Rights. . . ."

The United States Government respectfully disagrees with the Opinion of the Working Group and refers to its letters to the Working Group of December 17, 2002, and April 3, 2003, respecting detention at Guantanamo. These two earlier communications to this Working Group discussed at length the factual and legal issues surrounding detention at Guantanamo. In view of these communications, the United States believes that, contrary to the position expressed in the May 8 Opinion, we have constructively and respectfully engaged in a dialogue with the Working Group on this important issue, bearing in mind the mandate of the Working Group.

Further, as we observed in the foregoing correspondence, the mandate of the Working Group does not include competence to

address the Geneva Conventions of 1949 or matters arising under the law of armed conflict. Without in any way waiving or withdrawing its continuing objection that these matters are beyond the competence of the Working Group, the United States Government, continuing the spirit of dialogue and readiness to cooperate exhibited in its two earlier communications, offers this detailed Response to the Working Group's Communication and Opinion.

For reasons of national security, the United States Government is not in a position to answer specific questions regarding four named individuals . . . Nevertheless we are pleased to offer the followed detailed information about the detention and treatment of individuals held at Guantanamo.

As the UNCHR is aware, on September 11, 2001, terrorists used unlawful and perfidious means to attack innocent civilians in the United States. Immediately following the attacks of September 11, most of the world, including the United Nations Security Council in resolution 1368 and NATO, condemned these attacks as a "threat to international peace and security," recognized the inherent right of individual and collective self-defense, and expressed determination to combat by all means threats to international peace and security caused by terrorist acts.

* * * *

Consistent with this widely held international view, President Bush stated in the Military Order of November 13, 2001, that "international terrorists, including members of Al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces." Since September 11, the United States has exercised its inherent right of self-defense as recognized in Article 51 of the Charter of the United Nations and UN Security Resolutions 1368 (12 September 2001) and 1373 (28 September 2001) and has used other lawful and reasonable means to thwart further attacks by enemy combatants on American persons and property.

As the foregoing makes clear, the United States Government, and indeed the international community, have concluded that Al

Qaida and related terrorist networks are in a state of armed conflict with the United States. They have trained, equipped, and supported armed forces and have planned and executed attacks around the world against the United States on a scale that far exceeds criminal activity. Al Qaida attacks have deliberately targeted civilians and protected sites and objects. For example, in 2002, Al Qaida operatives in northern Iraq concocted suspect chemicals under the direction of senior Al Qaida associate Abu Mu'sab al-Zarqawi and tried to smuggle them into Russia, Western Europe, and the United States for terrorist operations. U.S. Department of State *Patterns of Global Terrorism 2002* (publication 11038 April 2003) at p. 79. Other attacks perpetrated by Al Qaida and Al Qaida-linked groups include the attempted bombing on December 22, 2001, of a commercial transatlantic flight from Paris to Miami by convicted shoe bomber Richard Reid; on October 12, 2002, a car bomb outside a nightclub in Bali, Indonesia, killing about 180 international tourists and injuring about 300; a suicide car bombing at a hotel in Mombassa, Kenya, killing 15 and injuring 40; the simultaneous near-miss SA-7 missile attack on a civilian jet departing Mombassa for Israel; an attack on US military personnel in Kuwait on October 8 that killed one US soldier and injured another; directing a suicide attack on the MV Limburg off the coast of Yemen on October 6, 2002, that killed one and injured four; and a firebombing of a synagogue in Tunisia on April 11, 2002 that killed 19 and injured 22. *Id.* at 118–19.

Moreover, Al Qaida directed the October 12, 2000 attack on the USS Cole in the port of Aden, Yemen, killing 17 US Navy members and injuring an additional 39. Al Qaida also conducted the bombings in August 1998 of the US Embassies in Kenya and Tanzania that killed at least 300 individuals and injured more than 5,000. *Id. at 119*. Al Qaida additionally claims to have shot down UN helicopters and killed US servicemen in Somalia in 1993 and to have conducted three bombings that targeted US troops in Aden, Yemen in December 1992. *Id.*

Al Qaida is also linked to the following plans that were disrupted or not carried out: to assassinate Pope John Paul II during his visit to Manila in late 1994; to kill President Clinton during a visit to the Philippines in early 1995; to bomb in midair

a dozen US trans-Pacific flights in 1995; to set off a bomb at Los Angeles International Airport in 1999; and to carry out terrorist operations against US and Israeli tourists visiting Jordan for millennial celebrations in late 1999. *Id.* (Jordanian authorities thwarted the planned attacks and put 28 suspects on trial. *Id.*)

Despite coalition successes in Afghanistan and around the world, the war is far from over. The Al Qaida network today is a multinational enterprise that has a global reach that exceeds that of any previous transnational group. Some Al Qaida operatives have escaped to plan and mount further terrorist attacks against the United States and coalition partners. The continuing military operations undertaken against the United States and its nationals by the Al Qaida organization both before and after September 11 necessitate a military response by the armed forces of the United States. To conclude otherwise is to permit an armed group to wage war unlawfully against a sovereign state while precluding that state from defending itself.

During the course of hostilities in Afghanistan, the United States military and its allies have captured or secured the surrender of thousands of individuals fighting as part of the Al Qaida terrorist network or who supported, protected or defended the Al Qaida terrorists. These were individuals captured in connection with the ongoing armed conflict. Their capture and detention was lawful and necessary to prevent them from returning to the battlefield or reengaging in armed conflict.

In Afghanistan, the United States has screened over 6,000 enemy combatants to determine whether continued detention by the United States was warranted. Many individuals released by the United States and coalition forces were released for many appropriate reasons. Those enemy combatants who were assessed as being of special concern to the United States, including because of their potential to remain a threat to coalition forces, their involvement in war crimes, and their intelligence value, were taken to Guantanamo Bay for further detention. The first detainees arrived at Guantanamo on January 11, 2002, and others have arrived (and some have been transferred out) since then.

International Humanitarian Law. As noted earlier, the Working Group lacks jurisdiction to entertain communications raising

issues under the laws and customs of war. The laws and customs of war are the applicable law in armed conflict. The Opinion and Communication ignore this crucial juridical context, suggesting that the detainees are entitled to judicial review or enjoy the right to resort to the courts. The Opinion, however, presents no legal support for the novel proposition that detained enemy combatants have any rights *under the law of armed conflict* to have their detention reviewed in a human rights forum or to have access to the courts of the Detaining Power to challenge their detention during the course of ongoing conflict.

The law of armed conflict is the *lex specialis* governing the status and treatment of persons detained during armed conflict. To be sure, many of the principles of humane treatment found in the law of armed conflict find similar expression in human rights law. Further, some of the principles of the law of armed conflict may be explicated by analogy or by reference to human rights principles. However, similarity of principles in certain respects does not mean an identity of principles, doctrine, or jurisprudence. Professor Theodor Meron, currently the President of the International Criminal Tribunal for the Former Yugoslavia in The Hague, has written:

> Not surprisingly, it has become common in some quarters to conflate human rights and the law of war/international humanitarian law. Nevertheless, despite the growing convergence of various protective trends, significant differences remain. Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage. *It also permits certain deprivations of personal freedom without convictions in a court of law.*[1]

The consequences of conflating the two bodies of law would be dramatic and unprecedented. For instance, application of

[1] Theodor Meron, *The Humanization of Humanitarian Law*, 94 A.J.I.L. 239, 240 (2000) (emphasis added).

principles developed in the context of human rights law would allow all enemy combatants detained in armed conflict to have access to courts to challenge their detention, a result directly at odds with well-settled law of war that would throw the centuries-old, unchallenged practice of detaining enemy combatants into complete disarray. As Professor Meron concludes his introduction to the *trends* at the heart of international humanitarian law, "[t]he two systems, human rights and humanitarian norms, are thus distinct. . . ."[2]

The Enemy Combatants are not Entitled to POW Status. Shortly after the detainees' arrival at Guantanamo, the President of the United States determined that the conflict with Al Qaida is not covered by the Geneva Convention. Al Qaida is a terrorist organization, not a state, and it is not and cannot be a party to the Geneva Conventions. The President further determined that, although the conflict with the Taliban is covered by the Geneva Convention, the Taliban detainees do not qualify for POW status. *See* White House Fact Sheet, Status of Detainees at Guantanamo, Office of the Press Secretary, Feb. 7, 2002, p. 1, at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> (visited April 5, 2002). The President reached this decision after careful review and in consultation with his most senior advisers.

The United States stated publicly that:

> Under Article 4 of the Geneva Convention, . . . Taliban detainees are not entitled to POW status. . . . The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. . . . Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the treaty.

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[2] *Id.*

Statement by the U.S. Press Secretary, The James S. Brady Briefing Room, in Washington, D.C. (Feb. 7, 2002).

Thus, the detainees do not enjoy POW status because they do not meet the criteria applicable to lawful combatants. The United States has made it clear that the detainees are unlawful combatants—a legal status that has long been recognized under international law—who may be detained at least for the duration of hostilities.[3] *See*, *e.g.*, INGRID DETTER, THE LAW OF WAR 148 (2000) ("Unlawful combatants . . . though they are a legitimate target for any belligerent action, are not, if captured, entitled to any prisoner of war status").

Further, Al Qaida members unlawfully engage in an armed conflict targeting civilians and military personnel and objects around the world. Al Qaida's conduct flagrantly violates even the most fundamental laws and customs and war. In addition to unlawfully targeting civilians, Al Qaida's methods and means of waging war are at odds with every requirement applicable to lawful armed forces. It is important to the rule of law that we not recognize Al Qaida and the Taliban as having POW status. Doing so would disserve the world's interests by diminishing the principles embodied in the Geneva Conventions.

It is the view of the United States Government that we cannot have an international legal system in which honorable soldiers who abide by the law of armed conflict and are captured on the battlefield may be detained and held until the end of a war without access to courts or other benefits claimed in the Opinion, but

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[3] The U.S. Supreme Court, citing numerous authoritative international sources, has held that unlawful combatants "are subject to capture and detention, [as well as] trial and punishment by military tribunals for acts which render their belligerency unlawful." *See* Ex parte Quirin, 317 U.S. 1, 31 (1942) (citing GREAT BRITAIN, WAR OFFICE, MANUAL OF MILITARY, ch. xiv, §§ 445–451; REGOLAMENTO DI SERVIZIO IN GUERRA, § 133, 3 LEGGI E DECRETI DEL REGNO D'ITALIA (1896) 3184; 7 MOORE, DIGEST OF INTERNATIONAL LAW, § 1109; 2 HYDE, INTERNATIONAL LAW, §§ 654, 652; 2 HALLECK, INTERNATIONAL LAW (4th Ed. 1908) § 4; 2 OPPENHEIM, INTERNATIONAL LAW, § 254; HALL, INTERNATIONAL LAW, §§ 127, 135; BATY & MORGAN, WAR, ITS CONDUCT AND LEGAL RESULTS (1915) 172; BLUNTSCHI, DROIT INTERNATIONAL, §§ 570 bis.).

terrorist combatants who violate the law of armed conflict must be given special privileges or released and allowed to continue their belligerent, unlawful or terrorist activities. Such a legal regime would signal to the international community that it is acceptable for armies to behave like terrorists.

Article Five Tribunals. Members of the Taliban and Al Qaida detained at Guantanamo are not entitled to Prisoner of War status under the Third Geneva Convention, and there is no need to convene an Article 5 tribunal to make individualized status determinations for each detainee. Article 5 states that "[s]hould any doubt arise," detainees "shall enjoy the protection of the [Geneva Convention] until such time as their status has been determined by a competent tribunal." Article 5 does not require a party to the Geneva Convention to convene tribunals to consider status determinations unless there is doubt. For members of Al Qaida and the Taliban, captured in the course of ongoing hostilities or directly acting in support of a hostile armed force engaged in an ongoing armed conflict, there is no doubt about their status. The President has determined for the United States as a categorical matter that Al Qaida fighters cannot enjoy POW status because Al Qaida is not a state party to the Convention, and Taliban fighters cannot enjoy POW status because the Taliban militia as a group failed to comply with the requirements of Article 4.

Enemy Combatants are Not Entitled to Be Released Prior to the End of Hostilities or to Have Access to Court or Counsel. Some have erroneously claimed that the United States is violating domestic and international laws that prohibit the indefinite detention of individuals without trial. This claim is contrary to the well-established and broad authority of a country to detain enemy combatants under the laws and customs of war for the duration of hostilities.

Individuals detained at Guantanamo are enemy combatants captured in the course of ongoing hostilities or directly acting in support of a hostile armed force engaged in an ongoing armed conflict. As such, they are being held in accordance with the laws and customs of war, which permit the United States to capture and detain enemy combatants to prevent their re-engaging in the ongoing armed conflict.

The United States has made it clear that the detainees are unlawful combatants[4]—a legal status that has long been recognized under international law—who may be detained at least for the duration of hostilities. *See*, *e.g.*, INGRID DETTER, THE LAW OF WAR 148 (2000) ("Unlawful combatants . . . though they are a legitimate target for any belligerent action, are not, if captured, entitled to any prisoner of war status"). Individuals detained at Guantanamo include a number of senior Al Qaida operatives or others committed to killing Americans and others. The United States continues to fight against enemy combatants who are planning and conducting attacks against it.

The detention of an enemy combatant is not an act of punishment but one of security and military necessity. It serves the important purpose of preventing an enemy combatant from continuing to fight against us. There is no law requiring a detaining power to prosecute enemy combatants on some form of charge or release them prior to the end of hostilities. Likewise, under the laws and customs of war, detained enemy combatants have no right of access to counsel or the courts to challenge their detention. Should a detainee be charged with a criminal offense, he would have the right to counsel and applicable fundamental procedural safeguards.

It is also important to note that the United States has no interest in detaining enemy combatants longer than necessary. On an ongoing basis, we are constantly reviewing the continued detention of each enemy combatant, based on security, war crime involvement, and intelligence concerns. This process has resulted in the release of, to date, 64 individuals. These individuals are required to sign an agreement that they will not take up arms against the United States or its allies. Additionally, some enemy combatants have been transferred to their countries of nationality for continued detention.

Intelligence gleaned from these enemy combatants has been invaluable in our ongoing war on terrorism. This information has

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[4] *See*, *e.g.*, Secretary Rumsfeld's statement that the detainees "are not POWs" and instead are "unlawful combatants". Gerry J. Gilmore, *Rumsfeld Visits, Thanks U.S. Troops at Camp X-Ray in Cuba*, American Forces Press Service, Jan. 27, 2002, at <http://www.defenselink.mil/news/Jan2002/n01272002_200201271.html> (visited April 11, 2002).

directly assisted the United States in its efforts to win the war on terrorism and in forestalling future terrorist attacks on the citizens of the United States and other countries.

Treatment of Detainees. Notwithstanding the fact that the detainees at Guantanamo are unlawful enemy combatants, the Armed Forces of the United States are "treating and will continue to treat [the detainees] humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the [Geneva Convention]. . . . The detainees will not be subjected to physical or mental abuse or cruel treatment." *See* White House Fact Sheet, Feb. 7, 2002, at 1–2.

The detainees are being provided shelter, new clothing and shoes, sleeping pads and blankets and three culturally-sensitive meals a day. *Id.* Indeed, the detainees have gained an average of thirteen pounds (over five kilos) each since their arrival in Guantanamo Bay. *See* "Intel of 'Enormous Value' Gleaned from Guantanamo Detainees," American Forces Information Service, Jan. 10, 2003, at <http://www.dod.mil/news/Jan2003/n01102003_200301107.html> (visited July 7, 2003).

* * * *

In March 2003, a special mental health unit was opened where detainees suffering from depression or other psychological difficulties or diseases receive individualized care and supervision. Although there have been some suicide attempts by detainees, discovery and rapid intervention by military guards have prevented detainee deaths. These individuals were also seen by medical personnel. These attempts are taken seriously and the United States makes every effort to prevent them.

The detainees have been given personal toiletries, new towels and washcloths, and an opportunity to take showers. *See* White House Fact Sheet, Feb. 7, 2002, at 1–2. They have been given the opportunity to worship freely and many have been given copies of the Koran in their native language. Newly-constructed detention facilities include indoor plumbing, more secure exercise areas, and improved shelter from the sun, which improves upon the original, temporary detention facilities which are no longer in use. *See* "GITMO General Rates Force Protection

High with Detainee Care," American Forces Information Service, June 21, 2002, at <http://www.dod.mil/news/Jun2002/n06212002_200206212.html> (visited July 7, 2003).

The detainees are not being held incommunicado. Representatives of the International Committee of the Red Cross ("ICRC") have visited detainees. . . . *See* White House Fact Sheet, Feb. 7, 2002, at 2; *see also* Statement by Secretary Rumsfeld in Jim Garamone, *Rumsfeld Explains Detainee Status*, American Forces Press Service, Feb. 8, 2002, at <http://www.defenselink.mil/news/Jan2002/n01272002_200201271.html> (visited April 11, 2002); International Committee of the Red Cross, "Guantanamo Bay: The Work Continues," May 9, 2003, at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList199/5C867C1D85AA2BE541256C94006000EE> (visited July 7, 2003).

Detainees are also permitted to communicate with family and friends at home via letters and postcards. They use either the U.S. military postal service, or the ICRC, which delivers mail via its offices in each country. The volume of communications is not insubstantial; from January 2002 (when detainees first began to arrive) to July 2002, the United States military delivered over 1,600 pieces of mail sent out by detainees and delivered over 300 pieces of mail sent to detainees, *see* "Detainees Send, Receive Mail Via Joint Task Force, Red Cross," American Forces Information Service, June 21, 2002, at <http://www.dod.mil/news/Jun2002/n07232002_200207231.html> (visited July 7, 2003), while the ICRC, by April 2003, had delivered nearly 4,200 such pieces of mail. *See* ICRC, "Guantanamo Bay: The Work Continues," *supra*.

Subject to certain restrictions, the detainees can engage in exercise and recreation periods and can communicate with one another. Some have met and consulted privately with a U.S. Navy chaplain of Muslim faith. *See*, *e.g.*, Statement by U.S. Navy Lt. Saiful Islam (Muslim Chaplain) (saying that he calls the detainees to afternoon prayer and has spoken with some of the detainees). Some have met with government officials from their country of nationality. *See*, *e.g.*, "Rumsfeld Invites Kuwaitis To Visit Their Citizens at Guantanamo," American Forces Information Service, June 10, 2002, at <http://www.dod.mil/news/Jun2002/n06102002_200206104.html> (visited July 7, 2003);

"Wolfowitz Interview with Jim Lehrer, News Hour," DoD News Transcript, Mar. 21, 2002, at <http://www.dod.mil/news/Mar2002/t03222002_t0321wol.html> (visited July 7, 2003) (explaining that numerous countries had already sent representatives to visit their nationals held at Guantanamo).

For the reasons discussed above, the United States Government respectfully disagrees with the Opinion No. 5/2003 dated May 8, 2003, and the Communication dated January 8, 2003, of the Working Group on Arbitrary Detention relating to detention at Guantanamo. Additionally, the United States Government underscores that the competence of the Working Group does not extend to the laws and customs of war and thus the Communication of January 8, 2003, and the Opinion of May 8, 2003, are outside the competence of the Working Group.

*c. Habeas corpus litigation in the United States concerning enemy combatant detainees**

(1) Access to U.S. courts in habeas corpus proceedings by detainees at Guantánamo

On November 10, 2003, the U.S. Supreme Court granted certiorari in the case of *Rasul v. Bush*, 124 S. Ct. 534 (2003) to review a decision of the U.S. Court of Appeals for the

* As this volume was going to press, the Supreme Court released opinions in cases discussed in this section. In *Rasul*, the Court "revers[ed] the judgment of the Court of Appeals and remand[ed] for the District Court to consider in the first instance the merits of petitioners' claims." *Rasul v. Bush*, 124 S. Ct. 2686 (2004). In *Hamdi*, the Court vacated the judgment of the Fourth Circuit and remanded the case for further proceedings. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). In *Padilla*, the Court reversed and remanded the Second Circuit opinion, holding that the district court lacked jurisdiction over Padilla's habeas petition. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004). (The order to release Padilla had been stayed on January 22, 2004.) Finally, the Court granted certiorari and vacated the Ninth Circuit opinion in *Gherebi* and remanded for further consideration in light of *Rumsfeld v. Padilla. Bush v. Gherebi*, 124 S. Ct. 2932 (2004). Relevant developments will be discussed in *Digest 2004*.

D.C. Circuit. The grant of certiorari was limited to the question "[w]hether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." The court of appeals had affirmed dismissals of petitions for habeas corpus for lack of jurisdiction in combined cases involving three detainees who were British and Australian nationals in one case, one Australian national in another, and twelve Kuwaiti nationals in a third case. *Al Odah v. United States*, 321 F.3d. 1134 (D.C. Cir. 2003). The case was pending in the Supreme Court at the end of 2003. For further discussion of the cases, *see Digest 2002* at 980–986.

On December 18, 2003, the Ninth Circuit reversed a lower court ruling that had dismissed a habeas corpus petition on behalf of another Guantánamo detainee for lack of jurisdiction. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003). The Ninth Circuit held that (1) habeas jurisdiction existed on the naval base located in Cuba but under the territorial jurisdiction of the United States pursuant to the lease granting the United States complete jurisdiction and control; (2) for habeas purposes, the naval base was a part of the sovereign territory of the United States; and (3) the District Court for the Central District of California had personal jurisdiction over the Secretary of Defense.

(2) Detention of enemy combatants in the United States

Two cases involving U.S. citizens being detained as enemy combatants in the United States were also pending at the end of 2003. On January 8, 2003, the U.S. Court of Appeals for the Fourth Circuit ordered dismissal of a petition for habeas corpus by Yaser Esam Hamdi. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003). On July 9, 2003, the Fourth Circuit denied rehearing and rehearing en banc. 337 F.3d 335 (4th Cir. 2003). *See Digest 2002* at 986–997.

On December 18, 2003, the Second Circuit ordered the District Court of the Southern District of New York to issue

a writ of habeas corpus directing the Secretary of Defense to release another U.S. citizen being held in the United States as an enemy combatant. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), as amended, January 14, 2004. *See* discussion in *Digest 2002* at 998–1000.

One of the issues before the courts of appeals in both cases concerned the government's position that enemy combatants such as Hamdi and Padilla may be held for the duration of hostilities under the law of armed conflict without being charged with a crime and without the right to counsel. On December 2, 2003, the Department of Defense announced that, as a matter of discretion and military policy, it would permit Hamdi to have access to counsel, stating:

> The Department of Defense announced today that Yaser Esam Hamdi, an enemy combatant detained at the Charleston Consolidated Naval Brig in Charleston, S.C., will be allowed access to a lawyer subject to appropriate security restrictions. Arrangements for that access will be developed over the next few days.
>
> DoD is allowing Hamdi access to counsel as a matter of discretion and military policy; such access is not required by domestic or international law and should not be treated as a precedent.
>
> DoD decided to allow Hamdi access to counsel because Hamdi is a U.S. citizen detained by DoD in the United States, because DoD has completed its intelligence collection with Hamdi, and because DoD has determined that the access will not compromise the national security of the United States.

The full text of the press announcement is available at *www.defenselink.mil/releases/2003/nr20031202-0717.html*.

In a case involving a non-U.S. national designated as an enemy combatant, the U.S. District Court for the Central District of Illinois dismissed a petition for writ of habeas corpus for lack of proper venue because the person was not being held in that district at the time the habeas petition was filed. *Al-Marri v. Rumsfeld*, 274 F. Supp. 2d 1003 (D.Ill.

2003). Al-Marri had been indicted on criminal charges in the Central District of Illinois until being designated as an enemy combatant by President Bush and transferred to the custody of the U.S. military at the Naval Consolidated Brig in Charleston, South Carolina. At the end of 2003 an appeal was pending in the Seventh Circuit.

4. Military Commissions

a. Instructions and appointments

On May 2, 2003, the general counsel of the U.S. Department of Defense made available eight military commission instructions issued pursuant to section 7(A) of Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, available at *www.defenselink.mil/news/commissions.html. See Digest 2002* at 957–976; *Digest 2001* at 872–881. In a May 2 news release, the Department indicated that the instructions "would facilitate the conduct of possible future military commissions."

On December 30, 2003, the Department of Defense announced three further steps in preparing for military commissions. First, the Department released Military Commission Instruction No. 9, dated December 26, 2003, which states that the purpose of the instruction is to "prescribe[] procedures and establish[] responsibilities for the review of military commission proceedings" by the Review Panel called for in Military Commission Order No. 1. As provided in 6(H)(4) of that Order, the Review Panel reviews all commission proceedings and either "(a) forward[s] the case to the Secretary of Defense with a recommendation as to disposition, or (b) return[s] the case to the Appointing Authority for further proceedings, provided that a majority of the Review panel has formed a definite and firm conviction that a material error of law occurred."

In addition, Secretary of Defense Donald H. Rumsfeld designated four persons to serve on the Review Panel,

pursuant to Article 6(H)(4) of Order No. 1 and named retired Army Maj. Gen. John D. Altenbrug, Jr. as the appointing authority for the military commissions. A news release from the Department of Defense described these three actions, including comments on the review panel, as excerpted below.

The full text of the news release is available at *www.defenselink.mil/news/Dec2003/n12302003_200312303.html.*

Trials of detainees accused of terrorist acts came a step closer today, following three moves announced by senior Pentagon officials.

* * * *

. . . Under the instruction, panel members will review the military commission proceedings. "The panel may consider written and oral arguments by the defense, the prosecution and the government of the nation of which the accused is a citizen," said a senior defense official. "If the review panel finds that a material error of law has occurred, the review panel will return the case for further proceedings, which may include dismissal of charges."

The panel may make recommendations to the defense secretary, including in sentencing matters. Written opinions of the review panel will be published, officials said. The results of all military commission trials will automatically go to the review panel.

Establishing the panel should go a long way to allaying fears that many critics have that the process does not have enough safeguards, officials said.

The nine instructions for military commissions issued during 2003 are as follows:

Military Commission Instruction No. 1, Military Commission Instructions
Military Commission Instruction No. 2, Crimes and Elements for Trial by Military Commission
Military Commission Instruction No. 3, Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors

Military Commission Instruction No. 4, Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel
Military Commission Instruction No. 5, Qualification of Civilian Defense Counsel
Military Commission Instruction No. 6, Reporting Relationships for Military commission Personnel
Military Commission Instruction No. 7, Sentencing
Military Commission Instruction No. 8, Administrative Procedures.
Military Commission Instruction No. 9, Review of Military Commission Proceedings

The full text of the nine instructions and other related material, including Military Commission Order No. 1, are available at *www.defenselink.mil/news/commissions.html.*

b. Enemy combatants subject to President's military order

(1) Determinations of individuals subject to order

On July 3, 2003, President George W. Bush determined that six persons held as enemy combatants were subject to his military order of November 13, 2001, a step that the Department of Defense noted "may lead to military commissions."

An announcement of the President's determination by the Department of Defense, excerpted below, is available at *www.defenselink.mil/releases/2003/nr20030703-0173.html.*

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The President determined that six enemy combatants currently detained by the United States are subject to his Military Order of November 13, 2001. Today's action is the next step in the process that may lead to military commissions. The President determined that there is reason to believe that each of these enemy combatants was a member of al Qaida or was otherwise involved in terrorism directed against the United States.

Military Commissions have historically been used to try violations of the law of armed conflict and related offenses. Offenses that may be charged include those listed in the *Crimes and Elements for Trials by Military Commission* (Department of Defense Military Commission Instruction No. 2).

Many considerations are used in selecting cases—relevant factors include: 1) the quality of evidence, 2) the completeness of intelligence gathering and, 3) our desire to bring closure to individual cases. There is evidence that the individuals designated by the President may have attended terrorist training camps and may have been involved in such activities as: financing al-Qaida, providing protection for Usama bin Laden, and recruiting future terrorists.

The Department of Defense is prepared to conduct full and fair trials if and when the Appointing Authority approves charges on an individual subject to the President's military order.

Since no charges against any of the detainees have been approved, their names will not be released.

(2) Discussions with relevant governments

On July 23, 2003, the Department of Defense issued statements on meetings with Australia and the United Kingdom concerning detainees from those two countries. The statement concerning the British meeting stated that

> [a]mong other things, the U.S. assured the U.K. that the prosecution had reviewed the evidence against Feroz Abbasi and Moazzem Begg, and that based on the evidence, if charged, the prosecution would not seek the death penalty in either case. Additionally, the circumstances of their cases are such that they would not warrant monitoring of conversations between them and their defense counsels.
>
> * * * *
>
> Individual enemy combatants held by the U.S. in the war on terrorism will continue to be assessed on a

> case-by-case basis based on their specific circumstances for an appropriate disposition of their case. To date, no enemy combatants have been charged for trial before a military commission.

The statement is available at *www.defenselink.mil/releases/2003/nr20030723-0222.html.* A similar statement concerning discussions with Australia is available at the same address.

On November 25, 2003, the United States and Australia announced that they had reached agreement on certain aspects of the use of military commissions to try any Australian citizen. The agreement was described as set forth below by the Department of Defense.

The full text of the DOD announcement is available at *www.defenselink.mil/releases/2003/nr20031123-0702.html.*

The United States and Australian governments announced today that they agree the military commission process provides for a full and fair trial for any charged Australian detainees held at Guantanamo Bay Naval Station.

Following discussions between the two governments concerning the military commission process, and specifics of the Australian detainees' cases, the U.S. government provided significant assurances, clarifications and modifications that benefited the military commission process.

After examining the specific facts and circumstances surrounding each Australian detainee case, the Department of Defense was able to provide the following assurances, which are case specific:

> The prosecution has reviewed the evidence against the Australian detainees, and based on that evidence, the prosecution would not seek the death penalty;
>
> The security and intelligence circumstances of Mr Hick's case are such that it would not warrant monitoring of conversations between him and his counsel;
>
> If David Hicks is charged, the prosecution does not intend to rely on evidence in its case-in-chief requiring

closed proceedings from which the accused could be excluded; and

The U.S. and Australian government will continue to work towards putting arrangements in place to transfer Hicks, if convicted, to Australia to serve any penal sentence in accordance with Australian and U.S. law.

Subject to any necessary security restrictions, military commissions will be open, the media present and appropriately cleared representatives of the accused's government may observe the proceedings;

If an accused is convicted, the accused's government may make submissions to the Review Panel;

If eligible for trial, and subject to security requirements and restrictions, an accused may be permitted to talk to appropriately cleared family members via telephone, and two appropriately cleared family members would be able to attend their trial; and,

An accused may choose to have an appropriately cleared foreign attorney as a consultant to the Defense Team. Foreign attorney consultant access to attorney-client information, case material or the accused will be subject to appropriate security clearances and restrictions and determined on a case-by-case basis.

The assurances are in addition to other military commission procedures which already provide for the presumption of innocence, proof of guilt beyond a reasonable doubt, representation by a competent and zealous defense counsel free of charge, no adverse inference for choosing to remain silent and the overall requirement that any commission proceedings be full and fair.

The Department of Defense is in the process of drafting clarifications and additional military commission rules that will incorporate the assurances where appropriate.

(3) Assignment of military defense counsel

In December 2003 the Department of Defense announced that Australian detainee David Hicks and Salim Ahmed Hamdan of Yemen had been assigned military defense

counsel. The two detainees were among the six whom President Bush determined to be subject to his military order of November 13, 2001, but no decision had been made as of the end of 2003 to approve charges and refer their cases to trial. Press releases announcing the assignment of counsel in the two cases stated, however, that "[m]ilitary commission rules require that a detailed defense counsel be available to an accused sufficiently in advance of trial to prepare a defense."

The full texts of the press releases announcing the assignment of counsel are available at *www.defenselink.mil/releases/2003/nr20031203-0721.html* (David Hicks) *and www.defenselink.mil/releases/2003/nr20031218-0792.html* (Salim Ahmed Hamdan).

5. International Court of Justice: *Oil Platforms* (Iran v. U.S.)

On November 2, 1992, the Islamic Republic of Iran filed in the Registry of the International Court of Justice ("ICJ") an application instituting proceedings against the United States of America concerning a dispute "aris[ing] out of the attack [on] and destruction of three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, by several warships of the United States Navy on 19 October 1987 and 18 April 1988, respectively." In its application, Iran contended that these acts constituted a "fundamental breach" of Articles I and X(1) of the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, signed in Tehran on August 15, 1955, entered into force June 16, 1957, and of "international law." Iran relied on Article XXI, paragraph 2, of the Treaty of Amity as the basis for the Court's jurisdiction. Iran's application asked for reparations "in an amount to be determined by the Court at a subsequent stage of the proceedings" and "any other remedy the Court may deem appropriate." In its memorial, Iran added a claim of violation of Article IV of the treaty.

The Court issued its decision on the merits on November 6, 2003, denying both Iran's claim and the U.S. counterclaim added in 1997. In its decision, the Court summarized the facts relevant to Iran's claims and U.S. counterclaim as set forth below.

All written and oral pleadings in the case and orders and judgments of the Court are available at *www.icj-cij.org/icjwww/idocket/iop/iopframe.htm*.

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23. Before proceeding further, it will be convenient to set out the factual background to the case, as it emerges from the pleadings of both Parties; the broad lines of this background are not disputed, being a matter of historical record. The actions giving rise to both the claim and the counter-claim occurred in the context of the general events that took place in the Persian Gulf between 1980 and 1988, in particular the armed conflict that opposed Iran and Iraq. That conflict began on 22 September 1980, when Iraqi forces advanced into the western areas of Iranian territory, and continued until the belligerent parties accepted a ceasefire in the summer of 1988, pursuant to United Nations Security Council resolution 598 (1987) of 20 July 1987. During the war, combat occurred in the territories of both States, but the conflict also spread to the Persian Gulf—which is an international commercial route and line of communication of major importance—and affected commerce and navigation in the region. From the very beginning of the conflict, on 22 September 1980, Iran established a defence exclusion zone around its coasts; shortly after, in early October 1980, Iraq declared a "prohibited war zone" and later established a "naval total exclusive zone" in the northern area of the Persian Gulf. In 1984, Iraq commenced attacks against ships in the Persian Gulf, notably tankers carrying Iranian oil. These were the first incidents of what later became known as the "Tanker War": in the period between 1984 and 1988, a number of commercial vessels and warships of various nationalities, including neutral vessels, were attacked by aircraft, helicopters, missiles or warships, or struck mines in the waters of the Persian Gulf. Naval forces of both belligerent parties were operating in the region, but Iran has

denied responsibility for any actions other than incidents involving vessels refusing a proper request for stop and search. The United States attributes responsibility for certain incidents to Iran, whereas Iran suggests that Iraq was responsible for them.

24. A number of States took measures at the time aimed at ensuring the security of their vessels navigating in the Persian Gulf. In late 1986 and early 1987, the Government of Kuwait expressed its preoccupation at Iran's alleged targeting of its merchant vessels navigating in the Persian Gulf. It therefore requested the United States, the United Kingdom and the Soviet Union to "reflag" some of these vessels to ensure their protection. Following this request, the Kuwaiti Oil Tanker Company was able to charter a number of Soviet vessels, and to flag four ships under United Kingdom registry and 11 ships under United States registry. In addition, the Government of the United States agreed to provide all United States-flagged vessels with a naval escort when transiting the Persian Gulf, in order to deter further attacks; these escort missions were initiated in July 1987, under the designation "Operation Earnest Will". Other foreign Powers, including Belgium, France, Italy, the Netherlands and the United Kingdom, took parallel action, sending warships to the region to protect international shipping. Despite these efforts, a number of ships, including reflagged Kuwaiti vessels, merchant tankers carrying Kuwaiti oil and warships participating in "Operation Earnest Will", suffered attacks or struck mines in the Persian Gulf between 1987 and the end of the conflict.

25. Two specific attacks on shipping are of particular relevance in this case. On 16 October 1987, the Kuwaiti tanker *Sea Isle City*, reflagged to the United States, was hit by a missile near Kuwait harbour. The United States attributed this attack to Iran, and three days later, on 19 October 1987, it attacked Iranian offshore oil production installations, claiming to be acting in self-defence. United States naval forces launched an attack against the Reshadat ["Rostam"] and Resalat ["Rakhsh"] complexes; the R-7 and R-4 platforms belonging to the Reshadat complex were destroyed in the attack. On 14 April 1988, the warship USS *Samuel B. Roberts* struck a mine in international waters near Bahrain while returning from an escort mission; four days later the United States, again asserting the right of self-defence, employed its naval

forces to attack and destroy simultaneously the Nasr ["Sirri"] and Salman ["Sassan"] complexes.

26. These attacks by United States forces on the Iranian oil platforms are claimed by Iran to constitute breaches of the 1955 Treaty; and the attacks on the *Sea Isle City* and the USS *Samuel B. Roberts* were invoked in support of the United States' claim to act in self-defence. The counter-claim of the United States is however not limited to those attacks; according to the United States, Iran was in breach of its obligations under Article X, paragraph 1, of the 1955 Treaty, "in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran". According to the United States, Iran conducted an aggressive policy and was responsible for more than 200 attacks against neutral shipping in international waters and the territorial seas of Persian Gulf States. Iran denies responsibility for those attacks, suggesting that they were committed by Iraq and drawing attention to Iraq's interest in internationalizing the conflict. Furthermore, Iran claims that the attitude of the Iranian authorities and the measures taken by its naval forces in the Persian Gulf were solely defensive in nature. It has emphasized that Iraq was the aggressor State in the conflict, and has claimed that Iraq received diplomatic, political, economic and military support from a number of third countries that were not formally parties to the conflict, including Kuwait, Saudi Arabia and the United States.

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On December 12, 1996, the ICJ issued its preliminary opinion in the case, responding to preliminary objections by the United States to the jurisdiction of the Court. The United States had argued that the Court lacked jurisdiction because Iran's claims raised issues relating to the use of force and denied that its actions had violated any of the "conventions, principles, or rules of customary international law" asserted by Iran. The Court found that it had jurisdiction over Iran's claim under Article X(1), but not under Article I or IV.

The U.S. counter-memorial, filed June 23, 1997, included a counterclaim, requesting the Court to find that "in attacking vessels, laying mines in the Gulf and otherwise engaging in military actions in 1987–1988 that were dangerous and detrimental to maritime commerce," Iran breached its obligations to the United States under Article X of the 1955 Treaty and is under an obligation to make "full reparation to the United States for violating the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceedings." By Order of March 10, 1998, the Court held that the counterclaim presented by the United States was admissible as such and formed part of the proceedings. On March 23, 2001, the United States filed the U.S. rejoinder, its final memorial in the case, with corrigendum, on June 23, 1997.

In 2003 the Court conducted oral proceedings from February 17 through March 7, before rendering its decision on November 6. The final submissions of Iran and the United States, as set forth in the decision of the Court, were as follows.

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On behalf of the Government of Iran,

"The Islamic Republic of Iran respectfully requests the Court, rejecting all contrary claims and submissions, to adjudge and declare:

1. That in attacking and destroying on 19 October 1987 and 18 April 1988 the oil platforms referred to in Iran's Application, the United States breached its obligations to Iran under Article X, paragraph 1, of the Treaty of Amity, and that the United States bears responsibility for the attacks; and
2. That the United States is accordingly under an obligation to make full reparation to Iran for the violation of its international legal obligations and the injury thus caused in a form and amount to be determined by the Court at a subsequent stage of the proceedings, the right being reserved

to Iran to introduce and present to the Court in due course a precise evaluation of the reparation owed by the United States; and

3. Any other remedy the Court may deem appropriate"; at the hearing of 7 March 2003, on the counter-claim of the United States: "The Islamic Republic of Iran respectfully requests the Court, rejecting all contrary claims and submissions, to adjudge and declare: That the United States counter-claim be dismissed."

On behalf of the Government of the United States,
at the hearing of 5 March 2003, on the claim of Iran and the counter-claim of the United States:

"The United States respectfully requests that the Court adjudge and declare:

(1) that the United States did not breach its obligations to the Islamic Republic of Iran under Article X, paragraph 1, of the 1955 Treaty between the United States and Iran; and
(2) that the claims of the Islamic Republic of Iran are accordingly dismissed.

With respect to its counter-claim, the United States requests that the Court adjudge and declare:

(1) Rejecting all submissions to the contrary, that, in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran, the Islamic Republic of Iran breached its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty; and
(2) That the Islamic Republic of Iran is accordingly under an obligation to make full reparation to the United States for its breach of the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceedings."

The oral pleadings of the United States set forth at length the relevant facts and the U.S. legal analysis concerning operations in the Gulf during the period at issue. As the introductory statement of William H. Taft, IV, Legal Adviser, U.S. Department of State, noted, the United States spent "perhaps more time than is usual in reviewing for the Court the facts in evidence underlying this case. This is necessary not because the matters at hand are complicated, but rather because the story Iran has offered this Court is woefully incomplete and, in many material respects, false." The introductory summary of the U.S. legal position provided by Mr. Taft to the Court on February 21, 2003, includes a brief summary of the facts; the lengthy factual analysis presented in the introductory statement has been omitted from excerpts below.

Mr. Taft

1. INTRODUCTORY STATEMENT

* * * *

1.3. Mr. President, Members of the Court, Iran proposes to use the Court in this proceeding to produce a perverse result. It asks the Court to find that a treaty intended to promote commercial relations between Iran and the United States required the United States to sit by while, over the course of more than three years, Iran carried out a campaign of unlawful attacks on United States and other neutral shipping engaged in lawful commerce in international waters. The Court should not allow itself to be taken down a path that leads to such a shameful conclusion. Nor is this necessary. As we will demonstrate in the upcoming days, Iran's positions in this case are without factual or legal merit, and, indeed, in some cases are so clearly wrong as to appear wholly disingenuous. They must be rejected.

1.4. In our presentation today and next week, the United States will be spending perhaps more time than is usual in reviewing for the Court the facts in evidence underlying this case. This is necessary not because the matters at hand are complicated, but

rather because the story Iran has offered this Court is woefully incomplete and, in many material respects, false.

* * * *

1.13. Mr. President, during the course of the United States presentation, we will fill in the gaps and correct the false statements in the story Iran has placed before the Court. In the end, the Court will see that the story of this case is very simple: Iran's relentless attacks on United States and other neutral shipping harmed essential United States security interests and made necessary the actions the United States took against Iran's oil platforms, actions which themselves had no effect on commerce between Iran and the United States. These factual issues are important because they carry with them the inescapable legal conclusions that the actions of the United States in no way violated its obligations under the 1955 Treaty on which Iran bases its claims in this case.

1.14. Let me summarize the position of the United States and the course of our presentation.

1.15. We start with the fact that the Persian Gulf was one of the world's most critical economic lifelines during the period 1984–1988. The Gulf region supplied 25 per cent of the world's oil and contained nearly two thirds of the world's petroleum reserves. While there were a small number of pipelines running to the Mediterranean or the Red Sea, the Gulf itself was the vital channel through which this oil flowed to the world economy. As a result, the economic stability and security of virtually all States around the world was affected by any disruptions in shipments of crude oil through the Gulf.

1.16. The G-7 nations, Canada, France, Germany, Italy, Japan, the United Kingdom and the United States, underscored this point in June 1987. They adopted a statement which "reaffirm[ed] that the principle of free navigation in the gulf is of paramount importance for us and for others and must be upheld" (Exhibit 232). By attacking shipping in the Gulf, Iran was attacking the economic security of countries around the world. It also intended, of course, to pressure third countries, particularly Kuwait and Saudi Arabia, into refraining from lawful economic relations with Iraq, with which country Iran was at war.

1.17. Iran's unlawful attacks on neutral shipping in the international waters of the Gulf during the relevant period must be viewed in this context. While Iran was at war with Iraq at this time, it was not at war with Iraq's neighbours or with the many countries whose ships transited the Gulf. Specifically, and most importantly, Iran was not at war with the United States. Nor was the United States at war with Iran.

1.18. Citing various statements by United States officials, Iran has implied that because at times the United States (together with many other States) believed that Iran's attacks on neutral shipping during the Iran-Iraq war were more dangerous than Iraq's were, the operations against the platforms should be viewed as reflecting a general United States policy of hostility toward Iran, rather than what they were, particular actions to protect specific essential security interests of the United States. In fact, however, it is quite clear from the record of the case that, whatever its general policy goals may have been regarding the war, at no point did the United States use force to achieve them. To the contrary, the United States conducted itself in strict conformity with its status as a neutral non-combatant with regard to Iran throughout the war. This is why, for example, the United States arranged for the return of the members of the crew of the *Iran Ajr* to Iran after it had detained them.

1.19. As for what the United States policy regarding the war actually was, it is simply stated and well known. The United States supported the position of the United Nations Security Council throughout, in particular in 1980, when the Security Council called on Iran and Iraq to refrain from the use of force at the time of Iraq's original invasion of Iran (United Nations Security Council resolution 479 (1980)); again, in 1984, when the Security Council condemned Iranian attacks on shipping in the Gulf (United Nations Security Council resolution 552 (1984)); and again, in 1987, when the Security Council called for a ceasefire, withdrawal of both sides' forces from occupied territory, and a peaceful settlement (United Nations Security Council resolution 598 (1987)). While it supported the first United Nations Security Council resolution to which I have referred in 1980, Iran rejected the second and the third. To that extent, Iran's and the United States policies on the

war certainly differed. But the United States did not use force against Iran in support of its policy goals during the eight long years of the Iran-Iraq war.

1.20. The United States did, however, use force in the two operations against the Iranian oil platforms in 1987 and 1988, as well as in one other instance, when it stopped the *Iran Ajr* while it was laying mines in international shipping lanes. Why the difference? The reason is self-evident. In these three distinct operations the United States was not concerned with general policy or the fortunes of Iran and Iraq in their war. It was protecting its own essential security interests against Iranian attacks. The operations against the platforms in particular had nothing to do with Iran's war against Iraq and everything to do with Iran's attacks on neutral shipping in the Gulf and, specifically, the attacks on United States ships that preceded them.

1.21. There are, of course, lawful and appropriate steps that a belligerent State may take with respect to neutral shipping to ensure, for example, that military supplies do not reach its enemy. While Iran has referred to its right to take these steps, it neglected to say that it did not actually take them in most cases. Instead, Iran pursued what can only be described as an illegal war on neutral shipping in the international waters of the Gulf region, carried out, with the help of intelligence and logistical support from its oil platforms, by aircraft, by helicopters and gunboats, by mines and by missiles. Altogether, there were over 200 Iranian attacks between 1984 and 1988, on average about one a week. These attacks were responsible for at least 63 persons being killed and many more injured before they were stopped shortly after the second operation against Iran's oil platforms by the United States. Many nations bore these human and monetary costs. Shipping sources concluded that Iran carried out its attacks on vessels so as to maximize injuries and deaths to sailors on these mostly commercial vessels.

1.22. This Iranian war, Mr. President, against neutral shipping in the Gulf was not accepted by the international community. Many multilateral and bilateral diplomatic initiatives were undertaken in an effort to stop Iran's attacks. The Security Council, the League of Arab States, and the Gulf Co-operation Council all

condemned Iran's attacks, and many States protested Iran's attacks through diplomatic channels. In addition, many States acted directly to address Iran's attacks, using their military capabilities defensively to protect commercial shipping. Belgium, France, Germany, Italy, the Netherlands, the Soviet Union, the United Kingdom, and the United States sent warships and demining vessels to the Gulf. The United States and the United Kingdom reflagged Kuwaiti tankers, and the Soviet Union chartered oil tankers to Kuwait in a further effort to protect oil trade with Kuwait from Iran's attacks. But none of these steps ended Iran's unlawful attacks in the international waters of the Gulf. In fact, over time, during the period I am speaking of, the unlawful attacks intensified.

1.23. Even before Iran began targeting United States ships for attack in July 1987, Iran's actions endangered essential United States security interests. Top United States officials made clear their concerns about this at the time. In May 1987, President Reagan spoke about "the vital interests of the American people that are at stake in the Persian Gulf". Recalling that the Middle East crisis of the mid-1970s created "enormous dislocation that shook our economy to its foundations", President Reagan noted that these same effects could result if "Iran was allowed to block the free passage of neutral shipping" in the Gulf (Exhibit 230). Around the same time, United States Secretary of Defence Caspar Weinberger issued a report emphasizing that the "vital" United States interests in freedom of navigation and the free flow of oil from the Gulf were important essential security interests (Exhibit 231).

1.24. But the damage Iran's actions caused to United States interests increased beginning in July 1987 when Iran began to target specifically United States naval vessels and United States commercial shipping interests in the Gulf. Iran's attacks seriously injured a number of United States seamen, caused very severe damage to United States ships and cargo, and caused United States shippers to take costly steps to avoid further attacks. The United States sought repeatedly through diplomatic notes sent to Iran to persuade it to cease these attacks. There were, in fact, five such notes between May and September 1987. But Iran rebuffed these

approaches just as it rebuffed the many similar pleas made by other countries.

1.25. Having exhausted all other means of deterring further Iranian attacks, the United States ultimately took necessary and proportionate military actions against Iran's oil platforms in the Gulf, platforms that Iran had been using in targeting and attacking neutral shipping. In each case, notice was given to personnel on the platforms in advance of the attacks, in order to minimize injuries or loss of life. After the notice was provided, United States troops took steps to ensure that the platforms would not continue to be used by Iran's military to target and attack neutral shipping. The United States promptly reported these actions to the United Nations Security Council, consistent with the United Nations Charter.

1.26. Following the second United States action in April 1988, Iran's attacks on neutral shipping dramatically declined and soon stopped. The record suggests that the United States measures against Iran's platforms played a significant part in bringing about this result. The United States actions helped make it possible for international shipping to again transit the Gulf without threat of Iranian attack. The security interests of the United States and the many other States that depended on a reliable and affordable supply of oil from the Gulf were thus protected.

1.27. Notably, unlike in the case of Iran's unlawful attacks on neutral shipping in the Gulf, the United Nations Security Council did not issue a condemnation of the United States actions, nor did any other multilateral forum do so.

1.28. Mr. President, Members of the Court, the 1955 Treaty between Iran and the United States cannot be interpreted to establish as wrongful the limited but effective steps taken by the United States to bring to an end Iran's programme of unlawful attacks on neutral shipping in the international waters of the Gulf. Nor does international law permit Iran, citing the Treaty, to turn to this Court to attain relief for the consequences of its own unlawful conduct, which was so broadly condemned by the international community.

1.29. The United States submits that, as a matter of law, Iran is not entitled to the judgment it seeks. We submit, first, that the Court should, pursuant to fundamental principles of international

law reflected in the Court's own jurisprudence, deny Iran the relief it seeks because Iran's own conduct, including its breach of its obligations under Article X of the 1955 Treaty, itself made necessary the United States conduct that is the subject of this case.

1.30. Second, we submit that Iran's claim should be denied because Iran has not shown that the United States actions in fact had any effect on freedom of commerce between the territories of Iran and the United States, that is, it did not violate Article X, paragraph 1, of the Treaty. By contrast, the United States will show that Iran's actions in attacking neutral vessels did violate Article X, paragraph 1, and that, of course, is the basis for our counter-claim.

1.31. Third, we submit that United States actions against the Iranian oil platforms did not violate the Treaty because Article XX, paragraph 1, of the Treaty specifically and expressly provides that the Treaty shall not preclude the application of measures necessary to protect the essential security interests of a party. The operations against the platforms were such measures.

1.32. We shall be discussing this "essential security interests" provision at some length. In particular, we shall show that the essential security interests of the United States were threatened by Iran's attacks on United States and other neutral shipping in the Persian Gulf. We shall also show that the United States actions against Iran's oil platforms in particular were necessary to protect its essential security interests in light of Iran's use of those platforms to support its military attacks.

1.33. Counsel for Iran have suggested a number of reasons why Article XX does not apply to the actions taken by the United States in respect of the oil platforms. We shall address them all in due course, but it is important at the outset to address one that goes to the heart of the Court's consideration of this case, that is, the limited nature of its jurisdiction to review and decide disputes between the Parties. According to Iran's view, which would import into Article XX the provisions of general international law with respect to the use of force and the right of self-defence, the Court cannot find that United States actions against the platforms are consistent with the terms of the Treaty, unless it first decides that they were consistent with general international law.

1.34. This interpretation of Article XX, paragraph 1, is wrong. There can be no doubt that under Article XX, paragraph 1, certain measures are permitted. If measures were taken in circumstances in which they were necessary to protect the essential security interests of a party, that is the end of the story. Such measures are lawful under the terms of the Treaty, and there is no need to consider general international law. The law of the Treaty and general international law are two wholly different matters.

1.35. Under Iran's interpretation, Article XX would be read to require that measures potentially within its scope be first subjected to review for compliance with obligations that are not part of the Treaty. Such an interpretation would turn the idea of the clause on its head, since it would require that the conduct in question not be excepted from review but instead be subjected to an even more comprehensive review.

1.36. Mr. President, Members of the Court, the United States stresses this point not because of any concern about the appropriateness of its actions under general international law. Our actions were consistent with our obligations under international law and a proper exercise of our right of self-defence. We stress the point because the Parties have specially confided to this Court's jurisdiction only certain issues, namely the scope of their obligations under the Treaty. This point directly affects the relationship between the United States and Iran, on the one hand, and this Court on the other. The United States and Iran consented in Article XXI, paragraph 2, of the Treaty to the jurisdiction of this Court with respect to any dispute as to the interpretation or application of the Treaty. They did not consent—either in the Treaty or elsewhere—to the jurisdiction of this Court to consider issues between them arising under general international law. For the Court to provide itself with such jurisdiction in the manner proposed by Iran would be inconsistent with the requirement that its jurisdiction be based on the consent of both of the Parties before it, not just one of them.

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1.40. Before concluding here, I would like to make one more point. We will, of course, focus in detail on the specific factual

and legal issues raised by Iran's claims. But, Mr. President, the implications of this case—both for the international community and for this Court—extend far beyond the specific allegations of the Parties. Iran's attacks posed grave threats to the vital interests of States around the world and had to be stopped. The United Nations, the United States and many other States made repeated diplomatic efforts to halt Iran's unlawful attacks, but Iran was not deterred by these efforts and its attacks continued. Can it be that under these circumstances no State had the right to take the steps necessary to stop Iran's attacks? That only States that had not tried to promote their commercial relations with Iran by treaty had such a right? Such an outcome would serve only to encourage the type of aggression that the United States actions here helped put an end to.

1.41. Moreover, such an outcome would make the Court complicit in providing a shield to Iran when its own unlawful armed attacks are the entire cause of the actions of which it complains. It would be a signal to other aggressors that this Court may be available to protect them from the consequences of their wrongful conduct and to advance their cause by finding liable those who seek to stop their aggression. The Court must not allow its proceedings to be abused in this way.

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Following a series of presentations on relevant facts in the period up to October 19, 1987, Mr. Taft summarized the evidence submitted to the Court regarding the period.

6.1. Mr. President, Members of the Court. At the outset of our presentation this morning I indicated that the United States would be reviewing carefully the facts that have been established in the record in this case. Today we have emphasized particularly the facts relating to Iran's attacks on neutral shipping in the Persian Gulf over the course of the three years prior to 19 October 1987. On that day, of course, as the Court knows, the United States took steps to disable the Rostam oil platform. This operation diminished somewhat Iran's ability to carry out its attacks on United States and other neutral shipping in the Gulf. It was,

regrettably, not effective in persuading Iran to stop its attacks altogether.

6.2. On Monday, we will continue our review of the facts in the record, focusing on the period between October 1987 and April 1988, when the United States had to take further steps to protect itself and its essential security interests against Iran's attacks. We will also at that time review the many efforts of the United States and others, prior to resorting to the use of force in October 1987, to stop Iran's attacks by diplomatic means and defensive deployments of naval forces.

6.3. On Monday we will also address the reasons why the United States decided, once it determined that it was necessary to use force to stop Iran's attacks, to direct our efforts specifically against Iran's offshore oil platforms. This was largely because of the role these platforms played in supporting Iran's attacks, but other factors also made these targets particularly suitable, including the fact that two of them were not commercially productive and that all three could, it was hoped, be attacked without the loss of life, either American or Iranian. Another important factor in selecting these targets was the United States desire to keep these operations, which were undertaken in order to protect United States security interests, as separate as possible, geographically, militarily and politically, from the action of the Iran-Iraq war which was taking place well to the north.

6.4. . . . We have intended here to put before the Court the record of Iran's conduct prior to October 1987. And that conduct is, by any standard, appalling. Over a period of three years Iran's Air Force carried out 33 attacks on neutral commercial vessels; Iranian helicopters and gunboats conducted another 80 attacks; ten neutral ships were damaged by Iranian mines laid in shipping lanes in international waters; and, finally, two ships were hit by Iranian missiles. These attacks resulted in the loss of 57 lives. Forty-four other persons were injured; many of these were permanently disabled, including the master and a member of the crew of the American ship *Sea Isle City*, who were made permanently blind.

6.5. These attacks went on for three years before the United States, having tried everything else, finally concluded that the only

way to stop Iran from launching further attacks was to use force. Iran now seeks to convince this Court that—even after three years of indiscriminate Iranian attacks—resort to force by the United States was barred by the 1955 Treaty. The Court should be alert to the implications of Iran's argument, having in mind Iran's conduct. How many more people would have to be killed? How many more injured? Can it be that the Treaty actually requires the United States to permit Iran to attack American ships and endanger American lives for as long as it likes without the United States being able to use force to prevent this? Is this still so where the United States has tried without success to stop Iran's attacks by diplomatic means and defensive military deployments? Must the attacks go on for some period more than three years before the United States can act? None of this is, of course, what the Treaty requires, as we will show in our presentations next week. The Treaty could hardly be clearer about the parties' rights to protect their essential security interests. Even if it were less clear than it is, however, the Court should shrink from interpreting the Treaty to give Iran a licence to conduct more than 100 attacks on neutral shipping over the course of three years, free from all fear of any military response. Yet, that, Mr. President, is what Iran is asking this Court to do.

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At the conclusion of the U.S. presentation, on February 26, 2003, Mr. Taft summarized the case as follows.

22.3. Where are we then? Let me summarize the status of the evidence before the Court. Mr. President, I am confident that the Court will conclude that the following facts have been established by the United States over the course of the last five sessions.

— First, the uninterrupted flow of maritime commerce, particularly commerce in petroleum, through the Gulf was essential to the economic stability of the entire developed and developing world, including to the United States. The safety of United States vessels, cargoes and crews was likewise an essential security interest of the United States.

Indeed, counsel for Iran appears to have conceded these facts last week.

— Second, Iran's attacks on neutral shipping in the Gulf killed at least 63 people and injured many more. The attacks also dramatically increased the risks and costs of carrying oil and other merchandise through the Gulf. Iran threatened that those attacks would continue.
— Third, Iran used its oil platforms to facilitate, and in some cases as a base to launch, those attacks.
— Fourth, many countries, again including the United States, both expressed, and eventually acted on, their grave concern about the threat posed by Iran's attacks. Several of those countries deployed military vessels to the Gulf in an attempt to deter Iran from continuing these attacks.
— Fifth, the United Nations, the United States and many other bodies and States took steps to try to bring an end to Iran's attacks diplomatically.
— Sixth, all those attempts failed.
— Seventh, the United States took military action on two occasions to end the Iranian attacks.

22.4. Mr. President, what contested issues are there before the Court? On the question of the application of Article XX of the 1955 Treaty, the United States submits that there is only one real issue: whether, given the facts I have just listed, the United States actions were "necessary" to protect its essential security interests.

22.5. While this issue is contested, Professors Weil and Matheson have shown that, on the facts I have just listed, this Court should find that the United States actions did not breach Article X, paragraph 1, of the Treaty because a violation is precluded by the express terms of Article XX, paragraph 1 (*d*). They have shown that Article XX applies if the United States actions were necessary to protect the essential security interests of the United States. The United States actions are not to be judged here by the standards of self-defence under customary international law and Article 51 of the United Nations Charter. Nor do the United States actions have to have been more than "necessary." In particular, the Treaty does not require that the precise means

chosen by the United States be the only way of addressing Iran's threat to United States essential security interests. Indeed, as Professor Weil explained, the United States should be accorded appropriate discretion in determining whether its essential security interests were threatened and in determining how to respond to that risk. Finally, my colleagues have shown that the actions taken by the United States fell well within that range of discretion.

22.6. What does Iran say in response to these points? Iran asserts that the actions against the platforms were not necessary to protect United States essential security interests because, on the one hand, it says those security interests were not really at risk and, on the other, that the United States actions were not necessary to respond to any existing risk. However, it is hard to give much credence to these arguments because they are premised on Iran's denials that it was engaging in *any* attacks on United States and other neutral shipping. We have shown that those denials are false and that United States security interests were clearly at risk from Iran's missile, mine, helicopter and boat attacks. Iran attempts to muddy the waters by arguing that Iraq's actions also threatened those interests; that argument is simply irrelevant to the issues before the Court.

22.7. With respect to the "necessity" of the United States actions, Iran really does little more than deny that they were necessary. Indeed, in the almost 20-year history of this case, Iran has never suggested that any other act by the United States would have convinced Iran to bring its attacks to an end. It has never said: if the United States had only written one more letter, or the United Nations had used slightly different language, or the United States had taken action against other Iranian targets, it would have ceased its attacks. This, at least, is honest on Iran's part because—as the Court has heard—Iran's leaders were intent on continuing the attacks. The only step that Iran suggests the United States could legitimately have taken to end *Iran's* attacks was to put pressure on *Iraq*. That argument is nonsense.

22.8. Rather than arguing that the United States overreacted, because lesser steps would have been sufficient, Iran has suggested in its pleadings that the Court ought to doubt the sincerity of the United States belief that it had to take action to stop the attacks,

because the United States did not take actions against targets on the Iranian mainland, or against purely military targets. That argument also is absurd on its face. The United States was not obligated to risk more American and Iranian lives or greater escalation of the Iran-Iraq war in order to bring Iran's attacks on neutral vessels to an end.

22.9. In its presentations last week, Iran argued that the United States acted unlawfully because, after its initial, limited action against the Rostam platform proved insufficient, and Iran stepped up its attacks on United States shipping and other neutral vessels, the United States took measures against two additional platforms and an Iranian frigate. My colleagues have shown, first, that Iran's assertion that the platforms were only fallback targets is false and, second, that the United States actions were, unfortunately, necessary to bring Iran's devastating attacks to an end. And they were, fortunately, effective in eliminating Iran's threat to commerce and navigation in the Gulf, effective in eliminating Iran's threat to the safety of United States vessels, cargoes and crews, and thus effective in eliminating Iran's threat to the essential security interests of the United States.

22.10. Because the Iranian attacks threatened United States essential security interests and the United States response was necessary and appropriate to protect those interests, the United States actions are outside the scope of the parties' undertakings in Article X. The Court need go no further to dispose of this case.

22.11. In particular, the Court need not address the question of self-defence. As Professor Weil has demonstrated, the scope of the exemption provided by Article XX, paragraph 1 (*d*), is not limited to those actions that would also meet the standards for self-defence under customary international law and the United Nations Charter. Any such limitation is contrary to the language of the Treaty, as well as contrary to this Court's conclusions in the *Nicaragua* case. As it has explained on many occasions in making this point, the United States is not claiming that its actions were exempt from the strictures of the United Nations Charter or customary international law. It is only saying that the question of whether the United States actions complied with those rules, rules that are extraneous to the Treaty, was not submitted to this

Court's jurisdiction pursuant to the dispute resolution clause of the Treaty. We have also shown that, in any case, the United States actions were in full compliance with the Charter and with customary international law.

22.12. Application of Article XX precludes viewing the United States military actions as prohibited by Article X, paragraph 1. Yet if we look at the terms of Article X it is apparent that Iran has failed to meet the burden of proof that it carries on the only Iranian complaint against the United States that is truly before this Court: that is, Iran's claim that the United States interfered with the freedom of commerce between the territories of Iran and the United States. Indeed, uncontested facts undercut an essential element of Iran's claim. Among those facts are:

— The United States did not destroy any goods destined for export, nor destroy any means for transporting or storing such goods.
— The first platform, Rostam, had not been functioning for over a year at the time the United States took action against it.
— The second platform, Sassan, not only was not functioning, but it also could not have produced oil for sale to the United States in any case due to the imposition of the oil embargo six months prior to the United States action against it.
— The third platform, Sirri, also could not produce oil for sale to the United States at the time of the United States action against it due to the same embargo.

No one knowledgeable about the international trade in crude oil and refined oil products would accept Iran's assertion that its exports of crude oil to Europe constituted commerce between Iran and the United States. Nor should this Court accept Iran's argument based merely on speculation that because it might hypothetically have engaged in oil trade with the United States at some time in the future there has been a violation of Article X.

22.13. Accordingly, Iran's claims under Article X, paragraph 1, must be dismissed because even Iran's own evidence demonstrates

that, at the time of the United States operations it complains of, there was no commerce in oil from the platforms between the territories of Iran and the United States. As a result, the United States could not even potentially have interfered with the freedom of that commerce.

22.14. While these facts regarding the application of Article X, paragraph 1, are dispositive, I do want to remind the Court of the importance of an additional reason Article X does not apply to the oil platforms, and that is their offensive military use. Mr. President, Members of the Court, the provision at issue in this case, "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation", does not mean that a State can immunize its offensive military actions, and carry out indiscriminate attacks on neutral vessels, simply by using a facility that has some connection with commerce between the two States. Stretching this provision to shield Iran's attacks from any effective response is wholly contrary to the purpose of the 1955 Treaty.

22.15. Are there any additional uncontested or definitively established facts with which the Court ought to be concerned? Yes, there are: specifically, the crucial facts with respect to the United States counter-claim. In particular:

— There was substantial commerce and navigation between the territories of the United States and Iran in 1987 and 1988.
— Iran's regular attacks on neutral shipping impeded all commerce and navigation in the Gulf, including that protected by Article X, paragraph 1, of the Treaty. They did so by, for example, requiring vessels to travel more circuitous and perilous routes, by requiring them to hide from Iranian attacks during the day and to travel only at night, by driving up the cost of insurance for vessels transiting the Gulf, by killing and maiming sailors on vessels that Iran was able to catch notwithstanding precautions they may have taken, and causing very serious damage to the vessels themselves.
— Finally, vessels protected under Article X, paragraph 1, were directly targeted by Iran and were damaged by mines Iran laid in shipping lanes in international waters.

22.16. One legal conclusion follows from these facts, which we developed in the presentation of our counter-claim this afternoon, and that is the same conclusion as was reached by this Court in the *Nicaragua* case: actions such as those constitute a breach of the undertaking in Article X, paragraph 1, with respect to freedom of commerce and navigation.

22.17. How does Iran respond to this? Iran offers incredible theories both to explain and to justify those attacks. First, Iran blames Iraq for the attacks we have shown Iran itself conducted. Then Iran attempts to justify the very acts it has denied committing by suggesting that its attacks on vessels of neutral countries were justified due to its war with Iraq. However, as we have shown, Iran cannot justify its indiscriminate attacks on neutral vessels, which is why it continues to deny them. Never, in the almost four years during which Iran engaged in its attacks against neutral shipping did Iran accept responsibility for those attacks or explain why it thought they were necessary or how they were consistent with the law of armed conflict and neutrality. Rather, Iran's plan was and evidently remains today before this Court to deny its responsibility, at least officially. Just as Ali Akbar Hashemi-Rafsanjani, then Speaker of the Iranian Majlis, said: "[i]f our ships are hit, the ships of Iraq's partners will be hit. Of course, we will not claim responsibility for anything, for it is an invisible shot that is being fired."

22.18. As my colleagues have explained, the unavoidable conclusion that Iran breached Article X, paragraph 1, of the Treaty has two consequences. The most obvious is that it triggers Iran's obligation to make reparations to the United States for that international wrong.

22.19. Equally important, however, in the view of the United States, is the fundamental international legal principle that prevents a State from prevailing on a claim based on allegedly wrongful acts when that State has previously breached its reciprocal obligations. That rule is an eminently just one. So too is the related rule that precludes a State from prevailing on a claim with respect to an act that was a consequence of its own wrongful deeds. Even if the United States actions against the platforms had happened to amount to a breach of the 1955 Treaty, which they did not,

those acts were taken only because of Iran's prior, and far more egregious, breaches of its obligations, including Iran's obligations under the laws of war and neutrality. Iran's claim must also be dismissed because the claim arises out of Iran's own manifestly wrongful conduct.

22.20. Mr. President, Members of the Court, at the outset of these proceedings, counsel for Iran expressed a concern that the Court not show any preference for the United States because it is a powerful State. It is not my purpose to quarrel with Iran's characterization of the United States. It is a powerful country. Nor do I question counsel's observation that the advantages a powerful State enjoys in other contexts are of no consequence in this Court. I would, however, add to this point.

22.21. From 1984 to 1988, when Iran carried out its attacks on United States and other neutral shipping in the Gulf and the United States took action against the oil platforms, Iran was engaged in a brutal and seemingly endless war with Iraq, a war which, Iran has correctly pointed out, it did not start. While at war, States occasionally do not observe the same standard of conduct as at other times. Quite often, for example, States do not reveal their war plans or take responsibility for military operations where publicity would jeopardize their ability to carry out similar operations in the future. Denial of responsibility and even deceit are common. Often ambiguous disclaimers are incongruously mixed with threats of future action. This was, as we have seen, a favoured practice of Iranian officials, including the Speaker of the Majlis, the Ambassador to the United Nations, the Deputy Foreign Minister and others, when addressing the subject of the attacks on neutral shipping in the Gulf.

22.22. In this Court, however, deception and ambiguity have no place. A litigant here must abandon entirely these ugly habits of war. Regrettably, Iran has not recognized this. It still, in this Court, denies responsibility for its actions.

22.23. The Court must, of course, as counsel for Iran has said, protect the integrity of its proceedings against a State seeking to influence this Court's judgment because it is powerful. The Court must also, however—and with no less vigour—protect the integrity of its proceedings against too casual a respect for truth.

22.24. At the time it was attacking United States and other neutral shipping in the Gulf, Iran carefully avoided formally taking responsibility for its actions even as it tried to convey the impression, without being explicit, that it was responsible for the attacks, so as to intimidate States trading with Saudi Arabia and Kuwait. Iran did not expect, and did not even want, to be believed when it failed to take responsibility then. Nor, as the Court has seen, did anyone in fact believe that Iran was not responsible then, and the Court should not believe this now.

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In its judgment, delivered on November 6, 2003, the Court held that the United States had not breached the "freedom of commerce" provision in the 1955 Treaty by taking military action against Iranian offshore oil platforms since the actions did not disrupt commerce between the territories of Iran and the United States. The Court thus rejected Iran's claim. It also rejected the U.S. counter-claim on similar grounds. Despite rejecting Iran's claim, the Court devoted a substantial portion of its opinion to a consideration of whether the U.S. actions against the oil platforms qualified as self-defense under international law. The Court's discussion of these points was unnecessary to resolve the case. Excerpts below from the Court's opinion explain its findings.

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43. The Court will . . . examine first the application of Article XX, paragraph 1 (*d*), of the 1955 Treaty, which in the circumstances of this case . . . involves the principle of the prohibition in international law of the use of force, and the qualification to it constituted by the right of self-defence. On the basis of that provision, a party to the Treaty may be justified in taking certain measures which it considers to be "necessary" for the protection of its essential security interests. As the Court emphasized, in relation to the comparable provision of the 1956 USA/Nicaragua Treaty in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, "the measures taken must not merely

be such as tend to protect the essential security interests of the party taking them, but must be 'necessary' for that purpose"; and whether a given measure is "necessary" is "not purely a question for the subjective judgment of the party" (*I.C.J. Reports 1986*, p. 141, para. 282), and may thus be assessed by the Court. In the present case, the question whether the measures taken were "necessary" overlaps with the question of their validity as acts of self-defence. As the Court observed in its decision of 1986 the criteria of necessity and proportionality must be observed if a measure is to be qualified as self-defence (see *I.C.J. Reports 1986*, p. 103, para. 194, and paragraph 74 below).

44. In this connection, the Court notes that it is not disputed between the Parties that neutral shipping in the Persian Gulf was caused considerable inconvenience and loss, and grave damage, during the Iran-Iraq war. It notes also that this was to a great extent due to the presence of mines and minefields laid by both sides. The Court has no jurisdiction to enquire into the question of the extent to which Iran and Iraq complied with the international legal rules of maritime warfare. It can however take note of these circumstances, regarded by the United States as relevant to its decision to take action against Iran which it considered necessary to protect its essential security interests. Nevertheless, the legality of the action taken by the United States has to be judged by reference to Article XX, paragraph 1 (*d*), of the 1955 Treaty, in the light of international law on the use of force in self-defence.

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78. The Court . . . concludes . . . that the actions carried out by United States forces against Iranian oil installations on 19 October 1987 and 18 April 1988 cannot be justified, under Article XX, paragraph 1 (*d*), of the 1955 Treaty, as being measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty.

79. . . . [T]he Court has now to turn to that claim, made under Article X, paragraph 1, of that Treaty, which provides that "Between the territories of the two High Contracting parties there shall be freedom of commerce and navigation." . . .

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94. The embargo imposed by Executive Order 12613 was already in force when the attacks on the Salman and Nasr platforms were carried out; and, as just indicated, it has not been shown that the Reshadat and Resalat platforms would, had it not been for the attack of 19 October 1987, have resumed production before the embargo was imposed. The Court must therefore consider the significance of that Executive Order for the interpretation and application of Article X, paragraph 1, of the 1955 Treaty. Iran has not disputed that the effect of the Executive Order was to halt all direct exports of Iranian crude oil to the United States. The United States therefore argues that "any damage done to Iran's oil platforms by U.S. actions was irrelevant to Iran's ability to export oil to customers located in the United States", and that consequently the attacks did not constitute a violation of the freedom of commerce "between the territories of the two High Contracting Parties". Iran however, while not presenting any formal submission or claim that the embargo was unlawful as itself a breach of Article X, paragraph 1, of the 1955 Treaty, has asserted that such was the case, and therefore suggests that the argument advanced by the United States amounts to a party taking advantage of its own wrong. The Iranian contention rests on the hypothesis that the embargo was a breach of the 1955 Treaty, and not justified under Article XX, paragraph 1 (*d*), thereof; but these are questions which Iran has chosen not to put formally in issue, and on which the Court has thus not heard full argument. The Court is here concerned with the practical effects of the embargo, about which there is no dispute.

95. In response to the contention of the United States that the damage to the platforms was irrelevant to Iranian oil exports to the United States, Iran argues that this conclusion does not follow from the mere fact that direct import into the United States of Iranian crude oil, as such, ceased with the issue of the embargo.

Iran suggests that "It is in the nature of the international oil trade that Iranian oil could not be excluded from the United States": "If Iranian crude oil was received by a refinery", for example in Western Europe, "and if that refinery in turn exported products to the United States, then it follows that a quantity of Iranian oil was necessarily imported into the United States in the form of products". Iran has observed that, as a result of the embargo, it found itself in 1987 with a surplus crude oil production of approximately 345,000 barrels per day, and had to find other outlets, namely in the Mediterranean and North-West Europe. At the same time, the United States had to make good the shortfall resulting from the prohibition of Iranian crude oil imports, and therefore increased its existing imports of petroleum products from refineries in the Mediterranean and Western Europe. Iran has submitted to the Court an expert report showing, *inter alia*, a very considerable increase in exports of Iranian crude oil to Western Europe from 1986 to 1987, and again in 1988, and an increase in United States imports of petroleum products from Western European refineries.

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97. In this respect, what seems to the Court to be determinative is the nature of the successive commercial transactions relating to the oil, rather than the successive technical processes that it underwent. What Iran regards as "indirect" commerce in oil between itself and the United States involved a series of commercial transactions: a sale by Iran of crude oil to a customer in Western Europe, or some third country other than the United States; possibly a series of intermediate transactions; and ultimately the sale of petroleum products to a customer in the United States. This is not "commerce" between Iran and the United States, but commerce between Iran and an intermediate purchaser; and "commerce" between an intermediate seller and the United States. After the completion of the first contract Iran had no ongoing financial interest in, or legal responsibility for, the goods transferred. If, for example, the process of "indirect commerce" in Iranian oil through Western European refineries, as described above, were interfered with at some stage subsequent to Iran's

having parted with a consignment, Iran's commitment and entitlement to freedom of commerce vis-à-vis the United States could not be regarded as having been violated.

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98. The Court thus concludes, with regard to the attack of 19 October 1987 on the Reshadat platforms, that there was at the time of those attacks no commerce between the territories of Iran and the United States in respect of oil produced by those platforms and the Resalat platforms, inasmuch as the platforms were under repair and inoperative; and that the attacks cannot therefore be said to have infringed the freedom of commerce in oil between the territories of the High Contracting Parties protected by Article X, paragraph 1, of the 1955 Treaty, particularly taking into account the date of entry into force of the embargo effected by Executive Order 12613. The Court notes further that, at the time of the attacks of 18 April 1988 on the Salman and Nasr platforms, all commerce in crude oil between the territories of Iran and the United States had been suspended by that Executive Order, so that those attacks also cannot be said to have infringed the rights of Iran under Article X, paragraph 1, of the 1955 Treaty.

99. The Court is therefore unable to uphold the submissions of Iran, that in carrying out those attacks the United States breached its obligations to Iran under Article X, paragraph 1, of the 1955 Treaty. In view of this conclusion, the Iranian claim for reparation cannot be upheld.

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100. In view of the Court's finding , on the claim of Iran, that the attacks on the oil platforms did not infringe the rights of Iran under Article X, paragraph 1, of the 1955 Treaty, it becomes unnecessary for the Court to examine the argument of the United States . . . that Iran might be debarred from relief on its claim by reason of its own conduct.

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119. Having disposed of all objections of Iran to its jurisdiction over the counter-claim [of the United States], and to the

admissibility thereof, the Court has now to consider the counter-claim on its merits. To succeed on its counter-claim, the United States must show that:

(*a*) its freedom of commerce or freedom of navigation between the territories of the High Contracting Parties to the 1955 Treaty was impaired; and that
(*b*) the acts which allegedly impaired one or both of those freedoms are attributable to Iran.

The Court would recall that Article X, paragraph 1, of the 1955 Treaty does not protect, as between the Parties, freedom of commerce or freedom of navigation in general. . . . [T]he provision of that paragraph contains an important territorial limitation. In order to enjoy the protection provided by that text, the commerce or the navigation is to be *between the territories* of the United States and Iran. The United States bears the burden of proof that the vessels which were attacked were engaged in commerce or navigation between the territories of the United States and Iran.

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123. The Court cannot disregard the factual context of the case. . . . While it is a matter of public record that as a result of the Iran-Iraq war navigation in the Persian Gulf involved much higher risks, that alone is not sufficient for the Court to decide that Article X, paragraph 1, of the 1955 Treaty was breached by Iran. It is for the United States to show that there was an *actual impediment* to commerce or navigation *between* the territories of the two High Contracting Parties. However, according to the material before the Court the commerce and navigation between Iran and the United States continued during the war until the issuance of the United States embargo on 29 October 1987, and subsequently at least to the extent permitted by the exceptions to the embargo. The United States has not demonstrated that the alleged acts of Iran actually infringed the freedom of commerce or of navigation between the territories of the United States and Iran.

The Court considers that, in the circumstances of this case, a generic claim of breach of Article X, paragraph 1, of the 1955

Treaty cannot be made out independently of the specific incidents whereby, it is alleged, the actions of Iran made the Persian Gulf unsafe for commerce and navigation, and specifically for commerce and navigation between the territories of the parties. However, the examination . . . of those incidents shows that none of them individually involved any interference with the commerce and navigation protected by the 1955 Treaty; accordingly the generic claim of the United States cannot be upheld.

124. The Court has thus found that the counter-claim of the United States concerning breach by Iran of its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty, whether based on the specific incidents listed, or as a generic claim, must be rejected; there is therefore no need for it to consider, under this head, the contested issues of attribution of those incidents to Iran. In view of the foregoing, the United States claim for reparation cannot be upheld.

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6. Convention on Certain Conventional Weapons: Protocol on Explosive Remnants of War

On November 28, 2003, the 2003 Meeting of States Parties to the Convention on Certain Conventional Weapons ("CCW") concluded a protocol on explosive remnants of war ("ERW"). As described by the International Committee of the Red Cross ("ICRC") in welcoming the agreement:

> The agreement adopted by the 91 States party to the CCW, including all major military powers, will be the fifth protocol additional to this convention. It requires the parties to an armed conflict to:
>
> - Clear ERW in areas under their control after a conflict.
> - Provide technical, material and financial assistance in areas not under their control with a view to facilitating the removal of unexploded or abandoned ordnance left over from their operations.

- Record information on the explosive ordnance used by their armed forces and share that information with organizations engaged in the clearance of ERW.
- Warn civilians of the ERW dangers in specific areas.

The treaty, which will enter into force after 20 states have ratified it, will apply primarily to conflicts that break out thereafter.

See www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/E47D5EA84B89A19EC1256DEC003C34B0.

The United States stated that it was pleased that the parties were able to conclude the protocol and provided the following comments on the ERW protocol and the U.S. interest in pursuing an additional protocol. *See www.ccwtreaty.com/1128ERW.html.*

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This achievement was possible because of the active and constructive involvement of the United States and many other states in the negotiations.

All agreed on the urgent need to address the humanitarian problems posed by unexploded and abandoned munitions remaining on the battlefield after the end of armed conflicts.

We continue to believe that a political document would be the most effective and most timely means to deal with this problem, as states should undertake to clear ERW in areas they control without waiting for the new protocol to enter info force.

However, in responding to the wishes of other CCW Parties, including many of our allies and friends, the U.S. decided not to block consensus on a legally binding protocol.

One reason for this decision is that, in essence, the provisions of the agreement follow current U.S. practice with respect to such munitions.

With the conclusion of the ERW Protocol, the United States looks forward in 2004 to the CCW negotiating a protocol

restricting the use of anti-vehicle mines (AVM) or Mines Other Than Anti-personnel Mines (MOTAPM).

We believe that dealing with the humanitarian risks posed by the indiscriminate use of AVM is now the CCW's top priority.

In 2001, the United States proposed a protocol dealing with anti-vehicle mines, an area not adequately covered by other landmine agreements. The proposal, cosponsored by Denmark and 28 other CCW members, has been steadily gathering momentum.

We look forward to completion of a protocol on AVMs in the next year.

B. ARMS CONTROL

1. Moscow Treaty

On March 6, 2003, the U.S. Senate provided advice and consent to ratification of the Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions ("Moscow Treaty"). 149 CONG. REC. S3128 (March 6, 2003); *see also* S. Treaty Doc. No. 107–8 (2002); S. Exec. Rpt. 108–1 (Feb. 20, 2003); *Digest 2002* at 1017–1023. The Russian Federation completed its domestic legal requirements and the treaty entered into force on June 1, 2003.

Under article III of the Moscow Treaty, the United States and the Russian Federation are required to meet twice a year in the Bilateral Implementation Commission ("BIC"). At the end of 2003 the United States and the Russia Federation were close to agreement on procedures to be followed in the BIC.

2. Libya's Pledge to Eliminate WMD Programs

On December 19, 2003, President George W. Bush announced that Libya had provided significant information on its weapons of mass destruction to the United States and the

United Kingdom and had agreed to eliminate its weapons of mass destruction and to allow inspections by the international community. A fact sheet issued by the White House of the same date described Libya's pledges as set forth below. *See also* discussion in chapter 3.B.1.c. concerning settlement of claims against Libya and related developments.

The full text of the fact sheet is available at *www.whitehouse.gov/news/releases/2003/12/2031219-8.html.*

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Libya has disclosed to the US and UK significant information on its nuclear and chemical weapons programs, as well as on its biological and ballistic missile-related activities: Libya has also pledged to:

> Eliminate all elements of its chemical and nuclear weapons programs;
> Declare all nuclear activities to the IAEA;
> Eliminate ballistic missiles beyond 300 km range, with a payload of 500kg;
> Accept international inspections to ensure Libya's complete adherence to the Nuclear Nonproliferation Treaty, and sign the Additional Protocol;
> Eliminate all chemical weapons stocks and munitions, and accede to the Chemical Weapons Convention;
> Allow immediate inspections and monitoring to verify all of these actions.

As President Bush said today, Libya must also fully engage in the war against terror. **Libya's announcement today is a product of the President's strategy which gives regimes a choice.** They can choose to pursue WMD at great peril, cost and international isolation. Or they can choose to renounce these weapons, take steps to rejoin the international community, and have our help in creating a better future for their citizens.

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3. Conference on Disarmament

On February 13, 2003, Stephen G. Rademaker, Assistant Secretary of State for Arms Control, addressed the Conference on Disarmament ("CD"), meeting in Geneva, Switzerland. In his remarks, excerpted below, Mr. Rademaker called for negotiation of the Fissile Material Cutoff Treaty ("FMCT") and, more broadly, improving the effectiveness of the CD.

The full text of the remarks is available at *www.state.gov/t/ac/rls/rm/2003/17744.htm.*

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. . . [T]he United States supports multilateralism when it is effective, and in appropriate cases is prepared to provide the leadership required to make multilateralism effective. For the past six years, the Conference on Disarmament has not been an instrument of effective multilateralism. The question before us today is whether it can be made effective.

The United States would like the CD to transform itself into a more effective multilateral forum. We continue to favor the negotiation here of a Fissile Material Cutoff Treaty (FMCT) that effectively and verifiably bans the production of fissile material for use in weapons and advances our national security. So far as we know, no country represented here disagrees with the basic concept of an FMCT. But so far in the CD, that has not been sufficient to commence a negotiation.

The CD operates on the principle of consensus, and for good reason. This principle gives every participant a veto, which helps ensure universal, or near-universal, support for any agreement that might emerge from this forum. However, the evolution of this principle in the CD over the last several years clearly demonstrates how even a good principle can be corrupted in practice. Consensus has in the CD become synonymous with hostage taking and obstruction. It has allowed a few states to make demands that are unrealistic and unobtainable—to insist on negotiations on subjects that are not ripe for negotiation as a condition for commencing work on subjects where progress might be possible.

The result has been to cast this, the only standing multilateral arms control negotiating body in the world, into such disrepute that responsible governments, including mine, are questioning whether it can retain relevance to the security environment we face today. We must all recognize that the CD as we have known it will not long survive if this malaise continues.

The solution to this problem is obvious: consensus must be preserved, but the states represented here must abandon their tolerance for comprehensive linkages, in which nothing is agreed until everything is agreed. We should negotiate on matters that all agree are ripe for negotiation, while informally exploring other issues until CD members can reach some common ground that could lead to further progress on those issues.

Accordingly, let us agree at this session to approve a "clean" resolution establishing FMCT negotiations. By "clean" I mean a resolution unencumbered by linkages to unrelated proposals about which there is no agreement in this body. The practice in the CD of holding vital international security initiatives hostage to win approval for dubious, unpopular or outdated proposals must end if this body is to have a future.

If, however, we remain gridlocked on the agenda items that have in the past been the focus of attention in the CD, we should explore whether consensus exists to take up other items where progress might be possible. Could we not agree, for example, that the dangers posed by the prospect of terrorists getting access to weapons of mass destruction deserve to be addressed seriously? Would it not be possible to agree on restrictions on the export of all nonself-destructing landmines that have caused untold civilian suffering on virtually every continent? Or will ideas like these also fall victim to the hostage taking that has come to characterize work at the CD?

The CD can also contribute to international peace and security by redoubling efforts to ensure compliance with treaties banning weapons of mass destruction once they have entered into force. Too often states seem eager to negotiate such agreements and then lose interest in their implementation. This is understandable: it is easier and more exciting to negotiate new treaties than to work on the tedious details of implementation and compliance.

This may be explainable, but it is not acceptable. Too many rogue states have signed such treaties and have covert programs to build these terrible weapons. We call on all parties to treaties banning weapons of mass destruction to honor their commitments.

Focusing on implementation also gives rise to occasions where some parties to a treaty have to call others to task for non-compliance. Few states like to make such accusations, not least because this can lead to the question of imposing penalties for non-compliance. Nevertheless, if multilateral arms control is to have a future, treaty parties must face up to their responsibilities. They must decide that they will not tolerate non-compliance.

One final matter that I cannot avoid mentioning is Iraq's possible assumption of the CD presidency next month. Let me be clear. Iraq's assuming the presidency of the CD is unacceptable to the United States. It should be unacceptable to all supporters of the CD, as it threatens to discredit this institution to a much greater degree than even the past six years of inactivity.

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4. Chemical Weapons

a. Chemical Weapons Convention

On April 28, 2003, Mr. Rademaker addressed the Special Conference of the States Parties to review the implementation of the Chemical Weapons Convention (First Review Conference) at The Hague. He announced that the United States had appointed Ambassador Eric M. Javits as its representative to the Organization for the Prohibition of Chemical Weapons, upgrading U.S. representation to permanent resident status. Excerpts below remarks address key issues: universality, compliance, national implementation, and disarmament.

The full text of the remarks is available at *www.state.gov/t/ac/rls/rm/2003/20099.htm.*

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The Chemical Weapons Convention [CWC], first and foremost, aims to prevent governments and other entities from using chemical weapons. Regrettably, this goal is not an anachronism. We confront a number of countries around the world that have or actively are seeking chemical weapons. These countries must be persuaded to forego these activities, join the CWC, and fulfill its provisions and intent.

The Convention also requires each State Party to prohibit persons on its territory or under its jurisdiction from participating in actions that the state itself has foresworn under the Convention and to enact appropriate legislation to enforce those prohibitions. This creates a web of obligations that, if enforced and implemented effectively, will ensure that there is never a safe haven for chemical terrorists in any State Party to the Convention. And terrorists are an ever-present global threat to the objective and purpose of this Convention.

Make no mistake—implementation matters. Words on the page, or even the norms embedded in the Convention itself, mean little unless we take the necessary steps to not only breathe life into them, but also to sustain them.

Universality

One step we must collectively take is to provide powerful incentives—both positive and negative—to those states remaining outside the Chemical Weapons Convention to join. The threat of chemical weapons remains, not least because some countries still pursue chemical weapons programs. Many who do so can claim a legal, though certainly not a moral, right to do so because they are not represented here as parties to the Convention. We must demonstrate consistently and forcefully to such countries, that such a choice is unacceptable and will be counterproductive to achieving other key national objectives.

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Compliance

But, I submit, Mr. Chairman, that we must move beyond a simple quantitative approach to universality. If universality is to matter, it must also have a qualitative element—strict compliance

with the provisions of the Convention and effective national implementation.

The central obligation of the CWC is simple: no possession, no development, no production, and no use of chemical weapons. The very meaning of the Convention flows from this central premise. The overwhelming majority of States Parties abide by this obligation. However, the United States believes that over a dozen countries currently possess or are actively pursuing chemical weapons. While some, such as Syria, Libya and North Korea are not Parties to the Chemical Weapons Convention, others have representatives here in this room. Again, U.S. concerns are a matter of public record, having been the subject of regular reports to the U.S. Congress. We owe it to you in this room to be candid about what those concerns are.

We are most troubled by the activities of Iran, which we believe continues to seek chemicals, production technology, training, and expertise from abroad. The United States believes Iran already has stockpiled blister, blood, and choking agents. We also believe it has made some nerve agents. We have discussed our concerns with Iran, but those concerns have not been dispelled. Those concerns need to be resolved rapidly and in the most transparent and cooperative manner possible.

In addition, we are working with Sudan to reconcile concerns we have voiced in the past about their attempts to seek capabilities from abroad to produce chemical weapons.

The United States believes it is dangerous to acquiesce quietly in violations of the fundamental obligations arising under this Convention. Accordingly, we have taken, and will continue to take, concrete measures to disrupt illicit programs and deny proliferators the materials they require for such programs. We call upon all nations to do the same.

We have also made extensive use of the provisions of the CWC to raise concerns directly with individual States Parties. We will vigorously continue these efforts, and we call upon other States Parties to join us. Paragraph 1 (d) of Article I is an undertaking never to "assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention." Passive acceptance of illegitimate CW programs is not compatible

with this obligation. My government believes in compliance, not complacency.

If this Organization is to fulfill its promise, it must not shrink from the task of confronting those States Parties that are violating the Convention. Certainly this organization cannot—it must not—undermine actions by states and groups of states that complement and reinforce the proscriptions of the CWC by directly diminishing the CW threat.

Verification is an integral part of the Chemical Weapons Convention. The past 5 years have been a learning experience for member states and the Technical Secretariat alike, marked by gradual improvement in the processes of the Technical Secretariat's contribution to verification. As we move ahead, we encourage more States Parties to become actively engaged in verification and compliance: this is not the sole province of the Technical Secretariat, but a shared responsibility among States Parties and the Technical Secretariat. My government has utilized the consultative provisions of Article IX on numerous occasions to address our compliance concerns, often with great success. Beyond the work of the Technical Secretariat, nations should draw upon their own sources of information in seeking to reach compliance judgments—and to act to deny violators access to CW technology.

* * * *

National Implementation

A basic obligation of membership in the OPCW is for each State Party to take the steps necessary to implement the Convention on its own territory—and yet only 55% of the membership have notified the Technical Secretariat of the implementing measures they have taken, as required by the Convention. This raises the troubling possibility that nearly half of all States Parties may not yet have taken such measures. Further, the Technical Secretariat's analysis of the information that has been provided indicates that the measures taken by many States Parties do not adequately cover all key areas. While intolerable under any circumstances, this becomes even more troubling in light of the efforts of Al Qaeda and other terrorist organizations to acquire chemical weapons. In terms of concrete steps, the Review Conference should call upon

all member states to report on their implementing measures by the 8th Regular Session of the Conference of the States Parties in October 2003. The Conference should also establish a timetable and action plan to address the situation. The United States stands ready to provide assistance on request, either bilaterally or in coordination with the Technical Secretariat, to States Parties that do not have the means to adopt national implementation measures.

Disarmament

Mr. Chairman, only five States Parties have declared stockpiles of chemical weapons. A few more have declared chemical weapons production facilities. Nevertheless, the verified destruction of these stockpiles and destruction or conversion of former production facilities is important to every State Party. Destruction of chemical weapons, on the whole, is not proceeding at the rate foreseen in the Convention, and this lack of progress must concern us all. These stockpiles must be eliminated, and in the interim, they must be secured.

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b. Organization for the Prohibition of Chemical Weapons

On October 20, 2003, Ambassador Javits delivered the opening statement of the United States at the Eighth Conference of the States Parties of the Organization for the Prohibition of Chemical Weapons ("OPCW") in The Hague. Excerpts below from Mr. Javits' remarks address issues of substance before the OPCW.

The full text of the remarks is available at *www.state.gov/t/ac/rls/rm/2003/25465.htm.*

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. . . . As decided at the Review Conference, we must adopt an action plan to assist and ensure full and effective compliance by States Parties with their national implementing obligations under [CWC] Article VII.

. . . I am very concerned at the lack of agreement so far on an action plan on national implementation. My delegation has made significant concessions in the interest of consensus, recognizing the importance of fulfilling the task set by the Review Conference. Unfortunately, some delegations have not been as flexible. We truly believe that the proposed plan of action, which includes an active program of positive measures to assist States Parties in meeting their obligations, is the right way to proceed. Absence of an agreed action plan does not, of course, relieve any State Party of its obligation under the Convention. Without such a plan, States Parties will still hold each other accountable for meeting these obligations, but will not have a framework for the positive support and assistance that is so clearly needed. We hope that the few states that have so far not accepted the proposed plan will refrain from blocking consensus.

* * * *

I would note, however, that there remain issues on which the Executive Council has not been able to reach consensus and make a recommendation to the Conference. The United States request for an extension of its deadline for destruction of 45% of its Category 1 chemical weapons stockpiles is one such issue. At the September Executive Council session, the United States announced that, despite an intense and genuine effort, we would be unable to meet the treaty-designated deadline for destruction of 45% of our stockpile of chemical weapons.

Based on a number of factors, we opted to destroy the most unstable chemical weapons first, rather than bulk containers. We would have been much farther along in our destruction program if we had begun by destroying bulk agent first. But at the outset, the U.S. chose to first get rid of the most dangerous, difficult and slowest to destroy of its stockpile.

Moreover, the U.S. believes that in submitting its request for a new deadline, it was imperative to submit a date we could meet. The December, rather than April, 2007 deadline, provides us a 90% confidence probability that this date can be met. Thus we opted—and this was the only reason we opted—for the more politically difficult date, and requested a deadline extension of

December 2007. We therefore submitted a request for an extension per paragraph 22, part IV of the verification annex.

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5. Biological Weapons Convention

On November 10, 2003, Ambassador Donald Mahley, Acting Deputy Secretary for Multilateral and Conventional Arms Control, addressed the annual meeting of states parties for the Biological Weapons Convention ("BWC"). In his opening statement, excerpted below, Ambassador Mahley addressed 2003 work program topics, including the importance of national implementation and biosecurity.

The full text of the statement is available at *www.state.gov/t/ac/rls/rm/2003/26932.htm.*

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The timeliness of the 2003 Work Program topics of national implementation measures and security and oversight of pathogens (what we have called "biosecurity") is apparent. The August Meeting of Experts reflected extensive presentation by some individual States to document their existing domestic measures. This had the important effect of revealing not only how states have gone about implementing and enforcing their obligations, but—perhaps more importantly—highlighted gaps which need urgent attention. The discussions were not confined to the experiences of States Parties but also provided a focal point for the crucial efforts underway by States Parties and intergovernmental organizations, such as the World Health Organization (WHO), to address some fundamental aspects of the BW problem. The United States believes that this initial session served as a good model for the 2004 and 2005 experts' activities. . . .

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On national implementation measures, it is encouraging that a significant number of States Parties, despite widespread differences

in governing principles and organization, have developed similar practices. A number of States have already undertaken important steps in implementing and enforcing appropriate measures. Other States at least recognize what they still need to do to implement the BWC. Regrettably, however, there are a number of States Parties that have yet to recognize, or at least to enforce, their obligations under the Convention. . . .

. . . I would like to point to what the United States believes could be an important outcome or "deliverable" of the year 2003 effort—an undertaking by all States Parties to review, update, and/or implement their national measures relative to both issues under discussion. A second "deliverable" could be a commitment from countries with the means to assist others on a national basis to do so in meeting their BWC obligations. . . . [W]e do not believe we should try to negotiate an agreement by the Parties at this Annual Meeting on sets of "common elements" or "best practices" relating to national implementation measures and/or biosecurity. The important focus needs to be on what States can do now, on a national basis, to implement their obligations. Any attempt to negotiate common elements will only serve to distract States from acting sovereignly now, when it is necessary. Additionally, negotiations may reduce the quality of measures States would enact by establishing only a least common denominator model, and actually making it more difficult for a willing state to put in place effective barriers. The United States believes negotiations are most likely to dangerously delay institution of strict measures and to reduce their quality. Therefore, intend to focus instead on helping others implement appropriate measures nationally.

There is, however, one matter which should be clarified before measures are implemented. Some States Parties continue to inappropriately link or confuse biosecurity and biosafety, which is not helpful. Biosecurity practices and principles are designed to reduce the risk of unauthorized access to or diversion of dangerous pathogens and toxins—practices designed to keep pathogens and toxins safe and out of the hands of unauthorized or unsafe people. Biosafety, on the other hand, involves practices designed to keep people safe from pathogens. It is essential that States Parties understand the differences between biosafety and biosecurity and

the critical relevance of biosecurity to our efforts to counter the biological weapons threat.

The United States strongly believes that measures that raise biosecurity awareness at specific facilities enhance both local and global security. All States Parties should strive to implement and enforce national measures necessary to prevent unauthorized diversion of dangerous pathogens and toxins from facilities approved for their use. Effective biosecurity efforts require that agents of concern be identified and that plans be developed to regulate and monitor the safekeeping of those agents. Since common universal guidelines and practices are not practicable, the most effective means for ensuring global biosecurity are thorough, enforced national implementation plans that require site-specific biosecurity assessments and programs.

Critically important activities are ongoing at the World Health Organization, the Office Internationale des Epizooties and the Food and Agriculture Organization, as well as other related intergovermental bodies that will enable States Parties to undertake meaningful biosecurity measures. These activities intersect with our work and should not only be lauded, but should be supported in concrete ways through additional financial and in-kind contributions such as the temporary loan of national experts. These bodies are the appropriate repositories of global information related to our Work Program topics and, as such, should be actively engaged and strengthened. The WHO is in the process of drafting biosecurity guidelines that foster the goals we have outlined in this forum and has mechanisms in place to engage the widest possible audience with concrete programs for increasing biosecurity awareness and implementation.

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As one of the depositaries to this key security treaty, the United States has every interest in maintaining the ongoing relevance of the BWC. . . . Given universal concerns about the rapid global reach of disease outbreaks, we anticipate and strongly encourage the full and active participation and cooperation of all States Parties in next year's focus on disease surveillance and response to alleged or suspicious outbreaks. Since every country in the world can be

subject to sudden outbreaks of disease, the 2004 topics should inspire all States Parties in a way not even biosecurity may have. . . .

6. Arms Embargoes

a. Partial arms embargo applicable to Rwanda

Effective July 30, 2003, the Department of State amended the International Traffic in Arms Regulations ("ITAR") to reflect UN Security Council Resolution 1011 lifting an embargo on the Government of Rwanda. 68 Fed. Reg. 44,613 (July 30, 2003). The amendments removed Rwanda as an example of a country on which the United States imposes an arms embargo under 22 C.F.R. § 126.1(a) and added the following separate statement of U.S. policy on Rwanda (under 22 C.F.R. § 126.1(h)):

> (h) Rwanda. It is the policy of the United States to deny licenses, other approvals, exports and imports of defense articles and defense services, destined for or originating in Rwanda except for the Government of Rwanda, which will be reviewed on a case-by-case basis. UN Security Council Resolution 1011 (1995) lifted the embargo only with respect to the Government of Rwanda.

Excerpts below from the Federal Register explained the effect of the action.

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The President issued Executive Order 12918 (May 26, 1994) implementing United Nations Security Council Resolution 918 (May 17, 1994). Due to the civil strife in Rwanda, Resolution 918 called upon all States to impose an embargo upon Rwanda. Consequently, all licenses and other approvals authorizing the export or transfer of defense articles or services to Rwanda were suspended, and a denial policy was imposed upon all new applications or other requests for such exports or transfers to Rwanda by Federal Register notice of June 2, 1994. Effective

August 17, 1994, section 126.1 of the ITAR was amended to add Rwanda to the exemplary list of embargoed countries.

United Nations Security Council Resolution 1011 (August 16, 1995) lifted the arms embargo only with respect to the Government of Rwanda. That Resolution retained the restriction that all States "* * * continue to prevent" transfers of "arms and related materiel of all types * * * to Rwanda, or to persons in the States neighboring Rwanda if such sale or supply is for the purpose of the use of such arms or materiel within Rwanda, other than to the Government of Rwanda * * *."

Accordingly, the policy of denial will remain in place for exports or other transfers of defense articles and defense services covered by section 38 of the Arms Export Control Act for use or originating in Rwanda other than by the Government of Rwanda. This action precludes the use in connection with non-governmental end-users in Rwanda of any exemptions from licensing or other approval requirements. Also, arms exports and transfers to or imports from Rwanda or neighboring States for use by the Government of Rwanda will continue to receive strict case-by-case review.

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b. Arms embargo implementing UN Security Council Resolutions 1390 and 1455

On August 25, 2003, the Department of State published a notice providing an updated list of persons subject to an arms embargo in implementation of UN Security Council Resolutions 1390 (2002) and 1455 (2003). 68 Fed. Reg. 51,048 (Aug. 25, 2003). These resolutions required states to impose sanctions, including those described in excerpts from the Federal Register below, on Usama bin Laden and the Taliban and persons associated with them.

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UN Security Council Resolutions 1390 (2002) and 1455 (2003) require UN Member States to implement an arms embargo (and

other sanctions) against those individuals, groups, undertakings and entities listed in the consolidated list created in accordance with UN Security Council Resolutions 1267 (1999) and 1333 (2000) and maintained by the UN 1267 Sanctions Committee. Specifically, the resolutions require that Member States prevent the direct or indirect supply, sale and transfer, to those on the 1267 Sanctions Committee list, from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related material of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities.

Effective October 24, 2002, U.S. manufacturers and exporters and any other affected parties were notified that the Department imposed a policy of denial for any new license application or other request for approval for the export or transfer of defense articles (including technical data) or defense services (whether or not all the information relied upon by the U.S. person in performing the defense service is in the public domain) if any of the names on the list published on October 24, 2002 appear in connection with the application or other request for approval subject to section 38 of the Arms Export Control Act. Further, that action also precluded the use of any exemptions from licensing or other approval (e.g. brokering) requirements available under the International Traffic in Arms Regulations (ITAR) involving any person on the list. A consolidated list created pursuant to UN Security Council Resolutions 1267 (1999), 1333 (2000) and 1390 (2002), updated on September 11, 2002, was published in the Federal Register on October 24, 2002, by the Bureau of Political-Military Affairs. This notice contains the list updated as of June 25, 2003, which also reflects UN Security Council Resolution 1455, adopted in January 2003.

Thus, U.S. manufacturers and exporters and any other affected parties are hereby notified the Department has imposed a policy of denial for any new license application or other request for approval for the export or transfer of defense articles or defense services if any of the names on the list below appear in connection with the application or other request for approval subject to section

38 of the Arms Export Control Act. This action also precludes the use of any exemptions from licensing or other approval (e.g. brokering) requirements available under the ITAR involving any person on the list.

The term "person", as defined in 22 CFR 120.14 of the ITAR, means a natural person as well as a corporation, business association, partnership, society, trust, or any other entity, organization or group, including governmental entities.

This action has been taken pursuant to sections 38 and 42 of the Arms Export Control Act (22 U.S.C. 2778 and 2791) and 126.7 of the International Traffic in Arms Regulations in furtherance of the foreign policy of the United States, and in accordance with section 5 of the UNPA (22 U.S.C. 287(c)) and E.O. 12918.

c. Syria Accountability and Lebanese Sovereignty Restoration Act of 2003

On December 16, 2003, President George W. Bush signed into law the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, Pub.L. No. 108-175, 117 Stat. 2482. The act prohibits the export to Syria of any item, including the issuance of a license for the export of any item, on the U.S. Munitions List or Commerce Control List of dual-use items in the Export Administration Regulations, 15 C.F.R. § 730.1-730.supp.3, and requires the President to impose two or more of six additional specified sanctions, absent a Presidential national security interest waiver. The act allows for the sanctions to be lifted and also authorizes the President to provide assistance to Syria if he makes determinations and certifies as provided in § 5(c) and (d), set forth below. *See also* Chapter 5.A.1. for the President's statement on signing the act.

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[5](c) Authority To Provide Assistance To Syria.—If the President—

(1) makes the determination that Syria meets the requirements described in paragraphs (1) through (4) of subsection (d) and

certifies such determination to Congress in accordance with such subsection;

(2) determines that substantial progress has been made both in negotiations aimed at achieving a peace agreement between Israel and Syria and in negotiations aimed at achieving a peace agreement between Israel and Lebanon; and

(3) determines that the Government of Syria is strictly respecting the sovereignty, territorial integrity, unity, and political independence of Lebanon under the sole and exclusive authority of the Government of Lebanon through the Lebanese army throughout Lebanon, as required under paragraph (4) of United Nations Security Council Resolution 520 (1982), then the President is authorized to provide assistance to Syria under chapter 1 of part I of the Foreign Assistance Act of 1961 (relating to development assistance).

(d) Certification.—A certification under this subsection is a certification transmitted to the appropriate congressional committees of a determination made by the President that—

(1) the Government of Syria has ceased providing support for international terrorist groups and does not allow terrorist groups, such as Hamas, Hizballah, Palestinian Islamic Jihad, the Popular Front for the Liberation of Palestine, and the Popular Front for the Liberation of Palestine—General Command to maintain facilities in territory under Syrian control;

(2) the Government of Syria ended its occupation of Lebanon described in section 2(7) of this Act;

(3) the Government of Syria has ceased the development and deployment of medium- and long-range surface-to-surface ballistic missiles, is not pursuing or engaged in the research, development, acquisition, production, transfer, or deployment of biological, chemical, or nuclear weapons, has provided credible assurances that such behavior will not be undertaken in the future, and has agreed to allow United Nations and other international observers to verify such actions and assurances; and

(4) the Government of Syria has ceased all support for, and facilitation of, all terrorist activities inside of Iraq, including preventing the use of territory under its control by any means

whatsoever to support those engaged in terrorist activities inside of Iraq.

C. NON-PROLIFERATION

1. 2005 Non-Proliferation Treaty Review Conference

John S. Wolf, Assistant Secretary of State for Nonproliferation and U.S. Representative to the Second Session of the Preparatory Committee Meeting for the 2005 Non-Proliferation Treaty Review Conference ("NPT"), addressed the committee on April 28, 2003. He began his remarks by delivering a message from Secretary of State Colin Powell, stating:

> . . . We meet at a time of considerable challenge to the NPT and to international peace and security.
>
> * * * *
>
> NPT Parties—weapon states and non-weapon states alike—must take strong action to deal with cases of noncompliance and to strengthen the Treaty's nonproliferation undertakings. We cannot allow the few who fail to meet their obligations to undermine the important work of the NPT.
>
> The International Atomic Energy Agency (IAEA) must be relentless in pursuing suspected cases of noncompliance. The IAEA needs our full financial and political support to do its job. Universal adoption of the IAEA Additional Protocol must remain a high priority objective.
>
> The United States remains firmly committed to its obligations under the NPT. . . .
>
> The NPT reflects our common realization that the spread of nuclear weapons would gravely destabilize our world. An NPT to which all states adhere and fully comply would serve to protect against the prospect of regional nuclear competition and to reduce the risk of nuclear war.
>
> The NPT can only be as strong as our will to enforce it, in spirit and in deed. We share a collective

responsibility to be ever vigilant, and to take concerted action when the Treaty, our Treaty, is threatened.

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Mr. Wolf's remarks, excerpted below, laid out in greater detail U.S. concerns with events in North Korea and Iran and the risk of terrorist access to nuclear materials. He also addressed the need to strengthen nonproliferation and disarmament efforts through greater efforts to enforce current provisions and strengthen of the NPT itself.

The full text of Mr. Wolf's remarks is available at *www.state.gov/t/np/rls/rm/20034.htm*. Additional remarks to the preparatory committee elaborating on issues including those concerning compliance with articles I, II and VI of the NPT, regional nonproliferation issues, and the role of IAEA safeguards, nuclear export controls, and nuclear-weapon-free zones are available at *www.state.gov/t/np/wmd/nnp/c10583.htm*.

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The NPT's core purpose is preventing the spread of nuclear weapons. It's in the title. While the Treaty has been largely successful in this respect, irresponsible NPT parties are taking actions that pose fundamental challenges to the Treaty.

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. . . One part of that choice requires dealing firmly with countries whose nuclear programs today pose a serious threat to the NPT. By doing so, we send a clear message to stop any other Treaty party that would seek to acquire or spread nuclear weapons or nuclear weapons technologies.

In October 2002, North Korea admitted to a secret uranium enrichment program as part of its nuclear weapons program. It is not just that this program compounded previous DPRK [Democratic People's Republic of Korea] violations of the NPT and several other international agreements. But it also happened even as my country and others were engaged in nearly a decade

of good faith efforts under the Agreed Framework and other international agreements.

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While all our options remain available, we are determined to end North Korea's threat through peaceful, diplomatic means. We met in Beijing last week for multilateral talks with China and North Korea. There were no breakthroughs, but we were able to make clear to North Korea our resolve in achieving the verifiable, irreversible dismantlement of its nuclear weapons program. It is important for every country represented here to send the same message to the DPRK: abandon your nuclear weapons ambitions and return to compliance with the NPT.

Iran provides perhaps the most fundamental challenge ever faced by the NPT. This is a country that professes to be in full compliance with its safeguards obligations. It is a country that has been one of the largest beneficiaries of IAEA technical cooperation for peaceful purposes. But, as recent revelations have made all too clear, Iran has been conducting an alarming, clandestine program to acquire sensitive nuclear capabilities that we believe make sense only as part of a nuclear weapons program.

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The IAEA, which is following up the revelations made during Director-General Elbaradei's February visit, undoubtedly has its own extensive list of questions. Some of these may relate to small issues and others to more fundamental matters. But the answers the IAEA is seeking are critical, are critical, to determining whether Iran is in compliance with its safeguards agreement—and therefore meeting its fundamental NPT obligations.

I want to make this clear: this is not, this is not, a bilateral issue between Iran and the United States. This is an issue between Iran and the rest of the world. Every NPT party has a stake in seeing the veil of secrecy lifted on Iran's nuclear program. Many countries have concerns and questions about Iran's intentions and the capabilities that must be addressed. The IAEA needs to ask the hard questions and it deserves, it needs to get complete answers. It needs to go wherever necessary to find the truth; and it needs

to measure each answer against the pattern to date of denial and deception. Member states of the IAEA will need to know how Iran has responded to requests for access. Iran has repeatedly asserted that its nuclear program is "completely transparent" and that it is "fully cooperating with the IAEA." Now is the time for Iran to provide full disclosure. IAEA members will be satisfied with nothing less than the truth. We look forward to the Director General's comprehensive report on Iran at the June Board of Governors meeting.

Our experiences with Iraq, Iran and North Korea reveal an objective message. We must constantly be mindful that an irresponsible NPT party may use its "declared" peaceful nuclear program to mask its development or acquisition of nuclear weapons capabilities. What is presented as "compliance" may in fact not be real. Only genuine commitment, true transparency, and rigorous verification can lead to genuine confidence.

Some argue that, absent a formal finding of noncompliance with safeguards, that non-nuclear-weapons states have a "right" to acquire nuclear technology for peaceful purposes. Article IV certainly provides for cooperation among NPT parties in pursuing peaceful nuclear programs. And many NPT parties have benefited from Article IV assistance over the life of the Treaty. But, underpinning and fundamental to this cooperation are the nonproliferation obligations in Articles II and III. These obligations require that nuclear material and facilities be used solely, solely, for peaceful purposes as set forth in the Treaty and the IAEA safeguards agreement. Nuclear commerce must not continue when there are questions, even if those questions have not yet resulted in formal findings of noncompliance. Recent history demonstrates that suppliers need to exercise far greater caution with countries of concern. Some may argue they must see the "smoking gun." Unfortunately, the smoking gun for clandestine nuclear programs may well be the mushroom cloud above an exploding weapon.

Today, we also face another risk—that of terrorist access to nuclear materials. The tragic lesson of September 11 is that terrorists are looking for ways to kill or injure large numbers of civilians, innocent civilians, and they are looking to create panic

and economic dislocation. Nuclear and radioactive material offer terrorists a tempting means to those ends. Lest anyone think this is a problem only for the United States, or perhaps a few western countries—think again. Remember, the economic tidal wave spawned by the September 11 terrorist actions is still, still, crashing down all across the world, causing economic losses in the trillions of dollars and misery and economic deprivation for millions all around the world. Use of a stolen nuclear weapon, or even a radiological dispersion device could cause far more extensive damage for all of us.

Many here already have spoken to the key importance of disarmament and the need to match the Treaty's disarmament and nonproliferation obligations. And I quite agree with that. Balance, balance, is an inherent part of the Treaty. The Treaty has three pillars: nonproliferation, disarmament, and peaceful nuclear cooperation. But the fact is, today, the Treaty is dangerously out of balance. Disarmament continues, and in fact took a significant step forward with the signing of the Moscow Treaty. We are leading that process, and we will continue to do so. In the past 15 years, huge strides have been made in reducing and eliminating nuclear weapons. The United States has dismantled over 13,000 nuclear weapons. We have eliminated more than a dozen different types of warheads and we have reduced the number of nuclear weapons by about 60%. Under the Moscow Treaty we will cut the number of strategic weapons again by two-thirds to 1,700 to 2,200 by the year 2012. In two decades, the United States will have eliminated or decommissioned three-quarters of its strategic arsenal. We have also given up whole classes of tactical nuclear weapons, and we have withdrawn remaining stocks from almost every overseas site.

We also are making progress under the U.S.-Russia agreement that ensure excess fissile material can never be used in nuclear weapons. Over their lifetime, these agreements will contribute to the irreversibility of nuclear reductions. They will ensure that fissile material capable of manufacturing over 30,000 nuclear weapons is no longer available for such use. And that's not all.

We are purchasing from Russia low-enriched uranium for reactor fuel that has been down-blended from hundreds of tons of

highly enriched uranium, uranium from dismantled warheads. The United States and Russia have agreed to permanently dispose of 34 tons each of weapons usable plutonium.

We spend about a $1 billion a year on a variety of nonproliferation and threat reduction programs in Russia and other states of the former Soviet Union. And much of this effort is to reduce nuclear material stocks and secure that which remains. We, we, fostered last year's decision by G-8 Leaders to launch a Global Partnership and commit up to $20 billion over ten years for nonproliferation assistance. The United States' share of that $20 billion is $10 billion.

Some may debate whether this pace is fast enough—but it is not credible to argue that we are not on a steady downward path toward the goals of Article VI.

Yet, the path for nuclear proliferation is spiraling upward. And what must we do?

IAEA safeguards play an indispensable role in the process of ensuring confidence in NPT compliance, but safeguards need further strengthening. We rely on the IAEA to safeguard peaceful nuclear programs around the world and to look for evidence of clandestine activities. It must have the resources and the resolve necessary to ensure that peaceful nuclear programs are not mere facades. The work of this unique international organization advances our collective security. We need to respond positively to the IAEA's chronic shortfall in regular budget safeguards funding. At the same time, at the same time, we must recognize that it will take more than additional funding for the IAEA to meet its maximum verification potential under the NPT. NPT parties must recognize the dangers that exist, and they must summon the political will to support a more assertive IAEA safeguards system. More resources must be matched with strengthened enforcement.

We need to take the next big step by substantially increasing the political momentum behind the Additional Protocol. In May of last year, President Bush transmitted the U.S.-IAEA Additional Protocol to the U.S. Senate for its advice and consent to ratification. In doing so, the President made clear his support for universal adoption of the Additional Protocol.

Since we met last year, there has been some progress globally in acceptance of the Additional Protocol. But the pace should intensify. Some states with significant nuclear programs have yet to bring a Protocol before the Board. The 2005 NPT Review Conference offers a target date for action. All NPT parties, including my government, should exert a maximum effort to have a Protocol in force in 2005. Sustained and rapid progress over the next two years in completing both Protocols and the 48 NPT safeguards agreements that are not yet in force would represent a solid achievement in support of the NPT and global security. Even NPT parties with no civil nuclear programs can contribute. Every safeguards agreement and Protocol that is concluded reinforces the fabric of the NPT and assists the IAEA in verifying that nuclear programs are genuinely peaceful.

There is a task for members of the Nuclear Suppliers Group (NSG) and for the Zangger Committee as well. They should continue to search for ways to ensure that items under their control do not find their way into nuclear weapon programs. Information sharing among NSG states is critical to this goal. But members must act on this information by recognizing the increased risk of diversion and they must act to deny nuclear-related items to states of concern. We applaud the recent action by the NSG to address the threat of terrorism. These supplier groups can provide a boost to the Additional Protocol by adopting it as a condition of supply, perhaps by 2005.

And strong national export controls are essential to enforcing the goals of the NSG and the NPT. There should be severe penalties for those who violate the law. And supplier governments must have authority to stop items not on the control lists. We should consider incorporating the concept of "catch-all" controls as an explicit NSG requirement. We all need to reflect on the fact, on the fact, that North Korea and Iran obtained proven enrichment technologies largely undetected, even though, even though, suppliers increased their scrutiny of enrichment transactions more than a decade ago.

The ongoing effort to amend the Physical Protection Convention will strengthen international standards for protecting nuclear material and facilities used for peaceful purposes. A

resolution adopted at last fall's IAEA General Conference noted with concern the lack of progress and called for the early completion of negotiations on an amendment. The drafting group convened by the IAEA Director-General completed its work in March without reaching a consensus. It is time, it is time, for parties to set aside political agendas and to realize our common goal. The need for an amended Convention is as critical as ever.

International cooperation in securing and regulating radioactive sources was given a boost last month at a conference in Vienna co-sponsored by Russia and the United States. And more than 120 countries joined the call for stronger national and international security over radioactive sources, especially the kind that can be used in "dirty bombs." Among the key recommendations were the need for national plans, national plans, to manage sources throughout their lifetime, as well as to locate, recover and secure high-risk radioactive sources. This is not an issue on which interests of developed and developing countries differ. Virtually no state is immune from the risk posed by these sources. Here is another opportunity for us to work together. The U.S. will be active in helping.

There are many opportunities for every state to make a difference in achieving nuclear nonproliferation objectives. It starts with robust support for the NPT. But declaratory statements must be backed up with political resolve to confront those who undermine nuclear nonproliferation and to take direct action to strengthen the barriers against possible future offenders. There must be serious consequences for those who violate their NPT commitments.

U.S. support for the goal of universal NPT adherence remains undiminished. We do not support any change to the NPT that would accord a different status to states currently outside the Treaty. The 2000 NPT Review Conference recognized that universality would depend, would depend, on successful efforts to enhance regional security in areas of tension such as the Middle East and South Asia. We continue to recognize the validity of the goal of the 1995 resolution on the Middle East, and we are committed to helping the parties of the Middle East to achieve peace.

In closing, let me reinforce that the NPT is more important today than ever before. As we prepare for the 2005 Conference, we should recognize the new proliferation challenges we face and attach a higher priority to strengthening the Treaty. The vast majority of parties, parties in this room, honor their obligations. Yet, the Treaty's value to future generations depends on what we do to preserve the Treaty as an effective instrument against the spread of nuclear weapons. I am confident that working together with strong resolve we can ensure the NPT and other multilateral approaches continue to play a critical role in the fight against the security threats of the 21st century.

2. Need for Strengthened Nonproliferation Program

In remarks to the UN General Assembly, September 23, 2003, President George W. Bush addressed pressing challenges to the world community, including the need for a strengthened non-proliferation regime. In his speech, excerpted below, he called, among other things, for a Security Council resolution requiring countries to criminalize proliferation, enact strict export controls, and secure sensitive materials within their borders.

President Bush's address, excerpted below, is available at *www.whitehouse.gov/news/releases/2003/09/20030923-4.html.*

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A . . . challenge we must confront together is the proliferation of weapons of mass destruction. Outlaw regimes that possess nuclear, chemical and biological weapons—and the means to deliver them—would be able to use blackmail and create chaos in entire regions. These weapons could be used by terrorists to bring sudden disaster and suffering on a scale we can scarcely imagine. The deadly combination of outlaw regimes and terror networks and weapons of mass murder is a peril that cannot be ignored or wished away. If such a danger is allowed to fully materialize, all words, all protests, will come too late. Nations of the world

must have the wisdom and the will to stop grave threats before they arrive.

One crucial step is to secure the most dangerous materials at their source. For more than a decade, the United States has worked with Russia and other states of the former Soviet Union to dismantle, destroy, or secure weapons and dangerous materials left over from another era. Last year in Canada, the G8 nations agreed to provide up to $20 billion—half of it from the United States—to fight this proliferation risk over the next 10 years. Since then, six additional countries have joined the effort. More are needed, and I urge other nations to help us meet this danger.

We're also improving our capability to interdict lethal materials in transit. Through our Proliferation Security Initiative, 11 nations are preparing to search planes and ships, trains and trucks carrying suspect cargo, and to seize weapons or missile shipments that raise proliferation concerns. These nations have agreed on a set of interdiction principles, consistent with legal—current legal authorities. And we're working to expand the Proliferation Security Initiative to other countries. We're determined to keep the world's most destructive weapons away from all our shores, and out of the hands of our common enemies.

Because proliferators will use any route or channel that is open to them, we need the broadest possible cooperation to stop them. Today, I ask the U.N. Security Council to adopt a new anti-proliferation resolution. This resolution should call on all members of the U.N. to criminalize the proliferation of . . . weapons of mass destruction, to enact strict export controls consistent with international standards, and to secure any and all sensitive materials within their own borders. The United States stands ready to help any nation draft these new laws, and to assist in their enforcement.

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3. Proliferation Security Initiative

President Bush announced the Proliferation Security Initiative referred to in his address to the UN, *supra*, on May 31, 2003, speaking from Wawel Royal Castle, in Krakow, Poland:

> The greatest threat to peace is the spread of nuclear, chemical and biological weapons. And we must work together to stop proliferation. . . . When weapons of mass destruction or their components are in transit, we must have the means and authority to seize them. So today I announce a new effort to fight proliferation called the Proliferation Security Initiative. The United States and a number of our close allies, including Poland, have begun working on new agreements to search planes and ships carrying suspect cargo and to seize illegal weapons or missile technologies. Over time, we will extend this partnership as broadly as possible to keep the world's most destructive weapons away from our shores and out of the hands of our common enemies.

The full text of the President's remarks is available at *www.whitehouse.gov/news/releases/2003/05/20030531-3.html*.

In a meeting in Paris in September 2003, eleven countries—Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United States and the United Kingdom—adopted a statement of interdiction principles, set forth below.

PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council. They call on all states concerned with this threat to international peace and security to join in similarly committing to:

1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation

concern. "States or non-state actors of proliferation concern" generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.

2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.
3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.
4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:
    a. Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.
    b. At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified.

c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.
d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.
e. At their own initiative or upon the request and good cause shown by another state, to (a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.
f. If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.

A fact sheet released by the White House on September 4 described the development as excerpted below.

The fact sheet is available at *www.whitehouse.gov/news/releases/2003/20030904-11.html.* Further information on the

Proliferation Security Initiative is available at *www.state.gov/t/np/c10390.htm*

The Proliferation Security Initiative (PSI) is a response to the growing challenge posed by the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide. The PSI builds on efforts by the international community to prevent proliferation of such items, including existing treaties and regimes. It is consistent with and a step in the implementation of the UN Security Council Presidential Statement of January 1992, which states that the proliferation of all WMD constitutes a threat to international peace and security, and underlines the need for member states of the UN to prevent proliferation. The PSI is also consistent with recent statements of the G8 and the European Union, establishing that more coherent and concerted efforts are needed to prevent the proliferation of WMD, their delivery systems, and related materials. PSI participants are deeply concerned about this threat and of the danger that these items could fall into the hands of terrorists, and are committed to working together to stop the flow of these items to and from states and non-state actors of proliferation concern.

The PSI seeks to involve in some capacity all states that have a stake in nonproliferation and the ability and willingness to take steps to stop the flow of such items at sea, in the air, or on land. The PSI also seeks cooperation from any state whose vessels, flags, ports, territorial waters, airspace, or land might be used for proliferation purposes by states and non-state actors of proliferation concern. The increasingly aggressive efforts by proliferators to stand outside or to circumvent existing nonproliferation norms, and to profit from such trade, requires new and stronger actions by the international community. We look forward to working with all concerned states on measures they are able and willing to take in support of the PSI, as outlined in the . . . "Interdiction Principles."

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4. North Korea

As noted in Mr. Wolf's remarks in C.1., *supra*, in October 2002 the People's Republic of Korea ("DPRK" or "North Korea") acknowledged that it was conducting a clandestine uranium-enrichment program for nuclear weapons. This program was in violation of the Agreed Framework, signed by the DPRK and the United States in 1994 to halt DPRK nuclear weapon development. 34 I.L.M. 603 (1995), the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT"), North Korea's comprehensive safeguards agreement with the International Atomic Energy Agency ("IAEA"), and the South-North Joint Declaration on Denuclearization of the Korean Peninsula.

On November 29, 2002, the IAEA Board of Governors adopted a resolution (available at *www.iaea.org/NewsCenter/Focus/IaeaDprk/index.shtml*) deploring North Korea's statements that it was entitled to possess nuclear weapons and urging the DPRK to give up any nuclear weapons program, expeditiously and in a verifiable manner. For further discussion of developments during 2002, see *Digest 2002* at 1044–1052.

On January 6, 2003, the IAEA Board of Governors adopted a resolution (1) calling upon the DPRK to co-operate urgently and fully with the IAEA by allowing the full implementation of all the required safeguards measures, including the return of IAEA inspectors expelled by the DPRK on December 31, 2002, and (2) affirming that unless the DPRK took all necessary steps to allow the Agency to implement all such measures, the DPRK would be in further non-compliance with its safeguards agreement. *See www.iaea.org/NewsCenter/Focus/IaeaDprk/index.shtml*

On January 10, 2003, North Korea announced its intention to withdraw from the NPT. Secretary of State Powell, speaking after a meeting of the IAEA on that date, stated: "The Non-Proliferation Treaty is an important international agreement, and this kind of disrespect for such an agreement cannot go undealt with." While North Korea's action "makes

it more difficult to find a solution," he indicated that the United States would, however,

> continue to be open to the opportunity for talks that deal with this problem—a problem created by North Korea—not by the international community, and not by the United States. It is their failure to comply with their obligations and their failure to do what they were supposed to do under not only international obligations, but the Agreed Framework entered into with the United States.

See www.state.gov/secretary/rm/2003/16553.htm.

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Deputy Secretary of State Richard L. Armitage addressed these issues, including North Korea's repeated assertions that the United States must provide it with assurances of non-aggression, in testimony before the Senate Foreign Relations Committee on February 4, 2003, excerpted below.

The full text of the testimony is available at *www.state.gov/s/d/rm/17170pf.htm.*

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President Bush and Secretary Powell have said repeatedly that when it comes to defending our nation, all options must remain on the table. Both have said that in this case, at this time, we believe that diplomacy is our best option. We intend to resolve the threats posed by North Korea's programs by working with the international community to find a peaceful, diplomatic solution.

As President Bush said in his visit to South Korea last year, the United States has no intention of invading North Korea. Secretary Powell reiterated this point most recently in Davos, Switzerland, where he also stated that we are prepared to communicate this position to the North Koreans in a way that is unmistakable.

Indeed, we are prepared to build a different kind of relationship with North Korea. Last summer, in consultation with South Korea and Japan, the United States was ready to pursue a bold new

approach with Pyongyang. That approach entailed a number of steps toward normalcy in our relationship, including political and economic measures to help improve the lives of the North Korean people.

This bold approach was derailed, however, by our discovery of a covert uranium enrichment program for nuclear weapons, which North Korea had been pursuing for years in egregious violation of its international obligations.

We cannot change our relationship with the DPRK until the DPRK changes its behavior. North Korea must abandon its nuclear weapons programs in a verifiable and irreversible manner. Specifically, North Korea must return immediately to the freeze on activities at the Yongbyon complex and dismantle the plutonium program there. Second, North Korea must dismantle its program to develop nuclear weapons through highly enriched uranium—and must allow international verification that it has done so. Third, North Korea must cooperate fully with the International Atomic Energy Agency (IAEA). Finally, North Korea must comply with the Nuclear Nonproliferation Treaty (NPT) and adhere to the safeguards agreement that is part of that treaty.

The United States will not dole out any "rewards" to convince North Korea to live up to its existing obligations. But we do remain prepared to transform our relations with that country, once it complies with its international obligations and commitments. Channels of communication between our countries remain open, but ultimately, it is the actions of North Korea that matter.

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We are consulting with our KEDO partners—South Korea, Japan, and the EU—about KEDO's future, including the fate of the light water reactor project. . . .*

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* [Editors' note: On November 21, 2003, the Executive Board of KEDO, "given that the conditions necessary for continuing the Light-Water Reactor (LWR) project have not been met by the Democratic People's Republic of Korea (DPRK)," decided to suspend the light water reactor project in the DPRK for a period of one year, beginning December 1, 2003. In announcing the suspension, KEDO stated that the future of the project

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While the nations in the neighborhood must play a starring role in resolving this problem, this is also an issue of international and multilateral interest.

For example, the Nuclear Nonproliferation Treaty (NPT) requires that states and organizations upholding it, notably the International Atomic Energy Agency (IAEA), must be involved in this issue. We are pleased that the IAEA and its Director, Dr. El Baradei, continue to stress this point.

Last month, the 35 member nations of the Board of Governors of the International Atomic Energy Agency (IAEA) unanimously condemned DPRK actions. Specifically, the Board issued a statement "deploring" North Korea's suggestion that it will resume nuclear activities at the Yongbyon complex, its disabling of the monitoring equipment installed there, and its expulsion of IAEA inspectors.

The IAEA also announced that it is no longer able to "exercise its responsibilities under the safeguards agreement, namely, to verify that the DPRK is not diverting nuclear material to nuclear weapons or other nuclear explosive devices . . ." The IAEA called on the DPRK to act urgently to restore international confidence by complying with safeguards and resuming surveillance at Yongbyon.

Unfortunately, North Korea rejected the IAEA resolution, announcing its withdrawal from the Nuclear Nonproliferation Treaty and suggesting that the nation may resume flight testing of long-range missiles.

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On February 12, 2003, the IAEA Board of Governors adopted a resolution declaring North Korea to be "in further non-compliance with its obligations under its Safeguards Agreement" with the IAEA, and calling on North Korea to

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will be assessed and decided by the Executive Board before the expiration of the suspension period, and that the suspension process will require preservation and maintenance both on-site and off-site. *See www.kedo.org/news_detail.asp?NewsID=13*.]

take "all steps deemed necessary" by IAEA. Further, it decided to report out of the IAEA:

> as provided for in Article XII.C. of the Statute, through the Director General, the DPRK's non-compliance and the Agency's inability to verify non-diversion of nuclear material subject to safeguards, to all Members of the Agency and to the Security Council and General Assembly of the United Nations; and in parallel stresses its desire for a peaceful resolution of the DPRK nuclear issue and its support for diplomatic means to that end.

See www.iaea.org/NewsCenter/Focus/IaeaDprk/index.shtml.

In August 2003 North Korea, the Republic of Korea, Japan, China, Russia, and the United States met in Beijing for six-party talks aimed at achieving a peaceful resolution of the issue. Following the meeting, U.S. Secretary of State Colin L. Powell and South Korea's Minister of Foreign Affairs and Trade Yoon Young-Kwan met in Washington, D.C., on September 3, 2003. The two leaders indicated that they had discussed the results of the six-party talks, and Secretary of State Powell reaffirmed the U.S. commitment to the "safety and security of our partner and ally in South Korea." In response to questions from reporters, Secretary Powell commented further on the status of diplomatic efforts, excerpted below.

The full text of their remarks is available at *www.state.gov/secretary/rm/2003/23737.htm.*

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QUESTION: Do you have any response to North Korea's promise, so to speak, last week that they will carry out a nuclear weapons test?

SECRETARY POWELL: Well, that's what they said. I don't know if it was a promise or just a statement.

We are looking for a diplomatic solution. We are working in concert with all of North Korea's neighbors—Russia, South Korea, China and Japan—to find a peaceful solution. We have made it

clear, the President has made it clear on many occasions, I have made it clear, that we have no intention of invading North Korea, of attacking North Korea.

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The General Conference of the IAEA adopted a resolution on September 19, 2003, calling for North Korea to "promptly accept comprehensive IAEA safeguards and cooperate with the Agency in their full and effective implementation." It urged North Korea to "completely dismantle any nuclear weapons programme" and stressed its desire for a "peaceful resolution through dialogue to the DPRK nuclear issue, leading to a nuclear-weapon-free Korean Peninsula, with a view to maintaining peace and security in the region." *See www.iaea.org/About/Policy/GC/GC47/Resolutions/gc47res12.pdf.*

5. Iran

In June 2003 the IAEA released a report by its director-general on the IAEA's ongoing investigation of Iran's nuclear program. The report identified a number of Iranian failures to meet its obligations under its NPT Safeguards Agreement. These included Iran's failure to: report uranium imported in 1991; declare activities involving the processing and use of the imported material; declare the facilities where material was kept; and provide timely design and waste storage information. The report raised questions about Iran's centrifuge enrichment program and questions about Iran's heavy-water program, including its intention to construct a heavy-water research reactor at Arak, which Iran informed the Agency of in May 2003. Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Report by the Director General, GOV/2003/40, June 6, 2003, available at *www.iaea.org/Publications/Documents/Board/2003/gov2003-40.pdf.*

This matter was considered at the June meeting of the IAEA Board of Governors and on June 19, 2003, the chairwoman of the board issued a statement that noted the

Board's concern about the number of Iran's past failures to report material, facilities and activities as required by its safeguards obligations, urged Iran promptly to rectify all safeguards problems identified in the report and resolve questions that remain open, and called upon Iran to cooperate fully with the Agency in its on-going work.

In August 2003 the Director General provided another report to the IAEA Board. GOV/2003/63. This report raised additional questions about Iran's nuclear activities, in part based upon evidence obtained from environmental sampling at nuclear facilities. The report identified additional verification work that needed to be done.

At the Board of Governors meeting in September, further concerns were identified. A statement by Ambassador Kenneth C. Brill, U.S. Representative to the U.S. Mission to International Organizations in Vienna, addressed the significance of these concerns, as excerpted below.

The full text of Ambassador Brill's statement is available at *www.iaea.org/NewsCenter/Focus/IaeaIran/bog092003_statement-usa.pdf.*

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. . . The Director General's June 6 report stated forthrightly that Iran had failed to meet important obligations under its Safeguards Agreement and provided a listing of those failures. It also reviewed a number of open questions it was still pursuing, with particular regard to Iran's enrichment program, the role of uranium metal in its nuclear fuel cycle, and its heavy water program. . . .

. . . The August 26 report makes additions to the already significant June 6 list of failures by Iran to meet its safeguards obligations. Contrary to earlier Iranian statements—and only in response to damning evidence and repeated IAEA inquiries—Iran has now confirmed it conducted undeclared conversion experiments on two occasions in the 1990s. . . .

Along with confirmed failures by Iran to observe its safeguards obligations, the June 6 report cited numerous "open questions" that required answers. . . .

. . . The August 26 report shows that, despite the Secretariat's excellent work in the intervening period, there are today more open questions bout Iran's nuclear program than there were on June 6. The more the Agency has looked underneath the surface of Iran's program, the less the explanations offered have hung together in a plausible way.

* * * *

In the face of the facts in the Director General's June 6 and August 26 reports, the Board has a responsibility to act. The credibility of the global nuclear nonproliferation regime depends on the Agency—and let me stress that the Agency includes the Board as well as the Secretariat and DG—standing firm against all efforts to violate or circumvent NPT obligations. The United States believes the Board must today send a clear message of political backing for the DG and Secretariat in their efforts to penetrate the fog of obfuscation, misleading information, and delayed admissions in which Iran continues to envelop its nuclear program. Because of their high skill and professionalism and hard work, Agency inspectors have made progress, but it is obvious from the August 26 report that they need help to complete the job. The Board has a responsibility now to address the nonproliferation challenge manifest in the clear pattern of the evidence before us.

* * * *

On September 12, the IAEA Board of Governors adopted a resolution calling on Iran to "provide accelerated cooperation and full transparency"; to "ensure there are no further failures to report material, facilities and activities that Iran is obliged to report pursuant to its safeguards agreement"; and to "suspend all further uranium enrichment-related activities . . . and, as a confidence-building measure, any reprocessing activities, pending provision by the Director General of the assurances required by Member States, and pending satisfactory application of the provisions of the additional protocol. . . ." The resolution also decided that

> it is essential and urgent in order to ensure IAEA verification of non-diversion of nuclear material that Iran remedy all failures identified by the Agency and cooperate fully with the Agency to ensure verification of compliance with Iran's safeguards agreement by taking all necessary actions by the end of October 2003. . . .

GOV/2003/69 (Sept. 12, 2003), available at *www.iaea.org/Publications/Documents/Board/2003/gov2003-69.pdf.*

Ambassador Brill commented on U.S. support for the resolution in a meeting with the press, as excerpted below.

The full text is available at *www.state.gov/t/np/rls/rm/24151pf.htm. See also* Assistant Secretary Wolf's testimony in 4, *supra.*

AMBASSADOR BRILL: I'd like to say that the Board of Governors and the IAEA [International Atomic Energy Agency] just passed a very strong resolution on the question of Iran. A resolution that gives full backing to the Agency's efforts to get to the bottom of the Iran nuclear issue and to really find what the truth about the Iranian nuclear program is. The Board has considered the issue very carefully for the past week based on the two reports of the DG [Director General] and I think it's very fair to say that there was very broad support in the Board for the Agency speeding up its work to get to the bottom of this. And for Iran, the absolute essential need for Iran, to respond promptly and fully to the outstanding questions the Agency has for it. I think it's very unfortunate that as we concluded this meeting with the passage of this resolution, without a vote, meaning that nobody objected to it, . . . our Iranian colleague sought to politicize the issue and brought into the Board a series of threats and political statements and did not choose to address any of the technical issues before us. This is an issue that lends itself to technical resolution. Simple answers to direct questions can bring us to the truth, and that's what all of us are trying to get to.

* * * *

QUESTION: If there are open questions again in November as happened in the last two reports, would you think that the Board should recommend sending it to the Security Council?
AMBASSADOR BRILL: The Board will have to make that decision but we think that finding them in non-compliance it's quite clear what the obligations of the Agency are . . . , the statute calls for us to report to the Security Council that finding of non-compliance.
QUESTION: In walking out the Iranian delegate said he accepts neither the resolution nor the process.

* * * *

On November 10, 2003, Iran's representative to the IAEA, Ambassador Ali Akbar Salehi, wrote to the IAEA "conveying his Government's acceptance of the Additional Protocol . . . [and] inform[ing] the Director General that Iran had decided, as of today, to suspend all uranium enrichment-related and reprocessing activities in Iran—specifically, to suspend all activities on the site of Natanz, not to produce feed material for enrichment processes and not to import enrichment-related items." The IAEA press release is available at *www.iaea.org/NewsCenter/PressReleases/2003/prn200313.html.*

Following more complete disclosures by Iran and a further report thereon by the IAEA director general, GOV/2003/75 (Nov. 10, 2003), the IAEA board of governors adopted a resolution on November 26, 2003, GOV/2003/81. The resolution focused on Iran's violations of its safeguards obligations. The Board:

> Strongly deplore[d] Iran's past failures and breaches of its obligation to comply with the provisions of its Safeguards Agreement . . . ;
> Call[ed] upon Iran to undertake and complete the taking of all necessary corrective measures on an urgent basis . . . ;
> Decide[d] that, should any further serious Iranian failures come to light, the Board of Governors would meet immediately to consider, in the light of the circumstances

> and of advice from the Director General, all options at its disposal, in accordance with the IAEA Statute and Iran's Safeguards Agrement;
>
> Note[d] with satisfaction the decision of Iran to conclude an Additional Protocol to its Safeguards Agreement, and re-emphasise[d] the importance of Iran moving swiftly to ratification and also of Iran acting as if the Protocol were in force in the interim, including by making all declarations required within the required timeframe; [and]
>
> Welcome[d] Iran's decision voluntarily to suspend all enrichment-related and reprocessing activities. . . .

The resolution is available at *www.iaea.org/Publications/Documents/Board/2003/gov2003-81.pdf.*

6. Highly Enriched Uranium

On November 7, 2003, the United States and Russia signed the Joint Statement on Cooperation to Transfer Russian-Origin High-Enriched Uranium Research Reactor Fuel to the Russian Federation. In remarks at the signing in Washington, D.C., U.S. Secretary of Energy Spencer Abraham stated:

> The Joint Statement that we are signing today reaffirms our commitment to the common objective of reducing, and to the extent possible, ultimately eliminating the use of Highly Enriched Uranium (HEU) in civil nuclear activity by returning to Russia all of the Russian origin HEU scattered throughout the countries of the Former Soviet Union. This Joint Statement commits us to develop a schedule by the end of the year for the completion of this program.
>
> Our two countries began developing this new program with the International Atomic Energy Agency in December 1999, when we first planned for the transfer of fresh and irradiated HEU currently stored at foreign research reactors back to the Russian Federation, where it originated.

* * * *

> Our efforts are well under way. Just recently, in September 2003, Russia accepted approximately 14 kilograms of fresh Russian-origin HEU from Romania. The HEU was airlifted from the Vinca reactor in Serbia Montenegro to Russia where it will be down-blended and used for nuclear power plant fuel fabrication. This was the first effort of this kind to repatriate Russian-origin spent fuel back to Russia.

The full text of Secretary Abraham's remarks is available at *www.state.gov/p/eur/rls/rm/2003/26058.htm.*

The joint statement is provided below in full, available at *www.state.gov/p/eur/rls/or/2003/26056.htm.*

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* * * *

The U.S. Department of Energy and MinAtom of Russia recognize the great significance of cooperation in the issue of transferring high enriched uranium (HEU) research reactor fuel of Russian origin to the Russian Federation as a mutual contribution to the reduction of global stockpiles of weapons-usable nuclear materials and, therefore, to reducing the threat of international terrorism and preventing the proliferation of weapons of mass destruction.

Such cooperation, which is being implemented with the active involvement of the International Atomic Energy Agency, supports the objective of transferring to the Russian Federation fresh and spent HEU fuel from research reactors currently located in research centers of 17 foreign countries. An important component of this activity is the conversion of such research reactors from HEU to low enriched uranium (LEU) fuel when a suitable LEU fuel has been qualified. To this end, we are jointly developing LEU fuel.

HEU can be directly used in manufacturing nuclear weapons. Our common objective consists of reducing, to the greatest extent possible, and, ultimately, eliminating the use of such materials in civilian nuclear activity.

We have real examples of cooperation in this area. Two shipments of Russian-origin fresh HEU research reactor fuel to

Russia have taken place. We have already started preparations for the next fresh HEU shipment. Preparations also are in progress for the transfer of spent HEU fuel from Uzbekistan to Russia. Completion of a bilateral Government-to-Government Agreement under which more than a dozen other countries will become eligible to ship their fresh and spent research reactor fuel to Russia for safe and secure disposition is in its final stages. It is expected that this Agreement will be signed shortly.

By the end of the year, we intend to conduct bilateral consultations between MinAtom of Russia and the U.S. Department of Energy to develop a schedule for all remaining potential shipments of fresh and irradiated HEU fuel.

7. Nonproliferation Export Control Efforts

a. Nuclear Suppliers Group

In a fact sheet issued September 10, 2003, the Department of State described the contributions of the Nuclear Suppliers Group ("NSG") to the nonproliferation of nuclear weapons through implementation of guidelines for control of nuclear and nuclear-related exports. As described in the fact sheet, "the NSG was formed in 1974 following the Indian nuclear explosion which demonstrated how nuclear technology and material transferred for peaceful purposes could be misused."

The full text of the fact sheet, excerpted below, is available at *www.state.gov/t/np/rls/fs/3053pf.htm*.

With 40 member states, the Nuclear Suppliers Group (NSG) is a widely accepted, mature, and effective export-control arrangement, which contributes to the nonproliferation of nuclear weapons through implementation of guidelines for control of nuclear and nuclear-related exports. Members pursue the aims of the NSG through voluntary adherence to the Guidelines which are adopted by consensus and through exchanges of information on developments of nuclear proliferation concern.

The first set of NSG Guidelines (Part 1) governs exports of nuclear materials and equipment which require the application of International Atomic Energy Agency (IAEA) safeguards at the recipient facility. The Part 1 nuclear control list is called the "Trigger List" because the export of such items "triggers" the requirement for IAEA safeguards.

The second set of NSG Guidelines (Part 2) governs exports of nuclear-related dual-use equipment and materials. The NSG Guidelines also control technology related to both nuclear and nuclear-related dual-use exports. Both Parts 1 and 2 of the NSG Guidelines aim to ensure that nuclear trade for peaceful purposes does not contribute to the proliferation of nuclear weapons or explosive devices while not hindering such trade.

The NSG was formed in 1974 following the Indian nuclear explosion which demonstrated how nuclear technology and materials transferred for peaceful purposes could be misused. The NSG Guidelines, first published in 1978, established requirements for: (1) formal recipient government assurances confirming safeguards and no nuclear explosive use; (2) adequate physical protection; (3) particular caution in the transfer of sensitive facilities, technology and weapons-usable materials; and (4) retransfer conditions.

In 1992, the NSG added full-scope IAEA safeguards as a condition of nuclear supply to non-nuclear weapon states and established controls over exports of significant nuclear-related dual-use items and technology by publication of Dual-Use Guidelines and a control list. In 1995, the NSG added controls on nuclear technology for items on the Trigger List.

. . . At an Extraordinary Plenary in December 2002, the NSG agreed: 1) to adopt U.S.-proposed anti-terrorism amendments to the Guidelines; 2) to issue a press statement alerting supplier states to concerns about the DPRK nuclear weapons program; and 3) to have the Chairman alert key non-member supplier and transit states to the risk of diversion of controlled and non-controlled items to the DPRK nuclear weapons program.

At the Pusan Plenary May 19–23, 2003, the NSG considered but did not reach consensus on: 1) membership for Lithuania; and 2) adoption of: a) steps to increase transparency of the NSG

full-scope safeguards supply policy; b) catch-all control provisions in the Dual-Use Guidelines; c) the Additional Protocol as a condition of supply; and d) technical amendments to the control lists. The Plenary did agree to emphasize the need for vigilance in exports to Iran during any outreach efforts with non-members and it called on the Iranian Government to resolve outstanding questions about its nuclear program. The Plenary also called again on all states to exercise extreme vigilance to ensure that exports of goods and technologies do not contribute to North Korea's nuclear weapons program.

* * * *

b. Zangger Committee

Another fact sheet also issued on September 10, 2003, described the role of the Zangger Committee in harmonizing implementation of IAEA safeguards applicable to nuclear exports. The Zangger Committee began with informal meetings of 15 nuclear supplier states between 1971 and 1974. It decided to remain informal and that its decisions would not be legally binding upon its members.

The full text of the fact sheet, excerpted below, is available at *www.state.gov/t/np/rls/fs/3054pf.htm.*

The purpose of the 35-nation Nuclear Non-Proliferation Treaty (NPT) Exporters (Zangger) Committee (ZC) is to harmonize implementation of the Non-Proliferation Treaty's requirement to apply International Atomic Energy Agency (IAEA) safeguards to nuclear exports. Article III.2 of the Treaty requires parties to ensure that IAEA safeguards are applied to exports to non-nuclear weapon states of (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material. The Committee maintains and updates a list of equipment that may only be exported if safeguards are applied to the recipient facility, called

the "Trigger List" because such exports trigger the requirement for safeguards.

The ZC is informal and its decisions are not legally binding upon its members. The relative informality of the ZC has enabled it to take the lead on certain nonproliferation issues that would be more difficult to resolve in the Nuclear Suppliers Group. (NSG). The latest such action is agreement to add plutonium separation technology to the Trigger List. The ZC, because of its link to the NPT, is also in a unique position to engage NPT-party non-member critics of the nonproliferation regimes and to present supplier government views to NPT meetings.

All of the nuclear weapon states, including China, are members of the ZC. However, China is the only ZC member that is not a member of the NSG, which requires full-scope safeguards (FSS) as a condition of nuclear supply to non-nuclear weapon states. China has not as yet been willing to accept the FSS policy, but its export control lists are comparable, if not virtually identical, to those of the NSG.

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c. Missile Technology Control Regime

On December 23, 2003, the Department of State issued a fact sheet concerning the Missile Technology Control Regime ("MTCR"), noting the expansion of the MTCR's mandate in January 2003 to include preventing terrorists from acquiring missiles and missile technology.

The full text of the fact sheet, excerpted below, is available at *www.state.gov/t/np/rls/fs/27514.htm*. An additional fact sheet, providing questions and answers concerning the MTCR, is available at *www.state.gov/t/np/rls/fs/27517.htm*.

In 1987, seven concerned countries created the Missile Technology Control Regime (MTCR) to restrict the proliferation of nuclear-capable missiles and related technology. The original participants in the Regime were Canada, France, West Germany, Italy, Japan,

the United Kingdom, and the United States. In 1993, the focus of the Regime was expanded to include missiles for the delivery of chemical or biological weapons (CBW) as well as nuclear weapons.

The MTCR is not a treaty, but a voluntary arrangement among member countries sharing a common interest in controlling missile proliferation. The Regime's mandate was expanded in January 2003 to include preventing terrorists from acquiring missiles and missile technology.

The MTCR Partners have committed to apply a common export control policy (MTCR Guidelines) to a common list (MTCR Annex) of controlled items, including virtually all key equipment and technology needed for missile development, production, and operation. The Guidelines and Annex are implemented by each Partner in accordance with its national legislation.

The MTCR Guidelines restrict transfers of "missiles"—defined as rocket systems (including ballistic missiles, space launch vehicles, and sounding rockets) and unmanned aerial vehicle (UAV) systems (including cruise missiles, target drones, and reconnaissance drones) capable of delivering weapons of mass destruction (WMD)—and their related equipment and technology. The Regime places particular focus on unmanned delivery systems capable of delivering a payload of at least 500 kg to a distance of at least 300 km, so called "Category I" or "MTCR-class" systems.

* * * *

8. Nonproliferation Sanctions Imposed by the United States

a. Missile technology

(1) Imposition of executive order and other measures on Chinese, Iranian, and Pakistani entities

Effective May 23, 2003, the Bureau of Nonproliferation, U.S. Department of State, imposed sanctions against the North China Industries Corporation ("NORINCO") based on a determination that it had engaged in missile technology

proliferation activities requiring imposition of measures pursuant to Executive Order 12938 (Nov. 14, 1994), as amended by Executive Order 13094 (July 28, 1998). 68 Fed. Reg. 28,314 (May 23, 2003). *See also* 68 Fed. Reg. 40,729 (July 8, 2003), establishing May 23 as the effective date. The measures imposed pursuant to the Arms Export Control Act and Executive Order 12938, as well as the International Traffic in Arms Regulations, are set forth below.

Effective May 9, 2003, the Bureau of Nonproliferation imposed similar measures on Shahid Hemmat Industrial Group ("SHIG") of Iran. 68 Fed. Reg. 31,739 (May 28, 2003). The United States had also imposed these measures on one entity from Pakistan, Khan Research Laboratories, effective March 24, 2003. 68 Fed. Reg. 16,113 (Apr. 2, 2003).

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Pursuant to the authorities vested in the President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), the Arms Export Control Act (22 U.S.C. 2751 *et seq.*), and section 301 of title 3, United States Code, and Executive Order 12938 of November 14, 1994, as amended, the U.S. Government determined on May 9, 2003 that the following Chinese person has engaged in proliferation activities that require the imposition of measures pursuant to sections 4(b), 4(c), and 4(d) of Executive Order 12938: North China Industries Corporation (NORINCO).

Accordingly, pursuant to the provisions of Executive Order 12938, the following measures are imposed on this entity, its subunits, and successors for two years:

1. All departments and agencies of the United States Government shall not procure or enter into any contract for the procurement of any goods, technology, or services from these entities including the termination of existing contracts;

2. All departments and agencies of the United States government shall not provide any assistance to these entities, and shall not obligate further funds for such purposes;
3. The Secretary of the Treasury shall prohibit the importation into the United States of any goods, technology, or services produced or provided by these entities, other than information or informational materials within the meaning of section 203(b)(3) of International Emergency Economic Powers Act (50 U.S.C. 1702(b)(3)).

These measures shall be implemented by the responsible departments and agencies as provided in Executive Order 12938.

In addition, pursuant to § 126.7(a)(1) of the International Traffic in Arms Regulations, it is deemed that suspending the above-named entity from participating in any activities subject to Section 38 of the Arms Export Control Act would be in furtherance of the national security and foreign policy of the United States.

Therefore, until further notice, the Department of State is hereby suspending all licenses and other approvals for: (a) Exports and other transfers of defense articles and defense services from the United States; (b) transfers of U.S.-origin defense articles and defense services from foreign destinations; and (c) temporary import of defense articles to or from the above-named entity.

Moreover, it is the policy of the United States to deny licenses and other approvals for exports and temporary imports of defense articles and defense services destined for this entity.

(2) Imposition of missile sanctions on North Korean, Moldovan, and Chinese entities

Effective March 24, the Bureau of Nonproliferation imposed missile sanctions on a North Korean entity, Changgwang Sinyong Corporation, and the government of North Korea for missile technology proliferation violations by Changgwang, as set forth below. 68 Fed. Reg. 16,113 (Apr. 2, 2003).

Pursuant to section 73(a)(1) of the Arms Export Control Act (22 U.S.C. 2797b(a)(1)); section 11B(b)(1) of the Export Administration Act of 1979 (50 U.S.C. app. 2401b(b)(1)), as carried out under Executive Order 13222 of August 17, 2001 (hereinafter cited as the "Export Administration Act of 1979"); and Executive Order 12851 of June 11, 1993; the U.S. Government determined on March 24, 2003 that [Changgwang Sinyong Corporation] has engaged in missile technology proliferation activities that require the imposition of the sanctions described in section 73(a)(2)(B) and (C) of the Arms Export Control Act (22 U.S.C. 2797b(a)(2)(B) and (C) and section 11B(b)(1)(B)(ii) and (iii) of the Export Administration Act of 1979 (50 U.S.C. app. 2410b(b)(1)(B)(ii) and (iii) on this person [the same measures as imposed on Chinese and Pakistani entities, supra].

Additionally, because North Korea is a country with a non-market economy that is not a former member of the Warsaw pact (as referenced in the definition of "person" in section 74(8)(B) of the Arms Export Control Act), the following sanctions shall be applied to all activities of the North Korean government relating to the development or production of missile equipment or technology and all activities of the North Korean government affecting the development or production of electronics, space systems or equipment, and military aircraft:

(A) New individual licenses for export to the government activities described above of equipment or technology controlled pursuant to the Arms Export Control Act will be denied for two years; and
(B) No new U.S. Government contracts involving the government activities described above will be entered into for two years.

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Effective May 9, 2003, the Bureau of Nonproliferation imposed missile sanctions on three Moldovan entities for missile technology proliferation violations, as set forth below. 68 Fed. Reg. 31,740 (May 28, 2003).

Pursuant to [the authorities cited *supra*], a determination was made on May 9, 2003, that the following foreign persons have engaged in missile technology proliferation activities that require the imposition of the sanctions described in section 73(a)(2)(A) of the Arms Export Control Act (22 U.S.C. 2797b(a)(2)(A)) and section 11B(b)(1)(B)(i) of the Export Administration Act of 1979 (50 U.S.C. app. 2410b(b)(1)(B)(i)) on the following entities: 1. Mikhail Pavlovich Vladov (Moldovan person); 2. Cuanta S.A. (Moldova) and its sub-units and successors; 3. Computer & Communicatii SRL (Moldova) and its sub-units and successors. Accordingly, the following sanctions are being imposed on these entities:

(A) New individual licenses for exports to the entities described above of MTCR Annex equipment or technology controlled pursuant to the Export Administration Act of 1979 will be denied for two years;

(B) New licenses for export to the entities described above of MTCR Annex equipment or technology controlled pursuant to the Arms Export Control Act will be denied for two years; and

(C) No new United States Government contracts relating to MTCR Annex equipment or technology involving the entities described above will be entered into for two years.

With respect to items controlled pursuant to the Export Administration Act of 1979, the export sanction only applies to exports made pursuant to individual export licenses.

Effective September 19, 2003, the Bureau of Nonproliferation imposed missile sanctions on NORINCO and the government of China for missile technology proliferation violations by NORINCO, as set forth below. 68 Fed. Reg. 54,930 (Sept. 19, 2003).

Pursuant to [the authorities cited *supra*], a determination was made on August 29, 2003, that the following foreign person has engaged in missile technology proliferation activities that require the imposition of the sanctions described in Section 73(a)(2)(A) and (C) of the Arms Export Control Act (22 U.S.C. 2797b(a)(2)(A) and (C)) and Section 11B(b)(1)(B)(i) and (iii) of the Export

Administration Act of 1979 (50 U.S.C. app. 2410b(b)(1)(B)(i) and (iii)) on the following entity and its sub-units and successors: China North Industries Corporation.

Accordingly, the following sanctions are imposed on this entity:

(A) New individual licenses for exports to the entity described above of MTCR Annex-controlled equipment or technology controlled pursuant to the Export Administration Act of 1979 will be denied for two years;

(B) New licenses for export to the entity described above of MTCR Annex-controlled equipment or technology controlled pursuant to the Arms Export Control Act will be denied for two years;

(C) No new United States Government contracts relating to MTCR Annex-controlled equipment or technology involving the entity described above will be entered into for two years; and

(D) The importation into the U.S. of products produced by the entity described above is prohibited for a period of two years.

With respect to items controlled pursuant to the Export Administration Act of 1979, the export sanction only applies to exports made pursuant to individual export licenses.

Additionally, because China is a country with a non-market economy that is not a former member of the Warsaw Pact . . . [sanctions] are also applicable to all activities of the Chinese government relating to the development or production of any missile equipment or technology and all activities of the Chinese government affecting the development or production of electronics, space systems or equipment, and military aircraft.

However, a further determination was made on August 29, 2003, pursuant to section 73(e) of the Arms Export Control Act (22 U.S.C. 2797b(e)), that it is essential to the national security of the United States to waive for a period of one year from the date of publication of this notice the import sanction described in Section 73(a)(2)(C) of the Arms Export Control Act (22 U.S.C. 2797b(a)(2)(C)) to the extent that this sanction applies to activities described in section 74(a)(8)(B) of the Arms Export Control Act (22 U.S.C. 2797c(a)(8)(B))—i.e., activities of the Chinese government relating to the development or production of any missile equipment or technology and activities of the Chinese

government affecting the development or production of electronics, space systems or equipment, and military aircraft.

Accordingly, the following sanctions are imposed on all activities of the Chinese government relating to the development or production of missile equipment or technology and all activities of the Chinese government affecting the development or production of electronics, space systems or equipment, and military aircraft:

(A) New licenses for export to the government activities described above of MTCR Annex-controlled equipment or technology controlled pursuant to the Arms Export Control Act will be denied for two years; and

(B) No new United States Government contracts relating to MTCR Annex-controlled equipment or technology involving the government activities described above will be entered into for two years.

b. Iran Nonproliferation Act of 2000

Effective June 26, 2003, the Bureau of Nonproliferation imposed nonproliferation measures against five Chinese entities, including NORINCO, also covered by measures discussed above, and one North Korean entity. 68 Fed. Reg. 40,011 (July 3, 2003). The measures were imposed on the basis of a determination that the six entities had engaged in activities that require the imposition of measures pursuant to section 3 of the Iran Nonproliferation Act of 2000, which provides for penalties on entities that transfer to Iran equipment and technology controlled under multilateral export control lists (Missile Technology Control Regime, Australia Group, Nuclear Suppliers Group, Wassenaar Arrangement) or otherwise having the potential to make a material contribution to weapons of mass destruction or missiles.

Excerpts below from the Federal Register set forth measures imposed against the entities.

. . . [P]ursuant to the provisions of the Act, the following measures are imposed on [Taian Foreign Trade General Corporation,

Zibo Chemcial Equipment Plant, Liyang Yunlong Chemical Equipment Group Company, China North Industries Corporation (NORINCO), China Precision Machinery Import/Export Corporation (CPMIEC), and Changgang Singyong Corporation of North Korea, and any successors, sub-units, or subisidiaries of these entities]:

* * * *

1. No department or agency of the United States Government may procure, or enter into any contract for the procurement of, any goods, technology, or services from these foreign persons;
2. No department or agency of the United States Government may provide any assistance to the foreign persons, and these persons shall not be eligible to participate in any assistance program of the United States Government;
3. No United States Government sales to the foreign persons of any item on the United States Munitions List (as in effect on August 8, 1995) are permitted, and all sales to these persons of any defense articles, defense services, or design and construction services under the Arms Export Control Act are terminated; and,
4. No new individual licenses shall be granted for the transfer to these foreign persons of items the export of which is controlled under the Export Administration Act of 1979 or the Export Administration Regulations, and any existing such licenses are suspended.

* * * *

c. Iran-Iraq Arms Nonproliferation Act of 1992

Effective February 13, 2003, Under Secretary of State John Bolton, acting by delegation, determined that certain foreign persons had engaged in proliferation activities that required the imposition of measures as described in section 1604(b) of the Iran-Iraq Arms Nonproliferation Act of 1992, Pub. L. No. 102–484, 106 Stat. 2315. 68 Fed. Reg. 11606 (March 11,

2003). The following measures were imposed on Protech Consultants Private, Ltd. (India) and Mohammed Al-Khatib (Jordanian national):

1. For a period of two years, the United States Government shall not procure, or enter into any contract for the procurement of, any goods or services from the sanctioned persons; and
2. For a period of two years, the United States Government shall not issue any license for any export by or to the sanctioned persons.

d. Chemical and biological weapons proliferation

Effective February 4, 2003, Assistant Secretary of State John Wolf, acting by delegation, determined that two foreign persons had engaged in chemical/biological weapons proliferation activities that required the imposition of sanctions, as set forth in excerpts below from the Federal Register notice below. 68 Fed. Reg. 8,068 (Feb. 19, 2003). As explained in a fact sheet released by the Department of State and available at *www.state.gov/r/pa/prs/ps/2003/17801.htm*, the penalties were imposed "for knowingly and materially contributing to Iraq's chemical biological weapons (CBW) program."

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Pursuant to Section 81(a) of the Arms Export Control Act (22 U.S.C. 2798(a)) and Section 11C(a) of the Export Administration Act of 1979 (50 U.S.C. app. 2410C(a)) as continued by Executive Order 13222 of August 17, 2001 (hereinafter referred to as the "Export Administration Act"), Executive Order 12851 of June 11, 1993, and State Department Delegation of Authority No. 145 of February 4, 1980, as amended, the Under Secretary of State for Arms Control and International Security Affairs has determined that the following foreign persons have engaged in chemical/biological weapons proliferation activities that require the imposition of measures as described in section 81(c) of the

Arms Export Control Act (22 U.S.C. 2798(c)) and section 11C(c) of the Export Administration Act of 1979 (50 U.S.C. app 2410C(c)):

> NEC Engineers Private, Ltd., and its successors (company originally based in India, but now also operating in the Middle East and Eurasia); and Hans Raj Shiv (previously residing in India, and believed to be in the Middle East).

Accordingly, until further notice and pursuant to the provisions of section 81(c) of the Arms Export Control Act (22 U.S.C. 2798(c)) and section 11C(c) of the Export Administration Act (50 U.S.C. app 2410c(c)), the following measures are imposed on these foreign persons and their successors:

1. *Procurement Sanction:* The United States Government shall not procure, or enter into any contract for the procurement of, any goods or services from the sanctioned persons and their successors; and
2. *Import Sanction:* The importation into the United States of products produced by the sanctioned persons and their successors shall be prohibited.

These measures shall be implemented by the responsible departments and agencies of the United States Government as provided in the Executive Order 12851 of June 11, 1993, and will remain in place for at least one year and until further notice.

Cross references

Protocols on accession to NATO, **Chapter 4.B.3. and Chapter 7.C.**
Rush-Bagot Agreement limiting U.S. and British navies on U.S. Great Lakes, **Chapter 4.B.5.**
Military detainees, **Chapter 6.A.2. and E.**

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